CIVIL RIGHTS AND DIVERSITY: ETHICS ISSUES

Hypotheticals and Analyses*

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

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Avoiding Bigotry and Discrimination

Hypothetical 1

One of the older lawyers in your firm tells racially charged jokes in the office and during meetings with clients and others. He also has been hostile to hiring minorities, and makes his views known during hiring committee meetings.

Do the ethics rules prohibit the older lawyer's actions?

MAYBE

Analysis

On August 9, 2016, the ABA House of Delegates overwhelmingly approved changes to ABA Model Rule 8.4, intended to prohibit certain discrimination. It will be interesting to see how any states adopting this new rule implement its crystal-clear per se prohibition.

Previous ABA Model Rule Comment

Before this change, the ABA Model Rules dealt with specified misconduct in an ABA Model Rule 8.4 Comment.

> A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

Former ABA Model Rule 8.4 cmt. [3] (emphasis added).

This former ABA Model Rule Comment was fairly limited. First, it applied only to a lawyers' conduct "in the course of representing a client." Other ABA Model Rule

prohibitions begin with the same or similar phrase, such as the prohibition on false statements of material fact (ABA Model Rule 4.1), or the prohibition on ex parte communications with represented persons (ABA Model Rule 4.2). This limiting language contrasts with the introductory phrase of ABA Model Rule 8.4: "It is professional misconduct for a lawyer to . . . ." Those prohibitions apply whenever the lawyer acts in any context, professionally or personally. Second, the former ABA Model Rule Comment prohibited only "knowing" misconduct. Third, the former ABA Model Rule Comment did not prohibit discrimination. It prohibited "bias or prejudice," if such conduct was "based upon" the stated attributes. The ABA Model Rules did not define those two terms, but presumably, they describe improper (and perhaps even unlawful) conduct that is a subset of discrimination. If the terms were meant to describe the more generic conduct of "discrimination," the ABA could have used that one word rather than the two words. Fourth, the former ABA Model Rule Comment prohibited the misconduct only when it was "prejudicial to the administration of justice." That vague standard paralleled the black letter ABA Model Rule 8.4(d)'s prohibition on any "conduct that is prejudicial to the administration of justice." In fact, the general language of ABA Model Rule 8.4(d) thus already prohibited the specific conduct described in former ABA Model Rule 8.4 cmt. [3].

ABA Model Rule 8.4(g)

The new ABA Model Rule 8.4 provision appears in the black letter rule.

> It is professional misconduct for a lawyer to: engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual

> orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.

ABA Model Rule 8.4(g) (emphasis added).

The new black letter rule provision expands the scope of the previous Comment. First, the rule applies to lawyers' conduct "related to the practice of law." This is far broader than conduct lawyers undertake "in the course of representing a client." But it is still narrower than other ABA Model Rule 8.4 provisions, which apply to all of lawyers' professional and private conduct. Second, the rule applies when a lawyer "knows or reasonably should know" that she is engaged in the articulated misconduct. This contrast with the previous Comment's "knowing" standard. Third, the rule prohibits "discrimination" -- in contrast to the old Comment's "bias or prejudice." As explained below, inclusion of this prohibition on any and all "discrimination" is the most interesting new addition. Fourth, the rule prohibits the described conduct whether or not it is "prejudicial to the administration of justice."

Immediately following its prohibitory language, the new black rule includes two exceptions.

> This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Id. As explained below, the ABA's inclusion of these exceptions in the black letter rule itself sheds light on the Comments accompanying the new black letter rule.

ABA Model Rule 8.4(g) is also notable for a word that is missing from the black letter rule. The language could have the word "unlawfully" in describing the prohibited conduct. New York's and California's ethics rules both prohibit lawyers from "unlawfully"

discriminating in practicing law. New York Rule 8.4(g); California Rule 2-400(B); proposed California Rule 8.4.1(b). Adding that word presumably would have imported into the ABA Model Rule prohibition constitutional and other case law drawing the line between permissible and impermissible consideration of race, sex, etc. Instead, ABA Model Rule 8.4(g) contains a per se prohibition of any such consideration.

The new ABA Model Rule is supplemented by two comments.

One explains the ill effects of discrimination and harassment, and then provides examples.

> Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

ABA Model Rule 8.4 cmt. [3] (emphasis added). Notably, this Comment's description of improper "discrimination" does not purport to define discrimination, or limit its definitional reach -- but merely provides several examples.

The second Comment explains the broader reach of the new black letter rule's discrimination ban, which now extends beyond lawyers' dealings with clients.

> Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.

ABA Model Rule 8.4 cmt. [4] (emphases added).

ABA Model Rule 8.4 Comment [4]

ABA Model Rule 8.4(g)'s flat prohibition covers any discrimination on the basis of race, sex, or any of the other listed attributes.

It is worth exploring the last sentence of Comment [4] to assess its possible impact on the per se prohibition in ABA Model Rule 8.4(g).

> Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

ABA Model Rule 8.4 cmt. [4].

This sentence appears to weaken the blanket anti-discrimination language in the black letter rule, but on a moment's reflection it does not – and could not -- do that.

First, as the ABA Model Rules themselves explain,

> [t]he Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

ABA Model Rules Scope [21]. In fact, that apparently is why the ABA moved its anti-discrimination provision into the black letter rules. An ABA Journal article describing the new ABA Model Rule 8.4(g) language quoted Professor Myles Lynk, then chair of the ABA Standing Committee on Ethics and Professional Responsibility. In describing why that Committee recommended a change to the black letter rule instead of relying on a Comment, Professor Lynk explained "[c]omments are only guidance or examples . . . [t]hey are not themselves binding." ABA J., Oct. 2016, at 60. So the last sentence of Comment [4] is not binding -- the black letter rule's per se discrimination ban is binding.

Perhaps that sentence was meant to equate "diversity" with discrimination on the basis of race, sex, etc. But that would be futile -- because it would fly in the face of the

explicit authoritative prohibition in the black letter rule. It would also be remarkably cynical, by forbidding discrimination in plain language while attempting to surreptitiously allow it by using a code word.

Second, the ABA clearly knew how to include exceptions to the binding black letter anti-discrimination rule. ABA Model Rule 8.4(g) itself contains two exceptions. If the ABA wanted to identity certain discriminatory conduct permitted by the black letter rule, it would have included a third exception in the black letter rule.

Third, Comment [4]'s last sentence says nothing about discrimination. It describes efforts to promote diversity and inclusion. Even if that language could overrule the black letter rule, the sentence does not describe activities permitting discrimination on the basis of the listed attributes. There are numerous types of diversity and inclusion that have nothing to do with ABA Model Rule 8.4(g)'s listed attributes. Some examples include political viewpoint diversity, geographic diversity, and law school diversity. Comment [4] allows such diversity and inclusion efforts. Those types of diversity and inclusion efforts would not involve discrimination prohibited in the black letter rule.

Reach of ABA Model Rule 8.4(g)

ABA Model Rule 8.4(g) prohibits any and all "discrimination on the basis of" the listed attributes. The prohibition extends to any lawyer conduct "related to the practice of law," including "operating or managing a law firm or law practice; and participating in bar association" activities. ABA Model Rule 8.4 cmt. [4].

The black letter rule thus prohibits such discrimination as women-only bar groups or networking events, minority-only recruitment days or mentoring sessions, etc. Law

firms will no longer be able to schedule social events or conferences limited to their LGBT lawyers.

In addition to the easily recognizable and now flatly prohibited discrimination listed above, lawyers will also have to comply with the new per se discrimination ban in their personal hiring decisions. Many of us operating under the old ABA Model Rules Comments or similar provisions either explicitly or sub silentio treated race, sex, or other listed attributes as a "plus" when deciding whom to interview, hire, or promote within a law firm or law department. That is discrimination. It may be well-intentioned and designed to curry favor with clients who monitor and measure law firms' head count on the basis of such attributes -- but it is nevertheless discrimination. In every state that adopts the new ABA Model Rule 8.4(g), it will become an ethics violation. Of course, it may be hard to detect, but so was lawyers' improper treatment of race, sex, or another listed attribute as a "minus" when making their hiring decisions. Lawyers will have to rely on their own conscience to assure their compliance with this new standard.

Impact of ABA Model Rule 8.4(g)

Ironically, at the same meeting that the ABA House of Delegates adopted the ABA Model Rule 8.4 changes, it adopted a Resolution urging (among other things) "the use of diverse merit selection panels" in connection with federal judge magistrate selection. ABA House of Delegates Resolution 102, Aug. 8-9, 2016. The Resolution also indicated that "[s]itting federal judges can assist the cause of diversity by ensuring that their interns and law clerks represent diverse backgrounds." Id. In its Conclusion, the Resolution lauds what it called "[p]ipeline recruitment," which includes "targeting minority students" to encourage them to consider judicial careers. However, the

Resolution concluded that "[i]t is also essential to have a diverse merit selection panel." Id.

These court practices probably do not fall into the definition of "[c]onduct related to the practice of law," but let's assume for a minute that they do. If the "minority students" mentioned in the Resolution's conclusion describe racial minorities, "targeting" them would violate ABA Model Rule 8.4(g). Determining whether the "diversity" references would likewise violate ABA Model Rule 8.4(g) is more subtle. If the word "diverse" in those examples and elsewhere in that Resolution means the type of diversity described above (political viewpoint, geography, educational background, etc.), the Resolution would not run afoul of new ABA Model Rule 8.4(g). But if the Resolution "urges" the court system to make hiring decisions based on the attributes listed in ABA Model Rule 8.4(g), that would be an ethics violation (if it were undertaken in "conduct related to the practice of law.").

The ABA's bizarre approach to ABA Model Rule 8.4(g) was on full display in the October 2017 ABA Journal. In that ABA Journal, noted Stanford Law School Professor Deborah Rhode essentially acknowledged that new ABA Model Rule 8.4(g) cannot (or at least will not) be used for disciplinary purposes.

> "The rule provides a useful symbolic statement and educational function," says Rhode, who is Stanford's director of the Center on the Legal Profession. "I understand the First Amendment concerns, but I don't think they present a realistic threat in this context. I don't think these cases are going to end up in bar disciplinary proceedings. They are going to end up in informal mediation and occasionally in lawsuits if the conduct is egregious and the damages are substantial.

David L. Hudson, Jr., Constitutional Conflict: States split on Model Rule limiting harassing conduct, 103 A.B.A.J. 25, 26, Oct. 2017 (emphases added).[1] So even one of the country's leading ethics authorities concluded that ABA Model Rule 8.4(g) merely "provides a useful symbolic statement and educational function." That is not the ABA Model Rules' purpose, and adopting disciplinary rules merely for symbolic or educational purposes carries frightening implications.

That same article indicated, among other things, that "[s]upporters say that the rule is necessary to enforce anti-discrimination principles." But seven pages later, that ABA Journal ran a story entitled "Mandating Diversity: Law firms borrow from the NFL to address the makeup of their leadership ranks." The article described what is known as the "Mansfield rule," which "mandates that at least 30 percent of a firm's candidates for leadership positions . . . be women, attorneys of color or both." Apparently several large law firms have already adopted or are considering adopting the "Mansfield rule."

Of course, complying with that rule requires discrimination on the basis of gender or race -- which is flatly unethical under the black letter ABA Model Rule 8.4(g), as explained seven pages earlier in the same Journal. The Journal's editors seem not to have noticed the irony of this juxtaposition.

It is also worth examining another example of discrimination that would violate ABA Model Rule 8.4(g) if it were "related to the practice of law." In Grutter v. Bollinger, 539 U.S. 306 (2003), the United States Supreme Court indicated that a university or a

[1] In a way, this is similar to the ABA's unavoidable concession about its overbroad and unenforceable ABA Model Rule 1.6 confidentiality standard. That confidentiality rule covers all "information relating to the representation." On its face, ABA Model Rule 1.6 would prohibit (absent the client's consent or some other exception) a litigator from congratulating the adversary's lawyer for doing a good job in an oral argument, or prevent a lawyer from telling her husband that she will be in Denver next week taking a deposition in the widely publicized Jones case.

law school (as in that case) may "consider race or ethnicity . . . flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant." Id. at *334 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978)). In their brief supporting respondents in more recent litigation over the University of Texas's race-conscience admissions, the Yale Law School and Harvard Law School deans acknowledged using race as a factor in admitting students to those law schools. Brief of *Amici Curiae* Post & Minow at 2, Fisher v. Univ. of Tex., U.S. (Aug. 13, 2012 (No. 11-345), 2012 WL 3418596, at *1 ("In both schools' admissions programs, 'race or ethnic background may be deemed a "plus" in a particular applicant's files."). The United States Supreme Court ultimately upheld the University of Texas's race conscious admissions process – emphasizing the unique educational benefits of a diverse student body. Fisher v. Univ. of Tex., 133 S. Ct. 2411 (2013).

As with the awkwardly timed ABA Resolution urging courts to use race as a factor in selecting magistrate judges, and hiring law clerks, the law school admissions process presumably does not involve "conduct related to the practice of law." But if it did, would Yale's and Harvard's deans run afoul of ABA Model Rule 8.4(g)? Of course they would. In both Grutter and Fisher, the United States Supreme Court did not deny that those admissions processes involved race discrimination. To the contrary, the United States Supreme Court acknowledged that the processes involved race discrimination -- but found it constitutional in those specific contexts. So Yale's and Harvard's use of race as a "plus" might be "lawful" discrimination – but ABA Model Rule 8.4(g) prohibits all discrimination.

Conclusion

More than any other profession, lawyers choose their words deliberately, intending to give them meaning. By consciously adopting language prohibiting all "discrimination on the basis of race, sex" and other listed attributes, ABA Model Rule 8.4(g) clearly forbids lawyers from considering any of the attributes in managing their law firms, recruiting or hiring lawyers, participating in bar associations, etc. Race, sex, and the other attributes may no longer play any role in lawyers' "conduct related to the practice of law." It will be fascinating to see how lawyers practicing in states adopting ABA Model Rule 8.4(g) conduct themselves in light of these carefully chosen words.

B 12/16; B 11/17

Duty to Supervise Lawyers and Nonlawyers

Hypothetical 2

You just hired two new lawyers and one new assistant. The lawyers recently graduated from law school, and the assistant had previously worked only for doctors. Having been a sole practitioner until now, you wonder about the ethical and professional implications of bringing on new folks like this.

(a) Do you have any responsibility for assuring that lawyers and nonlawyers you supervise comply with the ethics rules?

YES

(b) Can you be held responsible for any ethics violations by lawyers and nonlawyers you supervise?

YES

Analysis

The ethics rules contain provisions that deal with lawyers supervising other lawyers and nonlawyers.

(a) Not surprisingly, the ethics rules deal with a supervising lawyer's responsibilities.

> A partner in a law firm, or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

ABA Model Rule 5.1(a).

Thus, lawyers who manage other lawyers must take reasonable steps to put in place "measures" that provide at least reasonable assurance that lawyers in the firm comply with the ethics rules. Comment [2] to that rule mentions such "internal policies

and procedures" as those designed to identify conflicts, assure that filing and other deadlines are met, provide for proper trust account processes, etc. ABA Model Rule 5.1 cmt. [2]. Comment [3] explains that the measures lawyers may take to comply with this managerial responsibility can vary according to the size of the law firm.

> In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. . . . Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members, and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

ABA Model Rule 5.1 cmt. [3].

ABA Model Rule 5.1(b) applies to lawyers who have "direct supervisory authority" over another lawyer, and predictably require more immediate steps to assure that other lawyer's compliance with the ethics rules.

> A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

ABA Model Rule 5.1(b).

A different rule applies essentially the same standard to managers and direct supervisors of nonlawyers.

> With respect to a nonlawyer employed or retained by or associated with a lawyer:
>
> (a) a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in

> effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer; [and]
>
> (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.

ABA Model Rule 5.3. It is not clear how far away from lawyer ethics rules a nonlawyer can stray and still be considered to have acted in a way "compatible" with the lawyer ethics rules.

(b) The ethics rules explain the standard for holding a supervising lawyer responsible for a subordinate lawyer's ethics breach.

> A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
>
> (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ABA Model Rule 5.1(c).

Not surprisingly, the same basic rules apply to a supervising lawyer's responsibility for a nonlawyer's ethics breach.

> [A] lawyer shall be responsible for conduct of such a person [nonlawyer employed or retained by or associated with a lawyer] that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
>
> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ABA Model Rule 5.3(c).

Thus, lawyers can face bar discipline for ethical violations by their subordinates. In most situations, lawyers will face such punishment only if they have some complicity, either before or after the wrongdoing. However, the "should have known" standard could trigger a lawyer's discipline under what amounts to a negligence standard.

Best Answer

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

b 12/10; 10/14

Responsibility of Subordinate Lawyers

Hypothetical 3

You just finished your first week of work at a new law firm, and you already have some qualms. In particular, the partner who supervises your work has asked you to pose questions during a deposition that seem solely motivated by the desire to embarrass a gay adversary. You begin to wonder what responsibility you might have if your supervisor asks you to do something that makes you feel ethically uncomfortable.

May you be held responsible for conduct you undertake at your supervising partner's direction?

YES

Analysis

The ethics rules try to draw a fine line between automatically punishing subordinate lawyers for following a supervisor's direction and recognizing an "I was just following orders" defense.

ABA Model Rule 5.2(a) explains that lawyers must follow all of the ethics rules "notwithstanding that the lawyer acted at the direction of another person." On the other hand, ABA Model Rule 5.2(b) indicates that

> [a] subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

ABA Model Rule 5.2(b).

The comments reflect the same tension. Comment [1] notes (gratuitously, in a way) that subordinate lawyers might not have the type of actual knowledge of wrongdoing that must underlie most ethics breaches. As an example, that comment explains that a subordinate lawyer filing a frivolous pleading "would not be guilty of a

professional violation unless the subordinate knew of the document's frivolous character." ABA Model Rule 5.2 cmt. [1].

Comment [2] explains that supervising lawyers normally direct subordinates' actions -- to assure a "consistent course of action or position." If an ethics question arises, both the supervising and subordinate lawyer are responsible for any misconduct if the ethics question "can reasonably be answered only one way." On the other hand, a subordinate lawyer may safely defer to the supervising lawyer's direction "if the question is reasonably arguable." As an example, this comment explains that a supervisor's "reasonable resolution" of a conflicts question "should protect the subordinate professionally if the resolution is subsequently challenged." ABA Model Rule 5.2 cmt. [2].

This delicate balancing normally insulates subordinate lawyers from professional punishment if they defer to their supervisors. On the other hand, the balance makes it more difficult for subordinate lawyers to challenge unprofessional (as opposed to unethical) conduct.

Best Answer

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

b 12/10; 10/14

Lawyers' Wrongdoing Unrelated to Clients

Hypothetical 4

You have been following news stories about a local lawyer who also owns and manages several large apartment buildings in town. Several local groups have accused the apartment building management of discriminating against gays and lesbians. You wonder whether housing discrimination law violations might result in professional discipline.

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

CRIMES INVOLVING MORAL TURPITUDE OR WHICH EXHIBIT THE ABSENCE OF CHARACTERISTICS RELEVANT TO PRACTICING LAW

Analysis

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

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

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

The Restatement takes essentially the same approach.

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

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

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

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

> A record of conviction is conclusive evidence that the lawyer committed the offense, but absence of a conviction does not preclude a disciplinary prosecution. Because of the different

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

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

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

- Disciplinary Counsel v. O'Malley, 935 N.E.2d 5 (Ohio 2010) (suspending a lawyer for two years after a felony conviction for downloading pornography; rejecting a disciplinary board's recommendation for a shorter suspension).

- Fla. Bar v. Behm, 41 So. 3d 136, 144 (Fla. 2010) (disbarring a lawyer who had not paid his taxes, and claimed not to owe them; explaining the lawyer's unique argument: "Behm's dispute is not with whether he received money from the practice of law but whether the money constituted 'income' for purposes of filing federal income tax returns. According to Behm, he derived no net gain from the practice of law because his time was his life capital and, in practicing law, he was trading his life capital for an hourly fee, both of equal value. Thus, he realized no profit or net income from these transactions."; "Critically, Behm cites no case or other authoritative source that supports, even tangentially, his primary proposition -- that his earnings did not constitute taxable income because the earnings he received in exchange for billable hours resulted in no gain.").

- Leigh Jones, Barnes & Thornburg Attorney Disciplined for Hiring Prostitute, Nat'l L.J., Dec. 8, 2010 ("The Indiana Supreme Court has publicly reprimanded a Barnes & Thornburg attorney . . . for patronizing a prostitute in February.").

- Blind Justice, N.J. L.J., Oct. 25, 2010 ("Stealing from clients will get a lawyer disbarred, but the sanction for stealing from a blind refreshment stand operator in an office lobby is only a censure."; "That was the outcome Wednesday in the ethics case against Elwood John Walzer, an attorney and regulatory officer for the Department of Human Services [DHS], who was caught on camera swiping food and beverages at least 14 times between September 19 and October 26, 2007. The vendor operated the stand under a program of the DHS Commission for the Blind and Visually Impaired.").

- Office of Lawyer Regulation v. Hurtgen (In re Hurtgen), 772 N.W.2d 923, 924 (Wis. 2009) (revoking the license of a lawyer who had entered into a plea agreement after being indicted for involvement in a "pay-to-play" scheme in Illinois; "Attorney Hurtgen is a Wisconsin-licensed attorney who engaged in felonious behavior by participating in a pay-to-play scheme. Admittedly, Attorney Hurtgen was not acting as an attorney when he engaged in this scheme, but his participation in this scheme reflects serious misconduct that violates the public trust. The OLR recommends revocation as the appropriate sanction, and Attorney Hurtgen does not oppose this recommendation.").

- Office of Lawyer Regulation v. Brandt (In re Brandt), 766 N.W.2d 194, 196, 202 (Wis. 2009) (issuing a public reprimand against a lawyer for "multiple convictions for operating a motor vehicle while intoxicated"; "Attorney Brandt has been convicted of drunk driving on five separate occasions. Based on that record, we agree with the OLR that Attorney Brandt's multiple OWI convictions demonstrate a pattern of misconduct that evinces a serious lack of respect for the law and as such relate to his 'fitness as a lawyer in other respects.' Attorneys are officers of the court and should be leaders in their communities and should set a good example for others. Driving while intoxicated is a very serious offense with the potential to cause great harm -- or even death. . . . While it is indeed fortunate that Attorney Brandt did not injure anyone by his intoxicated driving, the fact that he repeatedly drove while intoxicated reflects adversely on his fitness as a lawyer and consequently constitutes a violation of former SCR 20:8.4(b).").

- Santulli v. Tex. Bd. of Law Exam'rs, No. 03-06-00392-CV, 2009 Tex. App. LEXIS 2471 (Tex. App. Apr. 10, 2009) (revoking the license of a lawyer who had not repaid his student loans).

- In re Fahy, No. 05-O-05123, 2009 Calif. Op. LEXIS 1, at *4 (Cal. Bar Ct. Mar. 6, 2009) (disbarring a lawyer for switching his vote during his service as a juror, in order to return to his law practice; "On April 22, respondent concluded that Judge Ballati would not declare a mistrial due to the jury's impasse. He foresaw further lengthy deliberations that his busy law practice could not afford. Accordingly, on that day, he told the other jurors that if the judge would not declare a mistrial, respondent would change his vote for the

defense to break the deadlock so he could return his attention to his law practice. On April 26, respondent changed his vote, thus creating a verdict in favor of the defendant.").

- Iowa Supreme Court Attorney Disciplinary Bd. v. Kress, 747 N.W.2d 530, 533, 533-34, 534, 534-35 (Iowa 2008) (suspending the license of a former University of Iowa Law Professor Kenneth Kress; explaining that Kress was a UC Berkeley Law School graduate who "is particularly well-known as one of the leading scholars nationally in mental health law."; also noting that Kress's "significant other" was a "mental health advocate knowledgeable about psychological disorders"; further explaining that "Kress believed that he had been treated badly at the law school because he deserved to be appointed to a faculty chair, but had not yet received one."; explaining that Kress handed out student evaluation forms to an evening "mental health law seminar," and explained to the ten students in the seminar that his job was "on the line"; emphasizing that "[t]he only student who testified at the hearing indicated that Kress's demeanor was normal, that he spoke at his normal rate, did not exhibit frenzied excitement or seem confused, his speech was not disordered or rambling, and that he seemed logical."; noting that Kress's research assistant was suspicious when Kress violated University procedures by insisting that the evaluation forms be left in Kress's secretary's office that evening; explaining that an investigation of the forms showed that Kress had tampered with them; "The investigation determined that three neutral or unfavorable evaluations were discarded and replaced with favorable versions, two were altered in order to raise the scores, and two evaluations were unchanged. The effect of the changes was to raise Kress's composite teaching effectiveness score on a five point scale from 2.86, a relatively low score that might attract attention of law school administrators, to 4.86, a very high score that few members of the faculty were able to achieve. When confronted with the results of the investigation, Kress did not claim a medical or mental defense."; noting that "[a]t the hearing, Kress admitted in light of the evidence that he must have tampered with the evaluations. Kress asserted, however, that at the time he suffered from mental and physical illnesses that excused or mitigated his conduct."; reciting Kress's defense: "Kress noted that after going with his research assistant to his secretary's office, he woke up in his office, either from sleep or from a 'delirious loss of consciousness' after hallucinating about two dogs. He told the Commission that he believed that conspirators had succeeded in sending rays into the students' minds changing their neurons, and altering their answers on the evaluations. Kress further testified that in light of the mind-changing rays, he believed that it was only fair for him to change the evaluations back, so they would be correct. Kress believed he was confronted with a matter of life or death. He hallucinated about being in prison, where a medieval jury was laughing at him for failing to save the world from the parade of horribles that was coming. Changing the evaluations thus was transformed from a

personal matter to a universal struggle between good and evil."; ultimately suspending Kress's license indefinitely with no possibility of reinstatement for three months, and holding that he could apply for reinstatement only after undergoing a comprehensive mental examination).

- In re Casey, No. 04-O-11237, 2008 WL 5122989 (Cal. Bar Ct. Dec. 4, 2008) (holding that a lawyer who arranged for a client to transfer land to another client in an unfair transaction had engaged in an act of moral turpitude; recommending suspension of the lawyer).

- In re Barrett, 852 N.E.2d 660, 668 (Mass. 2006) (suspending for two years a lawyer who misused company funds while acting as the corporation's CEO and Director; "We agree that the $130,000 taken by the respondent from NetFax's account did not constitute a misappropriation of client funds while the respondent was engaged in the practice of law. Nonetheless, as chief executive officer and sole director of NetFax, the respondent had a fiduciary obligation to the company, and he breached it. . . . The respondent did not stop being a lawyer merely because he was operating in a corporate capacity and, as such, he was expected to uphold the high moral standards and ethical obligations of the legal profession.").

- State v. Werdell, 136 P.3d 17, 21 (Or. 2006) (reversing the conviction of a lawyer who had disposed of a weapon and alcohol involved in his son's boating accident in which someone had died; examining the literal language of the Oregon statute under which the lawyer had been convicted, finding that the lawyer had not destroyed "physical evidence which might aid in the discovery or apprehension" of the son, because the son was already in custody).

- Disciplinary Counsel v. Ulinski, 831 N.E.2d 425 (Ohio 2005) (disbarring a lawyer who had pled guilty to federal conspiracy fraud charges).

- Ala. State Bar v. Quinn, 926 So. 2d 1018 (Ala.) (disbarring a lawyer caught smoking marijuana with minors), rehearing denied without opinion, No. 2005 Ala. LEXIS 576 (Ala. Oct. 21, 2005).

- In re Sims, 861 A.2d 1, 4 (D.,D.C. 2004) (disbarring a lawyer for committing what amounted to a misdemeanor -- but which involved the lawyer fixing traffic tickets; explaining that the activity involved a sufficient level of "moral turpitude" to justify disbarment).

- In re Tidwell, 831 A.2d 953, 964 (D.D.C. 2003) (disbarring an admittedly alcoholic Washington, D.C., lawyer after he was convicted in New York for leaving the scene of a fatal automobile accident; finding that the crime established the kind of "moral turpitude" that justified disbarment).

- In re Bikman, 760 N.Y.S.2d 5, 8 (N.Y. App. Div. 2003) (suspending for 18 months a New York lawyer who defrauded an apartment owner by concealing her sister's death and taking advantage of the lower rent-controlled rent by submitting checks in her deceased sister's name; "A lawyer's unethical conduct, even when it occurs outside the practice of law, is a proper concern of the Disciplinary Committee because it tends to reflect adversely on the legal profession as a whole"; citing earlier New York decisions in which lawyers were punished for making misrepresentations on a resume, issuing worthless checks, and engaging in improper business practices).

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

- Leigh Jones, Finally Passing The Bar, "Pretend" Robber Refused Admission to Practice, Nat'l L.J., Jan. 28, 2011 ("A law graduate who finally passed the bar exam after eight attempts nevertheless will remain without a license to practice, partly because he pretended to be a robber on April Fool's day."; "The Supreme Court of New Hampshire on January 26 ruled that the 1992 law school graduate was ineligible for admission because of his criminal record and because he had not repaid nearly $140,000 in student loans. Especially persuasive to the court was that the applicant had pulled a seven-inch knife on a store clerk in 1993 while, as he explained, he was 'pretending to be a robber.'").

- Iowa Supreme Court Attorney Disciplinary Bd. v. Templeton, 784 N.W.2d 761, 764, 767, 767-68, 769 (Iowa 2010) (suspending an Iowa lawyer's license indefinitely "with no possibility of reinstatement for a period of three months," even though he had been on inactive status since 2000; explaining that "[i]n 2000 Templeton took inactive status and began managing a newspaper distribution business. In 2007 he distributed newspapers in four states and personally delivered the newspapers in the Des Moines area."; noting that the lawyer had been arrested for being a "Peeping Tom," and admitted to a psychological disorder; "We have the authority to take disciplinary action against an attorney even though the attorney's license is inactive and the attorney is not actively engaged in the practice of law. . . . This is true even if at the time of the misconduct the attorney was not acting as a lawyer. . . . Thus, even though Templeton's law license was on inactive status and his conduct was unrelated to his representation of clients or any other facet of the practice of law, we still have the authority to sanction him upon a finding that he has engaged in misconduct in violation of the Iowa Rules of Professional Conduct."; finding that the lawyer's conduct violated

Iowa Rule 8.4(b), because it reflected adversely on the lawyer's "'honesty, trustworthiness, or fitness as a lawyer in other respects.'" (citation omitted); "Here, Templeton engaged in a pattern of criminal conduct by repeatedly looking into the victims' windows. In doing so, he violated Doe's, Roe's, and Poe's privacy, and caused them to suffer emotional distress. Although his conduct was compulsive, the record also establishes he intentionally and knowingly invaded the privacy of these women. This conduct also raises serious misgivings about whether Templeton understands the concept of privacy and respects the law protecting individuals' privacy rights. For these reasons, we find Templeton's criminal acts of invading Doe's, Roe's, and Poe's privacy reflects adversely on his fitness to practice law in violation of rule 32:8 4(b)."; finding that the conduct was not "prejudicial to the administration of justice").

- Barrett v. Va. State Bar, 675 S.E.2d 827, 829 (Va. 2009) ("We hold that a lawyer whose license is suspended is still an active member of the bar and, although not in good standing, is subject to the Rules.").

- In re Brown, 605 S.E.2d 509 (S.C. 2004) (suspending for two years a lawyer who had, among other things, improperly arranged for the notarization of documents, including engaging in such behavior before he became a lawyer).

- In re Hinson-Lyles, 864 So. 2d 108, 116 (La. 2003) (the Louisiana Supreme Court denied admission to the Louisiana Bar of a woman who -- five years earlier while working as a teacher -- was found guilty of having sex with a fourteen-year-old student; the Court had earlier allowed the woman to take the Bar exam and ordered a Commissioner's report on her character and fitness, which the woman passed; a dissenting judge pointed to the woman's successful rehabilitation, excellent performance as a law clerk for a Louisiana judge after graduating from law school, and what he called the "disingenuous" conduct by the Court in allowing the woman to take the Bar exam -- and then denying the woman's application without providing any clear guidelines for when she might be able to re-apply).

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

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

- Iowa Supreme Court Attorney Disciplinary Bd. v. Keele, 795 N.W.2d 507, 509, 515 (Iowa 2011) (dismissing the bar's complaint against a lawyer for improper possession of a firearm; explaining that "[i]n 2006 or 2007, a court finalized Keele's dissolution of marriage. After the dissolution, Keele lived alone in his West Liberty home and became lonely and depressed. He began to frequent bars and nightclubs, associate with new people, and use illegal drugs. Keele rented an apartment in Davenport where he partied with other drug addicts, who supplied him with drugs. Eventually, he became addicted to crack cocaine. From January 2007 through July, he was using crack cocaine on a regular basis. During this period, Keele continued to represent clients without complaint. However, he spent less time at the office and quit going to work on a regular basis."; "Thus, the board has failed to establish a convincing preponderance of the evidence that a sufficient nexus exists between Keele's illegal possession of the firearm and his ability to function as a lawyer. Accordingly, while we do not condone or excuse Keele's conduct, we find Keele's illegal possession of the firearm does not adversely reflect on his fitness to practice law in violation of rule 32:8.4(b).").

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

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

> attorneys little more than a slap on the wrist in some cases. In others, careers are finished.").

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

> State ex rel. Counsel for Discipline v. Switzer, 790 N.W.2d 433, 440, 440-41 (Neb. 2010) ("We put forward a test to establish depression as a mitigating factor. To satisfy the test, 'the respondent must show (1) medical evidence that he or she is affected by depression, (2) that the depression was a direct and substantial contributing cause to the misconduct, and (3) that treatment of the depression will substantially reduce the risk of further misconduct.' We noted that these elements were questions of fact. And we have applied this test in other cases." (footnotes omitted); "Here, the referee considered the Thompson [State ex rel. Counsel for Discipline v. Thompson, 652 N.W.2d 593 (Neb. 2002)] test. The referee found that Switzer met the first two elements of the test. Regarding the third element, the referee stated that he could not conclude with any degree of confidence whether treatment would substantially reduce the likelihood of future misconduct. Switzer takes exception to this finding by the referee."; "We do not believe it is necessary to parse the testimony to determine the likelihood of further misconduct. Even if Switzer can satisfy the Thompson test, his depression is just one mitigating factor. We balance it with other mitigating factors as well as aggravating factors. In short, when the Thompson test is satisfied, it does not automatically result in a less severe punishment.").

Best Answer

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

n 1/12; b 10/14

Areas of Practice

Hypothetical 5

After several years of spending considerable time on pro bono civil rights matters, you decided to leave your large firm and join a much smaller firm that focuses on civil rights litigation. Now you wonder how you can market yourself.

Assuming that these phrases are accurate, may you use the follow phrases in your marketing materials:

(a) "Limits her practice to civil rights matters"?

YES

(b) "Specializes in civil rights issues"?

MAYBE

(c) "Certified by the Texas Supreme Court as a trial lawyer"?

MAYBE

Analysis

As in most areas, most states have a core consensus rule governing lawyer descriptions of practice, but on the margins take widely varying approaches.

(a) Most states allow lawyers to provide accurate information about limitations in their practice.

(b) At least one state specifically prohibits use of the word "specialize." Rhode Island LEO 93-31 (5/12/93) (prohibiting use of the phrase: "Specializing in Personal Injury" on a lawyer's business card).

Courts have also dealt with these issues.

In Walker v. Board of Professional Responsibility, 38 S.W.3d 540 (Tenn. 2001), the Tennessee Supreme Court examined the following scenario:

> In February 1995, Walker placed an advertisement for divorce services in the Chattanooga News Free Press TV Magazine. The ad was published over the week of February 12 through 18, 1995 and states in its entirety: "DIVORCE, BOTH PARTIES SIGN, $ 125 + COST, NO EXTRA CHARGES, Ted Walker, [address & telephone number]." On March 29, 1995, the Board's Disciplinary Counsel filed a complaint against Walker alleging that this advertisement listed divorce as a specific area of practice but did not include the disclaimer required by DR 2-101(C) of the Code of Professional Responsibility.

Id. at 542. The Disciplinary Board reprimanded Walker because he had not included a disclaimer indicating that he had not been certified by the Tennessee Commission on Continuing Legal Education and Specialization. The appellate court upheld a private reprimand.

> The regulation before us requires that whenever a lawyer advertises his services in a particular area of law for which certification is available in Tennessee, he must disclose in the ad whether he is certified. DR 2-101(C). Since Walker was not certified as a civil trial specialist (which then covered the area of divorce law) yet he specifically mentioned divorce law in his ads, the disciplinary rule mandates that his ads include the following language: "Not certified as a civil trial specialist by the Tennessee Commission on Continuing Legal Education and Specialization." DR 2-101(C)(3). This regulation does not prohibit or limit speech; instead it requires more speech by way of an explanatory disclaimer.

Id. at 545.

In In re Robbins, 469 S.E.2d 191 (Ga. 1996), the Supreme Court of Georgia upheld a public reprimand against a lawyer for describing himself as a "specialist."

> Robbins, the sole shareholder of William N. Robbins, Attorney at Law, P.C., prepared and published a newsletter entitled Legal Beagle, copies of which were mailed to

> Robbins' former clients, as well as his and his employees' family and friends. An edition of the newsletter, announcing the return of a former attorney, stated, in part: "WELCOME TO Joe Maniscalco -- Joe is an attorney who has returned to the firm with a specialty in personal injury and litigation."
>
> The newsletter further stated: DON'T FORGET, we specialize in automobile accidents, motorcycle accidents, bicycle accidents, medical malpractice, workers' compensation and social security cases. Be sure to tell your friends about this. We appreciate referrals from our clients.
>
> Robbins has significant experience in handling the types of cases listed in the newsletter, and practices only in those areas.

Id. at 192-93.

On the other hand, the Supreme Court of Kentucky reversed the bar's disapproval of a television advertisement using the phrase "injury lawyers."

> The fundamental predicate of the decision by the Advertising Commission was that the phrase "injury lawyers" implies that the lawyers are specialists in representing injured people. Certainly reasonable minds can differ when considering such an implication. As argued by Hughes & Coleman, they are lawyers who can and do handle injury cases. The ads consequently contain truthful information and the Board and Commission do not challenge such an assertion.
>
> . . . .
>
> None of the ads use any form of the prohibited phrases such as "certified", "specialist", "expert", or "authority" at any time or in any manner. We are persuaded that they fall into the category of otherwise permitted comments such as "international lawyers", "corporate attorneys", "litigation attorneys", "bankruptcy-debtor-creditor rights attorneys" and "a full service business law firm."

In re Appeal of Hughes & Coleman, 60 S.W.3d 540, 544, 544-45 (Ky. 2001) (emphases added). The Kentucky Supreme Court held that the bar "paints with too broad a brush." Id. at 545.

(c) States vary widely in their rules governing specific references to particular certifications (see above).

Best Answer

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

b 7/14

Use of Terms Like "Expert" and "Authority"

Hypothetical 6

You just joined a small firm that focuses on civil rights litigation, and double checked the way the firm is marketing your areas of practice. Now your firm's chairman has asked you to check your colleagues' marketing.

(a) Can one of your colleagues call herself an "expert" in discrimination issues?

MAYBE

(b) Can one of your colleagues describe herself as an "authority" in anti-discrimination regulations?

MAYBE

Analysis

Several states have adopted specific prohibitions on lawyers using certain words when describing themselves in marketing materials.

(a) Several states have prohibited lawyers from calling themselves "experts."

- Fla. Bar v. Doane, 43 So. 3d 640, 640 (Fla. 2010) (enjoining respondent lawyer from "the use of the term 'Expert' or 'Experts' in all legal advertisements and any trade name.").

- In re Anonymous Member of S.C. Bar, 687 S.E.2d 41, 46 (S.C. 2009) ("Respondent's use of the words, as outlined in the report of the Hearing Panel, clearly violated Rule 7.4(b), which expressly prohibits use of 'any form' of the words 'expert' and 'specialist.'").

- In re PRB Dkt. No. 2002.093, 868 A.2d 709, 710, 712 (Vt. 2005) (privately admonishing a lawyer who used the term "'INJURY EXPERTS'" and "'WE ARE THE EXPERTS IN [certain areas of law]'" in yellow page advertisements; finding that use of the term "experts" violated the Vermont ethics rules "by placing an advertisement that implicitly compared his firm's services with those provided by other lawyers in a way that can not be 'factually substantiated.' The panel noted that the phrase 'the experts' was 'an implicit statement of superiority' as compared with other firms, and had a 'serious potential to mislead the consumer, since there is no objective way to

verify the claim.'"; pointing to an Ohio case prohibiting lawyers from using the phrase ""passionate and aggressive advocate'").

- Ohio LEO 2005-6 (8/8/05) (holding that Ohio lawyers may not engage in a television station's "Ask the Expert" television program; finding that the term "expert" as applying to a lawyer was improper; allowing lawyers to participate in the program if the word "expert" was removed).

Florida prohibits lawyers from using the term "expert" unless they are certified.

- Florida Rule 4-7.14(a)(4) ("Potentially Misleading Advertisements. Potentially misleading advertisements include, but are not limited to . . . a statement that a lawyer is board certified, a specialist, an expert, or other variations of those terms unless: (A) the lawyer has been certified under the Florida Certification Plan as set forth in chapter 6, Rules Regulating the Florida Bar and the advertisement includes the area of certification and that The Florida Bar is the certifying organization; (B) the lawyer has been certified by an organization whose specialty certification program has been accredited by the American Bar Association or The Florida Bar as provided elsewhere in these rules. A lawyer certified by a specialty certification program accredited by the American Bar Association but not The Florida Bar must include the statement 'Not Certified as a Specialist by The Florida Bar' in reference to the specialization or certification. All such advertisements must include the area of certification and the name of the certifying organization; or (C) the lawyer has been certified by another state bar if the state bar program grants certification on the basis of standards reasonably comparable to the standards of the Florida Certification Plan set forth in chapter 6 of these rules and the advertisement includes the area of certification and the name of the certifying organization. In the absence of such certification, a lawyer may communicate the fact that the lawyer limits his or her practice to 1 or more fields of law.").

(b) At least one state has specifically prohibited lawyers from using the word "authority" when describing themselves. South Carolina Rule 7.4(b)(advertisements "shall not contain any form of the words 'certified,' 'specialist,' 'expert,' or 'authority'").

Other states permit lawyers to use words like "expert" and "expertise" if the claims can be "factually substantiated." Virginia LEO 1750 (revised 12/18/08).

Best Answer

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

b 7/14

Depictions

Hypothetical 7

You were just appointed to the thankless task of supervising your law firm's television and print advertisements. As in previous years, your firm's marketing folks have prepared proposed story boards, pictures and copy. They have asked for your input about the ethical propriety of the following components of a new advertising campaign that your firm's chairman has already endorsed.

May your advertising campaign include the following:

(a) A fictionalized depiction of a client conference (using real firm lawyers and real clients)?

MAYBE

(b) A fictionalized depiction of a client conference (using actors, but with a disclaimer explaining that the depiction is fictionalized and the people are actors)?

MAYBE

(c) Pictures of people on your website who appear from the context to be your lawyers, but who are actually paid models?

MAYBE

Analysis

This hypothetical deals with the context of lawyer advertising -- the rules governing depictions.

(a)-(b) Not surprisingly, states' approach to this type of marketing mirror their general approach to marketing. Some states follow the generic ABA Model Rules approach, which simply prohibits false and misleading statements.

Other state ethics rules permit depictions as long as they are accompanied by an appropriate disclaimer.

- Florida Rule 4-7.13(b)(6) ("Examples of Deceptive and Inherently Misleading Advertisements. Deceptive or inherently misleading advertisements include, but are not limited to advertisements that contain . . . a dramatization of an actual or fictitious event unless the dramatization contains the following prominently displayed notice: 'DRAMATIZATION. NOT AN ACTUAL EVENT.' When an advertisement includes an actor purporting to be engaged in a particular profession or occupation, the advertisement must include the following prominently displayed notice: 'ACTOR. NOT ACTUAL [. . . .]'").

- New York Rule 7.1(c)(2) ("An advertisement shall not . . . include the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case"); New York Rule 7.1(c)(3) ("An advertisement shall not . . . use actors to portray a judge, the lawyer, members of the law firm, or clients, or utilize depictions of fictionalized events or scenes without disclosure of same").

- North Carolina Rule 7.1(b) ("A communication by a lawyer that contains a dramatization depicting a fictional situation is misleading unless it complies with paragraph (a) above and contains a conspicuous written or oral statement, at the beginning and the end of the communication, explaining that the communication contains a dramatization and does not depict actual events or real persons.").

- Pennsylvania Rule 7.2(g) ("An advertisement or public communication shall not contain a portrayal of a client by a non-client; the re-enactment of any events or scenes; or, pictures or persons, which are not actual or authentic, without a disclosure that such depiction is a dramatization.").

In January 2011, the Fifth Circuit upheld Louisiana's Rule 7.2(c)(1)(I) prohibiting marketing communications that "'include[] a portrayal of a client by a non-client without disclaimer . . . or the depiction of any events or scenes or pictures that are not actual or authentic without disclaimer.'" Public Citizen Inc. v. La. Attorney Disciplinary Bd., 632 F.3d 212, 227 (5th Cir. 2011).

The Utah Bar generally approved what sounds like an interesting advertisement.

> An acceptable fictional vignette should be labeled as "fictional" or should be clearly identifiable as fictional, as with lawyers portrayed as giants towering over the town, counseling a space alien about an insurance matter, and

> "running as fast as blurs to reach a client in distress." . . . A fictional vignette can convey such a message about a lawyer or law firm so long as the message itself is not misleading or likely to create unjustified expectations. A clearly identified fictional sketch in which a fictional party or opposing counsel shows frustration to learn that the opposing party has retained Firm X would be acceptable. The only limits are that these vignettes should be identified as fictional and ultimately must not lead a reasonable person to form an unjustified expectation. Obviously which fictional portrayals will be appropriate and which deemed misleading may depend, to some extent, on the facts about the lawyer and the contents of the vignette."; "Testimonials or dramatizations may be false or misleading if there is a substantial likelihood that a reasonable person will reach a conclusion for which there is no factual foundation or will form an unjustified expectation regarding the lawyer or the services to be rendered. The inclusion of appropriate disclaimer or qualifying language may prevent testimonials or dramatizations from being false or misleading.

Utah LEO 09-01 (2/23/09) (emphases added).

The Utah lawyer might have been using some generic nationally-circulated advertisements, because in March 2010, the Second Circuit overturned New York's efforts to stop an ad that seems strikingly similar.

- Alexander v. Cahill, 598 F.3d 79, 93, 94 (2d Cir. 2010) (in an opinion filed by Circuit Judge Guido Calabresi, upholding the constitutionality of New York State's 30-day moratorium on direct marketing in wrongful death or personal injury situations, but finding unconstitutional other provisions of New York's marketing rules, including bans on testimonials, portrayals of judge, irrelevant techniques such as gimmicky depictions, nicknames, and trade names; among other things, finding unconstitutional New York State's ban on "irrelevant advertising components"; "Defendants have introduced no evidence that the sorts of irrelevant advertising components proscribed by subsection 1200.50(c)(5) are, in fact, misleading and so subject to proscription."; "[T]he sorts of gimmicks that this rule appears designed to reach -- such as Alexander & Catalano's wisps of smoke, blue electrical currents, and special effects -- do not actually seem likely to mislead. It is true that Alexander and his partner are not giants towering above local buildings; they cannot run to a client's house so quickly they appear as blurs; and they do not actually provide legal assistance to space aliens. But given

> the prevalence of these and other kinds of special effects in advertising and entertainment, we cannot seriously believe -- purely as a matter of 'common sense' -- that ordinary individuals are likely to be misled into thinking that these advertisements depict true characteristics." (emphasis added)).

(c) Law firms may want to use stock photographs on their websites and other advertising, for a number of reasons. First, the models may be more attractive than lawyers in the law firm. Second, using stock photos could avoid the necessity of law firms having to redo their ads if one of the pictured lawyers leaves the firm.

At least one bar has explicitly indicated that law firms normally may use stock photos.

- North Carolina LEO 2010-9 (7/23/10) (holding that lawyers may advertise using stock photographs; stating that "a stock photograph may be included in legal advertisement without a dramatization disclaimer" unless "in the context of the advertisement or marketing document, the stock photograph creates a material misrepresentation of fact.").

An early 2009 Law Technology News article discussed this issue. The article started with a reference to Holland & Knight's use of models in their website.

> The images of several well-groomed, professional-looking people permeate the pages on the Web site of the Holland & Knight law firm. But would-be clients should not seek to speak with any of those people about their legal needs when contemplating whether to hire the Tampa, Fla.-based firm.
>
> All of those good-looking folks shown on virtually all of the Web site's main pages -- blacks and whites, males and females, younger people and gray-haired ones -- are paid models. Not one is a lawyer with the firm.

Bud Newman, Do Model Web Faces Misrepresent Law Firms? Law Tech. News [Special to the Fla. Bus. Reviews], Jan. 5, 2009. The article quoted a Florida Bar regulator as indicating that the bar has never received a complaint about Holland & Knight's use of models, and that the bar has never dealt with it.

The article included a Holland & Knight spokesman's facially implausible explanation for the firm's use of stock photos.

> Holland & Knight chief marketing officer Bruce Alltop also was unavailable for an interview on why the firm uses so many paid models on its Web site. However, in response to a question from the Daily Business Review, he issued a statement saying the practice is about to end.
>
> "Holland & Knight is in the process of redesigning the firm's marketing materials," Alltop said in the statement. "The look and feel of our Web site will be compatible with the new marketing materials, which will not incorporate the use of models as a design element. When our existing Web site was redesigned in 2007, firm management decided to use models rather than our own lawyers so as not to divert our lawyers' time from serving our clients."
>
> Holland & Knight spokeswoman Susan Bass added that the firm's new Web site -- sans models -- is expected to debut in the first quarter of this year.

Id. (emphasis added)

As humorous as this situation might seem, there could be serious implications for using models rather than firm lawyers. Perhaps most obviously, an all-white and all-male law firm could not use a false and misleading advertisement showing a diverse roster.

In 2010, the Colorado Bar sanctioned a lawyer for falsely claiming that it was a diverse law firm, in an effort to obtain DuPont's legal business.

- People v. Shepherd, Case No. 10PDJ033, slip op. at 3, 4, 4-5, 5, 8 (Colo. Mar. 18, 2010) [Stipulation, Agreement & Affidavit Containing Respondent's Conditional Admission of Misconduct] ("In approximately 2000, respondent and others started the law firm of Kamlet, Shepherd & Reichert, LLP (hereinafter referred to as 'KSR')."; "Respondent wanted to get the KSR firm qualified for the E.I. duPont de Nemours and Company ('DuPont') Diverse Legal Supplier Program. Only law firms with 50% equity ownership by minorities and/ or women qualified for the program."; "On December 6, 2007, respondent sent an e-mail to two individuals in the DuPont Legal Department

stating in pertinent part: 'With regard to our firm's diversity, we have a total of eight equity partners, three of whom are African American, and two of whom are women which correlates to 62% of equity partners within the firm being minority and/or women. Of the three minority equity partners, two are African American males, one is an African American female and our collective ownership interest is approximately 43%. Additionally, we have two women equity partners whose collective equity ownership interest is 5.5%. Total equity interest of our minority and women partners is 48.5% of the firm. We are very proud of the fact that we have the strong diversity in the equity ownership of the firm and believe that our diversity aligns with the spirit and motivation of the creation of DuPont's diverse legal supplier network and we believe that we would be an excellent firm to be added to DuPont's list to represent the Rocky Mountain Region.'"; "This e-mail contained false statements and/or misrepresentations. In December of 2007, respondent was the only African- American equity partner at the firm. There were two other African-American partners who did not have an equity stake. In December of 2007, there was only one woman equity partner (she resigned in January of 2008). As of December 31, 2007, there were a total of eight equity partners; therefore, only 25% of the equity partners were minorities and/ or women. Respondent and the one woman equity partner owned a combined total of 30.1% of the firm's equity."; "As of the end of 2007, KSR had not qualified for DuPont's program."; "On January 7, 2008, respondent sent an individual in the DuPont Legal Department an e-mail stating in part: 'You asked that I contact you after I thought our firm met DuPont's criteria for inclusion on its Diverse Outside Counsel list. I believe that our firm now meets your criteria and would love to have the opportunity to coordinate a visit to come and meet with you and your team sometime in February."; "The January 7 e-mail contains a false statement and/ or misrepresentation. KSR did not qualify for inclusion in DuPont's Diverse Legal Supplier Program and respondent knew KSR did not qualify at the time he sent this e-mail."; "On February 19, 2008, an individual in the DuPont Legal Department sent respondent an e-mail welcoming him and his firm to DuPont's Diverse Legal Supplier Program."; "KSR did not actually do legal work for DuPont until November 2008. At that time, DuPont included the KSR firm on a request for proposal. After respondent was told he won the bid, he said someone left the firm and, at least temporarily, they were under the definition for a minority-owned firm. This statement was false or misleading, as a person leaving the KSR firm was not the cause of KSR not meeting DuPont's definition for a minority owned firm; rather, KSR had never met the requirements for a minority-owned firm."; "An individual in the DuPont Legal Department told respondent if it was only temporary, it was not a problem. DuPont still used the KSR firm for the work."; "On March 28, 2009, KSR sent an individual in the DuPont Legal Department a letter, signed on behalf of KSR by respondent and another firm partner. The letter stated in part: 'We are writing to request that Kamlet Shepherd & Reichert,

> LLP be removed from the DuPont Diverse Legal Supplier program. We do not believe our firm meets DuPont's requirements for a minority-owned or women-owned law firm. As we understand those standards, we should never have been qualified or listed as a diverse legal supplier.'"; "DuPont has stated it was not harmed. In fact, they kept the work at KSR after the receipt of the March 28, 2009 letter."; "Based on the foregoing, the parties hereto recommend that a public censure be imposed upon the respondent. The respondent consents to the imposition of discipline of a public censure. The parties request that the Presiding Disciplinary Judge order that the effective date of such discipline be immediate.").

Best Answer

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

b 7/14

Requesting that Clients Forego Inappropriate Actions

Hypothetical 8

Despite the "lore" that clients involved in litigation become more emotional than those involved in transactional matters, one of your business clients has been quite a challenge for you. The client has become a lucrative source of business for your law firm -- because he owns extensive real estate in your city, as well as an NBA team. But he sometimes engages in racially insensitive conduct, or asks you to take the lead in legal actions that seem racially motivated. You know that you have to loyally and diligently serve your client, but you wonder if you can ask your client to forego such inappropriate actions.

May you ask your client to forego discourteous or other inappropriate actions?

YES

Analysis

The ethics rules contain several provisions recognizing lawyers' ability to forego inappropriate actions. It normally would make sense for lawyers to request that their client avoid giving direction to the lawyer to take such inappropriate actions (or withdraw such direction).

The ethics rules describe several occasions during the course of an attorney-client relationship when lawyers have more power than they might realize to act professionally -- without falling short of their clear ethical duty to act as diligent client advocates.

- First, lawyers establishing an attorney-client relationship can limit the scope of the representation so it "exclude[s] specific means that might otherwise be used to accomplish the client's objectives" -- such as "actions . . . that the lawyer regards as repugnant or imprudent" (lawyers can either make their services available only under this condition, or agree with the client to such a limit). ABA Model Rule 1.2 cmt. [6].

- Second, during the course of the representation clients generally set the objectives, but "normally defer to the special knowledge and skill of their

lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters." ABA Model Rule 1.2 cmt. [2]. Thus, lawyers "may have authority to exercise professional discretion in determining the means by which a matter should be pursued." ABA Model Rule 1.3 cmt. [1].

- Third, although lawyers must diligently represent their clients, "[a] lawyer is not bound, however, to press for every advantage that might be realized for a client." ABA Model Rule 1.3 cmt. [1].

- Fourth, although a lawyer "shall act with reasonable diligence and promptness in representing a client" (ABA Model Rule 1.3), "[t]he lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect." ABA Model Rule 1.3 cmt. [1] (emphasis added).

- Fifth, a lawyer may withdraw from representing a client (even if there is "material adverse effect on the interests of the client" (ABA Model Rule 1.16(b)(1))) if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." ABA Model Rule 1.16(b)(4) (emphasis added).

Lawyers should be ready to rely on the ethics rules' provision allowing lawyers to forego inappropriate actions.

Best Answer

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

b 12/10, 10/14

Withdrawal in the Face of Clients' Desire to Pursue Offensive Conduct

Hypothetical 9

You have had difficulty from the start dealing with an overly aggressive client. Now he has asked you to take several actions that you consider inappropriate and unprofessional -- both in the transactional and litigation work you are handling for the client. Although you satisfy yourself that the actions would not be unethical, the gender-based theme of some of the actions bothers you. You wonder if you can withdraw from the representation without violating your duties to the client.

May you withdraw from a representation if the client insists on pursuing conduct you think is offensive?

YES

Analysis

Although lawyers should properly view withdrawal from a representation as a last resort, they should also recognize those rare situations when the ethics rules require or permit such withdrawal.

Not surprisingly, the ethics rules contain a specific provision requiring lawyers to serve their clients unless the lawyers withdraw.

> A lawyer shall act with reasonable diligence and promptness in representing a client.

ABA Model Rule 1.3. Thus, lawyers act primarily as their clients' advocates.

In some rare situations, lawyers must withdraw from representing a client. Under ABA Model Rule 1.16, lawyers

> shall withdraw from the representation of a client if [among other things] . . . the representation will result in violation of the rules of professional conduct or other law.

ABA Model Rule 1.16(a)(1). Thus, lawyers must withdraw from a representation in an extreme situation involving unethical or illegal conduct.

Second, the ethics rules also permit withdrawal in several circumstances that might apply to a lawyer representing a client urging inappropriate conduct. Under ABA Model Rule 1.16(b)(1), lawyers may withdraw from a representation at any time if "withdrawal can be accomplished without material adverse effect on the interests of the client." Although the ABA Model Rules do not fully explore the meaning of that phrase, lawyers generally can withdraw at the very beginning of a representation without any looming deadlines, during a lull in activity, etc. Of course, withdrawal from a court case also requires judicial permission. Lawyers might rely on this permissible withdrawal provision if they find themselves representing a client pushing them to act inappropriately.

In addition to the provision allowing lawyers to withdraw for any reason (or no reason) in the absence of prejudice to their clients, other permissible withdrawal rules might apply as well.

Under ABA Model Rule 1.16, a lawyer may withdraw (even if the withdrawal would have a "material adverse effect on the interests of the client") if

> the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

ABA Model Rule 1.16(b)(4).

A comment provides some explanation of this principle.

> A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the

> client's interests. . . . <u>The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement</u>.

ABA Model Rule 1.16 cmt. [7] (emphasis added).

A lawyer may also withdraw if the client "refuses to abide by the terms of an agreement relating to the representation, such as an agreement . . . limiting the objectives of the representation." ABA Model Rule 1.16 cmt. [8]. A lawyer might point to this provision in withdrawing upon a client's refusal to abide by a limitation that excludes "actions that . . . the lawyer regards as repugnant or imprudent." ABA Model Rule 1.2 cmt. [6].

Best Answer

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

b 12/10

Public Policy Disagreements Between Lawyers and Their Clients

Hypothetical 10

A developer has proposed to build a large apartment complex on the site of what was your state's most active slave trade auction block. City officials have been so desperate for downtown housing that they have not criticized the proposed development. However, you and some other city residents want to form an ad hoc group to oppose the development. When you learn that your law firm represents the developer, you wonder what steps you may take.

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

(a) Represent the ad hoc group in litigation?

NO

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

NO

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

MAYBE

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

MAYBE

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

YES

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

YES

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

YES

Analysis

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

The ABA Model Rules do not explicitly deal with this issue, but in some circumstances normal ABA Model Rule 1.7 conflicts rules might apply. Under ABA Model Rule 1.7(a)(1),

> a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if . . . the representation of one client will be directly adverse to another client

ABA Model Rule 1.7(a)(1). This type of conflict arises only if a lawyer represents one client adverse to another client. While non-representational conduct might cause business and client-relations issues, only legal adversity triggers a rules-based conflict. Of course, harming a client through non-representational conduct probably violates lawyers' fiduciary duties, amounts to a breach of contract, etc.

As in other areas, the Restatement deals much more extensively with these issues.

> A conflict under this Section need not be created by a financial interest. Included are interests that might be altruistic, such as an interest in furthering a charity favored by the lawyer, and matters of personal relationship, for example where the opposing party is the lawyer's spouse or a long-time friend or an institution with which the lawyer has

> a special relationship of loyalty. Such a conflict may also result from a lawyer's deeply held religious, philosophical, political, or public-policy beliefs. . . . A conflict exists if such an interest would materially impair the lawyer's ability to consider alternative courses of action that otherwise might be available to a client, to discuss all relevant aspects of the subject matter of the representation with the client, or otherwise to provide effective representation to the client. In some cases, a conflict between the personal or financial interests of a lawyer and those of a client will be so substantial that client consent will not suffice to remove the disability.

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

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

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

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

The Restatement deals with a less extreme example.

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

> contributions to policy making of some persons most able to help.

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

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

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

Id. (emphasis added).

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

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

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

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

> Lawyer represents Corporation in negotiating with the Internal Revenue Service to permit Corporation to employ accelerated depreciation methods for machinery purchased in a prior tax year. At the same time, Lawyer believes that the accelerated depreciation laws for manufacturing equipment reflect unwise public policy. Lawyer has been working with a bar-association committee to develop a policy statement against the allowance, and the committee chair has requested Lawyer to testify in favor of the report and its proposal to repeal all such depreciation allowances. Any new legislation, as is true generally of such tax enactments, would apply only for current and future tax years, thus not directly affecting Corporation's matter before the IRS. Although the proposed legislation would be against Corporation's economic interests, Lawyer may, without Corporation's consent, continue the representation of Corporation while working to repeal the allowance.

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

Bars have also dealt with this issue.

- N.Y. County LEO 744 (10/19/11) ("Rule 6.4 does not require a lawyer to obtain client consent to speak publicly at a law reform forum, notwithstanding that the reform may affect the interests of a client of the lawyer. It is permissible for a lawyer to participate in law reform activities even if the client objects, provided the attorney does not divulge any confidential information. The lawyer must, however, take into consideration and be mindful that conflicts of interest may, in certain circumstances, require the lawyer to cease the client representation, or cease the law reform activity, under Rule 1.7. Rule 6.4 also requires that the lawyer disclose to the law reform organization when a lawyer knows that the client's interests may be materially benefitted by a decision in which the lawyer participates.").

- N.Y. City LEO 1997-3 (1997) ("A lawyer may espouse a personal viewpoint adverse to the interest of a former or present client in a pending matter as long as client confidences and zealous representation of the client are not compromised."; "[I]t is difficult to see how a lawyer could speak publicly on one side of an issue knowing that he or she must personally argue the opposing side of that issue in front of a tribunal in a pending case. The possibility that a lawyer's publicly proclaimed personal opinion would become known to the tribunal, undermining his or her credibility and thereby jeopardizing the client representation, does warrant some curtailment on public expression of a personal viewpoint to preserve the integrity of a lawyer's advocacy. Of course, the question of whether zealous advocacy

> may be compromised can arise in numerous situations. A lawyer must exercise sound judgment in determining whether publicly and openly espousing his or her personal opinion would be directly deleterious to a representation of a particular client. In certain cases, while client consent may not be required, it may nevertheless be desirable to give the client an opportunity to terminate the representation before the lawyer openly takes an opposing personal position on the same subject." (footnote omitted); "The rule of imputed disqualification that applies with respect to legal services rendered by different lawyers within the same law firm, see DR 5-105(D), should not automatically extend to a case involving personal views espoused as such by a lawyer in the firm not working on the relevant matter. In any case where there may be a question, it is recommended that the lawyer begin his or her remarks with a disclaimer to the effect that the views expressed are his or her own. In the Committee's view, the interests of the legal system are best served by encouraging lawyers to speak out about their personal convictions, even if they are not always in harmony with the interest of a client." (footnote omitted)).

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

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

- Oasis West Realty, LLC v. Goldman, 106 Cal. Rptr. 3d 539, 544, 548, 549, 550, 551, 552 (Cal. Ct. App. 2010) (not citable) (reversing a judgment against a former Reed Smith lawyer who represented a real estate developer in connection with a Beverly Hills project, and then publicly opposed the project two years after the representation ended; explaining that "[o]n May 6, 2008 he [Reed Smith partner Kenneth Goldman] addressed the city council, opposing a rule which required individuals seeking signatures on the referendum petition to carry with them the entire EIR and other documents, totaling about 15 pounds. Goldman's statement was that the requirement was unnecessary and unfair 'whether you're for the Hilton or for the Referendum.'"; "On May 12, 2008, he and his wife spent about 90 minutes soliciting signatures on the referendum petition from their neighbors. At four or five houses, they left a 'dear neighbor' note which they both signed,

expressing concern about the size of the project and the traffic impact, indicating that they would sign the referendum petition, and urging the neighbor to do the same."; "But Goldman never undertook a second employment, or developed any other relationship which could create conflicting fiduciary duties. He was not placed in the position of choosing between clients, because there was no second client."; "If, in opposing the Hilton project, Goldman had even hinted, or had by his conduct implied, that his opposition to the project was based on information obtained while he represented Oasis, he would have violated Business and Professions Code section 6068."; "However, there is no evidence that Goldman revealed any confidential information, or hinted that he had such information, or created circumstances which would encourage others to think that he did and that he was basing his opposition on that information. He did not trade on his former representation of Oasis to lend credence to his opposition. Such conduct would imply that he had confidential information and was basing his actions on that information, and would be tantamount to revealing confidential information."; "Our analysis does not end with the rules and the Business and Professions Code. An attorney's duty to a client is defined not just by the rules and statutes, but by the general principles of fiduciary relationships. The Rules of Professional Conduct do not supersede common law obligations."; "[W]e turn again to the facts, and conclude that a finding that Goldman's statements to the City Council breached a duty of loyalty to Oasis would stretch that duty to cartoonish proportions."; "However, when Goldman asked his neighbors to sign the petition (indeed, when he signed it himself) he unquestionably acted against the interest of his former client, on the issue on which he was retained. Did this breach the duty of loyalty?"; "This is a sweeping statement, and read literally would bar Goldman not only from circulating the petition, but from signing it, indeed, from voting against Measure H. However, all the cases which recite this rule do so in the context of subsequent representations or employment. None involve the acts an attorney takes on his or her own behalf."; "Oasis seeks to impose something like a rule against the appearance of impropriety, but California has not adopted such a rule."; explaining that Professor Hazard [reporter for original ABA Model Rules] has called the "appearance of impropriety" standard a '"garbage" standard'" (citation omitted); "We thus see no authority for a rule which would bar an attorney from doing that Goldman did here: signing a petition in opposition to the Hilton project, and asking his neighbors to sign such a petition, when he had once represented the developer concerning the project. To the extent that Oasis asks us to create such a rule, we decline the invitation. We cannot find that by representing a client, a lawyer forever after forfeits the constitutional right to speak on matters of public interest."), reversed and superseded by 250 P.3d 1115 (Cal. 2011).

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

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

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

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

Best Answer

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

n 1/12, b 10/14

Representing Unpopular Clients

Hypothetical 11

You were just asked to work on a pro bono matter in your large firm. The firm signed up to represent one the terrorists at Guantanamo Bay, accused in assisting in the September 11, 2001 attack on the World Trade Center. That was a personal event for you, because your mother died that day – jumping from her office on the 90th floor of the North Tower as the fires engulfed that floor. You wonder whether you could diligently represent your firm's proposed client.

(a) May you represent the accused terrorist?

MAYBE

(b) If you do not represent the accused terrorist, may other lawyers in your firm represent him?

YES (PROBABLY)

Analysis

The American legal profession has occasionally dealt with lawyers' representation of unpopular clients. These incidents have brought out the best and sometimes the worst in the profession.

Historical Examples

The most frequently-cited example of a lawyer bravely representing unpopular clients involves the early career of our second president -- John Adams.

On March 5, 1770, British soldiers fired into a crowd that had gathered in Boston. The shots killed three men on the spot, and two died later of their wounds. Interestingly, one of the victims was Crispus Attucks. Attucks was apparently a black man (variously described as "black, mulatto, or Indian" in one source) -- and the first casualty of what became the American Revolution.

The British soldiers' actions would not have been improper if they had read the "Riot Act" before firing. We now use the term "read the riot act" to describe a vigorous complaint -- but in 1770 it really meant something. If a crowd did not disperse after an official had "read the Riot Act," soldiers were free to take more forceful measures.

Massachusetts' Royal Governor Hutchinson promised a full inquiry, and told a crowd who gathered outside his office:

> The law shall have its course; I will live and die by the law.

After what became known as the "Boston Massacre," British Army Captain Thomas Preston and several of his men were incarcerated. The chief prosecutor appointed to prosecute the British officer and soldiers was Samuel Quincy. Ironically, he was a Loyalist. Quincy later left Massachusetts, and died in England thirteen years after America declared its independence.

The first lawyer who stepped up to represent the British officer and soldiers was Josiah Quincy -- the younger brother of the prosecutor, and a sympathizer of those seeking more independence from Britain. Quincy's father wrote his son the following note:

> 'My dear Son,
>
> I am under great affliction, at hearing the bitterest reproaches uttered against you, for having become an advocate for those criminals who are charged with the murder of their fellow-citizens. Good God! Is it possible? I will not believe it. . . .
>
> Your anxious and distressed parent,
>
> Josiah Quincy.'

http://www.bostonmassacre.net/trial/trial-summary2.htm. Quincy responded as follows to his father.

> 'Honored Sir,
>
> I refused all engagement, until advised and urged to undertake it, by an Adams, a Hancock, a Molineux, a Cushing, a Henshaw, a Pemberton, a Warren, a Cooper, and a Phillips. . . . I dare affirm, that you, and this whole people will one day REJOICE, that I became an advocate for the aforesaid "criminals," charged with the murder of our fellow citizens.
>
> I am truly and affectionately,
>
> your son,
>
> Josiah Quincy, Jun.'

Id.

The other lawyer who agreed to represent the British officer and soldiers was thirty-four year old John Adams. He had never held public office, but felt strongly (as he put it) that

> [c]ouncil ought to be the very last thing that . . . an accused Person should want in a free Country. [T]he Bar ought in my opinion to be independent and impartial at all Times And in every Circumstance.

John Adams Autobiography, Part 1, Adams Family Papers, Mass. Historical Soc'y, http://www.masshist.org/digitaladams/archive/doc?id=A1_12.

The case against Captain Preston was separated from the case against the soldiers, and came to trial about seven months later. http://www.bostonmassacre.net/trial/trial-summary2.htm. Sources say that Preston's trial was the first criminal trial in Massachusetts history that lasted more than one day. Webb Garrison, Great Stories of the American Revolution 40 (1990). The trial apparently represented the first time an

American court had used the term "reasonable doubt." http://www.bostonmassacre.net/trial/trial-summary4.htm.

Trials clearly moved more speedily back then -- Adams reportedly called 22 witnesses to the stand in just one day. After a five-day trial, the court adjourned at five o'clock p.m. on a Monday -- and the jury returned its verdict at eight o'clock the next morning. Captain Preston was acquitted. http://www.bostonmassacre.net/trial/trial-summary3.htm.

Approximately one month later, the trial began for the eight British soldiers. Id. John Adams again served as lead lawyer for the defense. This jury reportedly deliberated for about two and a half hours. Six of the soldiers were acquitted, but two were convicted of manslaughter (including the death of Crispus Attucks). http://www.bostonmassacre.net/trial/trial-summary4.htm.

The two convicted soldiers pleaded "Benefit of Clergy." That was a Medieval defense, allowing a convicted defendant to avoid the death penalty if he could prove he could read, by reciting Psalm 51 verse 1. In 1705, the reading requirement had been eliminated, so the two convicted soldiers were able to automatically avoid the death penalty. However, each had his right thumb branded with an "M" (for "murderer"), to assure that they could not plead Benefit of Clergy again. Id.

John Adams faced severe criticism for defending the British officer and soldiers. His cousin Sam Adams reportedly said that "this affair will end the political hopes of the little man from Braintree." Great Stories of the American Revolution 42.

It turns out that Adams used all of his fees (and more) to repair damage to his house caused by angry townspeople. Id. After the trial, Adams went on to be elected to

the Massachusetts legislature, and the Continental Congress. He later served as Commissioner to France, America's first vice president, and second president.

Some things never seem to change for lawyers -- Adams wrote in his diary that Captain Preston never thanked him.

John Adams remains among the most widely-cited examples of great American lawyers who volunteered to represent unpopular clients despite public criticism.

For instance, on April 25, 2011,

> [ABA President Stephen N.] Zack and National Law Day Chair Kim J. Askew participated in the Annual Leon Jaworski Public Program . . . in Washington, DC. The program, established in 2001, featured a panel discussion on the [2011] Law Day theme.

ABA Washington letter, May 2011, http://www.americanbar.org/publications/governmental_affairs_periodicals/washingtonletter/2011/may/2011lawday.html (emphases added).

The 2011 Law Day theme was: The Legacy of John Adams: From Boston to Guantanamo. The ABA's Law Day Planning Guide 2011 included the following introductory statement from ABA President Zack:

> I have chosen this year's Law Day theme, The Legacy of John Adams, From Boston to Guantanamo, to highlight our nation's first lawyer-president and to foster understanding of the historical and contemporary role of lawyers in defending the principle of due process and the rights of the accused.
>
> In 1770, John Adams, then a young leader in the American colonial resistance to British rule, defended the British officer and soldiers charged with firing into a crowd of protestors and killing five civilians in the "Boston Massacre." Adams ably defended those soldiers, despite risks to his safety and his livelihood, and regardless of the fact that many saw them as agents of an oppressive and

> unrepresentative British rule. He did so because of his faith in due process of law, in what he would later famously phrase as "a government of laws, not of men."
>
> John Adams is but one example of many noteworthy cases in American history in which lawyers have stepped forward to defend unpopular clients and the fundamental principle of the rule of law.

ABA Law Day Planning Guide 2011 at 4 (emphasis added), http://www.americanbar.org/content/dam/aba/migrated/2011_build/public_education/lawday_2011_web.authcheckdam.pdf. The ABA's question-and-answer teaching guide including the following question and answer:

> Why is John Adams's role in the Boston Massacre trial significant today? His role in the 1770 Boston Massacre trials has come to be seen as a lawyerly exemplar of adherence to the rule of law and defense of the rights of the accused, even in case when advocates may represent unpopular clients and become involved in matters that generate public controversy. For a contemporary illustration, in March 2010, 19 prominent lawyers signed an open letter supporting the role of lawyers in defending Guantanamo detainees by declaring, "The American tradition of zealous representation of unpopular clients is as least as old as John Adams's representation of the British soldiers charged in the Boston Massacre."

Id. at 11 (emphasis added).

Thus, the ABA president joined many others in praising John Adams for having

> stepped forward to defend unpopular clients [and] the fundamental principle of the rule of law.

Id. The ABA then equated John Adams with the lawyers defending terrorists detained at Guantanamo Bay -- because they also were fulfilling the "'American tradition of zealous representation of unpopular clients.'" Id. (citation omitted).

Although the ABA surely missed the irony, on the very day President Zack participated in the 2011 Law Day Panel (April 25, 2011), the Atlanta-based law firm of King & Spalding announced that it was withdrawing from a case the firm had accepted a week earlier -- representing the Bipartisan Legal Advisory Group of the United States House of Representatives ("BLAG") in defense of the Defense of Marriage Act.

Later that day, King & Spalding partner Paul Clement, who was leading the firm's representation, resigned from the firm. His resignation letter explained why.

> Please accept my resignation from the firm effective immediately.
>
> My resignation is, of course, prompted by the firm's decision to withdraw as counsel for the Bipartisan Legal Advisory Group of the United States House of Representatives in defense of Section III of the Defense of Marriage Act. To be clear, I take this step not because of strongly held views about this statute. My thoughts about the merits of DOMA are as irrelevant as my views about the dozens of federal statutes that I defended as Solicitor General.
>
> Instead, I resign out of the firmly-held belief that a representation should not be abandoned because the client's legal position is extremely unpopular in certain quarters. Defending unpopular positions is what lawyers do. The adversary system of justice depends on it, especially in cases where the passions run high. Efforts to delegitimize any representation for one side of a legal controversy are a profound threat to the rule of law. Much has been said about being on the wrong side of history. But being on the right or wrong side of history on the merits is a question for the clients. When it comes to the lawyers, the surest way to be on the wrong side of history is to abandon a client in the face of hostile criticism.
>
> I would have never undertaken this matter unless I believed I had the full backing of the firm. I recognized from the outset that this statute implicates very sensitive issues that prompt strong views on both sides. But having undertaken the representation, I believe there is no

> honorable course for me but to complete it. If there were problems with the firm's vetting process, we should fix the vetting process, not drop the representation.
>
> I reached this decision with great reluctance. I have immense fondness for my colleagues and the law firm. But in this instance, my loyalty to the client and respect for the profession must come first.
>
> As I searched for professional guidance on how to proceed, I found wisdom in the place you and I both would have expected to find it: from our former partner, Judge Griffin Bell, in a 2002 commencement speech to his alma mater, Mercer Law School. "You are not required to take every matter that is presented to you, but having assumed a representation, it becomes your duty to finish the representation. Sometimes you will make a bad bargain, but as professionals, you are still obligated to carry out the representation." I have every good wish for the firm, but I intend to follow Judge Bell's guidance and see this representation through with my new colleagues at Bancroft PLLC.

April 25, 2011, letter from Paul D. Clement to King & Spalding Chairman Robert D. Hays (emphases added).

One day later, a New York Times article explained what had happened.

- Michael D. Shear and John Schwartz, Law Firm Won't Defend Marriage Act, N.Y. Times, Apr. 26, 2011, at A1 ("The law firm hired by Republicans in the House of Representatives to defend the constitutionality of the Defense of Marriage Act withdrew Monday amid pressure from gay rights groups. The decision prompted the resignation of a prominent partner, who said he intended to take the case with him to another law office." (emphasis added); "Gay rights groups had fiercely criticized the law firm, the 126-year-old King & Spalding of Atlanta, saying that its agreement to defend the law, which prohibits federal recognition of same-sex marriages, would hurt its ability to recruit and retain lawyers. The firm's chairman, Robert D. Hays Jr., said in a statement Monday morning that the firm would no longer defend the law." (emphasis added); "King & Spalding, founded in 1885, is one of the nation's largest and most successful law firms, with offices around the world. American Lawyer magazine ranks it as the nation's 34th-largest, measured by gross revenue."; "Gay rights groups claimed victory, saying their criticism of the firm had its intended effect." (emphasis added); "Richard Socarides, the president of Equality Matters, an advocacy group for lesbian, gay, bisexual

and transgender people, said Monday: 'Mr. Clement's statement misses the point entirely. While it is sometimes appropriate for lawyers to represent unpopular clients when a [sic] important principle is at issue, here the only principle he wishes to defend is discrimination and second-class citizenship for gay Americans.'"; "But Stephen Gillers, an expert in legal ethics at the New York University law school, said the firm caved in, adding that the 'firm's timidity here will hurt weak clients, poor clients and despised clients.'" (emphasis added))

Two days after that, a New York Times editorial condemned as "deplorable" King & Spalding's decision "to abandon the firm's clients."

- Editorial, The Duty of Counsel, N.Y. Times, Apr. 28, 2011, at A24 ("We strongly oppose the federal statute known as the Defense of Marriage Act, which bans recognizing same-sex marriage. House Republicans should not have used taxpayer money to hire outside lawyers to defend it. But the decision of those lawyers, the law firm of King & Spalding, to abandon their clients is deplorable."; "King & Spalding had no ethical or moral obligation to take the case, but in having done so, it was obliged to stay with its clients, to resist political pressure from the left that it feared would hurt its business. Paul Clement, a former solicitor general who quit as partner in King & Spalding over the decision, said, 'a representation should not be abandoned because the client's legal position is extremely unpopular in certain quarters.'" (emphasis added); "Justice is best served when everyone whose case is being decided by a court is represented by able counsel."; "When Brown v. Board of Education was argued almost 60 years ago, two of the great American lawyers squared off, Thurgood Marshall for the winning side of desegregation and the renowned Wall Street lawyer John Davis for the principle of separate but equal. Segregation in public schools was the law of the land then."; "The Defense of Marriage Act, which was signed by President Bill Clinton in 1996, remains on the books despite rulings against it. That did not mean the administration was required to defend the law, and it was right to decide to stop. But that is separate from the law firm's action."; "About twice every three terms, the justices hear a case in which one side is abandoned by a party in the lower courts. The court appoints counsel for that unpopular side, and he argues for the client as best he can. Last week, Chief Justice John Roberts Jr. expressed the court's gratitude to the appointed lawyer in such a case. King & Spalding seems to have forgotten that ideal of advocacy.")

After a brief flurry of news stories, the media seems to have lost interest in King & Spalding's withdrawal from representing its unpopular client -- just six days before the

2011 Law Day whose theme was "The Legacy of John Adams: From Boston to Guantanamo."

Ethics Rules

Litigators asked by a court to represent an unpleasant defendant face a very difficult situation. The ethics rules address both a specific setting for this issue, and contain more general rules that affect the analysis.

The ethics rules also deal with imputation of an individual lawyer's disqualification to the lawyer's entire firm.

(a) Individual lawyers dealing with this awkward and sometimes painful scenario can look to several places for guidance.

First, a precise rule focuses on court appointments. Under the ethics rule for accepting appointments:

> A lawyer should not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:
>
> (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;
>
> (b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or
>
> (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

ABA Model Rule 6.2.

As in so many other areas, the ethics rules set a very low minimum standard. Under ABA Model Rule 6.2, lawyers should turn down court appointments only if the client or the client's cause is "so repugnant" as to fundamentally prevent an adequate representation. Not many clients or causes will fall below that minimum.

Second, the ethics rules provide more general guidance.

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

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

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

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

ABA Model Rule 1.2 cmt. [5].

The Restatement also acknowledges the issue:

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

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

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

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

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

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

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

subtle analysis than a "light switch" type of conflict arising from direct adversity to another client.

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

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

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

ABA Model Rule 1.10(a)(1) (emphasis added). Thus, a lawyer's personal conflict of interest does not normally preclude other lawyers in the firm from handling a matter.

A comment provides a further explanation.

> The rule in paragraph (a) does not prohibit representation where neither questions of client loyalty nor protection of confidential information are presented. Where one lawyer in a firm could not effectively represent a given client because of strong political beliefs, for example, but that lawyer will do no work on the case and personal beliefs of the lawyer will not materially limit the representation by others in the firm, the firm should not be disqualified. On the other hand, if an opposing party in a case were owned by a lawyer in the law firm, and others in the firm would be materially limited in pursuing the matter because of loyalty to that lawyer, the personal disqualification of the lawyer would be imputed to all others in the firm.

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

ABA Model Rule 1.10 cmt. [3] (emphasis added).[2]

The issue is therefore more subtle than it might seem at first glance. For instance, if the sole partner in a five-lawyer law firm would find his judgment materially affected in representing the accused terrorist (and thus could not personally do it), the vehemence of the partner's opposition to the accused terrorist might necessarily affect the judgment of the other four employee-at-will associates.

Best Answer

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

b 12/10; 10/14

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

Lawyers' Communications About Cases: Basic Principles

Hypothetical 12

You work with a civil rights group that takes an active role litigating discrimination cases. The media normally follows the lawsuits that your group files, and you wonder to what extent you and your colleagues can publicly comment on the lawsuits.

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

YES

Analysis

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

ABA Model Rules

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

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

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

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

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

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

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

ABA Model Rule 3.6(b).

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

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

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

ABA Model Rule 3.6 cmt. [5].

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

Restatement

The Restatement articulates the same basic prohibition.

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

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

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

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

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

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

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

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

State Approaches

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

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

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

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

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

Virginia also applies a different standard.

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

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

Courts' Gag Orders

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

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

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

Courts' Other Restrictions

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

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

- United States v. Fieger, Case No. 07-CR-20414, 2008 U.S. Dist LEXIS 18473, at *10-11 (E.D. Mich. Mar. 11, 2008) (addressing Fieger's advertisements which, among other things, compared the Bush Administration to the Nazi party; noting that the advertisements began to appear before Fieger's criminal trial on alleged campaign contribution

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

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

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

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

- Steiner v. Superior Court, 164 Cal. Rptr. 3d 155, 157, 165 (Cal. Ct. App. 2013) (holding that a court could not order a lawyer handling the case before

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

Best Answer

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

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

Lawyers' Communications About Cases: Defining the Limits

Hypothetical 13

Your civil rights group which actively litigates cases arranged for a young associate to research possible ethics limits on you and your colleagues' public statements about the discrimination cases your group pursues. She has determined that the ethics rules contain limits, and now you must fine-tune your analysis of what you and your colleagues may and may not say.

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

NO

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

NO

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

NO

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

YES

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

YES

Analysis

(a) The ABA Model Rules apply the prohibition to a lawyer who "is participating or has participated in the investigation or litigation of a matter." ABA Model Rule 3.6(a). Although the term "investigation" extends the prohibition beyond ongoing litigation, the rule clearly focuses on lawyers engaged in litigation, or the preparation for litigation.

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

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

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

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

ABA Model Rule 3.6 cmt. [6].

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

- In re Gilsdorf, No. 2012PR00006, Hearing Board of Ill. Attorney Registration & Disciplinary Comm'n (June 4, 2013) ("This matter arises out of the Administrator's two-count Complaint, filed on February 6, 2012, as amended by the Administrator's motions on April 5, 2012, and September 28, 2012. The charges of misconduct arose out of the Respondent knowingly posting on an Internet site, and showing to others, a DVD video he received from the state's attorney while representing a criminal defendant. The video showed the undercover drug transaction between Respondent's client and a confidential police source. The Respondent entitled the video 'Cops and Task Force Planting Drugs,' which was false. By posting the video while his client's criminal case was pending, Respondent intended to persuade residents of the county that the police or other government officials acted improperly in the prosecution of his client. The Hearing Board found that the Respondent engaged in the misconduct charged in both counts. Specifically, he revealed information relating to the representation of a client without the informed consent of his client and without the disclosure being impliedly authorized in order to carry out the representation; failed to reasonably consult with the client about the means by which the client's objectives are to be accomplished; made extrajudicial statements that the lawyer reasonably knows will be disseminated by means of public communication and would pose a serious and imminent threat to the fairness of an adjudicative proceeding; engaged in conduct prejudicial to the administration of justice; and engaged in conduct which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute. The Hearing Board recommended that Respondent be suspended from the practice of law for a period of five (5) months.").

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

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

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

- PCG Trading, LLC v. Seyfarth Shaw, LLP, 951 N.E.2d 315, 320, 321 (Mass. 2011) (finding that a lawyer from Bickel & Brewer had not violated Mass. Rule 3.6 by publicly commenting on a malpractice case that Bickel & Brewer was

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

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

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

Several years earlier, the Iowa Supreme Court dealt with a civil defense lawyer's letter to the editor about a case brought against an insurance agency that the lawyer

represented. Iowa Supreme Court Bd. of Prof'l Ethics v. Visser, 629 N.W.2d 376 (Iowa 2001). The letter initially summarized his client's defense, criticized the lawsuit and indicated that he and his client expected the client would be exonerated "from the claims of this unhappy and confused former employee." Id. at 379. The State Disciplinary Board recommended a public reprimand, but the Iowa Supreme Court found no violation, based in large part on the absence of any evidence that the letter to the editor would cause prejudice.

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

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

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

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

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

The court ultimately declined to sanction Quinn.

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

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

The Restatement also provides some guidance.

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

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

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

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

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

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

ABA Model Rule 3.6(c).

Comment [7] explains this exception.

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

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

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

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

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

Best Answer

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

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

Lawyers' Communications About Cases: Application to Prosecutors

Hypothetical 14

You and your colleagues working with a civil rights group have familiarized yourself with the ethics rules limiting your public statements about pending cases. You occasionally deal with aggressive criminal prosecutors pursuing criminal charges against your clients involved in demonstrations. You wonder whether the prosecutors face the same limits you do on making public statements about pending cases.

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

YES

Analysis

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

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

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

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

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

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

ABA Model Rule 3.8 cmt. [5].

The Restatement also has its own rule directed to prosecutors.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. (emphases added).

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

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

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

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

Best Answer

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

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

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

Lawyers' Communications About Judges

Hypothetical 15

You and your civil rights group pursue discrimination cases and represent criminal defendants in some civil rights cases. Although some judges are more sympathetic to your efforts than others, one judge has been very hostile -- making statements in court critical of your goals, and consistently ruling against you with surprisingly harsh language. You know that the ethics rules limit what lawyers can say about their cases, and now you wonder what limits apply to lawyers' criticism of judges.

(a) Are lawyers totally prohibited from criticizing judicial opinions?

NO

(b) Are lawyers totally prohibited from criticizing judges?

NO

(c) Are any limitations on lawyers' criticism of judges applicable to nonpublic criticism?

MAYBE

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

NO (PROBABLY)

(e) Are any limits on lawyers' public communications about judges applicable only to the wording used (as opposed to the substance of the statement)?

NO

Analysis

Introduction

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

- See, e.g., Conservatives, Liberals, Media Advocates Rally Behind Man Jailed For Criticizing Indiana Judge, FoxNews.com, Mar. 3, 2013 ("A group of free-speech advocates is rallying behind an Indiana inmate serving two years for his online rants against a judge who took away his child-custody rights during a divorce case."; "There's no disputing that Daniel Brewington's words were strong and angry -- found in hundreds of emails over the course of the related, two-year divorce case."; "But the group is asking the state's highest court to decide whether they indeed amounted to criminal behavior."; "Brewington was convicted in 2011 of perjury, intimidating a judge and attempting to obstruct justice -- with the attorney general's office successfully arguing that his threat was to expose the judge to 'hatred, contempt, disgrace or ridicule.'"; "However, the group recently filed an amicus brief with the state Supreme Court arguing an appeals court decision in January upholding the felony intimidation charge threatens constitutionally protected speech about public officials."; "The court will decide after the March 11 filing deadline on whether to take up the case."; "The appeals court argued that some of Brewington's claims against Judge James D. Humphrey were false. It also argued their truthfulness were not necessarily relevant to prosecution because the harm, which in this case was striking fear in the victim, occurred 'whether the publicized conduct is true or false,' according to Reason magazine."; "The group is led by University of California Los Angeles law professor Eugene Volokh and includes conservative lawyer James Bopp, a former executive director of the Indiana Civil Liberties Union, the Indiana Association of Scholars, The Indianapolis Star and the James Madison Center for Free Speech."; "Volokh wrote in the brief that the appeals court decision 'endangers the free speech rights of journalists, policy advocates, politicians and ordinary citizens.'"; "In his rants, Brewington called the judge a 'child abuser' and 'corrupt' and accused him of unethical or illegal behavior.").

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

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

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

ABA Model Rule 8.2(a) (emphasis added). Interestingly, none of the comments to ABA Model Rule 8.2 actually discuss this black-letter rule. Instead, the first two of the three

comments to this Rule deal with judges running for election, and the third comment encourages lawyers to defend unjustly criticized judges.

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

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

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

The Restatement follows the same basic formulation.

> A lawyer may not knowingly or recklessly make publicly a false statement of fact concerning the qualifications or

> integrity of an incumbent of a judicial office or a candidate for election to such an office.

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

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

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

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

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

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

- In re Oladiran, No. MC-10-0025-PHX-DGC, 2010 U.S. Dist. LEXIS 106385, at *5, *8, *8-9, *9 (D. Ariz. Sept. 21, 2010) (suspending for six months a former Greenberg Traurig associate who filed a motion in an action (in which he represented himself pro se) that he marked as assigned to the

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

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

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

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

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

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

- Florida Bar v. Ray, 797 So. 2d 556, 558-59 (Fla. 2001), cert. denied, 535 U.S. 930 (2002) ("Although the language of rule 4-8.2(a) closely tracks the subjective "actual malice" standard of New York Times, following a review of the significant differences between the interests served by defamation law and those served by ethical rules governing attorney conduct, we conclude that a purely subjective New York Times standard is inappropriate in attorney disciplinary actions. The purpose of a defamation action is to remedy what is ultimately a private wrong by compensating an individual whose reputation has been damaged by another's defamatory statements. However, ethical

rules that prohibit attorneys from making statements impugning the integrity of judges are not to protect judges from unpleasant or unsavory criticism. Rather, such rules are designed to preserve public confidence in the fairness and impartiality of our system of justice.").

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

- Board of Prof'l Responsibility v. Davidson, 205 P.3d 1008, 1014, 1016 (Wyo. 2009) (explaining that "[d]eterminations of recklessness under Rule 8.2(a) are made using an objective, rather than a subjective standard. . . . In other words, the standard is whether a reasonable attorney would have made the

statements, under the circumstances, not whether this particular attorney, with her subjective state of mind, would have made the statements."; "'Reckless disregard for the truth' does not mean quite the same thing in the context of attorney discipline proceedings as it does in libel and slander cases." (citation omitted); "Numerous courts agree with Graham [In re Disciplinary Action Against Graham, 453 N.W.2d 313 (Minn. 1990)] that the standard for judging whether an attorney has acted with reckless disregard for the truth under rules equivalent to Rule 8.2 is an objective standard, and that the attorney's failure to investigate the facts before making the allegation may be taken into consideration.").

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

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

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

administration of justice, and the profession, a purely subjective standard is inappropriate. . . . Thus, we determine what the reasonable attorney, considered in light of all his professional functions, would do in the same or similar circumstances.").

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

Decisions Punishing Lawyers for Criticizing Judges

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

- Lawrence Buser, Memphis Lawyer Vows To Fight 60-Day Suspension For Criticizing Judge, Commercial Appeal, Jan. 6, 2013 ("Few colleagues have ever accused veteran Memphis lawyer R. Sadler Bailey of being subtle, including the three-member disciplinary panel that recently recommended he be suspended for 60 days."; "The suspension, which Bailey plans to appeal, stemmed from the 'disrespect and sarcasm' in comments he made to Circuit Court Judge Karen Williams during a medical malpractice trial in 2008 that the panel described as 'contentious, combative and protracted.'"; "Bailey called opposing counsel a liar in court and told Williams she might 'set a

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

world record for error' in her rulings."; "'The primary issue before this panel is whether, even under very difficult circumstances, an attorney can justify making rude, insulting, disrespectful and demeaning statements to the judge during open court,' said the opinion of the Tennessee Board of Professional Responsibility panel."; "'We do not believe that such conduct can be justified no matter how worthy or vulnerable the attorney's client may be, or how poorly the judge may be performing or how difficult or unethical the adversary counsel may be. . . . Simply abusing or insulting the court to get rulings in your favor cannot ever be endorsed or justified by our rules and our system of professional conduct.'").

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

litigants to file affidavits of bias. Shimko argues that he had a 'firmly held belief that Judge Markus violated his duty as a judge and that Shimko had a right to complain about the conduct of Judge Markus. He refers to Gardner [Disciplinary Counsel v. Gardner, 793 N.E. 2d 425 (Ohio 2003)], which cited with approval the rationale from courts of other states that 'an objective malice standard strikes a constitutionality permissible balance between an attorney's right to criticize the judiciary and the public's interest in preserving confidence in the judicial system: Lawyers may freely voice criticisms supported by a reasonable factual basis even if they turn out to be mistaken.'" (citation omitted); rejecting a subjective analysis; "The board found such a subjective test unworkable for the test of falsity or reckless disregard of it. We note that the difference between acceptable fervent advocacy and misconduct is not always distinguishable."; ultimately concluding that the lawyer's statements were false, but not dealing with the reckless disregard standard; "The board considered numerous statements concerning Judge Markus, which Shimko admits to writing. The board concluded that these statements were proved by clear and convincing evidence to be unreasonable and objectively false with a mens rea of recklessness."; "There is, admittedly, a fine line between vigorous advocacy on behalf of one's client and improper conduct; identifying that line is an inexact science."; "Shimko could have and should have presented his allegations one at a time, pointing to the record and using words that were powerful, but less heated. It is his choice of language, not his right to allege bias in his affidavits and in his appellate briefs, that brought him before the Disciplinary Counsel."; three judges joined in the dissent, which included the following criticism of the majority opinion: "[T]he majority does damage to the bright-line Gardner rule by waxing poetic about the 'fine line between vigorous advocacy on behalf of one's client and improper conduct; identifying that line is an inexact science.' . . . I do not agree that the line is so fine.").

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

- Scialdone v. Commonwealth, 689 S.E.2d 716, 718 (Va. 2010) (reversing and remanding a contempt finding entered by a trial court judge against two

lawyers for allegedly tampering with evidence and violating a Virginia statute by using a Yahoo username "westisanazi" during a case presided over by Judge Patricia West; explaining that Judge West found (among other things) that the lawyers violated Virginia Code Section 18.2-456 [which indicates that the "courts and judges may issue attachments for contempt, and punish them summarily, only in the cases following: . . . (3) Vile, contemptuous or insulting language addressed to or published of a judge for or in respect to any act or proceeding had, or to be had, in such court, or like language used in his presence and intended for his hearing for or in respect of such act or proceeding"]; ultimately holding that the trial court had not provided sufficient due process before holding the lawyers in contempt).

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

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

'brainless coward.' These statements do not have 'specific, well-defined meanings [that] describe objectively verifiable matters,' but instead appear to be meant in a 'loose, figurative sense.' Id. The statements constitute 'rhetorical hyperbole, incapable of being proved true or false,' and 'convey nothing more substantive than [Oladiran's] contempt for Judge [Bolton].' Id. at 1440. As a result, they are protected by the First Amendment and cannot be found to violate Ethical Rule 8.2(a)."; "Without proof of falsity, Mr. Oladiran's motion is not sanctionable for impugning the integrity of Judge Bolton.").

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

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

- Iowa Supreme Court Attorney Disciplinary Bd. v. Weaver, 750 N.W.2d 71, 79, 80, 82, 90 (Iowa 2008) (suspending for three months a lawyer (and former judge) for accusing the judge handling a DUI case against him of "not being honest" in statements to a reporter; also analyzing the lawyer's second drunk driving charge, and finding that the offense "reflected adversely on his

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

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

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

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

- Brandon Glenn, Lawyer's 'Happy Meal' comment eats at judge, Crain's Chicago Business, May 29, 2007 ("A Chicago lawyer's comment to a bankruptcy judge in court has gotten him in some hot water, or perhaps more appropriately, hot oil. 'I suggest with respect, Your Honor, that you're a few french-fries short of a Happy Meal in terms of what's likely to take place,' William Smith, a partner with Chicago-based McDermott Will & Emery LLP, said during a hearing May 7 in Miami in front of Judge Laurel Myerson Isicoff, according to court documents. Mr. Smith's comment represents 'conduct that appears to be inconsistent with the requirements of professional conduct,' Judge Isicoff wrote in an order for Mr. Smith to appear before her June 25 'to show cause why he should not be suspended from practice before this court.' Though he's not licensed to practice in Florida, Mr. Smith has been granted permission to appear in this particular case. Judge Isicoff could revoke that permission at the June 25 hearing. Mr. Smith, a clerk for the court, both parties in the case and a lawyer from the opposing firm did not return calls seeking comment. In a statement, McDermott Will & Emery said: 'We expect our lawyers to observe established rules and protocols of professional conduct in the courtroom. Any departure from that standard is of concern to us and we look forward to a resolution of this matter.'" ((emphasis added)).

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

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

Barnhill wrote in boldface type that 'Ryan Taboada may be the unfortunate victim of a crazed criminal assailant who emerged from the dark to attack him. But Daly Seven will be the unfortunate victim of a dark and ill-conceived jurisprudence.' Barnhill also included the following statement in the petition: '[I]f you attack the King, kill the King; otherwise, the King will kill you.'").

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

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

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

- In re Cobb, 838 N.E.2d 1197, 1205, 1212 (Mass. 2005) (assessing a lawyer's claim that his adversary "must have some particular power or influence with

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Geoffrey Fieger's Dispute with the Michigan Judicial System

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

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

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

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

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

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

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

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

- Jacob Gersham, Michigan Ex-Justice Admits Guilt in Fraud, Associated Press, Jan. 29, 2013 ("Former Michigan Supreme Court Justice Diane Hathaway pleaded guilty Tuesday to a felony fraud charge in connection with a real-estate scheme that allegedly helped her avoid a debt payment of up to $90,000. The case is the latest setback for Michigan Democrats, who waged a bruising, high-profile election battle last fall for three of the court's seven seats, but failed to tip the balance of power in the court, occupied by four Republicans. Governor Rick Snyder is expected to fill Ms. Hathaway's seat

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

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

The Michigan Supreme Court recited Fieger's statements.

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

> know, Adolf Hitler and Goebbels, and I think--what was Hitler's--Eva Braun, I think it was, is now Judge Markey, she's on the Court of Appeals."

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

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

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

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

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

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

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affecting every judge in Michigan and throwing the Justice system into chaos"; noting that "[i]t is deeply troubling that a member of this Court would undertake so gratuitously, and so falsely, to impugn her colleagues. This is a sad day in this Court's history, for Justice Weaver inflicts damage not only on her colleagues, but also on this Court as an institution."; "The people of Michigan deserve better than they have gotten from Justice Weaver today, and so do we, her colleagues."; in dissenting from the majority, Justice Weaver argued that the Justices in the majority should have recused themselves, because they had made public statements critical of Fieger, and Fieger had made public statements critical of them), cert. denied, 549 U.S. 1205 (2007).

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

[4] Fieger v. Mich. Supreme Court, 553 F.3d 955, 960, 957 (6th Cir. 2009) (holding that well-known lawyer Geoffrey Fieger did not have standing to challenge the constitutionality of the Michigan ethics rules prohibiting critical statements about judges; noting that "plaintiffs [Fieger and another lawyer] neither challenged the Michigan Supreme Court's determination that the courtesy and civility rules were constitutional as applied to Fieger's conduct and speech, nor sought to vacate the reprimand imposed on Fieger; rather, plaintiffs raised facial challenges to the courtesy and civility provisions. Specifically, plaintiffs asserted that the rules violate the First and Fourteenth Amendments of the United States Constitution."; noting that the district court had held certain provisions of the Michigan ethics rules unconstitutionally vague, but reversing that decision, and remanding for dismissal; "We vacate the judgment of the district court and remand with instructions to dismiss the complaint for lack of jurisdiction. We hold that Fieger and Steinberg lack standing because they have failed to demonstrate actual present harm or a significant possibility of future harm based on a single, stipulated reprimand; they have not articulated, with any degree of specificity, their intended speech and conduct; and they have not sufficiently established a threat of future sanction under the narrow construction of the challenged

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

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

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

Judges' Criticism of Other Judges

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

Some majority opinions severely criticize dissenting judges.

- Grievance Adm'r v. Fieger, 719 N.W.2d 123, 129, 144, 145, 146, 153 (Mich. 2006) (in a 76-page invective-laden, 4-3 decision, reversing the Michigan Attorney Disciplinary Board's holding that the Michigan ethics rules governing lawyer criticism of judges violated the Constitution; addressing statements made by lawyer and radio talk show host Geoffrey Fieger after a 3-judge panel reversed a $15 million personal injury verdict for Fieger's client and

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provisions applied by the Michigan Supreme Court. For these same reasons, we also hold that the district court abused its discretion in entering declaratory relief."), cert. denied, 558 U.S. 1110 (2010).

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

In some situations, one judge's criticism of a colleague paralleled a lawyer's statement that drew sanctions. As explained above, an experienced appellate lawyer

from a large Indianapolis, Indiana, law firm was punished for signing (as local counsel) a brief that contained the following footnote:

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

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

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

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

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

- HSBC Bank USA, N.A. v. Taher, 962 N.Y.S.2d 301, 304 (N.Y. App. Div. 2013) (using harsh language and criticizing a trial judge; "[W]e take this opportunity to remind the Justice of his obligation to remain abreast of and be guided by binding precedent. We also caution the Justice that his independent internet investigation of the plaintiff's standing that included newspaper articles and other materials that fall short of what may be judicially noticed, and which was conducted without providing notice or an opportunity to be heard by any party . . . , was improper and should not be repeated." (emphasis added)).

- Gatz Props., LLC v. Auriga Capital Corp., 59 A.3d 1206, 1220 (Del. 2012) (criticizing Delaware Court of Chancery Chief Judge Leo Strine; "[T]he court's excursus on this issue strayed beyond the proper purview and function of a

> judicial opinion. 'Delaware law requires that a justiciable controversy exist before a court can adjudicate properly a dispute brought before it.' We remind Delaware judges that the obligation to write judicial opinions on the issues presented is not a license to use those opinions as a platform from which to propagate their individual world views on issues not presented. A judge's duty is to resolve the issues that the parties present in a clear and concise manner. To the extent Delaware judges wish to stray beyond those issues and, without making any definitive pronouncements, ruminate on what the proper direction of Delaware law should be, there are appropriate platforms, such as law review articles, the classroom, continuing legal education presentations, and keynote speeches." (footnotes omitted) (emphasis added)).

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

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

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

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

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

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

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

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

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

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

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

Interestingly, at least one state's former ethics code limited how a lawyer criticized the judge, rather than the criticism itself. See former Va. Code of Prof'l

Responsibility EC 8-6 ("While a lawyer as a citizen has a right to criticize [judges and other judicial officers], he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system.").

Best Answer

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

n 12/11; b 3/15

General Fee-Sharing Rules

Hypothetical 16

You have always worked at a large law firm, which frequently coordinates as co-counsel with a minority-owned law firm. Your managing partner just asked you to set up another arrangement with that firm, under which your firm and the other firm will share fees.

(a) Do you need the client's consent to share your fees with another law firm?

YES

(b) Must your fee sharing be in proportion to the amount of work that you handle on the matter?

NO

(c) To share in another law firm's fees, must your firm assume ethical and malpractice responsibility for a matter?

MAYBE

(d) May either your firm or the minority-owned firm earn a "referral fee" without handling any of the work on the matter?

MAYBE

Analysis

(a)-(b) Lawyers in different firms generally can share fees, as long as they follow the ethical guidelines.

Co-counsel who bill by the hour generally do not deal with such fee-splitting provisions. Each of the firms normally bills for their own time. In contrast, law firms handling work on a contingent fee basis or under a fixed fee must carefully comply with

the fee-splitting provisions -- because they are dividing a set amount that the client has agreed to pay both of them.

ABA Model Rules

The ABA Model Rules permit fee sharing under certain circumstances.

> A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) the total fee is reasonable.

ABA Model Rules 1.5(e). A comment provides an additional explanation.

> A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilities association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

ABA Model Rules 1.5 cmt. [7].

Restatement

The Restatement takes essentially the same approach.

> A division of fees between lawyers who are not in the same firm may be made only if:
>
> (1) (a) the division is in proportion to the services performed by each lawyer or (b) by agreement with the client, the lawyers assume joint responsibility for the representation;
>
> (2) the client is informed of and does not object to the fact of division, the terms of the division, and the participation of the lawyers involved; and (3) the total fee is reasonable.

Restatement (Third) of Law Governing Lawyers § 47 (2000). A comment explains the basis for this rule.

> The traditional prohibition of fee-splitting among lawyers is justified primarily as preventing one lawyer from recommending another to a client on the basis of the referral fee that the recommended lawyer will pay, rather than that lawyer's qualifications. The prohibition has also been defended as preventing overcharging that may otherwise result when a client pays two lawyers and only one performs services. Beyond that, the prohibition reflects a general hostility to commercial methods of obtaining clients.
>
> Those grounds do not warrant a complete ban on fee-splitting between lawyers. It is often desirable for one lawyer to refer a client to another, either because the services of two are appropriate or because the second lawyer is more qualified for the work in question. Allowing the referring lawyer to receive reasonable compensation encourages such desirable referrals. Lawyers are more able than other referral sources to identify other lawyers who will best serve their client. Even if a referring lawyer is compensated for the referral, that lawyer has several reasons to refer the client to a good lawyer rather than a bad one offering more pay. The referring lawyer will wish to satisfy the client, will to an extent remain responsible for the work of the second lawyer . . . , and, because fee-splitting arrangements most commonly occur in representations in which only a contingent fee is charged, will usually receive no fee at all unless the second lawyer helps the client to prevail. The reasonable-fee requirement of Subsection (3), moreover, reduces the likelihood that fee-splitting will lead to client overcharging. The balance between the dangers and advantages of fee-splitting is sufficiently close that informed clients should be

> able to agree to it, provided the safeguards specified in this Section are followed.

Restatement (Third) of Law Governing Lawyers § 47 cmt. b (2000).

The Restatement provides additional guidance on a number of issues that might come up in fee-sharing arrangements.

First, the Restatement explains that a fee-sharing arrangement can either be based on the proportion of the work performed by each lawyer, or on assumption of responsibility by each lawyer.

> There are two bases on which fee division is permissible. The division recognized by Subsection (1)(a) requires that each lawyer who participates in the fee have performed services beyond those involved in initially being engaged by the client. The lawyers' own agreed allocation of the fee at the outset of the representation will be upheld if it reasonably forecasts the amount and value of effort that each would expend. If allocation is not made until the end of the representation, it must reasonably correspond to services actually performed.

Restatement (Third) of Law Governing Lawyers § 47 cmt. c (2000).

> The second basis for fee-splitting . . . allows fee-splitting between lawyers in any agreed proportion when each agrees with the client to assume responsibility for the representation. (Some jurisdictions may impose an upper limit on the total fee, absent explicit client consent.) That means that each lawyer can be held liable in a malpractice suit and before disciplinary authorities for the others' acts to the same extent as could partners in the same traditional partnership participating in the representation . . . . Such assumption of responsibility discourages lawyers from referring clients to careless lawyers in return for a large share of the fee.

Restatement (Third) of Law Governing Lawyers § 47 cmt. d (2000). A comment explains that

> [i]n the large majority of jurisdictions permitting, as an alternative method of validating a fee-splitting arrangement, that the lawyers allocate the fee in proportion to the services each provides, a much-litigated issue is the extent of proportionality required and the means of testing it.

Restatement (Third) of Law Governing Lawyers § 47 cmt. c, reporter's note (2000). The next comment explains the other possibility.

> Almost every jurisdiction permits assumption of joint responsibility as an alternative basis on which a permissible fee-splitting arrangement can be made with another lawyer.

Restatement (Third) of Law Governing Lawyers § 47 cmt. d, reporter's note (2000).

Second, the Restatement emphasizes lawyers' obligation to explain the arrangement to the client.

> Because of the hazards of fee-splitting arrangements, they are not permissible unless the client consents as provided in subsection (1)(a) to joint responsibility of the lawyers when the division is not in proportion to the services each lawyer performs, and unless the client is informed and does not object to the fact and terms of the division and the participation of the lawyers involved as provided in Subsection (2). On the lawyer's duty to respond to client inquiries, see § 20. If disclosure and client consent do not occur at the outset of the representation, a fee-splitting arrangement constitutes a mid-representation fee agreement subject to § 18(1)(a).

Restatement (Third) of Law Governing Lawyers § 47 cmt. e (2000). A comment explains that

> [a] substantial majority of jurisdictions, following the ABA Model Rules of Professional Conduct (1983), require disclosure to the client only of the participation of all the lawyers involved.

Restatement (Third) of Law Governing Lawyers § 47 cmt. e, reporter's note (2000).

Third, the Restatement highlights the requirement (found elsewhere in the Restatement) that all fees must be reasonable -- including fees shared by lawyers.

> Under § 34, a lawyer's compensation for any representation must be reasonable. Under this Section, the total fee for all lawyers involved in a fee-splitting arrangement, not just the individual fee of each lawyer, must be reasonable. That requirement discourages fee-splitting arrangements that increase what the client must pay. It follows that what is a reasonable fee should be determined without reference to the value of the referring lawyer's services as a broker. Time devoted to conferences between the lawyers may be taken into account to the extent the case reasonably required the consultation. Even after applying those safeguards, it is still possible that the total fee under a fee-splitting arrangement will be larger than what the client might have had to pay to a single lawyer handling the same matter, since there will usually be a range of total fees satisfying the reasonableness requirements of § 34 and this Section. The remedy of the client, who must be informed of fee-splitting arrangements . . . , lies in rejecting the arrangement and retaining a single lawyer at a lower fee. As with other fee arrangements, fees agreed to by clients sophisticated in entering into such arrangements should almost invariably be found reasonable.

Restatement (Third) of Law Governing Lawyers § 47 cmt. f (2000).

Fourth, the Restatement analyzes fee sharing in what it calls "[b]orderline arrangements."

> Many arrangements between lawyers are similar to but diverge to some extent from the usual fee-splitting arrangement. Whether this Section applies to them depends on whether they pose the dangers that the Section is meant to address. When a client discharges one lawyer and retains another who is not recommended by the first, the danger of biased referral is absent, and any danger of excessive fees results from the substitution rather than from any referral agreement between the lawyers. An agreement in which the lawyers settle what part of the client's fee each will receive is therefore not forbidden by this Section, and may serve the useful purpose of resolving fee disputes

> between them that could delay and burden the client. The client is entitled to disclosure of such agreements between past and present counsel . . . , and the client's own liability for legal fees cannot be increased by an agreement to which the client is not a party. . . .
>
> In class actions, a court usually awards attorney fees and other expenses to the prevailing plaintiff class. When lawyers from different firms work together to represent the interests of the class, those lawyers often agree who will perform certain services or advance required funds, subject to payment if the action succeeds. Such arrangements ordinarily do not violate this Section. Likewise, agreements governing how any fee award will be divided ordinarily do not violate this Section, provided that the division is in proportion to the services performed by each firm or each firm assumes joint responsibility for the representation. When an agreement provides for payments that are disproportionate to the services performed or funds advanced, or for a distribution differing from the tribunal's award, it should be disclosed to the tribunal, which may invalidate it in whole or in part if it undermines the proper representation of the class and its members. A tribunal considering whether to do so should consider the justifications for the arrangement, the probable effects on the independent professional judgment of the lawyers involved, and the timeliness of disclosure to the tribunal.

Restatement (Third) of Law Governing Lawyers § 47 cmt. h (2000).

After analyzing the basic rule and all of these complicated factors, the Restatement discusses the lawyer's liability for any misconduct in this context, and the enforceability of such arrangements.

> A fee-splitting agreement that violates this Section renders the participating lawyers subject to professional discipline . . . . It also cannot be enforced against the client, may lead to partial or total forfeiture of the lawyers' fee claim . . . , and may form the basis for a claim by the client of restitution of the portion of the fee paid to the forwarding lawyer . . . . Some urge that lawyers who enter into an improper fee-splitting arrangement should be able to enforce it against each other, reasoning that neither may charge the other with an impropriety to which both agreed, and that the

> prohibition on fee-splitting protects clients rather than lawyers. Enforcement, however, encourages lawyers to continue entering into improper fee-splitting agreements. Accordingly, a lawyer who has violated a regulatory rule or statute by entering into an improper fee-splitting arrangement should not obtain a tribunal's aid to enforce that arrangement, unless the other lawyer is the one responsible for the impropriety. On the other hand, although most lawyer codes on the subject require that a fee-splitting agreement be in writing (and the absence of a writing is a disciplinary violation), when the fact of such agreement is clearly established, the absence of a writing by itself should not affect the rights of the lawyers between themselves.
>
> It is appropriate for the tribunal in which is pending either a separate suit between the lawyers or a suit to which the fee dispute is ancillary . . . to require notification to the client so that the client, if so disposed, may assert a claim to a refund of all or part of the fee.

Restatement (Third) of Law Governing Lawyers § 47 cmt. i (2000).

(c) Ethics rules address the meaning of the phrase "joint responsibility."

The ABA explains that

> [j]oint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership.

ABA Model Rule 1.5 cmt. [7] (emphasis added).

Similarly, the Restatement explains that the phrase

> means that each lawyer can be held liable in a malpractice suit and before disciplinary authorities for the others' acts to the same extent as could partners in the same traditional partnership participating in the representation.

Restatement (Third) of Law Governing Lawyers § 47 cmt. d (2000) (emphasis added).

Legal ethics opinions highlight some disagreement about whether "joint responsibility" necessarily involves substantial involvement. Most opinions follow the ABA Model Rules and Restatement approach finding such involvement unnecessary.

- Arizona LEO 10-04 (6/2010) (explaining that in Arizona the term "joint responsibility" does not necessarily require "substantive involvement in a matter").

- Samuel v. Druckman & Sinel, LLP, 906 N.E.2d 1042, 1045 (N.Y. 2009) (upholding a fee-split agreement in a medical malpractice case, under which the original law firm was to receive one third of the ultimate legal fee recovered; explaining that it "is of no moment" that the law firm "did not contribute to that part of the work that resulted in the award of the enhanced fee").

- Arizona LEO 04-02 (3/2004) ("The 'joint responsibility' that a referring lawyer must assume in order to share a single fee is not limited merely by the duties to refer matters only to another lawyer believed to be competent and to take appropriate steps if the referring lawyer learns the other lawyer has violated the ethical rules. These obligations, after all, would exist whether or not the referring lawyer also assumed 'joint responsibility' for the ongoing representation."; "Other jurisdictions disagree whether 'joint responsibility' must entail substantive involvement by the referring attorney, such as supervision of the other lawyer's work, or merely financial responsibility. Compare ABA Informal OP. 85-1514, supra; McFarland v. George, 316 S.W. 2d 662, 671-72 (Mo. Ct. App. 1958) ('responsibility' under Missouri's ethical rules means substantive involvement); Ohio Bd. Comm'rs of Grievance and Discipline Op. 2003-3 (concluding that 'responsibility' means referring lawyer must be available to other lawyer and client throughout the representation and remain knowledgeable about progress of matter); Wis. State Bar, Formal Op. E-00-01 (same, with Aiello v. Adar, 750 N.Y.S. 2d at 465 [750 N.Y.S.2d 457 (N.Y. Sup. Ct. 2002)] (joint responsibility is synonymous with joint and several liability; vicarious liability for any act of malpractice is sufficient assumption of responsibility). See also N.Y. County Lawyers' Association Comm. Professional Ethics Opinion 715 (1996) (referring attorney who assumes joint responsibility in exchange for legal fees is ethically obligated to accept vicarious liability for any act of malpractice that occurs during the course of the representation, but not required to supervise the activities of the receiving lawyer); Ill. Jud. Ethics Comm. Op. 94-16 ('acceptance of legal responsibility' required by Illinois professional ethics rule 'consists solely of potential financial responsibility for any malpractice action against the recipient of the referral'); Chicago Bar Association Professional Responsibility Comm. Op. 87-2 at 4 (same)." (first emphasis added); "Under Arizona's recently revised ER 1.5(e), the requisite 'joint responsibility' exists if the referring attorney assumes financial responsibility for any malpractice that occurs during the course of the representation. This conclusion comports with the amendments to ER 1.5(e), which delete the prior reference in the comments to ER 5.1 and do not otherwise suggest that a referring attorney must have a relationship comparable to a 'partnership' with the

recipient of the referral. It also would be somewhat illogical to require a referring attorney to 'supervise' the handling of a matter by another attorney believed to be more experienced or capable in a particular area. See Aiello, 750 N.Y.S. 2d at 465. Interpreting 'joint responsibility' as synonymous with joint liability allows flexibility in structuring the relationship among the attorneys and client involved. A referred attorney may, but is not necessarily required, to have ongoing supervisory responsibilities or other substantive involvement in the matter.'").

(d) The requirement in the ABA Model Rules and the Restatement that lawyers sharing their fees actually provide services or (in the alternative) assume "joint responsibility" for the matter generally precludes lawyers from earning what could be called a pure "referral fee."

Under a pure "referral-fee" arrangement, a lawyer retained by a client hands off the client to another lawyer without taking on any of the work, and without assuming any ethical or other responsibility for the matter.

Some states reject such arrangements.

- Washington LEO 2189 (2008) ("Paying a pure referral fee to anyone is generally prohibited by RPC 7.2(b). Also, because the referral fee proposed by the inquirer is not in proportion to services rendered, and the referring lawyer is not assuming any responsibility for the representation, payment and receipt of the fee is prohibited under RPC 1.5(e). As Professor Robert Aronson noted when the RPCs were first adopted in Washington, 'Unless another lawyer is not considered "a person," then pure referral fees are impermissible under RPC 7.2(c) [now subsection (b)], even if not barred by RPC Rule 1.5(e)(2).'" (citation omitted).)

- Arizona LEO 04-02 (3/2004) ("Arizona, unlike some other states, does not allow a lawyer to be paid a fee merely for recommending another lawyer or referring a case. Instead, Arizona allows 'referral fees' only in the sense that lawyers who are not in the same firm may divide a fee as provided in ER 1.5(e). That rule allows lawyers to divide a single billing to a client if three conditions are met: (1) each lawyer receiving any portion of the fee assumes joint responsibility for the representation; (2) the client agrees, in a signed writing, to the participation of all the lawyers involved; and (3) the total fee is reasonable. 'Joint responsibility; requires, at the least, that the referring attorney accept vicarious liability for any malpractice that occurs in the

representation. Although the client must consent to the respective roles of the lawyers in the ongoing representation, ER 1.5(e) does not require that the client consent to the particular division of the total fee among the lawyers.").

Although generally not using the phrase "referral fee," some states' ethics rules implicitly permit referral fees by not requiring that lawyers provide services or assume "joint responsibility" for a case.

- Va. Rule 1.5 Committee Commentary ("Paragraph (e) eliminates the requirement in the Virginia Code that each lawyer involved in a fee-splitting arrangement assume full responsibility to the client, regardless of the degree of the lawyer's continuing participation. The requirement in the Virginia Code was deleted to encourage referrals under appropriate circumstances by not requiring the lawyer making the referral to automatically assume ethical responsibility for all of the activities of the other lawyers involved in the arrangement. However, such an arrangement is acceptable only if the client consents after full disclosure, which must include a delineation of each lawyer's responsibilities to the client.").

Best Answer

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

B 10/14

"Unbundled" Legal Services

Hypothetical 17

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

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

YES

Analysis

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

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

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

be considered unethical. Not all clients want or can afford full-service representation, but their choice is not consistently respected or supported by existing ethics rules.").

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

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

The Florida Supreme Court adopted an "unbundled legal services" rule on November 13, 2003. As of that time, five other states had adopted similar rules: Colorado, Wyoming, Maine, Washington, and New Mexico. Amendments to the Rules Regulating the Fla. Bar & the Fla. Family Law Rules of Proc. (Unbundled Legal Servs.), 860 So. 2d 394, 399 (Fla. 2003).

States continue to move in this direction.

- Mass. Supreme Judicial Court Order, In re Limited Assistance Representation, (Apr. 10, 2009) (eff. May 1, 2009), available at

http://www.mass.gov/courts/sjc/docs/Rules/Limited_Assistance_Representation_order1_04-09.pdf (holding that lawyers can engage in "Limited Assistance Representation," as long as they qualify to do so and obtain the client's informed written consent to such a limited representation; explaining that such a limited representation can include the preparation of pleadings, but only with notification to the court; "A pleading, motion or other document filed by an attorney making a limited appearance shall comply with Rule 11(a), Mass. R.Civ.P., and/or cognate Departmental Rules, and shall state in bold type on the signature page of the document: 'Attorney of [party] for the limited purpose of [court event].' An attorney filing a pleading, motion or other document outside the scope of the limited appearance shall be deemed to have entered a general appearance, unless the attorney files a new Notice of Limited Appearance with the pleading, motion or other document.").

- Arizona LEO 06-03 (7/2006) (assessing a family law practitioner providing limited-scope representations; "An attorney who provides limited-scope representation to a client does not have an affirmative duty to advise opposing counsel of the limited-scope representation unless it is to avoid assisting the client with a criminal or fraudulent act and then only if permitted by ER 1.6. In an appropriate case and under appropriate circumstances, an attorney may limit services to 'coaching' a client. Because coaching may occur at a mediation, at a settlement conference or in litigation, the attorney should be guided by ER 4.1 and ER 3.3 when deciding whether the judge, mediator, or opposing counsel should be informed of the limited-scope representation. Finally, an attorney may limit services and only represent the client in a deposition, but should be aware of whether doing so constitutes an appearance in the case.").

- North Carolina LEO 2005-10 (1/20/06) (explaining the ethics rules governing lawyers providing "unbundled" legal services over the Internet; holding that the lawyer must follow the ethics rules requiring communication with the client and diligent representation; also noting that "a virtual lawyer must be mindful that unintended client-lawyer relationships may arise, even in the exchange of email, when specific legal advice is sought and given. A client-lawyer relationship may be formed if legal advice is given over the telephone, even though the lawyer has neither met with, nor signed a representation agreement with the client. Email removes a client one additional step from the lawyer, and it's easy to forget that an email exchange can lead to a client-lawyer relationship. A lawyer should not provide specific legal advice to a prospective client, thereby initiating a client-lawyer relationship, without first determining what jurisdiction's law applies (to avoid UPL) and running a comprehensive conflicts analysis."; also addressing the lawyer's desire to provide "unbundled" legal services; "VLF's website lists a menu of unbundled services from which prospective clients may choose. Before undertaking

> representation, lawyers with VLF must disclose exactly how the representation will be limited and what services will not be performed. VLF lawyers must also make an independent judgment as to what limited services ethically can be provided under the circumstances and should discuss with the client the risks and advantages of limited scope representation. If a client chooses a single service from the menu, e.g., litigation counseling, but the lawyer believes the limitation is unreasonable or additional services will be necessary to represent the client competently, the lawyer must so advise the client and decline to provide only the limited representation. The decision whether to offer limited services must be made on a case-by-case basis, making due inquiry into the facts, taking into account the nature and complexity of the matter, as well as the sophistication of the client.").

The issue of "unbundled services" presents more difficulties than many lawyers realize. For instance, the thorough Florida Supreme Court rule amendments provide such guidance as: "in fairness to the opposing party the attorney and the pro se litigant should not both be allowed to argue on the same legal issue" (id. at 399); "we do not envision that the rule would permit an attorney to appear solely for the purpose of making evidentiary objections on behalf of the family law litigant who is representing himself or herself on all matters" (id. at 399-400); "both the attorney and the litigant should be served with all pleadings that are filed during the duration of the limited representation" (id. 400); "the attorney who appears of record in a limited proceeding or matter does not require the permission of the court to end the representation when the limited representation is over. The rule requires only that the attorney file a notice of completion" (id. at 401).

In addition to the required full disclosure and client consent, the rules permitting "unbundled" services generally envision lawyers handling particular matters for a particular period of time -- rather than avoiding such basic duties as the obligation to

communicate to the client or conduct a careful legal analysis in the area that the lawyer has agreed to handle.

Best Answer

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

n 2/12, b 2/15

Ghostwriting Pleadings

Hypothetical 18

Your firm has "adopted" an inner-city public housing project, and tries to provide as much assistance as possible to its residents. Although you normally do not represent residents in filing law suits, you wonder to what extent you can assist residents in preparing pleadings that they can file pro se.

Without disclosure to the court and the adversary, may you draft pleadings that one of the public housing residents can file pro se?

MAYBE

Analysis

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

ABA Approach

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

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

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

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

Id. (emphases added).

In 2007, the ABA totally reversed itself.

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

ABA LEO 446 (5/5/07).

The ABA's historical hostility toward ghostwriting may have rested on its concern that either the supposedly pro se litigants or the lawyers assisting them were engaging in misrepresentation to the court.

However, ABA 446 found that theory unwarranted.

> [W]e do not believe that non-disclosure of the fact of legal assistance is dishonest so as to be prohibited by Rule 8.4(c). Whether it is dishonest for the lawyer to provide undisclosed assistance to a pro se litigant turns on whether the court would be misled by failure to disclose such assistance. The lawyer is making no statement at all to the forum regarding the nature or scope of the representation, and indeed, may be obligated under Rules 1.2 and 1.6 not to reveal the fact of the representation. Absent an affirmative statement by the client, that can be attributed to the lawyer, that the documents were prepared without legal assistance, the

> lawyer has not been dishonest within the meaning of Rule 8.4(c). For the same reason, we reject the contention that a lawyer who does not appear in the action circumvents court rules requiring the assumption of responsibility for their pleadings. Such rules apply only if a lawyer signs the pleadings and thereby makes an affirmative statement to the tribunal concerning the matter. Where a pro se litigant is assisted, no such duty is assumed.

Id. (footnotes omitted) (emphasis added).

ABA LEO 466 also addressed the worry that supposedly pro se litigants would receive the benefit of a lawyer's skills while also benefiting from acceptable levels of judicial discretion often given such pro se litigants. The ABA Model Code of Judicial Conduct recognizes the latter's permissibility.

> It is not a violation of this Rule for a judge to make reasonable accommodations to ensure pro se litigants the opportunity to have their matters fairly heard.

ABA Model Code of Judicial Conduct, Rule 2.2 cmt. [4].

But ABA LEO 446 also discounted that worry.

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

ABA LEO 446 (5/5/07) (footnote omitted).

Bars' Approach

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

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

- New York City LEO 1987-2 (3/23/87) ("Non-disclosure by a pro se litigant that he is, in fact, receiving legal assistance, may, in certain circumstances, be a misrepresentation to the court and to adverse counsel where the assistance is active and substantial or includes the drafting of pleadings. A lawyer's involvement or assistance in such misrepresentation would violate DR 1-102(A)(4). Accordingly, we conclude that the inquirer cannot draft pleadings and render other services of the magnitude requested unless the client commits himself beforehand to disclose such assistance to both adverse counsel and the court. Less substantial services, but not including the drafting of pleadings, would not require disclosure." (emphases added); "Because of the special consideration given pro se litigants by the courts to compensate for their lack of legal representation, the failure of a party who is appearing pro se to reveal that he is in fact receiving advice and help from an attorney may be seriously misleading. He may be given deferential or preferential treatment to the disadvantage of his adversary. The court will have been burdened unnecessarily with the extra labor of making certain that his rights as a pro se litigant were fully protected."; "If a lawyer is rendering active and substantial legal assistance, that fact must be disclosed to opposing counsel and to the court. Although what constitutes 'active and substantial legal assistance' will vary with the facts of the case, drafting any pleading falls into that category, except where no more is involved than assisting a litigant to fill out a previously prepared form devised particularly for use by pro se litigants. Such assistance or the making available of manuals and pleading forms would not ordinarily be deemed "active and substantial legal assistance." (footnote omitted)).

- Virginia LEO 1127 (11/21/88) ("Under DR:7-105(A) and recent indications from the courts that attorneys who draft pleadings for pro se clients will be called upon by the court, any disregard by either the attorney or the pro se litigant of the court's requirement that the drafter of the pleadings be revealed would be violative of that disciplinary rule. Such failure to disclose would be violative of DR:7-102(A)(3), which requires that a lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal. Under certain circumstances, such failure to disclose that the attorney provided active or substantial assistance, including the drafting of pleadings, may be a

misrepresentation to the court and to opposing counsel and therefore violative of DR:1-102(A)(4). In a similar fact situation, the Association of the Bar of the City of New York opined that a lawyer drafting pleadings and providing other substantial assistance to a pro se litigant must obtain the client's assurance that the client will disclose that assistance to the court and adverse counsel. Failure to secure that commitment from the client or failure of the client to carry it out would require the attorney to discontinue providing assistance." (emphasis added)).

- New York LEO 613 (9/24/90) ("Accordingly, we see nothing unethical in the arrangement proposed by our inquirer. Indeed, we note that our inquirer's proposed conduct, which involves disclosure to opposing counsel and the court by cover letter, fully meets the most restrictive ethics opinion described above. We believe that the preparation of a pleading, even a simple one, for a pro se litigant constitutes 'active and substantial' aid requiring disclosure of the lawyer's participation and thus are in accord with N.Y. City 1987-2. We depart from the City Bar opinion only to the extent of requiring disclosure of the lawyer's name; in our opinion, the endorsement on the pleading 'Prepared by Counsel' is insufficient to fulfill the purposes of the disclosure requirement. We see nothing ethically improper in the provision of advice and counsel, including the preparation of pleadings, to pro se litigants if the Code of Professional Responsibility is otherwise complied with. Full and adequate disclosures of the intended scope and consequences of the lawyer-client relationship must be made to the litigant. The prohibition against limiting liability for malpractice is fully applicable. Finally, and most important, no pleading should be drafted for a pro se litigant unless it is adequately investigated and can be prepared in good faith." (emphasis added)).

- Kentucky LEO E-343 (1/91) (holding that a lawyer may "limit his or her representation of an indigent pro se plaintiff or defendant to the preparation of initial pleadings"; "On the other hand, the same committees voice concern that the Court and the opponent not be misled as to the extent of the counsel's role. Counsel should not aid a litigant in a deception that the litigant is not represented, when in fact the litigant is represented behind the scenes. Accordingly, the opinions from other states hold that the preparation of a pleading, other than a previously prepared form devised specifically for use by pro se litigants, constitutes substantial assistance that must be disclosed to the Court and the adversary. Some opinions suggest that it is sufficient that the pleading bear the designation 'Prepared by Counsel.' However, the better and majority view appears to be that counsel's name should appear somewhere on the pleading, although counsel is limiting his or her assistance to the preparation of the pleading. It should go without saying that counsel should not hold forth that his or her representation was limited, and that the litigant is unrepresented, and yet continue to provide behind the

scenes representation. On the 'flip side,' the opponent cannot reasonably demand that counsel providing such limited assistance be compelled to enter an appearance for all purposes. A contrary view would place a higher value on tactical maneuvering than on the obligation to provide assistance to indigent litigants.").

- Delaware LEO 1994-2 (5/6/94) ("The legal services organization may properly limit its involvement to advice and preparation of documents. However, if the organization provides significant assistance to a litigant, this fact must be disclosed. Accordingly, if the organization prepares pleadings or other documents (other than assisting the litigant in the preparation of an initial pleading) on behalf of a litigant who will subsequently be proceeding pro se, or if the organization provides legal advice and assistance to the litigant on an on-going basis during the course of the litigation, the extent of the organization's participation in the matter should be disclosed by means of a letter to opposing counsel and the court."; "[W]e agree that it is improper for an attorney to fail to disclose the fact he or she has provided significant assistance to a litigant, particularly if the assistance is on-going. By 'significant assistance,' we mean representation that goes further than merely helping a litigant to fill out an initial pleading, and/or providing initial general advice and information. If an attorney drafts court papers (other than an initial pleading) on the client's behalf, we agree with the New York State Bar Association ethics committee in concluding that disclosure of this assistance by means of a letter to the court and opposing counsel, indicating the limited extent of the representation, is required. In addition, if the attorney provides advice on an on-going basis to an otherwise pro se litigant, this fact must be disclosed. Failure to disclose the fact of on-going advice or preparation of court papers (other than the initial pleading) misleads the court and opposing counsel in violation of Rule 8.4(c). We caution the inquiring attorney that regardless of whether the pleadings are signed by a pro se litigant or by a staff attorney, the attorney should not participate in the preparation of pleadings without satisfying himself or herself that the pleading is not frivolous or interposed for an improper purpose. If time does not permit a sufficient inquiry into the merits to permit such a determination before the pleading must be filed, the representation should be declined." (emphasis in italics added)).

- Virginia LEO 1592 (9/14/94) ("Under DR 7-105(A), and indications from the courts that attorneys who draft pleadings for pro se clients would be deemed by the court to be counsel of record for the [pro se] client, any disregard by either Attorney A or Defendant Motorist of a court's requirement that the drafter of pleadings be revealed would be violative of that disciplinary rule. Such failure to disclose would also be violative of DR 7-102(A)(3). Further, such failure to disclose Attorney A's substantial assistance, including the

drafting of pleadings and motions, may also be a misrepresentation to the court and to opposing counsel and, therefore, violative of DR 1-102(A)(4).").

- Massachusetts LEO 98-1 (1998) (explaining that "significant, ongoing behind-the-scenes representation runs a risk of circumventing the whole panoply of ethical restraints that would be binding upon the attorney if she was visible"; "An attorney may provide limited background advice and counseling to pro se litigants. However, providing more extensive services, such as drafting ('ghostwriting') litigation documents, especially pleadings, would usually be misleading to the court and other parties, and therefore would be prohibited.

- Connecticut Informal Op. 98-5 (1/30/98) ("A lawyer who extensively assists a client proceeding pro se may create, together with the client, a false impression of the real state of affairs. Whether there is misrepresentation in a particular matter is a question of fact. . . . Counsel who prepare and control the content of pleadings, briefs and other documents filed with a court could evade the reach of these Rules by concealing their identities." (emphasis added)).

- Virginia LEO 1803 (3/16/05) (lawyers practicing at a state prison may type up legal documents for inmates without establishing an attorney-client relationship with them, but should make it clear in such situations that the lawyer is not vouching for the document or otherwise giving legal advice; if the lawyer does anything more than act as a mere typist for an inmate preparing pleadings to be filed in court, the lawyer "must make sure that the inmate does not present himself to the court as having developed the pleading pro se," because the existence of an attorney-client relationship depends on the lawyer's actions rather than a mere title).

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

- Illinois LEO 849 (12/83) ("It is not improper for an attorney, pursuant to prior agreement with the client, to limit the scope of his representation in a proceeding for dissolution of marriage to the preparation of pleadings, without appearing or taking any part in the proceeding itself, provided the client is fully informed of the consequences of such agreement, and the attorney takes whatever steps may be necessary to avoid foreseeable prejudice to the client's rights.").

- Maine LEO 89 (8/31/88) ("Since the lawyer's representation of the client was limited to preparation of the complaint, the lawyer was not required to sign the complaint or otherwise enter his appearance in court as counsel for the plaintiff, and the plaintiff was entitled to sign the complaint and proceed pro

se. At the same time, however, the Commission notes that a lawyer who agrees to represent a client in a limited role such as this remains responsible to the client for assuring that the complaint is adequate and does not violate the requirements of Rule 11 of Maine Rules of Civil Procedure." (emphasis added)).

- Alaska LEO 93-1 (5/25/93) ("According to the facts before the Committee, the attorney assists in the preparation of pleadings only after fully describing this limited scope of his assistance to the client. With this understanding, the client then proceeds without legal representation into the courtroom for the hearing. The client may then be confronted by more complex matters, such as evidentiary arguments concerning the validity of the child support modification, or new issues such as child custody or visitation to which he may be ill-prepared to respond. The client essentially elects to purchase only limited services from the attorney, and to pay less in fees. In exchange, he assumes the inevitable risks entailed in not being fully represented in court. In the Committee's view, it is not inappropriate to permit such limitations on the scope of an attorney's assistance." (emphases added)).

- Los Angeles County LEO 502 (11/4/99) ("An attorney may limit the scope of representation of a litigation client to consultation, preparation of pleadings to be filed by the client in pro per, and participation in settlement negotiations so long as the limited scope of representation is fully explained and the client consents to it. The attorney has a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of retention, and to inform the client that the limitations on the representation create the possible need to obtain additional advice, including advice on issues collateral to the representation. These principles apply whether the attorney is representing the client on an hourly, contingency, fixed or no fee basis. Generally, where the client chooses to appear in propria persona and where there is no court rule to the contrary, the attorney has no obligation to disclose the limited scope of representation to the court in which the matter is pending. If an attorney, who is not 'of record' in litigation, is authorized by his client to participate in settlement negotiations, opposing counsel may reasonably request confirmation of the attorney's authority before negotiating with the attorney. Normally, an attorney has authority to determine procedural and tactical matters while the client alone has authority to decide matters that affect the client's substantive rights. An attorney does not, without specific authorization, possess the authority to bind his client to a compromise or settlement of a claim." (emphasis added)).

- Tennessee LEO 2007-F-153 (3/23/07) ("[A]n attorney in Tennessee may not engage in extensive undisclosed participation in litigation in [sic] behalf of a pro se litigant as doing so permits and enables the false appearance of being without substantial professional assistance. This prohibition does not extend to providing undisclosed assistance to a truly pro se litigant. Thus, an

attorney may prepare a leading pleading including, but not limited to, a complaint, or demand for arbitration, request for reconsideration or other document required to toll a statute of limitations, administrative deadline or other proscriptive rule, so long as the attorney does not continue undisclosed assistance of the pro se litigant. The attorney should be allowed, in such circumstances, to elect to have the attorney's assistance disclosed or remain undisclosed. To require disclosure for such limited, although important, assistance would tend to discourage the assistance of litigants for the protection of the litigants' legal rights. Such limited assistance is not deemed to be in violation of RPC 8.4(c)." (emphasis added)).

- New Jersey LEO 713 (1/28/08) (holding that a lawyer may assist a pro se litigant in "ghostwriting" a pleading if the lawyer is providing "unbundled" legal services as part of a non-profit program "designed to provide legal assistance to people of limited means"; however, such activity would be unethical "where such assistance is a tactic by lawyer or party to gain advantage in litigation by invoking traditional judicial leniency toward pro se litigants while still reaping the benefits of legal assistance"; specifically rejecting many other state Bars' opinions that a lawyer providing a certain level of assistance must disclose his role, and instead adopting "an approach which examines all of the circumstances"; "Disclosure is not required if the limited assistance is part of an organized R. 1:21(e) non-profit program designed to provide legal assistance to people of limited means. In contrast, where such assistance is a tactic by a lawyer or party to gain advantage in litigation by invoking traditional judicial leniency toward pro se litigants while still reaping the benefits of legal assistance, there must be full disclosure to the tribunal. Similarly, disclosure is required when, given all the facts, the lawyer, not the pro se litigant, is in fact effectively in control of the final form and wording of the pleadings and conduct of the litigation. If neither of these required disclosure situations is present, and the limited assistance is simply an effort by an attorney to aid someone who is financially unable to secure an attorney, but is not part of an organized program, disclosure is not required.").

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

A 2010 article and a 2011 legal ethics opinion described the then-current status of states' attitudes toward ghostwriting.

- Ira P. Robbins, Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts, 23 Geo. J. Legal Ethics 271, 285, 286-88, 292, 313-314, 314 (Spring 2010) ("The federal courts have almost universally condemned ghostwriting."; "The states are more evenly divided over the propriety of ghostwriting. Of the twenty-four states that have addressed ghostwriting, thirteen states explicitly permit ghostwriting of legal pleadings. In ten of these states, attorneys may draft pleadings, which their clients will then file pro se, without any indication that an attorney worked on the documents. In the other three states attorneys may prepare pleadings without signing them, but the documents must clearly indicate that they were 'prepared with the assistance of counsel. On the other side of the debate, ten states expressly forbid ghostwriting." (footnotes omitted) (emphasis added); "Particularly in the context of prisoner litigation, it is important to allow attorneys to provide ghostwriting assistance to litigants without disclosing their identities or the nature of their assistance. Under a rule allowing attorneys to provide drafting services without full disclosure, attorneys could restrict the scope of their representation of prisoners, thus reducing their time commitment, and limiting their exposure to liability and malpractice claims. In this way, undisclosed ghostwriting increases prisoners' access to the courts." (footnotes omitted); "Each state regulates the practice of law within its borders. Although the concept may seem relatively straight-forward, a precise definition of the phrase 'practice of law' is hard to come by. The term encompasses diverse activities, which can include drafting documents, preparing or expressing legal opinions, representing a person in a legal matter, or negotiating rights." (footnotes omitted); "Although the ABA Task Force on the Model Definition of the Practice of Law has encouraged every state to define 'the practice of law,' and although there has been some movement by the states to abide by this recommendation, fewer than half the states currently have an official definition of the term. The majority of states decide whether an action constitutes the practice of law on a case-by-case basis." (footnotes omitted)).

- Pennsylvania & Philadelphia LEO 2011-100 (2011) (permitting unbundled legal services and undisclosed ghostwriting on behalf of pro se plaintiffs; "The issue that has raised the most controversy in connection with limited scope engagements is whether or not a lawyer who is assisting a litigant in a court proceeding is obliged under the Rules to disclose his or her engagement in the matter to the tribunal."; "Various courts and bar association ethical guidance committees have reached different conclusions on that subject. As one can see by examining the attached Appendix A, at least 29 opinions have been issued by various bar associations on the topic. Eleven, including the American Bar Association, have concluded that disclosure to a tribunal of the fact of assistance is not required. Eighteen have concluded that at least some disclosure is required. While only three have held that disclosure of assistance is always mandatory, thirteen have found that disclosure is required where the aid provided to a litigant is

> 'substantial' or 'extensive', and two would require disclosure of the fact of legal assistance but not the identity of the provider." (footnotes omitted) (emphasis added); "A lawyer is not required as a matter of course to disclose her or her involvement in the limited engagement to others, including any tribunal in which the client is appearing pro se. A lawyer must be diligent in complying with all of the applicable Rules of Professional Conduct and should remember that even if the representation is limited, the client is entitled to the same protections and respect due to any other client.").

Since then, more states have followed the ABA's lead in permitting undisclosed ghostwriting.

- Virginia LEO 1874 (7/28/14) (explaining that lawyers assisting members of a pre-paid legal services plan do not have to disclose their role in preparing pleadings that will be filed by pro se litigants, because "absent a court rule or law to the contrary, there is no ethical obligation to notify the court of the lawyer's assistance to the pro se litigant"; after reviewing ABA and other states' legal ethics opinions, stating that "[t]he Committee concludes that there is not a provision in the Rules of Professional Conduct that prohibits undisclosed assistance to a pro se litigant as long as the lawyer does not do so in a manner that violates a rule of conduct that otherwise would apply to the lawyer's conduct." (emphasis added); warning that lawyers should nevertheless familiarize themselves with courts' policies about ghostwriting -- "lawyers are now on notice, because of Laremont-Lopez [Laremont-Lopez v. Se. Tidewater Opportunity Ctr., 968 F. Supp. 1075 (E.D. Va. 1997)] and other federal court cases, that 'ghostwriting' may be forbidden in some courts, and should take heed, even if such conduct does not violate any specific standing rule of court").

Unbundled Legal Services

Although state bars do not always explicitly acknowledge it, the clear ethical trend toward permitting ghostwriting may stem in part from the increasing acceptance of what is called "unbundled legal services" (also sometimes called "à la carte lawyering").

Starting with lawyers dedicated to increasing legal representation for indigents and other clients of limited means, lawyer groups have tried in many states to permit lawyers to provide certain defined services for clients without assuming responsibility for an entire representation. Requiring lawyers to assume full responsibility for a

representation might deter lawyers from assisting in discrete matters that clients of limited means might find useful.

States are increasingly permitting such practices.

- Pennsylvania & Philadelphia LEO 2011-100 (2011) ("Under Pennsylvania law, pro se litigants are not excused from adherence to the applicable rules and should not expect special accommodation from the court."; "It may be true, as a practical matter, that some courts do grant such leeway on occasion, but we do not feel compelled to manufacture a requirement that does not otherwise exist in the Rules just because some courts may choose to apply procedural requirements less stringently when dealing with pro se litigants in relation to represented litigants."; "As the final two rationales of those bodies that require disclosure, namely, that non-disclosure would permit avoidance of Rule 11-type obligations and permit withdrawal without court supervision, the whole point of a limited representation is that the lawyer is **not** before the Court, and so those rules are never triggered in the first place. In our view, to interpret the Rules of Professional Conduct so as to impose obligations on lawyers that they would have if they were to enter an appearance before a court misses the whole point of the Rule's explicit grant of permission to undertake limited engagements in the first place."; "Finally, requiring a lawyer or his or her client always to disclose the lawyer's involvement would frustrate, and often would practically negate, the purposes of Rule 1.2's explicit allowance of limited scope engagements. A judge who sees or learns the limited-service lawyer's name might order the lawyer to thereafter represent the client for all purposes, with the practical result that the lawyer serves without commensurate compensation, preparation, or resources. Particularly in the context of litigation, such a lawyer might be able to provide an appropriate insert to a brief on a discrete issue, but be unprepared or unable to handle the rigors of a trial, and the client may not want that either. Requiring the lawyer to handle all aspects of a matter might be a result beneficial to the court, but that is not reason to construct an ethical obligation that does not otherwise exist under the Rules as written."; "Limited scope engagements, for no fee or a reduced fee, are permitted and encouraged by the Rules of Professional Conduct. A lawyer should secure the informed consent of his or her client to the terms of the engagement and fully inform the client as to the ramifications of this type of representation. A lawyer should consider all of the circumstances and conditions, including applicable rules of court, court orders, substantive law, the Rules of Professional Conduct and the best interests of the client in determining whether his/her involvement in any particular matter must or should be disclosed.").

- Alabama LEO 2010-01 (2010) (approving "unbundled" legal services, in allowing undisclosed lawyer assistance in drafting pleadings; "Rule 1.2, Ala. R. Prof. C., allows a lawyer to limit the scope of his representation, and thereby, the services that he performs for his client. As such, a lawyer may participate in the 'unbundling' of legal services. Ordinarily, a lawyer is not required to disclose to the court that the lawyer has drafted a pleading or other legal document on behalf of a pro se litigant provided the following conditions are met: 1) The lawyer and client have entered into a valid limited scope of representation agreement consistent with this opinion and the drafting of legal documents on behalf of the pro se litigant is intended to be limited in nature and quantity. 2) The issue of the lawyer's involvement in the matter is not material to the litigation. 3) The lawyer is not required to disclose his involvement to the court by law or court rule."; "In recent years, the practice of offering clients 'unbundled' legal services has grown in popularity. 'Unbundled' legal services are often referred to as 'a la carte' legal services or 'discrete task representation' and involve a lawyer providing a client with specific limited services rather than the more traditional method of providing the client full representation in a legal matter. The unbundling of legal services falls into three general categories: consultation and advice; limited representation in court; and, document preparation. For example, the client and lawyer may agree that the lawyer will be available for consultation on an hourly basis regarding a specific matter, but the lawyer will not undertake to represent the client in the matter or file a notice of appearance in the case. Sometimes, the lawyer may agree to make a limited appearance on behalf of the client at a hearing, but will not represent the client in the actual trial of the matter. Most often, however, the lawyer agrees to prepare an initial complaint for a client that the client will then file pro se. In that instance, the lawyer's drafting of the complaint is most often referred to as 'ghostwriting.'"; "The rationale behind offering clients the option of unbundled legal services is two-fold. First, the unbundling of legal services is viewed as a means of helping clients control the cost of litigation by allowing the client to pick and choose which services the lawyer will actually provide. Advocates of the unbundling of legal service contend that such limited representation provides lower and middle income individuals greater access to legal assistance than they would normally be able to afford. Advocates argue that many such individuals do not have the financial means to employ a lawyer under the more traditional full representation approach. Another proposed benefit is that the unbundling of legal services allows a lawyer to provide limited assistance to individuals when the lawyer may not have the time or resources to undertake full representation.").

- New York County Lawyers' Ass'n LEO 742 (4/16/2010) ("Given New York's adoption of Rule 1.2(c) and the allowance of limited scope representation, it is now ethically permissible for an attorney, with the informed consent of his or her client, to play a limited role and prepare pleadings and other

submission for a pro se litigant without disclosing the lawyer's participation to the tribunal and adverse counsel. Disclosure of the fact that a pleading or submission was prepared by counsel need only be made 'where necessary.' Disclosure is necessary when mandated by (1) a procedural rule, (2) a court rule, (3) a particular judge's rule, (4) a judge's order in a specific case, or in any other situation in which the failure to disclose an attorney's assistance in ghostwriting would constitute a misrepresentation or otherwise violate a law or an attorney's ethical obligations. In cases where disclosure is necessary, unless required by the particular rule, order or circumstance mandating disclosure, the attorney need not reveal his or her identity and may instead indicate on the ghostwritten document that it was 'Prepared with the assistance of counsel admitted in New York.'"; "While judges may provide greater latitude to a pro se litigant as far as some procedural rules are concerned, a pro se litigant should not enjoy the same extended latitude on the merits of his or her claim."; "This is consistent with judges' duty of impartiality. Treating pleadings more leniently does not make it more likely that a pro se litigant will win. It simply makes it more likely that the pro se litigant's cause will be heard on the merits, as opposed to being dismissed at the pleading stage. Having limited scope assistance of an undisclosed attorney does not necessarily afford that litigant a substantive advantage, fair or otherwise, over his or her adversary. In fact, many adversary counsels would readily admit that having counsel involved makes proceedings easier, more efficient and fairer."; "While this Committee is hopeful that New York courts will recognize the benefits that will flow from the allowance of undisclosed ghostwriting, . . . until such a time comes, New York attorneys should err on the side of caution by ensuring that notice is given in circumstances where it is obvious that the court or opposing counsel is giving special consideration to an 'unrepresented party' as a result of his or her pro se status. It is precisely those circumstance that have caused much of the controversy surrounding the issue of ghostwriting. Conversely, if a lawyer is asked merely to review a pleading or a letter for a pro se litigant, the attorney's involvement is minimal, it appears that there is no duty to disclose under Rule 1.2(c). While this Committee favors the allowance of ghostwriting, we are mindful that New York courts have yet to interpret Rule 1.2(c). Accordingly, it is possible that a court could determine that a pro se litigant has committed a fraud upon the tribunal where he or she fails to disclose to the tribunal and/or opposing counsel that he or she had the assistance of counsel in the preparation of pleadings or other submissions. Although such a holding would seemingly conflict with the plain language of Rule 1.2(c), requiring disclosure only 'where necessary,' the Appellate Divisions have given no clarification of what 'where necessary' means. The language is not derived from either the ABA Model Rules of Professional Conduct or the former Code of Professional Responsibility. Given the lack of clarification from the Appellate Divisions, and New York's prior opinions disfavoring ghostwriting, best practices dictate that until there is such

clarification, where the attorney's participation on behalf of a pro se litigant has been substantial and the circumstances so warrant, practitioners should give notice to the tribunal and/or to opposing counsel.").

- Mass. Supreme Judicial Court Order, In re Limited Assistance Representation, (Apr. 10, 2009) (eff. May 1, 2009), available at http://www.mass.gov/courts/sjc/docs/Rules/Limited_Assistance_Representation_order1_04-09.pdf (holding that lawyers can engage in "Limited Assistance Representation," as long as they qualify to do so and obtain the client's informed written consent to such a limited representation; explaining that such a limited representation can include the preparation of pleadings, but only with notification to the court; "A pleading, motion or other document filed by an attorney making a limited appearance shall comply with Rule 11(a), Mass. R.Civ.P., and/or cognate Departmental Rules, and shall state in bold type on the signature page of the document: 'Attorney of [party] for the limited purpose of [court event].' An attorney filing a pleading, motion or other document outside the scope of the limited appearance shall be deemed to have entered a general appearance, unless the attorney files a new Notice of Limited Appearance with the pleading, motion or other document.").

- Arizona LEO 06-03 (7/2006) (assessing a family law practitioner providing limited-scope representations; "An attorney who provides limited-scope representation to a client does not have an affirmative duty to advise opposing counsel of the limited-scope representation unless it is to avoid assisting the client with a criminal or fraudulent act and then only if permitted by ER 1.6. In an appropriate case and under appropriate circumstances, an attorney may limit services to 'coaching' a client. Because coaching may occur at a mediation, at a settlement conference or in litigation, the attorney should be guided by ER 4.1 and ER 3.3 when deciding whether the judge, mediator, or opposing counsel should be informed of the limited-scope representation. Finally, an attorney may limit services and only represent the client in a deposition, but should be aware of whether doing so constitutes an appearance in the case.").

- North Carolina LEO 2005-10 (1/20/06) (explaining the ethics rules governing lawyers providing "unbundled" legal services over the Internet; holding that the lawyer must follow the ethics rules requiring communication with the client and diligent representation; also noting that "a virtual lawyer must be mindful that unintended client-lawyer relationships may arise, even in the exchange of email, when specific legal advice is sought and given. A client-lawyer relationship may be formed if legal advice is given over the telephone, even though the lawyer has neither met with, nor signed a representation agreement with the client. Email removes a client one additional step from the lawyer, and it's easy to forget that an email exchange can lead to a client-lawyer relationship. A lawyer should not provide specific legal advice to a

prospective client, thereby initiating a client-lawyer relationship, without first determining what jurisdiction's law applies (to avoid UPL) and running a comprehensive conflicts analysis."; also addressing the lawyer's desire to provide "unbundled" legal services; "VLF's website lists a menu of unbundled services from which prospective clients may choose. Before undertaking representation, lawyers with VLF must disclose exactly how the representation will be limited and what services will not be performed. VLF lawyers must also make an independent judgment as to what limited services ethically can be provided under the circumstances and should discuss with the client the risks and advantages of limited scope representation. If a client chooses a single service from the menu, e.g., litigation counseling, but the lawyer believes the limitation is unreasonable or additional services will be necessary to represent the client competently, the lawyer must so advise the client and decline to provide only the limited representation. The decision whether to offer limited services must be made on a case-by-case basis, making due inquiry into the facts, taking into account the nature and complexity of the matter, as well as the sophistication of the client.").

A 2013 article explained that the ABA will continue to advocate for such limited legal services.

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

States endorsing unbundled legal services disagree about whether an otherwise pro se litigant must advise the court that he or she has received limited legal assistance in connection with a specific pleading, etc. But in either situation, bars have become increasingly comfortable with litigants receiving behind-the-scenes assistance from lawyers who have not appeared as counsel of record.

Court Approach

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

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

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

- Johnson v. Bd. of Cnty. Comm'rs, 868 F. Supp. 1226, 1231, 1232 (D. Colo. 1994) ("It is elementary that pleadings filed pro se are to be interpreted liberally. . . . Cheek's pleadings seemingly filed pro se but drafted by an attorney would give him the unwarranted advantage of having a liberal pleading standard applied whilst holding the plaintiffs to a more demanding scrutiny. Moreover, such undisclosed participation by a lawyer that permits a litigant falsely to appear as being without professional assistance would permeate the proceedings. The pro se litigant would be granted greater latitude as a matter of judicial discretion in hearings and trials. The entire process would be skewed to the distinct disadvantage of the nonoffending party."; "Moreover, ghost-writing has been condemned as a deliberate evasion of the responsibilities imposed on counsel by Rule 11, F.R.Civ.P."; "I have given this matter somewhat lengthy attention because I believe incidents of ghost-writing by lawyers for putative pro se litigants are increasing. Moreover, because the submission of misleading pleadings and briefs to courts is inextricably infused into the administration of justice, such conduct may be contemptuous irrespective of the degree to which it is

considered unprofessional by the governing bodies of the bar. As a matter of fundamental fairness, advance notice that ghost-writing can subject an attorney to contempt of court is required. This memorandum opinion and order being published thus serves that purpose.").

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

- Ricotta v. Cal., 4 F. Supp. 2d 961, 986-87, 987 (S.D. Cal. 1998) ("The threshold issue that this Court must address is what amount of aid constitutes ghost-writing. Ms. Kelly contends that she acted as a 'law-clerk' and provided a draft of sections of the memorandum and assisted Plaintiff in research. Implicit in the three opinions addressing the issue of ghost-writing, is the observation that an attorney must play a substantial role in the litigation."; "In light of these opinions, in addition to this Court's basic common sense, it is this Court's opinion that a licensed attorney does not violate procedural, substantive, and professional rules of a federal court by lending some assistance to friends, family members, and others with whom he or she may want to share specialized knowledge. Otherwise, virtually every attorney licensed to practice would be eligible for contempt proceedings.

Attorneys cross the line, however, when they gather and anonymously present legal arguments, with the actual or constructive knowledge that the work will be presented in some similar form in a motion before the Court. With such participation the attorney guides the course of litigation while standing in the shadows of the Courthousedoor [sic]. This conclusion is further supported by the ABA Informal Opinion of 1978 that 'extensive undisclosed participation by a lawyer . . . that permits the litigant falsely to appear as being without substantial professional assistance is improper."; In the instant case it appears to the Court that Ms. Kelly was involved in drafting seventy-five to one hundred percent of Plaintiff's legal arguments in his oppositions to the Defendants' motions to dismiss. The Court believes that this assistance is more than informal advice to a friend or family member and amounts to unprofessional conduct."; "However, even though Ms. Kelly's behavior was improper this Court is not comfortable with the conclusion that holding her and/or Plaintiff in contempt is appropriate. The courts in Johnson and Laremont explained that because there were no specific rules dealing with ghost-writing, and given that it was only recently addressed by various courts and bar associations, there was insufficient evidence to find intentional wrongdoing that warranted contempt sanctions."; declining to hold the lawyer for the plaintiff in contempt of court).

- In re Meriam, 250 B.R. 724, 733, 734 (D. Colo. 2000) ("While it is true that neither Fed. R. Bank. P. 9011, nor its counterpart Fed. R. Civ. P. 11, specifically address the situation where an attorney prepares pleadings for a party who will otherwise appear unrepresented in the litigation, many courts in this district, and elsewhere, disapprove of the practice known as ghostwriting. . . . These opinions highlight the duties of attorneys, as officers of the court, to be candid and honest with the tribunal before which they appear. When an attorney has the client sign a pleading that the attorney prepared, the attorney creates the impression that the client drafted the pleading. This violates both Rule 11 and the duty of honesty and candor to the court. In addition, the situation 'places the opposite party at an unfair disadvantage' and 'interferes with the efficient administration of justice.' . . . According to these decisions, ghostwriting is sanctionable under Rule 11 and as contempt of court."; "The failure of an attorney to sign a petition he or she prepares potentially misleads the Court, the trustee and creditors, and distorts the bankruptcy process. From a superficial perspective, there is no apparent justification for excusing an attorney who prepares a petition from signing it when a petition preparer is required to do so. But regardless of whether it is an attorney or petition preparer who prepares the petition, if such person does not sign it the Court, trustee and creditors do not know who is responsible for its contents. Should the Court hold a debtor responsible for the petition's accuracy and sufficiency if it was prepared by an attorney? Can such debtor assert that the contents of the petition result from advice of counsel in defense of a motion to dismiss or a challenge to

discharge for false oath?" (footnotes omitted); nevertheless declining to reduce the lawyer's fees, and inviting the lawyer to sign a corrected pleading).

- Ostevoll v. Ostevoll, Case No. C-1-99-961, 2000 U.S. Dist. LEXIS 16178, at *30-32 (S.D. Ohio Aug.16, 2000) ("Ghostwriting of legal documents by attorneys on behalf of litigants who state that they are proceeding pro se has been held to be inconsistent with the intent of procedural, ethical and substantive rules of the Court. . . . We agree. Thus, this Court agrees with the 1st Circuit's opinion that, if a pleading is prepared in any substantial part by a member of the bar, it must be signed by him. . . . Thus, Petitioner, while claiming to be proceeding pro se, is obviously receiving substantial assistance from counsel. . . . We find this conduct troubling. As such, we feel the need to state unequivocally that this conduct violates the Court's Rules and will not be tolerated further.").

- Duran v. Carris, 238 F.3d 1268, 1271-72, 1273 (10th Cir. 2001) ("Mr. Snow's actions in providing substantial legal assistance to Mr. Duran without entering an appearance in this case not only affords Mr. Duran the benefits of this court's liberal construction of pro se pleadings . . . but also inappropriately shields Mr. Snow from responsibility and accountability for his actions and counsel."; "We recognize that, as of yet, we have not defined what kind of legal advice given by an attorney amounts to 'substantial' assistance that must be disclosed to the court. Today, we provide some guidance on the matter. We hold that the participation by an attorney in drafting an appellate brief is per se substantial, and must be acknowledged by signature. In fact, we agree with the New York City Bar's ethics opinion that 'an attorney must refuse to provide ghostwriting assistance unless the client specifically commits herself to disclosing the attorney's assistance to the court upon filing.' . . . We caution, however, that the mere assistance of drafting, especially before a trial court, will not totally obviate some kind of lenient treatment due a substantially pro se litigant. . . . We hold today, however, that any ghostwriting of an otherwise pro se brief must be acknowledged by the signature of the attorney involved." (footnote omitted); admonishing the lawyer; concluding that "this circuit [does not] allow ghostwritten briefs," and "this behavior will not be tolerated by this court, and future violations of this admonition would result in the possible imposition of sanctions").

- Washington v. Hampton Roads Shipping Ass'n, No. 2:01CV880, 2002 WL 32488476, at *5 & n.6 (E.D. Va. May 30, 2002) (explaining that pro se plaintiffs are "given more latitude in arguing the appropriate legal standard to the court"; holding that "[g]host-writing is in violation of Rule 11, and if there were evidence of such activity, it would be dealt with appropriately").

- In re Mungo, 305 B.R. 762, 767, 768, 768-69, 769, 770, 771 (Bankr. D. S.C. 2003) ("Ghost-writing is best described as when a member of the bar

represents a pro se litigant informally or otherwise, and prepares pleadings, motions, or briefs for the pro se litigant which the assisting lawyer does not sign, and thus escapes the professional, ethical, and substantive obligations imposed on members of the bar."; "Policy issues lead this Court to prohibit ghost-writing of pleadings and motions for litigants that appear pro se and to establish measures to discourage ghost-writing."; "[G]host-writing must be prohibited in this Court because it is a deliberate evasion of a bar member's obligations, pursuant to Local Rule 9010-1(d) and Fed R. Civ. P. Rule 11."; "[T]he Court will, in its discretion, require pro se litigants to disclose the identity of any attorneys who have ghost written pleadings and motions for them. Furthermore, upon finding that an attorney has ghost written pleadings for a pro se litigant, this Court will require that offending attorney to sign the pleading or motion so that the same ethical, professional, and substantive rules and standards regulating other attorneys, who properly sign pleadings, are applicable to the ghost-writing attorney."; "[F]ederal courts generally interpret pro se documents liberally and afford greater latitude as a matter of judicial discretion. Allowing a pro se litigant to receive such latitude in addition to assistance from an attorney would disadvantage the non-offending party."; "[T]herefore, upon a finding of ghost-writing, the Court will not provide the wide latitude that is normally afforded to legitimate pro se litigants."; "[T]his Court prohibits attorneys from ghost-writing pleadings and motions for litigants that appear pro se because such an act is a misrepresentation that violates an attorney's duty and professional responsibility to provide the utmost candor toward the Court."; "The act of ghost-writing violates SCRPC Rule 3.3(a)(2) and SCRPC Rule 8.4(d) because assisting a litigant to appear pro se when in truth an attorney is authoring pleadings and necessarily managing the course of litigation while cloaked in anonymity is plainly deceitful, dishonest, and far below the level of disclosure and candor this Court expects from members of the bar."; publicly admonishing the lawyer for "the unethical act of ghost-writing pleadings for a client").

- In re West, 338 B.R. 906, 914, 915 (Bankr. N.D. Okla. 2006) ("The practice of 'ghostwriting' pleadings by attorneys is one which has been met with universal disfavor in the federal courts."; "This Court has been able to Find no authority which condones the practice of ghostwriting by counsel.").

- Johnson v. City of Joliet, No. 04 C 6426, 2007 U.S. Dist. LEXIS 10111, at *5-6, *6, *8 (N.D. Ill. Feb. 13, 2007) ("As an initial matter, before addressing Johnson's motions, the court needs to address a serious concern with Johnson's pleadings. Johnson represents that she is acting pro se, yet given the arguments she raises and the language and style of her written submissions, it is obvious to both the court and defense counsel that someone with legal knowledge has been providing substantial assistance and drafting her pleadings and legal memoranda. We suspect that Johnson

is working with an unidentified attorney, although it is possible that a layperson with legal knowledge is assisting her. Regardless, neither scenario is acceptable."; "If, as we suspect, a licensed attorney has been ghost-writing Johnson's pleadings, this presents a serious matter of unprofessional conduct. Such conduct would circumvent the requirements of Rule 11 which 'obligates members of the bar to sign all documents submitted to the court, to personally represent that there are grounds to support the assertions made in each filing.' . . . Moreover, federal courts generally give pro se litigants greater latitude than litigants who are represented by counsel. . . . It would be patently unfair for Johnson to benefit from the less-stringent standard applied to pro se litigants if, in fact, she is receiving substantial behind-the-scenes assistance from counsel."; "Here, there is no doubt that Johnson has been receiving substantial assistance in drafting her pleadings and legal memoranda. (When asked at her deposition to disclose who was helping her, Johnson reportedly declined to answer and (improperly) invoked the Fifth Amendment). This improper conduct cannot continue. We therefore order Johnson to disclose to the court in writing the identity, profession and address of the person who has been assisting her by **February 20, 2007**.").

- Delso v. Trs. for Ret. Plan for Hourly Emps. of Merck & Co., Civ. A. No. 04-3009 (AET), 2007 U.S. Dist. LEXIS 16643, at *37, *40-42, *42-43, *53 (D.N.J. Mar. 5, 2007) ("Defendant asserts that Shapiro [lawyer] should be barred from 'informally assisting' or 'ghostwriting' for Delso in this matter. The permissibility of ghostwriting is a matter of first impression in this District. In fact, there are relatively few reported cases throughout the Federal Courts that touch on the issue of attorney ghostwriting for pro se litigants. Moreover, a nationwide discussion regarding unbundled legal services, including ghostwriting, has only burgeoned within the past decade."; "Courts generally construe pleadings of pro se litigants liberally. . . . Courts often extend the leniency given to pro se litigants in filing their pleadings to other procedural rules which attorneys are required to follow. . . . Liberal treatment for pro se litigants has also been extended for certain time limitations, service requirements, pleading requirements, submission of otherwise improper sur-reply briefs, failure to submit a statement of uncontested facts pursuant to [D.N.J. Local R. 56.1], and to the review given to stated claims."; "In many of these situations an attorney would not have been given as much latitude by the court. . . . This dilemma strikes at the heart of our system of justice, to wit, that each matter shall be adjudicated fairly and each party treated as the law requires. . . . Simply stated, courts often act as referees charged with ensuring a fair fight. This becomes an obvious problem when the Court is giving extra latitude to a purported pro se litigant who is receiving secret professional help."; "It is clear to the Court that Shapiro's 'informal assistance' of Delso fits the precise description of ghostwriting. The Court has also determined that undisclosed ghostwriting is not permissible under the current

form of the RPC in New Jersey. Although the RPC's are restrictive, in that they assume traditional full service representation, all members of the Bar have an obligation to abide by them. In this matter, Shapiro's ghostwriting was not affirmatively disclosed by himself or Delso. Delso's Cross Motion for Summary Judgment, on which Shapiro assisted, was submitted to the Court without any representation that it was drafted, or at least researched, by an attorney. Thus, for the aforementioned reasons the Court finds that undisclosed ghostwriting of submissions to the Court would result in an undue advantage to the purportedly pro se litigant.").

- Anderson v. Duke Energy Corp., Civ. Case No. 3:06cv399, 2007 U.S. Dist. LEXIS 91801, at *2 n.1 (W.D.N.C. Dec. 4, 2007) ("[I]f counsel is preparing the documents being filed by the Plaintiff in this action, the undersigned would take a dim view of that practice. The practice of 'ghostwriting' by an attorney for a party who otherwise professes to be pro se is disfavored and considered by many courts to be unethical.").

- Kircher v. Charter Township of Ypsilanti, Case No. 07-13091, 2007 U.S. Dist. LEXIS 93690, at *11 (E.D. Mich. Dec. 21, 2007) ("Although attorney Ward may not have drafted the Complaint, it is evident that he provided the Plaintiff with substantial assistance. All three Complaints are similar, and attorney Ward was able to provide Defendants' counsel with the reasoning that motivated Plaintiff to file the pro se Complaint. . . . This shows that he may have spoken with and assisted Plaintiff with his pro se pleading."; "While the Court declines to issue sanctions or show cause attorney Ward, he is forewarned that the Court may do that in the future if he persists in helping Plaintiff file pro se pleadings and papers.").

- Sejas v. MortgageIT, Inc., No. 1:11cv469 (JCC), 2011 U.S. Dist. LEXIS 66252, at *1-2 (E.D. Va. June 20, 2011) (reminding a lawyer that assisting a purportedly pro se litigant by ghostwriting pleadings was unethical; "Several unusual aspects of this case should be noted from the outset. It appears quite similar to Sejas v. MortgageIT, Inc., et al., Case No. 153CL09003947-00, filed in Prince William Circuit Court on October 15, 2009. In that earlier case, where Plaintiff was represented by counsel, Plaintiff claimed at Paragraph 11 of his complaint that he 'does not speak, read, or write English.' Remarkably, however, Plaintiff's instant Complaint is written in English, meaning either that his English skills have improved dramatically in the past two years or that his pleadings are being ghost-written. To the extent the latter case proves true, this Court admonishes Plaintiff that 'the practice of ghost-writing legal documents to be filed with the Court by litigants designated as proceeding pro se is inconsistent with the procedural, ethical and substantive rules of this Court.' Laremont-Lopez v. Se. Tidewater Opportunity Ctr., 968 F. Supp. 1075, 1079-80 (E.D. Va. 1997). The Court further warns any attorney providing ghostwriting assistance that he or she is

behaving unethically. Davis v. Back, No. 3:09cv557, 2010 U.S. Dist. LEXIS 42030, 2010 WL 1779982, at *13 (E.D. Va. April 29, 2010) (Ellis, J.).").

- Green v. Champs-Elysees, Inc., No. M2012-01352-COA-R3-CV, 2013 Tenn. App. LEXIS 244, at *12 (Tenn. Ct. App. Apr. 9, 2013) (holding that a lawyer's assistance of a pro se plaintiff did not amount to criminal contempt; "Counsel's conduct may be characterized as unethical in that she failed to ensure that her legal assistance was recognized by the trial court. See generally Tenn. Formal Ethics Op. No. 2007-F-153. However, we agree that Plaintiff failed to set forth sufficient facts to establish that her conduct rose to the level of criminal contempt.").

- United States v. Hosseini, No. 1:13-cv-02472, at 1 n.1, 102, 2, 2-3 (N.D. Ill. Apr. 5, 2013) (order compelling lawyer who ghostwrote pleadings for pro se defendant to appear) (condemning a lawyer's obvious assistance to a supposedly pro se criminal defendant; "It is more than worth observing that although Hosseini signed both the motion form and an accompanying affidavit, the Memorandum bears no one's signature -- neither Hosseini's nor anyone else's. Indeed, just four of the explanations in the motion setting out the eleven grounds relied on speak in the first person ('I was' or 'my trial,' etc.), while the other seven refer to 'Hosseini' exclusively in third person terms, just as the far more lengthy Memorandum does throughout -- a sure tipoff as to the presence of an unseen hand."; "Although it may be permissible as an ethical matter for a lawyer to provide some degree of assistance to a nonlawyer who is acting on his or her own behalf in the often difficult handling of legal proceedings, in this Court's view it is unethical for a lawyer to engage in the kind and scope of activity that was clearly required in the preparation of the Memorandum here while at the same time wrapping himself or herself in the cloak of invisibility -- or at least anonymity."; "Fed. R. Civ. P. 11 imposes responsibilities on pro se litigants as well as on lawyers, but the standards of conduct that apply to the nonlawyer are obviously much less demanding than those imposed on a legally trained and licensed lawyer."; "Accordingly this Court orders disclosure of the identity of the lawyer or lawyers involved in the preparation of the motion and Memorandum. That should be done expeditiously, and each such lawyer should file his or her appearance so that this Court has jurisdiction over him or her. But at the same time it should be understood that no such appearance will obligate the lawyer to render further services in the case -- Hosseini is free to proceed pro se if he chooses to do so.").

Thus, courts still generally condemn undisclosed lawyer participation in preparing pleadings, while bars have moved toward a more liberal approach.

But some courts have started to move in the direction of the bars.

In 2010, the Northern District of California declined to sanction a lawyer who assisted an otherwise pro se defendant, but did not try to hide his involvement.

- Warner v. Reiter, No. C 09-06030 RS, 2010 U.S. Dist. LEXIS 125043, at *11, *12, *13 (N.D. Cal. Nov. 12, 2010) ("Warner correctly points out that several courts have condemned the practice of 'ghostwriting' -- whereby a member of the Bar 'guides the course of litigation while standing in the shadows of the Courthouse door.' Ricotta v. State of Cal., 4 F.Supp.2d 961, 987 (S.D. Cal. 1998)."; "Here, even if Warner had not called attention to the issue with his motion to strike and for sanctions, there was little risk that the Court would have been misled into believing that Reiter's brief had been prepared by someone without legal training and that it was therefore entitled to the full deference given to pro se pleadings. Reiter's original brief listed his address as 'in care of Clausen, and it was sent to the Court under a cover letter on Clausen's letterhead. Thus, there does not appear to have been any attempt to deceive."; "Clausen has explained that he chose not to appear as counsel of record because he was providing his services pro bono, and hoped to avoid becoming further personally enmeshed in the extensive litigation that has arisen between the parties. Clausen argues there are a variety of situations in which policy considerations support allowing attorneys to assist litigants without formally appearing. Under all the circumstances here, the Court declines to determine the precise limits, if any, on the extent to which an attorney may provide assistance without making an appearance. There is no indication that Clausen acted in bad faith or that his conduct caused any prejudice. Accordingly, Warner's request for sanctions is denied.").

Perhaps most significantly, in 2011 the Second Circuit noted state bars' trend toward allowing ghostwriting in certain circumstances, which may reflect a more tolerant judicial approach.

- In re Liu, 664 F.3d 367, 372-73, 369, 370, 371 n.3 (2d Cir. 2011) (publicly reprimanding a lawyer for various misconduct, but finding that a lawyer's preparation of ghostwritten pleadings was not improper; explaining the nature of the pleadings the lawyer had prepared, and her motive; "We also conclude that there is no evidence suggesting that Liu knew, or should have known, that she was withholding material information from the Court or that she otherwise acted in bad faith. The petitions for review now at issue were fairly simple and unlikely to have caused any confusion or prejudice. Additionally, there is no indication that Liu sought, or was aware that she might obtain, any unfair advantage through her ghostwriting. Finally, Liu's motive in preparing the petitions -- to preserve the petitioners' right of review by satisfying the thirty-day jurisdictional deadline -- demonstrated concern for

her clients rather than a desire to mislead this Court or opposing parties. Under these circumstances, we conclude that Liu's ghostwriting did not constitute misconduct and therefore does not warrant the imposition of discipline." (footnote omitted); explaining the debate over ghostwritten pleadings; "[A] number of other federal courts have found that attorneys who had ghostwritten briefs or other pleadings for ostensibly pro se litigants had engaged in misconduct."; "On the other hand, a number of bar association ethics committees have been more accepting of ghostwriting. The ethics committee opinions described in the following paragraphs are representative of the range of views on the subject and suggest a possible trend toward greater acceptance of various forms of ghostwriting."; "[W]e note that, in contrast to the federal court precedents, a majority of state courts and state ethics committees are reportedly more open to undisclosed ghostwriting, although that majority might be described as slim. See Ira P. Robbins, Ghostwriting: Filling in the Gaps of Pro Se Prisoners' Access to the Courts, 23 Geo. J. Legal Ethics 271, 286-88 (2010) (stating that, of twenty-four states that have addressed the issue, thirteen permit ghostwriting and, of those thirteen states, ten permit undisclosed ghostwriting while three require the pleading to indicate that it was prepared with the assistance of counsel; ten states expressly forbid ghostwriting)." (emphasis added)).

In 2013, the Eleventh Circuit similarly declined to sanction a lawyer who assisted a pro se bankruptcy litigant in filling out a form.

- Torrens v. Hood (In re Hood), 727 F.3d 1360, 1364 & n.5, 1365 (11th Cir. 2013) (finding that a bankruptcy lawyer had not engaged in improper "ghostwriting" by filling blanks in a form on behalf of a pro se litigant; "'Circuits differ on the acceptance of attorney ghostwriting, with the First and Tenth Circuits requiring attorney disclosure, and the Second Circuit permitting nondisclosure in limited circumstances.'"; "It is apparent to us that under the plain language of the rule, Appellants did not 'draft' a document for Hood. . . . They did not 'write or compose' the pre-formatted Chapter 13 petition. . . . To the contrary, Appellants recorded answers on a standard fill-in-the-blank Chapter 13 petition based on Hood's verbal responses. Moreover, Hood personally signed the petition. That Hood attempted to attain the best of both worlds by claiming that he had no knowledge of the petition only after the bankruptcy proceeding effectively stalled the foreclosure on his property is patent. Regardless, a Chapter 13 petition stands in stark contrast to a ghostwritten pro se brief . . . . A legal brief is a substantive pleading that requires extensive preparation; much more than is necessary for the completion of a basic, fill-in-the-blank bankruptcy petition."; "[W]e see no fraudulent intent in this record by Appellants. Rather, they were attempting to assist Hood with the completion of a straightforward pro se Chapter 13 petition for which there was no unfair advantage to be gained.

> Who, within the firm, filled out the petition is a distinction without a difference. A Chapter 13 petition is a publicly available form that is designed in a manner that lends itself to a pro se litigant. Hood could have personally completed the petition at issue in the exact same manner and likely obtained the same result."; "[W]e conclude that Appellants did not 'draft' a document within the scope of Rule 4q and did not commit fraud in violation of the Florida Rules of Professional Conduct or 18 U.S.C. § 157(3).").

So far, it is too early to tell if these two circuit court opinions will start trend.

Best Answer

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

B 10/14

Tape Recording Telephone Calls

Hypothetical 19

As an Asian-American lawyer, you have been incredibly offended by an opposing lawyer's racial slurs during your frequent telephone discussions about discovery issues. You wonder about the ethical propriety of tape recording one of the other lawyer's calls.

May you tape-record a telephone call to capture the other lawyer's racial slurs in the following situations:

(a) Without the other lawyer's consent, in a state where both parties' consent is required?

NO

(b) Without the other lawyer's consent, in a state where one party's consent suffices?

YES (PROBABLY)

Analysis

Bars, courts, and commentators have for several decades vigorously debated what role non-governmental lawyers can play in tape recording telephone calls.

At the extremes, the answers seem easy. It might be tempting to simply say that lawyers can engage in legal conduct on behalf of their clients. The vast majority of states allow one telephone call participant to secretly tape-record the call. In those states, this approach would allow lawyers to do so.

Given the dramatic differences between states' approach to this issue, courts sometimes must deal with a choice of laws analysis -- when different states are involved in the tape recording. See, e.g., Kearney v. Salomon Smith Barney, Inc., 137 P.3d 914 (Cal. 2006) (assessing a situation in which someone in the Atlanta, Georgia, branch of

Salomon Smith Barney tape-recorded a plaintiff in California without advising the plaintiff of the recording; explaining that such tape recording was acceptable in Georgia but not California; entering an injunction against such future tape recording, but declining to award damages and declining to apply the California prohibition retroactively).

At the other extreme, tape recording a telephone call without all participants' consent seems somehow "sleazy" or "underhanded." Most commentators say that lawyers should do more than simply comply with the law.

All bars and courts agree on a few basic principles. Because a lawyer cannot conduct discovery that violates the legal rights of another person (ABA Model Rule 4.4(a)), they cannot themselves, or direct their client to, engage in illegal tape recording. In states where all telephone call participants must consent to a tape recording, a lawyer cannot record a call without everyone's consent.

Because lawyers cannot engage in knowingly deceptive conduct,[1] a lawyer who is otherwise acting ethically in tape recording a telephone call generally cannot lie if one of the other participants asks if she is being recorded.[2]

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[1] ABA Model Rule 4.1(a) ("In the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person.").

ABA Model Rule 8.4(c) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.").

[2] In re PRB Docket No. 2007-046, 2009 VT 115, at ¶¶ 7, 9, 12, 14, 15, 17, 19 (Vt. 2009) (issuing a private admonition in the case of a criminal defense lawyer who lied to a witness asking whether the lawyers were tape recording their telephone call with the witness; "We also agree that respondents knowingly made a false statement about the recording and thus violated Rule 4.1. One respondent stated in plain terms that she was not recording the conversation, when in fact she was. The second respondent attempted to distract the witness from the issue of recording entirely, by making a statement about the speakerphone. Furthermore, she did not disagree with or correct the misrepresentation made by the first respondent. Both respondents' actions, therefore, violate Rule 4.1."; also finding that the lawyers had not violated Rule 8.4, which prohibits "'conduct involving dishonesty, fraud, deceit or misrepresentation'"; "[W]e are not prepared to believe that any dishonesty, such as giving a false reason

Apart from those basic concepts, the ethics rules and case law have generally evolved in favor of a more permissive attitude about tape recording telephone calls -- but with plenty of stops and starts, and with some bars and courts holding out for a very strict view.

The basic chronology shows the course of this interesting debate.

In 1974, the ABA adopted a per se approach banning lawyer participation in tape recording telephone calls without all participants' consent.

> The conduct proscribed in DR 1-102(A)(4), i.e., conduct which involves dishonesty, fraud, deceit or misrepresentation in the view of the Committee clearly encompasses the making of recordings without the consent of all parties. With the exception noted in the last paragraph, the Committee

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for breaking a dinner engagement, would be actionable under the rules. Rather, Rule 8.4(c) prohibits conduct 'involving dishonesty, fraud, deceit or misrepresentation' that reflects on an attorney's fitness to practice law, whether that conduct occurs in an attorney's personal or professional life. V.R.Pr.C. 8.4(c). This affirms the hearing panel's conclusion the subsection (c) applies only 'to conduct so egregious that it indicates that the lawyer charged lacks the moral character to practice law.'"; "Admittedly, some false statements made to a third persons during the course of representation could also reflect adversely on a lawyer's fitness to practice, thus violating both rules. However, not all misrepresentations made by an attorney raise questions about her moral character, calling into question her fitness to practice law. If Rule 8.4 is interpreted to automatically prohibit 'misrepresentations' in all circumstances, Rule 4.1 would be entirely superfluous. There must be some meaning for Rule 8.4(c) independent of Rule 4.1 -- for we presume that the drafters meant every rule to have some meaning."; "Reading Rule 8.4 as applying only to misrepresentations that reflect adversely on a lawyer's fitness to practice law is additionally supported by authority from other jurisdictions. Sister courts have acknowledged that Rule 8.4(c) cannot reasonably be applied literally -- and with the same reasoning we have employed. See, e.g., Apple Corps. Ltd. v. Int'l Collectors Soc'y, 15 F. Supp. 2d 456, 475-76 (1998) (rejecting 'the literal application' of 8.4(c) on the grounds that it renders Rule 4.1 'superfluous'); see also D.C. Bar Legal Ethics Comm. Op. 323 (2004) ('Clearly [Rule 8.4(c)] does not encompass all acts of deceit -- for example, a lawyer is not to be disciplined professionally for committing adultery, or lying about the lawyer's availability for a social engagement.'"; ultimately concluding that '[i]n the course of zealously representing a client who was the defendant in a serious criminal matter, the respondents in this case engaged in an isolated instance of deception. All indications are that respondents earnestly believed that their actions were necessary and proper. Indeed, the panel found that respondents violated the rules of a 'determination to defend their client against serious criminal charges,' and nothing else. Under such circumstances, respondents' actions simply do not reflect adversely on their fitness to practice."; setting up a group to consider possible Rule amendments dealing with "investigatory misrepresentations"; "[W]e will establish, by separate administrative order, a joint committee comprised of members from the Civil Rules Committee, the Criminal Rules Committee, and the Professional Conduct Board, to consider whether the rules should be amended to allow for some investigatory misrepresentations, and, if so, by whom and under what circumstances. We make no comment today on the merits of the questions that we will charge the committee to consider.").

> concludes that no lawyer should record any conversation whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation.

ABA LEO 337 (8/10/74). The only exception identified by the ABA involved "extraordinary circumstances" involving government investigations.

The ABA addressed the issue again twenty-seven years later. In the meantime, here is a brief review of just some of the various bar and court approaches.

- In 1990, the California Supreme Court adopted a per se ban on lawyer participation and tape recording telephone calls without everyone's consent. Kimmel v. Goland, 793 P.2d 524 (Cal. 1990).

- Perhaps not surprisingly, the first bar to take a different position was the New York County Bar -- in 1993, that Bar rejected a per se prohibition on lawyers tape recording their telephone calls because such a prohibition is "no longer viable in today's day and age."[3]

- Several years later, the Texas Bar indicated that a lawyer (1) may not herself record a telephone call without every participant's consent; (2) may ethically advise her client to do so; (3) may not request his client to tape-record a conversation in which the lawyer is a participant unless all the participants consent. Texas LEO 514 (2/96) (see below for Texas' reversal in 2006, Texas LEO 575 (11/06)).

- Several months later, the Utah bar permitted its lawyers to tape-record a telephone call if the recording was legal under Utah law. The Utah Bar addressed the "unseemly" argument as follows: "Some have expressed an intuitive feeling that the use of tape recorders by attorneys in this type of circumstance is 'bush league' or 'unseemly.' Although we do not condone

[3] New York County LEO 696 (3/11/93) (rejecting a per se prohibition on secret recording of telephone calls to which one party to the conversation has consented; noting that such conduct does not violate New York criminal law, and is sometimes acceptable in criminal investigations; "Former pronouncements that secret recordings by lawyers are inconsistent with standards of candor and fairness are no longer viable in today's day and age. Perhaps, in the past, secret records were considered malevolent because extraordinary steps and elaborate devices were required to accomplish such recordings. Today, recording a telephone conversation may be accomplished by the touch of a button, and we do not believe that such an act, in and of itself, is unethical."; holding that lawyer may not falsely answer questions about whether they are recording the telephone call, and may not use any recorded statements in a misleading way; ultimately concluding that lawyers may secretly record telephone conversations with third parties (including other lawyers and even their own clients) -– as long as the recording does not violate the law, and as long as one party to the conversation consents to the recording).

deceptive, deceitful or fraudulent actions, we see no principled reason to find it to be unethical for an attorney, within the limits discussed elsewhere in this opinion, to tape-record a conversation when it is expressly permitted by Utah law for all other persons." Utah LEO 96-04 (7/3/96).

- Two years later, the Michigan Bar noted "a trend in other states to permit the recording of conversations by lawyers." The Michigan Bar specifically rejected the per se ABA approach, with an odd analysis: "'The time has come' the Walrus said, 'to talk of many things. . . .' The committee believes that ABA Formal Opinion 337 is over broad, and the rationale which supported its statement some twenty-four years ago has weakened. Whether a lawyer may ethically record a conversation without the consent or prior knowledge of the parties involved is situation specific, not unethical per se, and must be determined on a case by case basis." Michigan LEO RI-309 (5/12/98).

- That same year, the Restatement (Third) of Law Governing Lawyers indicated that "[w]hen secret recording is not prohibited by law, doing so is permissible for lawyers conducting investigations on behalf of their clients, but should be done only when compelling need exists to obtain evidence otherwise unavailable in an equally reliable form." Restatement (Third) of Law Governing Lawyers § 106 cmt. b (2000) (the Restatement was finally published in 2001).

- In 2000, the Arizona Bar indicated that a lawyer may not herself tape-record a conversation unless all participants consented, but may advise her client to engage in lawful tape recording of telephone calls. Arizona LEO 00-04 (11/2000).

The ABA finally reversed course in 2001. In ABA LEO 422 (6/24/01), the ABA noted the trend in favor of permitting the lawful tape recording of telephone calls. The ABA explained that "[w]here nonconsensual recording of conversations is permitted by the law of the jurisdiction where the recording occurs, a lawyer does not violate the Model Rules merely by recording a conversation without the consent of the other parties to the conversation." Not surprisingly, the ABA indicated that lawyers may not engage in illegal tape recording, and may not lie when a participant asks whether the lawyer is recording the telephone call. Interestingly, the ABA Ethics Committee was "divided as to whether the Model Rules forbid a lawyer from recording a conversation with a client

concerning the subject matter of the representation without the client's knowledge." The Committee did indicate that "such conduct is at the least, inadvisable."

Even after the ABA reversed its earlier opinion, the debate has continued to rage. For instance, the Northern District of Illinois held in 2001 that it is "inherently deceitful" for a lawyer to tape-record a telephone call, even if the recording is legal. Anderson v. Hale, 159 F. Supp. 2d 1116 (N.D. Ill. 2001). The court explained that "the law recognizes, in countless areas, that omitting material facts can be as misleading as affirmative misstatements." Id. Citing the lawyers' "particularly high standard of candor," the court explained "[t]hat a conversation . . . being recorded is a material fact that must be disclosed by an attorney." Id.

The trend clearly follows the ABA approach.

- New York City LEO 2003-02 (2003) (holding that "[a] lawyer may tape a conversation without disclosure of that fact to all participants if the lawyer has a reasonable basis for believing that disclosure of the taping would significantly impair pursuit of a generally accepted societal good"; acknowledging that "undisclosed taping entails a sufficient lack of candor and a sufficient element of trickery as to render it ethically impermissible as a routine practice").

- Missouri LEO 123 (3/8/06) (allowing a lawyer/participant to tape-record a telephone communication if it is not prohibited by law, does not involve any explicit or implicit statement by the lawyer that she is not recording the call, and the lawyer is not recording a current client).

- Texas LEO 575 (11/2006) ("The Texas Disciplinary Rules of Professional Conduct do not prohibit a Texas lawyer from making an undisclosed recording of the lawyer's telephone conversations provided that (1) recordings of conversations involving a client are made to further a legitimate purpose of the lawyer or the client, (2) confidential client information contained in any recording is appropriately protected by the lawyer in accordance with Rule 1.05, (3) the undisclosed recording does not constitute a serious criminal violation under the laws of any jurisdiction applicable to the telephone conversation recorded, and (4) the recording is

not contrary to a representation made by the lawyer to any person. Opinions 392 and 514 are overruled.").

- Ohio LEO 2012-1 (6/8/12) (withdrawing an earlier legal ethics opinion and finding that a secret tape recording of a conversation is not per se unethical; "A surreptitious, or secret, recording of a conversation by an Ohio lawyer is not a per se violation of Prof. Cond. R. 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) if the recording does not violate the law of the jurisdiction in which the recording took place. Because surreptitious recording is regularly used by law enforcement and other professions, society as a whole has a diminished expectation of privacy given advances in technology, the breadth of exceptions to the previous prohibition on surreptitious recording provides little guidance for lawyers, and the Ohio Rules of Professional Conduct are based on the Model Rules of Professional Conduct, the Board adopts the approach taken in ABA Formal Opinion 01-422. Although surreptitious recording is not inherently unethical, the acts associated with a lawyer's surreptitious recording may constitute a violation of Prof. cond. R. 8.4(c) or other Rules of Professional Conduct. Examples of misconduct may include lying about the recording, using deceitful tactics to become a party to a conversation, and using the recording to commit a crime or fraud. As a basic rule, Ohio lawyers should not record conversations with clients without their consent. A lawyer's duties of loyalty and confidentiality are central to the lawyer-client relationship, and recording client conversations without consent is ordinarily not consistent with these overarching obligations. Similar duties exist in regard to prospective clients, and Ohio lawyers should also refrain from nonconsensual recordings of conversations with persons who are prospective clients as defined in Prof. Cond. R. 1.8(a).").

Thus, the law clearly trends in favor of permitting lawyers to themselves record (or advise their clients to record) telephone calls in states allowing such activity.[4] As with most trends, some states do not follow along.

Some courts have adopted an awkward middle ground. For instance, a Colorado legal ethics opinion allowed Colorado lawyers to tape-record communications "in

[4] Courts also deal with such tape recordings in assessing work product doctrine protection. For instance, the Eastern District of Virginia has held that the work product doctrine does not protect a client's tape recording of telephone calls with other individuals who had not consented to the recording. Haigh v. Matsushita Elec. Corp. of Am., 676 F. Supp. 1332 (E.D. Va. 1987).

connection with actual or potential criminal matters" and in their personal lives -- but presumably not in other situations.[5]

The Virginia experience represents a microcosm of this evolution.

Virginia is a one-party state (Va. Code § 19.2-62(B)(2)), but another Virginia law indicates that even a legally recorded telephone call cannot be used as evidence in a civil action (other than a divorce or annulment proceeding) unless all of the participants knew they were being recorded, or if one of the participants knew the call was being recorded and the conversation serves as an admission of criminal conduct which is the basis for the civil suit. Va. Code § 8.01-420.2.

In Gunter v. Virginia State Bar, 238 Va. 617, 385 S.E.2d 597 (1989), the Virginia Supreme Court condemned a lawyer's participation in his client's interception of the client's wife's telephone calls (including some with her lawyer). Because the client did not participate in those calls, his actions were clearly illegal under Virginia law. Still, commentators treated Gunter as condemning any lawyer's participation in any tape recording of telephone calls -- perhaps based on the Virginia Supreme Court's statement that "conduct may be unethical . . . even if it is not unlawful." Id. at 621, 385 S.E.2d at 600.

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[5] Colorado LEO 112 (7/19/03) ("The Committee believes that, assuming that relevant law does not prohibit the recording, there are two categories of circumstances in which attorneys generally should be ethically permitted to engage in surreptitious recording or to direct surreptitious recording by another: (a) in connection with actual or potential criminal matters, for the purpose of gathering admissible evidence; and (b) in matters unrelated to a lawyer's representation of a client or the practice of law, but instead related exclusively to the lawyer's private life. The bases for the Committee's recognition of a 'criminal law exception' are the widespread historical practice of surreptitious recording in criminal matters, coupled with the Committee's belief that attorney involvement in the process will best protect the rights of criminal defendants. The Committee recognizes a 'private conduct exception' because persons dealing with a lawyer exclusively in his or her private capacity have diminished expectations of privacy in connection with those conversations; therefore, in the opinion of the Committee, purely private surreptitious recording is not ordinarily deceitful.").

In the next seventeen years, the Virginia Bar moved from a per se test to a gradual relaxation of the prohibition on lawyer participation in recording telephone calls.

- Virginia LEO 1324 (2/27/90) (even if it is not illegal, a lawyer cannot tape-record conversations without the other party's consent, or assist the client in doing so; a lawyer may use such a recording made by the client before the client retained the lawyer, and must keep the client's activity confidential).

- Virginia LEO 1448 (1/6/92) (even if non-consensual tape recordings are not illegal, a lawyer may not participate in such tapings or advise a client to do so; "advising one's client to initiate a conversation under possibly false pretenses and to secretly record such conversation is improper deceptive conduct" that must be reported to the Bar).

  LEO 1448 represents the Virginia Bar's most extreme statement on this issue. A lawyer's client had been sexually abused by her father for an extended period of time during her childhood. As a result of the abuse, the client "suffers from several significant psychiatric disorders and has required extensive therapy, including several periods of hospitalization." The lawyer wanted to represent his client in a civil action against her father, but there "is little corroborating evidence." The lawyer asked the bar if he can suggest that his client meet with her father (who does not have a lawyer in the matter) "and surreptitiously record their conversation, since [the father has] . . . in some conversations, . . . freely admitted his sexual abuse of [the client]." The bar held that advising the client to tape-record her conversation with her father was a flat ethics violation.

- Virginia LEO 1635 (2/7/95) (a company officer (who is also a lawyer) tape-records a telephone conversation the officer has with a terminated corporate employee; because the Code provision prohibiting lawyers from engaging in misrepresentation is "not specifically applicable to activities undertaken in an attorney-client relationship," the lawyer's tape-recording was improper even if the officer were acting only as a corporate officer and not as the corporate lawyer; after citing the familiar list of factors for determining whether a lawyer's misconduct must be reported, the Bar concluded that the tape-recording without consent "may raise a substantial question" as to the lawyer's honesty, trustworthiness, or fitness to practice law in other respects).

In 2000, the Virginia Bar finally started to move in the other direction.

- Virginia LEO 1738 (4/13/00) (lawyers may secretly record telephone conversations in which they are participants, as long as the recordings are legal and are made in connection with criminal or housing discrimination

investigations, or involve "threatened or actual criminal activity when the lawyer is a victim of such threat"; the Bar "recognizes that there may be other factual situations where such recordings would be ethical," but will address those in response to specific questions).

- Virginia LEO 1765 (6/13/03) (lawyers working for a federal intelligence agency may ethically perform such undercover work as use of "alias identities" and non-consensual tape recordings).

In 2006, the Virginia Ethics Committee revisited the issue (as explained below, the Virginia Supreme Court ultimately rejected the Virginia Ethics Committee's proposed revisions). Among other things, the Committee's research showed that states continue to be divided.

> In some states undisclosed tape-recording involving an attorney has been held to be generally permissible in the absence of some type of actual, affirmative misrepresentation. See, e.g., Alaska Ethics Op. 2003-1; Michigan Informal Ethics Op. RI-309 (1998); New York County Ethics Op. 696 (1993); Okla. Bar Ass'n Ethics Op. 337 (1994); Netterville v. Mississippi State Bar, 397 So.2d 878 (Miss. 1981) . . . Indiana State Bar Ass'n Op. 1 (2000); Missouri Bar Op. 97-0022 . . . New York City Ethics Op. 2003-2 (undisclosed tape-recording only appropriate where it promotes a generally accepted societal benefit); Hawaii Sup. Ct., Formal Op. 30 (modification 1995) (whether undisclosed recording by an attorney is unethical must be determined on a case-by-case basis); Wisconsin Bar Op. E-94-5 (determination of whether Rule 8.4 has been violated must be fact-specific on a case-by-case basis).

Va. State Bar, Standing Committee on Legal Ethics: Report on Nonconsensual Tape-Recording (Jan. 12, 2006).

The Virginia ethics committee recommended that the Virginia Supreme Court adopt rules changes occasionally permitting tape recording as part of such investigations. February 25, 2009, the Virginia Supreme Court rejected the proposed

rules change. The court acted on a 4-3 vote, which reflects the national debate about this difficult issue.

In 2011, the Virginia Bar adopted a legal ethics opinion that nudged the state in the direction of allowing tape recording in certain circumstances.

- Virginia LEO 1814 (5/3/11) (holding that a criminal defense lawyer may directly or through an agent engage in legal undisclosed recording of a telephone call with an unrepresented witness whom the lawyer worries might change his story and implicate the lawyer's client; explaining that because such tape-recording involves "a higher risk of the unrepresented party misunderstanding the lawyer or the lawyer's agent's role," the lawyer or the agent "must assure that the unrepresented third party is aware of the lawyer or agent's role" in order to comply with the Rule 4.3 provision governing a lawyer's communication with an unrepresented person; noting that although many states previously found a lawyer's participation even in lawful tape-recording of telephone calls to be unethical, "more recently a number of states have reversed or significantly revised their opinions to allow undisclosed recording" (describing many of those states' approaches in a footnote)).

Of course, such recordings implicate other areas of the law as well.

Best Answer

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

b 11/14

Ethics Rules' Application to Conduct by Private Investigators and Other Lawyer Assistants

Hypothetical 20

You are trying to compile as much information as possible about a restaurant owner reported to subtly harass gay and lesbian customers. One of your partners has recommended a private investigator.

(a) Before allowing the private investigator to start her work, must you instruct her on the ethical and legal limits on her activities?

YES

(b) May you use the fruits of the private investigator's work without assuring yourself that the private investigator has not used illegal means to obtain it?

MAYBE

(c) May you use the fruits of the private investigator's work when the only conceivable way she could have obtained the information involved wrongful conduct (such as violation of health privacy laws)?

NO (PROBABLY)

Analysis

Outside and in-house lawyers use assistants from within their own firms or departments and from the outside. In both scenarios, lawyers must take reasonable steps to assure that their assistants act in a way that is compatible with the lawyers' professional obligations.

A related issue focuses on lawyers' ability to use the fruits of investigations conducted by such assistants (especially those outside the firm or department) -- if the investigators definitely used, or might have used, means that lawyers could not themselves have employed.

(a)-(c) The ABA changed its pertinent rule in 2012, and courts and bars also seem to be altering their attitude about these issues.

ABA Model Rules

The main ABA Model Rule governing lawyers' supervision of nonlawyers has always been ABA Model Rule 5.3.

Because there was some misunderstanding about this requirement's reach, the ABA Ethics 20/20 Commission cleverly recommended changing the title of ABA Model Rule 5.3 from "Responsibilities Regarding Nonlawyer Assistants" to "Responsibilities Regarding Nonlawyer Assistance" (emphasis added).

The ABA 20/20 Commission Report dealt primarily with what is commonly called "outsourcing." ABA Commission on Ethics 20/20 Report (8/2012). However, the Report described the Commission's reasoning for suggesting a new Comment to ABA Model Rule 5.3.

> The rest of proposed Comment [3] describes a lawyer's obligations when using nonlawyer services outside the firm. The Comment states that, when using such services, the lawyer has an obligation to ensure that the nonlawyer services are performed in a manner that is compatible with the lawyer's professional obligations. The proposed Comment then identifies the factors that determine the extent of the lawyer's obligations in this regard. The Comment also references several other Model Rules that lawyers should consider when using nonlawyer services outside the firm.
>
> The last sentence of Comment [3] emphasizes that lawyers have an obligation to give appropriate instructions to nonlawyers outside the firm when retaining or directing those nonlawyers. For example, a lawyer who instructs an investigative service may not be in a position to directly supervise how a particular investigator completes an assignment, but the lawyer's instructions must be reasonable

> under the circumstances to provide reasonable assurance that the investigator's conduct is compatible with the lawyer's professional obligations.

Id. (emphases added).

After the ABA's 2012 approval of the Commission's suggestions, ABA Model Rule 5.3 describes supervising lawyers' responsibilities as follows:

> With respect to a nonlawyer employed or retained by or associated with a lawyer . . .[,] a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to insure that the person's conduct is compatible with the professional obligations of the lawyer.

ABA Model Rule 5.3(b).

In addition, a law firm's management must make "reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the [nonlawyer's] conduct is compatible with the professional obligations of the lawyer." ABA Model Rule 5.3(a).

ABA Model Rule 5.3(c) governs a lawyer's ethical liability for a nonlawyer's unethical conduct.

> With respect to a nonlawyer employed or retained by or associated with the lawyer . . .[,] a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
>
> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ABA Model Rule 5.3(c).

Comment [2] provides more detailed guidance about lawyers' responsibilities to oversee their nonlawyer colleagues.

> Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

ABA Model Rule 5.3 cmt. [2] (emphasis added).

The next comment (added in 2012) deals with lawyers' responsibility for overseeing non-colleagues assisting the lawyers.

> A lawyer may use nonlawyers outside the firm to assist the lawyer in rendering legal services to the client. Examples include the retention of an investigative or paraprofessional service, hiring a document management company to create and maintain a database for complex litigation, sending client documents to a third party for printing or scanning, and using an Internet-based service to store client information. When using such services outside the firm, a lawyer must make reasonable efforts to ensure that the services are provided in a manner that is compatible with the lawyer's professional obligations. The extent of this obligation will depend upon the circumstances, including the education, experience and reputation of the nonlawyer; the nature of the services involved; the terms of any arrangements concerning the protection of client information; and the legal and ethical environments of the jurisdictions in which the services will be performed, particularly with regard to confidentiality. See also Rules 1.1 (competence), 1.2 (allocation of authority), 1.4 (communication with client), 1.6

> (confidentiality), 5.4(a) (professional independence of the lawyer), and 5.5(a) (unauthorized practice of law). When retaining or directing a nonlawyer outside the firm, a lawyer should communicate directions appropriate under the circumstances to give reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer.

ABA Model Rule 5.3 cmt. [3] (emphases added).

The next comment (also added in 2012) addresses responsibility for supervising such independent contractors if the client selects them.

> Where the client directs the selection of a particular nonlawyer service provider outside the firm, the lawyer ordinarily should agree with the client concerning the allocation of responsibility for monitoring as between the client and the lawyer. See Rule 1.2. When making such an allocation in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

ABA Model Rule 5.3 cmt. [4]. In essence, this seems to be an effort to relieve lawyers of a sort-of respondeat superior responsibility for misconduct by an independent contractor selected by the client.

All in all, the ABA 20/20 Commission's changes to ABA Model Rule 5.3 heighten lawyers' responsibilities to assure that their assistants comply with the lawyers' ethics rules.

Lawyers relying on such outside assistants must also focus on two additional ABA Model Rules that might limit actions undertaken by such assistants.

First, under ABA Model Rule 4.4(a),

> [i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

ABA Model Rule 4.4(a) (emphasis added). This Rule generally prohibits lawyers from obtaining evidence by trespassing on a third party's property, etc.

Second, ABA Model Rule 4.2 contains the familiar prohibition on lawyers communicating ex parte with third persons they know to be represented by another lawyer in the matter.

> 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.

Interestingly, the 1969 ABA Model Code of Professional Responsibility explicitly prohibited lawyers from indirectly engaging in such prohibited communications.

> During the course of his representation of a client a lawyer shall not . . . [c]ommunicate or cause another to communicate on the subject of the representation with a party he knows to be represented by a lawyer in that matter unless he has the prior consent of the lawyer representing such other partyor is authorized by law to do so.

ABA Model Code of Professional Responsibility DR 7-104(A)(1) (emphasis added) (footnote omitted). Some states (including New York) have retained the "or cause another" language in their rules. New York Rule 4.2(a).[1]

Although the ABA Model Rules do not contain a specific reference to lawyers indirectly engaging in improper ex parte communications, a catch-all rule applies to

[1] A comment to New York Rule 4.2 (adopted by the New York Bar but not the New York courts) explains that investigators are not considered "clients" for purposes of permitting clients to speak directly with clients. New York Rule 4.2 cmt. [11] (". . . Agents for lawyers, such as investigators, are not considered clients within the meaning of this Rule even where the represented entity is an agency, department or other organization of the government, and therefore a lawyer may not cause such an agent to communicate with a represented person, unless the lawyer would be authorized by law or a court order to do so.").

lawyers indirectly engaging in such communications or in any other misconduct (such as trespassing).

> 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.

ABA Model Rule 8.4(a).

Legal Ethics Opinions and Case Law

Just as the ABA Model Rules have moved in the direction of requiring lawyers to train and take responsibility for their assistants, the legal ethics opinions and case law have trended in the same direction.

Bars' and courts' attitudes toward lawyers' assistants' misconduct has evolved over time.

Older legal ethics opinions tended to diminish lawyers' responsibility for such third parties' misconduct, and some even permitted lawyers to use the fruits of that misconduct.

- Virginia LEO 278 (1/29/76) (a client's wife stole a document from the client's employer to use in a lawsuit; as long as the client's lawyer was not involved in the theft, the lawyer may continue to represent the client and use the document; overruled in LEO 1702, which would require lawyer to return stolen document).

- Virginia LEO 1141 (10/17/88) (a lawyer representing a widow in a medical malpractice/wrongful death action may use files taken by the widow from the treating physician's office; the files are not "fruits of a crime" but the lawyer should advise the widow to return the original of the file; the lawyer could keep and use a copy of it).

- Maryland LEO 96-38 (6/19/96) ("You ask whether a lawyer who represents a client suing a corporate defendant may review documents of the corporation which were obtained from the dumpsters on the corporation's premises by a third party. The third party gave the documents to the client, who then

delivered them to the lawyer. You state that: (a) the lawyer did not solicit the retrieval of the documents; (b) the client believes that the documents are relevant to the pending suit; and (c) as a result of the pending suit and a related suit you believe the corporation may be disposing of sensitive information adverse to it. We are of the opinion that you are under no obligation to reveal the matter to the court in which the litigation is pending documents, and regardless whether they are privileged or confidential. . . . However, if the documents are originals, you may be obliged to return them to the owner.").

- Philadelphia LEO 2001-10 (11/2001) (holding that a lawyer could use surveillance audio tape the client's investigator obtained without the lawyer's knowledge or involvement, and would have required the investigator to communicate ex parte with a represented adversary; "In April 2001, the TPA [third-party administrator] arranged for surveillance to be conducted upon the claimant; defense counsel was not aware of the surveillance at the time it was ordered. As part of the surveillance, an investigator transported the claimant to and from an independent medical examination (IME). During the trip to the IME, the claimant spoke with the investigator and allegedly disclosed information or made a statement contrary to his claim of ongoing disability."; "The investigator in this case was not employed by counsel, but was instead employed by the TPA, and his existence was unknown to counsel at the time of the disputed conduct. Thus, there was no basis to impute to the lawyer a violation of the Rules by the conduct of someone wholly unrelated to him."; "A different conclusion may result, however, if the TPA had advised counsel of its retention of the investigator, and the assignment given to him, or if counsel either had actual knowledge, or had reason to believe from prior dealings with the TPA that the conduct was occurring. In that situation, counsel would be ratifying the investigator's conduct by virtue of his use of the information obtained."; "[T]he attempted proffer of the surveillance evidence does not constitute a ratification of the conduct by counsel. Of note is Rule 3.3 ('Candor Toward the Tribunal'), which precludes an attorney from introducing evidence that is 'untrustworthy,' but requires candor to the tribunal. In this situation, defense counsel was candid to the Judge and counsel by disclosing the facts surrounding the evidence as soon as he knew them.").

In 1995, the ABA issued a legal ethics opinion that took a surprisingly narrow view of lawyers' responsibilities when dealing with third-party assistants, and a surprisingly broad view of lawyers' freedom to use improperly obtained evidence.

> Under these provisions, if the lawyer has direct supervisory authority over the investigator, then in the context of contacts with represented persons, the lawyer would be ethically

> responsible for such contacts made by the investigator if she had not made reasonable efforts to prevent them (Rule 5.3(b)); if she instructed the investigator to make them (Rule 5.3(c)(1)); or if, specifically knowing that the investigator planned to make such contacts she failed to instruct the investigator not to do so (Rule 5.3(c)(2)). The Committee believes, however, that if, despite instruction to the contrary, an investigator under her direct supervisory authority (or one not under such authority) made such contacts, she would not be prohibited by Rule 5.3 from making use of the result of the contact. . . . Rule 8.4(a) imposes similar, albeit narrower, ethical limits on what a lawyer can direct an investigator to do. . . . Although the question is a close one, the Committee does not believe that a lawyer's making use of evidence offered by an investigative agent by means that would have been forbidden to the lawyer herself but in which she was not complicitous would constitute "ratification" under Rule 5.3(c)(1). "Ratify" is defined by Black's Law Dictionary (6th ed. 1990) as: "To approve and sanction; to make valid; to confirm; to give sanction to. To authorize or otherwise approve, retroactively, an agreement or conduct either expressly or by implication."

ABA LEO 396 (7/28/95) (emphases added). Thus, the ABA did not require the hypothetical lawyer to forego using the evidence -- unless the lawyer had actual knowledge of the investigator's misconduct. It is unclear whether the ABA would take the same approach now.

More recent legal ethics opinions and court decisions have tended to demand more oversight from lawyers, and prohibit lawyers from using the fruits of improper investigations. The trend seems clear.

- District of Columbia LEO 321 (6/2003) ("Counsel for a respondent may send an investigator to interview an unrepresented petitioner in preparation for a contempt proceeding in which the petitioner has alleged that the respondent has violated the terms of a domestic violence civil protection order, provided that respondent's counsel makes reasonable efforts to ensure that the investigator complies with the requirements of the D.C. Rules of Professional Conduct. These obligations include ensuring that the investigator does not

mislead the petitioner about the investigator's or the lawyer's role in the matter and that investigators do not state or imply that unrepresented petitioners must or should sign forms such as personal statements or releases of medical information. Counsel should also take reasonable steps to ensure that, where an investigator reasonably should know that the unrepresented person misunderstands the investigator's role, the investigator makes reasonable affirmative efforts to correct the misunderstanding.").

- Sutton v. Stevens Painton Corp., 917 N.E.2d 91, 93 (Ohio Ct. App. 2011) (analyzing a personal injury plaintiff's lawsuit against the Thompson Hine firm and one of its private investigators for alleged tortious activity during an investigation of the plaintiff; "Thompson Hine represented Terex [defendant] in the action. In an effort to obtain evidence concerning the extent of Sutton's alleged injuries, Thompson Hine engaged Shadow Investigations, Inc. ('Shadow'), a private investigative firm, to conduct surveillance of Sutton. The surveillance materials were disclosed to plaintiffs in the course of discovery. Thompson Hine asserts that '[u]pon receipt of the surveillance materials in June 2007, plaintiffs' counsel immediately threatened to file invasion of privacy claims against Terex, Shadow, and/or Thompson Hine, and from at least that point forward, Thompson Hine was anticipating litigation against it and/or Terex.'" (internal citation omitted)).

- Lynn v. Gateway Unified Sch. Dist., No. 2:10-CV-00981-JAM-CMK, 2011 U.S. Dist. LEXIS 143282 (E.D. Cal. Dec. 15, 2011) (analyzing the impact of a client's theft of privileged documents, and disclosure of those documents to her lawyer; ultimately disqualifying the lawyer and his law firm).

- Joel Cohen, The Use of Illegally Obtained Evidence, N.Y. L.J., Oct. 12, 2012 ("Law professors love to torture their students with this scenario: The client, a defendant in a murder case, comes to your office with a brown paper bag. He hands you the bag and says, 'You decide how to deal with it.' Of course, the existence of the gun might be extremely damaging, and you never want it to surface. While you can neither toss it into the sewer nor tell your client to do so, it certainly does you no good for your client to take the gun home. Taking into consideration a lawyer's legal and ethical responsibilities, as well as his defense strategy, the defense counsel's decision-making here will be difficult at best. Nowadays, however, the more typical situation that likely keeps the criminal bar awake at night is where the client comes to his lawyer with evidence actually helpful to his defense, but which he obtained by (likely) violating the law -- whether by traditional theft or, these days, via computer hacking. For a lawyer may expose himself criminally, or at least ethically, if he tries to use the evidence so obtained, thereby acknowledging its existence. Using the evidence could also expose the client to additional criminal liability. Then too, the possibilities that a court may rule the evidence inadmissible and that the lawyer may risk discipline or even prosecution, may factor into whether the attorney decides to 'surface' the material." (footnote

omitted); "As Michael Ross, an ethics and criminal law attorney who formerly served as Assistant United States Attorney in the Southern District of New York, pointed out in his presentation at the 2012 Fall Bench & Bar Retreat, an attorney who accepts stolen physical evidence from his client may indeed open the door to his own criminal liability. In New York, a person is guilty of criminal possession of stolen property in the fifth degree -- a Class A misdemeanor with a potential one-year jail sentence -- when he knowingly possesses stolen property with the intent to benefit himself or another person and to impede recovery by the property's owner. As a result, a lawyer who knows that the property his client handed over is stolen risks being charged with criminal possession of stolen property, not to mention potential criminal liability for his client." (footnotes omitted).

To be sure, some bars and courts occasionally still follow the more traditionally laissez-faire approach.

- Virginia LEO 1786 (12/10/04) (analyzing a series of hypotheticals in which a lawyer receives documents about an adversary that might be useful; explaining that: lawyers may not direct clients to obtain evidence via a method that the lawyers themselves may not engage in; determining whether lawyers must return documents that their clients have removed from the client's employer's office depends on a number of factors, including the client's authorization to handle the documents and the absence or presence of privileged communications in the documents; although the ABA has changed the Model Rules to replace a "return unread" policy with a notice requirement in the case of inadvertent transmission of privileged communications, Virginia has not changed its rules -- so under LEO 1702 lawyers should return unread an adversary's privileged documents given to the lawyer by clients, even if the client "had the documents as part of his employment"; lawyers are not required to notify the opposing party of such receipt of privileged documents if a whistleblower statute permits the lawyer to refrain from providing notice; an additional exception to the "return unread" rule applies if the client/employee made a copy of the employer's documents rather than took originals; LEO 1702 applies only to documents containing privileged communications of an adversary -- thus, lawyers may review and use non-privileged documents as long as the lawyer has not obtained the documents through the use of methods "that violate the legal rights of a third person" under Rule 4.4; determining whether Rule 4.4 would prohibit the lawyer's use of the documents "depends on whether the documents are originals or copies, whether any litigation is foreseen, how the employee acquired the materials, and their relevancy to the potential litigation"; lawyers should remember that stolen documents might amount to "fruits or instrumentalities of a crime" and thus have to be turned over to law enforcement authorities; all of these rules would not prohibit government

lawyers from engaging in the collection of documents that is "part of the lawful operation" of a U.S. Attorney's investigation).

Legal ethics opinions and case law focusing on conduct by clients and nonlawyers that would violate the lawyer ethics rules generally involve predictable scenarios.

For instance, lawyers have been punished for themselves engaging in, or arranging for their nonlawyer assistants to engage in, clearly illegal conduct.

- Amanda Bronstad, Christensen **slapped with three-year prison** term in wiretap case, Nat'l L.J. Online, Nov. 25, 2008 ("A federal judge has sentenced Terry Christensen to three years in federal prison, concluding that the attorney's decision to wiretap his opponent in a child support case 'marred the legal profession.' Christensen was convicted this summer on charges that he hired private investigator Anthony Pellicano to wiretap the ex-wife of his client, billionaire Kirk Kerkorian, in a child support case. On Monday, one of Christensen's lawyers, Terree Bowers, a partner in the Los Angeles office of Howrey, said his client did not financially benefit from the wiretapped conversations, nor did he obtain an advantage in the litigation. In hiring Pellicano, he was simply attempting to identify the biological father of the child at the center of the dispute. The fact that his client is an attorney, he added, has 'no relevance' to the conduct at issue. He also said Christensen was not the responsible party. 'Mr. Christensen was a customer. Mr. Pellicano held all the cards, all the controls,' he said. Christensen, who earlier had submitted a letter to [U.S. District Judge Dale] Fischer claiming he regretted hiring Pellicano, declined to comment further at Monday's hearing.
  Assistant U.S. Attorney Dan Saunders noted that Christensen's letter addressed his regret in hiring Pellicano, but not for the actual wiretapping. He also said that Christensen's being an attorney strikes at the 'heart of the underlying conduct.' 'This crime was a rational, calculated choice, something he did because he wanted to, not because he needed to,' Saunders said. In a strongly worded criticism, Fischer called Christensen's conduct 'shocking and outrageous.' 'Mr. Christensen has not taken responsibility for his criminal conduct, much less expressed remorse for it,' she said. She frequently cited the 'absolutely astounding telephone conversations' between Pellicano and Christensen, former managing partner of what is now Los Angeles-based Glaser, Weil, Fink, Jacobs & Shapiro, in her sentencing decision. In the recordings, Christensen discussed with Pellicano the settlement position, legal fees and deposition strategies of his opponent, she said. He also kept his client happy, thus realizing an economic gain, and

> was responsible for Pellicano's conduct. And he abused his position as an attorney by eavesdropping onto conversations that are protected by the attorney-client privilege – a 'sacrosanct' relationship, she said. 'Because he was an attorney, he knew what information was important and how it could be used,' she said. His behavior, she said, affected hundreds of people. In addition to the prison time, Fischer ordered Christensen to pay a $250,000 fine within 30 days. Christensen remains free on bond, however, pending the appeal of his conviction. After Monday's hearing, one of his lawyers, Patricia Glaser, a partner at his firm, said she was disappointed in the judge's sentence but grateful that her client was released on bond. Saunders, after the hearing, said the sentence was 'fully appropriate.' 'As the court stated, this was a shocking and outrageous crime,' he said.).

In stark contrast, courts justifiably analyzing the "best interest of the child" in custody and other domestic relations matters usually take into consideration even illegally or improperly obtained evidence.

- Kearney v. Kearney, 974 P.2d 872 (Wash. Ct. App. 1999) (allowing use of an illegally obtained tape in a child custody dispute; noting that the children's mother had taped conversations between her former husband and the children to show the former husband's emotional abuse).

- Maryland LEO 97-5 (10/11/96) (addressing a tape illegally made by a child's father of the mother threatening to kill herself and the child; ordering the lawyer to maintain the tape but not transfer it to a third party).

A common scenario raising these issues involves feuding spouses' efforts to obtain evidence against each other.

Some courts take a restrictive view of lawyers' ability to use such improperly obtained evidence.

- Steve Eder and Jennifer Valentino-DeVries, A Spy-Gear Arms Race Transforms Modern Divorce, Wall Street Journal, Oct. 5, 2012 ("The legality of spousal spying is complicated. Not all courts agree on what constitutes a 'reasonable expectation of privacy' in a marriage."; "In one 2011 Nebraska case, a mother who embedded a listening device in her daughter's teddy bear to record the girl's father was found guilty of violating the Federal Wiretap Act. And in a 2008 Iowa ruling, a court found that a man had violated his wife's privacy by taping her with a camera surreptitiously installed in an alarm clock in her bedroom in their home."; "All together, at least five of the 13 United States circuit courts have found that the Federal Wiretap Act

does prohibit surveillance within marriages. But at least two have ruled that the law doesn't prohibit recording your spouse."; "In October 2010, for instance, a federal judge in Texas ruled against Rhea Bagley, who, while divorcing her husband, sued him over allegations that he had put spyware on a computer she used and placed a recording device in the family home before he moved out. District Court Judge Lee Rosenthal cited a 1974 circuit court precedent that the Federal Wiretap Act didn't apply to 'interspousal wiretaps.'"; "Occasionally, both husband and wife are spying on each other. In Oakland County, Michigan, prosecutors charged Leon Walker under the state's anti-hacking statute after he read his wife's emails in a password-protected account on a shared computer. Then, this past July, they dropped the charge, claiming that his wife was snooping, too, by reading his text messages."; "[Danny Lee] Hormann, who lives about two hours outside Minneapolis, said he got the idea of sticking a GPS tracker on his wife's car in 2009 from an ad. The one he bought let him observe in real time where his wife drove her Mitsubishi Eclipse. It cost him $500 to buy, plus a monthly fee."; "'Pretty amazing stuff,' said Mr. Hormann, a former investment salesman and now a truck driver. At least four times in late 2009 and early 2010, he used it to locate his then-wife, Ms. Mathias, court records say."; "Ms. Mathias said she and her three children suspected for some time that Mr. Hormann was spying. 'He knew where I was constantly,' Ms. Mathias said. She said she never cheated. 'If you have a device on your phone, your computer, your car,' she said, 'how the hell are you supposed to have any affairs?'"; "In March 2010, the month she filed for divorce, Ms. Mathias had a mechanic look for a tracking device. One was found magnetically attached to the car's underside. She contacted police and the county prosecutor charged Mr. Hormann with stalking and using a mobile tracking device on her car."; "'She couldn't leave the house without him knowing exactly what she was doing,' said prosecutor Tim Hochsprung."; "In July, 2010, a jury convicted Mr. Hormann of two charges, stalking and tracking the car. He spent 30 days in jail. On appeal, a judge reversed the tracking charge, saying he had 'sufficient ownership interest' of the car and thus could legally track its whereabouts.").

- North Carolina LEO 192 (1/13/95) (addressing the lawyer's obligation upon receiving from a client an illegal tape-recording of the client's spouse and paramour; holding that the lawyer may not even listen to the tape; "The tape recording is the fruit of Client W's illegal conduct. If Attorney listens to the tape recording in order to use it in Client W's representation, he would be enabling Client W to benefit from her illegal conduct. This would be prejudicial to the administration of justice in violation of Rule 1.2(D). See also Rule 7.2(a)(8). Attention is directed to the Federal Wiretap Act, 18 U.S.C. Section 2510, et seq., particularly Sections 2511 and 2520, regarding criminal penalties for endeavoring to use or using the contents of an illegal wire communication.").

In contrast, some courts emphasize lawyers' confidentiality duty in such settings, or otherwise take a broader view.

- New York State LEO 945 (11/07/12) (posing the following question: "A lawyer represents a client in a matrimonial litigation. The client has disclosed that the client has access to, and has been reading, the spouse's e-mails, including e-mails with counsel. Although the client has not provided the spouse's lawyer-client e-mails or disclosed their contents to the lawyer, the client may be using knowledge of their contents in making decisions about the litigation. Must the lawyer disclose the client's conduct?"; concluding as follows: "A lawyer may not disclose that the client has been reading the opposing party's client-lawyer e-mails, although not communicating the e-mails or their contents to the lawyer, unless (1) the lawyer knows that the client is committing a crime or fraud and no remedial measures other than disclosure will prevent harm to the opposing party, or (2) governing judicial decisions or other law require disclosure.").

- Minakan v. Husted, 27 So. 3d 695, 698, 699, 699-700 (Fla. Dist. Ct. App. 2010) (declining to disqualify a lawyer representing a wife in a divorce case; explaining that the wife had obtained the husband's e-mails from the husband's computer; finding that the court acted too quickly in disqualifying the wife's lawyer; "The wife raises several arguments, the first of which is dispositive. The wife contends that the court violated her right to due process by not allowing her to testify and present other evidence on the factual question of whether the husband failed to treat the e-mail as confidential, thereby waiving the privilege. The husband responds that whether he failed to treat the e-mail as confidential is irrelevant because there was no question the wife had the e-mail forwarded to her attorney, thus rendering her testimony unnecessary."; "Even if the wife's evidence would not have impressed the court, a party has the right to present evidence and to argue the case at the conclusion of all the testimony. . . . Thus, it is necessary to grant the wife's petition, quash the order disqualifying her counsel, and remand for continuation of the hearing, at which the wife may present her evidence."; "[B]ased on the court's statement that it did not know whether the wife gained some advantage by having the email, the record does not suggest the court took that factor into account before disqualifying the wife's attorneys. The record also does not indicate whether the court considered the possible lesser remedies of precluding any discovery based on the e-mail's contents, precluding the use of the e-mail at trial, or both. On remand, the court can consider those matters further.").

- Castellano v. Winthrop, 27 So. 3d 134, 137 (Fla. Dist. Ct. App. 2010) (upholding the disqualification of a mother's lawyer who read a USB drive that the mother had illegally obtained from the father; "For the benefit of other

attorneys facing a similar dilemma, we note that the Florida Bar Commission on Professional Ethics has opined that when an attorney receives confidential documents he or she knows or reasonably should know were wrongfully obtained by his client, he or she is ethically obligated to advise the client that the materials cannot be retained, reviewed, or used without first informing the opposing party that the attorney and/or client have the documents at issue. If the client refuses to consent to disclosure, the attorney must withdraw from further representation. Fla. Bar Prof'l Ethics Comm. Formal Op. 07-1." (footnote omitted)).

- Philadelphia LEO 2008-2 (3/2008) (assessing a situation involving an ex-husband's desire to use email between his ex-wife and her lawyer; "The inquirer has a client whose ex-wife has sued the client regarding an estate matter. The client has revealed to the inquirer that he, the client, has access to the ex-wife's e-mail through the computer in his home which she used while they were married. She never changed her password until recently. The client has told the inquirer that he has e-mails between his ex-wife and her attorney that would devastate her case against the client. The inquirer does not know anything further because he advised his client that the e-mails were privileged communications and that he, the inquirer did not want to know anything further. The client wants to reveal the e-mails to the Orphans Court. The inquirer asks if he is correct that these communications should not be revealed and cannot be subpoenaed. The issues of whether the communications are, in fact, privileged and are or are not accessible via subpoena are mixed questions of fact and law which are beyond the purview of the Committee (however see discussion of the privilege below). However, the Committee understands this inquiry to be whether the inquirer is constrained by the Pennsylvania Rules of Professional Conduct (the "Rules") from (a) reviewing these e-mails and/or (b) making use of them in the litigation between the inquirer's client and the client's ex-wife."; noting that a Pennsylvania law renders illegal use of e-mail communications in certain circumstances, but explaining that there were insufficient facts to determine that law's applicability; "[I]f, after vetting these questions with the client, the inquirer is satisfied that there is no risk of civil and/or criminal liability to the client, it is the Committee's opinion that the inquirer cannot rest on the conclusion expressed in the inquiry that the e-mails are 'privileged communications' and merely ignore them. There are several reasons for this. First, the mere fact that the e-mail communications in question are between the client's ex-wife and her attorney does not render them privileged, per se. The scope of the privilege is statutory in nature; see, 42 Pa.C.S. § 5928, as well as case law interpreting the statute, and extends, inter alia, only to those communications that are 'for the purpose of securing primarily either an opinion of law or legal services. . . .' Accordingly, the Committee feels that the inquirer may not be able to make any judgments on the privilege issue without subjecting the e-mails to some kind of review. The

Committee appreciates the inquirer's concern about coming into possession of e-mails between the client's ex-wife and her lawyer that may turn out to have been inadvertently sent. In the event that the inquirer should determine that the e-mails came into the client's possession inadvertently the inquirer's ethical duties are limited to notifying the sender as provided by Rule 4.4(b). As previously stated, the question of whether and to what extent use can thereafter be made of those e-mails will be a matter of substantive and procedural law. However, should use of the e-mail be a possibility several other ethical issues must be examined."; holding that the lawyer must deal with the e-mails rather than just indicate to the client that the lawyer will not analyze or possibly use them; "In the present case, the client clearly wishes the inquirer to use the subject e-mails. Because the inquiry does not make the nature of the litigation between the client and his ex-wife entirely clear, the Committee cannot guess at the objectives of the representation. The Committee notes that the inquirer and the client, if they have not done so already, should clarify those objectives and at least discuss how and whether the e-mails can or should be used. This is entirely consistent with the inquirer's duty under Rule 1.4 Communication specifically, Rule 1.4(a)(2) which obligates a lawyer to 'reasonably consult with the client about the means by which the client's objectives are to be accomplished.' The Committee finds that the inquirer cannot rule out -- at least without being aware of their content -- the possibility that the content of the e-mails may be such as to impose an affirmative duty on the inquirer's part to employ them in pursuing the client' s claims and defenses if they will significantly advance the client's interests.").

- Florida LEO 07-1 (9/7/2007) (explaining that a lawyer faced the following situation in his representation of a wife in a divorce case; "It has come to my attention that my client has done the following: (1) Removed documents from husband's office prior to and after separation; (2) Figured out husband's computer and e-mail password and, at his office, printed off certain documents, including financial documents of the corporation, husband's personal documents and e-mails with third parties of a personal nature, and documents or e-mails authored by husband's attorney in this action; (3) Accessed husband's personal e-mail from wife's home computer, and printed and downloaded confidential or privileged documents; and (4) despite repeated warnings of the wrongfulness of wife's past conduct by this office, removed documents from husband's car which are believed to be attorney-client privileged."; explaining that neither the wife nor the lawyer reviewed the documents, and that the lawyer placed them in a sealed envelope; ultimately concluding that "[a] lawyer whose client has provided the lawyer with documents that were wrongfully obtained by the client may need to consult with a criminal defense lawyer to determine if the client has committed a crime. The lawyer must advise the client that the materials cannot be retained, reviewed or used without informing the opposing party

> that the inquiring attorney and client have the documents at issue. If the client refuses to consent to disclosure, the inquiring attorney must withdraw from the representation."; explaining that the documents were not "inadvertently" transmitted to the lawyer, so that Rule 4-4.4(b) did not apply; noting that the lawyer would have to produce the documents if they were responsive to a document request; also explaining that the lawyer might have statutory or other responsibilities if the documents were stolen; explaining that the lawyer had a duty to keep the client's role confidential, but that the lawyer could not assist the client if that conduct was criminal or fraudulent; "If the client possibly committed a criminal act, it may be prudent to have the client obtain advice from a criminal defense attorney if the inquiring attorney does not practice criminal law. The inquiring attorney should advise the client that the inquiring attorney is subject to disqualification by the court as courts, exercising their supervisory power, may disqualify lawyers who receive or review materials from the other side that are improperly obtained. . . . The inquiring attorney should also advise the client that the client is also subject to sanction by the court for her conduct."; "Finally, the inquiring attorney must inform the client that the materials cannot be retained, reviewed or used without informing the opposing party that the inquiring attorney and client have the documents at issue. . . . If the client refuses to consent to disclosure, the inquiring attorney must withdraw from the representation.").

Perhaps the largest number of legal ethics opinions and cases involving this issue deal with investigators' ex parte communications with represented persons.

As explained above, some states have retained the old ABA Model Code's prohibition on a lawyer "causing another" to engage in such ex parte communications. And the ABA and states adopting the ABA Model Rules formulation have struggled with reconciling the prohibition on lawyers' use of another to evade the ethics rules and clients' ability to freely communicate ex parte with represented adversaries.

Bars and courts have severely sanctioned lawyers who have directed investigators to engage in improper ex parte communications.

- United States v. Koerber, 966 F. Supp. 2d 1207, 1220, 1223 (D. Utah 2013) (finding that federal prosecutors violated the ex parte communication rule by arranging for FBI and IRS agents to communicate ex parte with a represented criminal target; "During the February 9, 2009 interview, Agent

Saxey [FBI agent] stated that 'Rick, you were represented for a while, and we're not permitted to talk to you, but in the future I plan on talking to you about what information you might have.'. . . Defendant expressed immediate surprise at Agent Saxey's off-hand remark."; "At that point Agent Saxey asked Defendant if he wanted to stop the interview and Defendant said 'No I'm all right.'. . . After nearly four hours of interview, however, Defendant reiterated his surprise at the agent's belief that he was not represented: 'Uh, I'm surprised about the whole Max thing. As far as I'm concerned Max still does represent me. He might be a little pissed that I came and talked to ya.'" (internal citation omitted); "Agent Saxey became unsure about whether Defendant was, in fact, represented or not after these comments, but he continued to interview and did nothing following the interview to verify whether Defendant was represented. Agent Saxey explained that he 'trusted Mr. Walz and the prosecutors I was working with' as to their position on whether Defendant was represented when they had instructed the agents to proceed with the ex parte interview. . . . Agent Marker confirmed that he also did nothing during or after the first interview to verify whether Defendant was, in fact, represented by any of the Defendant's attorneys of whom he had personally become aware in connection with the investigation."; "[T]he simple fact is the Government knew that Defendant was represented in this matter as early as March 2007 and reaffirmed in March of 2008 through direct correspondence with Max Wheeler. Nothing occurred at any time before February 13, 2009 that would support a reasonable inference that the representation had changed. And the record supports no inference that Mr. Skousen had ceased representing Defendant, not to mention the other attorneys with whom agents had worked and of whom prosecutors were aware. As the court mentioned during oral argument on April 18, 2013, 'it would be so simple to simply call up and say, Max -- they have known each other a long time -- we want to interview Mr. Koerber, do you have any objection? If they had done that, we wouldn't be here today.'" (internal citation omitted)).

- Bratcher v. Ky. Bar Ass'n, 290 S.W.3d 648, 648-49, 649 (Ky. 2009) (imposing a public reprimand based on the following situation: "Movant [lawyer] represented Dennis D. Babbs in a wrongful termination action against his former employer, R.C. Components, Inc. After suit was filed, Movant learned of a company called Documented Reference Check ('DRC'), which could be hired to determine the type of reference being given by a former employer. Movant obtained an application form from DRC and provided it to her client. Movant also paid DRC's fee on behalf of her client. An employee of DRC subsequently called the owner of R.C. Components, identified herself as a prospective employer of Mr. Babbs, and requested information about him. The telephone conversation was transcribed and provided to Movant."; "Movant sent a copy of the transcript to defense counsel as a part of discovery in the case. After receiving the transcript, R.C.

Components sought to have Movant disqualified as Mr. Babb's counsel and to have the DRC transcript suppressed."; "Then Circuit Judge John Minton presided over the case. He entered an order disqualifying Movant and suppressing the transcript. He also found that Movant's conduct violated SCR 3.130-4.2, which prohibits a lawyer from communicating about the subject of the representation with a party the lawyer knows to be represented by counsel, and SCR 3.130-8.3(a), which prohibits a lawyer from violating the Rules of Professional Conduct through the conduct of another.").

- Allen v. Int'l Truck & Engine, No. 1:02-cv-0902-RLY-TAB, 2006 U.S. Dist. LEXIS 63720, at *1-2, *25 (S.D. Ind. Sept. 6, 2006) (as a result of defendant's inadvertent filing one of its law firm's billing records in court, the plaintiffs discovered that the defendant had hired a "private investigation company to conduct an undercover investigation into allegations of racial hostility at its Indianapolis facility"; the court criticized defendant's lawyer Littler Mendelson, who knew or should have known that the investigator was engaging in improper ex parte contacts with represented adversaries; describing "Defendant's ostrich-styled defense"; explaining this "Defendant's counsel's culpability is compounded by their failure to affirmatively advise, instruct or otherwise act to prevent contact with represented employees or to prevent contact with unrepresented employees under false pretenses").

- Midwest Motor Sports v. Arctic Car Sales, Inc., 347 F.3d 693, 698 (8th Cir. 2003) (affirming an evidentiary sanction (precluding admission of gathered evidence), and denial of a monetary sanction, against lawyers whose investigator communicated ex parte with represented adversaries; explaining that the lawyer hired the investigator to visit a franchisee, and that the investigator spoke with the franchisee's represented owner during the investigation; "Arctic Cat's attorneys attempt to shield themselves from responsibility by 'passing the buck' to Mohr [Investigator]. They allege that they directed Mohr to speak only to low-level salespeople for the purpose of becoming familiar with the Arctic Cat line. Even if these factual assertions were true, lawyers cannot escape responsibility for the wrongdoing they supervise by asserting that it was their agents, not themselves, who committed the wrong. Although Arctic Cat's attorneys did not converse with Becker themselves, the Rules also prohibit contact performed by an investigator acting as counsel's agent. . . . In other words, an attorney is responsible for the misconduct of his nonlawyer employee or associate if the lawyer orders or ratifies the conduct. Model Rule of Prof'l Conduct R. 5.3. Accordingly, we conclude that Arctic Cat's attorneys are ethically responsible for Mohr's conduct in communicating with Becker as if they had made the contact themselves.").

Courts and bars have been somewhat more forgiving if investigators essentially act on their own, although some courts have prevented lawyers from using the fruits of any improper communications.

- North Carolina LEO 2003-4 (7/25/03) (explaining that a lawyer may not use a private investigator's testimony about conversations the investigator had with the plaintiff in a workers' compensation case, which tended to show that the plaintiff was not as severely injured as he claimed; explaining that the lawyer "instructed the private investigator not to engage Plaintiff in conversation," but that "[d]uring the surveillance, the investigator ignored Attorney's instructions and engaged Plaintiff in a conversation"; concluding that "to discourage unauthorized communications by an agent of a lawyer and to protect the client-lawyer relationship, the lawyer may not proffer the evidence of the communication with the represented person, even if the lawyer made a reasonable effort to prevent the contact, unless the lawyer makes full disclosure of the source of the information to opposing counsel and to the court prior to the proffer of the evidence"; also concluding that the lawyer may still use evidence "gained through the investigator's visual observations of Plaintiff" -- because "[v]isual observation is not a direct contact or communication with a represented person and does not violate Rule 4.2(a)").

- 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).

In 2005, an Eastern District of Virginia decision ultimately exonerated a lawyer in connection with an investigator's improper ex parte communications, but extensively discussed both the lawyers' and the investigators' responsibilities.

- United States v. Smallwood, 365 F. Supp. 2d 689, 691, 693, 695, 696, 699 (E.D. Va. 2005) (analyzing a situation in which a lawyer's investigator communicated ex parte with a represented person, and also tape-recorded a telephone call; noting that "[a]t issue, therefore, is whether an investigator hired by a lawyer must abide by an attorney's ethical obligations in Virginia not to (i) communicate with a person known to be represented by counsel regarding the subject of the representation, or (ii) electronically record a conversation with a third party without the full knowledge and consent of the other party."; explaining that the investigator's silence during the

tape-recording gave the wrong impression about who he was; "Significantly, the Investigator did not disclose his true identity as an investigator working for Smallwood, nor did he say anything to correct Brown's mistaken impression that the person on the line, i.e. the Investigator, was Dyer's uncle."; "[N]otably, a violation of Rule 4.2 occurs even where the represented party consents to the communication. . . . Because such consent is uncounseled, it cannot qualify as the knowing and intelligent consent required for the Rule."; "The Investigator pointed out at the hearing that Brown, not the Investigator, initiated the recorded telephone conversation and that the call took the Investigator by surprise. Yet, this is ultimately of no consequence, for what matters under the Rule is not which party initiated the communication, but that the communication occurred. Nor does it matter that the Investigator was surprised by the call; his surprise did not compel him to accept the call and participate in the communication; he could, of course, quite easily have declined to speak with Brown. The Investigator did not terminate the conversation once Brown came on the line, nor did he inform Brown that he was an investigator working on Smallwood's behalf. Instead, he permitted Brown to remain under the mistaken impression that the Investigator was a relative of Dyer interested in aiding Dyer by purchasing information from Brown so that Dyer could obtain government assistance in securing a sentence reduction. It follows, therefore, that this communication, if conducted by a lawyer, would have constituted a breach of the lawyer's professional ethics, subjecting the lawyer to discipline." (footnote omitted); "Given that a lawyer plainly could not ethically have communicated with Brown as the Investigators did here, it is necessary to consider whether the Investigators, as the lawyers' assistants and agents, may be held to the same ethical standard even though they are not members of the Bar. The answer to this question is readily apparent. Simply put, a lawyer should not be able to avoid ethical strictures that bind lawyers by using an assistant to engage in the proscribed conduct. In other words, in general, what a lawyer may not ethically do, his investigators and other assistants may not ethically do in the lawyer's stead. Were this not so, a lawyer might easily circumvent many ethical obligations through the use of an assistant or investigator who, given only a hint, cunningly perceives that his employer's cause can be aided by engaging in conduct that might be ethically forbidden to the lawyer. Further, it would give unscrupulous lawyers an incentive to provide those in their charge with only limited ethical direction. For these reasons, the Virginia Rules of Professional Conduct plainly contemplate that a lawyer's investigators or assistants, when acting on the lawyer's behalf, must abide by the ethical obligations of the legal profession as the Rules establish an affirmative duty for a lawyer to 'make reasonable efforts to ensure that [his nonlawyer assistants'] conduct is compatible with the professional obligations of the lawyer. See Rule 5.3, Va. R. Prof'l Conduct (2000). To be sure, a lawyer must, of necessity, often act through and with the help of assistants who are nonlawyers in order to accomplish the lawyer's work, and thus the

prudential concerns and ethical bounds that constrain the legal professional are of equal importance whether a lawyer acts directly or through the efforts of assistants or investigators. In general, therefore, a lawyer's assistants or investigators must abide by the lawyer's ethical obligations when they act on behalf of the lawyer." (footnotes omitted) (emphases added); concluding that "the lawyers in this case did not engage in any improper conduct nor did they knowingly authorize the Investigators to do so. At most, the lawyers may be faulted for failing to anticipate that events would occur that would require them to instruct the Investigators regarding their ethical obligations. Arguably, these events were not reasonably foreseeable in the circumstances. Nonetheless, the facts of this case are a useful reminder that lawyers are obligated to take affirmative steps to instruct and supervise their investigators or other assistants to ensure that they are aware of, and ultimately comply with, the lawyers' ethical obligations; in other words, it is incumbent upon an attorney to take all reasonable steps necessary to avoid inadvertent deception or unethical conduct carried out by his assistants or investigators." (emphasis added); "[A]n investigator or other assistant has an affirmative duty to learn and abide by a lawyer's ethical obligations; he may not simply claim ignorance of these duties and proceed to act with impunity; instead, investigators or other assistants should seek direction from their lawyer-employers when presented with areas of ethical ambiguity or uncertainty." (emphasis added); ultimately concluding that "[i]n the end, it is clear that neither the lawyers nor the Investigators knowingly engaged in any improper conduct"; allowing payment of the Investigator's bill).

Best Answer

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

B 10/14

Deception: Worthwhile Causes

Hypothetical 21

You have chosen as your favorite pro bono project a local private group that fights housing discrimination. Over the years, you have learned that the only effective way to find and eliminate housing discrimination is to use "testers." These "testers" are prospective homebuyers with false backgrounds that are identical in every way but one -- their race or national origin.

(a) May you participate as a "tester" in an effort to find and eliminate housing discrimination?

MAYBE

(b) May you supervise your group's use of such "testers" without engaging in the practice yourself?

YES (PROBABLY)

Analysis

Bars everywhere have wrestled with a lawyer's use of deception (either herself or through a non-lawyer) in the pursuit of some socially worthwhile goal.

A lawyer's deception implicates a number of ethics rules.

First, lawyers themselves must avoid deception when representing a client.

> In the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person.

ABA Model Rule 4.1(a). A comment describes this rule.

> A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the

> equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

ABA Model Rule 4.1 cmt. [1].

State ethics rules show a remarkable diversity in their approach to this basic principle. For instance, ABA Model Rule 4.1 prohibits only a lawyer's knowing false statement of material fact. The ABA Model Rules explain that this term

> denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

ABA Model Rule 1.0(f). The last sentence brings a touch of objectivity to the meaning. Commentators have explained that a lawyer cannot avoid violation of a rule requiring "knowing" conduct by willful blindness or other unreasonable behavior.

Virginia takes the ABA Model Rule approach to the level of required knowledge, but drops the materiality element.

> In the course of representing a client a lawyer shall not knowingly . . . make a false statement of fact or law.

Virginia Rule 4.1(a). Thus, on its face the Virginia ethics rules would prohibit a lawyer's insignificant (but knowing) lie. Ironically, this is exactly the opposite of the approach Virginia has taken to Rule 8.4. As explained below, Virginia added a phrase to ABA Model Rule 8.4(c) to avoid an absolute prohibition on all deceptive conduct, however insignificant.

Not surprisingly, courts punish such direct deception.[1]

Second, lawyers may not assist or counsel a client in committing fraud.

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[1] See, e.g., Attorney Grievance Comm'n v. Smith, 950 A.2d 101 (Md. 2008) (suspending a lawyer for pretending to be a police officer in a voicemail message left with a witness before a trial).

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

ABA Model Rule 1.2(d). A comment explains this rule.

> Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

ABA Model Rule 1.2 cmt. [9].

Not surprisingly, this obligation applies in litigation. "The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation." ABA Model Rule 3.3 cmt. [3].

Although such misconduct might be hard to detect, courts naturally punish lawyers who advise their clients to engage in deceptive conduct.

- Attorney Grievance Comm'n v. Elmendorf, 946 A.2d 542, 544 (Md. 2008) (reprimanding a lawyer who had sent the following email about the possibility of an acquaintance falsely claiming a one-year separation in order to obtain a no-fault divorce; "You can file whatever you want so long as the parties say that it has been a year, the court won't question it so long as the parties agree to that."; noting that the lawyer claimed to have later advised the acquaintance that the lawyer did not imply that the acquaintance should lie to the court; rejecting the bar's effort to have the lawyer suspended).

Third, lawyers must assure at least some level of similar conduct from non-lawyers that they supervise.

> With respect to a nonlawyer employed or retained by or associated with a lawyer[,] . . . (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ABA Model Rule 5.3(b), (c).

Fourth, the ABA Model Rules contain a catch-all provision that has vexed commentators for many years.

> It is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects [or] engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

ABA Model Rule 8.4(b), (c). As explained below, commentators have tried to interpret Model Rule 8.4(c) in a way that softens somewhat the absolute prohibition on any deceptive conduct.

Ironically, ABA Model Rule 8.4(b) prohibits a lawyer from committing a "criminal act" -- but only if that criminal act "reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." One would have expected that the "reflects adversely" proviso would also be added to ABA Model Rule 8.4(c). In fact, the proviso makes much more sense in ABA Model Rule 8.4(c) than (b). As it now stands, lawyers in a state following the ABA Model Rules might not automatically be

punished for a criminal act -- the bar must determine if that criminal act "reflects adversely" on the lawyer's honesty, trustworthiness, etc. However, a lawyer in that state can be punished for any other type of deceptive act (even if it does not "reflect adversely" on his honesty, etc.) -- presumably including making such knowingly false statements as "No, I really like the tie you gave me for Father's Day" or "I really loved your meatloaf."

As with ABA Model Rule 4.1, states have taken differing approaches to this rule. For instance, Virginia has taken what seems like a much more logical approach.

> It is professional misconduct for a lawyer to . . . (b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law; [or] (c) engage in conduct involving dishonesty fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law.

Virginia Rule 8.4(b), (c). Thus, Virginia includes the "reflects adversely" proviso in both the section dealing with criminal acts and the section dealing with other deceptive acts.

Vermont has not changed its rule, but a 2009 Vermont case articulated a limited reach of the seemingly unlimited prohibition on any deceptive conduct.

> [W]e are not prepared to believe that any dishonesty, such as giving a false reason for breaking a dinner engagement, would be actionable under the rules. Rather, Rule 8.4(c) prohibits conduct 'involving dishonesty, fraud, deceit or misrepresentation' that reflects on an attorney's fitness to practice law, whether that conduct occurs in an attorney's personal or professional life. V.R.Pr.C. 8.4(c). This affirms the hearing panel's conclusion the subsection (c) applies only 'to conduct so egregious that it indicates that the lawyer charged lacks the moral character to practice law.'"; "Admittedly, some false statements made to a third persons during the course of representation could also reflect adversely on a lawyer's fitness to practice, thus violating both rules. However, not all misrepresentations made by an

> attorney raise questions about her moral character, calling into question her fitness to practice law. If Rule 8.4 is interpreted to automatically prohibit 'misrepresentations' in all circumstances, Rule 4.1 would be entirely superfluous. There must be some meaning for Rule 8.4(c) independent of Rule 4.1 -- for we presume that the drafters meant every rule to have some meaning."; "Reading Rule 8.4 as applying only to misrepresentations that reflect adversely on a lawyer's fitness to practice law is additionally supported by authority from other jurisdictions. Sister courts have acknowledged that Rule 8.4(c) cannot reasonably be applied literally -- and with the same reasoning we have employed. See, e.g., Apple Corps. Ltd. v. Int'l Collectors Soc'y, 15 F. Supp. 2d 456, 475-76 (1998) (rejecting 'the literal application' of 8.4(c) on the grounds that it renders Rule 4.1 'superfluous'); see also D.C. Bar Legal Ethics Comm. Op. 323 (2004) ('Clearly [Rule 8.4(c)] does not encompass all acts of deceit -- for example, a lawyer is not to be disciplined professionally for committing adultery, or lying about the lawyer's availability for a social engagement.'

In re PRB Docket No. 2007-046, 2009 VT 115, at ¶¶ 12, 14, 15 (Vt. 2009).

Fifth, The ABA Model Rules contain another general provision that commentators have criticized for being essentially meaningless.

> It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.

ABA Model Rule 8.4(d). Much like the phrase "appearance of impropriety," the term "prejudicial to the administration of justice" provides no real guidance to lawyers or bar disciplinary committees.

The Restatement deals with tape recording and ex parte contacts, but not with the basic issue of deception.

> A lawyer may conduct an investigation of a witness to gather information from or about the witness. Such an investigation may legitimately address potentially relevant aspects of the finances, associations, and personal life of the witness. In conducting such investigations personally or through others, however, a lawyer must observe legal constraints on

> intrusion on privacy. The law of some jurisdictions, for example, prohibits recording conversations with another person without the latter's consent. When secret recording is not prohibited by law, doing so is permissible for lawyers conducting investigations on behalf of their clients, but should be done only when compelling need exists to obtain evidence otherwise unavailable in an equally reliable form. Such a need may exist more readily in a criminal-defense representation. In conducting such an investigation, a lawyer must comply with the limitations of § 99 prohibiting contact with [sic] represented person, of § 102 restricting communication with persons who owe certain duties of confidentiality to others, and of § 103 prohibiting misleading an unrepresented person.

Restatement (Third) of Law Governing Lawyers § 106 cmt. b (2000) (emphasis added).

Given these flat prohibitions on any deceptive conduct, there is simply no way to reconcile the ethics rules and commonly used deception -- even for a socially worthwhile goal.

Commentators have appeared to agree on a few basic principles. For instance, most authorities agree that the complete prohibition on any conduct "involving dishonesty, fraud, deceit or misrepresentation" in ABA Model Rule 8.4(c) cannot possibly mean what it says. Otherwise, a lawyer could lose his license by dishonestly answering questions from his wife such as "Does this dress make me look fat?"[2] The authorities therefore tend to argue that ABA Model Rule 8.4(c) must involve serious misconduct, or else it would render ABA Model Rule 4.1(a) superfluous.

But of course then they have to deal with Model Rule 4.1(a). At least that rule is limited to a lawyer's conduct "[i]n the course of representing a client." It also limits its reach to statements of "material" fact or law. Still, a lawyer participating in a housing

[2] Some states have wisely amended their version of Rule 8.4(c) to add the type of "reflects adversely on a lawyer's fitness" concept that appears in the mandatory reporting requirements. See Virginia Rule 8.4(c).

discrimination "test" presumably is "representing a client" and is clearly engaged in material deception. Whether the lawyer can ask a non-lawyer colleague to engage in such deception implicates ABA Model Rule 5.3. The answer is clearly "no" if the non-lawyer's conduct must match the lawyer's conduct.

Given this intractable discrepancy between the ethics rules and these common activities, commentators have proposed various rules changes that would allow socially worthwhile deception without totally abandoning the anti-deception principle.

An often-cited law review article by well-respected national bar leaders proposed the following standard for lawyer deception.

> (1) A lawyer employing an undercover investigator or discrimination tester must have reasonable grounds to believe that either: (a) the target person, entity, or group is engaged in criminal, corrupt, or otherwise unlawful activity, or (b) the deception is necessary to avoid physical bodily harm or death; and
>
> (2) The undercover investigator or discrimination tester can engage in misrepresentation only to the extent necessary for the limited purpose of detecting and/or proving the criminal or unlawful acts. The investigator or tester cannot engage or assist in any crime, even if for the purpose of investigating the target person or entity; and
>
> (3) With special regard to civil cases, a lawyer cannot authorize deception or misrepresentation for any other reason than those listed in (1) above. An undercover investigator or tester must not be used to circumvent the responsibilities of a lawyer under the Model Rules, and must be used only in connection with activities that would not violate the Model Rules if engaged in by a lawyer not acting as such (i.e. in a nonlawyer capacity). Any necessary deception must be used only in the public interest and with the intent of furthering justice.

David B. Isbell & Lucantonio N. Salvi, Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions

Prohibiting Misrepresentation Under the *Model Rules of Professional Conduct*, 8 Geo. J. Legal Ethics 791, 808 n.58 (1994-1995).

A 1989 article in the Notre Dame Law Review proposed the following standard:

> The ABA should recognize that it may not be unethical for an attorney to use deception when 1) the deception is coupled with a compelling reason to perpetrate the deception, 2) the deception is not intended for the benefit of the deceiver, 3) the deception is revealed within a reasonable time after the deception is perpetrated, 4) the deception is perpetrated with the intent of furthering justice, and 5) no reasonable alternative is available.

Christopher J. Shine, Deception and Lawyers: Away from a Dogmatic Principle and Toward a Moral Understanding of Deception, 64 Notre Dame L. Rev. 722, 749-50 (1989).

The ABA Intellectual Property Section recommended a similar standard for deceptive conduct.

> [3] This Rule pertains to statements of material facts that lawyers make in their professional capacity representing clients, not to statements made by persons acting in the capacity of an investigator in the course of gathering information, even though such person may be acting under the direction of a lawyer or may be him- or herself a lawyer. This Rule therefore does not apply to statements made by investigators to disguise their identity or purpose in order to facilitate gathering information. Communications made by an investigator may nonetheless present issues under other prohibitions of these Rules, such as those related to fraud, perjury or misrepresentations that reflect adversely on fitness to practice law or to communications with a person known to be represented by a lawyer.

Proposed Model Rule 4.1 cmt. [3] from the ABA IP Law Section (May 13, 1998).

None of these or similar proposals have made it very far at the ABA. In the meantime, several states have changed their rules.

For instance, Oregon allows all lawyers (not just government lawyers) to advise clients and supervise non-lawyers in some deceptive conduct, but not engage in it themselves.

> Notwithstanding paragraphs (a)(1), (3) and (4) and Rule 3.3(a)(1), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

Oregon Rule 8.4(b).[3]

More recently, several other states have adopted changes that are limited to government lawyers.

> A government lawyer involved with or supervising a law enforcement investigation or operation does not violate this rule as a result of the use, by law enforcement personnel or

[3] An Oregon legal ethics opinion applies this general rule to several examples. Oregon LEO 2005-173 (8/05) (addressing several scenarios under Oregon Rule 8.4(b), which indicates that "it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. 'Covert activity,' as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. 'Covert activity' may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future."; interpreting three situations, holding that (1) a lawyer cannot befriend or approach a witness pretending to be from witness's employer's personnel office and question the witness about an accident, because the lawyer's adversary is an injured worker and is not engaging in "violations of civil law, criminal law, or constitutional rights"; (2) a lawyer may not herself use a fictitious name when interviewing a doctor, in an effort to convince the doctor that she is severely injured, as part of an investigation into suspected fraud by the doctor in another accident case, noting that Rule 8.4(b) does not allow a lawyer to participate directly in covert activity; (3) a deputy district attorney may hire someone to pose as a drug customer in a sting operation, if he in good faith believes that unlawful drug dealings are taking place).

> others, of false identifications, backgrounds and other information for purposes of the investigation or operation.

South Carolina Rule 4.1 cmt. [2]. This South Carolina rule allows government lawyers themselves to engage in deceptive conduct.

> (2) The prosecutor shall represent the government and shall be subject to these Rules as is any other lawyer, except:
>
> (a) Notwithstanding Rules 5.3 and 8.4, the prosecutor, through order, directions, advice and encouragement may cause other agencies and offices of government, and may cause nonlawyers employed or retained by or associated with the prosecutor, to engage in any action that is not prohibited by law, subject to the special responsibilities of the prosecutor established in (1) above; and
>
> (b) To the extent an action of the government is not prohibited by law but would violate these Rules if done by a lawyer, the prosecutor (1) may have limited participation in the action, as provided in (2)(a) above, but (2) shall not personally act in violation of these Rules.

Alabama Rule 3.8(2). In contrast to the South Carolina rule, this Alabama rule only allows government lawyers to <u>supervise</u> non-lawyers in the deceptive conduct.

Florida has also adopted a rule dealing with this issue.

> A lawyer shall not . . . (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except that it shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to advise others about or to supervise another in an undercover investigation, unless prohibited by law or rule, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule.

Florida Rule 4-8.4(c). Florida's approach is different from Oregon's, South Carolina's and Alabama's. It allows government lawyers acting as lawyers to only supervise

others in the deceptive conduct. On the other hand, "government lawyers employed in a capacity other than as a lawyer" may engage in deceptive practices themselves.

Virginia added a sentence to the end of its Rule 5.3 Comment [1] -- which deals with non-lawyers.

> At the same time, however, the Rule is not intended to preclude traditionally permissible activity such as misrepresentation by a nonlawyer of one's role in a law enforcement investigation or a housing discrimination "test."

Virginia Rule 5.3 cmt. [1]. This comment essentially allows lawyers to supervise non-lawyers in traditionally accepted socially worthwhile deceptive conduct.

While the ABA has debated[4] and a handful of states acted, lawyers have continued to engage in knowingly deceptive conduct in furtherance of socially worthwhile goals.

For instance, an Arizona LEO clearly allowed lawyers to direct non-lawyers in such activities. Arizona LEO 99-11 (9/99) (indicating that "[a] private practice lawyer ethically may direct a private investigator or tester to misrepresent their identity or purpose in contacting someone who is the subject of investigation, only if the misrepresentations are for the purpose of gathering facts before filing suit"; the

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[4] ABA LEO 396 (7/28/95) ("There is no doubt that the use of investigators in civil and criminal matters is normal and proper. Particularly in the criminal context, there are legitimate reasons not only for the use of undercover agents. . . . to conduct investigations, but for lawyers to supervise the acts of those agents. And the investigators themselves are not directly subject to Rule 4.2, even if they happen to be admitted to the Bar (as many FBI agents are), because they are not, in their investigative activities, acting as lawyers: they are not 'representing a client.' However, when the investigators are directed by lawyers, the lawyers may have ethical responsibility for the investigators' conduct."; "Although there appears to be no decisional authority on the point, it seems clear, and widely understood, that the fact that an investigator is also a member of the bar does not render him, in his activities as an investigator, subject to those ethical rules -- the overwhelming majority of the provisions of the Model Rules -- that apply only to a lawyer 'representing a client.' Such an investigator would nonetheless be subject to those few provisions of the Model Rules, such as portions of Rule 8.4 (Misconduct) that apply to lawyers even when they are not acting as such. See, e.g., Rule 8.4(b): 'It is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.'")

hypothetical involved a "tester" whose goal was to investigate a school's possible discrimination. The Arizona Bar cited a number of cases approving the use of such "testers" in racial discrimination cases, including Richardson v. Howard, 712 F.2d 319 (7th Cir. 1983)).

Courts have clearly approved such conduct.

- Mena v. Key Food Stores Co-Operative, Inc., 758 N.Y.S.2d 246, 250 (N.Y. Sup. Ct. 2003) (finding the plaintiffs in a racial bias lawsuit had not acted improperly in being trained by the lawyer how to tape-record in-person and telephone conversations in which defendant's employees made racially offensive statements; "Contemporary ethical opinions hold that a lawyer may secretly record telephone conversations with third parties without violating ethical strictures as long as the law of the jurisdiction permits such conduct."; explaining that "[h]ere, too, we have activity that might otherwise evade discovery or proof and a circumstance which has policy interests as compelling as those we find in housing discrimination matters. The interests at stake here transcend the immediate concerns of the parties and attorneys involved in this racial bias action. The public at large has an interest in insuring that all of its members are treated with that modicum of respect and dignity that is the entitlement of every employee regardless of race, creed or national origin.").

- Kyles v. J.K. Guardian Sec. Servs., Inc., 222 F.3d 289 (7th Cir. 2000) (holding that employment "testers" have standing to sue for employment discrimination).

- Richardson v. Howard, 712 F.2d 319 (7th Cir. 1983) (approving use of a professional tester's testimony in the case alleging racial discrimination in the leasing of apartments).

(a) The ABA Model Rules contain a general prohibition on lawyers engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation." ABA Model Rule 8.4(c). ABA Model Rule 5.1(a) requires that law firms adopt "measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." Therefore, lawyers should avoid participation in such "tests" because they would require deceitful conduct by the lawyer.

(b) A law firm's responsibility for non-lawyer staff members is slightly different from the responsibility the law firm has for assuring that lawyers comply with the ethics rules. ABA Model Rule 5.3(a). This difference means that in certain limited circumstances law firm staff may engage in conduct that would be a violation of the rules if performed by a lawyer.

Best Answer

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

B 10/14

Manipulating the Choice of Judges: Docket Assignment

Hypothetical 22

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

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

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

YES (PROBABLY)

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

MAYBE

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

NO

Analysis

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

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

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

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

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

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

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

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

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

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

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

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

Id. at *7.

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

Best Answer

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

b 12/14

Manipulating the Choice of Judges: Triggering Recusal

Hypothetical 23

Several clients have hired you to pursue employment discrimination cases in Northern District of Alabama federal court. You expect other plaintiffs will hire you in the future to pursue similar cases. In previous discrimination cases, your clients have been extremely unlucky before one Northern District of Alabama judge.

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

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

YES

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

NO (PROBABLY)

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

MAYBE

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

MAYBE

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

MAYBE

Analysis

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

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

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

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

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

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

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

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

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

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

Id. at 115.

(b) A federal statute,[1] the ABA Model Code of Judicial Conduct,[2] the Code of Conduct for United States Judges[3] and every state counterpart requires disqualification if a judge's close family member appears as a lawyer before the judge. In some

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1 28 U.S.C. § 455(b)(5)(ii).

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

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

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

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

A number of courts have dealt with lawyers' efforts to trigger a judge's recusal.

In Grievance Adm'r v. Fried, 570 N.W.2d 262 (Mich. 1997), the court dealt with similar cases before the Monroe Circuit Court, in which three judges served. Two of the judges "had a reputation within the local legal community of being tough sentencing judges, while [the third judge] had the reputation of being somewhat more lenient." Id. at 263. One of the tough sentencing judges had a first cousin who practiced in the area, and the other tough sentencing judge had a brother-in-law who practiced in the area. The Michigan Bar alleged that these two lawyers improperly accepted retainers specifically for the purpose of disqualifying the judges who were relatives. In some cases, they received $1,000 retainer payments when appearing.

The Michigan grievance commission somehow obtained statements from clients indicating that the lawyers freely admitted that this was their practice. In one criminal case, one of the tough-sentencing judges was assigned to handle the matter. His relative entered an appearance, which caused his recusal. When the case was re-assigned to the other tough sentencing judge, his relative entered an appearance -- causing the case to be assigned to the more lenient judge.

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[4] ABA Model Code of Judicial Conduct, Rule 2.11(C) (2007); Code of Conduct for United States Judges, Canon 3D (2009).

The Michigan Supreme Court agreed with the lawyer disciplinary board that lawyers may freely undertake some action in an effort to "forum shop," but that these lawyers' actions crossed the line.

> The ADB correctly observes that there are a variety of permissible steps that have a degree of similarity to the charged conduct. For instance, a lawyer may file a motion for change of venue that recites legal grounds, but is motivated by a desire to move the case to a jurisdiction where the lawyer believes success is more likely. A lawyer may accept employment and be brought into a case because the client (or an attorney already involved in the case) believes the lawyer has a record of success in appearances against an opposing lawyer, or before a particular judge. . . . In the instant case, the Grievance Administrator charges that the respondents were selling, not their professional services, but their familial relationships.

Id. at 267. The Michigan Supreme Court found that the lawyers' conduct was "prejudicial to the administration of justice." Id.

> The alleged conduct is contrary to justice, ethics, honesty, and good morals. It is wrong. . . .
>
> . . . .
>
> It is unethical conduct for a lawyer to tamper with the court system or to arrange disqualifications, selling the lawyer's family relationship rather than professional services. A lawyer who joins a case as co-counsel, and whose principal activity on the case is to provide the recusal, is certainly subject to the discipline.
>
> On the other hand, the rules do not prohibit a lawyer from taking a case that might lead to a recusal. Mr. Golden and Mr. Rostash are not precluded from practicing law in the Monroe Circuit Court. The Grievance Administrator alleges that there are sixty-six cases in which the respondents acted improperly to gain recusals. To the extent that these are cases in which Mr. Golden or Mr. Rostash appeared as lawyers and were substantially involved in the representation of the client, then the recusal was an unavoidable result of the rules established to avoid conflicts of interest.

> An appearance filed principally to obtain the recusal (or de minimis activity as co-counsel to a lawyer who is handling the case, with the co-counsel designation serving with principally to obtain the recusal) is a ground for discipline. . . .

Id. at 267-68. The Michigan Supreme Court remanded to the disciplinary authorities.

Interestingly, one circuit court (the Eleventh Circuit) has twice dealt with such efforts involving Northern District of Alabama Judge U.W. Clemon. These incidents involved the rule involving a judge's relative appearing as a lawyer in the proceeding himself or herself, as well as the rule involving the relative's firm appearing in the proceeding (discussed more fully below).

Issues involving Judge Clemon arose as early as 1995. At that time, Judge Clemon's nephew was working at the Constangy, Brooks law firm.

As explained in the later case of Robinson v. Boeing Co., 79 F.3d 1053, 1056 (11th Cir. 1996), Judge Acker of the Northern District of Alabama was handling a case that a plaintiff had brought against BellSouth. Judge Acker ordered the clerk to provide a list of all cases filed in the Northern District of Alabama between January 1, 1993 and June 2, 1995, in which the case was originally assigned to Judge Clemon, but thereafter any lawyer from Costangy, Brooks appeared for the defendant -- thus triggering Judge Clemon's recusal.

As explained above, the ethics rules do not require judges to recuse themselves merely because a litigant had hired a law firm which employs the judge's close relative. The court nevertheless assumed that a defendant's retention of Costangy, Brooks would automatically cause Judge Clemon's recusal.

Judge Acker explained in his order that the BellSouth case was the first such case assigned to him in those circumstances, but that the clerk reported that lawsuits filed against the following corporate defendants faced exactly the same fate (original assignment to Judge Clemon, later appearance of Constangy, Brooks, recusal of Judge Clemon, and reassignment to another judge): AmSouth Bank, University of Alabama, Wal-Mart Inc., Parker Hannafin Corp., Southern Company Services, Inc., Southern Natural Gas, ALFA Mutual Insurance Co., Blue Cross and Blue Shield, Baptist Medical Center, Jim Walter Resources, Inc., Liberty National Life Insurance Co., Krystal Co., Compass Bancshares, Inc., etc.

Judge Acker reached the following conclusion:

> The court has no way of knowing what the incidence of Constangy, Brook and Smith's being retained by defendants would have been if the above-named cases had been originally assigned to judges other than Judge Clemon, but an intelligent guess is that the incidence would have been less. What, if anything, this court should do about the matter will be for the entire court and not for one judge. Meanwhile, the defendant in this case is represented by competent counsel and shall file its answer (which may include a motion to dismiss) . . . .

Id. at 1056-57. Unfortunately, it is unclear what step Judge Acker took after conducting this analysis. The order does not explicitly exclude Costangy, Brooks from representing BellSouth.

The issue of Judge Clemon came up again just a few years later. An employment plaintiff sued Boeing and the case was assigned to Judge Clemon. About fifteen months later, Boeing sought to associate lawyers from Constangy, Brooks as "additional trial counsel cognizant of the fact that Judge Clemon's nephew was

associated with the firm and granting defendant's motion would most certainly lead to Judge Clemon's recusal." Id. at 1054.

Not surprisingly, Boeing argued that it wanted to hire Constangy Brooks because of "the additional attorneys' knowledge of employment-related matters and the vast resources of the firm." Id. Another district judge heard Boeing's motion, and denied Boeing's effort to add Constangy Brooks. That judge did not find that Boeing was attempting to manipulate the system, but noted the possibility of abuse.

> "If the issue is truly not one of 'judge shopping' the denial of the motion will not adversely affect the defendant. There is no shortage of law firms available to replace the Lanier-Ford law firm. The fact that a case has been pending a considerable period of time lends itself to potential abuse after there has been an opportunity for considering rulings, discussions, etc. of a trial judge. No matter how extensive the discovery may be, the true motive will be elusive, non-objective and not likely truly ascertainable. The discovery issues, especially those involving attorney-client privilege, are complex, and further discovery would not likely result in a confession or 'smoking gun.' When there has been a passage of fifteen months, the problem is exacerbated. When there has been such a passage of time, the burden to establish the right to join a disqualifying firm is greater. The court concludes that the motion should be denied."

Id. at 1055 (emphasis added). The Eleventh Circuit affirmed that denial of Boeing's motion to retain Judge Clemon's nephew's firm.

The Eleventh Circuit concluded that "[t]his potential for manipulation or impropriety may be considered, without making specific findings, a difficulty the deciding judge reflected upon in his opinion." Id. at 1056.

The Eleventh Circuit addressed matters involving Judge Clemon again seven years later. In re BellSouth Corp., 334 F.3d 941 (11th Cir. 2003), the Eleventh Circuit

denied a petition for writ of mandamus filed by BellSouth, which was attempting to overturn a district court's order disqualifying Judge Clemon's nephew and the law firm in which he was then a partner (Lehr Middlebrooks Price & Proctor) from representing BellSouth.

The Eleventh Circuit first provided the background of the judicial ethics rules that applied.

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

Id. at 943-44 (emphasis added). This per se approach does not appear in the judicial ethics rules -- which reject such an absolute rule.

The Eleventh Circuit acknowledged that "[i]t has long been a matter of concern that parties in the Northern District of Alabama might be taking strategic advantage of the recusal statute to, in effect, 'judge-shop.'" Id. at 944. The court explained that after the early decisions, the Northern District of Alabama adopted a "Standing Order" essentially creating a presumption that any party adding a lawyer in a case before

Judge Clemon was acting improperly, if the addition of that lawyer would result in Judge Clemon's recusal.

> ". . . There shall be a strong, but rebuttable, presumption that the reason for such a proposed addition or substitution of counsel is to cause recusal or disqualification of the assigned judge . . . ."

Id. at 945 (quoting from Standing Order).

In the case before the court this time, the Eleventh Circuit noted that Judge Clemon's nephew filed a stand-alone appearance as counsel of record eleven days after the plaintiff filed a class-action employment discrimination case against BellSouth. The case had been assigned to Judge Clemon, but another judge heard the disqualification motion. That judge disqualified the Judge Clemon's nephew and his law firm.

The Eleventh Circuit acknowledged that the Standing Order did not technically apply to the case before it, because BellSouth did not add Judge Clemon's nephew as additional counsel, but rather retained the nephew from the beginning. However, the Eleventh Circuit noted that the district court had been "suspicious" about BellSouth's retention of Judge Clemon's nephew, and had conducted some research.

> The court then discussed BellSouth's history of retaining Price [Judge Clemon's nephew] as counsel. Based on a computer analysis by court staff, Price was retained in only four of the 204 cases in which BellSouth was sued in the Northern District of Alabama since 1991. Although the 204 cases were divided among 19 different judges, three of the four Price cases were initially referred to Judge Clemon, forcing his recusal. The court found the fourth case to be of dubious value, since the appearance was entered only after the Jenkins controversy developed, suggesting it may have been contrived. Applying the presumption in light of the foregoing evidence, the district court found that the reason

> for the selection of Price as counsel was to cause the recusal of the assigned judge.

Id. at 947. The Eleventh Circuit ultimately agreed that the Standing Order did not apply, but nevertheless denied BellSouth's petition for writ of mandamus. Ironically, BellSouth had already been represented for over a year by the Constangy firm -- the law firm where Judge Clemon's nephew previously worked.

Well-respected Judge Tjoflat filed a lengthy dissent (even though he had been one of three judges who issued the per curiam decision in the earlier Robinson v. Boeing Co. case (discussed above)). He thought that Judge Clemon should automatically have disqualified himself as soon as his nephew filed his notice of appearance. Judge Tjoflat noted that Judge Clemon's nephew had appeared from the beginning of the case, so the situation did not involve BellSouth later choosing the nephew "as counsel to force the district court and the respondents to start from scratch with a new judge after expending significant resources." Id. at 976 (Tjoflat, J., dissenting). Judge Tjoflat worried about the process that the majority would require.

> If the majority is correct that the recusal statute authorizes the disqualification of counsel hired to force recusal of the first judge, this will require an evidentiary hearing before a second judge every time the first judge's third-degree relative is retained as counsel and the opposing party would like the proceedings to remain before the first judge. Under the majority's scheme, a party who wants the first judge to stay on the case because of a type of bias not covered by the recusal statute - e.g., ideological bias - will always move to disqualify the relative once he appears as counsel in the case, even if the relative is retained for legitimate reasons long before the complaint is ever filed. In every such case, the motion to disqualify will force an evidentiary hearing before a second judge to determine the party's motivation for hiring the judge's relative, this hearing will be necessary even if the motion to disqualify the relative

> is baseless because the first judge is conflicted and thus cannot rule that the motion is baseless.

Id. at 977 (Tjoflat, J., dissenting). Judge Tjoflat predicted that this would result in a lengthy and inappropriate evidentiary process.

> Following an evidentiary hearing in which the moving party demonstrates that the first judge is likely to be biased in his favor and the relative was hired to avoid this bias, and it appears that the moving party only wants the case returned to the first judge so that he can capitalize on the judge's bias in favor of his position, there would be, at the very least, a reasonable basis to question the first judge's impartiality under Section 455(a), if the case were reassigned to him.

Id. at 978 (Tjoflat, J., dissenting). Judge Tjoflat concluded that "[a]voiding this ugly scenario is why Congress opted to eliminate a hearing on a party's motive for hiring the judge's relative in the first place." Id. at 978 (Tjoflat, J., dissenting).

Interestingly, about as many pages of judicial analysis have been devoted to Judge Clemon's situation as to all other judges combined.

Still, a few other courts have dealt with similar recusal issues.

- Valley v. Phillips County Election Comm'n, 183 S.W.3d 557, 560 (Ark. 2004) (addressing a situation in which three days after learning that his case had been assigned to a particular judge, the plaintiff hired the partner of the judge's political opponent; concluding that "Valley retained [the lawyer] to force recusal" -- and disqualifying the lawyer).

- United States v. Jones, 102 F. Supp. 2d 1083, 1086 (E.D. Ark. 2000) (addressing a situation in which lawyer Luther Sutter filed an entry of appearance for criminal defendant Jones, thus triggering recusal of the judge handling the criminal matter; noting that "[b[y order filed on June 1st in the case of Harris v. Lester, 4:99cv00320 GH, the Court filed an order of recusal due to family members of the Court and family members of the plaintiff's attorney, Sutter, having recently participated in religious and church activities. By memo dated June 2nd, Sutter was added to the Court's recusal list. On June 7th, Sutter personally visited with several of this Court's staff members and received clarification that the recusal would be in all the cases where he was attorney of record and would apply to him personally and not other members of the firm. The attachments to the June 19th motion for

> accommodation clearly show that Sutter was aware when he entered his appearance here that the undersigned was the judge assigned to this case."; refusing to allow Sutter's appearance on behalf of Jones).

At least one bar has taken the same approach.

- Michigan LEO JI-44 (11/1/91) ("A lawyer may not associate as co-counsel with a lawyer in another firm, or offer or accept a referral from a lawyer, when one of the reasons for associating with or referring to the particular lawyer is to instigate a judicial recusal.").

(c) Courts obviously have an easier time analyzing (and possibly finding an improper motive in) a litigant's retention of a lawyer whose hiring triggers a judge's recusal after the judge has begun to handle the case. In some of the situations discussed above, the cases have been pending for some time.

For instance, in In re BellSouth Corp., 334 F.3d 941 (11th Cir. 2003), the Eleventh Circuit noted that

> [c]ourts in the district have been asked to apply the Standing Order several times in cases assigned to Judge Clemon in which Price (Judge Clemon's nephew) appeared. In two cases brought to our attention, courts declined to invoke the presumption of wrongful intent, because Price and LMPP [Price's law firm] had appeared from the outset rather than as substitute or additional counsel.

Id. at 945. In the case before the court, Judge Clemon's nephew entered an appearance just eleven days after the plaintiff filed the complaint against BellSouth -- although the case apparently had been assigned to Judge Clemon before that time.

One of the interesting questions is how (or even whether) the court can assess a client's motives in retaining lawyers.

In Grievance Adm'r v. Fried, 570 N.W.2d 262 (Mich. 1997), the Michigan disciplinary authority somehow obtained access to privileged communication between the clients and the lawyers -- and thus could point to several admissions that the

lawyers were purely motivated by their desire to recuse their relatives from acting as judges.

In one of the Eleventh Circuit cases (In re BellSouth Corp., 334 F.3d 941 (11th Cir. 2003)) and in the Eastern District of Arkansas case discussed above, the courts had entered orders dealing with the situation. The order involving Judge Clemon created a rebuttable presumption that retaining the judge's nephew or the nephew's law firm was improper. The Eastern District of Arkansas order memorialized the judge's intent to recuse himself if any litigant hired a family/church friend.

In the matters involving Judge Clemon, the district court examined statistics to demonstrate some improper motive by corporate defendants obviously anxious to avoid their cases being heard by Judge Clemon.

Absent some evidence that a lawyer has retained co-counsel primarily to disqualify a judge sometime in the future, it is difficult to see how the lawyer could be punished for his or her selection of co-counsel.

(d) A comment to the ABA Model Judicial Code,[5] the Code of Conduct for United States Judges,[6] and state counterparts explains that a judge does not have to disqualify himself or herself just because a litigant appearing before the judge is represented by a lawyer who practices in the firm with one of the judge's relatives.

Instead, the issue is whether the relative has any interest or any "de minimis[] interest"[7] that could be "substantially affected by the outcome of the proceeding."[8]

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

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

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

Courts and bars take different positions on this issue, but it is more likely that a judge would be disqualified if one of the judge's close relatives was a partner (rather than an associate) in the law firm representing one of the litigants before the judge.

As explained elsewhere, judges wondering whether they must disqualify themselves in a setting like that might choose to disclose the relationship, and follow the process for seeking litigants' and lawyers' consent to stay in the case.[9]

Many courts and bars have condemned efforts to seek a judge's disqualification by hiring a law firm that employs one of the judge's relatives. Several cases dealing with Northern District of Alabama Judge U.W. Clemon (discussed above) seemed not to differentiate much between situations in which Judge Clemon's nephew appeared personally, and situations in which colleagues from his law firm appeared. It would be easy to understand this reaction if the judge had already announced that the judge would recuse himself or herself if any colleague of the judge's relative appeared as a lawyer before the judge (or if there was a track record of the judge doing so). In that situation, the judge would essentially have turned the fairly subtle analysis of the relative's "interest" in the firm into a per se rule -- which other litigants and their lawyers would be tempted to use in manipulating the judge selection.

(e) Nothing in the ABA Model Judicial Code or in any of its state equivalents requires judges to recuse themselves if a litigant before the judge has hired the law firm in which the judge previously served as a partner or as an associate. Instead, judges

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[8] 28 U.S.C. § 455(b)(5)(ii); Code of Conduct for United States Judges, Canon 3C(1)(d)(ii) & (iii) (2009).

[9] ABA Model Code of Judicial Conduct, Rule 2.11(C) (2007); Code of Conduct for United States Judges, Canon 3D (2009).

use their own judgment about that situation, either: (1) automatically disqualifying themselves (for at least a certain period of time); (2) making the required disclosure and seeking the litigants' and lawyers' consent to continue handling the case under the prescribed process; or (3) not disclosing the affiliation at all (often after a lapse of time following the judge's departure from the firm).

Given the lack of any certain rules about the effect of this situation, it is somewhat surprising that several courts in high-profile cases found that litigants had acted improperly in hiring law firms at which the judges hearing the case had previously worked.

- Order at 2, 2-3, 3, 4, 4-5, Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp., No. 00-1218 (Fed. Cir. Nov. 28, 2001) (not citable as precedent pursuant to Fed. Cir. R. 47.6) (addressing a situation in which ex-solicitor general Seth Waxman and his new firm of Wilmer Cutler appeared as counsel for appellant DeKalb Genetics after that company had summary judgment entered against it; holding that Wilmer Cutler "surely knew that upon the filing of its entry of appearance, two members of the [federal circuit] panel would be called upon to determine" whether Wilmer Cutler's appearance "counsels their disqualification from further proceedings in this case" (emphasis added); explaining that one member of the panel departed from Wilmer Cutler in 1990 and at that time severed all financial connections with Wilmer Cutler, while another member of the panel "more recently retained a financial interest in the firm"; noting that the Second Circuit was "similarly disrupted" in an early case involving similar facts; concluding that "[w]e see no reason not to follow the rule that in these circumstances, the judges stay and the new lawyers go"; acknowledging that "[t]his court, of course, cannot know precisely why Mr. Waxman's skills have been sought by Appellant"; "If he is desired only for strategic advice, no entry of appearance would have been required, and we would have been saved the need to examine our duties under the Canons. Mr. Waxman's entry however leaves open substantive participation by Wilmer, Cutler & Pickering in the remainder of the appeal here, and it is that situation which compels our invocation of the rule that protects the integrity of our appellate process."; sua sponte ordering Mr. Waxman and Wilmer Cutler to withdraw their entry of appearance).

- In re Federal Communications Comm'n, 208 F.3d 137, 139, 139-40, 139 n.1 (2d Cir. 2000) (addressing a situation in which Gibson, Dunn entered an

> appearance for its client NextWave in preparation for a petition for rehearing, thereby triggering the recusal of one of the judges who signed the order that NextWave sought to overturn; noting that "[i]t cannot have escaped the notice of the Gibson, Dunn firm and its several partners that one of the members of this Court's panel, Judge Robert Sack, was a member of that firm from 1986 until 1998. It was therefore obvious that Gibson, Dunn's appearance, if accepted by this Court, would draw into question Judge Sack's ability or willingness to remain on the panel, regardless of whether counsel focused on the relevant texts." (emphasis added); ultimately rejecting the appearance of Gibson, Dunn; "Once the members of a panel assigned to hear an appeal become known or knowable, counsel thereafter retained to appear in that matter should consider whether appearing might cause the recusal of a member of the panel. We make no finding as to good faith or intent by the estimable lawyers of Gibson, Dunn. It is clear, however, that tactical abuse becomes possible if a lawyer's appearance can influence the recusal of a judge known to be on a panel. Litigants might retain new counsel for rehearing for the very purpose of disqualifying a judge who ruled against them. As between a judge already assigned to a panel, and a lawyer who thereafter appears in circumstances where the appearance might cause an assigned judge to be recused, the lawyer will go and the judge will stay. . . . So the failure of counsel to consider in advance the known or knowable risk of a judge's recusal may result in the rejection of the appearance by that lawyer or firm."; ironically, noting that "On March 2, 2000, a motion was made by Global Crossing Ltd. and Liberty Media Corporation for leave to file a brief amicus curiae in support of NextWave's position. The motion, which has yet to be adjudicated, was filed by Simpson Thacher & Bartlett. A second member of the panel is a former partner of that firm; and a current partner of that firm is the son of the third member of this panel.").

The judicial codes certainly do not require such a harsh approach, but courts perceiving some attempt to manipulate the system understandably resist such efforts.

Best Answer

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

b 12/14

Challenging Court Orders

Hypothetical 24

In reading about the civil rights movement, you noted that some lawyers were ordered to produce the names of those contributing financially to various civil rights organizations. You wonder about those lawyers' duty to resist such court orders.

(a) To comply with their ethics confidentiality duty, were civil rights lawyers required to seek an interlocutory appeal of such orders?

MAYBE

(b) If the only way to have assured an interlocutory review was to have ignored such a court order and then appealed the resulting contempt citation, were civil rights lawyers ethically obligated to have done so?

NO (PROBABLY)

Analysis

(a)-(b) Compliance with a court order requiring disclosure of protected client information involves both ethics issues and privilege principles. Lawyers must resist such court orders up to a certain point -- both to comply with their ethics confidentiality duty and to avoid a court finding that the lawyers' client voluntarily disclosed protected communications or documents and therefore waived any privilege or work product protection.

Ethics Confidentiality Duty

The 1908 ABA Canons of Professional Ethics did not address lawyers' obligation to comply with or resist court orders requiring disclosure of protected client information.

The 1969 ABA Code of Professional Responsibility provided a safe harbor for such disclosure.

> A lawyer may reveal . . . [c]onfidences or secrets when permitted under Disciplinary Rules or required by law or court order.

ABA Model Code of Professional Responsibility, DR 4-101(C)(2) (emphasis added). An Ethical Consideration mentioned lawyers' compliance with law, but not a court order.

> The obligation to protect confidences and secrets obviously does not preclude a lawyer from revealing information when his client consents after full disclosure,[3] when necessary to perform his professional employment, when permitted by a Disciplinary Rule, or when required by law.

ABA Model Code of Professional Responsibility, EC 4-2 (footnote omitted).

The 1983 ABA Model Rules of Professional Conduct did not initially contain a black letter provision allowing lawyers to disclose protected client information to comply with law or court orders. This seems like a strange omission, but the ABA Standing Committee on Ethics and Professionalism essentially recognized the same safe harbor despite the absence of a black letter rule. A 1994 ABA legal ethics opinion noted the absence of a specific rule, but pointed to narrow comment language in finding one anyway.

> [U]nlike DR 4-101(C)(2), Rule 1.6 does not specifically provide that 'a lawyer may reveal confidences or secrets when required by law or court order.' Nevertheless, the Comment to Rule 1.6 does state that if a lawyer is 'called as a witness to give testimony concerning a client, absent waiver by the client, Paragraph (a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.'

ABA LEO 385 (7/5/94) (footnotes omitted). ABA LEO 385 explained that lawyers must resist such court orders, and certainly implied that lawyers must seek interlocutory relief if it was available.

> This recognition that a court may supersede the lawyer's obligation of confidentiality under Rule 1.6, however, does not mean that the lawyer should be a passive bystander to attempts by a government agency -- or by any other person or entity, for that matter -- to examine her files or records. To the contrary, it is the opinion of the Committee that, in the situation here being considered -- i.e., where a governmental agency serves on the lawyer a subpoena or court order directing the lawyer to turn over to the agency the lawyer's files relating to her representation of the client -- the lawyer has a professional responsibility to seek to limit the subpoena, or court order, on any legitimate available grounds (such as the attorney-client privilege, work product immunity, relevance or burden), so as to protect documents as to which the lawyer' s obligations under Rule 1.6 apply. Only if the lawyer's efforts are unsuccessful, either in the trial court or in the appellate court (in those jurisdictions where an interlocutory appeal on this issue is permitted), and she is specifically ordered by the court to turn over to the governmental agency documents which, in the lawyer's opinion, are privileged, may the lawyer do so.

Id. (footnote omitted) (emphasis added)).

In 2002, the ABA Model Rules finally added a black letter rule allowing disclosure of protected client information to comply with law and court orders.

> A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to comply with other law or a court order.

ABA Model Rule 1.6(b)(6) (emphasis added).

A comment (added at the same time as comment 11) backed off a bit from the 1994 ABA legal ethics opinion's insistence that lawyers seek an interlocutory appeal.

> A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is

> protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal to the extent required by Rule 1.4. Unless review is sought, however, paragraph (b)(6) permits the lawyer to comply with the court's order.

ABA Model Rule 1.6 cmt. [15] (emphasis added). Thus, the comment indicates that lawyers "should" assert nonfrivolous claims resisting a court order. The comment requires that lawyers consult with their clients about an appeal, but does not clearly require that lawyers comply with a client's direction to appeal an adverse ruling. However, the comment recognizes that the lawyer might appeal a court order requiring disclosure of protected client information.

Another ABA Model Rule comment predictably warns lawyers to comply with such disclosure obligations as narrowly as possible, and to restrict disclosure beyond those entitled to the client information under such obligation.

> Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to accomplish the purpose. If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

ABA Model Rule 1.6 cmt. [16] (emphasis added).

The ABA dealt with this issue again in 2010. ABA LEO 456 (7/14/10) addressed lawyers' right to defend themselves from criminal clients' ineffective assistance of

counsel claims. In addressing lawyers' response to an order compelling disclosure of arguably protected client information, the ABA indicated that a lawyer may appeal such an order -- but did not indicate whether the lawyer had to do so.

- ABA LEO 456 (7/14/10) ("Ordinarily, if a lawyer is called as a witness in a deposition, a hearing, or other formal judicial proceeding, the lawyer may disclose information protected by Rule 1.6(a) only if the court requires the lawyer to do so after adjudicating any claims of privilege or other objections raised by the client or former client. Indeed, lawyers themselves must raise good-faith claims unless the current or former client directs otherwise."; "[T]he criminal defendant may be able to object based on relevance or maintain that the attorney-client privilege waiver was not broad enough to cover the information sought. If the court rules that the information sought is relevant and not privileged or otherwise protected, the lawyer must provide it or seek appellate review." (emphasis added)).

The Restatement takes essentially the same approach as the ABA Model Rules, but provides more guidance to lawyers wondering what steps they must take to challenge a court order before relying on the safe harbor.

> A lawyer may use or disclose confidential client information when required by law, after the lawyer takes reasonably appropriate steps to assert that the information is privileged or otherwise protected against disclosure.

Restatement (Third) of Law Governing Lawyers § 63 (2000).

Although the provision only refers to "law," a comment mentions scenarios involving court orders.

> A lawyer's general legal duty . . . not to use or disclose confidential client information . . . is superseded when the law specifically requires such use or disclosure. For example, a lawyer may be called as a witness and directed by the tribunal to testify to what the lawyer believes is confidential client information protected by the attorney-client privilege . . . , the work-product immunity . . . , or another evidentiary rule. The scope of the protection afforded by the attorney-client privilege and the work-product immunity may be debatable in various circumstances. Similar issues may arise in pretrial discovery or in supplying evidence to a

> legislative committee, grand jury, or administrative agency. A lawyer may be directly required to file reports, such as registering as the agent for a foreign government or reporting cash transactions. Other laws may require lawyers to turn over certain evidence and instrumentalities of crime to governmental agencies . . . . In such situations, steps by the lawyer to assert a privilege would not be appropriate and are not required.

Restatement (Third) of Law Governing Lawyers § 63 cmt. a (2000) (emphasis added).

The Restatement then discusses lawyers' possible duty to appeal an adverse court order, and whether lawyers must suffer a contempt citation if that is the only route to an interlocutory appeal.

> Whether a lawyer has a duty to appeal from an order requiring disclosure is determined under the general duties of competence . . . . A lawyer may be instructed by a client to appeal . . . . If a lawyer may obtain precompliance appellate review of a trial-court order directing disclosure only by being held in contempt of court . . . , the lawyer may take that extraordinary step but is generally not required to do so by the duty of competent representation. In any event, . . . the lawyer should inform the client of an attempt to obtain the client's confidential information if it poses a significant risk to the material interests of the client and when circumstances reasonably permit opportunity to inform the client.

Restatement (Third) of Law Governing Lawyers § 63 cmt. b (2000) (emphasis added). Thus, the Restatement seems to require lawyers to seek interlocutory review, but does not require lawyers to be held in contempt if that is the only way to obtain such interlocutory review.

Some states provide even more specific guidance. For instance, Florida's ethics rules explicitly indicate that lawyers may appeal court orders requiring disclosure of protected client information.

> When required by a tribunal to reveal such information ["relating to representation of a client"], a lawyer may first exhaust all appellate remedies.

Florida Rule 4-1.6(d).

Some legal ethics opinions parallel the 1994 ABA legal ethics opinion that seemed to require lawyers to file an interlocutory appeal if such a remedy is available -- but follow the current version of the ABA Model Rules in declining to require lawyers to suffer a contempt citation.

- District of Columbia LEO 288 (2/16/99) (analyzing the ethics rules governing a lawyer's response to a congressional subpoena seeking client confidences from the lawyer; "The inquirer seeks to know how far he and the firm must go to meet their obligations to protect the client's confidences under the D.C. Rules of Professional Conduct. Implicitly, he raises the question of whether a lawyer must stand in contempt of a subcommittee and face the prospect of a criminal conviction, imprisonment and fines in order to vindicate the client's interest in confidentiality."; "When threatened by the chairman with contempt of Congress and possible criminal prosecution and sanctions, the subpoenaed partner produced the documents, despite protests and a threat of suit by the client."; "[O]ur opinions and all of the other authorities we can identify bearing on the question suggest that a lawyer is not required to stand in contempt of a court order and risk criminal prosecution in order to protect the subpoenaed information." (emphasis added); "The fact that a lawyer may deem himself or herself 'required by law' to produce the documents at the point the subcommittee demands it does not mean that the lawyer must produce the documents at that time. . . . [T]he lawyer retains the discretion to risk being held in contempt and litigate the issue in the courts, based on the totality of the circumstances."; "At the point that the lawyer has made and pressed every appropriate objection to the Congressional subpoena and has no avenues of appeal available, and in the absence of any judicial order to the contrary, a lawyer faced with a Congressional directive and a threat of contempt of Congress may deem himself or herself 'required by law' to comply with the subpoena within the meaning of D.C. Rule 1.6(d)(2)(A). A lawyer has satisfied his or her professional obligation to maintain client confidences once all objections have been made and exhausted and is not required by the Rules to stand in contempt of Congress if the subcommittee overrules the objections." (emphasis added)).

Not surprisingly, some lawyers grandstand.

- Alyson M. Palmer, Lawyer Vows To Go To Jail Rather Than Give Up Information, Daily Report, Aug. 13, 2013 ("Atlanta criminal defense lawyer Jerome Froelich Jr. vows he will go to jail before disclosing his communications in representing a disbarred lawyer who scammed millions of dollars from a woman he met on a dating website."; "Earlier this month, the United States Court of Appeals for the Eleventh Circuit turned away Froelich's bid for protection from subpoena by the woman, who is trying to recover her money through a lawsuit. A three-judge panel faulted Froelich for appealing too soon, saying the appeals court didn't have jurisdiction given that he had neither turned over the documents nor taken a contempt citation."; "Froelich said he'll wait for the woman's attorneys to make the next move - and will go to jail if he has to. 'I'm not going to give up communications that I had with people in defense of a case,' said Froelich. 'It's not going to happen.'"; "Froelich's client was Mitchell Gross, who lost his Georgia bar license in 1991 and was sentenced to 12½ years in prison last year."; "Johnson's attorneys pointed to the settlement between Gross and Johnson, in which Gross had waived the attorney-client privilege and work product doctrine as to 'hidden assets.' Froelich responded that the attorney work product doctrine belongs to the attorney, so he had a right to assert it regardless of what Gross might have waived."; "United States District Judge Timothy Batten, who oversaw the civil case, overruled Froelich's objections and, on March 30, 2012, ordered Froelich to comply with the subpoena. Batten later held Froelich in contempt, but he vacated the contempt order and certified the March 30 order for appeal to the Eleventh Circuit."; "More than a year later, in an August 2 ruling, a panel of Eleventh Circuit Judge William Pryor Jr., Senior Judge Emmett Cox and visiting United States District Judge Donald Walter of Louisiana dismissed Froelich's appeal for lack of jurisdiction. The appeal's panel unsigned order said that because the civil case already had been settled, Batten's order wasn't considered a final order that would normally be appealable. Froelich might have gotten around that rule by either complying with the order, then appealing, or by being held in contempt and appealing from that order, the panel said, but he did neither of those things. Given that Batten certified the order for appeal, Froelich also could have asked for the Eleventh Circuit's permission to appeal, the panel said, but he didn't do that, either."; "Froelich said the communications sought by Johnson's lawyers took place because he was defending his client in a criminal case. If Johnson's lawyers want to know more, Froelich said, they can depose the folks they think were on the other end of the conversations."; "Garbarini said the communications sought aren't work product, saying the issue is limited to how Gross paid his bills. Plus, he said, Gross' criminal case is over.").

Most of these stories evaporate, presumably because the lawyer ultimately complies with a court order requiring disclosure of protected client information. If not,

one would expect continuing news coverage -- similar to that describing reporters' stints in jail for refusal to turn over information protected by the less clearly defined and universally-accepted reporter's privilege.

Privilege/Work Product Waiver Issues

Lawyers assessing their duty to resist court orders requiring disclosure of protected client information must also focus on privilege/work product waiver issues.

By definition, a client waives privilege or work product protection only by voluntarily disclosing protected communications or documents. Thus, a compelled disclosure does not waive any privilege. However, all courts require the client's lawyer to put up a fight -- although they disagree about how vehement that fight must be. Every court agrees that lawyers must object to discovery and lose before they can claim a compelled disclosure. Some courts go even further, and require lawyers to appeal disclosure orders or risk a later court finding that the disclosure was voluntary.

Fortunately for nervous lawyers, Federal Rule of Evidence 502 reduces the high stakes often involved in this issue.

Before Rule 502, the "voluntary" disclosure of protected communications or documents sometimes triggered a "subject matter waiver" -- requiring the client to disclose even more protected communications or documents on the same subject.

The subject matter waiver doctrine rests on a common sense refusal to allow clients to use protected communications or documents as a "sword" in litigation while simultaneously using the applicable privilege or work product protection as a "shield" to withhold related documents or connections. But the subject waiver doctrine never made any sense unless the client intended to use protected communications or documents as

a "sword." In other words, a client disclosing such protected information or documents should always have been able to avoid a subject matter waiver by simply disclaiming any intent to use them to gain some advantage in litigation. Yet, some jurisdictions inexplicably applied the subject matter waiver doctrine to any voluntary disclosure. The District of Columbia even applied the subject matter waiver doctrine to inadvertent disclosure.

Federal Rule of Evidence 502 limits the reach of the subject matter waiver doctrine, returning it to the limited circumstances it should always have been -- requiring clients to produce related privileged or work product-protected communications or documents only if they unintentionally disclose and then rely on such protected communications or information to gain an advantage in litigation.

Although Rule 502 applies only in limited circumstances, courts seem to be applying the same principle in other circumstances involving disclosures. In most courts, this trend allows lawyers to avoid extraordinary resistance to a court order requiring disclosure -- to eliminate the risk that some later court will find that they voluntarily disclosed protected communications or information, and thus triggered a subject matter waiver.

Best Answer

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

N 5/14

Challenging Existing Law

Hypothetical 25

You have researched the history of the civil rights movement during the 1960s in Democrat-controlled southern states. Among other things, you wonder if civil rights lawyers violated any ethics rules by repeatedly challenging the constitutionality of laws that clearly complied with then-acceptable constitutional doctrine articulated in Plessy v. Ferguson.

May lawyers ethically challenge the constitutionality of laws that satisfy existing constitutional doctrine?

YES

Analysis

Restricting legal arguments to those already recognized by courts could have a dramatic effect. The common law expands and contracts gradually, with courts sometimes moving away from precedent or creating new principles as society evolves.

If lawyers could be sanctioned for advancing claims that were not already recognized by some judicial decision, lawyers advancing civil rights in the 1950s and 1960s might have lost their licenses.

The ABA Model Rules contain the basic standard.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

These principles allowed civil rights lawyers to question and ultimately overturn Plessy. Plessy v. Ferguson, 163 U.S. 537 (1896). Interestingly, many people have misinterpreted Plessy's holding, and civil rights lawyers' arguments in Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

In 1896, the United States Supreme Court addressed a Louisiana law requiring Mr. Plessy to ride in a railroad car designated for non-whites, because he was of "mixed descent," in proportion of "seven eighths Caucasian and one eighth African blood." Plessy, 163 U.S. at 541.

The court focused on the Fourteenth Amendment, emphasizing its requirement of equality "before the law."

> The object of the amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the state legislatures in the exercise of their police power. The most common instance of this is connected with the establishment of separate schools for white and colored children, which has been held to be a valid exercise of the legislative power even by courts of States where the political rights of the colored race have been longest and most earnestly enforced.

Id. at 544 (emphasis added). The Supreme Court noted the difference between equality before the law and statutes requiring or prohibiting racial separation.

> The distinction between laws interfering with the political equality of the negro and those requiring the separation of the two races in schools, theatres and railway carriages has been frequently drawn by this court.

Id. at 545.

Significantly, the Supreme Court pointed to an earlier decision[1] upholding the constitutionality of a law prohibiting racial separation in railway cars

> where the laws of a particular locality or the charter of a particular railway corporation has provided that no person shall be excluded from the cars on account of color, we have held that this meant that persons of color should travel in the same car as white ones, and that the enactment was not satisfied by the company's providing cars assigned exclusively to people of color, though they were as good as those which they assigned exclusively to white persons.

Id. at 545-46 (emphasis added).

The Supreme Court even indicated that someone required to sit in a racially segregated railway car could pursue a lawsuit

> While we think the enforced separation of the races, as applied to the internal commerce of the State, neither abridges the privileges or immunities of the colored man, deprives him of his property without due process of law, nor denies him the equal protection of the laws, within the meaning of the Fourteenth Amendment, we are not prepared to say that the conductor, in assigning passengers to the coaches according to their race, does not act at his peril, or that the provision of the second section of the act, that denies to the passenger compensation in damages for a refusal to receive him into the coach in which he properly belongs, is a valid exercise of the legislative power.

Id. at 548-49 (emphasis added).

Thus, Plessy did not require racial segregation. Instead, Plessy stood for the principle that federal and state laws and regulations may constitutionally take race into account. Id. at 550-51.

Justice Harlan vigorously dissented. He noted that the Constitution does not allow the government to treat people differently based on their race.

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[1] R.R. Co. v. Brown, 84 U.S. 445, 452-53 (1873).

> In respect of civil rights, common to all citizens, the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and under appropriate circumstances when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper. But I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved. Indeed, such legislation, as that here in question, is inconsistent not only with that equality of rights which pertains to citizenship, National and State, but with the personal liberty enjoyed by every one within the United States.

Id. at 554-55 (emphasis added). Justice Harlan cited both the Thirteenth and the Fourteenth Amendment.

> These notable additions to the fundamental law were welcomed by the friends of liberty throughout the world. They removed the race line from our governmental systems.

Id. at 555 (emphasis added).

Justice Harlan repeatedly emphasized that the Constitution requires laws to be color-blind.

> [I]n view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law. The humblest is the peer of the most powerful. The law regards man as man, and takes no account of his surroundings or of his color when his civil rights as guaranteed by the supreme law of the land are involved. It is, therefore, to be regretted that this high tribunal, the final expositor of the fundamental law of the land, has reached the conclusion that it is competent for a State to regulate the enjoyment by citizens of their civil rights solely upon the basis of race.

Id. at 559 (emphasis added). Justice Harlan predicted continuing racial tension if the court allowed laws to consider a person's race.

> The sure guarantee of the peace and security of each race is the clear, distinct, unconditional recognition by our governments, National and State, of every right that inheres in civil freedom, and of the equality before the law of all citizens of the United States without regard to race. State enactments, regulating the enjoyment of civil rights, upon the basis of race, and cunningly devised to defeat legitimate results of the war, under the pretence of recognizing equality of rights, can have no other result than to render permanent peace impossible, and to keep alive a conflict of races, the continuance of which must do harm to all concerned.

Id. 560-61 (emphasis added).

Ironically, Justice Harlan's dissent itself highlighted the wisdom of a color-blind legal system that does not permit the government to take race into account -- rather than allowing government rights, responsibilities, and benefits to be based on current racial stereotypes, politics, or even well-intentioned perceived social justifications.

Justice Harlan's climatic paragraph containing the famous statement "[o]ur Constitution is color-blind" began with an embarrassingly politically incorrect preface.

> The white race deems itself to be the dominant race in this country. And so it is, in prestige, in achievements, in education, in wealth and in power. So, I doubt not, it will continue to be for all time, if it remains true to its great heritage and holds fast to the principles of constitutional liberty.

Id. at 559 (emphasis added).

Near the end of his dissent, Justice Harlan added an even more astounding statement that sounds like a line from the movie Blazing Saddles.

> There is a race so different from our own that we do not permit those belonging to it to become citizens of the United States. Persons belonging to it are, with few exceptions,

> absolutely excluded from our country. I allude to the Chinese race.

Id. at 561.

As the civil rights movement began to challenge racial discrimination, Thurgood Marshall and other civil rights lawyers wisely challenged the government's consideration of race in dispensing educational benefits. They carefully selected a Kansas case arising from racial segregation imposed by the Board of Education of Topeka, Kansas. The case eventually ended up in the United States Supreme Court. Brown v. Board of Education of Topeka, 347 U.S. 483 (1954).

Marshall's and his colleagues' brief in Brown v. Board of Education of Topeka could not be any clearer. The first paragraph under the heading "Summary of Argument" succinctly stated their position.

> The Fourteenth Amendment precludes a state from imposing distinctions or classifications based upon race and color alone. The State of Kansas has no power thereunder to use race as a factor in affording educational opportunities to its citizens.

Brief for Appellants at 5 (Sept. 23, 1952), Brown v. Bd. of Educ., 349 U.S. 294 (1955) (No. 1) (emphasis added). Their main argument elaborated.

> When the distinctions imposed are based upon race and color alone, the state's action is patently the epitome of that arbitrariness and capriciousness constitutionally impermissible under our system of government. . . . A racial criterion is a constitutional irrelevance . . . and is not saved from condemnation even though dictated by a sincere desire to avoid the possibility of violence or race friction.

Id. at 6-7 (emphasis added).

Best Answer

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

B 10/14

Judges' Personal Investigations and Reliance on Non-Evidentiary Factual Submissions

Hypothetical 26

You have been litigating a case before a trial judge who seems very hostile to your client and her claims. Unfortunately, the appellate court seemed equally hostile during a recent interlocutory appeal of a trial court ruling. Among other things, the trial judge has indicated several times that he conducted his own internet research on some factual issues. You wonder about the propriety of that conduct, as well as the appellate court's reliance on factual statements in amicus briefs.

(a) Is it permissible for judges to conduct their own research using the internet?

MAYBE

(b) Is it permissible for appellate courts to rely on factual statements made in amicus briefs, but not subjected to cross-examination?

YES (PROBABLY)

Analysis

(a) The ABA Model Judicial Code severely restricts judges' personal factual investigations.

> A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

ABA Model Code of Judicial Conduct, Rule 2.9(C) (2007). Not surprisingly, this prohibition explicitly extends to electronic sources (such as the internet). ABA Model Code of Judicial Conduct, Rule 2.9 cmt. [6] (2007) ("The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.").

The ABA Model Judicial Code even finds it necessary to include a limited permission for judges to consult with court staff and officials. ABA Model Code of Judicial Conduct, Rule 2.9(A)(3) (2007) ("A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.").

At the trial court level, judges have faced criticism and even sanctions for personal internet research.

A North Carolina legal ethics opinion that condemned a judge's "friending" as ex parte communications with one side's lawyer also found that the judge had engaged in an improper investigation.

- North Carolina Judicial Standards Comm. Inquiry No. 08-234 (4/1/09) (publicly reprimanding a judge who engaged in ex parte communication with a party's lawyer on a judge's Facebook page, and also conducted an independent investigation of the other party using Google; "On or about the evening of September 10, 2008, Judge Terry checked Schieck's 'Facebook' account and saw where Schieck had posted 'how do I prove a negative.' Judge Terry posted on his 'Facebook' account, he had 'two good parents to choose from' and 'Terry feels that he will be back in court' referring to the case not being settled. Schieck then posted on his 'Facebook' account, 'I have a wise Judge.'"; "Sometime on or about September 9, 2008, Judge Terry used the internet site 'Google' to find information about Mrs. Whitley's photography business. Judge Terry stated he wanted to seek examples of Mrs. Whitley's photography work. Upon visiting Mrs. Whitley's web site, Judge Terry stated he viewed samples of photographs taken by Mrs. Whitley and also found numerous poems that he enjoyed."; explaining that Judge Terry later recited one of the mother's poems in court, "to which he had made minor changes"; finding Judge Terry's conduct improper; "Judge Terry had ex parte communications with counsel for a party in a matter being tried before him. Judge Terry was also influenced by information he independently gathered by viewing a party's web site while the party's hearing was ongoing,

even though the contents of the web site were never offered as nor entered into evidence during the hearing.").

Courts have also criticized judges' improper personal internet research.

- United States v. Lawson, 677 F.3d 629, 639-40, 650, 650 n.28 (4th Cir. 2012) ("We observe that we are not the first federal court to be troubled by Wikipedia's lack of reliability. See Bing Shun Li v. Holder, 400 F. App'x 854, 857-58 (5th Cir. 2010) (expressing 'disapproval of the [immigration judge's] reliance on Wikipedia and [warning] against any improper reliance on it or similarly reliable internet sources in the future' (footnote omitted); Badasa v. Mukasey, 540 F.3d 909, 910-11 (8th Cir. 2008) (criticizing immigration judge's use of Wikipedia and observing that an entry 'could be in the middle of a large edit or it could have been recently vandalized'). . . ."; "We note, however, that this Court has cited Wikipedia as a resource in three cases.").

Somewhat surprisingly, in 2010 the Second Circuit found nothing improper in then-District Judge Denny Chin's internet investigation of the availability of yellow hats for sale.

- United States v. Bari, 599 F.3d 176, 179, 180, 181 (2d Cir. 2010) (holding that then District Judge Denny Chin had not acted improperly in performing a Google search to confirm his understanding that there are many types of yellow hats for sale, so that a criminal defendant's possession of a particular kind of yellow hat was an important piece of evidence pointing to the criminal defendant's guilt; "[W]e now consider whether the District Court committed reversible error when it conducted an independent Internet search to confirm its intuition that there are many types of yellow rain hats for sale."; "Common sense leads one to suppose that there is not only one type of yellow rain hat for sale. Instead, one would imagine that there are many types of yellow rain hats, with one sufficient to suit nearly any taste in brim-width or shade. The District Court's independent Internet search served only to confirm this common sense supposition." (emphasis added); "Bari argues in his reply brief that 'Judge Chin undertook his internet search precisely because the fact at issue . . . was an open question whose answer was not obvious.' . . . We do not find this argument persuasive. As broadband speeds increase and Internet search engines improve, the cost of confirming one's intuitions decreases. Twenty years ago, to confirm an intuition about the variety of rain hats, a trial judge may have needed to travel to a local department store to survey the rain hats on offer. Rather than expend that time, he likely would have relied on his common sense to take judicial notice of the fact that not all rain hats are alike. Today, however, a judge need only take a few moments to confirm his intuition by conducting a basic Internet search." (emphases

added); "As the cost of confirming one's intuition decreases, we would expect to see more judges doing just that. More generally, with so much information at our fingertips (almost literally), we all likely confirm hunches with a brief visit to our favorite search engine that in the not-so-distant past would have gone unconfirmed. We will not consider it reversible error when a judge, during the course of a revocation hearing where only a relaxed form of Rule 201 applies, states that he confirmed his intuition on a 'matter[] of common knowledge.'").

Interestingly, Judge Chin was then in the process of joining the Second Circuit.

Ironically, some have noted United States Supreme Court Justices' use of Google in their opinions.

- Robert Barnes, Should Supreme Court Justices Google?, Wash. Post, July 8, 2012 ("Justice Antonin Scalia's angry dissent from the Supreme Court's decision to strike down parts of Arizona's tough anti-illegal-immigrant law outraged liberals even more than his biting words normally do."; "As part of his argument, that the decision imposed on the sovereignty of the states, Scalia reached outside the briefs and the oral arguments to mention President Obama's recent decision to allow some illegal immigrants who were brought here as children to remain in the country."; "'That Arizona contradicts federal law by enforcing applications of federal immigration law that the president declines to enforce boggles the mind,' Scalia said in reading part of his dissent from the bench."; "If the framers had proposed that all immigration decisions will be made by the federal government and 'enforced only to the extent the president deems appropriate,' Scalia thundered, 'the delegates to the Grand Convention would have rushed to the exits from Independence Hall.'"; "For our purposes, let's leave aside Scalia's excoriation from the left and defense from the right and focus on a different lesson: Supreme Court justices Google just like the rest of us."; "Well known is the story of Justice Harry Blackmun hunkering down in the medical library of the Mayo Clinic to research abortion procedures before he wrote the 1973 majority opinion in Roe v. Wade."; "[Allison Orr] Larsen, a former clerk to retired Justice David Souter, studied 15 years of Supreme Court decisions for her paper. She found more than 100 examples of asserted facts from authorities never mentioned in any of the briefs in the case. And in the 120 cases from 2000 to 2010 rated the most salient — judged largely by whether they appeared on the front pages of newspapers — nearly 60 percent of them contained facts researched in-house."; "A 2011 decision in which the court found a California law forbidding the sale of violent video games to minors violated the First Amendment provided a good example. Justice Stephen G. Breyer in a dissent provided 13 pages of studies on the topic of psychological harm from playing violent video games."; "Justice Clarence Thomas cited 59 sources to

> support his view that the Founding Fathers believed that parents had absolute control over their children's development; 57 of them were not in the briefs submitted in the case.").

A 2010 United States Supreme Court decision highlighted the risk of Supreme Court justices relying on "facts" they uncover themselves, but which have not faced any cross-examination.

In his majority opinion declaring unconstitutional Florida's life sentence for a minor who did not commit a homicide, Justice Kennedy emphasized evidence that the court (presumably Justice Kennedy himself) had found.

> The study [relied upon by the plaintiff in challenging the Florida sentence's constitutionality] also did not note that there are six convicts in the federal prison system serving life without parole offenses for nonhomicide crimes. See Letter and Attachment from Judith Simon Garrett, U.S. Dept. of Justice, Federal Bureaus of Prisons, to Supreme Court Library (Apr. 12, 2010) (available in Clerk of Court's case file).

From the originally circulated May 17, 2010, Opinion, available at http://www.law.cornell.edu/supct/html/08-7412.ZO.html; not surprisingly, the Supreme Court issued a corrected opinion on June 6 without this discussion. Graham v. Florida, 560 U.S. 49 (2010).

As the Washington Post article explained, the Bureau of Prisons had provided the Supreme Court erroneous information.

- Robert Barnes, Should Supreme Court Justices Google?, Wash. Post, July 8, 2012 ("In Graham v. Florida, for instance, the court invalidated life-without-parole sentences for juveniles who commit non-homicide offenses. Justice Anthony M. Kennedy relied on a letter from the Bureau of Prisons (BOP), solicited at his request by the Supreme Court library, about the number of such prisoners."; "After the decision, the government submitted a letter to the court saying the bureau had been wrong: None of the six inmates listed in the BOP's letter was actually serving a life sentence for a crime committed as a juvenile." (emphasis added); "'Do I think that factual

> information would have changed Justice Kennedy's mind?' Larsen asked. 'Probably not.'"; "But she says the practice undermines the adversary process."; "Asked whether she had engaged in in-house fact-finding as a clerk to Souter, she laughed and declined to comment. But she added: 'I will tell you Justice Souter didn't own a computer.'").

If that information had been subject to cross-examination, presumably the error would have been uncovered.

Of course, the court probably would have ruled the same way. In his majority opinion, Justice Kennedy concluded that "'it is fair to say that a national consensus has developed'" against sentencing minors to life in prison for a non-homicide offense. Graham, 560 U.S. at 67 (citation omitted). As for the "national consensus," USA Today's description of the court's opinion gave the states' lineup on the issue as of that time.

- Joan Biskupic and Martha T. Moore, Court Limits Harsh Terms For Youths, USA Today, May 18, 2010 ("The court's 5-4 decision — which says that an automatic life sentence for a young offender who has not committed murder violates the Constitution's ban on 'cruel and unusual' punishment — wipes out laws in 37 states." (emphasis added)).

(b) In appellate courts, the line between factual investigation and background reading seems to blur. Although there is no reason to think that the ABA Model Code of Judicial Conduct applies any differently to appellate judges than it does to trial judges, appellate courts routinely examine such extraneous material that has not been tested through cross-examination.

To be sure, there is an important difference between a judge conducting her own research and the judge relying on material presented by one of the parties to an appeal (or an amicus). Still, it is interesting to consider the role of material presented on appeal that has not survived the crucible of cross-examination at trial.

Many academic writers urge courts to accept such extrajudicial sources of information, as a way to advance basic social justice. For instance, in her article Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs, 34 U.S.F. L. Rev. 197 (2000), Temple University School of Law Professor Ellie Margolis defended use of such materials.

> As long as appellate courts decide cases and write opinions that rely upon non-legal materials, lawyers should learn to use these materials effectively. . . . Lawyers are missing a golden opportunity for advocacy by allowing judges alone to research non-legal materials and draw their own connections, often unsupported, between the legal arguments presented and the factual information thought to be supportive of the judge's conclusion. It is particularly important for lawyers to do this when making policy arguments, for which non-legal information may often provide the best support. For all of these reasons, lawyers not only can, but should use non-legal information in support of arguments in appellate briefs.
>
> . . . .
>
> In cases which require the formulation of a new legal rule, policy-based reasoning is extremely important, and the appellate lawyer should present policy arguments as effectively as possible to the court. Non-legal materials can often be the best, and sometimes the only support for these policy arguments. Indeed, non-legal materials serve a unique function in supporting policy arguments that is different from other uses of legislative facts. Because of this, the appellate court is the appropriate forum to use them.

Id. at 202-03, 210-11 (emphases added; footnotes omitted).

Most commentators point to the case of Muller v. Oregon, 208 U.S. 412 (1908) as initiating this process of judicial reliance on extrajudicial sources. In that case, the Supreme Court upheld the constitutionality of an Oregon law limiting to ten hours the amount of time that women may work in certain establishments.

The state of Oregon was represented in that case by Louis Brandeis, who filed what became known as a "Brandeis Brief" in support of the Oregon statute. Brandeis's brief consisted of a two-sentence introduction, a few transition sentences, a one-sentence conclusion, and 113 pages of statutory citations and (primarily) social science study reports and academic treatises about how women cannot tolerate long work hours. For example, the Brandeis Brief contained the following passages:

> Long hours of labor are dangerous for women primarily because of their special physical organization. In structure and function women are differentiated from men. Besides these anatomical and physiological differences, physicians are agreed that women are fundamentally weaker than men in all that makes for endurance: in muscular strength, in nervous energy, in the powers of persistent attention and application.

Brandeis Brief at 18 (emphasis added), available at http://www.law.louisville.edu/library/collections/brandeis/sites/www.law.louisville.edu.library.collections.brandeis/files/brief3.pdf.

The various social science study reports quoted in the Brandeis Brief had some remarkable conclusions and language.

> "You see men have undoubtedly a greater degree of physical capacity than women have. Men are capable of greater effort in various ways than women."[1]
>
> . . .
>
> "Woman is badly constructed for the purposes of standing eight or ten hours upon her feet."[2]

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[1] Brandeis Brief at 19 (quoting Report of Committee on Early Closing of Shops Bill, British House of Lords, 1901) (emphasis added), available at http://www.law.louisville.edu/library/collections/brandeis/sites/www.law.louisville.edu.library.collections.brandeis/files/brief3.pdf.

[2] Id. (quoting Report of the Maine Bureau of Industrial and Labor Statistics, 1888).

. . .

> "It has been declared a matter of public concern that no group of its women workers should be allowed to unfit themselves by excessive hours of work, by standing, or other physical strain, for the burden of motherhood, which each of them should be able to assume."[3]

. . .

Brandeis Brief (emphases added).

One of the quotations cited in the Brandeis Brief had a chilling source -- the Berlin Imperial Home Office.

> "'The children of such mothers -- according to the unanimous testimony of nurses, physicians, and others who were interrogated on this important subject -- are mostly pale and weakly; when these in turn, as usually happens, must enter upon factory work immediately upon leaving school, to contribute to the support of the family, it is impossible for a sound, sturdy, enduring race to develop.'"[4]

Id.

Based on all of this social science, the Brandeis Brief ended with the following conclusion:

> We submit that in view of the facts above set forth and of legislative action extending over a period of more than sixty years in the leading countries of Europe, and in twenty of our States, it cannot be said that the Legislature of Oregon had no reasonable ground for believing that the public health, safety, or welfare did not require a legal

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[3] Id. at 49-50 (quoting Legislative Control of Women's Work, by S.P. Breckinridge, Journal of Political Economy, p. 107, vol. XIV, 1906) (emphases added), available at http://www.law.louisville.edu/library/collections/brandeis/sites/www.law.louisville.edu.library.collections.brandeis/files/brief5.pdf.

[4] Id. at 53 (quoting The Working Hours of Female Factory Hands. From Reports of the Factory Inspectors, Collated by the Imperial Home Office, p. 113, Berlin, 1905) (emphasis added), available at http://www.law.louisville.edu/library/collections/brandeis/sites/www.law.louisville.edu.library.collections.brandeis/files/brief5.pdf.

> limitation on women's work in manufacturing and mechanical establishments and laundries to ten hours in one day.

Brandeis Brief at 113 (emphasis added), available at http://www.law.louisville.edu/library/collections/brandeis/sites/www.law.louisville.edu.library.collections.brandeis/files/brief11.pdf.

Incidentally, an article published approximately 100 years after Brandeis filed his brief noted that Brandeis's dramatic conclusion stated exactly the opposite of what he intended to argue. Clyde Spillenger, Revenge of the Triple Negative: A Note on the Brandeis Brief in Muller v. Oregon, 22 Const. Comment. 5 (Spring 2005).

In its decision upholding Oregon's statute, the United States Supreme Court explicitly relied on Brandeis's Brief -- emphasizing women's physical weakness and their importance in bearing and raising children. Emphasizing "the difference between the sexes," the Supreme Court quoted from one of the sources that Brandeis had included in his brief.

> "The reasons for the reduction of the working day to ten hours -- (a) the physical organization of women, (b) her maternal functions, (c) the rearing and education of the children, (d) the maintenance of the home -- are all so important and so far reaching that the need for such reduction need hardly be discussed."

Muller v. Oregon, 208 U.S. 412, 419 n.1 (citation omitted). The court took "judicial cognizance of all matters of general knowledge" -- including the following:

> That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring,

> the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.
>
> Still again, history discloses the fact that woman has always been dependent upon man.
>
> . . .
>
> [S]he is not an equal competitor with her brother.
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> . . .
>
> It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him.
>
> . . .
>
> [S]he is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions -- having in view not merely her own health, but the well-being of the race -- justify legislation to protect her from the greed as well as the passion of man.
>
> . . .
>
> The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her.

Id. at 421, 422, 422-23 (emphases added).

The United States Supreme Court has continued to debate reliance on such extrajudicial sources.

In Roper v. Simmons, 543 U.S. 551 (2005), for instance, the Supreme Court found unconstitutional states' execution of anyone under 18 years old, however horrible

their crime. Justice Kennedy's majority relied heavily on social science sources (presented for the first time to the court, and therefore not subjected to cross-examination) indicating that people under 18 are not fully capable of making rational decisions, and therefore should never be subject to execution.

Justice Scalia's dissent severely criticized the majority's reliance on such studies.

> Today's opinion provides a perfect example of why judges are ill equipped to make the type of legislative judgments the Court insists on making here. To support its opinion that States should be prohibited from imposing the death penalty on anyone who committed murder before age 18, the Court looks to scientific and sociological studies, picking and choosing those that support its position. It never explains why those particular studies are methodologically sound; none was ever entered into evidence or tested in an adversarial proceeding.

Id. at 616-17 (emphasis added) (Scalia, J., dissenting). Justice Scalia said that by selecting favorable extrajudicial and untested social science articles means that "all the Court has done today, to borrow from another context, is to look over the heads of the crowd and pick out its friends." Id. (emphasis added).

Justice Scalia provided a concrete example.

> We need not look far to find studies contradicting the Court's conclusions. As petitioner points out, the American Psychological Association (APA), which claims in this case that scientific evidence shows persons under 18 lack the ability to take moral responsibility for their decisions, has previously taken precisely the opposite position before this very Court. In its brief in [another case], the APA found a "rich body of research" showing that juveniles are mature enough to decide whether to obtain an abortion without parental involvement. . . . The APA brief, citing psychology treatises and studies too numerous to list here, asserted: "[B]y middle adolescence (age 14-15) young people develop abilities similar to adults in reasoning about moral dilemmas,

> understanding social rules and laws, [and] reasoning about interpersonal relationships and interpersonal problems."

Id. at 617-18 (emphases added; citation omitted) (Scalia, J., dissenting).

The Supreme Court (and other appellate courts) nevertheless continues to rely on extrajudicial sources that have never been subjected to cross-examination.

Best Answer

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

N 1/13; B 7/14, 12/14

Involvement with Discriminatory Organizations

Hypothetical 27

Now that you have become a judge, you have tried to be extra careful in avoiding any appearance of prejudice or bias. However, several recent invitations have left you agonizing over what you can do.

May you accept an invitation to:

(a) Join an honorary society that does not admit minorities?

NO

(b) Join an organization that does not allow women to hold certain positions in the organization?

MAYBE

(c) Attend a weekly lecture series at a country club which limits its membership to Protestants?

MAYBE

(d) Attend a wedding reception for your niece, to be held at a local private club which excludes minorities?

YES

Analysis

Not surprisingly, judges must avoid any prejudice or discrimination "by words or conduct" in performing their judicial duties.

> A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall

> not permit court staff, court officials, or others subject to the judge's direction and control to do so.

ABA Model Code of Judicial Conduct, Rule 2.3(B) (2011).

This simple prohibition creates a number of subtle issues when applied to a judge's membership or involvement in arguably discriminatory organizations.

The ABA Model Judicial Code prohibits lawyers from holding membership in organizations that practice "invidious discrimination."

> A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.

ABA Model Code of Judicial Conduct, Rule 3.6(A) (2011); Code of Conduct for United States Judges, Canon 2C (2009) ("A judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.").

This flat prohibition raises a number of ancillary issues.

First, how do you define "invidious discrimination"? The ABA Model Judicial Code explains that "[a]n organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation persons who would otherwise be eligible for admission." ABA Model Code of Judicial Conduct, Rule 3.6 cmt. [2] (2011).

The ABA Model Judicial Code warns that "[t]he answer cannot be determined from a mere examination of an organization's current membership rolls, but rather, depends upon how the organization selects members, as well as other relevant factors, such as whether the organization is dedicated to the preservation of religious, ethnic, or

cultural values of legitimate common interest to its members, or whether it is an intimate, purely private organization whose membership limitations could not constitutionally be prohibited." Id.

Second, does the prohibition on such membership include membership in churches or other organizations which might restrict the participation of women, etc.? As indicated above, the ABA Model Judicial Code examines such factors as whether the organization "is dedicated to the preservation of religious, ethic, or cultural values." Id. To make the point even clearer, the ABA Model Judicial Code explicitly indicates that "[a] judge's membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of this Rule," and also notes that the rule "does not apply to national or state military service." ABA Model Code of Judicial Conduct, Rule 3.6 cmts. [4], [5] (2011).[1] Thus, judicial ethics codes generally permit judges' participation in traditional religious, military, or other groups that restrict participation by some members.

Third, what should a judge do upon learning of a group's discriminatory practices (or when a judge belongs to such an organization upon becoming a judge)? The ABA Model Judicial Code explains that

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[1] Accord Code of Conduct for United States Judges, Canon 2C Commentary (2009) ("Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Canon 2C refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. See New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988).").

> When a judge learns that an organization to which the judge belongs engages in invidious discrimination, the judge must resign immediately from the organization.

ABA Model Code of Judicial Conduct, Rule 3.6 cmt. [3] (2011).

The judicial code governing federal judges takes a totally different approach.

> When a judge determines that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Canon 2C or under Canons 2 and 2A, the judge is permitted, in lieu of resigning, to make immediate and continuous efforts to have the organization discontinue its invidiously discriminatory practices. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within two years of the judge's first learning of the practices), the judge should resign immediately from the organization.

Code of Conduct for United States Judges, Canon 2C Commentary (2009). Thus, the ABA Model Code of Judicial Conduct requires immediate resignation, while the judicial code governing federal judges allows a more gradual approach.

Fourth, may a judge attend events or meetings at facilities of a discriminatory organization? The ABA Model Judicial Code explains that

> [a] judge's attendance at an event in a facility of an organization that the judge is not permitted to join is not a violation of this Rule when the judge's attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization's practices.

ABA Model Code of Judicial Conduct, Rule 3.6(B) (2011). The judicial code governing federal judges takes a somewhat more subtle approach -- prohibiting the judge from setting up a meeting at such an organization, but allowing use that is not regular.

> [I]t would be a violation of Canons 2 and 2A for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion, or

> national origin in its membership or other policies, or for the judge to use such a club regularly.

Code of Conduct for United States Judges, Canon 2C Commentary (2009).

(a) All judicial codes would prohibit judges from joining an organization that invidiously discriminates against minorities.

(b) Judges might be able to join organizations that do not allow women to hold certain positions, but probably would have to point to one of the exemptions for religious or other organizations to justify such an action.

(c) Weekly attendance at a country club probably would be seen as a "regular" attendance, but the religious nature of the organization might allow judges to rely on the exemption mentioned above.

(d) Most judicial codes would allow judges to attend such an event, as long as the judge did not arrange for the event and does not regularly attend such events at the discriminatory organization.

Best Answer

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

B 10/14

Judicial Bias

Hypothetical 28

You have only been a judge for about six months, but now you face a very difficult ethics issue. You just started hearing a criminal trial of a defendant charged with burning a cross in a biracial couple's front yard. This scenario triggered some strong feelings, because in a widely reported incident someone burned a cross on your biracial parents' front yard just after you were born.

(a) Must you disclose this fact to the prosecution and the defense?

MAYBE

(b) Must you recuse yourself if requested by either the prosecutor or the defense lawyer?

MAYBE

(c) From what you have already heard about this defendant from both his lawyer and the prosecutor in various pretrial hearings, the defendant seems to be a real hot head -- must you recuse yourself in the course of the trial if the defendant brags about his cross burning, says that he knows about the cross-burning incident involving your parents, and then shouts an ugly racist comment directed at you?

NO

Analysis

General Standards

Judges' recusal is governed both by statute and by judicial code.

For instance, a federal statute requires any federal judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455.

The ABA Model Judicial Code similarly explains that

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

ABA Model Code of Judicial Conduct, Rule 2.11(A) (2011).

The judicial code governing federal judges takes the same basic approach.

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

Code of Conduct for United States Judges, Canon 3C(1) (2009). A comment to that code provides some explanation.

> An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. This prohibition applies to both professional and personal conduct. A judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen. Because it is not practicable to list all prohibited acts, the prohibition is necessarily cast in general terms that extend to conduct by judges that is harmful although not specially mentioned in the Code. Actual improprieties under this standard include violations of law, court rules, or other specific provisions of this Code.

Id. Canon 2A Commentary.

When the ABA revisited the judicial code several years ago, an enormous national debate focused on whether to drop the "appearance of impropriety" standard from the ethics code for judges. The ABA finally decided to leave the standard in its judicial code.

> A judge shall act at all times in a manner that promotes public confidence in the independence,[] integrity,[] and impartiality[] of the judiciary, and shall avoid impropriety and the appearance of impropriety.

ABA Model Code of Judicial Conduct, Rule 1.2 (2011). A comment explains what the term means.

> Actual improprieties include violations of law, court rules or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.

Id. cmt. [5].

Not surprisingly, the ABA Model Code of Judicial Conduct emphasizes that judges must analyze their own involvement even if no party files a motion seeking their disqualification.[1]

Interestingly, the ABA Model Judicial Code contains a separate provision warning judges not to disqualify themselves too quickly.

> A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law.

Id. Rule 2.7. A comment explains this concept.

> Judges must be available to decide the matters that come before the court. Although there are times when disqualification is necessary to protect the rights of litigants and preserve public confidence in the independence, integrity, and impartiality of the judiciary, judges must be available to decide matters that come before the courts. Unwarranted disqualification may bring public disfavor to the

[1] ABA Model Code of Judicial Conduct, Rule 2.11 cmt. [2] (2011) ("A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.").

> court and to the judge personally. The dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues.

Id. cmt. [1][2] (emphases added).

Like all other judicial codes, the ABA Model Judicial Code also recognizes what is called a "rule of necessity" -- requiring a judge to hear a case if no other judge could step in.

- ABA Model Code of Judicial Conduct, Rule 2.11 cmt. [3] (2011) ("The rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In matters that require immediate action, the judge must disclose on the record the basis for possible disqualification and make reasonable efforts to transfer the matter to another judge as soon as practicable.").

Alleged Bias Caused by Evidence in the Case

Most courts recognizing a judge's apparent bias against a party do not require disqualification if the bias comes from what the judge has heard in the courtroom.

- United States v. Pearson, 203 F.3d 1243, 1278 (10th Cir.) ("[T]his case comports with the Supreme Court's continuing recognition in Liteky [v. United States, 510 U.S. 540 (1994)] that comments made by a judge based on information learned during the course of the proceedings normally do not necessitate recusal on the grounds of bias. Of course, even when angry, a judge must be fair and take care not to cross the line separating righteous criticism from injudicious damnation. We are satisfied that the line has not been crossed here, and that the district judge's rulings, based on information he learned during the course of the proceedings, did not display a deep-seated antagonism that would make fair judgment impossible and require us

[2] Although lawyers must diligently represent their clients in seeking a judge's disqualification in the right circumstances, they can pay a price if they target a judge but miss. See, e.g., Ginsberg v. Evergreen Sec., Ltd. (In re Evergreen Sec., Ltd.), 570 F.3d 1257 (11th Cir. 2009) (suspending for five years a Crowell & Moring partner from appearing in bankruptcy court, for improperly pursuing disqualification of a bankruptcy judge).

> to vacate and direct a new trial or resentencing."), cert. denied, 530 U.S. 1268 (2000).

It is extremely rare for a court to disqualify a trial judge for comments the trial judge makes in court or in an opinion.

One case involved D.C. district Judge Royce Lamberth. The D.C. Circuit pointed to the following statement in one of Judge Lamberth's opinions in concluding "reluctantly, that this is one of those rare cases in which reassignment is necessary" because of "a judge's animosity toward a party." Cobell v. Kempthorne, 455 F.3d 317, 335 (D.C. Cir. 2006), cert. denied, 549 U.S. 1317 (2007).

> "The entire record in this case tells the dreary story of Interior's degenerate tenure as Trustee-Delegate for the Indian trust -- a story shot through with bureaucratic blunders, flubs, goofs and foul-ups, and peppered with scandals, deception, dirty tricks and outright villainy -- the end of which is nowhere in sight. . . . The puerile reference is not lost on the Court, but Interior's misguided attempt at levity in the context of litigation an issue of immense importance to 500,000 members of a historically oppressed people is disgraceful. . . . This Court has played host to countless pleadings from clinically insane litigants and prison inmates but has rarely seen such a disrespectful tenor in the court filing."

Id. at 327-28 (citation omitted; emphases added).

> "While it is undeniable that Interior has failed as a Trustee-Delegate, it is nevertheless difficult to conjure plausible hypotheses to explain Interior's default. Perhaps Interior's past and present leaders have been evil people, deriving their pleasure from inflicting harm on society's most vulnerable. Interior may be consistently populated with apathetic people who just cannot muster the necessary energy or emotion to avoid complicity in the Department's grossly negligent administration of the Indian trust. Or maybe Interior's officials are cowardly people who dodge their responsibilities out of a childish fear of the magnitude of effort involved in reforming a degenerative system. Perhaps Interior as an institution is so badly broken that even the

> most well-intentioned initiatives are polluted and warped by the processes of implementation. The government as a whole may be inherently incapable of serving as an adequate fiduciary because of some structural flaw. Perhaps the Indians were doomed the moment the first European set foot on American soil. Who can say? It may be that the opacity of the cause renders the Indian trust problem insoluble."

Id. at 328-29 (footnote omitted; emphases added). The court remanded the case to the district court's chief judge "with instructions to reassign the case." Id. at 335. For obvious reasons, this sort of disqualification only occurs in the most extreme cases.

Bias Caused by Stock Ownership

Most courts have adopted their own standards for judges' disqualification if the judge owns stock in one of the parties.

- Comm. on Codes of Conduct [for United States Judges], Advisory Op. No. 57 (7/10/98) ("The Committee concludes that under the Code the owner of stock in a parent corporation has a financial interest in a controlling subsidiary. Therefore, when a judge knows that a party is controlled by a corporation in which the judge owns stock, the judge should recuse. Canon 3C(3)(c). However, if the judge owns stock in the subsidiary rather than the parent corporation, and the parent corporation appears as a party in a proceeding, the judge must recuse only if the interest in the subsidiary could be substantially affected by the proceeding. Id.").

However, an occasional decision still deals with a related issue.

For instance, in United States v. Wolff, 263 F. App'x 612 (9th Cir. 2008) (unpublished opinion), the Ninth Circuit reversed 18 convictions of a defendant in a corporate fraud scheme. The defendant was CEO and chairman of a company that dealt with AOL. The fraud involved the defendant's company's dealings with AOL, although AOL was not itself involved in the case. Defendant Wolff had sought to disqualify the judge handling the case, because he acknowledged that he owned AOL

stock. A colleague in the Central District of California had heard the motion to disqualify, and denied it.

However, the Ninth Circuit disagreed with that decision -- and reversed the criminal conviction because the judge had continued to preside after his colleague denied the defendant's disqualification motion. The Ninth Circuit noted the following facts: several AOL employees were unindicted co-conspirators; the allegedly fraudulent deals involved an AOL senior executive; four AOL officials testified at the trial; many witnesses testified about the defendant's dealings with AOL; the U.S. government filed a criminal complaint against AOL that was stayed pending the criminal trial; the SEC charged AOL's successor with fraud in connection with the same transactions; and several private plaintiffs filed actions against AOL based on the transactions. The Ninth Circuit found that these facts meant that the judge's ownership of AOL stock should have resulted in his disqualification.

> There is no dispute that Judge Anderson's ownership of AOL stock constitutes the requisite "financial interest[";] the only question is whether it is an interest "in the subject matter in controversy." Based on the unique facts that are before us, we conclude that the judge did have a financial interest in the subject matter in controversy under section 455(b)(4). Accordingly, Judge Walter erred in denying Wolff's disqualification motion.
>
> . . .
>
> Based on our review of the record, we conclude that Judge Anderson's ownership of AOL stock constituted a "financial interest in the subject matter in controversy," in violation of 28 U.S.C. § 455(b)(4). We therefore conclude that Judge Walter abused his discretion by denying Wolff's motion to disqualify Judge Anderson.

Id. at 615-16.

On the other hand, some judges clearly go too far. For instance, the Fourth Circuit reversed an Eastern District of Virginia judge who had declined to hear a case involving a power company, because as a power company customer the judge might ultimately receive a fairly minor refund.

> We are inclined to agree with the district court that $70 to $100 cash in hand is not de minimis. But when the possibility of recovering that amount is spread over the next 40 years, is dependent upon VEPCO winning the lawsuit and the full amount claimed, collecting the judgment, and the Virginia State Corporation Commission requiring VEPCO to return increased fuel costs to its customers, we doubt that anyone other than Jimmy the Greek would offer anything for the judge's chance. A reasonable man would doubtless prefer a $2 ticket at Churchill Downs on the first Saturday in May. We hold the judge's "any other interest" in VEPCO's speculative recovery was de minimis and his finding to the contrary clearly erroneous.

Va. Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co. (In re Va. Elec. & Power Co.), 539 F.2d 357, 368 (4th Cir. 1976).

In some situations, judges deal with their own possible interests in a somewhat mysterious way. For instance, in Muchnik v. Thomson Corp. (In re Literary Works in Electronic Copyright Databases Litigation), 509 F.3d 136 (2d Cir. 2007), two judges on the Second Circuit explained why they did not recuse themselves. As they explained it, they realized one day before an important argument that "there was a high probability that [the judges] held copyrights in works, such as law review articles and speeches, reproduced on defendants' databases" (which was the subject matter of the case). Id. at 139. The judges publically stated at the hearing that they would "forego any financial interest in the settlement that we could possibly have now or in the future." Id.

Within the next several days, the judges sought advice from the Committee on Codes of Conduct of the Judicial Conference of the United States, which advised the judges not to continue serving on the Second Circuit panel. Several weeks later, the judges informed this Committee "of the added fact that the case had been assigned to us after the claims period had expired" -- which meant that "we would have been ineligible to participate in any recovery." Id. at 140. Three days later, the Committee's chair "informed us that this fact did not alter the Committee's opinion that recusal should occur." Id. The judges nevertheless decided to remain in the case -- despite having been told twice by the Committee hearing such matters that they should disqualify themselves.

(a)-(b) Courts usually reject disqualification motions based on some bias supposedly resulting from the judge's personal experience.

In 2011, the Northern District of California found that the judge handling the California gay marriage case had not acted improperly in failing to advise the litigants that he was in a long-term relationship with a gay partner. The Ninth Circuit affirmed.

- Perry v. Schwarzenegger, 790 F. Supp. 2d 1119, 1125 (N.D. Cal. 2011) ("In applying this conclusion to the present case, the Court finds that Judge Walker was not required to recuse himself under Section 455(b)(4) on the ground that he was engaged in a long-term same-sex relationship and, thus, could reap speculative benefit from an injunction halting enforcement of Proposition 8 in California. In particular, in a case involving laws restricting the right of various members of the public to marry, any personal interest that a judge gleans as a member of the public who might marry is too attenuated to warrant recusal. Requiring recusal because a court issued an injunction that could provide some speculative future benefit to the presiding judge solely on the basis of the fact that the judge belongs to the class against whom the unconstitutional law was directed would lead to a Section 455(b)(4) standard that required recusal of minority judges in most, if not all, civil rights cases. Congress could not have intended such an unworkable

recusal statute."; aff'd, Perry v Brown, 671 F.3d 1052, 1095-96 (9th Cir. 2012)).

More recently, two Ninth Circuit panel judges severely criticized a criminal defendant's lawyer for seeking the other panelist's disqualification because her father had been murdered in an incident similar to that going to trial.

- Miles v. Ryan, 697 F.3d 1090, 1090-91, 1091, 1092 (9th Cir. 2012) (rejecting a motion by a criminal defendant to recuse Judge Susan Graber from sitting on the Ninth Circuit panel, because forty years earlier Judge Graber's father was murdered in a carjacking incident, similar to the crime for which the defendant was convicted; in an opinion by the other two judges on the panel, rejecting the motion and finding that it was inappropriate; "Judge Graber has been a judge for almost twenty-five years. In that time, she has sat on numerous capital murder cases, voting to affirm some and to reverse others. She has never been asked to recuse in any of them and never has. There is absolutely no reason she should do so now."; "[T]he suggested basis for questioning Judge Graber's impartiality is especially flimsy, as the acts on which it is based happened close to forty years ago."; "We well understand that this is a death penalty case, and that the petitioner's lawyers properly regard it as their duty to try appropriately to raise every colorable issue that could possibly redound to their client's benefit. But asking for the recusal of a member of this court who has decided capital cases for over two decades because of something that happened well before she became a judge is a request lacking even colorable merit. And doing so by reciting in detail the facts of long ago, tragic incident in her life, requiring her to relive them yet again and exposing them anew to public view is, in our opinion, beyond the limits of appropriate representation." (emphasis added)).

The panelists' harsh language seemed out of bounds, given criminal defendants' lawyers' duty to vigorously represent their clients.

Other courts have held that:

- A judge who is an adoptive mother could hear a case about the disclosure of adoption records.[3]

- A judge whose father had been killed by a black man could hear a case involving a black criminal defendant.[4]

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3 In re Margaret Susan P., 733 A.2d 38 (Vt. 1999).

4 State v. Shabazz, 719 A.2d 440 (Conn. 1998), cert. denied, 525 U.S. 1179 (1999).

- A judge who had been the victim of harassment and stalking could hear a case involving alleged stalking.[5]

- A judge who had been sexually abused as a child could hear a sexual abuse case.[6]

In a more somewhat surprising case, the Virginia Court of Appeals held that a judge did not have to automatically disqualify himself from hearing a criminal case against a defendant who several years earlier had stolen the judge's car.[7]

(c) Interestingly, judges need not disqualify themselves in situations that on first blush would seem to require recusal.

- Broady v. Commonwealth, 429 S.E.2d 468, 471, 472 (Va. Ct. App. 1993) (reversing and remanding a criminal conviction for robbery and burglary, because of possible racially-motivated peremptory strikes; noting that the criminal defendant had not raised on appeal the possible obligation of the

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[5] Commonwealth v. Urrutia, 653 A.2d 706 (Pa. Super. Ct. 1995), appeal denied, 661 A.2d 873 (Pa. 1995).

[6] State v. Mann, 512 N.W.2d 528 (Iowa 1994). A federal district court later granted a writ of habeas corpus based on the judge's failure to recuse himself (Mann v. Thalacker, No. 3:95-cv-03008-DEO (N.D. Iowa Sept. 10, 1999)), but the Eighth Circuit reversed – rejecting the defendant's argument that he never would have waived a jury and let the judge decide his sexual abuse case if he had known that the judge himself had been sexually abused as a teenager. Mann v. Thalacker, 246 F.3d 1092 (8th Cir.), cert. denied, 543 1018 (2001).

[7] Broady v. Commonwealth, 429 S.E.2d 468, 471, 472 (Va. Ct. App. 1993) (reversing and remanding a criminal conviction for robbery and burglary, because of possible racially-motivated peremptory strikes; noting that the criminal defendant had not raised on appeal the possible obligation of the trial judge to recuse himself; "We consider the recusal issue because it may arise again upon retrial. Appellant made a motion prior to the commencement of the case requesting that the trial judge recuse himself as the appellant had previously been convicted of grand larceny of the judge's motor vehicle."; noting that the judge had "no personal recollection of the individual that had been convicted of larceny of his vehicle," that he had not participated in the earlier criminal proceeding as either a judge or witness, that the matter before the judge was to be decided by a jury, that he as judge would be dealing with the law, and that "[t]he fact that he as the victim of a prior act would not, in his opinion, prevent him from acting fairly and impartially"; explaining that "we point out that the judge's role in a jury trial should be given little weight in determining whether the judge should recuse himself. Many of the legal issues in a trial involve mixed questions of law and fact and require the judge to be the fact finder on certain issues. Further, many critical rulings in a case are left to the sound discretion of the trial judge, not the least of which is whether to impose or suspend the jury's recommended sentence. Therefore, the fact that the case is to be tried by a jury should be accorded little, if any, weight in determining whether the judge should recuse himself. Also, on remand, the trial judge should give consideration to the Canons of Judicial Conduct, Canons III (c)(1), which provides: '[a] judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.'"; not reaching any conclusion about what the judge should do on remand).

> trial judge to recuse himself; "We consider the recusal issue because it may arise again upon retrial. Appellant made a motion prior to the commencement of the case requesting that the trial judge recuse himself as the appellant had previously been convicted of grand larceny of the judge's motor vehicle." (emphasis added); noting that the judge had "no personal recollection of the individual that had been convicted of larceny of his vehicle," that he had not participated in the earlier criminal proceeding as either a judge or witness, that the matter before the judge was to be decided by a jury, that he as judge would be dealing with the law, and that "[t]he fact that he as the victim of a prior act would not, in his opinion, prevent him from acting fairly and impartially" (emphasis added); explaining that "we point out that the judge's role in a jury trial should be given little weight in determining whether the judge should recuse himself. Many of the legal issues in a trial involve mixed questions of law and fact and require the judge to be the fact finder on certain issues. Further, many critical rulings in a case are left to the sound discretion of the trial judge, not the least of which is whether to impose or suspend the jury's recommended sentence. Therefore, the fact that the case is to be tried by a jury should be accorded little, if any, weight in determining whether the judge should recuse himself. Also, on remand, the trial judge should give consideration to the Canons of Judicial Conduct, Canons III (c)(1), which provides: '[a] judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.'"; not reaching any conclusion about what the judge should do on remand).

Several courts and bar have indicated that judges need not disqualify themselves if a party appearing before the judge:

- Files a lawsuit against the judge.[8]
- Files an ethics charge against the judge.[9]

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[8] United States v. Walls, Case No. 92-CR-80236-DT, 2006 U.S. Dist. LEXIS 27381, at *5-6 (E.D. Mich. May 9, 2006) (denying a motion to recuse filed by a criminal defendant who had filed a lawsuit against a judge; "Defendant also argues that this court should disqualify itself because Defendant has recently filed a lawsuit against the undersigned judge. (5/1/06 Aff. at 3.) While under 28 U.S.C. § 455(b)(5)(i), the court would be required to disqualify itself if it were a party to this proceeding, there is no such requirement when the court is a party in a separate proceeding involving the same defendant. United States v. Grismore, 564 F.2d 929, 933 (10th Cir. 1977) ('A judge is not disqualified merely because a litigant sues or threatens to sue him.'); Scarrella v. Midwest Federal Sav. and Loan, 536 F.2d 1207, 1209 (8th Cir. 1976) (holding that judges were not disqualified merely because they were parties in a separate action involving one of the litigants). As discussed above, Defendant has failed to allege any facts which demonstrate 'reliance upon an extrajudicial source . . . .' Liteky, 510 U.S. 540 at 555, 127 L. Ed. 2d 474 [(2nd Cir. 1943)]. Nor are the defendant's averments the 'rare[] circumstance[]' variety that might 'evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved.' Id." (footnote omitted)).

- Asserts other charges against the judge.[10]

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[9] United States v. Talley, Case No. 3:06cr448-01/RV, 2007 U.S. Dist. LEXIS 54597, at *4, *5 (N.D. Fla. July 27, 2007) (a non-motion to recuse filed by a defendant who had "recently filed a charge of judicial misconduct against me, as well as a separate lawsuit seeking damages from this court in the amount of $78,600,000.00."; "I am now the third judge in this court assigned to the defendant's case. It appears that his defense tactic is to file judicial complaints and/or lawsuits against the presiding judge (or, indeed, anyone affiliated with the case), attempt to seek that judge's recusal, and then continue the same foolish routine until he exhausts the supply of judges. The law, however, does not permit such 'judge-shopping,' and this tactic will not be tolerated."); Smartt v. United States, 267 F. Supp. 2d 1173, 1177 (M.D. Fla. 2003) (denying a motion to recuse by a defendant who had filed an ethics charge against a sitting judge; "It has long been established that a party cannot force a judge to recuse himself by engaging in personal attacks on the judge. Otherwise, 'every man could evade the punishment due to his offense, by first pouring a torrent of abuse upon his judges, and then asserting that they act from passion.' Standing Committee v. Yagman, 55 F.3d 1430, 1443-44 (9th Cir. 1995). See also United States v. Wolfson, 558 F.2d 59, 62 (2d Cir. 1977) (defendant's unfounded charges of misconduct against judge did not require disqualification because defendant's remarks established only the defendant's feelings towards the judge, and not the reverse)."; "Further, a judge has as strong a duty to sit when there is no legitimate reason to recuse as he does to recuse when the law and facts require.").

[10] Brown v. Alabama, 740 F. Supp. 819, 820-21, 821, 822, 822-23, 823 (N.D. Ala. 1990) (denying a motion to recuse filed by an individual defendant in a race and sex discrimination case filed against the state of Alabama and a number of individuals; explaining that one of the individual defendants served as the Alabama Commissioner of Revenue, and had in that role filed a tax lien against the judge twelve years earlier; noting that the judge paid the full amount of the lien six days after receiving the lien notice; "A reasonable person, accepting these facts as true, would infer no bias or prejudice against the tax official by the taxpayer-judge. Such reasonable person would conclude that the judge, upon receiving notice of the lien, conceded its correctness and promptly paid the taxes. That reasonable person would infer that had the judge harbored any resentment of or hostility towards the tax official, he would have put the tax official to his proof -- as he had a perfect legal right to do so. . . . Instead, the judge voluntarily paid the tax before the final establishment of the legal obligation to do so -- evincing an obvious desire to put the entire matter behind him." (footnote omitted); "A precious few, if any, citizens rejoice in the prospect of paying taxes. But only an unreasonable taxpayer would take offense at the tax collector who simply performs his/her job in any evenhanded manner. More importantly, only an unreasonable tax collector would fear any bias or prejudice at the hands of a judge to whom he had sent a valid uncontested tax lien twelve years earlier, and from whom he had heard nothing since the lien was satisfied."; "The Beshears affidavit speaks to other matters. It says that prior to 1982, this judge was habitually late in filing his tax returns; that these late filings resulted in additional interest and penalties; and that his tax returns have been subject to numerous field audits and adjustments. Beshears does not allege any personal involvement with any of these alleged problems. Thus, his affidavit is legally insufficient insofar as these matters are concerned, for it is settled law that the bias alleged in a § 144 affidavit must be personal bias against the affiant or in favor of an adverse party." (footnote omitted); also noting that "[t]he Beshears affidavit was not filed under seal. It is now a matter of public record."; "This judge has been unable to verify the existence of any court order authorizing the release of his income tax returns and records to defendant Beshears and/or his attorney. . . . If no such order exists, then a crime may have been committed by defendant Beshears and possibly others, for this judge has not consented to the release of his tax records and their use in this proceeding." (footnote omitted); "Before disposing of the disqualification issue in its entirety, the Court must know whether Beshears or his attorney obtained the requisite court order prior to making public the otherwise confidential tax information. Upon being so advised, the Court will determine whether disqualification is warranted."; "By 4:30 P.M. on Friday, June 29, 1990, Counsel for Beshears shall file with the Court a certified copy of any court order authorizing the release by said defendant of this judge's tax returns and other tax information. Should counsel fail to file such document, the Court will assume that none exists and proceed to pass on the ultimate issue of

- Threatens the judge.[11]
- Assaults the judge in court.[12]

Although one might think that a judge could not impartially hear a case involving a party in such a situation, rewarding the party for such misbehavior by requiring disqualification would clearly encourage other parties to engage in similar misconduct.

Best Answer

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

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whether disqualification is warranted based on a possible violation of the judge's right of privacy by a party to this proceeding.").

[11] State v. Prater, 583 So. 2d 520, 527 (La. Ct. App. 1991) (affirming a conviction of a criminal defendant who had apparently sent threatening letters to the judge (based on handwriting analysis); "Immediately prior to sentencing, counsel for defendant orally moved for the trial judge to recuse himself from sentencing defendant. This oral motion for recusal was based upon the threats defendant apparently made against the judge making it improper for the court to impose sentence. The trial judge denied the motion stating he had no personal animosity towards defendant and defendant had not demonstrated any prejudice on the judge's part. Further, the trial judge stated that defendant could not 'disarm' him because defendant wrote him some letters.").

[12] State v. Bilal, 893 P.2d 674, 675 (Wash. Ct. App. 1995) (upholding a lower court's ruling that a trial judge could sentence a criminal defendant after a jury verdict finding the defendant guilty of rape, even though the criminal defendant "assaulted the trial judge as he sat on the bench" after the verdict was read); People v. Hall, 499 N.E.2d 1335, 1339, 1347 (Ill. 1986) (affirming a conviction and death sentence for a convicted murderer; explaining that the criminal defendant had hit the judge "'on the head with his fist'" and had attacked his public defender lawyer with a chair (citation omitted); "The actions of the defendant in striking his attorney and the trial judge were certainly outrageous and called for extraordinary detachment on their part. Despite the gravest of provocations the attorney and the judge, as we have observed, carried out their responsibilities with professional competence and, considering the circumstances, even grace. We cannot presume a failure of impartiality of a trial judge even under extreme provocation. Judges are called upon to preside over the trial of onerous causes and persons. By definition, however, a trial judge is required to ignore provocations and pressures, whether public or from individuals. The record shows that the trial judge's conduct here was entirely proper. He correctly noted that the administration of justice requires the courage to insure that justice is fairly and impartially administered. The judge could easily have stepped aside without criticism and had the cause tried by another judge, even though it was predictable that a claim of double jeopardy might subsequently be raised. To hold that the law requires a substitution of judges under circumstances similar or comparable to those here would invite misconduct toward judges and lawyers, and a practice would develop that the grosser the misconduct the better the chances to avoid trial with an undesired judge or lawyer."), rev'd in part on other grounds sub nom. Hall v. Washington, 106 F.3d 742 (7th Cir. 1997).