

MEDIATION ETHICS

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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Disclosure of Conflicts of Interest

Hypothetical 1

As you approach the end of your career, you think it might be interesting and lucrative to act as a mediator. Among other things, you wonder whether you will have to disclose any past unrelated representations of any of the parties in mediations you are selected to handle.

Do mediators have to disclose unrelated past representations of, or adversity against, parties to mediations they handle?

MAYBE

Analysis

Mediators must comply with whatever conflicts disclosure obligations have been imposed by statute or regulations, by the entity arranging the mediation, or agreed upon by the parties.

- Randy Evans, Shari Klevens and Suzanne Y. Badawi, Attorney-Mediators Can't Hide From Conflicts of Interest, *The Recorder*, June 11, 2014 ("Increasingly, attorneys and law firms are looking for different ways of generating income. Seasoned attorneys, and by affiliation their law firms, seeking diversification often start a mediation practice. Of course, not every litigator makes a good mediator. On the other hand, years of experience settling and trying cases can be the perfect background for an effective mediator. While training and skill are important, appropriate systems for ethics compliance are also critical. The California Rules of Court govern the rules of conduct for mediators in court-connected mediation programs for civil cases. Rule 380.5 provides that "[t]he rules in this article establish the minimum standards of conduct for mediators in court-connected mediation programs for general civil cases. These rules are intended to guide the conduct of mediators in these programs, to inform and protect participants in these mediation programs, and to promote public confidence in the mediation process and the courts. For mediation to be effective there must be broad public confidence in the integrity and fairness of the process. Mediators in court-connected programs are responsible to the parties, the public, and the courts for conducting themselves in a manner that merits that confidence."; "Many attorney/mediators and law firms often ask whether they must do a conflicts check at all since a mediation does not involve the rendition of legal

services -- unless of course there is a claim and they want coverage from their legal malpractice insurer. The short answer is 'Yes -- do the conflicts check.' The important point is that an attorney's ethical obligations do not end when the attorney undertakes a non-legal service, especially when the services are provided by his law practice or law firm. As a result, attorney mediators should identify all participants in a mediation and any interested insurers. These names should be compared with the attorney's/law firm's client matter list to see if any of the participants are clients or adverse parties. If so, the attorney/mediator should either decline the mediation or disclose the potential conflict and follow the rules for a consent or waiver of any conflict. This includes written full disclosure and written consent. The more difficult question is how mediation participants are listed for determining conflicts with other firm representations. Here, the important step is to confirm with the participants that they are not clients of the attorney mediator or the law firm. This can best be accomplished through a form to be signed by all of the participants at the mediations stating: 'Each participant understands and agrees as follows: no attorney-client relationship exists between the mediator and any participant based on this mediation.' With this disclaimer, the attorney/mediator or law firm can designate mediation participants as just that, as opposed to listing them in the client database. Practicing attorneys make good mediators and can supplement their practice with this important additional service. To mediate well, get trained. To do it safely, read and follow the ethics rules for mediators and comply at all times with the rules. This includes special attention to the identification and resolution of anything that looks like a conflict.").

- Bruce A. Friedman, [The Ethical Neutral: What Must Be Disclosed in Mediation](#), Law360, May 28, 2013 ("During my time as a mediator, I have encountered some confusion among lawyers and mediators over conflict-of-interest and disclosure requirements applicable to mediators in California. Some say there are no requirements at all. Others say that there are strict rules requiring disclosure. Turns out, both sides are right. In court-ordered mediations conducted by panel mediators, California Rules of Court, Rule 3.855 provides guidelines regarding conflicts of interest and disclosure. The same is true in the United States District Court Central District of California (under General Order Number 11-10) governing the referral of cases to the alternative dispute resolution program with a neutral from the court's mediation panel. Those that say there are no such requirements are correct with respect to mediations that are not conducted by panel mediators. However, in light of the recent closing of the Los Angeles Superior Court's mediation program (due to budgetary constraints), it is important to review and understand these rules and when they apply. Rule 3.855 requires disclosure of matters that may reasonably raise a question about a mediator's ability to be impartial or subject a judge to disqualification under California Code of Civil Procedure Section 170.1. These matters include past, present

and currently expected interests, relationships and affiliations of a personal, financial, professional or financial nature. The federal rules are similar. Under General Order Number 11-10, panel mediators are governed by the Rules of Professional Responsibility and must disclose anything that may cause a party to question the mediator's impartiality under 28 U.S.C. Section 455 (a). California Rules of Professional Responsibility, Rule 3-310 provides the conflict-of-interest and disclosure requirements in the context of the attorney-client relationship. Generally, the rules do not permit adverse representation of a client. In the mediation context, this would only be applicable to an attorney mediator that is practicing law and represents a party to the mediation in another matter. As it pertains to disclosure, the rule is similar in nature to the rule of court in terms of disclosing relationships to parties and/or lawyers of a personal, professional, business or financial nature. Many state courts and legislatures have adopted mediation disclosure and conflict-of-interest rules. Illinois and Washington, among others, have adopted the Uniform Mediation Act, which includes disclosure of conflicts of interest and relationships that may be perceived as affecting the mediator's neutrality."; "In my opinion, the most prudent and best practice is to comply with these rules in all mediations in order to protect the integrity of the mediator and the mediation process. The rules boil down to disclosing to counsel for the parties anything that a mediator believes may impact upon the perception of neutrality and impartiality. This doesn't mean that a mediator needs to go as far as to meet arbitrator disclosure requirements (which include disclosure of all past arbitrations conducted for the parties or their counsel), but certainly, current representation of a party in mediation or past representation of a party with respect to a similar case should be disclosed. A financial interest in a party or personal relationship with a party or counsel should also be disclosed. While a mediator does not need to disclose past mediations with a party or counsel, if there is a personal friendship or financial interest that exceeds the professional relationship between a mediator and a lawyer, that should be disclosed."; "The current hodgepodge of court rules, model rules and statutes makes compliance complicated and often leaves mediators and counsel in a quandary as to what is required.").

Failure to comply with the required disclosure can lead to disastrous results. A decision arising from an arbitration (which admittedly involves higher-stakes issues than mediations) highlights this risk.

- Tenaska Energy, Inc. v. Ponderosa Pine Energy, LLC, 437 S.W.3d 518, 520 (Tex. 2014) (vacating a \$125,000,000 arbitration award, because the arbitrator had not fully disclosed his connections with Nixon Peabody, which represented one of the arbitration parties; "The trial court found the arbitrator failed to disclose that all of his contacts at the 700-lawyer firm were with the

two lawyers that represented the party to the arbitration at issue; he owned stock in the litigation services company that was pursuing business opportunities with the firm; he served as the president of the company's United States subsidiary; he conducted significant marketing in the United States for the company; he had additional meetings or contacts with the two lawyers in question to solicit business from the firm for the company; and he allowed one of the two lawyers to edit his disclosures to minimize the contact.").

Best Answer

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

B 2/15

Unauthorized Practice of Law Issues

Hypothetical 2

You attended law school, but were unable to pass the bar despite several attempts. You wonder whether you can represent parties in mediations despite being unable to practice law in the traditional sense.

Can nonlawyers represent parties in mediations without violating unauthorized practice of law statutes and regulations?

MAYBE

Analysis

Several states have held that nonlawyers may not legally represent parties in arbitrations.

- Alabama LEO R0 2014-01 ("[A]bsent a federal or state statute allowing such, the representation of a party by a non-lawyer in a court-ordered arbitration proceeding in Alabama would constitute the unauthorized practice of law. Moreover, a lawyer has an obligation to bring the matter of the non-lawyer's representation of a party to the attention of the arbitrator and where appropriate, to the attention of the court." (emphasis added); "It is the opinion of the Disciplinary Commission that under section (b)(1) of the UPL statute a non-lawyer may not represent a party during a [sic] arbitration absent an express federal or state statute or law allow for such. A non-lawyer representative would be making an appearance in a representative capacity. Moreover, it is presumed that during the arbitration, the non-lawyer representative would be introducing exhibits, conducting examination of witnesses, including expert witnesses, objecting to exhibits and making legal arguments on behalf of the party and/or providing legal advice to the party. Such activities generally require the skill and judgment of a licensed attorney and under the UPL statute constitutes the practice of law."; "In addition, Rule 5.5, Ala. R. Prof. C., prohibits a licensed Alabama lawyer from assisting 'a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.' If a lawyer were to stay silent and allow a non-lawyer to represent a party in a [sic] arbitration, that lawyer would be aiding and abetting that non-lawyer in the unauthorized practice of law. As such, a lawyer has an obligation to bring the matter of the non-lawyer's representation of a party to the attention of the arbitrator and where appropriate, to the attention of the court and the Office of General Counsel.").

- Illinois LEO 13-03 (1/2013) (holding that a nonlawyer could not represent a party to an arbitration under the Financial Industry Regulatory Authority ("FINRA") Code of Arbitration Procedure for Customer Disputes; "[W]hile we are not prepared to impose upon the attorney/arbitrator responsibility for preventing unauthorized practice, we believe that an arbitrator faced with such a situation should inform FINRA and, if necessary, notify the ARDC, the agency that has jurisdiction to investigate unauthorized practice pursuant to authority newly granted by Illinois Supreme Court Rule 752. It is not our view, however, that an attorney having taken such steps could be said to be assisting the unauthorized practice should he or she not withdraw as an arbitrator in the event that the steps taken do not result in the discontinuation of the nonlawyer representation.").
- Virginia UPL Op. 214 (2/27/09) (holding that a certified public accountant could not represent a party in a Virginia arbitration; "The individual in the present inquiry is neither an attorney licensed in another jurisdiction coming into Virginia to handle a matter for a client the attorney represents elsewhere nor is the person or entity who is a party to the arbitration the regular employer of this individual. Rather, this individual is a CPA, in Virginia, not a licensed attorney in any jurisdiction, who appears to be independently offering to provide to customers from the public, services related to arbitration, including representation, and charging a fee for those services and representation. Based on the Definition of the Practice of Law in the Commonwealth of Virginia, in particular, subsection (1), and the decisions of the Committee in UPL Opinions 92, 200 and 206, the conduct of this CPA is the unauthorized practice of law.").

The answer is not as clear in the context of mediations. Informal mediations involve much less formality and required procedural steps than court-sponsored arbitrations. As long as nonlawyer mediators do not provide legal advice and do not attempt to prepare documents memorializing any agreements, they should be safe from any unauthorized practice of law accusations.

Nonlawyer corporate employees wishing to represent parties in mediation might also rely on many states' permissive rules allowing corporate employees to represent their employers in certain limited dispute-resolution activities.

Some states even permit corporate employees to represent their employers in the much more formal arbitration setting.

- Virginia UPL Op. 206 (2/10/04) (finding that a nonlawyer corporate officer could represent the corporation in a Virginia arbitration; "Based on this authority the Committee is of the opinion, in response to your first question, that it would not be the unauthorized practice of law for an officer of a corporation who is not a lawyer to represent the corporation in an arbitration proceeding in Virginia. The definition of the practice of law allows 'a regular employee acting for his employer' to provide legal advice and prepare legal documents for this employer. While the definition and Rule 1-101 prohibit a nonlawyer from representing the interests of or appearing on behalf of his employer or a corporation before 'a tribunal,' the definition of 'tribunal' in UPC 1-1 does not include an arbitration proceeding. It follows, therefore, that a non-attorney officer of a corporation can represent that corporation and provide legal advice to the corporation/employer within the context of an arbitration proceeding." (emphasis added; footnote omitted)).

Best Answer

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

B 2/15

Law Firms Offering Mediation Services through the Firm or Subsidiaries

Hypothetical 3

Your law firm is looking for ways to increase its revenue. One of your partners suggests that perhaps your firm can establish a subsidiary to handle mediations.

May law firms establish subsidiaries to handle mediations?

YES

Analysis

Most if not all states allow law firms to provide mediation services through the firm itself or through wholly owned subsidiaries.

ABA Debate Over Ancillary Services. Several years ago, the ABA engaged in a vigorous debate about lawyers selling non-legal services.¹

In what amounted to a precursor to the even more contentious debate about multidisciplinary practice,² the ABA finally settled on a fairly bland rule governing lawyers' sale of non-legal services.³

¹ Historically, the ABA has permitted lawyers to sell non-legal services to their clients. ABA Informal Op. 1497 (3/1/83) (a lawyer/doctor may practice law and medicine from the same office and serve the same person as both lawyer and doctor).

² Undoubtedly prompted by the practice of accounting firms gobbling up European law firms (and worries that ultimately all American lawyers would end up working for accountants), the ABA established a Commission on Multidisciplinary Practice to study possible changes in the ethics rules so that lawyers would partner with (and share their fees with) nonlawyers under certain circumstances.

After many months of hearings, careful deliberations, intense analysis, and a wide-ranging effort to obtain a consensus, the Commission presented its MDP proposal to the ABA House of Delegates on August 10, 1999. The House of Delegates sent the Commission back to the drawing board -- by a vote of 304 to 98.

After nearly a year of re-work and re-analysis, the Commission presented a softened MDP proposal to the House of Delegates on July 11, 2000. By a vote of 314 to 106, the ABA not only rejected the Commission's recommendations, it officially disbanded the Commission.

(a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services . . . if the law-related services are provided:

(1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or

(2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist;

(b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

ABA Model Rule 5.7.

A comment to ABA Model Rule 5.7 confirms that the rule

applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity.

Nearly every state engaged in its own debate about MDPs, with many states (including Virginia) following essentially the same pattern as the ABA -- state bar elected bodies rejecting recommendations by special task forces that almost always favored some form of MDPs.

For instance, the Joint Virginia State Bar and Virginia Bar Association Commission on Multidisciplinary Practice met nearly every month for two years before sending its proposed MDP changes to the Virginia State Bar Council (the elected body that decides such issues). On June 14, 2002, the Virginia State Bar Council rejected the recommendation of the Joint Commission by a vote of 60 to 4.

The demise of Arthur Andersen and other Enron-related events seem to have ended the MDP debate for now.

³ A comment to ABA Model Rule 5.7 provides examples of the non-legal services that lawyers might provide:

[T]itle insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

ABA Model Rule 5.7 cmt. [9].

ABA Model Rule 5.7 cmt. [2].

Comment [8] requires that lawyers providing such non-legal services through a separate entity assure that "nonlawyer employees in the distinct entity that the lawyer controls compl[y] in all respects with the Rules of Professional Conduct."

Thus, lawyers cannot avoid the ethics rules if they sell non-legal services to their clients in connection with legal services, or if the lawyer has not carefully explained the inapplicability of the conflicts rules.

Of course, the ABA Model Rules warn that

a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest.

ABA Model Rule 1.7 cmt. [10].

In a 2004 legal ethics opinion, the ABA dealt with lawyers posting bail bond for their clients -- declining to adopt a per se prohibition, but warning lawyers to be careful when doing so. ABA LEO 432 (1/14/04) (although some states totally prohibit lawyers from posting bail bonds for their clients, such conduct is sometimes permissible as long as clients consent after full disclosure. Lawyer should recognize that (1) there is a possibility of conflicts because someone posting a bail bond has a financial incentive to apprehend a fugitive client or otherwise assure that the client appears in court; (2) some states consider the posting of bail bonds a form of impermissible financial assistance to a client; and (3) obtaining the necessary consent from a client would be extremely difficult if the client is incarcerated; posting such bail bonds is more likely to be

permissible if there is an immaterial amount of money at stake, or if there is a family or friendship relationship between the lawyer and client).

Restatement. The Restatement acknowledges that lawyers can sell law-related services.

Ancillary business activities of lawyers can be conducted consistent with the Section and with other applicable requirements. A lawyer may, for example, operate a real-estate agency, insurance agency, title-insurance company, consulting enterprise, or similar business, along with a law practice. So long as each enterprise bills separately and so long as the ancillary enterprise does not engage in the practice of law, involvement of both the lawyer's law practice and the lawyer's ancillary business enterprise in the same matter does not constitute impermissible fee-splitting with a nonlawyer, even if nonlawyers have ownership interests or exercise management powers in the ancillary enterprise.

Restatement (Third) of Law Governing Lawyers § 10 cmt. g (2000). Not surprisingly, the Restatement then warns lawyers that they must be very careful when doing so, and also mandates various disclosures.

However, a lawyer's dual practice of law and the ancillary enterprise must be conducted in accordance with applicable legal restrictions, including those of the lawyer codes. Among other things, the lawyer's self-interest in promoting the enterprise must not distort the lawyer's judgment in the provision of legal services to a client, including in making recommendations of the lawyer's own ancillary service. To avoid misleading the client, a lawyer must reveal the lawyer's interest in the ancillary enterprise when it should be reasonably apparent that the client would wish to or should assess that information in determining whether to engage the services of the other business. The lawyer must also, of course, avoid representing a client (or do so only with informed client consent) in a matter in which the ancillary enterprise has an adverse interest of such a kind that it would materially and adversely affect the lawyers' representation of the client The lawyer must also disclose to the client, unless the client is already sufficiently

aware, that the client will not have a client-lawyer relationship with the ancillary business and the significance of that fact. Other disclosures may be required in the course of the matter. For example, when circumstances indicate the need to do so to protect an important interest of the client, the lawyer must disclose to the client that the client's communications with personnel of the ancillary enterprise -- unlike communications with personnel in the lawyer's law office . . . -- are not protected under the attorney-client privilege. If relevant, the lawyer should also disclose to the client that the ancillary business is not subject to conflict-of-interest rules . . . similar to those applicable to law practice.

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

Finally, the Restatement mirrors ABA Model Rule 5.7 in advising lawyers that they might well be governed by all of the ethics rules applicable to the provision of legal services.

A lawyer's provision of services to a client through an ancillary business may in some circumstances constitute the rendition of legal services under an applicable lawyer code. As a consequence, the possibly more stringent requirements of the code may control the provision of the ancillary services, such as with respect to the reasonableness of fee charges . . . or confidentiality obligations When those services are distinct and the client understands the significance of the distinction, the ancillary service should not be considered as the rendition of legal services. When those conditions are not met, the lawyer is subject to the lawyer code with respect to all services provided. Whether the services are distinct depends on the client's reasonably apparent understanding concerning such considerations as the nature of the respective ancillary-business and legal services, the physical location at which the services are provided, and the identities and affiliations of lawyer and nonlawyer personnel working on the matter.

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

Thus, the Restatement takes the same essentially liberal approach as the ABA Model Rules.

State Bars' Approach. Despite these inherent difficulties, state bars generally have accepted the notion of lawyers selling non-legal services to their clients.

For instance, the Virginia Bar has repeatedly dealt with this issue. In a surprisingly large number of legal ethics opinions, the Virginia Bar has allowed lawyers to act in the following roles in providing non-legal services to their law clients: consultant;⁴ certified public accountant;⁵ stockbroker;⁶ insurance salesperson;⁷ real

⁴ Virginia LEO 1658 (12/6/95) (a law firm may establish a non-legal consulting firm (to provide human resource advice) and share common directors, use similar logos and letterheads, share overhead expenses (such as secretarial support, library resources and lobby space), engage in joint marketing and refer clients to each other, as long as: the public would not be confused by any advertising; the joint marketing does not result in any misperceptions; the firms avoid sharing any confidential client information; the firms do not split fees or pay one another a referral fee; the firms advise their clients of other available referral options; the firms adopt "adequate conflicts screening procedures"; any lawyers involved in the consulting firm "comply at all times with applicable rules of the Code of Professional Responsibility, whether or not the attorney is acting in a professional capacity as a lawyer"); Virginia LEO 1318 (2/1/90) (a lawyer may practice law and operate a consulting firm out of the same office as long as the activities are kept separate and clients consent after full disclosure; the lawyer may send out one bill for both services as long as the bill fully discloses the separate services).

⁵ Virginia LEO 1163 (11/16/88) (a lawyer who is also a CPA may perform both legal and accounting services as long as the client consents after full disclosure).

⁶ Virginia LEO 430 (10/16/81) (a lawyer/stockbroker may send out announcements describing both roles, but must advise clients that the attorney-client privilege would not cover communications if the lawyer is acting as a stockbroker).

⁷ Virginia LEO 1754 (5/17/01) (a lawyer who also sells insurance may recommend that a legal client purchase insurance from the lawyer, with the lawyer receiving part of the commission on the sale of the insurance policy, as long as there is full disclosure and consent (under Rule 1.8) and the lawyer's judgment is not affected by the conflict); Virginia LEO 1612 (9/21/94) (a lawyer who also sells insurance may represent plaintiffs against insurance companies or their insureds for which the lawyer has written insurance policies, as long as the client consents; in fact, the lawyer may pursue such cases even if the lawyer wrote the policy for the defendant insured; [the Bar did not discuss the possibility that as an insurance agent the lawyer might have acquired confidential information about the defendant]); Virginia LEO 1311 (11/21/89) (a lawyer wishes to sell insurance to other law firms representing a client's adversaries; the clients must consent to this arrangement); Virginia LEO 869 (12/19/86) (a lawyer employed by a law firm may also be employed as a part-time life insurance agent).

estate salesperson;⁸ title insurance seller;⁹ mediator;¹⁰ registered agent;¹¹ escheator;¹² escrow agent;¹³ financial planner.¹⁴

Other states take a similarly broad approach.

- Arizona LEO 05-01 (5/2005) (analyzing an Arizona rule that deals with the ability of lawyers to share in the fees of other professionals to whom they

⁸ Virginia LEO 1131 (9/1988) (a law firm may invest in a realty corporation and continue to represent clients of the corporation if the clients consent after full disclosure); Virginia LEO 627 (11/13/84) (a lawyer who is a full time real estate broker may represent the broker but may not represent other parties to the transaction).

⁹ Virginia LEO 1152 (11/16/88) (a lawyer may arrange for title insurance for a client through a company of which the lawyer is part owner, as long as the client consents). [This LEO was further explained in LEO 1564.]; Virginia LEO 1097 (7/11/88) (a lawyer may issue title binders on behalf of a client as long as the client consents after full disclosure); Virginia LEO 1072 (5/31/88) (a lawyer may obtain title insurance for clients through a company in which the lawyer has an interest as long as the client consents after full disclosure. [This LEO was further explained in LEO 1564.]).

¹⁰ Virginia LEO 1759 (2/4/02) (a lawyer who owns a mediation company is "of counsel" to a law firm in which his/her spouse is a partner; after mediation of a domestic dispute, one of the parties asks an associate in the law firm to file for divorce on behalf of that party; the Bar holds that lawyers/mediators may not represent either party after they handle a mediation, even with the clients' consent (overruling earlier LEOs 1684, 590, 544, and 511); because this specific disqualification applies only to the lawyer/mediator, an associate in the firm would not be disqualified based on the mediator's disqualification; however, the lawyer/mediator's duty of confidentiality arising from the mediation also disqualifies that lawyer, and is imputed to the firm to which the lawyer/mediator is "of counsel" (although client consent can cure this conflict); if there were no connection between the lawyer/mediator and the law firm, lawyers practicing in the firm would not be disqualified from representing the party in the divorce as a result of the spousal relationship to the mediator); Virginia LEO 1368 (12/12/90) (lawyers may be shareholders of a corporation providing mediation and arbitration services, but the lawyers must comply with the ethics code).

¹¹ Virginia LEO 961 (9/3/87) (a lawyer representing a client sued by a construction company for which the lawyer formerly did legal work and for which the lawyer continues to serve as registered agent may continue the representation but must first resign as registered agent (citing "an appearance of impropriety").

¹² Virginia LEO 863 (4/1/87) (a lawyer who has acted as an escheator may not later represent a party in litigation over property sold in the estate sale, because there is a "strong possibility" that the lawyer would be a witness).

¹³ Virginia LEO 1482 (10/19/92) (acting as a lawyer and escrow agent is not per se unethical); Virginia LEO 466 (9/20/82) (a lawyer serving as escrow agent may receive the income from investments made as payment for services as escrow agent, as long as the client consents); Virginia LEO 372 (5/15/80) (a lawyer representing a purchaser in a real estate transaction may act as joint escrow agent if the purchaser and seller consent).

¹⁴ Virginia LEO 563 (4/10/84) (as long as the client consents, a lawyer acting as a financial adviser may receive a fee from the third party who markets the investments); Virginia LEO 473 (9/20/82) (a lawyer having a relationship with a finance company may refer a client to the company, but only after full disclosure; the lawyer may not refer the debtor to the company if the lawyer represented the creditor).

- refer clients; "Under ER 5.7, adopted in December 2003, a lawyer who operates a separate investment advisory business may refer non-clients to an investment advisory firm that pays a referral fee to the lawyer, so long as the lawyer takes reasonable steps to assure that the non-clients understand they are not receiving legal services and they do not have the protections of a lawyer-client relationship. A lawyer who provides such services to former clients must also comply with the confidentiality requirements and other obligations under ER 1.9, and should take particular care to assure that the former clients understand they do not have a lawyer-client relationship with respect to the investment transactions. A lawyer may not refer a current client to such a program, however, unless the lawyer meets the 'heavy burden' of showing compliance with ER 1.7 and 1.8(a)."; ultimately concluding that a lawyer may accept a referral fee from an investment advisory firm to which the lawyer referred clients of the lawyer's separate investment-related services firm; noting that "[t]he lawyer would not provide investment-related services in the same matter in which the lawyer provides legal services. The lawyer also would disclose in writing to the customers that the investment services are not legal services and the protections of the client-lawyer relationship do not apply."; "Also, a lawyer who provides investment advisory services must satisfy ERs 7.1 through 7.3 and maintain separation between the law practice and the lawyer's investment advisory business so that they do not appear to be related.").
- Utah LEO 04-05 (12/2/04) ("It is not per se unethical for a lawyer to refer a client to a cooperative organization created by the lawyer to provide non-legal services and for the lawyer to participate in the organization's profit sharing. If the lawyer complies with the following, then the arrangement is permissible: (1) objectively concludes that any identifiable conflicts between the lawyer and the cooperative organization would not materially affect the representation of that client; (2) affirms in writing to the client that the referral will not compromise the client's interests in any way; (3) fairly concludes that the services provided by the cooperative organization are being provided at fair and reasonable fees; (4) discloses that the lawyer will receive a share of profits from the cooperative organization; (5) advises the client to seek independent counsel as to the referral; and (6) secures the client's consent.").
 - Oklahoma LEO 316 (12/14/01) ("While the safest and least onerous course of conduct would be for a lawyer to avoid possible conflicts of interest and ethical violations by not entering into business transactions with a client beyond the attorney-client relationship, total avoidance of such transactions is not demanded by the ethics rules or by the vast majority of case law and ethics interpreting them. Under the current Oklahoma Rules of Professional Conduct, a lawyer may enter into a business transaction with a client if: (1) the terms of the transaction and the lawyer's interest therein (including compensation) are fair and reasonable to the client, (2) the terms of the

transaction and the lawyer's interest therein are fully disclosed in an understandable manner to the client in writing, (3) the client is advised to, and given a reasonable opportunity to, seek independent counsel in the transaction, and (4) thereafter, the client consents to the transaction in writing. If these requirements are satisfied, the client's interests can be adequately protected. If the lawyer complies with the applicable Rules of Professional Conduct and other laws (such as insurance or securities licensure, registration and disclosure requirements), a lawyer who provides legal services to a client in estate planning or trust matters may also provide non-legal, but ancillary, products or services to their law clients, either directly or through an affiliated entity. Because the 'fair and reasonable to the client' standard is both objective and fact-specific in nature, no absolute 'safe harbor' exists. However, as the provision of coordinating legal and non-legal services evolves, Oklahoma lawyers who provide law-related services to their clients can minimize the risk of alleged ethics violations by carefully reviewing the applicable Rules of Professional Conduct and fully documenting their compliance with these requirements in order to respond to any subsequent questions regarding their professional conduct.").

- North Carolina LEO 2001-9 (10/19/01) (holding that a lawyer may recommend the purchase of financial products from a client of the lawyer, but may not receive a commission for the sale of such products; "Rule 1.8(b), however, does not prevent an attorney from providing law-related services to a legal client, so long as the attorney fully discloses his self-interest in the referral and the referral is in the best interest of the client. 2000 Formal Ethics Opinion 9 was not intended and does not create an exception to Rule 1.8(b). That opinion allows an attorney to provide accounting services to his legal clients. Nothing in the opinion specifically permits an attorney/CPA, who holds an appropriate license, to sell securities or other products to a client and profit from the sale. An attorney may, however, provide accounting, financial planning, or other law-related services to a client and charge a fee for rendering those services. An attorney may also provide financial products to the client, but may not profit from the sale of those products by charging either an additional fee or a commission.").
- North Carolina LEO 2000-9 (1/18/01) (analyzing the following question about a lawyer who also acts as a CPA: "Attorney may decide to join an existing accounting practice as a CPA. If so, may Attorney operate a separate legal practice within his office in the accounting firm?"; answering as follows: "Yes, this arrangement is not distinct from the arrangement allowed in RPC 201 in which a lawyer/real estate agent operated a separate law practice within the offices of a real estate brokerage. Nevertheless, such an arrangement presents serious obstacles to the fulfillment of a lawyer's professional responsibility. Preserving the confidentiality of client information and records is virtually impossible in such a setting. Client information must be isolated

- and concealed from all of the employees of the CPA firm. See Rule 1.6. In addition, Attorney must avoid conflicts of interest between the interests of his legal clients and the interests of the clients of the CPA firm. See Rules 1.7 and 1.9. There may be no sharing of legal fees with the CPA firm in violation of Rule 5.4(a) which prohibits a lawyer from sharing legal fees with a non-lawyer. Finally, Attorney must maintain a separate trust account for the funds of his law clients pursuant to Rule 1.15 et seq."; also analyzing the question of whether the lawyer may "offer legal services to his accounting clients and vice versa"; answering as follows: "Yes, if there is full disclosure of the lawyer's self-interest in making the referral and Attorney reasonably believes that he is exercising independent professional judgment on behalf of his legal clients in making such a referral. However, direct solicitation of legal clients is prohibited under Rule 7.3 although it may be permitted by the regulations for certified public accountants. Rule 7.3(a) does permit a lawyer to engage in in-person or telephone solicitation of professional employment if the lawyer has a 'prior professional relationship' with a prospective client. If a prior professional relationship was established with a client of the accounting firm, Attorney may call or visit that person to solicit legal business."; also holding that the lawyer may share a telephone number with the accounting firm with whom the lawyer also works).
- New York LEO 731 (7/27/00) (allowing lawyers to engage in businesses other than the practice of law, as long as they do not violate any ethical or legal rules; concluding, however, that a lawyer may not compensate employees for soliciting clients to engage the services of a title insurance agency in which the lawyer has an ownership interest).
 - North Carolina LEO 99-6 (7/23/99) (analyzing the following question: "May a North Carolina lawyer own all or part of a title insurance agency that writes title policies on North Carolina property?"; providing the response: "Yes, provided the lawyer does not give a title opinion to the title insurance company for which the title agency issues policies. See RPC 185.").
 - New York LEO 711 (1/7/98) (finding an inherent conflict in a lawyer selling long-term care insurance to clients that the lawyer represents in estate planning).
 - Philadelphia LEO 97-11 (10/1997) (allowing lawyers to own businesses providing non-legal services, as long as there is disclosure to clients and informed consent).
 - Florida LEO 94-6 (4/30/95) (allowing a law firm to operate an ancillary business within the firm, as long as it conforms with all of the ethics Rules; "A law firm may operate a mediation department within the firm. The mediation practice must be conducted in conformity with the Rules of Professional

- Conduct. Consequently, nonlawyers employed by the firm's mediation department may not have an ownership interest in the firm or its mediation department, the attorney advertising rules will apply to any advertising by the mediation department, and the mediation department may not use a proposed trade name because that trade name is not the name under which the firm practices.").
- Illinois LEO 92-5 (10/23/92) (permitting a lawyer to affiliate with a nonlawyer mediator in a mediation business, as long as the lawyer complies with applicable ethics rules; "There is no prohibition against lawyer engaging in divorce mediation business with a non-lawyer and operating the business from the law office where lawyer does not represent either party in the underlying divorce.").
 - Florida LEO 88-15 (10/1/88) (allowing lawyers to practice law and engage in another profession from the same office, as long as the lawyer preserves client confidences, refrains from prohibited solicitation and does not impermissibly share legal fees).
 - Florida LEO 79-3 (1979) (recognizing that in 1979 Florida eliminated an earlier prohibition on a lawyer practicing law and engaging in another profession from the same office).

Other states take a more stringent approach.

Among other things, some bars express concern about lawyers' preservation of client confidences, sharing fees with nonlawyers, or violating the prohibition on providing a benefit to a third party in return for that third party's recommendation of the lawyer.

- New York LEO 845 (10/14/10) ("A lawyer who is also a real estate broker may ethically offer to share her broker's commission with attorneys who refer buyers or sellers to her if either (a) the referring lawyer is not representing the buyer or seller in the real estate transaction, or (b) the referring lawyer is representing the buyer or seller in the real estate transaction but remits or credits the referral fee to the client and obtains the client's informed consent to the potential conflict arising from the referral fee."; "This Committee has often opined that a lawyer cannot act as a lawyer in the same transaction in which a lawyer acts a real estate broker because of the possible conflict between the client's interest and the lawyer's own personal interest."; "In N.Y. State 682 (1996), we noted that our prior opinions have allowed an attorney to receive a referral fee from providers of non-legal services or products for

referring clients if (a) the client consents after full disclosure, (b) the legal fee and the referral fee together do not constitute an excessive fee for legal services, and (c) the attorney remits the referral fee to the client if the client so requests. In these opinions, the referral concerned a product or service that was 'fairly uniform among providers' and either was (1) 'required in an objectively determinable quantity incident to the legal service performed by the attorney' (e.g., a mortgage and title insurance in connection with a real estate transaction), or (2) was 'unconnected with any particular legal services' (e.g. certificates of deposit)."; "We think the present situation -- real estate brokerage -- falls somewhere in between 'fairly uniform' products and services like title insurance and certificates of deposit (where receiving a referral fee in connection with client work is routinely consentable as long as the referral fee is remitted to the client), on the one hand, and highly variable products and services like life insurance and investment advice (where receiving a referral fee is nonconsentable even if the referral fee is remitted to the client), on the other hand. While the quality of real estate brokerage services varies among providers, the services are 'required in an objectively determinable quantity incident to the legal services performed by the attorney' because a client typically employs only one broker per transaction, commissions are relatively standard, and the size of the broker's commission depends on the price of the home the client purchases. Moreover, although a referral fee give the lawyer a financial incentive to refer a client to that particular broker even if the fee is passed on to the client, clients are generally aware that they have many real estate brokers to choose from, and clients are generally capable of evaluating different brokers.").

- Florida Bar v. Glueck, 985 So. 2d 1052 (Fla. 2008) (disbarring a lawyer for creating a joint business with an immigration consulting firm, which involved sharing offices and an employee; noting that the lawyer had not kept separate track of money paid to him and to the consulting firm).
- New Jersey LEO 688 (3/13/00) (holding that the ethics rules prohibited a law firm from establishing a separate limited liability company to provide title reports for the firm's foreclosure clients; citing a number of its earlier decisions prohibiting lawyers "who own[ed] controlling interests in title companies, or title abstract companies which act as agents for title companies, from referring clients to those companies"; explaining that earlier decisions "are grounded in the premise that there is an inherent conflict between the title insurer and the real estate purchaser. On the one hand, the title insurer seeks to limit its liability, while on the other, the purchaser would want to expand it."; finding that general prohibition inapplicable because the proposed arrangement did not involve the purchase of title insurance; nevertheless barring the proposed arrangement -- relying on more general principles; citing an earlier opinion in which it labeled "inherently coercive" any arrangement in which a lawyer refers clients to another service provider owned by the client;

- noting that in an earlier opinion, the Advisory Committee imposed several disclosure consent requirements, and warned that lawyers must keep their law practice totally separate from such other service-providing subsidiaries; analyzing how these principles applied to the proposed ownership of a title abstract company by the lawyers making the inquiry, indicating that it had "serious doubt" that the arrangement would satisfy the "requirement of a physically distinct location" for the subsidiary (the inquiry indicated that the title abstract company "would have office space within the law firm's offices, although it would have a separate sign to identify it"); raising what the Advisory Committee called the "more serious concern" that the title abstract company intended to limit its liability to \$1,000 for each report; noting that there apparently would be no title insurance in the proposed arrangement, explaining that "by interposing a separate entity and expressed disclaimer, the [attorneys will] have facially limited the liability they might have otherwise had to their clients, if they had performed the same services as part of their law practice"; refusing to allow the arrangement because of the "confusion in the minds of their clients" caused by the "similarity of the services performed and proximity of their offices" -- compounded by the limitation on liability).
- New York LEO 711 (1/7/98) ("[W]e conclude that a lawyer is categorically forbidden from selling long-term care insurance to clients whom the lawyer represents in estate planning. For purposes of our analysis, long-term care insurance has many of the same characteristics as life insurance (e.g., a wide array of insurance products sold by various companies at different prices, and threshold questions of whether long-term care insurance products are the most appropriate or economical way to satisfy the client's needs). Furthermore, when a lawyer advises a client in estate-planning matters, central objects of the representation include how best to satisfy the financial needs of the client and of those for whom the client wishes to or is obliged to provide; how to conserve the client's assets in the event of various contingencies; and how to provide for various health-related contingencies (such as by means of a health care proxy or living will). Thus, advice about the purchase of long-term care insurance is not likely to be 'merely tangential' to the representation, but central to it. This conflict cannot be cured by disclosure and client consent.").
 - Utah LEO 146a (4/28/95) ("A lawyer who is employed for an insurance firm or who works as an insurance agent is restricted from soliciting legal services from insurance customers under Rule 7.3.").
 - South Carolina LEO 93-05 (1993) ("A law firm that provides legal services to retirement plans may own interest in and refer clients to an ancillary business that provides services to retirement plans if the services provided do not constitute the unauthorized practice of law and the law firm complies with the provisions of Rules 1.7 and 1.8. If the services rendered by the business

entity constitute the unauthorized practice of law, the attorneys or law firm may not assist that unauthorized law practice by referring clients to the entity. A lawyer may not give anything of value in return for a referral for legal services. Therefore, a law firm that provides value to an ancillary business entity and its employees in the form of capital, management, advice, employee compensation and client referrals may not enter into an agreement providing referrals for legal services from the ancillary business. . . . In the present situation, a law firm proposes to help organize and participate in an ancillary business that will provide referrals to the law firm for legal services. The law firm's role in providing capital for the ancillary business, management advice, compensation to the business' employees, and referrals to the business constitute value to the ancillary business in return, in part, for referrals to the law firm. The proposed relationship therefore violates Rule 7.2(c).").

Interestingly, the Philadelphia Bar has dealt with the application of these principles to in-house lawyers participating in business as well as legal matters. The Philadelphia Bar generally indicates that in-house lawyers providing business services to their clients do not fall within Rule 1.8.

- Philadelphia LEO 2008-8 (10/2008) (addressing the privilege and ethics implications of an in-house lawyer participating in business as well as legal matters; initially finding that Rule 1.8 does not apply to the in-house lawyer receiving a salary from the company for the business role; "[U]nless the inquirer is acquiring some partnership interest in the company, or is otherwise being compensated with nonmonetary property, the provisions of Rule 1.8(a) do not apply."; acknowledging that Rule 5.7 might apply to the in-house lawyer's provision of nonlegal services, but that presumably both the lawyer and the company will want the lawyer to provide all of the ethics-based duties to the corporation; warning the in-house lawyer that the attorney-client privilege will not protect communications relating primarily to business matters; and concluding that "[i]t will be prudent for the inquirer to disclose to the client now the potential issues, in writing, because that may help the company's constituents to decide how they wish to proceed. The disclosure should encourage the client to seek the advice of independent counsel regarding the advisability of having its general counsel serve in a nonlegal role as well.").

Law Firm Subsidiaries

Although law firms may provide non-legal services through law firm employees, many law firms have chosen to use a different organizational arrangement -- establishing a wholly owned subsidiary to provide non-legal service. This allows the law firm to more carefully analyze the profitability of such services.

The existence of a separate organization providing such services adds to the complexity of the lawyers' ethics duties. In essence, the law firm and its non-legal subsidiaries must (1) treat the institutions as separate, for confidentiality purposes (meaning that each institution's clients' confidences can be shared with the other only with the clients' consent); (2) usually treat the institutions as the same for conflicts purposes (meaning that neither institution can work on matters adverse to the other institution's clients, without their consent or the application of some other exception); (3) advise all of the institutions' clients (who are considering or who engage the services of both) of the separate nature and the related nature of the institutions; (4) advise subsidiaries' clients that communications with its employees generally will not deserve attorney-client privilege protection.

As complicated as this sounds, most states permit law firms to provide non-legal services through a separate wholly owned institution.

- Virginia LEO 1819 (9/19/05) (explaining that a lawyer who co-owns (with other non-lawyers) a lobbying firm must comply with certain ethics rules (such as the prohibition on criminal or wrongful conduct), although not rules that apply only when a lawyer is "representing a client," such as the ex parte contact rule; noting that this lawyer's references to his expertise as a lawyer, etc. could create confusion about whether he is providing legal advice -- lawyers providing such services have "an affirmative duty to clarify the boundaries of the business relationship," including whether any legal services are included; warning that lawyers not clarifying their role could find

themselves bound by the confidentiality and conflicts rules governing lawyers representing clients -- although a lawyer providing legal services through a lobbying firm could be guilty of a misdemeanor for unauthorized practice of law; explaining that if this lawyer was simultaneously engaged in a law practice, the lawyer's "responsibilities to . . . a third person" (client of the lobbying firm) might prevent the lawyer from representing clients adverse to lobbying firm clients (a disqualification which would be imputed to all lawyers in the lawyer's law firm); confirming that the warning that the ethics rules governing conflicts do not apply to a lawyer/lobbyist's pure lobbying work; providing an example: a lawyer who is acting only as a lobbyist can lobby against a former lobbying client for whom the lawyer previously lobbied; concluding that if the lawyer must follow the conflicts rules because a lobbying client reasonably believes that the lawyer is supplying legal advice (and thus must comply with the conflicts rules), the individual lawyer's disqualification would not be imputed to the entire lobbying firm (because it is not a law firm)).

- North Carolina LEO 2000-9 (1/18/01) (allowing lawyers to provide legal services and other services from the same office, as long as there is full disclosure to clients who use both services, and the lawyer maintains the confidentiality of the clients' information).
- New York LEO 731 (7/27/00) (allowing lawyers to engage in businesses other than the practice of law, as long as they do not violate any ethical or legal rules; concluding, however, that a lawyer may not compensate employees for soliciting clients to engage the services of a title insurance agency in which the lawyer has an ownership interest).
- New York LEO 711 (1/7/98) (finding an inherent conflict in a lawyer selling long-term care insurance to clients that the lawyer represents in estate planning).
- Virginia LEO 1658 (12/6/95) (explaining that a law firm may establish a non-legal consulting firm (to provide human resource advice) and share common directors, use similar logos and letterheads, share overhead expenses (such as secretarial support, library resources and lobby space), engage in joint marketing and refer clients to each other, as long as: the public would not be confused by any advertising; the joint marketing does not result in any misperceptions; the firms avoid sharing any confidential client information; the firms do not split fees or pay one another a referral fee; the firms advise their clients of other available referral options; the firms adopt "adequate conflicts screening procedures"; any lawyers involved in the consulting firm "comply at all times with applicable rules of the Code of Professional Responsibility, whether or not the attorney is acting in a professional capacity as a lawyer.").

- Florida LEO 94-6 (4/30/95) (allowing a law firm to operate an ancillary business within the firm, as long as it conforms with all of the Rules of Professional Conduct, does not give non-lawyers any ownership interest in the law firm, follows all of the advertising rules governing lawyers, and does not use a trade name that is different from the name under which the law firm practices).
- Illinois LEO 92-5 (10/23/92) (permitting a lawyer to affiliate with a non-lawyer mediator in a mediation business, as long as the lawyer complies with applicable ethics rules).
- Florida LEO 88-15 (10/1/88) (allowing lawyers to practice law and engage in another profession from the same office, as long as the lawyer preserves client confidences, refrains from prohibited solicitation, and does not impermissibly share legal fees);
- Florida LEO 79-3 (1979) (recognizing that in 1979 Florida eliminated an earlier prohibition on a lawyer practicing law and engaging in another profession from the same office).

Best Answer

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

B 2/15

Multijurisdictional Practice Issues

Hypothetical 4

Over the years, you have shifted from being a trial lawyer to primarily representing your clients in employment law mediations and arbitrations. One of your clients just asked if you could represent it in a mediation scheduled to take place in a state where you are not licensed.

May you represent a client in a mediation taking place in a state where you are not licensed?

YES (PROBABLY)

Analysis

Having a law license in one state does not automatically entitle lawyers to practice law in other states. Determining what lawyers may ethically and legally do in states where they are not licensed involves a subset of unauthorized practice of law called "multijurisdictional practice."

Lawyers who are interested in practicing law (even temporarily) in a state where they are not licensed must remember to check the multijurisdictional practice rules in that state, not their home state. The ABA Model Rules contain a liberal multijurisdictional practice approach, but no state has adopted all of the ABA Model Rules verbatim, so lawyers must check the governing rules in states where they would like to practice law.

As in other unauthorized practice of law contexts, case law largely focuses on arbitrations, which often involve courts and are nearly always more formal than mediations.

Most bars addressing arbitrations take the broad ABA Model Rule approach.

- Illinois LEO 13-03 (1/2013) (holding that a nonlawyer could not represent a party to an arbitration under the Financial Industry Regulatory Authority ("FINRA") Code of Arbitration Procedure for Customer Disputes; "It is thus clear that an out-of-state attorney complying with the provisions of RPC 5.5(c)(3) may represent parties to an Illinois arbitration. The more difficult question, however, is whether the representation by a nonlawyer, who is not licensed to practice in any jurisdiction, of parties to an Illinois FINRA arbitration constitutes the unauthorized practice of law in Illinois.").
- New Jersey UPL Op. 43 (1/8/07) (affirming an earlier New Jersey legal ethics opinion that permitted out-of-state lawyers to engage in New Jersey arbitrations; noting that New Jersey adopted its version of Rule 5.5 after that earlier opinion; "While RPC 5.5 does not change the ultimate opinion of the Committee in Opinion 28, i.e., that an out-of-state attorney may appear in an AAA arbitration, RPC 5.5 does change the prerequisites for this appearance. In Opinion 28 the Committee required that no related action was pending in the attorney's state of admission. This is not a requirement of RPC 5.5 and so is no longer required by this Committee. Further, RPC 5.5(c)(1) through (6) provides additional requirements, the most important of which is that the out-of-state attorney must register with the Clerk of the Supreme Court, authorize the Clerk to accept service of process on the attorney's behalf, and comply with New Jersey Rules regarding registration and fees. These requirements are therefore added to Opinion 28 in this Supplemental Opinion. Additionally, the question has been posed whether a multi-jurisdictional practitioner may represent an existing out-of-state client in mediation in New Jersey. The Committee finds that this is akin to arbitration and that an out-of-state attorney may participate in mediation and may prepare an order for the court reflecting a memorandum of understanding/agreement reached in mediation, provided that the out-of-state attorney has satisfied the requirements of RPC 5.5."; noting an additional requirement for such lawyers -- that they must "maintain a bona fide office in conformance with R. 1:21-1(a), except that, when admitted pro hac vice, the lawyer may maintain the bona fide office within the bona fide law office of the associated New Jersey attorney pursuant to R. 1:21-2(a)(1)(B)").
- Virginia UPL Op. 200 (1/22/01) (permitting a lawyer licensed only in Maryland to represent a client in an arbitration in Virginia; "The committee is of the opinion that the foreign attorney is authorized to represent his client in an arbitration proceeding in Virginia if it would be incidental to the foreign attorney's representation of the client whom the attorney represents elsewhere." (emphasis added)).
- Virginia UPL Op. 92 (5/2/86) ("It is not the unauthorized practice of law for a non-Virginia licensed attorney to present evidence and argue matters of law

before an arbitration panel of the American Association in Virginia in order to represent a client from the attorney's jurisdiction in a franchise contract dispute.").

Not surprisingly, however, lawyers who repeatedly participate in arbitrations might find themselves running afoul of a state's multijurisdictional practice rule.

- Illinois LEO 94-5 (7/1994) ("Regular representation of Illinois parties to arbitration proceedings by lawyer not licensed in Illinois constitutes unauthorized practice of law. If a lawyer not licensed in Illinois seeks to advertise for or solicit Illinois clients, the lawyer should disclose the lack of an Illinois license in any advertising and solicitation materials."; explaining that "[t]he threshold issue presented is whether the representation of a party to an arbitration proceeding is the practice of law. In general, the courts have held that a person practices law when the person applies the law to the facts of a particular case. Rotunda, Professional Responsibility 123 (3d ed. 1992). The Illinois position is consistent with the general rule. The Supreme Court has held that the practice of law involves more than the representation of parties in litigation and includes the giving of advice or the rendering of any services requiring the use of legal skill or knowledge. People v. Schafer, 404 Ill. 45, 87 N.E.2d 773, 776 (1949). In a case directly relevant to the present inquiry, the Supreme Court held that the representation of parties in contested workers' compensation matters before an arbitrator of the Illinois Industrial Commission constituted the practice of law. People v. Goodman, 366 Ill. 346, 8 N.E.2d 941, (1937). The respondent in Goodman had argued that he was not practicing law because he was representing parties before an administrative agency rather than a court. The Supreme Court responded that the 'character of the act done, and not the place where it is committed' is the decisive factor. 8 N.E.2d at 947. In view of these authorities, the Committee concludes that the representation of a party in a contested arbitration proceeding would be considered the practice of law."; "the present inquiry involves matters by an unlicensed person. For these reasons, the Committee believes that the Illinois courts would find that a lawyer licensed only in another state who regularly represents Illinois parties in arbitration proceedings in Illinois engages in the unauthorized practice of law." (emphases added)).

The trend is clearly in favor of permitting such activity by out-of-state lawyers.

For instance, in 2003 the Florida Supreme Court prohibited an out-of-state lawyer from engaging in securities arbitration proceedings in Florida.

- Fla. Bar v. Rapoport, 845 So. 2d 874, 875, 876 (Fla. 2003) ("The Bar filed its petition for an injunction in January 2001, claiming that Rapoport was engaged in the unlicensed practice of law (UPL) because he (1) represents parties in Florida in securities arbitration proceedings by entities such as the American Arbitration Association, the National Association of Securities Dealers, and the New York Stock Exchange; and (2) advertises his securities arbitration services in the Fort Lauderdale Sun-Sentinel."; "In Sperry v. Florida ex rel. Florida Bar, 373 U.S. 379, 10 L. Ed. 2d 428, 83 S. Ct. 1322, 1963 Dec. Comm'r Pat. 211 (1963), the United States Supreme Court, although acknowledging Florida's substantial interest in regulating the practice of law within the state, held that Florida could not enjoin a nonlawyer registered to practice before the U.S. Patent Office from preparing and prosecuting patent applications in Florida because a federal statute and Patent Office regulations authorized the practice. Rapoport provides a long list of federal cases concerning securities arbitration that involve preemption of state law by the FAA. None of the cases, however, concerns the authorization of the practice of law in securities arbitration proceedings." (footnote omitted); enjoining a Washington, D.C., lawyer not admitted in Florida from participating in Florida arbitrations)

However, current Florida Rule 4-5.5(c)(3) permits out-of-state lawyers to provide legal services in connection with Florida ADR in two scenarios:

(A) if the services are performed for a client who resides in or has an office in the jurisdiction in which the lawyer is admitted to practice, or

(B) where the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

Florida Rule 4-5.5(c)(3).

A comment provides further guidance.

- Florida R. of Prof'l Conduct 4-5.5 cmt. ("Subdivisions (c)(3) and (d)(3) permit a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in Florida if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services are performed for a client who resides in or has an office in the lawyer's home state, or if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a

court-annexed arbitration or mediation if court rules or law so require. The lawyer must file a verified statement with The Florida Bar in arbitration proceedings as required by rule 1-3.11 unless the lawyer is appearing in an international arbitration as defined in the comment to that rule. A verified statement is not required if the lawyer first obtained the court's permission to appear pro hac vice and the court has retained jurisdiction over the matter. For the purposes of this rule, a lawyer who is not admitted to practice law in Florida who files more than 3 demands for arbitration or responses to arbitration in separate arbitration proceedings in a 365-day period shall be presumed to be providing legal services on a regular, not temporary, basis; however, this presumption shall not apply to a lawyer appearing in international arbitrations as defined in the comment to rule 1-3.11.").

This expands the situations in which a non-Florida lawyer can participate in a Florida ADR. Under ABA Model Rule 5.5(c)(3), the services must be related to the lawyer's practice in his or her home jurisdiction. Under the Florida alternative, lawyers may also participate in a Florida ADR if the client for whom the lawyer provides the services has an office in the lawyer's home state -- presumably even if the ADR is not related to the lawyer's practice in the home state.

The issue sometimes comes up in court, when the losing party in an arbitration challenges the award -- by arguing that an out-of-state lawyer impermissibly represented one of the arbitration parties. These arguments normally fail.

- Nolan v. Kenner, 250 P.3d 236, 238 (Ariz. Ct. App. 2011) (holding that an arbitration award cannot be overturned because an out-of-state lawyer improperly represented a party in the arbitration; "Defendants-appellants Philip A. Kenner, Standard Advisors L.L.C., and Standard Advisors Inc. (collectively 'Kenner') appeal the superior court's order confirming an arbitration award granting Plaintiffs-Appellees Owen Nolan and Diana Nolan (collectively, 'Nolan') approximately \$2,700,000 in damages and attorneys' fees for Kenner's breach of fiduciary duty. Kenner contends that the arbitration award should be vacated because Nolan's counsel during arbitration was neither a member of the State Bar of Arizona nor admitted to appear pro hac vice. We hold that open representation by a foreign attorney is not the type of undue means permitting a court to vacate an arbitration award pursuant to Arizona Revised Statutes ('A.R.S.') section 12-1512(A)(1) (2003). Accordingly, we affirm the judgment of the superior court.").

- Superadio L.P. v. Winstar Radio Prods., LLC, 844 N.E.2d 246 (Mass. 2006) (upholding an arbitration award despite the fact that a non-Massachusetts lawyer had represented a party in the arbitration proceeding; declining to decide whether the lawyer's participation in the arbitration constituted unauthorized practice of law; concluding that the arbitration should be upheld even if the lawyer had engaged in the unauthorized practice of law in Massachusetts);
- Colmar, Ltd. v. Fremantlemedia N. Am., Inc., 801 N.E.2d 1017, 1022, 1022-23, 1026 (Ill. App. Ct. 2003) (affirming an arbitration award; "We are called upon to determine for the first time what effect, if any, an out-of-state attorney's representation of an out-of-state client during arbitration in Illinois has on an arbitration award. We find that, for the reasons that follow, Anderson's representation has no effect on the arbitration award in this case."; "No Illinois decision has considered whether the general voidance rule applies to cases where the representation occurred strictly during arbitration proceedings. After considering the applicable Illinois cases, the modern trend in the jurisprudence of multijurisdictional practice, and the public policy reasons promoting both the rule prohibiting unauthorized practice and the general voidance rule, we find that the harsh general rule should not be applied in the instant case."; "Though the ABA Model Rule 5.5 has not been adopted by the Illinois Supreme Court at the time that we decide this case, we find it persuasive in that it reflects the modern trend in the law of multijurisdictional practice and is also in keeping with well-reasoned decisions from other jurisdictions that have found that an out-of-state attorney's representation of a client during arbitration does not violate the rules prohibiting the unauthorized practice of the law.").

Although these decisions arise in a different context (attacks on an existing arbitration award rather than a pre-arbitration analysis of the lawyer's role), the decisions reflect most states' liberal approach to out-of-state lawyers engaging in arbitrations.

Some courts have taken a remarkably narrow view of what out-of-state lawyers may safely do within a state absent a pro hac vice admission. Until the West Virginia Supreme Court took a different approach effective January 1, 2015, West Virginia followed an incredibly draconian approach -- described in a 2010 unauthorized practice of law opinion.

- West Virginia UPL Op. 10-001 (2010) (interpreting the then-current Rule 8.0 of the Rules for Admission to the Practice of Law, which explains the circumstances under which an out-of-state lawyer must apply for admission in West Virginia *pro hac vice*; "Except in conformity with this Rule, members of the bar of any jurisdiction other than the State of West Virginia may not in this state do any act, or hold themselves out as entitled to do any act, within the definition of the practice of law, as prescribed by the Supreme Court of Appeals of West Virginia." (citation omitted); explaining the broad reach of that Rule; "As noted, Rule 8.0 (a) states that the requirement of admission pro hac vice is necessary before an applicant attorney can perform any act that falls within the definition of the practice of law. Based upon the clear language of the Rule, the Committee finds that attorneys licensed in states other than West Virginia must apply for admission pro hac vice in conformity with Rule 8 of the West Virginia Rules of Admission to the Practice of Law prior to engaging in any act that would fall within the definition of the practice of law. This requirement exists notwithstanding the absence of a pending action, suit or proceeding within which the applicant can seek to obtain an order granting admission pro hac vice. Under those circumstances, and along with the other requirements contained in Rule 8, the applicant must file a miscellaneous action in a West Virginia court of general jurisdiction to seek an order granting the applicant's admission."; holding that local West Virginia counsel must attend court proceedings, depositions and other events; "It is the concerted opinion of the Committee that these 'other actions' include any events that are brought about because of the existence of the in-court or out-of-court proceedings; that is, if the event is a necessary part of the proceedings -- such as depositions, arbitration, mediation, scheduling conference before a court employee other than the presiding judge, etc. -- then the responsible local counsel is required to attend." (emphasis added); explaining that the local lawyer can attend by video or telephone if the out-of-state lawyer can also attend in the same fashion; "Assuming that personal attendance is not required by the presiding judge, tribunal or other body of the State of West Virginia, the responsible local counsel may attend the proceeding, deposition or other action by telephone or video-conferencing if the attorney admitted pro hac vice appears in a similar manner."; also concluding that a court cannot relieve a local lawyer of these obligations; "Any order purporting to release a responsible local counsel that was entered after the entry of the 2000 order of the West Virginia Supreme Court amending Rule 8 is, therefore, void and is of no effect. Responsible local counsel shall appear at all proceedings, depositions and other actions consistent with this Advisory Opinion."; also concluding that courts can decide whether to deny a motion for admission *pro hac vice*; "'if the applicant's appearances within the State of West Virginia within the past 24 months are numerous or frequent or involve improper conduct, the court or tribunal shall deny such person the continuing privilege of appearance.'" (citation omitted)).

As of January 1, 2015, West Virginia adopted a more measured approach.

The new rule allows out-of-state lawyers to conduct certain activities in West Virginia without being admitted pro hac, including: providing legal services "pertaining to or an aid of" proceedings pending in other states; consulting with a West Virginia lawyer about a "pending or potential proceeding in West Virginia" in which the out-of-state lawyer "reasonably believes he is eligible for admission pro hac"; providing legal services in West Virginia in preparation for a "potential case" to be filed in West Virginia on behalf of a client residing in West Virginia or elsewhere; preparing for and participating in an ADR proceeding (including arbitrations and mediations) regardless of where it is "expected to take place or actually takes place." West Virginia Rule of Prof'l Conduct 8(k).

Revised West Virginia Rule 8 requires out-of-state lawyers admitted pro hac to associate with a West Virginia lawyer who maintains "an actual physical office equipped to conduct a practice of law in the State of West Virginia, which office is the primary location from which local counsel practices law on a daily basis"; adds his or her name and West Virginia Bar ID number to all pleadings; "physically or electronically" signs all pleadings; personally appears and participates in all proceedings before a tribunal; attends depositions and other events, unless the court permits him or her to appear by telephone. West Virginia Rule of Prof'l Conduct 8(b).

As long as lawyers temporarily participate in arbitrations or mediations in states where they are not licensed, they should not run afoul of the other state's MJP rules. Of course, the analysis changes if the lawyer engages in such activities with sufficient frequency that a court or bar might find that the lawyer has established a "systematic

and continuous" presence in the other state -- in which case the lawyer probably will cross the line into improper multijurisdictional practice in that other state.

Best Answer

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

B 1/15, 2/15

Limited Representations

Hypothetical 5

One of your clients is interested in resolving a commercial dispute while spending as little money as possible. Among other things, your client suggests that he would be willing to hire you to handle the mediation, but not any litigation that could ensue if the mediation proves unsuccessful.

May you limit your representation to include your representation of a client only in a mediation, at which time you would withdraw from the representation if the mediation proves unsuccessful?

YES

Analysis

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

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

¹ New York City LEO 2001-3 (2001) (explaining that a lawyer may ethically limit the scope of a representation in an effort to avoid conflicts; providing a litigation example; "In one common litigation situation, a law firm may agree to defend a corporate client in a lawsuit which does not appear to pose a conflict with any other client of the law firm. As fact development proceeds, an amendment to the complaint is filed adding as a defendant an additional party, such as the company's accounting firm, which is also a client of the attorney's firm in unrelated matters. At this juncture, an actual conflict still may not exist if the positions of the client company and its accounting firm appear to be united in interest or are not directly adverse. But if facts develop that suggest the client company may possess a cross-claim against the accounting firm, or vice versa, a conflict may emerge that could impact the lawyer's ability ethically to continue its representation of the corporate client. In this context, the question arises whether the law firm can ethically avoid the conflict by limiting the scope of the engagement for the corporate client to exclude any involvement in the aspect of the matter that is adverse to the accounting firm. Absent the ability of the lawyer to limit the engagement, the Code requires the attorney to withdraw from her representation of the corporate defendant."; "The Committee concludes that the scope of a lawyer's representation of a client may be limited in order to avoid a conflict that might otherwise result with a present or former client, provided that the client whose engagement is limited consents to the limitation after full disclosure and the limitation on the representation does not render the lawyer's counsel inadequate or diminish the zeal of the representation. An attorney whose representation has been limited, however, must be mindful of her duty of loyalty to both clients. Where the portion of the engagement to be carved out is discrete and limited in scope, such a limitation may well resolve the conflict presented.").

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

ABA Model Rule 1.2 cmt. [7].

The Restatement takes essentially the same approach.

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

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

Restrictions on the power of a client to redefine a lawyer's duties are classified as paternalism by some and as necessary protection by others. On the one hand, for some clients the costs of more extensive services may outweigh their benefits. A client might reasonably choose to forgo some of the protection against conflicts of interest, for example, in order to get the help of an especially able or inexpensive lawyer or a lawyer already familiar to the client. The scope of a representation may properly change during a representation, and the lawyer may sometimes be obligated to bring changes of scope to a client's notice In some instances, such as an emergency, a restricted

representation may be the only practical way to provide legal services

On the other hand, there are strong reasons for protecting those who entrust vital concerns and confidential information to lawyers Clients inexperienced in such limitations may well have difficulty understanding important implications of limiting a lawyer's duty. Not every lawyer who will benefit from the limitation can be trusted to explain its costs and benefits fairly. Also, any attempt to assess the basis of a client's consent could force disclosure of the client's confidences. In the long run, moreover, a restriction could become a standard practice that constricts the rights of clients without compensating benefits. The administration of justice may suffer from distrust of the legal system that may result from such a practice. Those reasons support special scrutiny of noncustomary contracts limiting a lawyer's duties, particularly when the lawyer requests the limitation.

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

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

Clients and lawyers may define in reasonable ways the services a lawyer is to provide (see § 16), for example to handle a trial but not any appeal, counsel a client on the tax aspects of a transaction but not other aspects, or advise a client about a representation in which the primary role has been entrusted to another lawyer. Such arrangements are not waivers of a client's right to more extensive services but a definition of the services to be performed. They are therefore treated separately under many lawyer codes as contracts limiting the objectives of the representation. Clients ordinarily understand the implications and possible costs of such arrangements. The scope of many such representations requires no explanation or disclaimer or broader involvement.

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

the representation. Taken together with requirements stated in other Sections, five safeguards apply.

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

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

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

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

Fifth, the terms of the limitation must in all events be reasonable in the circumstances When the client is sophisticated in such waivers, informed consent ordinarily permits the inference that the waiver is reasonable. For other clients, the requirement is met if, in addition to informed consent, the benefits supposedly obtained by the waiver -- typically, a reduced legal fee or the ability to retain a particularly able lawyer -- could reasonably be considered to outweigh the potential risk posed by the limitation. It is also relevant whether there were potential circumstances warranting the limitation and whether it was the client or the lawyer who sought it. Also relevant is the choice available to clients; for example, if most local lawyers, but not lawyers in other communities, insist on the same limitation, client acceptance of the limitation is subject to special scrutiny.

The extent to which alternatives are constrained by circumstances might bear on reasonableness. For example, a client who seeks assistance on a matter on which the statute of limitations is about to run would not reasonably expect extensive investigation and research before the case must be filed. A lawyer may be asked to assist a client concerning an unfamiliar area because other counsel are unavailable. If the lawyer knows or should know that the lawyer lacks competence necessary for the representation,

the lawyer must limit assistance to that which the lawyer believes reasonably necessary to deal with the situation.

Reasonableness also requires that limits on a lawyer's work agreed to by client and lawyer not infringe on legal rights of third persons or legal institutions. Hence, a contract limiting a lawyer's role during trial may require the tribunal's approval.

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

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

Corporation wishes to hire Law Firm to litigate a substantial suit, proposing a litigation budget. Law Firm explains to Corporation's inside legal counsel that it can litigate the case within that budget but only by conducting limited discovery, which could materially lessen the likelihood of success. Corporation may waive its right to more thorough representation. Corporation will benefit by gaining representation by counsel of its choice at limited expense and could readily have bargained for more thorough and expensive representation.

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

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

The third illustration provides an example of an unacceptable limitation.

Lawyer offers to provide tax-law advice for an hourly fee lower than most tax lawyers charge. Lawyer has little knowledge of tax law and asks Lawyer's occasional tax

clients to agree to waive the requirement of reasonable competence. Such a waiver is invalid, even if clients benefit to some extent from the low price and consent freely and on the basis of adequate information. Moreover, allowing such general waivers would seriously undermine competence requirements essential for protection of the public, with little compensating gain. On prohibitions against limitations of a lawyer's liability, see § 54.

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

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

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

Clients too may sometimes agree to special obligations, for example to contribute work to a case, as by conducting witness interviews.

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

A later Restatement provision specifically indicates that clients can agree to a lawyer's representation of the client in mediation, but not any later litigation.

- Restatement (Third) of Law Governing Lawyers § 122 cmt. e (2000) ("A client's informed consent to a conflict can be qualified or conditional. A client might consent, for example, to joint representation with one co-party but not another. Similarly, the client might condition consent on particular action being taken by the lawyer or law firm. For example, a former client might consent that the conflict of one individually prohibited lawyer should not be

imputed . . . to the rest of the firm, but only if the firm takes steps to assure that the prohibited lawyer is not involved in the representation Such a partial or conditional consent can be valid even if an unconditional consent in the same situation would be invalid. For example, a client might give informed consent to a lawyer serving only in the role of mediator between clients . . . but not to the lawyer representing those clients opposing each other in litigation if mediation is unavailing" (emphasis added)).

Best Answer

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

B 2/15

Collaborative Lawyering

Hypothetical 6

One of your business clients just called to ask if you are willing to participate in what seems like an unusual arrangement. Your client is trying to resolve a contractual dispute with one of her customers. Under your client's proposed arrangement, both clients and both lawyers would agree to mediate a possible resolution of the dispute. If the mediation fails, both lawyers would agree to withdraw from representing their clients -- and the clients would have to retain new lawyers to litigate. This concept sounds intriguing to you, but you worry that your contractual agreement to withdraw in case of litigation would create an insoluble conflict with your duty of loyalty and diligence -- because you and the other lawyer would have an incentive to recommend settlement even if clients would be better served by litigating.

May you enter into the arrangement your client has proposed?

YES (PROBABLY)

Analysis

This arrangement involves the increasingly common practice of lawyers limiting the scope of their representations.

Traditionally, clients retained lawyers to handle matters to their conclusion. As the legal profession became more specialized, clients tended to hire transactional lawyers to handle business negotiations, and turn to litigators if disputes arose. In some situations, clients hired certain lawyers to seek resolution of a dispute, with the plan to retain other lawyers if litigation ensued. However, all of these selections normally reflected the client's decision. The adversary might well take the same approach, but neither the client nor the lawyer generally agreed with the adversary to limit the lawyer's role in any way.

As part of the increasing menu of options that imaginative lawyers have created, clients and lawyers several years ago began to develop what are called "cooperative law" and "collaborative law" arrangements.

The former arrangement essentially amounts to an agreement among clients to mediate or arbitrate disputes.

However, a collaborative law arrangement takes a dramatically different view than the traditional approach. As described by the Colorado Bar in Colorado LEO 115,

[t]he Collaborative Law model of practice is generally regarded as constituting a fundamental shift in the lawyer's role from an advocate in an adversarial system to an advocate in a collaborative environment where the commitment is to the settlement of a dispute outside the traditional litigation model. Collaborative Law involves the advance agreement entered into by the clients and the lawyers. Importantly, the lawyers execute this Four-Way Agreement as independent parties. The Four-Way Agreement limits the lawyers' participation to the negotiation and facilitation of a settlement without the threat of litigation. If the parties decide to use the court system, they must hire lawyers other than the lawyers who participated in the Collaborative Law process. The lawyers agree to discontinue representing their client if the parties choose to litigate the dispute, which creates a practical incentive to resolve the dispute without the need for litigation. While Collaborative Law has not been universally defined, "[v]irtually all collaborative law leaders and practitioners believe that the disqualification agreement is the irreducible minimum condition for calling a practice collaborative law.

Colorado LEO 115 (2/24/07) (footnotes omitted). Thus, a collaborative law arrangement necessarily depends on the lawyers' agreement to withdraw if negotiations fail. This creates an enormous incentive to settle rather than litigate cases.

States disagree about the ethical permissibility of collaborative law arrangements.

As lawyers began to develop the collaborative lawyering model several years ago, some bars quickly concluded that the ethics rules permitted such limited representations.

For instance, in North Carolina LEO 2002-1, the North Carolina Bar dealt with the following question:

Several lawyers from different law firms would like to start a non-profit organization (the "CFL Organization") to promote the use of a process called "collaborative family law" to facilitate the resolution of domestic through non-adversarial negotiation. The goal of the collaborative family law process is to avoid the negative economic, social, and emotional consequences of protracted litigation by using cooperative negotiation and problem solving. In the "four-way meetings" to negotiate a settlement, each spouse is represented by a lawyer of his or her choice provided the lawyer is trained in and dedicated to the process of collaborative family law. A spouse who wants the CFL Organization to facilitate a collaborative family law process may be represented by a lawyer who is not a member of the organization provided the lawyer is committed to the process. However, it is anticipated that in the majority of cases, both the husband and the wife will be represented by lawyers who are members of the CFL Organization. Each spouse agrees to pay his or her own legal fees. A lawyer participating in the process, including a member of CFL Organization, receives all compensation for legal representation from his or her client.

May a lawyer who is a member of the CFL Organization represent a spouse in a collaborative family law process if another member of the organization represents the other spouse?

North Carolina LEO 2002-1 (4/19/02). The North Carolina Bar answered "yes."

Significantly, the North Carolina Bar also explicitly answered "yes" to the following question:

To further the goal of avoiding litigation, the lawyers must agree to limit their representation of their respective clients to representation in the collaborative family law process and to withdraw from representation prior to court proceedings. May a lawyer ask a client to agree, in advance, to this limitation on the lawyer's legal services?

Id. (emphasis added).

Several years later, the Kentucky Bar noted the dramatic spread of collaborative law arrangements.

Collaborative law is a relatively new form of alternative dispute resolution, which encourages parties to cooperate in order to reach an agreement, rather than to engage in acrimonious litigation. The collaborative law process has become increasingly popular and the topic has been widely discussed in family law seminars across the country. There are well over a hundred collaborative law groups in more than 25 states from California to New York and Texas has a statute specifically authorizing parties and their lawyers to use collaborative law procedures in divorce proceedings.

Kentucky LEO E-425 (6/2005) (footnotes omitted). The Kentucky Bar recognized that collaborative law arrangements are "used primarily in family law cases." Id. The Kentucky Bar ultimately concluded that Kentucky lawyers may enter into such collaborative law arrangements, but provided several warnings.

[L]awyers who engage in the collaborative-type resolution process are reminded that they are still bound by the Rules of Professional Conduct and cannot circumvent those rules through the collaborative agreement. More specifically, the lawyer has a duty of competence and independence, including the duty to evaluate whether the collaborative process will serve the client's best interests. In addition, the lawyer has a duty to adequately inform the client about the process, including the advantages, disadvantages and alternatives, and to obtain the client's informed consent to its use. Where it is contemplated that the lawyer will be prohibited from continued representation, either because the client does make disclosures required by the substantive

provisions of the collaborative law agreement or because the parties are unable to reach a settlement, the lawyer must fully advise the client of the limitations on continued representation and of the consequences of withdrawal. The lawyer also must be prepared to comply with the applicable rules on mandatory withdrawal and confidentiality.

Id.

Later that year, the New Jersey Supreme Court's Advisory Committee on Professional Ethics reached essentially the same conclusion -- allowing New Jersey lawyers to enter into collaborative law arrangements if they reasonably believe that the process will succeed, and if they "disclose the potential risks and consequences of failure of the collaborative law process to the client." New Jersey LEO 699 (12/12/05).

However, the Colorado Bar then reached the opposite conclusion. In Colorado LEO 115, the Colorado Bar concluded that

[i]t is the opinion of this Committee that the practice of Collaborative Law violates Rule 1.7(b) of Colorado Rules of Professional Conduct insofar as a lawyer participating in the process enters into a contractual agreement with the opposing party requiring the lawyer to withdraw in the event that the process is unsuccessful. The Committee further concludes that pursuant to Colo. RPC 1.7(c) the client's consent to waive this conflict cannot be validly obtained.

Colorado LEO 115 (2/24/07) (footnote omitted). In essence, the Colorado Bar explained that collaborative law agreements represent a promise by the lawyer to benefit the adversary by agreeing "to impair his or her ability to represent the client." Id.

Furthermore, the Colorado Bar held that the client could not consent to the arrangement because of the inherent conflicts.¹

¹ Colorado LEO 115 (2/24/07) (finding that the practice of what the Bar calls "collaborative law" violates Colorado ethics rules). "The Committee concludes that a client may not consent to this conflict for several reasons. First, in the Collaborative Law context, the possibility that a conflict will materialize is

First, in the Collaborative Law context, the possibility that a conflict will materialize is significant. In fact, the conflict materializes whenever the process is unsuccessful because, in that instance, the lawyer's contractual responsibilities to the opposing party (the obligation to discontinue representing the client) are in conflict with the obligations the lawyer has to the client (the obligation to recommend or carry out an appropriate course of action for the client). Second, the potential conflict inevitably interferes with the lawyer's independent professional judgment in considering the alternative of litigation in a material way.

Id.

Interestingly, the Colorado Bar held that clients may enter into the same arrangement as long as the lawyers do not participate.

While it is not within this Committee's province to comment on legal issues, it is axiomatic that private parties in Colorado may contract for any legal purpose. Thus, parties wishing to participate in a collaborative environment may agree between each other to terminate their respective lawyers in the event that the process fails, provided the lawyer is not a party to that contract.

Id. Not surprisingly, the Colorado Bar permitted Colorado lawyers to enter into "cooperative law" arrangements, which do not include the draconian disqualification provisions.

significant. In fact, the conflict materializes whenever the process is unsuccessful because, in that instance, the lawyer's contractual responsibilities to the opposing party (the obligation to discontinue representing the client) are in conflict with the obligations the lawyer has to the client (the obligation to recommend or carry out an appropriate course of action for the client). Second, the potential conflict inevitably interferes with the lawyer's independent professional judgment in considering the alternative of litigation in a material way. Indeed, this course of action that 'reasonably should be pursued on behalf of the client,' or at least considered, is foreclosed to the lawyer."; explaining that clients may enter into essentially the same arrangement as long as the lawyers do not participate; "Thus, parties wishing to participate in a collaborative environment may agree between each other to terminate their respective lawyers in the event that the process fails, provided the lawyer is not a party to that contract. Such agreements may promote the valid purposes of Collaborative Law, including creating incentives for settlement, generating a positive environment for negotiation, and fostering a continued relationship between the parties without violating the Colorado Rules of Professional Conduct.")

As it often does, the ABA spoke on the issue shortly after Colorado created a conflict with other states.

In ABA LEO 447 (8/9/07), the ABA flatly rejected the Colorado approach, and endorsed the concept of collaborative lawyering. Among other things, the ABA noted that Colorado was the only jurisdiction to have rejected the concept of collaborative lawyering since the concept arose in 1990 (in Minnesota). The ABA could not have been any clearer.

[W]e agree that collaborative law practice and the provisions of the four-way agreement represent a permissible limited scope representation under Model Rule 1.2, with the concomitant duties of competence, diligence, and communication. We reject the suggestion that collaborative law practice sets up a non-waivable conflict under Rule 1.7(a)(2).

ABA LEO 447 (8/9/07). The ABA indicated that lawyers may limit the scope of their representations, and that agreeing in advance to withdrawal rather than to litigate was not "per se unreasonable." Id.

Of course, a lawyer contemplating such an arrangement must obtain the client's informed consent.

Obtaining the client's informed consent requires that the lawyer communicate adequate information and explanation about the material risks of and reasonably available alternatives to the limited representation. The lawyer must provide adequate information about the rules or contractual terms governing the collaborative process, its advantages and disadvantages, and the alternatives. The lawyer also must assure that the client understands that, if the collaborative law procedure does not result in settlement of the dispute and litigation is the only recourse, the collaborative lawyer must withdraw and the parties must retain new lawyers to prepare the matter for trial.

Id. (footnote omitted). As the ABA explained it,

When a client has given informed consent to a representation limited to collaborative negotiation toward settlement, the lawyer's agreement to withdraw if the collaboration fails is not an agreement that impairs her ability to represent the client, but rather is consistent with the client's limited goals for the representation.

Id. The ABA's endorsement of a collaborative lawyer presumably ended the debate about such an arrangement's ethical propriety.

Since the ABA's 2007 opinion, other states have recognized collaborative lawyering's ethical propriety.

- South Carolina LEO 10-01 (3/31/10) ("An attorney may limit the scope of representation to the collaborative law process, provided the attorney proceeds pursuant to the other Rules of Professional Conduct. While a potential conflict of interest may be created in the collaborative process, it is one to which the client may consent.").
- Alaska LEO 2011-3 (5/3/11) ("ARPC 1.2(c) permits a lawyer to limit the scope of his representation with the consent of the client. So long as the collaborative law practitioner has previously obtained the separate written agreement of the client after full discharge of the risks of, and alternatives to the limited representation, the disqualification agreement is permissible.").
- Maine LEO 208 (3/6/14) ("It is the opinion of the Commission that the Maine Rules of Professional Conduct do not prohibit attorneys from participating in or becoming parties to a collaborative participation agreement."; "The agreement should state whether or the extent to which (1) the clients waive the attorney/client privilege and the extent to which information may be revealed among the parties, their counsel, and to the court or (2) that the attorney/client privilege is not waived and the attorneys shall preserve the confidentiality of information, subject to M.R. Prof. Conduct 1.6. Clients must be made aware that, absent an agreement that preserves the privilege or an agreement in which the parties exclude from evidence information revealed during the collaborative process, all disclosed information may be shared with the opposing party and their counsel and admitted as evidence in any contested adjudicative proceeding. Each client should be clearly informed that absent legislation or court rule, rules imposing confidentiality, such as those that govern mediation under M.R. Evid. 514, are not applicable to collaborative law agreements."; "A client may revoke the authority of the

attorney at any time. M.R. Prof. Conduct 1.2, Comment 3. Furthermore, the right of access to the courts in divorce proceedings is a fundamental right guaranteed under the Due Process Clause. Boddie v. Connecticut, 401 U.S. 371, 384-85 (1971). Accordingly, the agreement should contain a provision permitting any client to terminate the process at any time and for any reason."; "A lawyer must fully explain the collaborative participation process to the client, including the content of the agreement, its benefits, risks, rights and obligations, and obtain the client's informed consent before the collaborative participation process is initiated. M.R. Prof. Conduct 1.4.").

States continue to fine-tune their approach to collaborative lawyering in the context of mediations and arbitrations.

- In re Mabray, 355 S.W.3d 16, 23-24, 24 (Tex. App. 2010) (analyzing a "Cooperative Law Dispute Resolution Agreement"; explaining the difference between cooperative law and collaborative law; "Developed in Minnesota in 1990, collaborative law attempts to foster an amiable rather than an adversarial atmosphere by creating a 'four-way' agreement between each party and their attorneys 'in which all are expected to participate actively.'"; "[C]ollaborative law attorneys cannot represent their collaborative clients in litigation if the collaborative process fails, but collaborative law clients retain their right to pursue litigation with new counsel."; "In some jurisdictions, collaborative law attorneys may continue to represent their clients in arbitration if the parties agree to arbitration in the collaborative law agreement. . . . Although case law has not address the issue, Texas appears to preclude a collaborative-law attorney's representation of a collaborative-law client in arbitration."; declining to disqualify a lawyer who had represented one of the parties in a failed cooperative resolution arrangement).

Best Answer

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

B 2/15

Availability of Work Product Protection

Hypothetical 7

You have been a litigator for about three years, and you have frequently withheld documents based on the work product doctrine -- which you know can protect documents "prepared in anticipation of litigation or for trial." A client just hired you to represent it in attempting to resolve a contractual dispute through mediation.

Can the work product doctrine protect documents prepared in preparation for a mediation?

MAYBE

Analysis

Work product protection covers documents prepared in anticipation of litigation or for trial. Fed. R. Civ. P. 26(b)(3)(A); Va. Sup. Ct. R. 4:1(b)(3).

Whether that protection extends to documents relating to a mediation depends on what motivates the mediation and when it occurs. In sum, the protection probably does not cover documents prepared for mediation designed to avoid litigation, but presumably extends to documents prepared in connection with mediation motivated by resolving ongoing or reasonably anticipated litigation.

The first issue is whether mediation itself counts as "litigation" for work product purposes. If so, the protection would cover documents created in anticipation of mediation, regardless of any relationship to litigation.

Not surprisingly, given the differences between arbitration and mediation, several courts have held that the former counts as "litigation" for work product purposes. Amobi v. D.C. Dep't of Corr., 262 F.R.D. 45, 52 (D.D.C. 2009); Samuels v. Mitchell, 155 F.R.D. 195, 200 (N.D. Cal. 1994).

It is not as clear if the ADR process involves mediation rather than the much more formal and often court-related arbitration. In its typically expansive approach, the Restatement includes within its definition of "litigation" what it calls "alternative-dispute-resolution proceedings such as mediation or a mini-trial." Restatement (Third) of Law Governing Lawyers § 87 cmt. h (2000) (emphasis added).

Most courts would probably not be that generous with the work product protection.

- Lenihan v. Stewart Enters., Inc., Civ. A. No. 01-2895 SECTION "E"(2), 2002 U.S. Dist. LEXIS 16714 (E.D. La. Sept. 3, 2002) (holding that the work product doctrine did not protect documents prepared for an unsuccessful mediation effort between a company and its employees who later sued the company).

Concluding that mediation does not count as "litigation" for work product purposes does not doom a work product claim for documents prepared in anticipation of mediation. As explained below, some courts extend work product protection to documents motivated by avoiding litigation, and all courts protect documents motivated by a mediation conducted when one or both sides are in or reasonably anticipate litigation. So the abstract question of whether mediation counts as "litigation" really involves terminology more than substance. For instance, describing a withheld document as work product because the litigant prepared it "in anticipation of mediation" might fall short of the pertinent court's work product standard.

The second issue is whether the work product protection extends to documents created to avoid litigation. Some courts find that the protection does not extend that far. Rockies Express Pipeline LLC v. 58.6 Acres, Case No. 1:08-cv-0751-RLY-DML, 2009 U.S. Dist. LEXIS 121618, at *13-14 (S.D. Ind. Dec. 31, 2009).

Some courts are more generous.

- Meighan v. Transguard Ins. Co. of Am., Inc., 298 F.R.D. 436, 445 (N.D. Iowa 2014) ("As for the other documents and claims notes related to mediation or settlement, I find these documents are properly protected under the work product privilege as they were prepared in anticipation of litigation (or avoiding such litigation) after March 13, 2012.").
- Cal. Earthquake Auth. v. Metro. W. Sec., 285 F.R.D. 585, 591 (E.D. Cal. 2012) (protecting as work product materials created by PwC during an internal corporate investigation into a structured investment by the California Earthquake Authority; "[I]t is also informative that CEA sent Wells Fargo a formal request for mediation pursuant to the dispute resolution provision of their contract around the time that PwC completed its investigation and draft report in June 2008. . . . When informal dispute resolution efforts eventually broke down, this litigation ensued in December 2009.").

It is unclear exactly what these courts mean. As explained immediately below, every court protects documents motivated by anticipated litigation, even if the documents' intent is to avoid actual litigation. On the other hand, it is unclear if the work product doctrine extends to documents intended to avoid the anticipation of litigation. This might also be a question of privilege log terminology rather than substance.

The third issue is whether the work product doctrine extends to mediation-related documents prepared when the participants reasonably anticipated litigation that had not yet started. Such documents would fall within even the narrowest definition of work product, as long as they were motivated by the anticipated litigation.

The fourth issue is even more clear. The work product doctrine can obviously extend to documents litigants prepare in the heat of litigation, even if they are motivated by an effort to resolve the litigation.

- Genon Mid-Atlantic, LLC v. Stone & Webster, Inc., No. 11 CV 1299 (HB), 2011 U.S. Dist. LEXIS 139849, at *7, *8-9, *10 (S.D.N.Y. Dec. 5, 2011) (holding that a document prepared in connection with a mediation deserved work product protection; not explaining whether the mediation occurred in the

midst of litigation; concluding that the document was what the court called "privileged work product"; "Based on the explanation presented by Shaw [defendant], including the sworn declaration of Ferguson [defendant's Project Director], this Document is protected work product. The Document would not have been created in the same form 'irrespective of the litigation,' but rather was created specifically in preparation for mediation."; "Even if, as GenOn argues, the Document was used by Shaw to determine what levels of change orders and charges to assert against GenOn, because the Document was prepared because of litigation, to assist with an upcoming mediation, the work-product privilege applies.").

- Rohm & Haas Co. v. Dow Chem. Co., Civ. A. No. 4309-CC, 2009 Del. Ch. LEXIS 31, at *5-7 (Del. Ch. Feb. 24, 2009).
- Raytheon Aircraft Co. v. United States Army Corps of Eng'rs, 183 F. Supp. 2d 1280, 1289 (D. Kan. 2001).

Another complicating factor is the possibility that the anticipation of litigation ebbs and flows -- depending on the parties' litigation intent. For instance, one court held that the work product doctrine protected documents created as adverse parties headed for litigation, but evaporated when they decided to put the litigation on hold in an attempt to resolve their dispute. When the settlement talks failed, the work product doctrine kicked in again. Minebea Co. v. Papst, 229 F.R.D. 1, 4 (D.D.C. 2005).

Best Answer

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

B 2/15

Courts' Role

Hypothetical 8

You represent the defendant in contentious litigation. You think that the judge's participation in settlement discussions might result in a favorable settlement for your client.

Can the presiding judge participate in settlement negotiations, such as caucused mediations?

YES

Analysis

Not surprisingly, the ABA Model Code of Judicial Conduct permits judges to encourage settlement, but warns against any coercion.¹ The judicial ethics code governing federal judges takes the same basic approach.²

The ABA Model Judicial Code also permits judges to more directly involve themselves in settlement discussions, with the parties' consent. ABA Model Code of Judicial Conduct, Rule 2.9(A)(4) (2010) ("A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.").

However, the ABA Model Judicial Code warns judges that such involvement might ultimately require their disqualification.

¹ ABA Model Code of Judicial Conduct, Rule 2.6(B) (2010) ("A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.").

² Code of Conduct for United States Judges, Canon 3A(4) Commentary (2009) ("A judge may encourage and seek to facilitate settlement but should not act in a manner that coerces any party into surrendering the right to have the controversy resolved by the courts.").

Judges must be mindful of the effect settlement discussions can have, not only on their objectivity and impartiality, but also on the appearance of their objectivity and impartiality. Despite a judge's best efforts, there may be instances when information obtained during settlement discussions could influence a judge's decision making during trial, and, in such instances, the judge should consider whether disqualification may be appropriate.

ABA Model Code of Judicial Conduct, Rule 2.6 cmt. [3] (2010).

Thus, the judicial codes do not prohibit per se a judge's involvement in settlement discussions, but also provide no assurance that the judge may continue hearing the case should settlement talks fail.

Courts, bars, and mediation guidelines have also debated a parallel issue -- whether a judge/mediator's preparation of a settlement agreement after a successful mediation would violate the general principle prohibiting judges from practicing law. The issue is whether such an action makes the judge a mere "scrivener" (a role not prohibited by the judicial codes) or instead involves the judge practicing law (which generally is forbidden except in the case of the judge's family-owned company).

Courts and bars disagree about that issue. The Maryland Bar noted the debate in the context of a lawyer/mediator. The Bar ultimately concluding that the mediator "cannot represent both parties in the dispute," and therefore could not draft a settlement agreement for the parties -- although he or she could prepare "a document that memorializes the understanding that was reached by the parties."

The gist of the issue involves the question of whether an attorney-mediator can draft a settlement agreement for unrepresented parties in resolution of a dispute the mediator has been asked to resolve. The short answer to that question is that an attorney-mediator may not draft a settlement agreement on behalf of unrepresented parties to

the mediation. . . . It is common for mediators to assist the parties in preparing a term sheet or a memorandum of understanding to set forth the essential terms of the mediated resolution of the dispute. This activity is undertaken as a mediator, not as the lawyer for either party. We see no problem with a lawyer-mediator engaging in this task. . . . When the task changes from memorializing the understanding to drafting legally binding documents, the mediator's role as scrivener changes to legal practitioner. . . . This issue is not one without difference of opinion. Other states that have considered the issue under the Model Rules reached conflicting conclusions. Utah, North Carolina, Virginia and New Hampshire, all reached the same conclusion that we do. New York, Connecticut and Massachusetts reach the opposite conclusion. We believe the Utah Committee's analysis to be best under Maryland law.

Maryland LEO 2007-19 (11/5/07) (footnotes omitted).³ The same principle would probably apply to judges.

Best Answer

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

B 2/15

³ Maryland LEO 2007-19 (11/5/07) ("The gist of the issue involves the question of whether an attorney-mediator can draft a settlement agreement for unrepresented parties in resolution of a dispute the mediator has been asked to resolve. The short answer to that question is that an attorney-mediator may not draft a settlement agreement on behalf of unrepresented parties to the mediation."; "It is common for mediators to assist the parties in preparing a term sheet or a memorandum of understanding to set forth the essential terms of the mediated resolution of the dispute. This activity is undertaken as a mediator, not as the lawyer for either party. We see no problem with a lawyer-mediator engaging in this task."; "When the task changes from memorializing the understanding to drafting legally binding documents, the mediator's role as scrivener changes to legal practitioner."; "This issue is not one without difference of opinion. Other states that have considered the issue under the Model Rules reached conflicting conclusions. Utah, North Carolina, Virginia and New Hampshire, all reached the same conclusion that we do. New York, Connecticut and Massachusetts reach the opposite conclusion. We believe the Utah Committee's analysis to be best under Maryland law." (footnotes omitted); ultimately concluding that the mediator "cannot represent both parties in the dispute" and therefore could not draft a settlement agreement for the parties as opposed to "a document that memorializes the understanding that was reached by the parties").

Required Disclosures

Hypothetical 9

You have decided to give up practicing law and become a mediator, and you wonder what disclosures you will have to make to parties once you begin this new career.

Are there any statutes or regulations that dictate what type of disclosures mediators must make to the mediation parties as the mediation begins?

YES

Analysis

Most states have statutes or regulations requiring certain disclosures by mediators.

- Virginia Code § 8.01-581.26 (2014) ("Upon the filing of an independent action by a party, the court shall vacate a mediated agreement reached in a mediation pursuant to this chapter, or vacate an order incorporating or resulting from such agreement, where: 1. The agreement was procured by fraud or duress, or is unconscionable; 2. If property or financial matters in domestic relations cases involving divorce, property, support or the welfare of a child are in dispute, the parties failed to provide substantial full disclosure of all relevant property and financial information; or 3. There was evident partiality or misconduct by the mediator, prejudicing the rights of any party. For purposes of this section, 'misconduct' includes failure of the mediator to inform the parties at the commencement of the mediation process that: (i) the mediator does not provide legal advice, (ii) any mediated agreement may affect the legal rights of the parties, (iii) each party to the mediation has the opportunity to consult with independent legal counsel at any time and is encouraged to do so, and (iv) each party to the mediation should have any draft agreement reviewed by independent counsel prior to signing the agreement." (emphasis added)).

Best Answer

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

Mediators' Deception

Hypothetical 10

You want to maintain your law license but spend more time acting as a mediator. You know that lawyers generally cannot engage in deceptive conduct, but you have read that mediators might be able to "close the deal" by relying on what some might call a "little white lie" presented to each side -- underestimating the value of the side's claim by overemphasizing the adversary's claim.

May lawyer-mediators engage in mild deception as part of their mediator duties?

NO (PROBABLY)

Analysis

Most states' ethics rules prohibit lawyer deception in a specific context and in a more general way.

Under ABA Model Rule 4.1,

[i]n the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person; or . . . fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

ABA Model Rule 4.1 (emphasis added).

Under the more general ABA Model Rule 8.4(c)

It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

ABA Model Rule 8.4(c).

Some states have added a phrase to the end of that general prohibition, which renders the rule more logical and enforceable.

- Virginia Rule 8.4(c) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law").

In 2006, the ABA issued a legal ethics opinion indicating that the general anti-deception rule applied to lawyers representing clients in caucused mediations. In ABA LEO 439 (4/12/06), the ABA dealt with lawyers' statements while representing mediation parties. That opinion explored the line between permissible "puffery" and impermissible deceptive factual statements. In a footnote, the ABA dealt with the same issue that confronts lawyer-mediators.

This opinion is limited to lawyers representing clients involved in caucused mediation, and does not attempt to explore issues that may be presented when a lawyer serves as a mediator and, in carrying out that role, makes a false or misleading statement of fact. A lawyer serving as a mediator is not representing a client, and is thus not subject to Rule 4.1, but may well be subject to Rule 8.4(c).

ABA LEO 439 n.19 (4/12/06) (emphasis added).

Best Answer

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

B 2/15

Mediators' Confidentiality Duty

Hypothetical 11

In your role as a mediator, you wonder whether you must keep one side's statements confidential from the other side. In some situations, you think that explicitly or implicitly disclosing those might facilitate the mediation.

Must mediators maintain the confidentiality of what they are told during the mediation process?

YES

Analysis

Absent mediation parties' consent, mediators generally must maintain the confidentiality of what they learn during the process.

- Virginia Code § 8.01-581.24 ("Unless expressly authorized by the disclosing party, the mediator may not disclose to either party information relating to the subject matter of the mediation provided to him in confidence by the other. A mediator shall not disclose information exchanged or observations regarding the conduct and demeanor of the parties and their counsel during the mediation, unless the parties otherwise agree.").

Of course, mediation parties may consent to the mediator's disclosure to mediation adversaries. Both parties obviously must consent to the mediator's disclosure to the adversary of their claims or positions, and they can consent to the disclosure of other communications or information as well.

Best Answer

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

Job Offers to Mediators

Hypothetical 12

Your litigation practice has increasingly involved your representation of parties in mediation. Over the past several years, you have come to admire one particularly successful mediator, and you have convinced your partners to offer her a job at your firm. However, she is currently handling a number of mediations in which your partners are representing one of the mediating parties.

May you offer a job to the mediator while she is handling your firm's clients' mediations?

NO

Analysis

An ABA Model Rule provision contains a common sense principle.

A lawyer shall not negotiate for employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially as a judge or other adjudicative officer or as an arbitrator, mediator or other third-party neutral.

ABA Model Rule 1.12(b) (emphasis added).

Interestingly, this rule literally applies to the mediator rather than to the lawyer interested in hiring the mediator. But lawyers thinking of hiring a mediator are essentially bound by the same provision, because they cannot assist another lawyer (even when acting as a mediator) in violating any ethics rules governing the mediator's conduct.

Best Answer

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

Mediator's Drafting Settlement Agreements: Unauthorized Practice of Law for Nonlawyer Mediators

Hypothetical 13

You gave up your law license many years ago, and you have been acting as a mediator ever since. It just dawned on you that your involvement in memorializing mediation parties' settlements might implicate unauthorized practice of law issues.

May nonlawyer mediators participate in drafting mediation parties' settlement agreements without implicating unauthorized practice of law issues?

YES (PROBABLY)

Analysis

Given the difficulty of defining the "practice of law," it would not be surprising for mediators to wonder about the unauthorized practice of law implications of their help memorializing mediation parties' settlements.

However, the ABA has indicated that such actions do not constitute the practice of law.

- ABA Section for Dispute Resolution, Resolution of Mediation & the Unauthorized Practice of Law (Adopted Feb. 2, 2002) ("When an agreement is reached in a mediation, the parties often request assistance from the mediator in memorializing their agreement. The preparation of a memorandum of understanding or settlement agreement by a mediator, incorporating the terms of settlement specified by the parties, does not constitute the practice of law. If the mediator drafts an agreement that goes beyond the terms specified by the parties, he or she may be engaged in the practice of law. However, in such a case, a mediator shall not be engaged in the practice of law if (a) all parties are represented by counsel and (b) the mediator discloses that any proposal that he or she makes with respect to the terms of settlement is informational as opposed to the practice of law, and that the parties should not view or rely upon such proposals as advice of counsel, but merely consider them in consultation with their own attorneys." (emphasis added)).

This seems to be a stretch of the normal unauthorized practice of law rules, but reflects the ABA's encouragement of ADR processes.

Best Answer

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

B 2/15

Conflicts of Interest Issues Implicated by Lawyer-Mediators Drafting Settlements

Hypothetical 14

You decided to maintain your law license even though you spend most of your time as a mediator. Someone just suggested to you that your practice of writing up mediation parties' settlement agreements to resolve litigation constitutes your improper simultaneous representation of litigation adversaries.

May lawyer-mediators memorialize litigation adversaries' settlement agreements following a successful mediation?

MAYBE

Analysis

The only clear unconsentable conflict described in the ABA Model Rules involves the same lawyer simultaneously representing a client in making a claim and another client in defending against that claim.

Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) 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. (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent, confirmed in writing.

ABA Model Rule 1.7 (emphases added).

This per se prohibition can have an interesting effect on a lawyer's role as mediator. An ABA Model Rules comment addresses this issue.

Paragraph (b)(3) describes conflicts that are nonconsentable because of the institutional interest in vigorous development of each client's position when the clients are aligned directly against each other in the same litigation or other proceeding before a tribunal. Whether clients are aligned directly against each other within the meaning of this paragraph requires examination of the context of the proceeding. Although this paragraph does not preclude a lawyer's multiple representation of adverse parties to a mediation (because mediation is not a proceeding before a "tribunal" under Rule 1.0(m)), such representation may be precluded by paragraph (b)(1).

ABA Model Rule 1.7 cmt. [17] (emphasis added).

Interestingly, states take differing positions on whether a lawyer-mediator who has successfully resolved a divorce or other contentious matter may prepare documents memorializing the settlement agreement.

In 2007, the Maryland Bar noted the differing positions taken by states, and ultimately held that the lawyer could not draft a settlement agreement.

- Maryland LEO 2007-19 (11/5/07) ("The gist of the issue involves the question of whether an attorney-mediator can draft a settlement agreement for unrepresented parties in resolution of a dispute the mediator has been asked to resolve. The short answer to that question is that an attorney-mediator may not draft a settlement agreement on behalf of unrepresented parties to the mediation." (emphasis added); "It is common for mediators to assist the parties in preparing a term sheet or a memorandum of understanding to set forth the essential terms of the mediated resolution of the dispute. This activity is undertaken as a mediator, not as the lawyer for either party. We see no problem with a lawyer-mediator engaging in this task."; "When the task changes from memorializing the understanding to drafting legally binding documents, the mediator's role as scrivener changes to legal practitioner."; "This issue is not one without difference of opinion. Other states that have considered the issue under the Model Rules reached conflicting conclusions. Utah, North Carolina, Virginia and New Hampshire, all reached the same conclusion that we do. New York, Connecticut and Massachusetts reach the

opposite conclusion. We believe the Utah Committee's analysis to be best under Maryland law." (emphasis added; footnotes omitted); ultimately concluding that the mediator "cannot represent both parties in the dispute" and therefore could not draft a settlement agreement for the parties as opposed to "a document that memorializes the understanding that was reached by the parties").

As the Maryland legal ethics opinion recognized, some states permit mediators to engage in such practice.

- ABA Section of Dispute Resolution, Comm. on Mediator Ethical Guidance Op. 2010-1 (2010) (explaining that the mediator handling a no-fault divorce has asked whether he or she could also prepare documents memorializing the parties' agreement on property issues and child support issues; explaining that the mediator had to comply with ABA guidelines, which require full disclosure to the client about the limits of the mediator's abilities to provide legal advice or information, and the inability of the mediator to represent the parties; "The Committee sees no ethical impediment under the Model Standards to the mediator performing a drafting function that he or she is competent to perform by experience or training. A mediator may, in drafting a mediated settlement agreement or MOU, act as a 'scrivener' -- simply memorializing the parties' agreement without adding terms or operative language. The Model Standards arguably also permit a mediator to, if she has the necessary background and experience, provide legal information to the parties. If, however, the mediator puts on his or her legal counsel's hat, by giving legal advice or performing tasks typically done by legal counsel, then the mediator runs the serious risk of inappropriately mixing the role of legal counsel and mediator without disclosing the implications of that shift in roles or without getting party consent.").
- New York State LEO 736 (1/3/01) ("An attorney-mediator may prepare divorce documents incorporating a mutually acceptable separation agreement and represent both parties only in those cases where mediation has proven entirely successful, the parties are fully informed, no contested issues remain, and the attorney-mediator satisfies the 'disinterested lawyer' test of DR 5-105(C).").
- Michigan LEO RI-278 (8/12/96) ("A lawyer acting as a mediator in a domestic dispute resolution process may draft documents which purport to represent the understanding reached between the parties."; "The lawyer mediator is not per se prohibited from preparing pleadings for purposes of implementation of the memorandum of understanding. However, any activity in this regard would be construed as legal services by a lawyer, not mediation, and would necessarily invoke MRPC 1.7, 2.2, and other ethics duties.").

Other states take exactly the opposite approach.

- Ohio LEO 2009-4 (6/12/09) ("Upon conclusion of domestic relations mediation, a lawyer-mediator may not, pursuant to Prof. Cond. Rule 1.7(c)(2), prepare necessary legal documents, such as petitions, decrees, and ancillary documents, for filing by or on behalf of both the parties in a domestic relations proceeding. Upon conclusion of domestic relations mediation, a lawyer-mediator, a lawyer-mediator may prepare necessary legal documents, such as petitions, decrees, and ancillary documents, for filing by or on behalf of one of the parties to a domestic relations proceeding, provided the following conditions are met. First, as required by Prof. Cond. R. 1.12(b), during mediation, a lawyer-mediator must not negotiate to subsequently represent one of the parties. Second, as required by Prof. Cond. R. 1.12(a), both parties must give informed consent, confirmed in writing to a lawyer-mediator's subsequent representation of one of the parties. Third, as required by R.C. 102.03(A)(1) and through application of Prof. Cond. R. 1.7(c)(1), during employment or for one year after employment with the court, a lawyer-mediator who is a court employee must not undertake a representation in a matter in which he or she personally participated. Fourth, as required by Prof. Cond. R. 4.3, if one party is unrepresented, a lawyer-mediator who subsequently represents the other party, must properly deal with the unrepresented party. Fifth, a lawyer-mediator who undertakes a subsequent legal representation must comport with any applicable standards of practice for mediators.").
- Texas LEO 583 (9/2008) ("Under the Texas Disciplinary Rules of Professional Conduct, a lawyer may not agree to serve both as a mediator between parties in a divorce and as a lawyer to prepare the divorce decree and other necessary documents to effect an agreement resulting from the mediation. Because a divorce is a litigation proceeding, a lawyer is not permitted to represent both parties in preparing documents to effect the terms of an agreed divorce.").
- Utah LEO 05-03 (9/30/05) ("When a lawyer-mediator, after a successful mediation, drafts the settlement agreement, complaint and other pleadings to implement the settlement and obtain a divorce for the parties, the lawyer-mediator is engaged in the practice of law and attempting to represent opposing parties in litigation. A lawyer may not represent both parties following a mediation to obtain a divorce for the parties.").

Best Answer

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

Negotiation Ethics

Hypothetical 15

You are preparing for a mediation that you hope will resolve litigation that just started, and have posed several questions to a partner whose judgment you trust.

- (a) May you advise the adversary that you think that your case is worth \$250,000, although you really believe that your case is worth only \$175,000?

YES

- (b) May you argue to the adversary that a recent case decided by your state's supreme court supports your position, although you honestly believe that it does not?

YES (MAYBE)

- (c) Your client (the defendant) has instructed you to accept any settlement demand that is less than \$100,000. If the plaintiff's lawyer asks "will your client give \$90,000?," may you answer "no"?

MAYBE

Analysis

In some situations, lawyers must assess whether the lawyer must or may disclose protected client information to correct a negotiation or transactional adversary's misunderstanding. Such negotiations or transactions can occur in a purely commercial setting or in connection with settling litigation.

The analysis frequently involves characterized statements that the lawyer or lawyer's client has made -- which might have induced the adversary's misunderstanding. This in turn sometimes involves distinguishing between harmless statements of intent and wrongful statements of fact. Most authorities label the former

"puffery" -- as if giving it a special name will immunize such statements from common law or ethics criticism. The latter type of statement can run afoul of both common law and ethics principles significantly. The ethics rules prohibit misrepresentation regardless of the adversary's reliance or lack of reliance, and regardless of any causation.

Under ABA Model Rule 4.1 and its state counterparts,

[i]n the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

ABA Model Rule 4.1

The first comment confirms that lawyers do not have an obligation to volunteer unfavorable facts to the adversary.

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.

ABA Model Rule 4.1 cmt. [1] (emphasis added).

Comment [2] addresses the distinction between factual statements and what many call "puffing."

This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an

undisclosed principal except when nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

ABA Model Rule 4.1 cmt. [2] (emphasis added).

Not surprisingly, it can be very difficult to distinguish between ethical statements of fact and ethically permissible "puffing."

Perhaps because of this difficulty in drawing the lines of acceptable conduct, the ABA explained in one legal ethics opinion that judges should not ask litigants' lawyers about the extent of their authority.¹

The Restatement takes the same necessarily vague approach -- although focusing more than the ABA Model Rules on the specific context of the statements.

A knowing misrepresentation may relate to a proposition of fact or law. Certain statements, such as some statements relating to price or value, are considered nonactionable hyperbole or a reflection of the state of mind of the speaker and not misstatements of fact or law Whether a misstatement should be so characterized depends on whether it is reasonably apparent that the person to whom the statement is addressed would regard the statement as one of fact or based on the speaker's knowledge of facts reasonably implied by the statement or as merely an expression of the speaker's state of mind. Assessment depends on the circumstances in which the statement is made, including the past relationship of the negotiating persons, their apparent sophistication, the plausibility of the statement on its face, the phrasing of the statement, related communication between the persons involved, the known negotiating practices of the community in which both are negotiating, and similar circumstances. In general, a lawyer who is known to represent a person in a negotiation will be

¹ ABA LEO 370 (2/5/93) (unless the client consents, a lawyer may not reveal to a judge the limits of his settlement authority or advice to the client regarding settlement; the judge may not require the disclosure of such information; a lawyer may not lie in response to a direct question about his settlement authority, although "a certain amount of posturing or puffery in settlement negotiations may be an acceptable convention between opposing counsel.")

understood by nonclients to be making nonimpartial statements, in the same manner as would the lawyer's client. Subject to such an understanding, the lawyer is not privileged to make misrepresentations described in this Section.

Restatement (Third) of Law Governing Lawyers § 98 cmt. c (2000) (emphasis added).

A proposed 2014 California legal ethics opinion distinguished between statements that amount to harmless "puffery" and those that cross the line into knowing misrepresentations. Some statements clearly fall into the former category.

- Proposed California LEO 12-0007 (1/24/14) (finding as permissible "puffing" the following example: "Attorney's inaccurate representation regarding Plaintiff's 'bottom line' settlement number." (emphasis added); "As explained in ABA Formal Opn. No. 06-439, statements regarding a party's negotiating goals or willingness to compromise, as well as statements that constitute mere 'puffery,' are not false statements of material fact and thus, do not constitute an ethical violation and are not fraudulent or deceitful. In fact, a party negotiating at arm's length should realistically expect that an adversary will not reveal its true negotiating goals or willingness to compromise."; "Here, Attorney's inaccurate representation regarding the Plaintiff's 'bottom line,' settlement number is allowable 'puffery' rather than a misrepresentation of a material fact. Attorney has not committed an ethical violation by overstating Plaintiff's 'bottom line' settlement number. Moreover, Attorney revealing actual 'bottom line' could be a violation of Business and Professions code section 6068(e).").

Some statements fall at the other end of the spectrum, and constitute improper misrepresentations.

- Proposed California LEO 12-0007 (1/24/14) (finding the following to be examples of impermissible statements of representation of fact: "Attorney's misrepresentation about the existence of a favorable eyewitness." (emphasis added); "Attorney's inaccurate representations to the settlement officer (which Attorney intended be conveyed to Defendant and Defendant's lawyer) regarding Plaintiff's wage-loss claim." (emphasis added); "Defendant's lawyer's representation that Defendant's insurance policy is for \$50,000 although it is really \$500,000." (emphasis added)).

The proposed California legal ethics opinion also analyzed statements that could fall into either category, depending on the facts.

- Proposed California LEO 12-0007 (1/24/14) (examining the following scenario: "Defendant's lawyer also states that Defendant is prepared to litigate the matter and might simply file for bankruptcy if Defendant does not get a defense verdict. In fact, Defendant has a \$500,000 insurance policy. Further, Defendant has no plans to file for bankruptcy and has never discussed doing so with his lawyer." (emphasis added); analyzing the following example based on that scenario: "Defendant's lawyer's representation that Defendant will litigate the matter and file for bankruptcy if there is not a defense verdict."; "Whether Defendant's lawyer's representation regarding Defendant's plans to file for bankruptcy constitutes a permissible negotiating tactic will depend on the specific facts at hand. For example, if Defendant's lawyer knows that Defendant does not qualify for bankruptcy protection, threatening protection, threatening that Defendant intends to file in order to gain a negotiating advantage would constitute an impermissible intentional misrepresentation of a material fact intended to mislead Plaintiff and Attorney regarding Defendant's financial ability to pay. However, if Defendant's lawyer believes in good faith that bankruptcy is an available option for Defendant, even if unlikely, a statement by Defendant's lawyer that Defendant could or might consider filing for bankruptcy protection would likely be a permissible negotiating tactic, rather than a false statement of material fact." (emphasis added)).

(a) A 1980 American Bar Foundation article explains that this type of tactic does not violate the ethics rules.

It is a standard negotiating technique in collective bargaining negotiation and in some other multiple-issue negotiations for one side to include a series of demands about which it cares little or not at all. The purpose of including these demands is to increase one's supply of negotiating currency. One hopes to convince the other party that one or more of these false demands is important and thus successfully to trade it for some significant concession. The assertion of and argument for a false demand involves the same kind of distortion that is involved in puffing or in arguing the merits of cases or statutes that are not really controlling. The proponent of a false demand implicitly or explicitly states his interest in the demand and his estimation of it. Such behavior is untruthful in the broadest sense; yet at least in collective bargaining its

use is a standard part of the process and is not thought to be inappropriate by any experienced bargainer.

James J. White, Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation, 1980 Am. B. Found. Res. J. 926, 932 (1980) (emphases added; footnote omitted).

An ABA legal ethics opinion defines this type of statement as harmless puffery rather than material misstatement of fact.

For example, parties to a settlement negotiation often understate their willingness to make concessions to resolve the dispute. A plaintiff might insist that it will not agree to resolve a dispute for less than \$ 200, when, in reality, it is willing to accept as little as \$ 150 to put an end to the matter. Similarly, a defendant manufacturer in patent infringement litigation might repeatedly reject the plaintiff's demand that a license be part of any settlement agreement, when in reality, the manufacturer has no genuine interest in the patented product and, once a new patent is issued, intends to introduce a new product that will render the old one obsolete. In the criminal law context, a prosecutor might not reveal an ultimate willingness to grant immunity as part of a cooperation agreement in order to retain influence over the witness.

A party in a negotiation also might exaggerate or emphasize the strengths, and minimize or deemphasize the weaknesses, of its factual or legal position. A buyer of products or services, for example, might overstate its confidence in the availability of alternate sources of supply to reduce the appearance of dependence upon the supplier with which it is negotiating. Such remarks, often characterized as "posturing" or "puffing," are statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely, and must be distinguished from false statements of material fact.

ABA LEO 439 (4/12/06) (emphases added). The opinion makes essentially the same point a few pages later.

[S]tatements regarding negotiating goals or willingness to compromise, whether in the civil or criminal

context, ordinarily are not considered statements of material fact within the meaning of the Rules. Thus, a lawyer may downplay a client's willingness to compromise, or present a client's bargaining position without disclosing the client's "bottom line" position, in an effort to reach a more favorable resolution. Of the same nature are overstatements or understatement of the strengths or weaknesses of a client's position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the negotiation. Such statements generally are not considered material facts subject to Rule 4.1.

Id. (emphases added). This sort of statement represents the classic type of settlement "bluffing" that the authorities seem to condone, and most lawyers expect during settlement discussions.

(b) As explained above, courts and bars anticipate that lawyers will exaggerate the strength of their factual and legal positions.

For instance, the 1980 American Bar Foundation article explains this common practice.

In writing his briefs, arguing his case, and attempting to persuade the opposing party in negotiating, it is the lawyer's right and probably his responsibility to argue for plausible interpretations of cases and statutes which favor his client's interest, even in circumstances where privately he has advised his client that those are not his true interpretations of the cases and statutes.

White, 1980 Am. B. Found. Res. J. at 931-32.

(c) The American Bar Foundation article poses this question, but has a difficult time answering it.

Assume that the defendant has instructed his lawyer to accept any settlement offer under \$100,000. Having received that instruction, how does the defendant's lawyer respond to the plaintiff's question, "I think \$90,000 will settle this case. Will your client give \$90,000?" Do you see the

dilemma that question poses for the defense lawyer? It calls for information that would not have to be disclosed. A truthful answer to it concludes the negotiation and dashes any possibility of negotiating a lower settlement even in circumstances in which the plaintiff might be willing to accept half of \$90,000. Even a moment's hesitation in response to the question may be a nonverbal communication to a clever plaintiff's lawyer that the defendant has given such authority. Yet a negative response is a lie.

Id. at 932-33 (emphasis added).

Some ethicists providing advice to lawyers in this situation might advise those lawyers to plan ahead -- by foregoing such settlement authority or otherwise telling the adversary at the very beginning of the settlement negotiations about how the lawyer might or might not respond to questions during the negotiations. The article describes this "solution" as unrealistic.

It is no answer that a clever lawyer will answer all such questions about authority by refusing to answer them, nor is it an answer that some lawyers will be clever enough to tell their clients not to grant them authority to accept a given sum until the final stages in negotiation. Most of us are not that careful or that clever. Few will routinely refuse to answer such questions in cases in which the client has granted a much lower limit than that discussed by the other party, for in that case an honest answer about the absence of authority is a quick and effective method of changing the opponent's settling point, and it is one that few of us will forego when our authority is far below that requested by the other party. Thus despite the fact that a clever negotiator can avoid having to lie or to reveal his settling point, many lawyers, perhaps most, will sometime be forced by such a question either to lie or to reveal that they have been granted such authority by saying so or by their silence in response to a direct question.

Id. at 933 (emphases added).

It would be easy to reach the opposite conclusion in this setting -- arguing that the adversary could not reasonably expect an honest answer to such a question. Instead, the adversary might be hoping to gain some insight into the possible outcome of negotiations by examining both the verbal and non-verbal responses to such a question.

The article's author ultimately concludes that lying is not permissible in this setting, but concedes that "I am not nearly as comfortable with that conclusion" as in situations involving more direct deception. Id. at 934.

Best Answer

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

B 8/11, 1/15, 2/15

Negotiation/Transactional Adversaries' Legal Misunderstanding

Hypothetical 16

You are trying to mediate a complex case involving both automobile liability policies and workers' compensation coverage. The lawyer representing your adversary seems confused about her client's right to subrogation in connection with proceeds of an uninsured motorist policy. You conclude that she does not understand the applicable law.

Must you disclose adverse law to your adversary?

NO

Analysis

Lawyers sometimes assess whether they must or may disclose protected client information to correct a negotiation/transactional adversary's misunderstanding about the law. Although ethics rules and authorities have debated knowledge of the law's protection under ABA Model Rule 1.6 and other confidentiality rules, the issue is largely mooted by the majority approach concluding that lawyers generally have no duty to correct adversaries' misunderstanding of the law that was not induced by some misrepresentation.

Most authorities hold lawyers do not have a duty to disclose adverse law to a negotiation adversary.

- Philadelphia LEO 2005-2 (4/2005) ("The inquirer represents a truck driver who suffered serious injuries in a motor vehicle accident during the course of his employment. The driver of the other vehicle was at fault. The inquirer pursued three sources of recovery for the client: (1) workers compensation benefits; (2) a third party claim against the driver of the other vehicle who has a policy limit of \$25,000, and (3) underinsured motorist benefits with a policy limit of \$100,000. The workers compensation insurer is paying lost wage and medical benefits. The insurance company for the other driver has tendered

the \$25,000 policy limit. Inquirer has not yet settled the underinsured motorist claim, but inquirer believes that the full \$100,000 will be offered to the client. The workers compensation insurance adjuster, in discussing with the inquirer the workers compensation subrogation lien, limited the discussion of the lien to the \$12,000 net proceeds to the client from the third-party action and stated that there could be no subrogation lien in the underinsured motorist action. This, according to the inquirer, is wrong as a matter of law. In fact, according to the inquirer, workers compensation carriers have the right to a subrogation lien in the proceeds of an uninsured motorist action. The inquirer's question is whether he or she has an ethical obligation to disclose to the workers compensation insurance adjuster that the law permits the carrier to have a subrogation lien in the proceeds from the underinsured motorist claim. Of course, if inquirer made this disclosure, the adjuster would demand a share of the client's recovery from the underinsured motorist claim. Pennsylvania Rule of Professional Conduct 4.1 (the 'Rules') does not compel disclosure because the inquirer has not made a false statement of material fact or law. The omission at issue, i.e., the failure to correct the mistake of law, is not the kind of false statement Rule 4.1 would prohibit. Furthermore, the committee concludes that Rule 8.4's prohibition of dishonesty, fraud, deceit or misrepresentations does not require the correction of the adjuster's mistake of law. Finally, Rule 3.3 does not compel disclosure because there have been no representations of law made to a tribunal in the facts presented. For these reasons, the committee has concluded that the inquirer has no ethical duty to comment on the adjuster's mistake of law." (emphasis added).

- ABA LEO 387 (9/26/94) (posing the following question: "Does a lawyer have an ethical duty to inform an opposing party that the statute of limitations has run on the claim over which they are negotiating?"; answering as follows: "[T]he lawyer is not ethically obligated to reveal to opposing counsel the fact that her client's claim is time-barred in the context of negotiations").
- Rhode Island LEO 94-40 (7/27/94) ("The inquiring attorney represents a plaintiff in a personal injury matter. The attorney believes that his/her client's claim may be barred by a recent development in Rhode Island case law. Notwithstanding this information, an out-of-state insurance company made an offer of settlement. The attorney asks if the continuation of negotiations regarding a settlement with the insurance company would violate any ethical rules in light of the change in case law. . . . A lawyer generally has no affirmative duty to inform an opposing party of statutory or case law adverse to his/her client's case. Since the inquiring attorney is not making false representations in this matter, Rule 4.1 is not being violated." (emphasis added)).

As in other areas, courts tend to be more result-driven, and occasionally recognize such a duty.

- Hamilton v. Harper, 404 S.E.2d 540, 542 n.3, 544 (W. Va. 1991) (invalidating a settlement agreement in which plaintiff's lawyer accepted a \$100,000 settlement from Nationwide without advising the insurance company that a federal court had recently granted Nationwide a summary judgment in a declaratory judgment case which had eliminated Nationwide's possible liability; "While we do not dispose of this case on the grounds of misrepresentation or fraud, we take a particularly dim view of the Hamiltons' attorney's failure to disclose his knowledge regarding the action taken by the federal court. The preferred course of action for the Hamiltons' counsel, in our opinion, would have required him to voluntarily disclose that information to Nationwide in the spirit of encouraging truthfulness among counsel and avoiding the consequences of his failure to disclose, e.g. this appeal."; finding that the settlement agreement was unenforceable for "failure of consideration," rather than concluding that the plaintiff's lawyer had engaged in fraudulent conduct.).

Best Answer

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

B 1/15, 2/15

Negotiation/Transactional Adversaries' Factual Misunderstanding

Hypothetical 17

On behalf of your client in a mediation, you just made a \$100,000 offer to buy land from a farmer and his wife. You know that the farmer thinks that your client's offer contains a provision under which your client would assume an existing mortgage -- although the offer does not.

Must you disclose the fact that your client's offer does not include assumption of a mortgage?

MAYBE

Analysis

The ABA Model Rules recognize a limited duty by lawyers to correct a negotiation adversary's misunderstanding.

In the course of representing a client a lawyer shall not knowingly:

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

ABA Model Rule 4.1(b).

Comment [1] provides some explanation.

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] (emphasis added).

The Restatement deals in several places with a lawyer's silence in the face of a negotiation/transactional adversary's misunderstanding of facts.

In one section, the Restatement explains that

A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only:

(a) where he knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material.

(b) where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.

(c) where he knows that disclosure of the fact would correct a mistake of the other party as to the contents or effect of a writing, evidencing or embodying an agreement in whole or in part.

(d) where the other person is entitled to know the fact because of a relation of trust and confidence between them.

Restatement of the Law (Second) Contracts, § 161 (1981). A comment sets a fairly high disclosure duty.

One party cannot hold the other to a writing if he knew that the other was mistaken as to its contents or as to its legal effect. He is expected to correct such mistakes of the other party and his failure to do so is equivalent to a misrepresentation, which may be grounds either for avoidance under § 164 or for reformation under § 166. . . . The failure of a party to use care in reading the writing so as to discover the mistake may not preclude such relief In the case of standardized agreements, these rules supplement that of § 211(3), which applies, regardless of actual knowledge, if there is reason to believe that the other party would not manifest assent if he knew that the writing

contained a particular term. Like the rule stated in Clause (b), that stated in Clause (c) requires actual knowledge and is limited to non-disclosure by a party to the transaction.

Restatement of the Law (Second) Contracts, § 161 cmt. e (1981).

The Restatement includes an illustration of this concept.

A, seeking to induce B to make a contract to sell a tract of land to A for § 100,000, makes a written offer to B. A knows that B mistakenly thinks that the offer contains a provision under which A assumes an existing mortgage, and he knows that it does not contain such a provision but does not disclose this to B. B signs the writing, which is an integrated agreement. A's non-disclosure is equivalent to an assertion that the writing contains such a provision, and this assertion is a misrepresentation. Whether the contract is voidable by B is determined by the rule stated in § 164. Whether, at the request of B, the court will decree that the writing be reformed to add the provision for assumption is determined by the rule stated in § 166.

Restatement of the Law (Second) Contracts, § 161 cmt. e, illus. 12 (1981).

Another Restatement section states a more obvious rule -- requiring lawyers to comply with any legal compulsion requiring disclosure of facts.

A lawyer communicating on behalf of a client with a nonclient may not . . . fail to make a disclosure of information required by law.

Restatement (Third) of Law Governing Lawyers § 98(3) (2000).

A Restatement comment bluntly states that

In general, a lawyer has no legal duty to make an affirmative disclosure of fact or law when dealing with a nonclient. Applicable statutes, regulations, or common-law rules may require affirmative disclosure in some circumstances, for example disciplinary rules in some states requiring lawyers to disclose a client's intent to commit life-threatening crimes or other wrongful conduct.

Restatement (Third) of Law Governing Lawyers § 98 cmt. e (2000).

Bars and courts have taken differing positions on a lawyer's duty in this setting.

Some states have seemingly increased lawyers' disclosure obligation by removing the confidentiality reference. For instance, Virginia's Rule 4.1(b) indicates as follows:

[i]n the course of representing a client a lawyer shall not knowingly . . . fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

Virginia Rule 4.1(b). Deleting the phrase "unless disclosure is prohibited by Rule 1.6" removes the confidentiality duty's ability to "trump" the disclosure duty.

The American Trial Lawyers' 1982 proposed ethics rules (providing that group's contribution to the national debate resulting in the 1983 ABA Model Rules) predictably emphasized lawyers' confidentiality duty in such a transactional setting.

A lawyer represents a client negotiating the purchase of real estate. During negotiations, the parties and their lawyers discuss the adverse effect of existing zoning restrictions, which prevent commercial development of the property. Just prior to formalizing an agreement of sale, however, the buyer learns that his lawyer has persuaded the zoning board to change the zoning to permit commercial use. The buyer decides not to tell the seller about the imminent zoning change. The buyer's lawyer would commit a disciplinary violation by informing the seller.

Am. Lawyer's Code of Conduct, Proposed Revision of the Code of Prof'l Responsibility, illus. 1(d), Comm'n on Prof'l Responsibility, Roscoe Pound-Am. Trial Lawyers Found., Revised Draft (May 1982) (emphases added).

Some ethics opinions take a narrow view of lawyers' duty to correct a negotiating counterparty's misunderstanding.

- N.Y. Cnty. Law. Ass'n LEO 731 (9/1/03) (holding that a litigant's lawyer did not have to disclose the existence of an insurance policy during settlement negotiations, unless the dispute was in litigation and the pertinent rules required such disclosure; "A lawyer has no duty in the course of settlement negotiations to volunteer factual representations not required by principle of substantive law or court rule. Nor is the lawyer obliged to correct an adversary's misunderstanding of the client's resources gleaned from independent, unrelated sources. However, while the lawyer has no affirmative obligation to make factual representations in settlement negotiations, once the topic is introduced the lawyer may not intentionally mislead. If a lawyer believes that an adversary is relying on a materially misleading representation attributable to the lawyer or the lawyer's client, or a third person acting at the direction of either, regarding insurance coverage, the lawyer should take such steps as may be necessary to disabuse the adversary from continued reliance on the misimpression created by the prior material misrepresentation. This is not to say that the lawyer must provide detailed corrective information; only that the lawyer may not permit the adversary to continue to rely on a materially inaccurate representation presented by the lawyer, his or her client or another acting at their direction." (emphases added); "It is the opinion of the Committee that it is not necessary to disclose the existence of insurance coverage in every situation in which there is an issue as to the available assets to satisfy a claim or pay a judgment. While an attorney has a duty not to mislead intentionally, either directly or indirectly, we believe that an attorney is not ethically obligated to prevent an adversary from relying upon incorrect information which emanated from another source. Under those circumstances, we conclude that the lawyer may refrain from confirming or denying the exogenous information, provided that in so doing he or she refrains from intentionally adopting or promoting a misrepresentation.").
- New York County LEO 686 (7/9/91) ("If, based on information imparted by the client, a lawyer makes an oral representation in a negotiation, which is still being relied upon by the other side, and the lawyer discovers the representation was based on materially inaccurate information, the lawyer may withdraw the representation even if the client objects. The Code of Professional Responsibility does not require the lawyer to disclose the misrepresentation.").

Some ethics opinions seem to require such disclosure. A 2014 proposed California legal ethics opinion presented one scenario in which a lawyer would violate the ethics rules by failing to disclose a material fact unknown to the adversary. The scenario involved a lawyer scheduling settlement negotiations in an unemployed client's

case against a former employer seeking lost wages, among other things. In the Bar's scenario, the lawyer deliberately scheduled the settlement negotiations the day before the client was to begin a new job, which allowed the client and lawyer to honestly say to the adversary that the client was still unemployed. However, the Bar explained that a wage-loss claim assumes continuing losses in the future -- which would be inconsistent with the lawyer's knowledge that the client would start a new job the next day.

- Proposed California LEO 12-0007 (1/24/14) (examining the following scenario: "The matter does not resolve at the settlement conference, but the parties agree to participate in a follow-up settlement conference one month later, pending the exchange of additional information regarding Plaintiff's medical expenses and wage-loss claim. During that month, Attorney learns that Plaintiff has accepted an offer of employment in a new field and that Plaintiff's starting salary will be \$75,000.00. Recognizing that accepting this position negatively impacts her wage loss claim, Plaintiff instructs Attorney to conceal Plaintiff's new employment at the upcoming mediation. Attorney pushes to have the follow-up settlement conference occur the day before Plaintiff starts her new job so that, 'technically,' Plaintiff is not working at the time of the follow-up settlement conference." (emphasis added); analyzing the following example based on that scenario: "This example raises two issues -- the failure to disclose the new employment, and Plaintiff's instruction to Attorney to not disclose the information. First, as to the underlying fact of employment itself, the failure to disclose the new employment would be a suppression of material fact that is the equivalent of a material misrepresentation, and would be improper. (Vega v. Jones (2004) 121 Cal. App. 4th 282, 291 [17 Cal. Rptr. 3d 26]). The parties specifically agreed to participate in a follow-up settlement conference pending exchange of specific information, including that involving the wage-loss claim. Unquestionably, the wage loss claim is at the heart of the follow negotiations, and is therefore material. Even if Plaintiff is technically not employed on the date of the mediation, the wage-loss claim is one that assumes wage losses going forward, and any representation of such loss that does not disclose the \$75,000 new employment would be a false representation regarding the extent of the losses." (emphasis added); "Second, Attorney was specifically instructed by Plaintiff, his client, not to make the disclosure. That instruction, conveyed by a client to his attorney, is a confidential communication that Attorney is obligated to protect under rule 3-100 and Business and Professions Code section 6068(e). See also Cal. Evidence Code sections 952, 954, 955. While Attorney is generally required to follow his client's instructions, Attorney must counsel his client that Attorney cannot take part in

a misrepresentation and/or suppression of evidence. (Cal. State Bar Formal Opn. No. 2013-189, see also Los Angeles County Bar Assn. Formal Opn. 520).").

Other bars have also indicated that lawyers in some situations must affirmatively disclose adverse facts to the adversary.

Courts show the same dichotomy.

Some courts find that lawyers need not disclose adverse facts to an adverse party entering into settlement negotiations before the completion of discovery.

- Hardin v. KCS Int'l, Inc., 682 S.E.2d 726, 731, 734, 736 (N.C. Ct. App. 2009) (addressing a situation in which a plaintiff settled with the seller of a large boat for any past problems with the boat, and reserved only the right to pursue claims against the seller based on warranty work; rejecting the plaintiff's effort to void the settlement after discovering "that Hardin's boat, while being shipped from Cruisers' manufacturing facility in Wisconsin to North Carolina, had been involved in a collision with a tree"; explaining that "Hardin had the ability by virtue of the civil discovery rules to obtain from defendants -- prior to entering into the settlement agreement -- information about the pre-sale collision. Hardin, therefore, could have, through the exercise of due diligence, learned of the supposed latent defect."; noting that "Hardin cites no authority -- and we have found none -- requiring opposing parties in litigation to disclose information adverse to their positions when engaged in settlement negotiations. Such a requirement would be contrary to encouraging settlements. One of the reasons that a party may choose to settle before discovery has been completed is to avoid the opposing party's learning of information that might adversely affect settlement negotiations. The opposing party assumes the risk that he or she does not know all of the facts favorable to his or her position when choosing to enter into a settlement prior to discovery. On the other hand, the opposing party may also have information it would prefer not to disclose prior to settlement."; also explaining that "Hardin chose to forego discovery, settle his claims, and enter into this general release. Like the plaintiffs in Talton [Talton v. Mac Tools, Inc., 453 S.E.2d 563 (N.C. Ct. App. 1995)], he cannot now avoid the release by arguing that subsequent to signing the release, he learned of facts that would have persuaded him not [to] sign the release when he has not demonstrated that defendants had any duty to disclose those facts.").
- Brown v. County of Genesee, 872 F.2d 169, 173, 175 (6th Cir. 1989) (reversing a trial court's conclusion that a county had acted improperly in failing to disclose the highest pay level to which a plaintiff might have risen

(which was an important element in a settlement); first noting that "counsel for Brown could have requested this information from the County, but neglected to do so. The failure of Brown's counsel to inform himself of the highest pay rate available to his client cannot be imputed to the County as unethical or fraudulent conduct."; criticizing the lower court's analysis; "[T]he district court erred in its alternative finding that the consent agreement should be vacated because of fraudulent and unethical conduct by the County. The district court concluded that the appellant had both a legal and ethical duty to have disclosed to the appellee its factual error, which the appellant may have suspected had occurred. However, absent some misrepresentation or fraudulent conduct, the appellant had no duty to advise the appellee of any such factual error, whether unknown or suspected. 'An attorney is to be expected to responsibly present his client's case in the light most favorable to the client, and it is not fraudulent for him to do so. . . . We need only cite the well-settled rule that the mere nondisclosure to an adverse party and to the court of facts pertinent to a controversy before the court does not add up to "fraud upon the court" for purposes of vacating a judgment under Rule 60(b).'" (emphasis added) (citation omitted); also noting that the county's lawyer was not certain that the claimant misunderstood the facts; "The district court, in the case at bar, concluded that since counsel for the appellant knew that appellee's counsel misunderstood the existing pay scales available to Brown and knew that she could have been eligible for a level "D" promotion at the time the July 9, 1985 settlement had been executed, the consent judgment should be vacated. This conclusion, however, is in conflict with the facts as stipulated, which specified with particularity that appellant and its counsel had not known of appellee's misunderstanding and/or misinterpretation of the County's pay scales, although believing it to be probable.").

In contrast, several courts either criticized, imposed liability, refused to dismiss cases or otherwise condemned lawyers who did not disclose adverse facts.

- Vega v. Jones, Day, Reavis & Pogue, 17 Cal. Rptr. 3d 26, 28-29, 32 n.6, 33, 38 (Cal. Ct. App. 2004) (reversing a dismissal of a fraud action against Jones Day for representing a buyer in a corporate transaction who did not advise the seller of shares of a "toxic" financing deal that adversely affected the value of the shares in the new company that the seller obtained; affirming dismissal of a negligent misrepresentation claim against Jones Day, but declining to find against Jones Day on the fraud claim; noting in the description of the case that Jones Day won summary judgment in other similar cases against it; "A shareholder in a company acquired in a merger transaction sued the law firm which represented the acquiring company for fraud. He alleged the law firm concealed the so-called toxic terms of a third party financing transaction, and thus defrauded him into exchanging his

valuable stock in the acquired company for 'toxic' stock in the acquiring company. The law firm demurred. It contended it made no affirmative misstatements and had no duty to disclose the terms of the third party investments to an adverse party in the merger transaction. We conclude the complaint stated a fraud claim based on nondisclosure. The complaint alleged the law firm, while expressly undertaking to disclose the financing transaction, provided disclosure schedules that did not include material terms of the transaction." (emphases added); "The demurrer to Vega's cause of action for negligent misrepresentation was properly sustained by the trial court, since such a claim requires a positive assertion. . . . Since no positive assertions are alleged, other than the comments that the financing was 'standard' and 'nothing unusual,' no claim for negligent misrepresentation is stated."; "Jones Day specifically undertook to disclose the transaction and, having done so, is not at liberty to conceal a material term. Even where no duty to disclose would otherwise exist, 'where one does speak he must speak the whole truth to the end that he does not conceal any facts which materially qualify those stated. . . . One who is asked for or volunteers information must be truthful, and the telling of a half-truth calculated to deceive is fraud." (citation omitted) (emphasis added); "Jones Day contends that Vega's claims are barred by the doctrine of res judicata, because Jones Day obtained summary judgment in its favor on fraud claims in earlier lawsuits brought by three other shareholders, who subsequently waived, abandoned and dismissed their respective appeals. Jones Day argues Vega was in privity with each of those three shareholders, because he is also a former shareholder in MonsterBook, his fraud claim is the same as their claims, he knew about their lawsuits, and he is using the same attorney. This relationship, Jones Day contends, is sufficiently close to justify application of the principle of preclusion. Again, we cannot agree."; "While Jones Day obtained summary judgment on fraud claims by three other shareholders, Vega was not a party to those lawsuits.").

- Statewide Grievance Comm. v. Egbarin, 767 A.2d 732, 735 (Conn. App. Ct. 2001) (suspending for five years a lawyer for making a true but misleading statement -- providing lenders copies of his tax return, but failing to explain that he had not actually paid the taxes; "As a condition to receiving the loans, the defendant provided Sanborn [mortgage company] and the Picards [couple whose property defendant purchased, who also made a \$30,000 loan to him] with copies of his 1992 and 1993 federal income tax returns. The defendant's 1992 federal income tax return listed an adjusted gross income of \$93,603 and a tax liability of \$26,210. His 1993 federal income tax return stated that the adjusted gross income was \$116,950, with a tax owing of \$31,389."; "As of the date of the closing, however, the defendant had in fact not paid, not even filed for, the amounts due and owing on the 1992 and 1993 federal income tax returns. The defendant did not disclose either to

Sanborn or to the Picards that he had not paid his 1992 and 1993 federal income tax obligations.").

- Neb. v. Addison, 412 N.W.2d 855, 856 (Neb. 1987) (suspending for six months a lawyer who knew that an unrepresented counterparty was unaware of a \$1,000,000 insurance policy that the lawyer's client had available; "On November 5, 1985, respondent Addison visited the business offices of Lutheran Medical Center, where he met with Gregory Winchester, the business office manager for the hospital. Addison became aware at this meeting that Winchester was under the false impression that State Farm and Allstate were the only two companies whose policies were in force in connection with the accident. Rather than disclose the third policy, Addison negotiated for a release of the hospital's lien based upon Winchester's limited knowledge. Winchester agreed to release the lien in exchange for \$45,000 of the State Farm settlement of \$100,000, and an additional \$15,000 if and when Medina settled with Allstate, plus another \$5,000 if the settlement proceeds from Allstate exceeded \$40,000. Subsequent to this agreement the hospital learned of the third policy, and thereafter informed the Sea Insurance Company that it did not consider the release binding, since it was obtained by fraudulent misrepresentations made by respondent Addison."; "In his report the referee found that the respondent had a duty to disclose to Winchester the material fact of the Sea Insurance Company policy and that his failure to do so constituted a violation of DR 1-102(A)(1) and (4). The referee also found that the respondent's act of omission in failing to correct Winchester's false impression constituted a violation of DR 7-102(A)(5).").
- Slotkin v. Citizens Cas. Co., 614 F.2d 301 (2nd Cir. 1979) (finding a hospital's lawyer liable for fraud because he failed to advise the plaintiff of a \$1,000,000 excess insurance policy, but nevertheless represented the hospital in settling with the plaintiff for a much smaller amount; noting that a letter in the lawyer's file mentioned the larger insurance policy).

In 1999, the District of New Mexico dealt with what the court found was "sharp practice." A plaintiff's lawyer, who had deliberately picked an effective date of a release knowing the release would not cover an additional claim that his client eventually asserted. The court held that the plaintiff had not acted unethically, but decried the unprofessional conduct.

Pendleton v. Cent. N.M. Corr. Facility, 184 F.R.D. 637, 640, 638, 640-41, 641 (D.N.M. 1999) (rejecting defendant's claim for sanctions based on "a material misrepresentation by Plaintiff's attorney as to why he sought the change in

the effective date of the release in CIV 96-1472."; finding that defendant's argument procedurally defective; also finding plaintiff's claim for sanctions against defendant procedurally defective; describing the background of the parties' competing claims for sanctions: "Defendant's counsel drafted the settlement documents in the prior action unaware of the CNMCF Warden's August 28, 1997 letter or Plaintiff's retaliation claim. As drafted, the effective date of the release was to be the date Plaintiff executed the document. On September 2, 1997, Plaintiff's counsel (Mr. Mozes) requested that the release be effective only through August 21, the date of the settlement conference. When questioned why, Plaintiff's counsel responded that such was his normal practice. Defendant contends that based on this representation, its counsel agreed to the request. Plaintiff's counsel discussed the change in a September 2, 1997 letter indicating that 'we will release the "State" up through the date of the Settlement Conference, August 21, 1997.'" (emphases added); "Although Rule 11(c)(1)(A) provides that 'if warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion [for sanctions]' (emphasis added), the court does not believe that such fees are warranted, even in the face of Defendant's non-compliance with the safe-harbor provisions of Rule 11, because of the sharp practices engaged in by the Plaintiff's counsel."; "As we go through this life we learn, and sometimes the hard way, who we can trust to be candid and who we cannot. It is unfortunate that some attorneys apparently feel no obligation to their fellow attorneys, but then again, as the saying goes, 'it's a short road that doesn't have a bend in it.' The Rules of Professional Conduct and the case law suggest that, even in the context of finalizing a settlement agreement and release, a knowing failure to disclose a non-confidential, material and objective fact upon inquiry by opposing counsel is improper. See 2 N.M. R. Ann. (1998), Rules of Professional Conduct, Preamble, A Lawyer's Responsibilities ('As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others.');

id. § 16-401 ('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.');

id § 16-804(C); ABA/BNA Lawyers' Manual on Professional Conduct, § 71:201 ('An omission of material information that is intended to mislead a third person may constitute a 'false statement.'). The court agrees with Defendant that the failure to disclose a fact may be a misrepresentation in certain circumstances. See Restatement (Second) of Torts § 529 & cmt. A ('A statement containing a half-truth may be as misleading as a statement wholly false.') (1977)."; "What is particularly troubling in this case is that the second retaliation lawsuit arose directly and immediately out of efforts to settle the prior action. Holding back information that if divulged might have led to a quick low-cost resolution of this action without resort to additional litigation is exactly the type of conduct that the public finds abhorrent and that contributes to the low esteem that the bar currently is trying to reverse."

(emphasis added); "Practicing law transcends gamesmanship and making a buck. We should be trying to make a difference. The profession is more than a business, and should remain so. As professionals we should, while trying to solve our clients' problems, make every effort to avoid needless litigation. The conduct employed in this case certainly was not calculated to achieve that end." (emphasis added)).

Best Answer

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

B 1/15, 2/15

Transactional Adversaries' Substantive Mistakes

Hypothetical 18

You are representing the seller in mediating a complicated dispute with a buyer. You are nearing the end of the mediation, and working on memorializing the agreement in a 50-page draft agreement. One provision indicates that buyer's sole remedy for seller's breach of a covenant not to compete is return of the consideration allocated in the agreement for the covenant not to compete. Near the end of the drafting process, the buyer amends another provision in the agreement so that only one dollar is allocated to consideration for the covenant not to compete -- which essentially renders the covenant meaningless (because seller's breach would at most result in one dollar of damages). When you advise your client of the buyer's mistake, she directs you to keep it secret.

Must you disclose the buyer's mistake to the buyer?

NO (PROBABLY)

Analysis

In some situations, a negotiation/transaction adversary makes a substantive mistake. For instance, the adversary might forget to ask for an indemnity in a situation which would normally call for an indemnity. Or the adversary might make changes in one part of a lengthy contract that has implications in another part of the contract, which the adversary does not realize. These mistakes differ from what might be considered drafting mistakes (sometimes called "scrivener's errors"), such as overlooking a necessary comma, or failing to include a provision that the negotiating parties agree to add to a contract, etc.

Courts and bars seem to agree that lawyers generally have no duty to transactional adversaries, other than to avoid fraudulent representations or asserting clients' misconduct.

- Lighthouse MGA, L.L.C. v. First Premium Ins. Grp., Inc., 448 F. App'x 512, 516, 517, 518 (5th Cir. 2011) (holding that the general counsel of a party in a transaction did not jointly represent the counterparty, and did not engage in an affirmative misrepresentation about a forum selection clause in the contract; concluding that the lawyer did not have a duty to tell the unrepresented counterpart about the forum selection provision; finding that the lawyer did not have a conflict under Rule 1.7; "Lighthouse's Director of Marketing has affirmed that the general counsel was 'the attorney for First Premium,' and there is no evidence in the record that the general counsel ever undertook to give legal advice to Lighthouse or purported to draft the contract on Lighthouse's behalf. As First Premium notes, even if Lighthouse subjectively believed that First Premium's general counsel was also Lighthouse's attorney, such a belief would not be reasonable." (footnote omitted); finding the lawyer did not violate Rule 4.3 by providing advice to an unrepresented party; "As First Premium notes, no authority supports Lighthouse's contention that First Premium's general counsel provided legal advice to Lighthouse merely by drafting the contract."; concluding that the lawyer did not violate Rule 8.4(c)); "There is no evidence that the general counsel made any false or misleading statements to Lighthouse. To the extent that Lighthouse's argument is based on the general counsel's failure to point out or explain the forum selection clause to Lighthouse, First Premium's general counsel did not have a fiduciary relationship with Lighthouse that would give rise to a duty to convey that information under Louisiana law.").
- Fox v. Pollack, 226 Cal. Rptr. 532 (Cal. Ct. App. 1986) (holding that a lawyer did not have a duty of professional care to an unrepresented counterparty in a real estate transaction).

This hypothetical comes from a 2013 California legal ethics opinion. California LEO 2013-189 (2013)¹ started with a basic scenario:

¹ California LEO 2013-189 (2013) (explaining that a lawyer could not advise an adversary of the adversary's mistake in drafting a transactional document, but had a duty to disclose to the adversary the lawyer's accidental failure to redline a change; providing the facts of the opinion: "Buyer's Attorney prepares an initial draft of the Purchase and Sale Agreement. One section towards the back of the 50-page draft agreement contains the terms of an enforceable covenant not to compete, and includes a provision that Buyer's sole and exclusive remedy for a breach by Seller of its covenant not to compete is the return of that portion of the total consideration which has been allocated in the Purchase and Sale Agreement for the covenant not to compete."; presenting two scenarios; explaining that "[u]nder either Scenario A or Scenario B of our Statement of Facts, once Seller's Attorney has informed Seller of the development, Seller's Attorney must abide by the instruction of Seller to not disclose. If, however, failure to make such disclosure constitutes an ethical violation by Seller's Attorney, then Seller's Attorney may have an obligation to withdraw from the representation under such circumstances." (footnote omitted); "Any duty of professionalism, however, is secondary to the duties owed by attorneys to their own clients. There is no general duty to protect the interests of nonclients."; "Attorneys generally owe no duties to

Buyer's Attorney prepares an initial draft of the Purchase and Sale Agreement. One section towards the back of the

opposing counsel nor do they have any obligation to correct the mistakes of opposing counsel. There is no liability for conscious nondisclosure absent a duty of disclosure."; "[A]n attorney may have an obligation to inform opposing counsel of his or her error if and to the extent that failure to do so would constitute fraud, a material misstatement, or engaging in misleading or deceitful conduct."; describing Scenario A: "Buyer's Attorney then prepares a revised version of the Purchase and Sale Agreement which, apparently in response to the comments of Seller's Attorney, provides for an allocation of only \$1 as consideration for the covenant not to compete with \$4,999,999 allocated to the purchase price for the Company. In reviewing the changes made in the revised version, Seller's Attorney recognizes that the allocation of only \$1 as consideration for the covenant not to compete essentially renders the covenant meaningless, because Buyer's sole and exclusive remedy for breach by Seller of the covenant would be the return by Seller of \$1 of the total consideration. Seller's Attorney notifies Seller about the apparent error with respect to the consequences of the change made by Buyer's Attorney. Seller instructs Seller's Attorney to not inform Buyer's Attorney of this apparent error. Seller's Attorney says nothing to Buyer's Attorney and allows the Purchase and Sale Agreement to be entered into by parties in that form."; analyzing Scenario A as follows: "In Scenario A of our Statement of Facts, although the Purchase and Sale Agreement contains a covenant not to compete, the apparent error of Buyer's Attorney limits the effectiveness of the covenant because the penalty for breach results in payment by Seller of only \$1. However, Seller's Attorney has engaged in no conduct or activity that induced the apparent error. Further, under our Statement of Facts, there had been no agreement on the allocation of the purchase price to the covenant, and the Purchase and Sale Agreement does in fact contain a covenant not to compete the terms of which are consistent with the parties' mutual understanding. Under these circumstances, where Seller's Attorney has not engaged in deceit, active concealment or fraud, we conclude that Seller's Attorney does not have an affirmative duty to disclose the apparent error to Buyer's Attorney."; also explaining Scenario B: "After receiving the initial draft from Buyer's Attorney, Seller's Attorney prepares a revised version of the Purchase and Sale Agreement which provides for an allocation of only \$1 as consideration for the covenant not to compete, with the intent of essentially rendering the covenant not to compete meaningless. Although Seller's Attorney had no intention of keeping this change secret from Buyer's Attorney, Seller's Attorney generates a 'redline' of the draft that unintentionally failed to highlight the change, and then tenders the revised version to Buyer's attorney. Subsequently, Seller's Attorney discovers the unintended defect in the 'redline' and notifies Seller about the change, including the failure to highlight the change, in the revised version. Seller instructs Seller's Attorney to not inform Buyer's Attorney of the change. Seller's Attorney says nothing to Buyer's Attorney and allows the Purchase and Sale Agreement to be entered into by the parties in that form."; analyzing Scenario B as follows: "Had Seller's Attorney intentionally created a defective 'redline' to surreptitiously conceal the change to the covenant not to compete, his conduct would constitute deceit, active concealment and possibly fraud, in violation of Seller's Attorney's ethical obligations. However, in Scenario B of our Statement of Facts, Seller's Attorney intentionally made the change which essentially renders the covenant not to compete meaningless, but unintentionally provided a defective 'redline' that failed to highlight for Buyer's Attorney that the change had been made. Under these circumstances, and prior to discovery of the unintentional defect, Seller's Attorney has engaged in no such unethical conduct. But once Seller's Attorney realizes his own error, we conclude that the failure to correct that error and advise Buyer's Attorney of the change might be conduct that constitutes deceit, active concealment and/or fraud, with any such determination to be based on the relevant facts and circumstances. If Seller instructs Seller's Attorney to not advise Buyer's Attorney of the change, where failure to do so would be a violation of his ethical obligations, Seller's Attorney may have to consider withdrawing." (footnote omitted); concluding with the following: "Where an attorney has engaged in no conduct or activity that induced an apparent material error by opposing counsel, the attorney has no obligation to alert the opposing counsel of the apparent error. However, where the attorney has made a material change in contract language in such a manner that his conduct constitutes deceit, active concealment or fraud, the failure of the attorney to alert opposing counsel of the change would be a violation of his ethical obligation.").

50-page draft agreement contains the terms of an enforceable covenant not to compete, and includes a provision that Buyer's sole and exclusive remedy for a breach by Seller of its covenant not to compete is the return of that portion of the total consideration which has been allocated in the Purchase and Sale Agreement for the covenant not to compete.

California LEO 2013-189 (2013).

Scenario A involves an adversary's substantive mistake.

Buyer's Attorney then prepares a revised version of the Purchase and Sale Agreement which, apparently in response to the comments of Seller's Attorney, provides for an allocation of only \$1 as consideration for the covenant not to compete with \$4,999,999 allocated to the purchase price for the Company. In reviewing the changes made in the revised version, Seller's Attorney recognizes that the allocation of only \$1 as consideration for the covenant not to compete essentially renders the covenant meaningless, because Buyer's sole and exclusive remedy for breach by Seller of the covenant would be the return by Seller of \$1 of the total consideration. Seller's Attorney notifies Seller about the apparent error with respect to the consequences of the change made by Buyer's Attorney. Seller instructs Seller's Attorney to not inform Buyer's Attorney of this apparent error. Seller's Attorney says nothing to Buyer's Attorney and allows the Purchase and Sale Agreement to be entered into by parties in that form.

Id.

The legal ethics opinion started its analysis with a general statement:

Any duty of professionalism, however, is secondary to the duties owed by attorneys to their own clients. There is no general duty to protect the interests of nonclients. . . . Attorneys generally owe no duties to opposing counsel nor do they have any obligation to correct the mistakes of opposing counsel. There is no liability for conscious nondisclosure absent a duty of disclosure.

Id. (emphasis added). On the other hand,

an attorney may have an obligation to inform opposing counsel of his or her error if and to the extent that failure to do so would constitute fraud, a material misstatement, or engaging in misleading or deceitful conduct.

Id.

The legal ethics opinion provided the following analysis of this scenario:

In Scenario A of our Statement of Facts, although the Purchase and Sale Agreement contains a covenant not to compete, the apparent error of Buyer's Attorney limits the effectiveness of the covenant because the penalty for breach results in payment by Seller of only \$1. However, Seller's Attorney has engaged in no conduct or activity that induced the apparent error. Further, under our Statement of Facts, there had been no agreement on the allocation of the purchase price to the covenant, and the Purchase and Sale Agreement does in fact contain a covenant not to compete the terms of which are consistent with the parties' mutual understanding. Under these circumstances, where Seller's Attorney has not engaged in deceit, active concealment or fraud, we conclude that Seller's Attorney does not have an affirmative duty to disclose the apparent error to Buyer's Attorney.

Id. (emphasis added).

Scenario B involved what would be considered an adversary's scrivener's error -- which raises different issues.

The legal ethics opinion recognized that California's confidentiality-centric rules might require withdrawal under certain circumstances, even if they did not require disclosure.

Under either Scenario A or Scenario B of our Statement of Facts, once Seller's Attorney has informed Seller of the development, Seller's Attorney must abide by the instruction of Seller to not disclose. If, however, failure to make such disclosure constitutes an ethical violation by Seller's Attorney, then Seller's Attorney may have an obligation to withdraw from the representation under such circumstances.

Id. (footnote omitted).

Best Answer

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

B 1/15, 2/15

Transactional Adversaries' Scrivener's Errors

Hypothetical 19

You have been furiously exchanging draft agreements with a mediation adversary. You finally reached agreement on the last few provisions, which the adversary's lawyer says she will write up while you head home for an hour or two of sleep. When you returned to the mediation this morning to check what the other lawyer prepared, you realize that she left out an important term (favorable to her client) to which you had agreed during the final negotiation discussion.

(a) Must you advise your client of the adversary's mistake?

MAYBE

(b) Must you disclose the mistake to the adversary's lawyer?

YES (PROBABLY)

Analysis

In some situations, lawyers or their clients make what could be called a scrivener's error. These differ from substantive mistakes, such as forgetting to negotiate a provision that would normally be found in a contract, etc.

A scrivener's error often involves a typographical mistake, a failure to highlight a change, etc. In today's fast-paced and electronic communication-intensive world, such mistakes can occur easily.

- Jim Carlton, Fresh Dispute Mars Bay Area Transit Deal, Wall St. J., Nov. 18, 2013 ("An unusual dispute threatens to undo a contract agreement between management and labor leaders of the Bay Area Rapid Transit (BART) system, raising the possibility of another crippling public-transit strike."; "The dispute centers on a provision in the contract that allows workers to take up to six weeks of paid family leave. Management says the provision was never agreed to and was left in as a result of a clerical error. Representatives of the two unions, Amalgamated Transit Union (ATU) Local 1555 and Service Employees International Union (SEIU) Local 1021, say BART negotiators were fully aware of it."; "Labor experts said that, while unusual, isn't

unprecedented for a dispute to arise over the terms of a labor contract after it has been ratified. 'There are a number of cases that arise in arbitration over the allegation that something is in the agreement as a result of a mutual mistake,' said William B. Gould IV, emeritus professor of law at the Stanford Law School and former chairman of the National Labor Relations Board."; "In the BART case, 'there is certainly some kind of screw-up,' Mr. Gould added. 'The question is really going to be, if they are unable to resolve this through discussion and negotiations, was this a mutual mistake?'").

- BBC News (Europe), Bank Clerk Falls Asleep On Keyboard And Accidentally Transfers £189 Million To Customer, June 10, 2013 ("A German labour court has ruled that a bank supervisor was unfairly sacked for missing a multi-million-euro error by a colleague who fell asleep during a financial transaction. The clerk was transferring 64.20 euros (£54.60) when he dozed off with his finger on the keyboard, resulting in a transfer of 222,222,222.22 euros (£189Million). His supervisor was fired for allegedly failing to check the transaction. But judges in the state of Hesse said she should have only been reprimanded.").
- Brad Heath, Small Mistakes Cause Big Problems, USA Today, March 30, 2011 ("If you're reading this in New York, you're probably too drunk to drive. That's because lawmakers accidentally got too tough with a get-tough drunken-driving law, inserting an error that set the standard for 'aggravated driving while intoxicated' below the amount of alcohol that can occur naturally. The one-word mistake makes the new law unenforceable, says Lieutenant Glenn Miner, a New York State Police spokesman. However, drivers with a blood-alcohol content of 0.08% or higher can still be prosecuted under other state laws. In the legislative world, such small errors, while uncommon, can carry expensive consequences. In a few cases around the nation this year, typos and other blunders have redirected millions of tax dollars or threatened to invalidate new laws. In Hawaii, for instance, lawmakers approved a cigarette-tax increase to raise money for medical care and research. Cancer researchers, however, will get only an extra 1.5 cents next year -- instead of the more than \$8 million lawmakers intended. That's because legislators failed to specify that they should get 1.5 cents from each cigarette sold, says Linda Smith, an adviser to Governor Linda Lingle."; "New York's mistake came in a bill meant to set tougher penalties and curb plea bargains for drivers well above the legal intoxication standard. Instead of specifying blood alcohol as a percentage, as most drunken-driving laws do, New York set its threshold as 0.18 grams --'so low you can't even measure it,' Miner says.").
- Anahad O'Connor, New York State Backs Remorseful Buyers at Rushmore Tower, The New York Times, April 9, 2010 ("Call it the multimillion-dollar typo. On Friday, the New York State attorney general's office ruled in favor

of a group of buyers who were looking to back out of their multimillion-dollar contracts at The Rushmore, an expensive Manhattan condominium building along the Hudson River. The buyers found an unusual loophole -- a seemingly minor typo in a date in the densely worded 732-page offering plan -- and used it to argue that they deserved their hefty deposits back."; "In this case, the typo got in the way. Instead of stating that buyers had the right to back out if the first closing did not occur before September 1, 2009, the offering plan stated that buyers had the right to back out if the first closing did not occur before September 1, 2008, which was the first day of the budget year, not the last. Ultimately, the first closing took place in February 2009. The sponsors argued that they made a trivial mistake -- a typo that lawyers refer to as a 'scrivener's error' -- that should be overlooked. But the attorney general's office disagreed. It sided with the buyers.").

- Mizuho Securities Sues Tokyo Stock Exchange Over 41 Billion Yen Trade Fiasco, Kyodo News, Oct. 28, 2006 ("Mizuho Securities Company filed a lawsuit Friday against Tokyo Stock Exchange (TSE) Inc. at the Tokyo District Court for 41.5 billion yen in damages, claiming the bourse caused it huge losses when the TSE computer system failed to process a correction to an erroneous order the brokerage placed last December. The suit brought by Mizuho Securities, a unit of Mizuho Financial Group Inc., marks the first time a brokerage has sued the operator of the Tokyo Stock Exchange over equity trading. Last December, a Mizuho Securities clerk mistakenly entered a sell order for 610,000 shares in staffing company J-Com Company for 1 yen each. The actual order was one share for 610,000 yen. As soon as the brokerage noticed the mistake, it tried to withdraw the sell order but the TSE's computer system took time to process the cancellation order. Sources said earlier this month that Mizuho lost about 40.7 billion yen buying back all the shares from people who bought at the erroneous price and said the brokerage has calculated 40.4 billion yen of that loss was due to a system failure at the TSE.").
- Grant Robertson, Comma Quirk Irks Rogers Communications, The Globe & Mail, Aug. 6, 2006 ("It could be the most costly piece of punctuation in Canada. A grammatical blunder may force Rogers Communications Inc. to pay an extra \$2.13-million to use utility poles in the Maritimes after the placement of a comma in a contract permitted the deal's cancellation. The controversial comma sent lawyers and telecommunications regulators scrambling for their English textbooks in a bitter 18-month dispute that serves as an expensive reminder of the importance of punctuation. Rogers thought it had a five-year deal with Aliant Inc. to string Rogers' cable lines across thousands of utility poles in the Maritimes for an annual fee of \$9.60 per pole. But early last year, Rogers was informed that the contract was being cancelled and the rates were going up. Impossible, Rogers thought, since its contract was iron-clad until the spring of 2007 and could potentially be

renewed for another five years. Armed with the rules of grammar and punctuation, Aliant disagreed. The construction of a single sentence in the 14-page contract allowed the entire deal to be scrapped with only one-year's notice, the company argued. Language buffs take note -- Page 7 of the contract states: The agreement 'shall continue in force for a period of five years from the date it is made, and thereafter for successive five year terms, unless and until terminated by one year prior notice in writing by either party.'"; "Had it not been there, the right to cancel wouldn't have applied to the first five years of the contract and Rogers would be protected from the higher rates it now faces. 'Based on the rules of punctuation,' the comma in question 'allows for the termination of the [contract] at any time, without cause, upon one-year's written notice,' the regulator said. Rogers was dumbfounded. The company said it never would have signed a contract to use roughly 91,000 utility poles that could be cancelled on such short notice. Its lawyers tried in vain to argue the intent of the deal trumped the significance of a comma. 'This is clearly not what the parties intended,' Rogers said in a letter to the CRTC.").

- Gladwin Hill, For Want of Hyphen, N.Y. Times, July 27, 1962 ("The omission of a hyphen in some mathematical data caused the \$18,500,000 failure of a spacecraft launched toward Venus last Sunday, scientists disclosed today. The spacecraft, Mariner I, veered off course about four minutes after its launching from Cape Canaveral, Florida, and had to be blown up in the air. The error was discovered here this week in analytical conferences of scientists and engineers of the National Aeronautics and Space Administration, the Air Force and the California Institute of Technology Jet Propulsion Laboratory, manager of the project for N.A.S.A. Another launching will be attempted sometime in August. Plans had been suspended pending discovery of what went wrong with the first firing. The hyphen, a spokesman for the laboratory explained, was a symbol that should have been fed into a computer, along with a mass of other coded mathematical instructions. The first phase of the rocket's flight was controlled by radio signals based on this computer's calculations. The rocket started out perfectly on course, it was stated. But the inadvertent omission of the hyphen from the computer's instructions caused the computer to transmit incorrect signals to the spacecraft.").

Ethics authorities usually do not deal with such drafting errors, but rather with more substantive mistakes or misunderstanding.

(a) In 1986, the ABA explained that a lawyer in this situation did not have to advise a client of the adversary's scrivener's error.

- Informal ABA LEO 1518 (2/9/86) (analyzing the following situation: "A and B, with the assistance of their lawyers, have negotiated a commercial contract. After deliberation with counsel, A ultimately acquiesced in the final provision insisted upon by B, previously in dispute between the parties and without which B would have refused to come to overall agreement. However, A's lawyer discovered that the final draft of the contract typed in the office of B's lawyer did not contain the provision which had been in dispute. The Committee has been asked to give its opinion as to the ethical duty of A's lawyer in that circumstance." (emphasis added); concluding that the lawyer must advise the adversary of the mistake but need not advise the lawyer's client of the mistake; "The Committee considers this situation to involve merely a scrivener's error, not an intentional change in position by the other party. A meeting of the minds has already occurred. The Committee concludes that the error is appropriate for correction between the lawyers without client consultation. A's lawyer does not have a duty to advise A of the error pursuant to any obligation of communication under Rule 1.4 of the ABA Model Rules of Professional Conduct (1983)." (emphases added); "The client does not have a right to take unfair advantage of the error. The client's right pursuant to Rule 1.2 to expect committed and dedicated representation is not unlimited. Indeed, for A's lawyer to suggest that A has an opportunity to capitalize on the clerical error, unrecognized by A and B's lawyer, might raise a serious question of the violation of the duty of A's lawyer under Rule 1.2(d) not to counsel the client to engage in, or assist the client in, conduct the lawyer knows is fraudulent. In addition, Rule 4.1(b) admonishes the lawyer not knowingly to fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a fraudulent act by a client, and Rule 8.4(c) prohibits the lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation."; providing a further explanation in a footnote; "The delivery of the erroneous document is not a 'material development' of which the client should be informed under EC 9-2 of the Model Code of Professional Responsibility, but the omission of the provision from the document is a 'material fact' which under Rule 4.1(b) of the Model Rules of Professional Conduct must be disclosed to B's lawyer." (emphasis added); also analyzing the impact of ABA Model Rule 1.6, and the opinion's deliberate lack of an analysis if the client wanted to take advantage of the adversary's mistake; "Assuming for purposes of discussion that the error is 'information relating to [the] representation,' under Rule 1.6 disclosure would be 'impliedly authorized in order to carry out the representation.' The Comment to Rule 1.6 points out that a lawyer has implied authority to make 'a disclosure that facilitates a satisfactory conclusion' -- in this case completing the commercial contract already agreed upon and left to the lawyers to memorialize. We do not here reach the issue of the lawyer's duty if the client wishes to expl[oi]t the error.").

(b) The next question is whether a lawyer in this situation must advise the adversary of the error.

The ABA dealt with this situation in ABA LEO 1518 (2/9/86). As explained above, the ABA concluded that "the omission of the provision from the document is a 'material fact' which . . . must be disclosed to [the other side's] lawyer." Id.

The Ethical Guidelines for Settlement Negotiations similarly indicates that lawyers "should identify changes from draft to draft or otherwise bring them explicitly to the other counsel's attention." ABA, Ethical Guidelines for Settlement Negotiations 57 (Aug. 2002). The Guidelines explain that "[i]t would be unprofessional, if not unethical, knowingly to exploit a drafting error or similar error concerning the contents of the settlement agreement." Id.

Other authorities agree. See, e.g., Patrick E. Longan, Ethics in Settlement Negotiations: Foreword, 52 Mercer L. Rev. 807, 815 (2001) ("the lawyer has the duty to correct the mistakes" if the lawyer notices typographical or calculation errors in a settlement agreement).

As in other situations, a court might allow reformation of a contract in such a situation.

A lawyer may even face bar discipline for trying to take advantage of an adversary's drafting error.

- Alan Cooper, Roanoke Lawyer gets reprimand in case with divorce drafting error, Va. Law. Wkly., Nov. 9, 2010 ("Richard L. McGarry represented his sister in her divorce, and in drafting the final order the husband's lawyer made a mistake. The sister owed her ex more than \$11,000, but the order switched the parties, and stated the man owed the money. McGarry's position was that the order had been entered and had become final. The judge later corrected the order. The VSB [Virginia State Bar] 8th District Disciplinary Committee

issued a public reprimand without terms, citing the disciplinary rule that prohibits taking action that 'would serve merely to harass or maliciously injure another.' . . . The husband's attorney, Stacey Strentz, drafted the final order, but inadvertently said in it that the husband owed the sister the child's support arrearages. The judge entered the order on Oct. 15, 2007. A short time after the order was entered, Strentz discovered the error and asked McGarry to cooperate in presenting a corrected order. He refused and instead contacted the Division of Child Support Enforcement and demanded that the agency take action to collect the arrearages. On Oct. 25, Strentz mailed McGarry notice of a hearing for Nov. 6 to correct a clerk's error as set forth in Virginia Code § 8.01-428.2. The provision is an exception to the general rule that a court order becomes final after 21 days. The matter was not heard that day because the judge was ill. Despite Strentz's effort to correct the order, McGarry wrote the Division of Child Support Enforcement on Nov. 5 that the order was final and could not be modified under Rule 1:1 of the Rules of the Supreme Court of Virginia even if Strentz claimed she had made a mistake. . . . On Nov. 8, McGarry wrote Strentz contending that the error was a 'unilateral mistake' that could not be corrected. He cited cases in support of his position that the findings of fact [] did not support that conclusion. . . . The VSB district committee concluded that McGarry had violated Rule 3.4 of the Rules of Professional Conduct, in taking action that 'would serve merely to harass or maliciously injure another,' and Rule 4.1, in knowingly making a false state[ment] of fact or law. Although McGarry said he believed the committee strayed across the line and considered a legal matter rather than an ethical one, he emphasized that he has no criticism of the committee. 'I don't want anybody to think I'm trying to re-chew this bitter cabbage,' he said."

In Stare v. Tate, 98 Cal. Rptr. 264 (Cal. Ct. App. 1971), a husband negotiating a property settlement with his former wife noticed two calculation errors in the agreement. The husband nevertheless signed the settlement without notifying his former wife of the errors. The court explained the predictable way in which the issue arose.

The mistake might never have come to light had not Tim desired to have that exquisite last word. A few days after Joan had obtained the divorce he mailed her a copy of the offer which contained the errant computation. On top of the page he wrote with evident satisfaction: "PLEASE NOTE \$100,000.00 MISTAKE IN YOUR FIGURES. . . ." The present action was filed exactly one month later."

Id. at 266. The court pointed to a California statute allowing lawyers to revise written contracts that contain a "mistake of one party, which the other at the time knew or suspected." Id. at 267. The court reformed the property settlement agreement to match the parties' agreement.

In 2013, a California legal ethics opinion¹ dealt with a similar situation, although the lawyer seeking the opinion had made a scrivener's error by not highlighting a

¹ California LEO 2013-189 (2013) (explaining that a lawyer could not advise an adversary of the adversary's mistake in drafting a transactional document, but had a duty to disclose to the adversary the lawyer's accidental failure to redline a change; providing the facts of the opinion: "Buyer's Attorney prepares an initial draft of the Purchase and Sale Agreement. One section towards the back of the 50-page draft agreement contains the terms of an enforceable covenant not to compete, and includes a provision that Buyer's sole and exclusive remedy for a breach by Seller of its covenant not to compete is the return of that portion of the total consideration which has been allocated in the Purchase and Sale Agreement for the covenant not to compete."; presenting two scenarios; explaining that "[u]nder either Scenario A or Scenario B of our Statement of Facts, once Seller's Attorney has informed Seller of the development, Seller's Attorney must abide by the instruction of Seller to not disclose. If, however, failure to make such disclosure constitutes an ethical violation by Seller's Attorney, then Seller's Attorney may have an obligation to withdraw from the representation under such circumstances." (footnote omitted); "Any duty of professionalism, however, is secondary to the duties owed by attorneys to their own clients. There is no general duty to protect the interests of nonclients."; "Attorneys generally owe no duties to opposing counsel nor do they have any obligation to correct the mistakes of opposing counsel. There is no liability for conscious nondisclosure absent a duty of disclosure."; "[A]n attorney may have an obligation to inform opposing counsel of his or her error if and to the extent that failure to do so would constitute fraud, a material misstatement, or engaging in misleading or deceitful conduct."; describing Scenario A: "Buyer's Attorney then prepares a revised version of the Purchase and Sale Agreement which, apparently in response to the comments of Seller's Attorney, provides for an allocation of only \$1 as consideration for the covenant not to compete with \$4,999,999 allocated to the purchase price for the Company. In reviewing the changes made in the revised version, Seller's Attorney recognizes that the allocation of only \$1 as consideration for the covenant not to compete essentially renders the covenant meaningless, because Buyer's sole and exclusive remedy for breach by Seller of the covenant would be the return by Seller of \$1 of the total consideration. Seller's Attorney notifies Seller about the apparent error with respect to the consequences of the change made by Buyer's Attorney. Seller instructs Seller's Attorney to not inform Buyer's Attorney of this apparent error. Seller's Attorney says nothing to Buyer's Attorney and allows the Purchase and Sale Agreement to be entered into by parties in that form."; analyzing Scenario A as follows: "In Scenario A of our Statement of Facts, although the Purchase and Sale Agreement contains a covenant not to compete, the apparent error of Buyer's Attorney limits the effectiveness of the covenant because the penalty for breach results in payment by Seller of only \$1. However, Seller's Attorney has engaged in no conduct or activity that induced the apparent error. Further, under our Statement of Facts, there had been no agreement on the allocation of the purchase price to the covenant, and the Purchase and Sale Agreement does in fact contain a covenant not to compete the terms of which are consistent with the parties' mutual understanding. Under these circumstances, where Seller's Attorney has not engaged in deceit, active concealment or fraud, we conclude that Seller's Attorney does not have an affirmative duty to disclose the apparent error to Buyer's Attorney."; also explaining Scenario B: "After receiving the initial draft from Buyer's Attorney, Seller's Attorney prepares a revised version of the Purchase and Sale Agreement which provides for an allocation

change that the lawyer intended to point out to the transactional adversary as part of the negotiation process.

After receiving the initial draft from Buyer's Attorney, Seller's Attorney prepares a revised version of the Purchase and Sale Agreement which provides for an allocation of only \$1 as consideration for the covenant not to compete, with the intent of essentially rendering the covenant not to compete meaningless. Although Seller's Attorney had no intention of keeping this change secret from Buyer's Attorney, Seller's Attorney generates a 'redline' of the draft that unintentionally failed to highlight the change, and then tenders the revised version to Buyer's attorney. Subsequently, Seller's Attorney discovers the unintended defect in the 'redline' and notifies Seller about the change, including the failure to highlight the change, in the revised version. Seller instructs Seller's Attorney to not inform Buyer's Attorney of the change. Seller's Attorney says nothing to Buyer's Attorney and allows the Purchase and Sale Agreement to be entered into by the parties in that form.

California LEO 2013-189 (2013) (emphasis added).

of only \$1 as consideration for the covenant not to compete, with the intent of essentially rendering the covenant not to compete meaningless. Although Seller's Attorney had no intention of keeping this change secret from Buyer's Attorney, Seller's Attorney generates a 'redline' of the draft that unintentionally failed to highlight the change, and then tenders the revised version to Buyer's attorney. Subsequently, Seller's Attorney discovers the unintended defect in the 'redline' and notifies Seller about the change, including the failure to highlight the change, in the revised version. Seller instructs Seller's Attorney to not inform Buyer's Attorney of the change. Seller's Attorney says nothing to Buyer's Attorney and allows the Purchase and Sale Agreement to be entered into by the parties in that form."; analyzing Scenario B as follows: "Had Seller's Attorney intentionally created a defective 'redline' to surreptitiously conceal the change to the covenant not to compete, his conduct would constitute deceit, active concealment and possibly fraud, in violation of Seller's Attorney's ethical obligations. However, in Scenario B of our Statement of Facts, Seller's Attorney intentionally made the change which essentially renders the covenant not to compete meaningless, but unintentionally provided a defective 'redline' that failed to highlight for Buyer's Attorney that the change had been made. Under these circumstances, and prior to discovery of the unintentional defect, Seller's Attorney has engaged in no such unethical conduct. But once Seller's Attorney realizes his own error, we conclude that the failure to correct that error and advise Buyer's Attorney of the change might be conduct that constitutes deceit, active concealment and/or fraud, with any such determination to be based on the relevant facts and circumstances. If Seller instructs Seller's Attorney to not advise Buyer's Attorney of the change, where failure to do so would be a violation of his ethical obligations, Seller's Attorney may have to consider withdrawing." (footnote omitted); concluding with the following: "Where an attorney has engaged in no conduct or activity that induced an apparent material error by opposing counsel, the attorney has no obligation to alert the opposing counsel of the apparent error. However, where the attorney has made a material change in contract language in such a manner that his conduct constitutes deceit, active concealment or fraud, the failure of the attorney to alert opposing counsel of the change would be a violation of his ethical obligation.").

The legal ethics opinion started its analysis with a general statement:

Any duty of professionalism, however, is secondary to the duties owed by attorneys to their own clients. There is no general duty to protect the interests of nonclients. . . . Attorneys generally owe no duties to opposing counsel nor do they have any obligation to correct the mistakes of opposing counsel. There is no liability for conscious nondisclosure absent a duty of disclosure.

Id. On the other hand,

an attorney may have an obligation to inform opposing counsel of his or her error if and to the extent that failure to do so would constitute fraud, a material misstatement, or engaging in misleading or deceitful conduct.

Id.

The legal ethics opinion provided the following analysis of Scenario B:

Had Seller's Attorney intentionally created a defective 'redline' to surreptitiously conceal the change to the covenant not to compete, his conduct would constitute deceit, active concealment and possibly fraud, in violation of Seller's Attorney's ethical obligations. However, in Scenario B of our Statement of Facts, Seller's Attorney intentionally made the change which essentially renders the covenant not to compete meaningless, but unintentionally provided a defective 'redline' that failed to highlight for Buyer's Attorney that the change had been made. Under these circumstances, and prior to discovery of the unintentional defect, Seller's Attorney has engaged in no such unethical conduct. But once Seller's Attorney realizes his own error, we conclude that the failure to correct that error and advise Buyer's Attorney of the change might be conduct that constitutes deceit, active concealment and/or fraud, with any such determination to be based on the relevant facts and circumstances. If Seller instructs Seller's Attorney to not advise Buyer's Attorney of the change, where failure to do so would be a violation of his ethical obligations, Seller's Attorney may have to consider withdrawing. . . . Where an attorney has engaged in no conduct or activity that induced an apparent material error by opposing counsel, the attorney has no obligation to alert the opposing counsel of the

apparent error. However, where the attorney has made a material change in contract language in such a manner that his conduct constitutes deceit, active concealment or fraud, the failure of the attorney to alert opposing counsel of the change would be a violation of his ethical obligation.

Id. (footnote omitted) (emphases added).

The legal ethics opinion recognized that California's confidentiality-centric rules might require withdrawal under certain circumstances, even if they did not require disclosure.

Under either Scenario A or Scenario B of our Statement of Facts, once Seller's Attorney has informed Seller of the development, Seller's Attorney must abide by the instruction of Seller to not disclose. If, however, failure to make such disclosure constitutes an ethical violation by Seller's Attorney, then Seller's Attorney may have an obligation to withdraw from the representation under such circumstances.

Id. (footnote omitted).

Not all authorities agree that lawyers must disclose an adversary's mistake of this sort.

In 1989 a Maryland legal ethics opinion seemed to take the opposite position -- in an analogous situation.

- Maryland LEO 89-44 (1989) ("The issue which you raise is basically as follows: what duty of disclosure, if any, does a lawyer have in negotiating a transaction when the other party's counsel has drafted contracts which fail to set forth all of the terms which you believe have been agreed to, and where the omission results in favor of your client?"; "[T]he Committee is of the opinion that you are under no obligation to reveal to the other counsel his omission of a material term in the transaction. Based on the facts set forth in your letter, it does not appear that you or your client have made any false statement of material fact or law to the other side at any time during the negotiations, and, furthermore, the omission in no way is attributable to a fraudulent act committed by you or your client. To the contrary, it appears that the omission was made by the other counsel either negligently or, conceivably, because they do not believe that the terms were part of the

transaction. In either case, Rule 5.1(a), based on these facts, does not require you to bring the omission to the other side's attention." (emphasis added)).

This situation fell somewhere between a pure scrivener's error (such as those discussed above) and a more substantive error such as failing to negotiate for an indemnity provision that most parties would normally have included in an agreement.

Best Answer

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

B 1/15, 2/15

Settlements Limiting Lawyers' Practice

Hypothetical 20

You represent a product manufacturer in mediating a product liability claim. You have advised your client that the plaintiff's lawyer is perhaps the most effective plaintiff's lawyer available to represent plaintiffs claiming injuries caused by your client's product. Your client has asked whether you can "sweeten the pot" in current mediation in return for a settlement agreement in which the plaintiff's lawyer agrees not to represent future plaintiffs against your client.

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

NO

Analysis

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

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

ABA Model Rule 5.6(b).

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

The Restatement takes the same basic position.

In settling a client claim, a lawyer may not offer or enter into an agreement that restricts the right of the lawyer to practice law, including the right to represent or take particular action on behalf of other clients.

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

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

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

Bars routinely take the same approach.¹

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

it cannot be true that the profession's duty to help make counsel available requires individual lawyers to keep themselves free to serve clients. Absent court order, lawyers may reject clients outright and without a reason. Less directly, every time lawyers accept a case they reduce their availability, if only by virtue of the conflict rules.

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

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

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

Id.

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

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

- opinion."; "Several other bar associations have considered whether other restrictions on an attorney's conduct in a settlement agreement violate Rule 5.6(b). For example, both the ABA and several state and local bar associations have opined that a portion of a confidentiality clause prohibiting an attorney from "using" any information gained from a case in the future violates the Rule because such a provision "effectively would restrict the lawyer's right to practice and hence would violate Rule 5.6(b)." ABA Formal Op. 00-417; accord D.C. Bar Legal Ethics Committee Opinion No. 35 (1977); Arizona Opinion No. 90-6 (1990); Colorado Bar Ethics Committee Opinion No. 92 (1993). Some have opined that settlement provisions that prevent an attorney from advertising that the attorney has handled a particular type of case or cases against a particular opponent also violate the Rule. South Carolina Opinion 10-04 (2010); San Francisco Bar Association Opinion 2012-1. Other opinions conclude that agreements forbidding an attorney from disclosing publicly available facts about litigation against a defendant in law firm promotional materials violate the Rule. D.C. Bar Legal Ethics Committee Opinion 335 (2006). The Indiana Supreme Court has left open the question of whether agreements to restrict advertising may violate Rule 5.6. Blackburn v. Sweeney, 659 N.E.2d 131, 133 (Ind. 1995)").
- Office of Attorney Ethics, Supreme Court of N.J., 2012 State of Attorney Disciplinary System Report, July 8, 2013 ("Charles X. Gormally - Reprimanded on December 19, 2012 (212 N.J. 486) for making an agreement in which a restriction on the lawyer's right to practice was part of the settlement of a controversy between the parties. Charles Centinaro appeared before the Supreme Court for the OAE and Michael R. Griffinger appeared for the respondent."; "Sean Alden Smith - Admonished on December 19, 2012 (212 N.J. 486) for his subordinate role in an agreement in which a restriction on the lawyer's right to practice was part of the settlement of a controversy between the parties. Charles Centinaro appeared before the Supreme Court for the OAE and Michael R. Griffinger appeared for the respondent.").
 - Cardillo v. Bloomfield 206 Corp., 988 A.2d 136, 137, 140 (N.J. Super Ct. App. Div. 2010) (analyzing a situation in which a plaintiff's lawyer agreed not to represent other clients adverse to a defendant with which her client had settled; noting that the lawyer herself can challenge the enforceability of the agreement to which she entered; "Attorneys may not circumvent the import of RPC 5.6(b) by stating that the settlement of litigation is separate from the agreement to restrict the practice of law where the agreements were negotiated contemporaneously and are interconnected."; "Defendants argue that principles of equitable estoppel preclude Cardillo from challenging the validity of the Cardillo Agreement on the basis that it is tied to the Rubinstein litigation because she had consistently asserted during negotiations that the Rubinstein settlement and the Cardillo Agreement were separate and independent from each other."; "This equitable doctrine is not appropriately

applied here. First, defendants, in negotiating an agreement that violated RPC 5.6(b), cannot be said to have acted with good reason or in good faith. Second, enforcement of RPC 5.6(b) will cause no injustice here. RPC 5.6(b) is designed in part to benefit the public; that purpose would be thwarted if equitable estoppel principles allowed the Cardillo Agreement to stand."; ultimately holding that the agreement was void and unenforceable under Rule 5.6).

- North Carolina LEO 2003-9 (1/16/04) (holding that a lawyer may not agree to a settlement arrangement in which the lawyer agrees not to represent a client against the same defendant; also holding that "a lawyer may participate in a settlement agreement that contains a provision limiting or prohibiting disclosure of information obtained during the representation even though the provision will effectively limit the lawyer's ability to represent future claimants."; explaining that "[t]he confidentiality provision above does not specifically prohibit Attorney's use of confidential information learned during the representation or representation of other claimants with similar claims against Employer. Instead, it restricts only the disclosure of certain information gained in the representation. The provision is not proscribed by Rule 5.6(b) which is silent on participation in a settlement agreement that prohibits a lawyer from revealing information about the matter or the terms of the settlement. In fact, such a provision is consistent with the lawyer's continuing duty to not reveal the confidential information of a client or a former client without the informed consent of the client or the former client."; "Attorney's use of Plaintiff's confidential information to represent the other employees, even without overt disclosure of the information, would violate Rule 1.9(c) if it exposed Plaintiff to liability under the confidentiality provision of the settlement agreement. In this event, Attorney would be prohibited from representing other employees because Attorney's failure to use Plaintiff's confidential information would materially limit his representation of the other employees. Rule 1.7(a)(2). But see, ABA Formal Opinion 00-417.").

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

succeeded. Somewhat surprisingly, at least one court refused to address the ethical propriety of Merck's settlement offer in advance.²

Best Answer

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

n 2/12, b 2/15

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

Privilege Waiver

Hypothetical 21

You know that the attorney-client privilege protection can be very fragile, and you wonder about the waiver implications of disclosing privileged communications in a mediation.

- (a) Does disclosing privileged communications to a mediation adversary waive the attorney-client privilege?

YES (PROBABLY)

- (b) Does disclosing privileged communications to a mediator waive the attorney-client privilege?

YES (PROBABLY)

Analysis

Despite the justice system's obvious encouragement of ADR processes, the attorney-client privilege protection's fragility leads most courts to find that disclosing privileged communications during mediations or other settlement negotiations waives that protection.

- (a) Some courts flatly hold that disclosing privileged communications during settlement negotiations triggers a waiver.¹

¹ Oxyn Telecomms., Inc. v. Onse Telecom, No. 01 Civ. 1012 (JSM), 2003 U.S. Dist. LEXIS 2671, at *17, *18-19 (S.D.N.Y. Feb. 25, 2003) (holding that the defendant had waived the privilege and work product protection for documents shared with the plaintiff, but that "this waiver does not extend to other documents that may contain similar (or different) advice on the same subjects, unless Onse attempts to use those documents or that advice affirmatively in this litigation"; "The extrajudicial disclosures to which Oxyn points do not implicate the legal prejudice which the fairness doctrine is intended to prevent. In fact, to hold that a waiver results from disclosure of statements like those at issue here, including those articulating a potential litigating position in the course of prelitigation discussions of a dispute, would gravely impede potential litigants' attempts to avoid litigation by convincing their adversaries of the correctness of their views. This is not a result that would be in the best interests of either the judicial system or of society generally."); Eagle Compressors, Inc. v. HEC Liquidating Corp., 206 F.R.D. 474, 476-80 (N.D. Ill. 2002) (holding that a company's managing director had waived the attorney-client

On the other hand, a handful of courts have reached the opposite conclusion.²

privilege and work product protection covering a "confidential legal opinion letter" that he allowed another company's president to read during settlement negotiations); Bausch & Lomb Inc. v. Alcon Labs., Inc., 173 F.R.D. 379, 384 (W.D.N.Y. 1996) ("Although the courts have recognized that the question of whether a waiver of privilege has taken place during a settlement conference must be considered in light of the importance of facilitating the settlement process, the predominant view of the relevant case law holds that the disclosure of privileged information during settlement conferences does constitute a waiver of the privilege."; vacating in part court's order dated Sept. 18, 1995, reported at 173 F.R.D. 367); United States ex rel. Mayman v. Martin Marietta Corp., 886 F. Supp. 1243 (D. Md. 1995) (finding that the company waived the attorney-client privilege by disclosing privileged information to the government during settlement negotiations); Atari Corp. v. Sega of Am., 161 F.R.D. 417, 420 (N.D. Cal. 1994) (addressing a patent holder's efforts to seek discovery from one of its former employees, who had invented one of the patents at issue, but had now been retained by the defendant as a non-testifying expert; noting that defendant had given plaintiff a videotape of an interview with the non-testifying expert during settlement discussions; "The Court finds that the foregoing is sufficient evidence that Sega gave the tape to Atari as voluntary discovery, despite the fact that it was given at the settlement meeting. Any voluntary disclosure inconsistent with the confidential nature of the work product privilege waives the privilege. . . . Waiver of a privilege may occur by voluntary disclosure to an adverse party during settlement negotiations, despite any agreement between the parties to keep the information confidential."; finding that the scope of the waiver extended to "documents underlying the communications Mr. Stubben made in the videotape"); Chubb Integrated Sys. Ltd. v. National Bank of Wash., 103 F.R.D. 52, 67 (D.D.C. 1984) (finding that sharing during settlement negotiations waived both privilege and work product protection; "Voluntary disclosure to an adversary waives both the attorney-client and work-product privileges. . . . The agreement between Chubb and NCR does not alter the objective fact that the confidentiality has been breached voluntarily."); Roush v. Seagate Tech., LLC, 58 Cal. Rptr. 3d 275, 277, 285 (Cal. Ct. App. 2007) (assessing a situation in which an employment discrimination plaintiff settled with his former employer, and agreed to share with the defendant's law firm what he knew about another discrimination plaintiff who had filed a separate action against the same employer; ultimately refusing to disqualify the defendant's law firm because the second plaintiff (Roush) "did not meet her initial burden of proving that Kilgore [the other plaintiff who had settled] possessed any information that Roush could claim was confidential"; finding it unnecessary to address defendants' argument that if Roush and Kilgore were joint clients of the same law firm, the privilege is waived because Roush and Kilgore are now adverse to each other; "It is true that under section 962, neither joint client may claim the privilege 'in a civil proceeding' between themselves. But so far as we can tell from the record, there is no civil proceeding between Roush and Kilgore. Kilgore has merely chosen to settle his separate case and has agreed to cooperate with a defendant in this one. There is no California case, and little from other jurisdictions, that touches upon the question of whether a jointly held privilege or an information sharing agreement continues to apply in such circumstances. One federal case holds that the privilege of one joint client cannot be destroyed at the behest of the other where the two have merely developed ill-feelings or a divergence of interests Although the problem begs for resolution, we need not resolve it here because it is clear to us that Roush and Kilgore were not joint clients of Markowitz and the evidence is insufficient to show that disclosure of Roush's protected information to Kilgore was necessary to her case."), review denied, No. 5153187, 2007 Cal. LEXIS 8045 (Cal. July 25, 2007).

² Akamai Techs., Inc. v. Digital Island, Inc., No. C-00-3508 CW (JCS), 2002 U.S. Dist. LEXIS 13515 (N.D. Cal. May 30, 2002) (finding that a company's sharing of a privilege document with another company as part of an unsuccessful negotiation did not result in a waiver of the attorney-client privilege or the work product doctrine because the sharing was an extrajudicial disclosure under the von Bulow doctrine).

Significantly, an express waiver can occur despite a confidentiality agreement between the disclosing and the receiving party.³ As one court recited, "[e]ven if the disclosing party requires, as a condition of disclosure, that the recipient maintain the materials in confidence, the agreement does not prevent the disclosure from constituting a waiver of the privilege; it merely obligates the recipient to comply with the terms of any confidentiality agreement."⁴ The third party who has not signed the confidentiality agreement generally will not be bound by it, and can argue that the disclosure has caused a waiver.

An express waiver can also occur despite the presence of a confidentiality warning on the disclosed communication,⁵ or the party's express disclaimer of an intent to waive.⁶ A New York state court held that the well-known law firm of Paul Weiss and its client (a doctor litigating with his former employer Beth Israel Hospital) could not avoid a waiver by pointing to Paul Weiss' disclaimer in its e-mails to its doctor client. The court explained that the Paul Weiss disclaimer "cannot create a right to confidentiality out of whole cloth" and that "[w]hen client confidences are at risk, [Paul Weiss'] pro forma notice at the end of the e-mail is insufficient and not a reasonable precaution to protect its clients."⁷

³ United States v. Reyes, 239 F.R.D. 591, 604 (N.D. Cal. 2006).

⁴ Urban Box Office Network, Inc. v. Interfase Managers, L.P., No. 01 Civ. 8854 (LTS) (THK), 2004 U.S. Dist. LEXIS 21229, at *17-18 (S.D.N.Y. Oct. 19, 2004) (quoting Bowne of N.Y. City, Inc. v. AmBase Corp., 150 F.R.D. 465, 480 (S.D.N.Y. 1993)).

⁵ Cline v. Reliance Trust Co., Case No. 1:04-CV-02079, 2005 U.S. Dist. LEXIS 26066, at *10 n.4 (N.D. Ohio Oct. 31, 2005).

⁶ Oxford Assocs. Real Estate, L.P. v. TSI Society Hill, Inc., Civ. A. 05-4445, 2006 U.S. Dist. LEXIS 76450 (E.D. Pa. Oct. 19, 2006).

⁷ Scott v. Beth Israel Med. Ctr., Inc., 847 N.Y.S.2d 436, 444 (N.Y. Sup. Ct. 2007).

(b) Courts disagree about the privilege waiver impact of disclosing privileged communications to a mediator.

A 2009 Sixth Circuit case found a waiver.

- A & H Mgmt. Servs., Inc. v. Chafflose Corp., No. 08-3809, 2009 U.S. App. LEXIS 2046 (6th Cir. Feb. 3, 2009) (not for full text publication) (holding that the attorney-client privilege did not protect defendant's privileged communications because one of the defendant's principals filed an affidavit "explaining his understanding of the mediation" -- which waived the privilege covering an email apparently sent by the company's lawyer to an AAA arbitration panel).

A district court decided a year later took the opposite position.

- Moe v. System Transp., Inc., 270 F.R.D. 613, 624 (D. Mont. 2010) ("Disclosure of confidential information to a mediator does not, by itself, waive the attorney-client privilege. . . . Furthermore, all mediation-related communications to a mediator are confidential and privileged, and are not subject to discovery. . . . Accordingly, Moe's motion is DENIED with respect to Bates Stamped Nos. Sys. Tran. 0960-0980.").

Best Answer

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

N 2/15

Work Product Waiver

Hypothetical 22

You know from experience that the work product doctrine provides a more robust protection than the attorney-client privilege. However, given the inherently adverse nature of mediations, you wonder about the waiver implications of disclosing work product in that context.

- (a) Does disclosing privileged communications to the adverse mediation party waive the work product?

NO (PROBABLY)

- (b) Does disclosing privileged communications to the mediator waive the work product?

NO (PROBABLY)

Analysis

The work product doctrine is not as fragile as the attorney-client privilege. Disclosing work product to a third party generally triggers a waiver only if the third party is an adversary or likely to further disclose the work product to an adversary.

Although a confidentiality agreement generally does not prevent waiver of the attorney-client privilege covering communications disclosed to third parties, such an agreement can be critical in determining the waiver effect of disclosing work product.¹ A confidentiality agreement might demonstrate that the party disclosing work product did not increase the chance that the adversary could obtain access to the work product.²

¹ BASF Aktiengesellschaft v. Reilly Indus., Inc., 224 F.R.D. 438, 443 (S.D. Ind. 2004).

² Smithkline Beecham Corp. v. Pentech Pharm., Inc., No. 00 C 2855, 2001 U.S. Dist. LEXIS 18281, at *15-16 (N.D. Ill. Nov. 5, 2001).

Courts have held that disclosure to the following third parties did not waive the work product protection: advertising agency;³ public relations consultant;⁴ independent accountant;⁵ accountant acting as consultant;⁶ investment banker;⁷ corporate employee outside the control group (which would otherwise cause a waiver in Illinois);⁸ daughter (by Martha Stewart).⁹

One case provides a superb example of how the attorney-client privilege protection differs from the work product protection. In that case, the court held that the presence of an investment banker during a corporate board of directors meeting destroyed any chance for privilege protection for communications occurring during that meeting, but that her presence did not destroy the work product protection. In fact, the work product doctrine protected the notes she prepared during the board of directors meeting.¹⁰

³ Cellco P'ship v. Nextel Commc'n, Inc., No. M8-85(RO), 2004 U.S. Dist. LEXIS 12717, at *4-5 (S.D.N.Y. July 7, 2004).

⁴ Calvin Klein Trademark Trust v. Wachner, 198 F.R.D. 53, 55-56 (S.D.N.Y. 2000) (law firm did not waive the work product protection covering documents by sharing them with a public relations firm).

⁵ Gramm v. Horsehead Indus., Inc., No. 87 CIV. 5122 (MJL), 1990 WL 142404, at *5-6 (S.D.N.Y. Jan. 25, 1990).

⁶ Samuels v. Mitchell, 155 F.R.D. 195, 201 (N.D. Cal. 1994).

⁷ National Educ. Training Group, Inc. v. Skillsoft Corp., No. M8-85(WHP), 1999 U.S. Dist. LEXIS 8680, at *17-18 (S.D.N.Y. June 9, 1999).

⁸ Ocean Atl. Dev. Corp. v. Willow Tree Farm, L.L.C., No. 01 C 5014, 2002 U.S. Dist. LEXIS 15841, at *15-18 (N.D. Ill. Aug. 22, 2002).

⁹ United States v. Stewart, 287 F. Supp. 2d 461 (S.D.N.Y. 2003).

¹⁰ National Educ. Training Group, Inc. v. Skillsoft Corp., No. M8-85 (WHP), 1999 WL 378337, at *12-13, *17-18 (S.D.N.Y. June 10, 1999).

Some courts find that disclosing work product during settlement negotiations waives that protection -- noting that the negotiating parties clearly are in an adversarial position.¹¹

On the other hand, some courts find that such disclosure does not cause a waiver.¹²

¹¹ In re Chrysler Motors Corp. Overnight Evaluation Program Litig., 860 F.2d 844, 847 (8th Cir. 1988) (work product privilege of computer tape produced during settlement negotiation waived despite agreement that it was confidential work product and did not constitute a waiver; "[T]he agreement between Chrysler and co-liaison counsel for the class action plaintiffs not to disclose the computer tape to third-parties [does not] change the fact that the computer tape has not been kept confidential. 'Confidentiality is the dispositive factor in deciding whether [material] is privileged.'" (alteration in original) (citation omitted)); Bowles v. National Ass'n of Home Builders, 224 F.R.D. 246, 259 (D.D.C. 2004) (recognizing a debate among the courts, and finding that a company sharing work product during settlement negotiations caused a subject matter waiver that applied to documents otherwise protected by the work product doctrine; "Further, one can assume that when NAHB [company] sent documents to NAHBRC and plaintiff in an effort to persuade them to sign the License Agreement, NAHB was only sending documents that supported the legality and advisability of the License Agreement, but withholding any documents (if they exist) that might suggest otherwise. Thus, this case is at least closer to the core concern of subject matter waiver -- the partial release of documents to gain a tactical advantage -- than most instances of inadvertent waiver, although the advantage sought was in negotiations between NAHB and NAHBRC, not in this litigation. . . . Upon consideration of all of these factors, the Court concludes that this is a case where subject matter waiver of opinion work product is appropriate. Such a waiver should not frustrate the purposes of the work product doctrine, and in fact is likely to promote the adversary system by ensuring that the evidence in the record will not reflect only one side or a part of privileged communications. Accordingly, the Court will allow the subject matter waiver of attorney work product documents in this case."); Khandji v. Keystone Resorts Mgmt., Inc., 140 F.R.D. 697, 699 (D. Colo. 1992) (finding that sharing during settlement negotiations waived work product protection; "Because the work product doctrine is intended to protect the integrity of the adversary system, a voluntary disclosure of information to an adversary constitutes a waiver of the privilege." (citing In re Chrysler Motors Corp. Overnight Evaluation Program Litig., 860 F.2d 844, 846 (8th Cir. 1988))); Chubb Integrated Sys. Ltd. v. National Bank of Wash., 103 F.R.D. 52, 67 (D.D.C. 1984) (finding that sharing during settlement negotiations waived both privilege and work product protection; "Voluntary disclosure to an adversary waives both the attorney-client and work-product privileges. . . . The agreement between Chubb and NCR does not alter the objective fact that the confidentiality has been breached voluntarily."); Grumman Aerospace Corp. v. Titanium Metals Corp. of Am., 91 F.R.D. 84, 90 (E.D.N.Y. 1981) (finding that sharing during settlement negotiations waived work product protection; "The agreements under which the report was produced contemplated that [defendants] were [Department of Defense]'s potential adversaries. Disclosure to an adversary waives the work product protection as to items actually disclosed, even where disclosure occurs in settlement.")

¹² Ken's Foods, Inc. v. Ken's Steak House, Inc., 213 F.R.D. 89, 96, 97 (D. Mass. 2002) (explaining that "the disclosure of legal analysis during the course of [settlement] negotiations does not necessarily constitute a waiver of the work product doctrine"; also holding that the subject matter waiver doctrine does not apply as broadly to work product as to privileged communications; holding that a party's disclosure of a work product memorandum to the IRS waived the work product doctrine as to that memorandum because the IRS was an adversary, but "given that the disclosure was clearly within the context of

To make matters more complicated, some states have adopted statutes specifically indicating that disclosing work product during mediations does not waive that protection.

- Virginia Code § 8.01-581.22 ("[U]se of attorney work product in a mediation shall not result in a waiver of the attorney work product privilege.").

Given the very different nature of the work product doctrine compared to the attorney-client privilege, it is easy to imagine complicated scenarios in which disclosing work product to a settlement negotiation adversary clearly does not waive the work product protection. For instance, suppose that two companies are negotiating a dispute over their liability to some third party (perhaps under some ambiguous indemnity provision between the two negotiating companies). They share an interest in reducing the amount of liability to the third person, and to that extent are not adversaries. Although disclosing privileged communications to the other might trigger a waiver (because the other company clearly is a third party), it would be easy to see a court concluding that disclosing work product generated during the dispute with the third party does not trigger a waiver of that protection.

Best Answer

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

N 2/15

settlement negotiations, there is no basis for extending the waiver beyond the document itself"); Akamai Techs., Inc. v. Digital Island, Inc., No. C-00-3508 CW (JCS), 2002 U.S. Dist. LEXIS 13515 (N.D. Cal. May 30, 2002) (finding that a company's sharing of a privileged document with another company as part of an unsuccessful negotiation did not result in a waiver of the attorney-client privilege or the work product doctrine, because there was an implied contract that the document would be used solely for the purposes of attempting to settle their dispute).

Mediators' Immunity from Liability

Hypothetical 23

During your years as a lawyer, you always worried about malpractice claims. Now that you spend all your time mediating, you wonder whether you could be sued by one of the parties for some good faith mistake that you made during the mediation.

Do any statutes or regulations provide immunity to mediators?

YES

Analysis

Most states provide at least some immunity to mediators, given the importance of the ADR process.

- Virginia Code § 8.01-581.23 ("When a mediation is provided by a mediator who is certified pursuant to guidelines promulgated by the Judicial Council of Virginia, or who is trained and serves as a mediator through the statewide mediation program established pursuant to § 2.2-1202.1, then that mediator, mediation programs for which that mediator is providing services, and a mediator co-mediating with that mediator shall be immune from civil liability for, or resulting from, any act or omission done or made while engaged in efforts to assist or conduct a mediation, unless the act or omission was made or done in bad faith, with malicious intent or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another. This language is not intended to abrogate any other immunity that may be applicable to a mediator." (emphasis added)).

Mediators may also essentially avoid liability by relying on the absolute confidentiality duty covering communications occurring during the mediation, which can effectively prevent worries about liability, and prevent disgruntled parties from presenting evidence in a claim against the mediator.

Best Answer

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

N 2/15

Conflict of Interest Issues for Lawyer-Mediators

Hypothetical 24

You recently mediated a case which came close to settling. One of the parties now wants to hire you as its lawyer, because they were impressed with the way you approached the issues. You had a good relationship with the other side as well, and you think that it might consent to your representation of one of the parties going forward.

As long as the other side consents, may you represent one of the parties after unsuccessful mediation?

MAYBE

Analysis

Most states absolutely prohibit such post-mediation activity, even with both parties' consent.

- Virginia Rule 2.10(e) ("A lawyer who serves or has served as a third party neutral may not serve as a lawyer on behalf of any party to the dispute, nor represent one such party against the other in any legal proceeding related to the subject of the dispute resolution proceeding.").
- People v. Keisha C. (In re W.R.), 966 N.E.2d 1139 (Ill. App. Ct. 2012) (holding that a mediator in a child custody case could not represent either parent in a related litigation three years later), appeal denied, No. 114173, 2012 Ill. LEXIS 348 (Ill. May 10, 2012).
- Virginia LEO 1826 (3/28/06) (Under Rule 2.10(e), a lawyer who acts as a mediator in a dispute may not later represent any party in that dispute (this conflict cannot be cured with consent). Although the conflict is imputed to all the lawyers in the law firm, another lawyer in the firm may represent a party in the dispute with consent. Although a "screen" (which is the proper term for "fire wall," "Chinese wall," etc.) cannot take the place of such consent, it frequently is used as an inducement for obtaining the consent. Lawyers serving together in a mediation firm do not face imputed disqualification, because the mediation firm is not considered a "firm" under Rule 1.10. Lawyers practicing in a law firm and also acting as independent contractors or directors of a mediation firm (and who refer mediation firm clients to their law firm) must consider whether the "personal interest" they have by virtue of participating in the mediation firm creates a conflict under Rule 1.7 -- requiring

disclosure and consent. Any lawyer acting as a mediator must also comply with the Virginia statute requiring confidentiality of all mediation material. Lawyers owning an interest in a mediation firm must comply with the ancillary business rules. Lawyers referring cases between law firms and mediation firms must comply with Rule 7.3, which prohibits giving anything of value in return for a recommendation.).

Some states allow mediators to represent one of the mediation participants in a later dispute with another participant, as long as the dispute is sufficiently different from the mediated dispute.

- Hossaini v. Vaelizadeh, No. 4:11CV3052, 2011 U.S. Dist. LEXIS 86436, at *9 (D. Neb. Aug. 4, 2011) (holding that a mediator who had handled a child custody dispute could represent one of the spouses in an unrelated matter involving a monetary dispute between the parties; explaining that states take different approaches to what a mediator can do if asked to represent one of the parties in a later dispute; "Galter [mediator] is not attempting to represent [Hossaini] in the same 'matter' he mediated between [Hossaini] and Vaelizadeh. The mediated matter was a custody dispute, apparently involving only the disagreement in how often and under what conditions Vaelizadeh would be able to visit his minor child. The current case is, at its core, a suit for monetary damages due to the action of the parties and the exchange of promises and gifts during the relationship between [Hossaini] and Vaelizadeh. Although the Nebraska ethics rules would prevent Galter from representing either party in the litigated custody action, the rules do not appear to prevent Galter from representing [Hossaini] in a separate matter.").

Best Answer

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

N 2/15

Mediators' Post-Mediation Self-Defense Exception to Confidential Duty

Hypothetical 25

You know that mediators must maintain the confidentiality of any communications occurring during the mediation. However, you wonder whether some exception would allow you to defend yourself from a mediation party's claim against you.

May mediators disclose otherwise confidential mediation communications to defend themselves from a mediation party's claim.

YES

Analysis

Not surprisingly, most states recognize mediators' post-mediation confidentiality duty.

- Virginia Code § 8.01-581.22 ("All memoranda, work products and other materials contained in the case files of a mediator or mediation program are confidential. Any communication made in or in connection with the mediation, which relates to the controversy being mediated, including screening, intake, and scheduling a mediation, whether made to the mediator, mediation program staff, to a party, or to any other person, is confidential.").

However, most states also recognize exceptions, including a mediator self-defense exception, allowing disclosure of otherwise confidential communications by mediators defending themselves.

- Virginia Code § 8.01-581.22 ("Confidential materials and communications are not subject to disclosure in discovery or in any judicial or administrative proceeding except (i) where all parties to the mediation agree, in writing, to waive the confidentiality, (ii) in a subsequent action between the mediator or mediation program and a party to the mediation for damages arising out of the mediation, (iii) statements, memoranda, materials and other tangible evidence, otherwise subject to discovery, which were not prepared specifically for use in and actually used in the mediation, (iv) where a threat to inflict bodily injury is made, (v) where communications are intentionally used

to plan, attempt to commit, or commit a crime or conceal an ongoing crime, (vi) where an ethics complaint is made against the mediator by a party to the mediation to the extent necessary for the complainant to prove misconduct and the mediator to defend against such complaint, (vii) where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party's legal representative based on conduct occurring during a mediation, (viii) where communications are sought or offered to prove or disprove any of the grounds listed in § 8.01-581.26 in a proceeding to vacate a mediated agreement, or (ix) as provided by law or rule." (emphases added)).

Best Answer

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

N 2/15

Lawyer-Mediators' Reporting of Child Abuse

Hypothetical 26

After several years of working as a lawyer for a child protective services agency, you have decided to leave the government and become a mediator. However, you worry that you might quickly face a horrible situation -- determining if you have a legal duty to report child abuse that comes to your attention in your role as mediator.

Must lawyer-mediators report child abuse?

MAYBE

Analysis

Lawyer-mediators' possible duty to disclose child abuse depends on state statutes.

- Lisa Hansen, Attorneys' Duty to Report Child Abuse, 19 J. Am. Acad. of Matrimonial Lawyers, 59, 74 (2004-2005) ("Each state has different rules regarding mediators and mandated reporting. In Missouri the mediator is required to have either a J.D. or a master's degree in a social health field, such as a social worker, in order to do domestic relations mediations. The difference in education makes a difference as to whether the mediator is a mandated reporter. If a social worker facilitates the mediation and one party makes allegations of abuse, the mediator is also a mandated reporter and must call in a hotline report. However, if an attorney mediator is in the same mediation and hears the exact same information, the attorney is under no obligation to report the allegation. If the same set of circumstances occurs across the state line in Kansas, the rules change. When a mediation is performed in that state a mediator is a mandated reported [sic] regardless of what type of education or background the mediator possesses. Whether a mediator is a mandated reporter or not is a highly contested issue. Some mediators feel very strongly that the entire process of mediation is confidential regardless of what is disclosed. Others believe that they have an ethical duty to protect children who are possibly being abused." (footnotes omitted) (emphases added)).

A Virginia statute requires at least some mediators to report child abuse.

The following persons who, in their professional or official capacity, have reason to suspect that a child is an abused or

neglected child, shall report the matter immediately to the local department of the county or city wherein the child resides or wherein the abuse or neglect is believed to have occurred or to the Department's toll-free child abuse and neglect hotline . . . [a]ny mediator eligible to receive court referrals pursuant to § 8.01-576.8.

Virginia Code § 63.2-1509(A)(9). Presumably this obligation applies to lawyer-mediators.

Best Answer

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

N 2/15

Lawyer-Mediators' Reporting of Other Lawyers' Misconduct

Hypothetical 27

You decided to offer your services as a mediator, and have been considering the type of awkward situations that might arise. You have heard some unsettling stories about lawyer misconduct during mediations, and you wonder whether you might have a duty to report such misconduct to the bar.

Are lawyer-mediators required to report sufficiently egregious misconduct to the bar?

MAYBE

Analysis

Most states require lawyers to report other lawyers' sufficiently egregious misconduct.

A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

ABA Model Rule 8.3(a). However, most states also recognize that lawyers' duty of confidentiality to their clients trumps the reporting obligation.

This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

ABA Model Rule 8.3(c).

The Restatement section dealing with this issue essentially parallels the ABA Model Rules approach.

A lawyer who knows of another lawyer's violation of applicable rules of professional conduct raising a substantial question of the lawyer's honesty or trustworthiness or the

lawyer's fitness as a lawyer in some other respect must report that information to appropriate disciplinary authorities.

Restatement (Third) of Law Governing Lawyers § 5(3) (2000).

Perhaps the most important debate about the reporting requirement's coverage involves lawyers acting as mediators. Determining whether lawyer-mediators must report other lawyers' misconduct involves balancing the profession's self-policing principle and the critical role of mediation confidentiality.

The analysis begins with some states' understandable statutory recognition of the mediation process's confidentiality.

- Virginia Code § 8.01-581.22 ("All memoranda, work products and other materials contained in the case files of a mediator or mediation program are confidential. Any communication made in or in connection with the mediation, which relates to the controversy being mediated, including screening, intake, and scheduling a mediation, whether made to the mediator, mediation program staff, to a party, or to any other person, is confidential. However, a written mediated agreement signed by the parties shall not be confidential, unless the parties otherwise agree in writing. Confidential materials and communications are not subject to disclosure in discovery or in any judicial or administrative proceeding except (i) where all parties to the mediation agree, in writing, to waive the confidentiality, (ii) in a subsequent action between the mediator or mediation program and a party to the mediation for damages arising out of the mediation, (iii) statements, memoranda, materials and other tangible evidence, otherwise subject to discovery, which were not prepared specifically for use in and actually used in the mediation, (iv) where a threat to inflict bodily injury is made, (v) where communications are intentionally used to plan, attempt to commit, or commit a crime or conceal an ongoing crime, (vi) where an ethics complaint is made against the mediator by a party to the mediation to the extent necessary for the complainant to prove misconduct and the mediator to defend against such complaint, (vii) where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party's legal representative based on conduct occurring during a mediation, (viii) where communications are sought or offered to prove or disprove any of the grounds listed in § 8.01-581.26 in a proceeding to vacate a mediated agreement, or (ix) as provided by law or rule. The use of attorney work product in a mediation shall not result in a waiver of the attorney work product privilege.").

A 1997 law review article noted the inherent inconsistency between mediation, confidentiality and the disclosure duty.

- Pamela A. Kentra, Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct, 3 *BYU L. Rev.* 715, 717-18, 744-45 (1997) ("Mediation and alternative dispute resolution processes have enjoyed epic growth in recent years; however, in the midst of this growth, some serious ethical quandaries have surfaced for the attorney-mediator. If the mediation process is to continue to grow and flourish in a productive manner, obligations of the attorney-mediator must be made clear for the protection of the mediator, the parties, and the process. This Article addresses one crucial issue facing attorney-mediators today: the conflict between confidentiality and professional responsibility in the mediation process. The mediation process must be confidential to work effectively, and most states have enacted legislation granting confidentiality to the mediation process. However, the vast majority of these confidentiality rules are in direct conflict with attorney rules of professional conduct that require attorneys to report misconduct by fellow attorneys to disciplinary authorities. Attorney-mediators are placed in an intolerable conflict when they must choose between two groups of binding obligations: mediation confidentiality rules and attorney misconduct reporting requirements" (footnotes omitted) (emphases added); "Courts interpreting Rule 8.3 and state counterparts to this rule have run the proverbial gamut from stringently requiring misconduct reporting and holding that discipline is mandated for a lawyer who fails to report, to showing surprising leniency in construing disclosure requirements in certain cases.").

Interestingly, the article explained that neither the ABA Model Rules nor the various mediation rules deal with the conflict between confidentiality and the disclosure duty.

At least one of the drafters of the Model Rules admitted that the Kutak Commission, the body that debated and drafted the Model Rules, never considered the conflict created when a lawyer-mediator gains knowledge of another lawyer's misconduct during the mediation process. As such, no comment on this precarious conflict situation "appears in the comment to [Rule] 8.3 or the legislative history of the Model Rules."

....

. . . [T]he American Bar Association, the American Arbitration Association, and the Society of Professionals in Dispute Resolution have drafted Model Standards for Mediator conduct. Unfortunately, this code also does not specifically address the conflict between the duty to maintain confidentiality in the mediation session versus attorney misconduct reporting requirements.

Id. at 750 (footnotes omitted) (emphases added).

As of that article's 1997 publication, only one state had adopted a statute dealing with the issue.

A survey of all state statutes granting confidentiality to the mediation process reveals only one statute that contemplates the conflict between the duty to maintain confidentiality and the duty to report fellow attorney misconduct. The Minnesota statute creates a privilege for alternative dispute resolution program participants, forbidding them from testifying in any subsequent civil proceeding or administrative hearing as to any statement, conduct, decision, or ruling occurring at or in conjunction with the alternative dispute resolution proceeding.

Id. at 751 (footnote omitted) (emphasis added).

The conflicting interests described in the 1997 law review article seem unresolved even now.

Some states continue to recognize a very strong mediation confidentiality principle -- which explicitly or implicitly trumps any possible disclosure duty.

- Virginia Rule 8.3 cmt. [3a] ("In court-related dispute resolution proceedings, a third party neutral cannot disclose any information exchanged or observations regarding the conduct and demeanor of the parties and their counsel during the proceeding. Mediation sessions are covered by another statute, which is less restrictive, covering 'any communication made in or in connection with the mediation which relates to the controversy being mediated.' Thus a lawyer serving as a mediator or third party neutral may not be able to discharge his or her obligation to report the misconduct of another lawyer if the reporting lawyer's information is based on information

protected as confidential under the statutes. However, both statutes permit the parties to agree in writing to waive confidentiality." (emphasis added)).

- Cassel v. Superior Court, 244 P.3d 1080, 1083, 1083-84, 1084 (Cal. 2011) ("In order to encourage the candor necessary to a successful mediation, the Legislature has broadly provided for the confidentiality of things spoken or written in connection with a mediation proceeding. With specified statutory exceptions, neither 'evidence of anything said,' nor any 'writing,' is discoverable or admissible 'in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which . . . testimony can be compelled to be given,' if the statement was made, or the writing was prepared, 'for the purpose of, in the course of, or pursuant to, a mediation' (Evid. Code, § 1119, subds. (a), (b).) 'All communications, negotiations, or settlement discussions by and between participants in the course of a mediation . . . shall remain confidential.' (Id., subd. (c).) We have repeatedly said that these confidentiality provisions are clear and absolute. Except in rare circumstances, they must be strictly applied and do not permit judicially crafted exceptions or limitations, even where competing public policies may be affected." (footnote omitted); "The issue here is the effect of the mediation confidentiality statutes on private discussions between a mediating client and attorneys who represented him in the mediation. Petitioner Michael Cassel agreed in mediation to the settlement of business litigation to which he was a party. He then sued his attorneys for malpractice, breach of fiduciary duty, fraud, and breach of contract. His complaint alleged that by bad advice, deception, and coercion, the attorneys, who had a conflict of interest, induced him to settle for a lower amount than he had told them he would accept, and for less than the case was worth. Prior to trial, defendant attorneys moved, under the statutes governing mediation confidentiality, to exclude all evidence of private attorney-client discussions immediately preceding, and during, the mediation concerning mediation settlement strategies and defendants' efforts to persuade petitioner to reach a settlement in the mediation."; "We must apply the plain terms of the mediation confidentiality statutes to the facts of this case unless such a result would violate due process, or would lead to absurd results that clearly undermine the statutory purpose. No situation that extreme arises here. Hence, the statutes' terms must govern, even though they may compromise petitioner's ability to prove his claim of legal malpractice.").
- Florida Mediator Ethics Advisory Comm. Op. 2006-005 (3/10/08) ("I have been recently involved in a mediation and during the mediation it was learned that there was an expenditure from funds held in escrow by one of the attorneys representing a party to the litigation." (emphasis added); " For purposes of this discussion, we assume that the expenditure from escrow funds was improper."; "To answer your question, one must first determine whether the communication regarding the escrow funds is a 'mediation

communication' pursuant to Florida Statutes. A mediation communication means 'an oral or written statement . . . by or to a mediation participant made during the course of a mediation. . . ' Section 44.403(1), Florida Statutes. The communication you describe clearly fits this definition. Having determined that the statement was a mediation communication, one must next determine whether it fits within any of the listed statutory exceptions to confidentiality. One of the listed statutory exceptions to the confidentiality of mediation communications is a communication 'offered to report, prove or disprove *professional misconduct occurring during the mediation*, solely for the internal use of the body conducting the investigation of the conduct.' Section 44.405(4)(a)6. Emphasis added. Since the misconduct which would be the subject of the report, the escrow violation, did not occur during the mediation, the misconduct statutory exception does not apply." (footnote omitted) (emphasis added underscored); "As to the issue of whether the referenced communication is *required* to be reported to The Florida Bar by an attorney mediator, the Committee notes that rule 10.650 provides that in the course of providing mediation services, mediation rules control over conflicting ethical standards. Given that the mediation communication does not appear to fit into any of the specified exceptions, the attorney mediator would be prohibited from making the disclosure to The Florida Bar. Your second question, whether an attorney litigant's action is prohibited is beyond the scope of the Committee's function since it would involve an interpretation of the attorney ethics code. Finally, the Committee cautions that a mediator is prohibited from revealing information obtained during caucus without the consent of the disclosing party. Doing so would be an ethical violation of confidentiality under rule 10.360(b) and may also be a violation of impartiality under rule 10.330(a)." (footnote omitted) (emphasis added underscored)).

In contrast, at least one state has imposed a reporting requirement on lawyer-mediators.

- Illinois LEO 11-01 (1/2011) ("Under Illinois Rule of Professional Conduct 8.3 (a), a mediator who is also a lawyer licensed in Illinois must report another lawyer when the lawyer-mediator knows the other lawyer has engaged in conduct that violates 8.4 (c). This duty to report exists even though the lawyer-mediator is not acting as a lawyer representing a client during the mediation. Further, the Committee believes the confidentiality provisions of the Uniform Mediation Act and the Not-for-Profit Dispute Resolution Center Act do not abrogate the lawyer-mediator's obligation to report the other lawyer's misconduct." (emphasis added)).

The American Arbitration Association Commercial Arbitration Rules and Mediation Procedure emphasize mediator confidentiality duties.

- "Subject to applicable law or the parties' agreement, confidential information disclosed to a mediator by the parties or by other participants (witnesses) in the course of the mediation shall not be divulged by the mediator. The mediator shall maintain the confidentiality of all information obtained in the mediation, and all records, reports, or other documents received by a mediator while serving in that capacity shall be confidential. The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum. The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding the following, unless agreed to by the parties or required by applicable law: (i) Views expressed or suggestions made by a party or other participant with respect to a possible settlement of the dispute; (ii) Admissions made by a party or other participant in the course of the mediation proceedings; (iii) Proposals made or views expressed by the mediator; or (iv) The fact that a party had or had not indicated willingness to accept a proposal for settlement made by the mediator."

American Arbitration Ass'n, Commercial Arbitration Rules and Mediation Procedures, Rule M-10, at 47 (effective Oct. 1, 2013) (emphases added).

Best Answer

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

N 2/15

Areas of Practice

Hypothetical 28

You currently act as your firm's partner in charge of marketing. You have always thought that clients tend to hire individual lawyers because of their specific expertise and experience, rather than focus on a law firm's general reputation. You and your marketing director want to highlight your lawyers' areas of practice and expertise.

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

- (a) "Limits her practice to domestic relations matters"?

YES

- (b) "Specializes in domestic relations mediations"?

MAYBE

- (c) "Certified specialist in mediations"?

YES

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) As in so many other areas, states differ in their approaches to lawyers claiming certification as specialists.

The ABA Model Rules simplified its approach several years ago. ABA Model Rule 7.4(d) now prohibits lawyers from claiming that they are certified as a specialist unless the certifying organizations is clearly identified in the communication, and has itself been approved by an appropriate "state authority" or accredited by the ABA. ABA Model Rule 7.4(d).¹

A 2012 Second Circuit case describes the enormous variation in states' approaches.

[Forty-eight] states have rules that permit lawyers to identify themselves as specialists. The rules of 32 of these states are similar to the ABA's model rule, although some of these require state board or state court approval of the certifying body. Many of the states that have not adopted the Model Rule require any claim of specialization to be accompanied by various forms of disclaimers, such as a statement that the state does not certify lawyers as specialists. Two of the 48 states, Minnesota and Missouri, permit identification of a lawyer as a specialist even in the absence of certification, but require disclosure that there has been no certification by an organization accredited by a state board or court. One state, West Virginia, prohibits lawyers from identifying themselves as specialists except for patent attorneys and proctors in admiralty. One state, Maryland, prohibits identification as a specialist with no exceptions. Michigan

¹ As in the earlier versions of the ABA Model Rules, lawyers may communicate that they do or do not practice in particular areas of law, and may use designations such as "patent attorney" or "admiralty" where truthful. ABA Model Rule 7.4(a)-(c).

and Mississippi have no rules concerning communications about lawyer specialization.

Hayes v. N.Y. Attorney Grievance Comm., 672 F.3d 158, 163-64 (2d Cir. 2012)

(footnotes omitted).²

Most states have specific rules governing advertisements that explicitly or implicitly claim that the lawyer "specializes" or is "certified" in a certain specialty.

- 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.").
- Florida Rule 4-7.14 cmt. ("This rule permits a lawyer or law firm to indicate areas of practice in communications about the lawyer's or law firm's services, provided the advertising lawyer or law firm actually practices in those areas of law at the time the advertisement is disseminated. If a lawyer practices only in certain fields, or will not accept matters except in such fields, the lawyer is

² Hayes v. N.Y. Attorney Grievance Comm., 672 F.3d 158, 167, 167-68, 170 (2d Cir. 2012) (finding unconstitutional New York ethics Rule 7.4, which required a "prominently made" disclaimer for any lawyer advertising himself or herself as a "certified specialist"; concluding that New York had not presented evidence supporting the requirement that the disclaimer explain: (1) that "[c]ertification is not a requirement for the practice of law"; and (2) that certification "does not necessarily indicate greater competence than other attorneys experienced in this field of law"; also concluding that the "prominently made" requirement was void for vagueness).

- permitted to indicate that. A lawyer who is not certified by The Florida Bar, by another state bar with comparable standards, or an organization accredited by the American Bar Association or The Florida Bar may not be described to the public as a 'specialist,' 'specializing,' 'certified,' 'board certified,' 'being an expert,' 'having expertise,' or any variation of similar import. A lawyer may indicate that the lawyer concentrates in, focuses on, or limits the lawyer's practice to particular areas of practice as long as the statements are true.").
- Florida Rule 4-7.14 cmt. ("Certification is specific to individual lawyers; a law firm cannot be certified, and cannot claim specialization or expertise in an area of practice per subdivision (c) of rule 6-3.4. Therefore, an advertisement may not state that a law firm is certified, has expertise in, or specializes in any area of practice. A lawyer can only state or imply that the lawyer is 'certified,' a 'specialist,' or an 'expert' in the actual area(s) of practice in which the lawyer is certified. A lawyer who is board certified in civil trial law, may so state that, but may not state that the lawyer is certified, an expert in, or specializes in personal injury. Similarly, a lawyer who is board certified in marital and family law may not state that the lawyer specializes in divorce.").
 - Georgia Rule 7.4 ("A lawyer who is a specialist in a particular field of law by experience, specialized training or education, or is certified by a recognized and bona fide professional entity, may communicate such specialty or certification so long as the statement is not false or misleading.").
 - Georgia Rule 7.4 cmt. [2] ("A lawyer may truthfully communicate the fact that the lawyer is a specialist or is certified in a particular field of law by experience or as a result of having been certified as a 'specialist' by successfully completing a particular program of legal specialization. An example of a proper use of the term would be 'Certified as a Civil Trial Specialist by XYZ Institute' provided such was in fact the case, such statement would not be false or misleading and provided further that the Civil Trial Specialist program of XYZ Institute is a recognized and bona fide professional entity.").
 - Illinois prohibits lawyers from using terms like "certified," "specialist," "expert," or other similar terms, unless (1) they are referring to "certificates, awards or recognitions"; and (2) they include a disclaimer that the Illinois Supreme Court does not recognize the certifications of specialties. Illinois Rule 7.4(b) and (c).
 - Illinois Rule 7.4(c) ("Except when identifying certificates, awards or recognitions issued to him or her by an agency or organization, a lawyer may not use the terms 'certified,' 'specialist,' 'expert,' or any other, similar terms to describe his qualifications as a lawyer or his qualifications in any subspecialty of the law. If such terms are used to identify any certificates, awards or

- recognitions issued by any agency, governmental or private, or by any group, organization or association, the reference must meet the following requirements: (1) the reference must be truthful and verifiable and may not be misleading in violation of Rule 7.1; (2) the reference must state that the Supreme Court of Illinois does not recognize certifications of specialties in the practice of law and that the certificate, award or recognition is not a requirement to practice law in Illinois.").
- Maryland prohibits lawyers from publicly holding themselves out as specialists. Maryland Rule 7.4.
 - North Carolina prohibits lawyers from communicating that they are certified specialists, unless the certification comes from the North Carolina State Bar, or the communication mentions a certifying organization that is approved by the North Carolina State Bar or by the ABA. North Carolina Rule 7.4(b)(1)-(3).
 - North Carolina Rule 7.4 cmt. [2] ("A lawyer may, however, describe his or her practice without using the term 'specialize' in any manner which is truthful and not misleading. This rule specifically permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. The lawyer may, for instance, indicate a 'concentration' or an 'interest' or a 'limitation.'").
 - Pennsylvania prohibits lawyers from communicating that they are certified specialists, unless the certified organization is approved by the Pennsylvania Supreme Court or the lawyer is engaged as a patent or admiralty lawyer. Pennsylvania Rule 7.4(a), (b).
 - South Carolina Rule 7.4(b) ("A lawyer who is not certified as a specialist but who concentrates in, limits his or her practice to, or wishes to announce a willingness to accept cases in a particular field may so advertise or publicly state in any manner otherwise permitted by these rules. To avoid confusing or misleading the public and to protect the objectives of the South Carolina certified specialization program, any such advertisement or statements shall be strictly factual and shall not contain any form of the words 'certified,' 'specialist,' 'expert,' or 'authority' except as permitted by Rule 7.4(d).").
 - Virginia Rule 7.4 ("Lawyers may state, announce or hold themselves out as limiting their practice in a particular area or field of law so long as the communication of such limitation of practice is in accordance with the standards of this Rule, Rule 7.1, Rule 7.2, and Rule 7.3, as appropriate. A lawyer shall not state or imply that the lawyer has been recognized or certified as a specialist in a particular field of law except as follows: (a) A lawyer admitted to engage in patent practice before the United States Patent and

Trademark Office may use the designation 'Patent Attorney' or a substantially similar designation; (b) A lawyer engaged in Admiralty practice may use as a designation 'Admiralty,' 'Proctor in Admiralty' or a substantially similar designation; (c) A lawyer who has been certified by the Supreme Court of Virginia as a specialist in some capacity may use the designation of being so certified, e.g., 'certified mediator' or a substantially similar designation; (d) A lawyer may communicate the fact that the lawyer has been certified as a specialist in a field of law by a named organization, provided that the communication clearly states that there is no procedure in the Commonwealth of Virginia for approving certifying organizations." (emphasis added)).

State bars' legal ethics opinions provide additional explanation.

- Illinois LEO 03-05 (1/2004) ("An associate attorney with Firm A and is also a Certified Trust Financial Advisor (CTFA), having received that accreditation from the Institute of Certified Bankers (ICB). Rule 7.4(c) limits the use of certifications as they relate to 'qualifications as a lawyer,' or 'qualifications in any subspecialty of the law'; "With respect to the prohibition against listing subspecialties of the law in Rule 7.4, the committee opines that CTFA does not fall within this prohibition because CTFA certification is neither a subspecialty of the law nor does it describe a qualification as a lawyer.").
- Illinois LEO 03-03 (1/2004) ("A lawyer may list the certification 'Capital Litigation Trial Bar' on letterhead without the disclaimer that 'the Supreme Court of Illinois does not recognize certifications of specialties in the practice of law.'").
- Illinois LEO 96-08 (5/16/97) ("It is not misleading for a law firm to hold itself out as concentrating its practice in intellectual property law despite the fact that it does not do patent work. However, it may not hold itself out as 'specializing' in any field of practice."; "In the present instance, the firm holds itself out as concentrating (see later discussion regarding 'specializing') in the field of intellectual property law. This appears appropriate, despite the fact that it does not do patent work. The term 'intellectual property law' is broader than the practice of patent law, and encompasses several practice areas including patent law, copyright law, trademark law, trade secrets, licensing, etc. The fact that a lawyer may practice in one or more, but not all of these areas, does not render his holding himself out as concentrating his practice in intellectual property law as false or misleading. Thus, we believe that the present designation of the firm as concentrating in intellectual property law is not misleading under Rule 7.1(a), and is appropriate under Rule 7.4(a). However, the firm's holding itself out as 'specializing' in any given area of practice is improper. Rule 7.4(c) provides: Except when identifying certificates, awards or recognitions issued to him by an agency or organization, a lawyer may not use the terms 'certified,' 'specialist,' or 'expert,'

or any other, similar terms to describe his qualifications as a lawyer or his qualification in any subspecialty of the law.").

As with other rules, courts have overturned state bar restrictions on lawyers' marketing of their certifications.

Several years ago, New York adopted a rule that required two disclaimers if lawyers wanted to market their certifications.

- New York Rule 7.4(c)(1) ("A lawyer may state that the lawyer has been recognized or certified as a specialist only as follows: . . . A lawyer who is certified as a specialist in a particular area of law or law practice by a private organization approved for that purpose by the American Bar Association may state the fact of certification if, in conjunction therewith, the certifying organization is identified and the following statement is prominently made: 'The [name of the private certifying organization] is not affiliated with any governmental authority.'").

In 2012, the Second Circuit found this rule unconstitutional. First, it found that the "prominently made" requirement was void for vagueness.

Although the uncertainties as to how the prominence requirement will be enforced could be alleviated if the Grievance Committee would give preenforcement guidance to inquiring attorneys, such guidance was not available to Hayes. The former principal counsel to the Grievance Committee was asked at trial, '[I]s there a way that you would assist the attorney if there were not a grievance file pending?' He replied, 'The short answer is, no.' He added that the Committee did not provide advisory opinions because, in part, 'it would probably take up most of our work.'

Hayes v. N.Y. Attorney Grievance Comm., 672 F.3d 158, 170 (2d Cir. 2012). The

Second Circuit then found unconstitutional the requirement that a disclaimer explains that "certification is not a requirement for the practice of law."

The statement that certification is not a requirement for the practice of law is more questionable. . . . Although trial testimony is not required, the proponents of a restriction

must either advance an interest that is self-evident or put something in the record to make the required 'demonstrat[ion].' No such demonstration is present in the record before us. And the alleged harm is surely not self-evident. It is difficult to imagine that any significant portion of the public observing the thousands of lawyers practicing in New York without certification believe that all of them are acting unlawfully.

Id. at 167-68 (alteration in original).

The Second Circuit also found unconstitutional the requirement that the marketing be accompanied by a disclaimer explaining that certification "does not necessary indicate greater competence than other attorneys experienced in this field of law."

Although the assertion might be technically accurate, depending on how "competence" and "experienced in the field" are understood, the assertion has a capacity to create misconceptions at least as likely and as serious as that sought to be avoided by the first assertion. Some members of the public, reading this third assertion, might easily think that a certified attorney has no greater qualifications than other attorneys with some (unspecified) degree of experience in the designated area of practice. In fact, the qualifications of an attorney certified as a civil trial specialist by the NBTA include having been lead counsel in at least 5 trials and having "actively participated" in at least 100 contested matters involving the taking of testimony, passing an extensive examination, participating in at least 45 hours of CLE, and devoting at least 30 percent of the lawyer's practice to the specialized field. . . . These qualifications may reasonably be considered by the certifying body to provide some assurance of "competence" greater than that of lawyers meeting only the criterion of having some experience in the field, and a contrary assertion has a clear potential to mislead. Such a requirement does not serve a substantial state interest, is far more intrusive than necessary, and is entirely unsupported by the record. As such, it cannot survive First Amendment scrutiny.

Id. at 168.

Lawyers upset at falling short of the requirements for certification sometimes seek relief through litigation. In early 2011, the Eleventh Circuit rejected a disgruntled Florida lawyer's due process allegation.

- Doe v. Fla. Bar, 630 F.3d 1336, 1337-38, 1338, 1339-40, 1344 (11th Cir. 2011) (affirming the dismissal for lack of subject matter jurisdiction of a Florida lawyer's due process lawsuit complaining of the Florida Bar's denial of her status as a board-certified marital and family law "specialist"; starting its analysis with a reference to a Gilbert and Sullivan operetta; "This case reminds us of the observation of the Grand Inquisitor in Gilbert and Sullivan's *The Gondoliers*. Upon finding that all ranks of commoners and servants have been promoted to the nobility, he protests that there is a need for distinction, explaining that: 'When everyone is somebody, then no one's anybody.' The same is true of a state bar's certification process. If every attorney who practices in an area is certified in it, then no one is anybody in that field. The easier it is to be certified, the less that certification means." (footnote omitted); explaining that Zisser [plaintiff] had been certified as a specialist several times before, but that in Florida that status expires after five years, and that Zisser's efforts to be recertified were unsuccessful -- due mostly to peer review criticism based (in part) on her "'tendency to over litigate [her] cases'" (internal citation omitted); not explicitly noting the irony, but pointing out that Zisser (1) appealed the initial denial to the Florida Bar, (2) re-filed an entirely new application the next year, (3) notified the Florida Bar "of her intention to submit additional documentation," (4) "requested and was granted an extension of time to prepare a rebuttal," (5) sent the Florida Bar committee a "nine-page letter that contested the peer review findings and also provided the names of additional lawyers and judges for the Committee to contact," (6) sent in other information over the course of the next several months, (7) "requested an opportunity to appear before the Board to challenge its decision." (8) submitted "extensive documentation" before the hearing, including a "'Motion to Remand' her application to the Committee for reconsideration," (9) sent a "nine-page 'Memorandum of Law'" challenging the denial, (10) appeared at the Board hearing accompanied by counsel, (11) filed "two more internal appeals with the Board, first to the Certification Plan Appeals Committee and then to the Bar's Board of Governors itself," (12) filed a twenty-five page petition with the Florida Supreme Court (which included thirty-seven appendices), (13) filed a lawsuit in federal district court, (14) participated in a bench trial before that court, and (15) appealed the district court's judgment to the Eleventh Circuit; ultimately relying on the Rooker-Feldman doctrine in ruling that federal courts do not have subject matter jurisdiction over a final state court decision absent some federal constitutional issue; finding that Zisser's due process claims had no merit,

because Zisser could practice law without a certification as a specialist, and that failure to be certified is not "stigmatizing").

Best Answer

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

b 7/14

Use of Terms Like "Expert" and "Authority"

Hypothetical 29

The firm's chairman has asked you to review your lawyers' website biographies to make sure they comply with applicable ethics rules.

- (a) Can one of your lawyers call herself an "expert" in mediations?

MAYBE

- (b) Can one of your lawyers describe himself as an "authority" on mediation rules?

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**.

Post-Mediation Confidentiality Exception to Enforce Settlements

Hypothetical 30

You have only been a mediator for several months, but now face an awkward dilemma. You know that mediation communications are confidential, but one participant is now relying on that general principle to prevent the other side from seeking enforcement of a settlement you reached last evening.

Is there an exception to the general mediation confidentiality duty for enforcing settlements?

YES

Analysis

Most states recognize a strong mediation confidentiality agreement, but also an exception for enforcing mediation settlements.

- Virginia Code § 8.01-581.22 ("All memoranda, work products and other materials contained in the case files of a mediator or mediation program are confidential. Any communication made in or in connection with the mediation, which relates to the controversy being mediated, including screening, intake, and scheduling a mediation, whether made to the mediator, mediation program staff, to a party, or to any other person, is confidential. However, a written mediated agreement signed by the parties shall not be confidential, unless the parties otherwise agree in writing.").

To supplement this approach, some states have statutes specifically recognizing the enforceability of written mediation settlements.

- Virginia Code § 8.01-581.25 ("If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract. If the mediation involves a case that is filed in court, upon request of all parties and consistent with law and public policy, the court shall incorporate the written agreement into the terms of its final decree disposing of a case. In cases in which the dispute involves support for the minor children of the parties, an order incorporating a written agreement shall also include the child support guidelines worksheet

and, if applicable, the written reasons for any deviation from the guidelines. The child support guidelines worksheet shall be attached to the order.").

Courts generally take the same approach.

- Rutigliano v. Rutigliano, Dkt. No. A-2797-11T1, 2012 N.J. Super. Unpub. LEXIS 2319, at *8-9 (N.J. Super. Ct. Oct. 15, 2012) (in an action to enforce a mediation settlement, allowing the plaintiff to rely on statements made by the defendant at the close of the mediation indicating that the parties had reached a settlement; finding that the plaintiff had agreed to waive the mediation privilege by acquiescing in the mediator's disclosure to the court that the case had settled; "To foster negotiations, N.J.S.A. 2A:23C-4 and Rule 1:40-4d provide that the mediator, the parties, or any other participant in a mediation may not disclose any mediation communication to anyone other than a participant in the mediation session. However, both the statute and the rule recognize that the privilege may be waived by the parties. N.J.S.A. 2A:23C-5a; R. 1:40-4(d). No express form of waiver is required by either the statute or the rule. In order to be effective, however, the mediation privilege must be 'expressly waived by all parties to the mediation.' Ibid."; "[P]laintiff overlooks the fact that both he and defendant authorized the mediator to contact the court to advise that the matter had been concluded with a settlement. Acting on this information, the court marked the matter as settled on its docket."; "Thus, both parties waived the mediation privilege prior to the plenary hearing when they each consented to permit the mediator to notify the court the case had been settled. Because each disclosed there was a settlement, there was no bar to either party disclosing the terms of that settlement or, if necessary, going to court to enforce that settlement.").
- XL Ins. Am., Inc. v. BJ's Wholesale Club, Inc., 86 Vir. Cir. 476, 481, 482 (Va. Cir. Ct. 2013) (finding that a lawyer had "apparent authority" to bind a client to a settlement; "Viewing the record in light of the relevant case law, it is the Court's ruling that Mr. Nyce possessed apparent authority to bind BJ's as to both the settlement agreement and the SIR [Self-Insured Retention]. Nothing at the mediation took place to put XL on notice that Mr. Nyce lacked authority to settle the matter or bind BJ's as to the SIR. BJ's sent two attorneys, Messrs. Nyce and Kelly, to attend mediation in their representative capacities. Both attorneys participated actively in the mediation. Like in Singer [Singer Sewing Machine Co. v. Ferrell], 144 Va. 395 (1926)], Mr. Nyce left the negotiating table to confer with his client via telephone. Both attorneys for BJ's advised Mr. Cortese that \$3,000,000 was a good settlement amount. Upon conclusion of the mediation, Mr. Nyce drafted and signed the documents memorializing the settlement agreement, then prepared the final documents ultimately removing this case from Norfolk Circuit docket."; "Mr. Nyce testified at deposition that he 'made it clear to Judge Shadrick, Cortese, everybody else, that [he] was [attending the mediation], but [he] did

not have the authority to [. . .] agree to fund [the] BJ's SIR . . . ' Mr. Nyce's testimony to this effect was not corroborated. Importantly, co-counsel for BJ's, Mr. Kelly, did not testify to hearing such a disclaimer. Rather, the record indicates that counsel for BJ's acted in such a way as to create the reasonable belief that they possessed authority to bind BJ's as to the settlement agreement and \$500,000 SIR."; "The facts here are closer to Singer than they are to Walson. In Walson, the attorney in question ended negotiations with an explicit disclaimer of authority with respect to a particular issue. Notwithstanding this disclaimer, he appeared the following day and executed a settlement agreement against his client's wishes. Moreover, the attorney in that case repeatedly sent to his client for endorsement draft settlement agreements, indicating that his client's signature, rather than his own, would be required to bind the parties to settlement. Neither of these facts are presented by the record."; "Here, Mr. Nyce consulted with his client during the mediation on several occasions, returning each time to continue the process. At no point did he indicate that BJ's was unwilling to settle, nor did negotiations break down following one of these consultations. Rather, each time he returned to the table, negotiations continued, ultimately resulting in an agreement signed by Mr. Nyce. All of his actions created the reasonable belief that he possessed the authority to bind BJ's to the agreement and SIR.").

California takes a narrower view, at least as to settlement agreement drafts.

- A&E Television Networks, LLC v. Pivot Point Entm't, LLC, No. 10 Civ. 9422 (PGG) (JLC), 2011 U.S. Dist. LEXIS 149740, at *7-8 (S.D.N.Y. Dec. 20, 2011) (refusing to allow discovery of drafts of a settlement agreement entered into after a mediation; "Even assuming, arguendo, that the Chapmans were able to demonstrate relevance under California law or federal law (were California law not to apply to the Agreement), they have failed to establish that neither the Agreement nor its drafts are not privileged and thus discoverable. The Agreement was negotiated 'under the auspices of a California mediation process' . . . , which prohibits disclosure of drafts of a settlement agreement. California's mediation confidentiality statute provides, in relevant part, that absent an express statutory exception, '[n]o writing . . . that is prepared for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation, is admissible or subject to discovery, and disclosure of the writing shall not be compelled, in any arbitration, administration adjudication, civil action, or other noncriminal proceeding in which, pursuant to law, testimony can be compelled to be given.' Rojas v. Superior Court, 33 Cal. 4th 407, 15 Cal. Rptr. 3d 643, 93 P.3d 260, 265 (Cal. 2004) (quoting Cal. Evid. Code § 1119(b)). The Chapmans have not asserted any argument to overcome the California Evidentiary Code's presumption against disclosure of drafts of the Agreement.").

Best Answer

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

N 2/15

Enforcing Settlements

Hypothetical 31

Late last evening, you reached a handshake settlement with the other side in a strenuous and exhausting mediation. You agreed to meet again this morning to hammer out the settlement agreement with the mediator's help. However, you were dismayed (and angry) when the other side's lawyer told you this morning that his client wants to renegotiate last evening's settlement. You wonder whether you can enforce the settlement agreement you reached last night.

May you enforce a settlement based on a mediation adversary's lawyer's representation?

NO

Analysis

The enforceability of an oral settlement agreement depends on the context.

In a mediation context, the overall confidentiality rule essentially makes it impossible (at least in some states) to enforce an unwritten oral settlement agreement – because only written agreements can be enforced.

For instance, a Virginia statute covers all mediation-related communications and documents as confidential, with the exception of a written mediation agreement.

- Virginia Code § 8.01-581.22 ("All memoranda, work products and other materials contained in the case files of a mediator or mediation program are confidential. Any communication made in or in connection with the mediation, which relates to the controversy being mediated, including screening, intake, and scheduling a mediation, whether made to the mediator, mediation program staff, to a party, or to any other person, is confidential. However, a written mediated agreement signed by the parties shall not be confidential, unless the parties otherwise agree in writing.").

Another Virginia statute makes it clear that only a written settlement agreement can be enforced in the normal fashion.

- Virginia Code § 8.01-581.25 ("If the parties reach a settlement and execute a written agreement disposing of the dispute, the agreement is enforceable in the same manner as any other written contract. If the mediation involves a case that is filed in court, upon request of all parties and consistent with law and public policy, the court shall incorporate the written agreement into the terms of its final decree disposing of a case. In cases in which the dispute involves support for the minor children of the parties, an order incorporating a written agreement shall also include the child support guidelines worksheet and, if applicable, the written reasons for any deviation from the guidelines. The child support guidelines worksheet shall be attached to the order.").

In contexts other than a mediation scenario, the enforceability of oral (rather than written) settlement agreements differs dramatically from state to state. Judicial and bar analyses represent a spectrum -- from essentially automatically enforcing oral settlements to essentially ignoring such settlements if the client balks.

As explained below, Virginia law generally favors enforceability of such agreements.

First, some courts follow traditional agency principles in finding that a lawyer can bind her client to a settlement if the lawyer acts with apparent authority. See, e.g., Motley v. Williams, 647 S.E.2d 244, 247 (S.C. Ct. App. 2007) ("Acts of an attorney are directly attributable to and binding upon the client. Absent fraud or mistake, where attorneys of record for a party agree to settle a case, the party cannot later repudiate the agreement." Shelton [Shelton v. Bressant, 439 S.E.2d 833 (S.C. 1993)] at 184, 439 S.E.2d at 834 (quoting Arnold v. Yarborough, 281 S.C. 570, 572. 316 S.E.2d 416, 417 (Ct. App. 1984)). This court has held: '[E]mployment of an attorney in a particular suit implies his client's assent that he may do everything which the court may approve in the progress of the cause. Upon this distinction in a large measure rest the certainty, verity, and finality of every judgment of a court. Litigants must necessarily be held bound by

the acts of their attorneys in the conduct of a cause in court, in the absence, of course, of fraud.' Arnold at 572, 316 S.E. at 417 (quoting Ex parte Jones, 47 S.C. 393, 397, 25 S.E. 285, 286 (1896))." (emphasis added); enforcing the settlement).

Second, some courts recognize a presumption in favor of the lawyer's authority, and thus in favor of a settlement's enforceability.

For instance, the Second Circuit has acknowledged that "the decision to settle a case rests with the client," and that "a client does not automatically bestow the authority to settle a case on retained counsel." Pereira v. Sonia Holdings, Ltd. (In re Artha Mgmt., Inc.), 91 F.3d 326, 329 (2d Cir.1996). The Second Circuit nevertheless recognized a presumption that a lawyer has a client's authority to settle a case.

Nevertheless, because of the unique nature of the attorney-client relationship, and consistent with the public policy favoring settlements, we presume that an attorney-of-record who enters into a settlement agreement, purportedly on behalf of a client, had authority to do so. In accordance with that presumption, any party challenging an attorney's authority to settle the case under such circumstances bears the burden of proving by affirmative evidence that the attorney lacked authority.

Id. (emphasis added). In that case, the Second Circuit held that a Rogers & Wells client had not overcome the presumption that its lawyer possessed authority to settle a case. The court affirmed a bankruptcy court's denial of the client's motion to set aside the settlement.

Many other courts have taken this approach.

- XL Ins. Am., Inc. v. BJ's Wholesale Club, Inc., 86 Vir. Cir. 476, 481, 482 (Va. Cir. Ct. 2013) (finding that a lawyer had "apparent authority" to bind a client to a settlement; "Viewing the record in light of the relevant case law, it is the Court's ruling that Mr. Nyce possessed apparent authority to bind BJ's as to both the settlement agreement and the SIR [Self-Insured Retention]. Nothing

at the mediation took place to put XL on notice that Mr. Nyce lacked authority to settle the matter or bind BJ's as to the SIR. BJ's sent two attorneys, Messrs. Nyce and Kelly, to attend mediation in their representative capacities. Both attorneys participated actively in the mediation. Like in Singer [Singer Sewing Machine Co. v. Ferrell, 144 Va. 395 (1926)], Mr. Nyce left the negotiating table to confer with his client via telephone. Both attorneys for BJ's advised Mr. Cortese that \$3,000,000 was a good settlement amount. Upon conclusion of the mediation, Mr. Nyce drafted and signed the documents memorializing the settlement agreement, then prepared the final documents ultimately removing this case from Norfolk Circuit docket."; "Mr. Nyce testified at deposition that he 'made it clear to Judge Shadrick, Cortese, everybody else, that [he] was [attending the mediation], but [he] did not have the authority to [. . .] agree to fund [the] BJ's SIR . . .' Mr. Nyce's testimony to this effect was not corroborated. Importantly, co-counsel for BJ's, Mr. Kelly, did not testify to hearing such a disclaimer. Rather, the record indicates that counsel for BJ's acted in such a way as to create the reasonable belief that they possessed authority to bind BJ's as to the settlement agreement and \$500,000 SIR."; "The facts here are closer to Singer than they are to Walson. In Walson, the attorney in question ended negotiations with an explicit disclaimer of authority with respect to a particular issue. Notwithstanding this disclaimer, he appeared the following day and executed a settlement agreement against his client's wishes. Moreover, the attorney in that case repeatedly sent to his client for endorsement draft settlement agreements, indicating that his client's signature, rather than his own, would be required to bind the parties to settlement. Neither of these facts are presented by the record."; "Here, Mr. Nyce consulted with his client during the mediation on several occasions, returning each time to continue the process. At no point did he indicate that BJ's was unwilling to settle, nor did negotiations break down following one of these consultations. Rather, each time he returned to the table, negotiations continued, ultimately resulting in an agreement signed by Mr. Nyce. All of his actions created the reasonable belief that he possessed the authority to bind BJ's to the agreement and SIR.").

- Messer v. Huntington Anesthesia Grp., Inc., 664 S.E.2d 751, 759, 760 (W. Va. 2008) ("When an attorney-client relationship exists, apparent authority of the attorney to represent his client is presumed."; finding that the party challenging the settlement had not overcome the "strong presumption" that the settlement should be enforced).
- Collick v. United States, 552 F. Supp. 2d 349, 353 (E.D.N.Y. 2008) ("[A] party challenging an attorney's settlement authority bears the burden of showing that the attorney lacked authority to settle."; refusing to enforce the settlement agreement).

- Joseph v. Worldwide Flight Servs., Inc., 480 F. Supp. 2d 646, 653 (E.D.N.Y. 2007) ("A client who seeks to set aside a settlement entered into by his attorney 'bears the burden of proving by affirmative evidence that the attorney lacked authority.' . . . Thus, in order to set aside the settlement agreement and stipulation of discontinuance, Joseph must show with 'clear evidence,' . . . that Ronai entered into the settlement and stipulation without his consent or approval. This burden of proof is 'not insubstantial.'" (citation omitted); recommending that the court enforce a settlement agreement).
- Am. Prairie Constr. Co. v. Tri-State Fin., LLC, 529 F. Supp. 2d 1061, 1076-77 (D.S.D. 2007) ("While an attorney's authority to settle must be expressly conferred, the existence of the attorney of record's authority to settle in open court is presumed unless rebutted by affirmative evidence that authority is lacking." . . . Clients are held accountable for acts and omissions of their attorneys. . . . The rules for determining whether settlement authority has been given by the client to the attorney are the same as those which govern other principal-agent relationships. . . . The party who denies that the attorney was authorized to enter into the settlement has a heavy burden to prove that authorization was not given. . . . Also, a client's failure to object timely to his or her attorney's action taken without the client's consent may be deemed to be acquiesced by the client."; remanding to the bankruptcy court for an analysis of the settlement agreement's enforceability).
- Infante v. Bridgestone/Firestone, Inc., 6 F. Supp. 2d 608, 610 (E.D. Tex. 1998) ("An attorney retained for litigation is presumed to possess express authority to enter into a settlement agreement on behalf of the client. . . . The client bears the burden of rebutting this presumption with clear evidence that the attorney lacked settlement authority."; finding that the client had not overcome that presumption; granting defendants' motion to enforce a settlement agreement).
- Sorensen v. Consol. Rail Corp., 992 F. Supp. 146, 149 (N.D.N.Y. 1998) (acknowledging that "[o]nly the principal can act to bestow apparent authority upon an agent," and thus an "agent cannot unilaterally obtain this authority"; nevertheless recognizing that "[w]hen the attorney of record enters into a settlement agreement, there is a presumption that the attorney had authority to do so. . . . The party seeking to prove a lack of settlement authority 'bears the burden of proving by affirmative evidence that the attorney lacked authority.'" (citations omitted); finding that the client had not carried its burden of overcoming the presumption granting defendant's motion to enforce an oral settlement agreement).
- HNV Cent. Riverfront Corp. v. United States, 32 Fed. Cl. 547, 549-50 (Fed. Cl. 1995) ("It is well established that 'an attorney retained for litigation purposes is presumed to possess express authority to enter into a settlement

agreement on behalf of the client, and the client bears the burden of rebutting this presumption with affirmative proof that the attorney lacked settlement authority." Amin v. Merit Systems Protection Bd., 951 F.2d 1247, 1254 (Fed. Cir. 1991) (emphasis added). Thus unless HNV rebuts this presumption with affirmative proof, HNV's attorney is presumed to have had the express authority to settle this case by dismissing it with prejudice. HNV, however, has provided no such proof. In fact, HNV has failed to respond to this motion."; granting defendant's motion to enforce a settlement agreement).

- Shields v. Keystone Cogeneration Sys., Inc., 620 A.2d 1331, 1333-35 (Del. Super. Ct. 1992) ("The applicable principle is that authority given by a client to his attorney to settle a case when exercised by the attorney in accordance with the terms of the authority culminating in settlement of litigation is binding upon the client. . . . This principle applies even though the client attempts to repudiate that authority after settlement has been reached by the attorney. . . . An agreement entered into by an attorney is presumed to have been authorized by his client to enter into the settlement agreement. . . . The burden is upon the party who challenges the authority of the attorney to overcome the presumption of authority."; approving a stipulation of settlement over clients' objection).

Third, some states apply just the opposite presumption -- requiring the party seeking to enforce the settlement to prove the lawyer's authority (rather than requiring the challenger to establish lack of authority). These courts rely on the ethics rules' allocation of authority.

Under ABA Model Rule 1.2(a), lawyers "shall abide by a client's decision whether to settle a matter." Comment [1] explains that clients and lawyers can allocate the decision-making process between them, but that major decisions "such as whether to settle a civil matter, must . . . be made by the client." ABA Model Rule 1.2 cmt. [1] (emphasis added).

Similarly, Restatement (Third) of Law Governing Lawyers § 22 cmt. c (2000) explains that "[t]his Section forbids a lawyer to make a settlement without the client's authorization." That comment warns that "[a] lawyer who does so may be liable to the

client or the opposing party . . . and is subject to discipline." Id. The comment then explains that:

The Section allows a client to confer settlement authority on a lawyer, provided that the authorization is revocable before settlement is reached. A client authorization must be expressed by the client or fairly implied from the dealings of lawyer and client. Thus, a client may authorize a lawyer to enter a settlement within a given range. A client is bound by a settlement reached by such a lawyer before revocation.

Id.

Thus, several states have refused to enforce settlement agreements entered into by a lawyer absent some evidence that the lawyer possessed actual authority to resolve the case.

For instance, in Brewer v. National Railroad Passenger Corp., 649 N.E.2d 1331 (Ill. 1995), the Illinois Supreme Court reversed a lower court's enforcement of a personal injury settlement. The court explained the general Illinois principles.

Turning to the merits, the controlling legal principles are quite settled. The authority of an attorney to represent a client in litigation is separate from and does not involve the authority to compromise or settle the lawsuit. An attorney who represents a client in litigation has no authority to compromise, consent to a judgment against the client, or give up or waive any right of the client. Rather, the attorney must receive the client's express authorization to do so. . . .

Where a settlement is made out of court and is not made a part of the judgment, the client will not be bound by the agreement without proof of express authority. This authority will not be presumed and the burden of proof rests on the party alleging authority to show that fact. . . . Further, in such a case, opposing counsel is put on notice to ascertain the attorney's authority. If opposing counsel fails to make inquiry or to demand proof of the attorney's

authority, opposing counsel deals with the attorney at his or her peril.

Id. at 1333-34 (emphases added). The Illinois Supreme Court noted that the record "contains affirmative uncontradicted evidence that plaintiff did not expressly authorize his attorney to agree that plaintiff would quit his job," and therefore reversed the lower court's enforcement of the settlement. Id. at 1334.

Similarly, in New England Educational Training Service, Inc. v. Silver Street Partnership, 528 A.2d 1117 (Vt. 1987), the court reversed a trial court's decision to enforce a settlement agreement. The court characterized the plaintiff's argument in favor of enforcing the settlement.

Plaintiff's argument is that retention of an attorney with express authority to negotiate a settlement, which defendant's attorney had in this case, combined with an extensive history of negotiations, implies the power to reach a binding agreement. While this Court has never addressed this precise question, other courts have concluded that an attorney does not have implied authority to reach a binding agreement under these circumstances.

Id. at 1119-20. The court rejected plaintiff's argument.

We think that these decisions are specialized applications of the general rule, supported by the weight of the authority, that an attorney has no authority to compromise or settle his client's claim without his client's permission . . . [A]n important distinction must be drawn between an attorney's authority to conduct negotiations and his authority to bind his client to a settlement agreement without express permission. The latter is within the ambit of the subject matter of litigation, which remains at all times within the control of the client, and cannot be implied from authority to conduct negotiations. Accordingly, we hold that retention of an attorney to represent one's interest in a dispute, with instructions to conduct settlement negotiations, without more, does not confer implied authority to reach an agreement binding on a client.

Plaintiff's argument that our holding will undercut the policy in favor of settlement agreements is unpersuasive. First, the incentives for all parties to settle litigation are not affected by our holding today. While our holding will restrict the enforceability of unauthorized agreements against clients, it does not follow that settlement will be discouraged. Rather, the primary effect of this decision will be to "encourage attorneys negotiating settlements to confirm their, or their opponent's, actual extent of authority to bind their respective clients." . . . More importantly, the client's control over settlement decisions is preserved.

Id. at 1120 (emphases added).

Several states take this approach.

- Wells Fargo Bank, N.A. v. Green, Civ. A. No. 3:10-CV-67, 2011 U.S. Dist. LEXIS 23113, at *2, *4 (W.D. Va. Mar. 7, 2011) ("Under Virginia law, 'it is well settled that a compromise made by an attorney without authority . . . will not be enforced to the client's injury' Walson v. Walson, 37 Va. App. 208, 556 S.E.2d 53, 56 (Va. Ct. App. 2001) (quoting Singer Sewing Machine Co. v. Ferrell, 144 Va. 395, 132 S.E. 312, 315 (Va. 1926). The attorney's authority to settle a case may be actual or apparent. See Dawson v. Hotchkiss, 160 Va. 577, 169 S.E. 564, 566 (Va. 1933). As Plaintiff's counsel has represented that he lacked actual authority to enter the alleged agreement, and there is no evidence to the contrary, the court will only consider whether counsel had apparent authority."; "[T]here is no evidence before the court that Plaintiff made any verbal or nonverbal representation that Plaintiff[]s counsel had authority to enter a settlement agreement. Under Virginia law, it is not sufficient that Plaintiff[]s counsel was an attorney, retained by Plaintiff, and authorized to negotiate."; declining to enforce the settlement).
- Alper v. Wiley, 81 Va. Cir. 212, 213 (Va. Cir. Ct. 2010) ("Long standing precedent in Virginia makes clear that an attorney, simply by reason of his or her employment, does not have the authority to compromise his or her client's claim. . . . Generally, the scope of the agent's authority in dealings with third parties is that authority which the principal has held the agent out as possessing or which the principal is estopped to deny. . . . Evidence of apparent authority of an attorney to bind the client to a settlement agreement must find support in the record."; "The authority of the attorney to bind his client cannot be proved by his or her declarations, acts, or conduct alone."; declining to enforce the settlement).

- Andrews v. Andrews, 80 Va. Cir. 279, 282 (Va. Cir. Ct. 2010) ("An attorney may not bind his client[] to a settlement absent the client's express authority. . . . This has long been a proposition of settled law with which sophisticated commercial parties such as Insurance companies should be well familiar[.] It is clear from the evidence here that the plaintiff did not authorize Conrad to enter into the settlements claimed, was unaware that he had taken the actions he took, and received none of the funds tendered by the defendants to him. In short the evidence is wholly devoid of any showing that Conrad [lawyer] acted within the terms of his actual authority or any implied authority."; "A client may, as principal, imbue his attorney with apparent authority to settle a claim."; "It is essential, in determining the scope of any apparent authority, to look at the actions of the client, however, for it is clear that the attorney can never [b]e the architect of his own mandate. . . . The apparent authority must be the product of a belief that is 'traceable to the principal's manifestations.' Restatement (Third) of Agency §2.03 (2006). Manifestation by the principal is the *sine qua non* to any creation of apparent authority."; "A decision to settle a claim is the client's alone. . . . And while rationing a lawyer may vest [him] with apparent authority to do all acts reasonably calculated to advance the client's interests, it may never be the sole source for a finding of apparent authority to compromise them."; declining to enforce the settlement).
- Walson v. Walson, 556 S.E.2d 53, 55, 57 (Va. Ct. App. 2001) (rejecting a trial court's finding that a wife had given her lawyer apparent authority to settle a case, despite the undisputed fact that the lawyer repeatedly spoke by telephone to his client (the wife) during the settlement negotiation, and told the husband's lawyer "that wife had agreed" to the proposed settlement; "Through her conduct, wife plainly held Byrd [lawyer] out as possessing the authority to conduct settlement negotiations on her behalf. She permitted him to attend the two negotiation meetings and to relay her offers and counteroffers to husband and Schell [opposing lawyer], as well as her rejections and acceptance of husband's offers and counteroffers. However, nothing in the record indicates that wife held out Byrd as possessing the authority to execute the final property settlement agreement on her behalf."; declining to enforce the settlement).
- Magallanes v. Ill. Bell Tel. Co., 535 F.3d 582, 584, 585 (7th Cir. 2008) ("Under Illinois law, an attorney has no authority to settle a claim of the client absent the client's express authorization to do so. . . . An attorney's authority to agree to an out-of-court settlement will not be presumed, and the burden of proof rests on the party alleging authority to show that fact."; finding for the second time that a trial court had abused its discretion in enforcing a settlement, and remanding for reinstatement of the case; explaining that "lest there be any lingering doubt as to our intent, this case must proceed to decision on the merits").

- Price v. Bowen, 945 A.2d 367, 368 (Vt. 2008) ("[The Vermont Supreme Court] ha[s] long recognized 'the general rule, supported by the weight of the authority, that an attorney has no authority to . . . settle his client's claim without his client's permission.' . . . A 'settlement is valid only if defendant was found to have granted express authority to settle on those terms.'" (citation omitted); remanding for a hearing "as to the authority of defendant's attorney to enter the disputed settlement").
- Kulchawik v. Durabla Mfg. Co., 864 N.E.2d 744, 749 (Ill. App. Ct. 2007) ("An attorney who represents a client in litigation has no authority to settle a claim of the client absent the client's express authorization to do so. . . . Where a settlement is made out of court and not made part of the judgment, the client will not be bound by the agreement without proof of express authority. . . . The party alleging authority has the burden of proving that fact. . . . The plaintiffs point to no evidence that Moser [defendant's president] expressly authorized Meyer to settle the lawsuits on behalf of Durabla. Meyer had been retained by Durabla's insurance company."; enforcing a settlement agreement).
- BP Prods. N. Am., Inc. v. Oakridge at Winegard, Inc., 469 F. Supp. 2d 1128, 1134-35 (M.D. Fla. 2007) ("In Florida, the party seeking to enforce the settlement agreement must establish that counsel for the opposing party was given the clear and unequivocal authority to settle the case by his or her client. See, e.g., Spiegel [Spiegel v. Holmes, 834 So. 2d 295 (Fla. Ct. app. 2002)], 834 So. 2d at 297 (citing Jorgensen v. Grand Union Co., 490 So.2d 214 (Fla. 4th DCA 1986)). 'An unauthorized compromise, executed by an attorney, unless subsequently ratified by his client, is of no effect and may be repudiated or ignored and treated as a nullity by the client.' Vantage Broadcasting Co. v. WINT Radio, Inc., 476 So. 2d 796 (Fla. 1st DCA 1985). In Murchison v. Grand Cypress Hotel Corporation, [13 F.3d 1483 (11th Cir. 1994)], the Circuit Court considered the following facts in deciding whether a client had given his attorney clear authority to settle the case: 1) whether the client knew his lawyer was in the process of negotiating a settlement; 2) whether and how many times the client met or spoke with his attorney while settlement negotiations were ongoing; 3) whether the client was present in the courtroom when the settlement was announced in open court; 4) whether the client immediately objected to the settlement; and 5) whether the client was an educated man who could understand the terms of the settlement agreement. See Murchison, 13 F.3d at 1485-86." (footnote omitted); enforcing the settlement).

Some states have even adopted statutes specifically indicating that only clients have the power to settle cases, and declining to honor settlements entered into by

lawyers without "special authority in writing" from the client. Cook v. Surety Life Ins. Co., 903 P.2d 708, 714 & 717, 715 (Haw. Ct. App. 1995) ("Thus, we hold, that ordinarily, an attorney must have the written authority of the client to settle in order to settle a matter on behalf of a client."; vacating the trial court's enforcement of a settlement).

This approach has faced considerable academic criticism. For instance, a Georgetown Journal of Legal Ethics article has bluntly condemned this approach.

In an attempt to protect the client in the context of the attorney-client relationship, some courts have trod inappropriately upon the rights and expectations of the other party to the contract. The third party's rights and expectations of sanctity of contract deserve no less protection than that afforded by traditional agency law to third parties in general contexts.

Grace M. Giesel, Enforcement of Settlement Contracts: The Problem of the Attorney Agent, 12 Geo. J. Legal Ethics 543, 545 (1999). Later in the article, the author elaborates.

Although the client may not have actually authorized the attorney to enter into a settlement agreement, the third party must be allowed to enforce the agreement against the client if the third party reasonably interprets the client's manifestations as bestowing the authority to settle on the attorney. The wariness expressed by some courts is based on the desire to protect a client within the attorney-client relationship but the result ignores fairness to the third party. There is no reason to rob an innocent third party of the entire doctrine of apparent authority as a matter of law when the attorney for a client enters into a settlement agreement with the third party. As with all other agency settings, the client principal selects the attorney agent, and fairness demands that courts view the principal as more responsible than the reasonable third party when the agent errs. The third party who has reasonably interpreted the client's manifestations as an indication that the attorney has authority to settle is

indeed the innocent, and deserves the protection of the apparent authority doctrine.

Any desire by courts to protect the client from the wrongdoing attorney cannot be furthered at the expense of the third party. The client has other, more appropriate protections. Not only can a wronged client sue his attorney for malpractice, but the client can pursue professional discipline for the attorney, an avenue of recourse unavailable in most other agency settings.

Id. at 586 (emphases added; footnotes omitted). Despite this criticism, many jurisdictions continue to follow this client-centric approach.

Fourth, some courts do not recognize any presumptions, but instead look to such issues as the speed with which a client attempts to repudiate a settlement agreement the client's lawyer entered into without authority.

For instance, a Colorado appellate court explained that

[a]n attorney does not have the authority to compromise and settle the claim of a client without his or her knowledge and consent. . . . Thus, generally, a client is not bound by a settlement agreement made by an attorney when the lawyer has not been granted either express or implied authority. . . .

However, because there is at least one other party involved in a settlement (who, in the absence of further action or proceedings on the claim against it, is entitled to rely on the fact that the case has been resolved), when a client discovers that an attorney has "settled" his claim without authority, the client must either timely repudiate the settlement and proceed with the lawsuit or ratify the settlement as an acceptable bargain.

Siener v. Zeff, 194 P.3d 467, 471 (Colo. Ct. App. 2008) (refusing to enforce a settlement).

Fifth, some courts follow a different approach if the settlement occurred in a court proceeding or in a court-supervised ADR proceeding.

For instance, in Koval v. Simon Telelect, Inc., 693 N.E.2d 1299 (Ind. 1998), the court answered a certified question from the United States District Court for the Northern District of Indiana. In explaining a lawyer's authority to settle a case, the court first explained

[a]s a general proposition an attorney's implied authority does not extend to settling the very business that is committed to the attorney's care without the client's consent. The vast majority of United States jurisdictions hold that the retention of an attorney to pursue a claim does not, without more, give the attorney the implied authority to settle or compromise the claim. The rationale for this rule is that an attorney's role as agent by definition does not entitle the attorney to relinquish the client's rights to the subject matter that the attorney was employed to pursue to the client's satisfaction. In Indiana, the rule that retention does not ipso facto enable an attorney to settle a claim has a solid if distant foundation.

Id. at 1302-03 (footnote omitted). The court then recognized the different rule that applied in court.

Although the theoretical underpinnings of this rule are not always fully explained, and on occasion are set forth in terms slightly at variance with standard agency doctrines, these cases uniformly bind the client to an in court agreement by the attorney and remit the client to any recovery that may be available from the attorney.

Id. at 1305 (emphasis added; footnote omitted). Although acknowledging that several states disagree with this approach (including New Hampshire, Kentucky and Mississippi), the court explained that

[t]he cases in Indiana and elsewhere recite the content of this rule, but frequently do not explain the reason for it. Indeed one rarely encounters a rule that is so commonly cited and yet so infrequently explained. When the rationale is stated, it emerges as one of necessity.

Id. at 1306 (emphasis added). The court then explained the reasoning for this rule.

The reason behind this rule stems from the setting of an in court proceeding and the unique role of an attorney-agent in that setting. Proceedings in court transpire before a neutral arbiter in a formal and regulated atmosphere, where those present expect legally sanctioned action or resolution of some kind. A rule that did not enable an attorney to bind a client to in court action would impede the efficiency and finality of courtroom proceedings and permit stop and go disruption of the court's calendar. Of course the attorney is free, and obligated, to disclaim authority if it does not exist. But in the absence of such a disclaimer, an attorney's actions in court are binding on the client. In contrast to court proceedings, when an attorney represents a client out of court, custom does not create an expectation of settlement or compromise without the client's signing off.

Id. The court then expanded the reach of this general rule to ADR proceedings under court rules.

We conclude that a client's retention of an attorney does not in itself confer implied or apparent authority on that attorney to settle or compromise the client's claim. However, retention does confer the inherent power on the attorney to bind the client to an in court proceeding. For purposes of an attorney's inherent power, proceedings that are regulated by the ADR rules in which the parties are directed or agree to appear by settlement authorized representatives are in court proceedings.

Id. at 1309-10.

Best Answer

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

N 2/15

Lawyers' Post-Mediation Confidentiality Duty

Hypothetical 32

In a classic "no good deed goes unpunished" scenario, you were just sued by a client you recently represented in what everyone thought was a remarkably successful mediation. You wonder whether you can point to your state's mediation confidentiality statute in arguing that client's malpractice claim should be dismissed.

May you obtain dismissal of your former client's malpractice action by relying on the mediation confidentiality statute?

NO (PROBABLY)

Analysis

States disagree about the generally-accepted mediation confidentiality principle's effect on malpractice claims against participants' lawyers.

Virginia recognizes a confidentiality exception in such a context.

Several states point to strong mediation confidentiality principles in precluding clients' malpractice actions against lawyers who represented them in a mediation.

- Cassel v. Superior Court, 244 P.3d 1080, 1083, 1083-84, 1084 (Cal. 2011) ("In order to encourage the candor necessary to a successful mediation, the Legislature has broadly provided for the confidentiality of things spoken or written in connection with a mediation proceeding. With specified statutory exceptions, neither 'evidence of anything said,' nor any 'writing,' is discoverable or admissible 'in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which . . . testimony can be compelled to be given,' if the statement was made, or the writing was prepared, 'for the purpose of, in the course of, or pursuant to, a mediation . . . ' (Evid. Code, § 1119, subs. (a), (b).) 'All communications, negotiations, or settlement discussions by and between participants in the course of a mediation . . . shall remain confidential.' (Id., subd. (c).) We have repeatedly said that these confidentiality provisions are clear and absolute. Except in rare circumstances, they must be strictly applied and do not permit judicially crafted exceptions or limitations, even where competing public policies may be affected."; "The issue here is the effect of the mediation confidentiality statutes on private discussions between a mediating client and

attorneys who represented him in the mediation. Petitioner Michael Cassel agreed in mediation to the settlement of business litigation to which he was a party. He then sued his attorneys for malpractice, breach of fiduciary duty, fraud, and breach of contract. His complaint alleged that by bad advice, deception, and coercion, the attorneys, who had a conflict of interest, induced him to settle for a lower amount than he had told them he would accept, and for less than the case was worth. Prior to trial, defendant attorneys moved, under the statutes governing mediation confidentiality, to exclude all evidence of private attorney-client discussions immediately preceding, and during, the mediation concerning mediation settlement strategies and defendants' efforts to persuade petitioner to reach a settlement in the mediation."; "We must apply the plain terms of the mediation confidentiality statutes to the facts of this case unless such a result would violate due process, or would lead to absurd results that clearly undermine the statutory purpose. No situation that extreme arises here. Hence, the statutes' terms must govern, even though they may compromise petitioner's ability to prove his claim of legal malpractice.").

- Fehr v. Kennedy, Civ. Case No. 08-1102-KI, 2009 U.S. Dist. LEXIS 63748 (D. Or. July 24, 2009) (finding that the Oregon statute prohibiting admissibility in any judicial proceedings of a mediation communication meant that a client could not pursue a malpractice case against a lawyer for malpractice in a mediation).

Other states do not go that far.

- Virginia Code § 8.01-581.22 ("All memoranda, work products and other materials contained in the case files of a mediator or mediation program are confidential. Any communication made in or in connection with the mediation, which relates to the controversy being mediated, including screening, intake, and scheduling a mediation, whether made to the mediator, mediation program staff, to a party, or to any other person, is confidential. However, a written mediated agreement signed by the parties shall not be confidential, unless the parties otherwise agree in writing. Confidential materials and communications are not subject to disclosure in discovery or in any judicial or administrative proceeding except (i) where all parties to the mediation agree, in writing, to waive the confidentiality, (ii) in a subsequent action between the mediator or mediation program and a party to the mediation for damages arising out of the mediation, (iii) statements, memoranda, materials and other tangible evidence, otherwise subject to discovery, which were not prepared specifically for use in and actually used in the mediation, (iv) where a threat to inflict bodily injury is made, (v) where communications are intentionally used to plan, attempt to commit, or commit a crime or conceal an ongoing crime, (vi) where an ethics complaint is made against the mediator by a party to the mediation to the extent necessary for the complainant to prove misconduct

and the mediator to defend against such complaint, (vii) where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party's legal representative based on conduct occurring during a mediation, (viii) where communications are sought or offered to prove or disprove any of the grounds listed in § 8.01-581.26 in a proceeding to vacate a mediated agreement, or (ix) as provided by law or rule." (emphasis added)).

Best Answer

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

Lit IV; N 2/15