

LITIGATION ETHICS: PART IV (CLAIMS AND SETTLEMENTS)

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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Frivolous Factual Claims

Hypothetical 1

One of your clients recently purchased an old house, and has had several contractors working on various renovation projects. Your client told you that the contractor working on some roof repairs cut through a water pipe -- causing about \$5,000 worth of damage. That contractor is on shaky ground financially. You know that another unrelated contractor doing plumbing work on the house has substantial assets.

May you file a claim against the plumbing contractor for cutting the pipe?

NO

Analysis

Lawyers clearly cannot file a claim for which there is no conceivable basis. On the other hand, lawyers normally must accept their client's word about the underlying factual context of litigation. Lawyers must investigate the facts before pursuing litigation or advancing a defense, but there are both ethics and cost limitations on that process. Moreover, the adversarial system itself generally uncovers any unsupportable factual allegations and legal arguments. Disciplining lawyers for "pushing the envelope" factually could discourage ultimately meritorious claims.

Both bars (through the ethics rules and the disciplinary process) and courts deal with the issue of frivolous factual claims.

On the ethics front, the old ABA Model Code had essentially a subjective test for determining whether a lawyer was advancing an impermissible frivolous claim.

In his representation of a client, a lawyer shall not: (1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

ABA Model Code of Professional Responsibility, DR 7-102(A)(1) (1980) (emphasis added).

The ABA Model Rules contain a more objective standard.

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

ABA Model Rule 3.1. Comment [2] provides some explanation.

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

ABA Model Rule 3.1 cmt. [2] (emphases added).

The ABA changed these rules as recently as February 2002. In ABA Model Rule 3.1 itself, the change added the phrase "in law and fact" in the first sentence. The Reporter's Explanation Memo indicated that the change did not intend to alter the substance of the rule, but the change certainly made it clear that the standard focuses both on the facts and the law.

Also in February 2002, the ABA added the second sentence in Comment [2], which explains lawyers' prefiling investigation requirement: "What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases

and the applicable law and determine that they can make good faith arguments in support of their clients' positions." The change also deleted part of Comment [2] which prohibited the lawyer from taking steps designed primarily to harass or harm third parties (a topic which is covered in other rules).

The Restatement (Third) of Law Governing Lawyers takes essentially the same approach, but with a more extensive discussion of the standard.

A lawyer may not bring or defend a proceeding or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good-faith argument for an extension, modification, or reversal of existing law.

Restatement (Third) of Law Governing Lawyers § 110(1) (2000). Comment b warns against the risk of too readily punishing lawyers for advancing frivolous positions.

Frivolous advocacy inflicts distress, wastes time, and causes increased expense to the tribunal and adversaries and may achieve results for a client that are unjust. Nonetheless, disciplinary enforcement against frivolous litigation is rare. Most bar disciplinary agencies rely on the courts in which litigation occurs to deal with abuse. Tribunals usually sanction only extreme abuse. Administration and interpretation of prohibitions against frivolous litigation should be tempered by concern to avoid overenforcement.

Restatement (Third) of Law Governing Lawyers § 110 cmt. b (2000). Thus, the Restatement calls for "tempered" enforcement of the prohibition on filing frivolous claims.

Not surprisingly, bars sometimes sanction lawyers for filing frivolous claims or advancing frivolous defenses. See, e.g., North Carolina LEO 2006-9 (7/21/06) (explaining that a lawyer representing a guardian ad litem may not file a baseless lawsuit, and must either move to withdraw or seek to have the guardian ad litem removed if the guardian ad litem insists on pursuing the matter).

Most situations involving frivolous claims or defenses lead to court sanctions rather than bar discipline. Rule 11 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1927 have generated considerable case law about the standards governing lawyers' contentions. See, e.g., Hamilton v. Boise Cascade Express, 519 F.3d 1197 (10th Cir. 2008) (sanctioning a plaintiff's lawyer for mischaracterizing the defendant's position in litigation); Chaplin v. Du Pont Advance Fiber Sys., 303 F. Supp. 2d 766 (E.D. Va. 2004) (awarding approximately \$37,000 in fees and sanctions against a plaintiff's lawyer who filed a frivolous employment discrimination claim), aff'd, 124 F. App'x 771 (4th Cir. 2005) (unpublished opinion).

Large law firms are not immune from such punishment.

- United Stars Industries, Inc. v. Plastech Engineered Products, Inc., 525 F.3d 605, 609 (7th Cir. 2008) (upholding \$30,000 in sanctions against Jones Day under Rule 11 and § 1927; noting district court's explanation of defendant's "baseless" counterclaim; "Although defendant made many requests directed to the overcharges, when it came to its own disclosures, it identified only one employee, Scott Ryan, as having information about them. It told plaintiff that Ryan had performed an 'in-depth audit' and was knowledgeable about the alleged overcharges. In fact, at his deposition, Ryan expressed his ignorance of any damages. He denied having ever conducted an audit or even knowing what an 'internal audit staff' was. Undaunted, defendant named Ryan as a witness at trial and called him despite his lack of knowledge about the alleged overcharges. It produced no other witnesses to testify about its counterclaim.").
- Medtronic Navigation, Inc. v. BrainLAB Medizinische Computersysteme GmbH, Civ. A. No. 98-cv-010720-RPM, 2008 U.S. Dist. LEXIS 13483 (D. Colo. Feb. 12, 2008) (criticizing the law firm of McDermott, Will and Emery for taking frivolous positions and finding cost award justified).
- Depuy Spine, Inc. v. Medtronic Sofamor Danek, Inc., 534 F. Supp. 2d 224, 225 (D. Mass. 2008) (awarding \$10,000,000 in attorneys' fees to plaintiffs in a patent infringement case; explaining that the defendants' law firm of Dewey & LeBoeuf acted improperly; "[t]hroughout trial, the defendants demonstrated a failure to accept the claim construction governing this case. In fact, with the exception of their ensnarement argument, their defense to infringement appears to have been wholly based on an attempt to obscure,

evade, or minimize the Federal Circuit's construction of the patent-in-suit (the '678 patent). Even as early as the defendants' opening statements, they essentially urged the jury to adopt an interpretation of the patent claims developed by their experts instead of the construction mandated by the Federal Circuit.").

Thus courts have tried to balance the need to avoid frivolous arguments and the desire to avoid inhibiting meritorious claims.

Courts often explain that lawyers will most often face punishment for continuing to advance arguments once it becomes clear that the arguments have no basis. For instance, in Brunswick v. Statewide Grievance Committee, 931 A.2d 319 (Conn. App. Ct. 2007), the court reprimanded a lawyer for continuing to assert frivolous claims.

It is not that the plaintiff alleged partiality or corruption consistent with § 52-418 in the motion to vacate, but rather that he persisted in that allegation despite having not a scintilla of evidence to support it. For that reason, we agree that the plaintiff lacked a good faith basis to maintain his allegation of evident partiality or corruption on the part of the arbitrators.

Id. at 333 (emphasis added; footnote omitted). The court specifically rejected the lawyer's plea for forgiveness because his client had directed him to keep pursuing the frivolous position.

The plaintiff further testified that his client refused to authorize him to withdraw the allegation. That is no excuse for his continued pursuit of the allegation. The commentary to Rule 1.2(a) of the Rules of Professional Conduct (2002) states in relevant part that "a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. When an attorney is aware that a good faith basis is lacking, his duty as a minister of justice every time must trump a client's desire to continue an untenable allegation.

Id. at 334 (emphasis added; footnotes omitted).

Best Answer

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

Unenforceable Subpoenas

Hypothetical 2

You represent the defendant in state court litigation. Although you think that a witness living in another state might have documents that would help your position, your client cannot afford to undertake the elaborate process involved in obtaining discovery across state lines. Your state allows lawyers to prepare and serve their own third-party document subpoenas within the state (although such subpoenas have no force in other states).

May you send such a subpoena to the out-of-state witness in the hope that he will produce documents?

NO

Analysis

Simply sending the subpoena would almost surely violate the general prohibition on deceptive conduct. See, e.g., ABA Model Rule 4.1(a) ("In the course of representing a client, a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person"); ABA Model Rule 8.4(c) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation").

For instance, in Virginia LEO 1495, the Virginia Bar held that a Virginia lawyer could not

request a Virginia court to issue a subpoena duces tecum to obtain documents from an out-of-state individual, knowing that such subpoena is not enforceable, unless the subject of the subpoena has agreed to accept service.

Virginia LEO 1495 (11/5/92). To the extent that the subpoena seems to include a mandatory court process, this approach makes perfect sense.

More recently, the Virginia court essentially repeated this position.

Your third inquiry involves the propriety of Attorney B having a subpoena duces tecum served on the husband outside of Virginia. In Legal Ethics Opinion 1495 the committee opined that DR 1-102(A)(4) is violated where a Virginia attorney requests a Virginia court to issue a subpoena duces tecum to obtain documents from an out-of-state individual, knowing that the subpoena is unenforceable unless the witness has agreed to accept service. Assuming that Attorney B knows that a subpoena duces tecum served on an out-of-state individual is not enforceable, and further assuming that the documents served on the individual threaten contempt for non-compliance and the husband has not accepted service, Attorney B's conduct may be in violation of DR 1-102(A)(4).

Virginia LEO 1700 (6/24/97).

Thus, sending an unenforceable subpoena violates the general anti-deception rules, if the subpoena would appear to a layman as requiring compliance under threat of some compulsory judicial process.

Presumably a lawyer could avoid this ethics violation by clearly indicating in some communication that the recipient does not have to comply with what appears to be the mandatory provisions in the subpoena. Of course, lawyers communicating with such third parties must comply with the prohibition on communications with represented persons (ABA Model Rule 4.2) and the limits on communicating with unrepresented third parties (ABA Model Rule 4.3).

Best Answer

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

Frivolous Legal Claims

Hypothetical 3

You work in a public interest law firm that fights to eliminate the death penalty. You would like to claim that the United States Constitution prohibits states from executing people under 18, even for the most despicable crimes. However, the United States Supreme Court recently held that the United States Constitution does not prohibit such executions in all cases.

May you file a lawsuit contending that the United States Constitution prohibits states from executing people under 18, even for the most despicable crimes?

YES

Analysis

As difficult as it is for bars and courts to analyze frivolous factual claims, it can be even more complicated to analyze arguably frivolous legal positions. Presumably there is only one unchanging set of facts (although it may take a while to find them), while the law changes.

Restricting legal arguments to those already recognized by courts could have a dramatic effect. The common law expands and contracts gradually, with courts sometimes moving away from precedent or creating new principles as society evolves. If lawyers could be sanctioned for advancing claims that were not already recognized by some judicial decision, lawyers advancing civil rights in the 1950s and 1960s might have lost their licenses.

The ABA Model Rules contain the basic standard.

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.

ABA Model Rule 3.1 (emphases added). Comment [2] specifically mentions the possibility that lawyers might advance legal positions that would actually change existing law.

The filing of an action or defense or similar action taken for a client is not frivolous merely because the facts have not first been fully substantiated or because the lawyer expects to develop vital evidence only by discovery. What is required of lawyers, however, is that they inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions. Such action is not frivolous even though the lawyer believes that the client's position ultimately will not prevail. The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law.

ABA Model Rule 3.1 cmt. [2] (emphases added).

The Restatement (Third) of Law Governing Lawyers essentially follows the ABA Model Rule approach.

A lawyer may not bring or defend a proceeding or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good-faith argument for an extension, modification, or reversal of existing law.

Restatement (Third) of Law Governing Lawyers § 110(1) (2000) (emphasis added).

The Restatement contains a surprisingly frank discussion of the factors lawyers may consider in analyzing whether they can advance a legal position:

A nonfrivolous argument includes a good-faith argument for an extension, modification, or reversal of existing law. Whether good faith exists depends on such factors as whether the lawyer in question or another lawyer established a precedent adverse to the position being argued (and, if so, whether the lawyer disclosed that precedent), whether new legal grounds of plausible weight can be advanced, whether new or additional authority supports the lawyer's position, or

whether for other reasons, such as a change in the composition of a multi-member court, arguments can be advanced that have a substantially greater chance of success.

Restatement (Third) of Law Governing Lawyers § 110 cmt. d (2000) (emphasis added).

The Restatement's list of factors might surprise some folks, who believe that the law derives from timeless principles rather than from the ebb and flow of political fortunes. The most explicitly practical factor is any "change in the composition of a multi-member court." Lawyers realize that such judicial shifts make a big difference in the law, but nonlawyers might think otherwise.

As it frequently does, the Restatement provides two illustrations to make its point. In the first illustration, the Restatement contrasts an old legal doctrine that has been widely criticized with a recently articulated judicial rule.

The supreme court of a jurisdiction held 10 years ago that only the state legislature could set aside the employment-at-will rule of the state's common law. In a subsequent decision, the same court again referred to the employment-at-will doctrine, stating that "whatever the justice or defects of that rule, we feel presently bound to continue to follow it." In the time since the subsequent decision, the employment-at-will doctrine has been extensively discussed, often critically, in the legal literature, and courts in some jurisdictions have overturned or limited the older decisions. Lawyer now represents an employee at will. Notwithstanding the earlier rulings of the state supreme court, intervening events indicate that a candid attempt to obtain reversal of the employment-at-will doctrine is a nonfrivolous legal position in the jurisdiction. On the other hand, if the state supreme court had unanimously reaffirmed the doctrine in recent months, the action would be frivolous in the absence of reason to believe that there is a substantial possibility that, notwithstanding the recent adverse precedent, the court would reconsider altering its stance.

Restatement (Third) of Law Governing Lawyers § 110 cmt. d, illus. 1 (2000) (emphases added). In this first illustration, the Restatement thus focuses on the amount of criticism leveled at an existing legal doctrine, and the lapse of time since the controlling court dealt with it.

The more extensive the criticism and the older the precedent, the easier it is for a lawyer to ethically challenge legal precedent.

The second illustration describes "well settled" law that has received only minor academic criticism.

Following unsuccessful litigation in a state court, Lawyer, representing the unsuccessful Claimant in the state-court litigation, filed an action in federal court seeking damages under a federal civil-rights statute, 42 U.S.C. § 1983, against the state-court trial judge, alleging that the judge had denied due process to Claimant in rulings made in the state-court action. The complaint was evidently based on the legal position that the doctrine of absolute judicial immunity should not apply to a case in which a judge has made an egregious error. Although some scholars have criticized the rule, the law is and continues to be well settled that absolute judicial immunity under § 1983 extends to such errors and precludes an action such as that asserted by Claimant. No intervening legal event suggests that any federal court would alter that interpretation. Given the absence of any basis for believing that a substantial possibility exists that an argument against the immunity would be accepted in a federal court, the claim is frivolous.

Restatement (Third) of Law Governing Lawyers § 110 cmt. d, illus. 2 (2000) (emphasis added).

Thus, lawyers might be sanctioned for advancing essentially baseless legal claims, but the ethics rules will provide a wide berth if there is any chance that the lawyers can successfully change the law.

This hypothetical comes from the recent debate over states' execution of criminal defendants younger than eighteen.

The United States Supreme Court held as recently as 1989 that states could constitutionally execute minors in certain circumstances. Stanford v. Kentucky, 492 U.S. 361 (1989), overruled in part in Roper v. Simmons, 543 U.S. 551, 574-75 (2005).

In 1993, a minor killed a Missouri woman, and was sentenced to death. The Missouri Supreme Court concluded on its own that "the Supreme Court would today hold such executions [of minors] are prohibited by the Eighth and Fourteenth Amendments." State ex rel. Simmons v. Roper, 112 S.W.3d 397, 400 (Mo. 2003), aff'd, 543 U.S. 551 (2005).

The United States Supreme Court ultimately agreed with the Missouri Supreme Court. Justice Kennedy's majority opinion has received widespread criticism for relying on foreign law in determining that "the evolving standards of decency" now rendered such executions unconstitutional. Roper v. Simmons, 543 U.S. 551 (2005) (5-4 decision).

In a forceful dissent, Justice Scalia criticized the majority opinion.

What a mockery today's opinion makes of Hamilton's expectation, announcing the Court's conclusion that the meaning of our Constitution has changed over the past 15 years -- not, mind you, that this Court's decision 15 years ago was wrong, but that the Constitution has changed. The Court reaches this implausible result by purporting to advert, not to the original meaning of the Eighth Amendment, but to "the evolving standards of decency," . . . of our national society.

Id. at 608 (Scalia, J., dissenting, joined by Rehnquist, Ch. J. and Thomas, J.).

Justice Scalia specifically criticized the majority for acquiescing in Missouri's cavalier attitude toward the United States Supreme Court's own precedent.

To add insult to injury, the Court affirms the Missouri Supreme Court without even admonishing that court for its flagrant disregard of our precedent in Stanford. Until today, we have always held that "it is this Court's prerogative alone to overrule one of its precedents." . . . That has been true even where "changes in judicial doctrine' ha[ve] significantly undermined" our prior holding, . . . and even where our prior holding "appears to rest on reasons rejected in some other line of decisions," . . . Today, however, the Court silently approves a state-court decision that blatantly rejected controlling precedent.

Id. at 628-29 (emphases added). In the next paragraph, Justice Scalia surmises why the majority did not take the Missouri Supreme Court to task for ignoring its earlier pronouncements.

One must admit that the Missouri Supreme Court's action, and this Court's indulgent reaction, are, in a way, understandable. In a system based upon constitutional and statutory text democratically adopted, the concept of "law" ordinarily signifies that particular words have a fixed meaning. Such law does not change, and this Court's pronouncement of it therefore remains authoritative until (confessing our prior error) we overrule. The Court has purported to make of the Eighth Amendment, however, a mirror of the passing and changing sentiment of American society regarding penology. The lower courts can look into that mirror as well as we can; and what we saw 15 years ago bears no necessary relationship to what they see today. Since they are not looking at the same text, but at a different scene, why should our earlier decision control their judgment?

However sound philosophically, this is no way to run a legal system. We must disregard the new reality that, to the extent our Eighth Amendment decisions constitute something more than a show of hands on the current Justices' current personal views about penology, they purport to be nothing more than a snapshot of American

public opinion at a particular point in time (with the timeframes now shortened to a mere 15 years).

Id. at 629 (emphases added).

Thus, at least in the context of federal constitutional law, there may be no legally frivolous claims.

It is not as clear that courts addressing more mundane areas of the law would take the same approach.

Best Answer

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

Frivolous Criminal Defenses

Hypothetical 4

Your local federal court appointed you to represent a criminal defendant. Your client wants to appeal his recent conviction, and insists that you pursue every possible argument -- including some arguments that you believe have no merit.

May you include in an appeal of a criminal conviction arguments that lack any factual support?

YES (FOLLOWING A JUDICIALLY PRESCRIBED PROCESS)

Analysis

Analyzing arguably frivolous criminal defenses implicates both the ethics rules and constitutional law.

ABA Model Rule 3.1 contains an explicit reference to criminal defenses.

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

ABA Model Rule 3.1 (emphasis added). Comment [3] to that Rule also discusses criminal lawyers.

The lawyer's obligations under this Rule are subordinate to federal or state constitutional law that entitles a defendant in a criminal matter to the assistance of counsel in presenting a claim or contention that otherwise would be prohibited by this Rule.

ABA Model Rule 3.1 cmt. [3]. The ABA added this comment in February 2002, to emphasize the constitutional dimensions of the analysis.

The Restatement (Third) of Law Governing Lawyers provides a more extensive discussion of this issue. As in the ABA Model Rules, the Restatement contains what amounts to an exception for criminal lawyers.

(1) A lawyer may not bring or defend a proceeding or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good-faith argument for an extension, modification, or reversal of existing law.

(2) Notwithstanding Subsection (1), a lawyer for the defendant in a criminal proceeding or the respondent in a proceeding that could result in incarceration may so defend the proceeding as to require that the prosecutor establish every necessary element.

Restatement (Third) of Law Governing Lawyers § 110 (2000). Comment f addresses the special considerations in the criminal context.

The rules in this Section apply generally to criminal-defense lawyers. However, as stated in Subsection (2), a lawyer defending a person accused of crime, even if convinced that the guilt of the offense charged can be proved beyond a reasonable doubt, may require the prosecution to prove every element of the offense, including those facts as to which the lawyer knows the accused can present no effective defense. A criminal-defense lawyer may take any step required or permitted by the constitutional guarantee of the effective assistance of counsel. With respect to propositions of law, a criminal-defense lawyer may make any nonfrivolous argument. Under decisions of the United States Supreme Court, a lawyer representing a convicted person on appeal may be required to file a so-called Anders brief in the event the lawyer concludes that there is no nonfrivolous ground on which the appeal can be maintained.

Restatement (Third) of Law Governing Lawyers § 110 cmt. f (2000).

The Restatement's reference to Anders refers to Anders v. California, 386 U.S. 738 (1967). That case defined an elaborate process in which criminal lawyers thread the needle between pursuing frivolous arguments on appeal and falling short of their

constitutional representation requirements. In essence, Anders allows appointed criminal defense lawyers to seek a withdrawal from the representation if they conclude that any appeal would be completely frivolous. Oddly, their motion to withdraw must be accompanied by a brief that carefully points out (with record citations) any conceivably meritorious claim. The lawyer seeking to withdraw must provide a copy of the brief to the client, who has the opportunity to file a supplemental brief pro se.

After the appellate court reviews the brief and the record, it then decides whether to (1) dismiss the appeal as frivolous, and allow the criminal defense lawyer to withdraw; or (2) substitute another lawyer to pursue any arguably meritorious points. In other words, the original lawyer drops out of the case either way. Significantly, the Anders process does not represent constitutionally mandated procedure. Instead, it suggests one way that criminal defense lawyers may adequately represent their clients while avoiding ethical violations and wasting courts' time and resources.

Not surprisingly, the Anders process has proven easier to articulate than to apply.

For instance, in United States v. Burnett, 989 F.2d 100 (2d Cir. 1993), the Second Circuit received an inadequate Anders brief from a criminal defense lawyer seeking to withdraw. The court noted that the Anders brief provided less than two pages of argument about possibly meritorious claims. The Second Circuit held that "[a]cceptance of a nonconforming Anders belief is akin to a constructive denial of counsel." Id. at 104. The Second Circuit ultimately replaced the deficient lawyer with a new criminal counsel, and denied the first lawyer's fee petition.

Some courts have developed variations on the Anders theme. For instance, in State v. Balfour, 814 P.2d 1069 (Or. 1991), the Oregon Supreme Court held that a criminal lawyer who concludes that any appeal would be frivolous does not need to withdraw.

We conclude that an appointed attorney in an appeal in Oregon who, after a diligent examination of the whole record and appropriate consultation with defendant and trial counsel, is faced with a conclusion that only frivolous issues exist for appeal, has no mandatory ethical obligation to withdraw from the representation.

Id. at 1078. The Oregon Supreme Court instead indicated that the lawyer could file an elaborate brief containing two parts -- the second of which (Section B) addresses claims that the client wants the lawyer to pursue.

If the client seeks to raise one or more issues with the court that counsel considers to be frivolous, the brief shall contain a presentation of the issue or issues in a Section B. Section B of the appellant's brief, under those circumstances, shall raise any claim of error requested by the client.

Id. at 1080. The criminal defense lawyer signs Section A of the brief, while the client signs Section B of the brief. Because the criminal defense lawyer does not sign the frivolous part of the brief, the lawyer does not fall short of the ethical standards.

Several years later, the New Hampshire Supreme Court also adopted a variation of Anders.

Counsel first must discuss with the defendant whether to appeal. If, in counsel's estimation, the appeal lacks merit or is frivolous, counsel should so inform the defendant and seek to persuade the defendant to abandon the appeal. If the defendant chooses, notwithstanding counsel's advice, to proceed with the appeal, counsel must prepare and file the notice of appeal, including all arguable issues. For cases in which a transcript is required, . . . a transcript shall be

prepared and provided to the defendant. After appellate counsel is ordered to file a statement of reasons why the appeal should be accepted, . . . or a brief, counsel must thoroughly examine the record and again determine whether any nonfrivolous arguments exist. If counsel concludes that the appeal is frivolous, counsel should again advise the defendant to withdraw the appeal. If the defendant decides not to withdraw the appeal, counsel must file a statement of reasons or a brief that argues the defendant's case as well as possible. Counsel cannot concede that the appeal is frivolous. If an appeal is truly frivolous, counsel's accurate summary of the facts and law will make that obvious. Thereafter, the appeal will proceed to the normal course.

State v. Cigic, 639 A.2d 251, 254 (N.H.1994). Significantly, the New Hampshire court then essentially amended the New Hampshire ethics rules.

As we have noted, our adoption of this procedure may, on rare occasions, require appellate counsel to assert a frivolous issue before this court. Accordingly, we create an exception to New Hampshire Rule of Professional Conduct 3.1 for such conduct.

Id.

Courts continue to debate the nuances of the Anders process. For instance, in In re Schulman, 252 S.W. 3d 403 (Tex. Crim App. 2008), the court rejected a criminal defense lawyer's effort to file an Anders brief without a motion to withdraw.

Mr. David Schulman, the appointed appellate attorney for Maryln Solanas, filed an application for a writ of mandamus with this Court claiming that the Seventh Court of Appeals violated a ministerial duty when it ordered him to file a motion to withdraw as counsel along with his Anders brief. That brief concludes, as all Anders briefs conclude, that his client's appeal is "frivolous," but Mr. Schulman argues that, while counsel for the defense may file an Anders brief, he is not obligated to simultaneously file a motion to withdraw from representation. This is backwards. Under both Supreme Court and Texas precedent, when counsel files a motion to withdraw because he believes the appeal is frivolous, he may simultaneously file an Anders brief. An Anders brief may not be filed without a motion to withdraw,

as the sole purpose of an Anders brief is to explain and support the motion to withdraw. The court of appeals did not err, much less violate a ministerial duty. We therefore deny relief on this application for a writ of mandamus.

Id. at 404 (footnote omitted). The court explained the reason for the Anders rule, and why a criminal defense lawyer must file a motion to withdraw along with the Anders brief.

The Anders brief reflects the fact that the appointed attorney has adequately researched the case before requesting to withdraw from further representation. It also sets out the attorney's due diligence investigation on behalf of his client. It has an additional use for the appellate courts: it provides them with a roadmap for their review of the record because the court itself must be assured that the attorney has made a legally correct determination that the appeal is frivolous. It has additional use for the defendant: it provides him with appropriate citations to the record if he wishes to exercise his right to file a pro se brief. And it has an additional use for the appointed attorney: it protects him "from the constantly increasing charge that he was ineffective and had not handled the case with that diligence to which an indigent defendant is entitled." Despite its helpfulness to all concerned, the Anders brief is the only proverbial "tail"; the motion to withdraw is "the dog."

Id. at 407-08 (footnotes omitted). The court noted that Anders is "not constitutional dogma," but instead provides a suggestion of one way in which courts can meet their constitutional requirements. The court nevertheless adopted the Anders approach, and described what would happen under that process.

[T]he court of appeals will either agree that the appeal is wholly frivolous, grant the attorney's motion to withdraw, and dismiss the appeal, or it will determine that there may be plausible grounds for appeal. If the court of appeals decides that there are any colorable claims for appeal, it will:
(1) grant the original attorney's motion to withdraw; and
(2) abate the case and send it back to the trial court to appoint a new attorney with directions to file a merits brief.

Id. at 409 (footnote omitted).

Best Answer

The best answer to this hypothetical is **YES (FOLLOWING A JUDICIALLY
PRESCRIBED PROCESS).**

Foregoing Meritorious Claims

Hypothetical 5

You devote several hundred hours each year to your state's capital murder pro bono project.

At one recent meeting with a client, he expressed tremendous regret for the murder that he admits committing. He wants you to forego putting on a defense, saying that he "deserves to die." This client seems to be increasingly confused, and you wonder about his competence to make decisions.

May you honor your client's request not to present any defense at his murder trial?

MAYBE

Analysis

In most situations, lawyers must generally follow their clients' direction when diligently representing those clients.

[A] lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.

ABA Model Rule 1.2(a).

However, death penalty cases present special issues -- both because of the high stakes involved, and because of the possibility that clients will not act in their own best interests in such circumstances. Thus, these cases involve an odd mix of basic morality, constitutional principles and several ethics rules -- including those requiring diligence, prohibiting frivolous pleadings and guiding lawyers whose clients have become impaired. ABA Model Rule 1.14.

Federal and state courts have disagreed about the ability of criminal defendants facing the death penalty to forego meritorious claims. Not surprisingly, the decisions often take an ideological tone, based on the judges' political leanings.

Some courts indicate that death row inmates can direct their lawyers not to present any exonerating evidence -- without causing the lawyer to violate either ethical rules or the federal constitution's requirements. See, e.g., Singleton v. Lockhart, 962 F.2d 1315 (8th Cir.), cert. denied, 506 U.S. 964 (1992); Zagorsky v. State, 983 S.W.2d 654, 661 (Tenn. 1998) ("Accordingly, when a defendant instructs counsel not to investigate or present mitigating evidence, counsel must follow the procedure outlined in this case to insure on the record that the defendant is competent and fully aware of his rights and the possible consequences of that decision. Thereafter, counsel will not be adjudged ineffective for abiding by the defendant's lawful decision."), cert. denied, 528 U.S. 829 (1999); Pettit v. State, 591 So. 2d 618 (Fla. 1992).

However, some authors have spoken about what they call "Death Row Syndrome" -- a form of mental illness which allegedly deprives death row inmates of the ability to make rational decisions. For instance, one recent article explained that many of the executions undertaken since the Supreme Court reinstated the death penalty in 1976 involved so-called "volunteers" affected by "Death Row Syndrome." These "volunteers" order their lawyers to stop fighting the death penalty. Stephen Blank, Killing Time: The Process of Waiving Appeal, The Michael Ross Death Penalty Cases, 14 J.L. & Pol'y 735 (2006).

In assessing a criminal defendant's ability to make rational decisions, courts sometimes have to deal with third parties seeking to intervene in the judicial process on

the death penalty inmate's behalf. This standing issue has spawned a series of cases taking different positions. For instance, in Miller v. Stewart, 231 F.3d 1248, 1251 (9th Cir. 2000), the Ninth Circuit dealt with a so-called "volunteer" who had "given up his fight for life." The court permitted the local public defender's office to act as the inmate's "next friend" in an effort to stop the execution. Four years later, the Ninth Circuit held that a lawyer for a death penalty inmate (found competent to stand trial) could not file a habeas corpus petition as the inmate's "next friend." Dennis v. Budge, 378 F.3d 880 (9th Cir.), stay denied, cert. denied, 542 U.S. 959 (2004).

Most recently, the Supreme Court wrestled with the ability of a mentally ill criminal defendant to represent himself pro se. In Indiana v. Edwards, 128 S. Ct. 2379 (2008), the Supreme Court dealt with the constitutionality of Indiana insisting that a mentally competent defendant accept the assistance of a lawyer even if the defendant wanted to proceed pro se.

This case focuses upon a criminal defendant whom a state court found mentally competent to stand trial if represented by counsel but not mentally competent to conduct that trial himself. We must decide whether in these circumstances the Constitution forbids a State from insisting that the defendant proceed to trial with counsel, the State thereby denying the defendant the right to represent himself. . . . We conclude that the Constitution does not forbid a State so to insist.

Id. at 2381. Writing for the majority, Justice Breyer allowed Indiana to force the defendant to accept a lawyer's help.

We consequently conclude that the Constitution permits judges to take realistic account of the particular defendant's mental capacities by asking whether a defendant who seeks to conduct his own defense at trial is mentally competent to do so. That is to say, the Constitution permits States to insist upon representation by counsel for those competent

enough to stand trial . . . but who still suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves.

Id. at 2387-88.

Justice Scalia dissented.

When a defendant appreciates the risks of forgoing counsel and chooses to do so voluntarily, the Constitution protects his ability to present his own defense even when that harms his case.

Id. at 2391 (Scalia, J., dissenting). Justice Scalia concluded that "[b]ecause I think a defendant who is competent to stand trial, and who is capable of knowing and voluntary waiver of assistance of counsel, has a constitutional right to conduct his own defense, I respectfully dissent." Id. at 2394.

Bars also deal with these issues. In Virginia LEO 1737 (10/20/99), the Virginia Bar held that a lawyer representing a capital murder defendant must comply with the client's decision not to present any mitigating evidence at the sentencing hearing, as long as the lawyer had fully advised the client of the consequences of such conduct, and as long as the client is "competent to make an informed, rational and stable choice regarding whether to fight the death penalty with mitigating evidence."

The Virginia Bar dealt with this issue again several years later. In Virginia LEO 1816, the Virginia Bar pointed to Virginia Rule 1.14, which deals with a lawyer's obligation when dealing with a client who might be impaired. The Virginia Bar explained that a forensic psychologist's conclusion that the criminal defendant was competent to stand trial does not necessarily equate to a lack of impairment under Virginia Rule 1.14. As the Virginia Bar explains,

[t]he determination of competency to stand trial is specific enough such that a client may have been determined competent for trial but nonetheless under impairment with regard to making decisions involving the matter. Also, the facts do not state when the evaluation was done; if the client's mental state has deteriorated since that time, the attorney again should consider obtaining a new evaluation.

Virginia LEO 1816 (8/17/05). Noting that the lawyer asking for the opinion pointed out that his client had repeatedly tried to commit suicide, the Virginia Bar reasoned that

[a]ccordingly, assuming the attorney has a rational basis for that belief, Rule 1.14 permits this attorney to take such protective action as is necessary to protect his client. Such action may properly include, but is not limited to, seeking further evaluation of the client's mental state, seeking an appointment of a guardian, and/or going forth with a defense in spite of the client's directive to the contrary. The precise steps appropriate will depend on the attorney's conclusion regarding the degree of the client's impairment.

Id. (footnote omitted).

However, the Virginia Bar rejected the requesting lawyer's suggestion that "perhaps the attorney need not follow this client directive as it seeks an unlawful objective."

The committee disagrees with that characterization. The imposition by the state of the death penalty is a lawful process, governed by constitutional parameters. A client's election preference for that penalty does not convert the imposition of that sentence to an unlawful act. As one commentator explained it, a client's preference for the death penalty is not "state-assisted suicide" as the state's imposition of the penalty is not a homicide. In LEO 1737, the committee concluded that an attorney should respect a client's wishes to refrain from presenting mitigating evidence at the sentencing hearing, so long as the client was capable of a rational decision, even where that decision was "tantamount to a death wish." As the committee does not consider this client's objective "unlawful," the committee rejects the suggestion raised by the third question. However, as stated above, Rule 1.14 may nonetheless

support this attorney disregarding this particular directive of his client should the attorney conclude, as discussed above, that his client cannot make "adequately considered decisions" regarding the representation such that protective action is needed.

Id. (footnote omitted).

Issues involving the death penalty normally play out in the courts rather than in the bars. However, the ethics rules themselves acknowledge the primacy of constitutional principles over the ethical prohibition on arguably frivolous claims. And at the extreme, lawyers may have to deal with clients who are incapable of protecting themselves -- while avoiding supplanting a rational client's judgment with the lawyer's own crusading zeal.

Best Answer

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

Ghostwriting Pleadings

Hypothetical 6

One of your sorority sisters just lost her job, and wants to pursue a wrongful termination claim. Your firm would probably not want you to represent the plaintiff in a case like this, although you do not have any conflicts. You offer to help your sorority sister as much as you can.

Without disclosure to the court and the adversary, may you draft pleadings that your sorority sister can file pro se?

MAYBE

Analysis

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

ABA Approach

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

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

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

the preparation of a pleading for a litigant who is otherwise acting pro se.

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

Id. (emphases added).

In 2007, the ABA totally reversed itself.

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

ABA LEO 446 (5/5/07).

The ABA rebutted several arguments advanced by those condemning such a practice.

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

Id. (footnote omitted). The ABA even explained that the lawyer involved in such a practice may have a duty to keep it secret.

[W]e do not believe that non-disclosure of the fact of legal assistance is dishonest so as to be prohibited by Rule 8.4(c). Whether it is dishonest for the lawyer to provide undisclosed assistance to a pro se litigant turns on whether the court would be misled by failure to disclose such assistance. The lawyer is making no statement at all to the forum regarding the nature or scope of the representation, and indeed, may be obligated under Rules 1.2 and 1.6 not to reveal the fact of the representation. Absent an affirmative statement by the client, that can be attributed to the lawyer, that the documents were prepared without legal assistance, the lawyer has not been dishonest within the meaning of Rule 8.4(c). For the same reason, we reject the contention that a lawyer who does not appear in the action circumvents court rules requiring the assumption of responsibility for their pleadings. Such rules apply only if a lawyer signs the pleadings and thereby makes an affirmative statement to the tribunal concerning the matter. Where a pro se litigant is assisted, no such duty is assumed.

Id. (footnotes omitted).

Bars' Approach

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

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

- New York City LEO 1987-2 (3/23/87) ("Non-disclosure by a pro se litigant that he is, in fact, receiving legal assistance, may, in certain circumstances, be a misrepresentation to the court and to adverse counsel where the assistance is active and substantial or includes the drafting of pleadings. A lawyer's involvement or assistance in such misrepresentation would violate DR 1-102(A)(4). Accordingly, we conclude that the inquirer cannot draft pleadings and render other services of the magnitude requested unless the client commits himself beforehand to disclose such assistance to both adverse counsel and the court. Less substantial services, but not including

the drafting of pleadings, would not require disclosure." (emphases added); "Because of the special consideration given pro se litigants by the courts to compensate for their lack of legal representation, the failure of a party who is appearing pro se to reveal that he is in fact receiving advice and help from an attorney may be seriously misleading. He may be given deferential or preferential treatment to the disadvantage of his adversary. The court will have been burdened unnecessarily with the extra labor of making certain that his rights as a pro se litigant were fully protected."; "If a lawyer is rendering active and substantial legal assistance, that fact must be disclosed to opposing counsel and to the court. Although what constitutes 'active and substantial legal assistance' will vary with the facts of the case, drafting any pleading falls into that category, except where no more is involved than assisting a litigant to fill out a previously prepared form devised particularly for use by pro se litigants. Such assistance or the making available of manuals and pleading forms would not ordinarily be deemed "active and substantial legal assistance." (footnote omitted)).

- Virginia LEO 1127 (11/21/88) ("Under DR:7-105(A) and recent indications from the courts that attorneys who draft pleadings for pro se clients will be called upon by the court, any disregard by either the attorney or the pro se litigant of the court's requirement that the drafter of the pleadings be revealed would be violative of that disciplinary rule. Such failure to disclose would be violative of DR:7-102(A)(3), which requires that a lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal. Under certain circumstances, such failure to disclose that the attorney provided active or substantial assistance, including the drafting of pleadings, may be a misrepresentation to the court and to opposing counsel and therefore violative of DR:1-102(A)(4). In a similar fact situation, the Association of the Bar of the City of New York opined that a lawyer drafting pleadings and providing other substantial assistance to a pro se litigant must obtain the client's assurance that the client will disclose that assistance to the court and adverse counsel. Failure to secure that commitment from the client or failure of the client to carry it out would require the attorney to discontinue providing assistance." (emphasis added)).
- New York LEO 613 (9/24/90) ("Accordingly, we see nothing unethical in the arrangement proposed by our inquirer. Indeed, we note that our inquirer's proposed conduct, which involves disclosure to opposing counsel and the court by cover letter, fully meets the most restrictive ethics opinion described above. We believe that the preparation of a pleading, even a simple one, for a pro se litigant constitutes 'active and substantial' aid requiring disclosure of the lawyer's participation and thus are in accord with N.Y. City 1987-2. We depart from the City Bar opinion only to the extent of requiring disclosure of the lawyer's name; in our opinion, the endorsement on the pleading 'Prepared by Counsel' is insufficient to fulfill the purposes of the disclosure requirement. We see nothing ethically improper in the provision of advice

and counsel, including the preparation of pleadings, to pro se litigants if the Code of Professional Responsibility is otherwise complied with. Full and adequate disclosures of the intended scope and consequences of the lawyer-client relationship must be made to the litigant. The prohibition against limiting liability for malpractice is fully applicable. Finally, and most important, no pleading should be drafted for a pro se litigant unless it is adequately investigated and can be prepared in good faith." (emphasis added)).

- Kentucky LEO E-343 (1/91) (holding that a lawyer may "limit his or her representation of an indigent pro se plaintiff or defendant to the preparation of initial pleadings"; "On the other hand, the same committees voice concern that the Court and the opponent not be misled as to the extent of the counsel's role. Counsel should not aid a litigant in a deception that the litigant is not represented, when in fact the litigant is represented behind the scenes. Accordingly, the opinions from other states hold that the preparation of a pleading, other than a previously prepared form devised specifically for use by pro se litigants, constitutes substantial assistance that must be disclosed to the Court and the adversary. Some opinions suggest that it is sufficient that the pleading bear the designation 'Prepared by Counsel.' However, the better and majority view appears to be that counsel's name should appear somewhere on the pleading, although counsel is limiting his or her assistance to the preparation of the pleading. It should go without saying that counsel should not hold forth that his or her representation was limited, and that the litigant is unrepresented, and yet continue to provide behind the scenes representation. On the 'flip side,' the opponent cannot reasonably demand that counsel providing such limited assistance be compelled to enter an appearance for all purposes. A contrary view would place a higher value on tactical maneuvering than on the obligation to provide assistance to indigent litigants.").
- Delaware LEO 1994-2 (5/6/94) ("The legal services organization may properly limit its involvement to advice and preparation of documents. However, if the organization provides significant assistance to a litigant, this fact must be disclosed. Accordingly, if the organization prepares pleadings or other documents (other than assisting the litigant in the preparation of an initial pleading) on behalf of a litigant who will subsequently be proceeding pro se, or if the organization provides legal advice and assistance to the litigant on an on-going basis during the course of the litigation, the extent of the organization's participation in the matter should be disclosed by means of a letter to opposing counsel and the court."; "[W]e agree that it is improper for an attorney to fail to disclose the fact he or she has provided significant assistance to a litigant, particularly if the assistance is on-going. By 'significant assistance,' we mean representation that goes further than merely helping a litigant to fill out an initial pleading, and/or providing initial general advice and information. If *an attorney drafts court papers (other than an*

initial pleading) on the client's behalf, we agree with the New York State Bar Association ethics committee in concluding that disclosure of this assistance by means of a letter to the court and opposing counsel, indicating the limited extent of the representation, is required. In addition, if the attorney provides advice on an on-going basis to an otherwise pro se litigant, this fact must be disclosed. Failure to disclose the fact of on-going advice or preparation of court papers (other than the initial pleading) misleads the court and opposing counsel in violation of Rule 8.4(c). We caution the inquiring attorney that regardless of whether the pleadings are signed by a pro se litigant or by a staff attorney, the attorney should not participate in the preparation of pleadings without satisfying himself or herself that the pleading is not frivolous or interposed for an improper purpose. If time does not permit a sufficient inquiry into the merits to permit such a determination before the pleading must be filed, the representation should be declined." (emphasis in italics added)).

- Virginia LEO 1592 (9/14/94) ("Under DR 7-105(A), and indications from the courts that attorneys who draft pleadings for pro se clients would be deemed by the court to be counsel of record for the [pro se] client, any disregard by either Attorney A or Defendant Motorist of a court's requirement that the drafter of pleadings be revealed would be violative of that disciplinary rule. Such failure to disclose would also be violative of DR 7-102(A)(3). Further, such failure to disclose Attorney A's substantial assistance, including the drafting of pleadings and motions, may also be a misrepresentation to the court and to opposing counsel and, therefore, violative of DR 1-102(A)(4).").
- Massachusetts LEO 98-1 (1998) (explaining that "significant, ongoing behind-the-scenes representation runs a risk of circumventing the whole panoply of ethical restraints that would be binding upon the attorney if she was visible"; "An attorney may provide limited background advice and counseling to pro se litigants. However, providing more extensive services, such as drafting ('ghostwriting') litigation documents, especially pleadings, would usually be misleading to the court and other parties, and therefore would be prohibited.
- Connecticut Informal Op. 98-5 (1/30/98) ("A lawyer who extensively assists a client proceeding pro se may create, together with the client, a false impression of the real state of affairs. Whether there is misrepresentation in a particular matter is a question of fact. . . . Counsel who prepare and control the content of pleadings, briefs and other documents filed with a court could evade the reach of these Rules by concealing their identities." (emphasis added)).
- Virginia LEO 1803 (3/16/05) (lawyers practicing at a state prison may type up legal documents for inmates without establishing an attorney-client relationship with them, but should make it clear in such situations that the

lawyer is not vouching for the document or otherwise giving legal advice; if the lawyer does anything more than act as a mere typist for an inmate preparing pleadings to be filed in court, the lawyer "must make sure that the inmate does not present himself to the court as having developed the pleading pro se," because the existence of an attorney-client relationship depends on the lawyer's actions rather than a mere title).

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

- Illinois LEO 849 (12/83) ("It is not improper for an attorney, pursuant to prior agreement with the client, to limit the scope of his representation in a proceeding for dissolution of marriage to the preparation of pleadings, without appearing or taking any part in the proceeding itself, provided the client is fully informed of the consequences of such agreement, and the attorney takes whatever steps may be necessary to avoid foreseeable prejudice to the client's rights.").
- Maine LEO 89 (8/31/88) ("Since the lawyer's representation of the client was limited to preparation of the complaint, the lawyer was not required to sign the complaint or otherwise enter his appearance in court as counsel for the plaintiff, and the plaintiff was entitled to sign the complaint and proceed pro se. At the same time, however, the Commission notes that a lawyer who agrees to represent a client in a limited role such as this remains responsible to the client for assuring that the complaint is adequate and does not violate the requirements of Rule 11 of Maine Rules of Civil Procedure." (emphasis added)).
- Alaska LEO 93-1 (5/25/93) ("According to the facts before the Committee, the attorney assists in the preparation of pleadings only after fully describing this limited scope of his assistance to the client. With this understanding, the client then proceeds without legal representation into the courtroom for the hearing. The client may then be confronted by more complex matters, such as evidentiary arguments concerning the validity of the child support modification, or new issues such as child custody or visitation to which he may be ill-prepared to respond. The client essentially elects to purchase only limited services from the attorney, and to pay less in fees. In exchange, he assumes the inevitable risks entailed in not being fully represented in court. In the Committee's view, it is not inappropriate to permit such limitations on the scope of an attorney's assistance." (emphases added)).
- Los Angeles County LEO 502 (11/4/99) ("An attorney may limit the scope of representation of a litigation client to consultation, preparation of pleadings to be filed by the client in pro per, and participation in settlement negotiations so long as the limited scope of representation is fully explained and the client

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

- Tennessee LEO 2007-F-153 (3/23/07) ("[A]n attorney in Tennessee may not engage in extensive undisclosed participation in litigation in [sic] behalf of a pro se litigant as doing so permits and enables the false appearance of being without substantial professional assistance. This prohibition does not extend to providing undisclosed assistance to a truly pro se litigant. Thus, an attorney may prepare a leading pleading including, but not limited to, a complaint, or demand for arbitration, request for reconsideration or other document required to toll a statute of limitations, administrative deadline or other proscriptive rule, so long as the attorney does not continue undisclosed assistance of the pro se litigant. The attorney should be allowed, in such circumstances, to elect to have the attorney's assistance disclosed or remain undisclosed. To require disclosure for such limited, although important, assistance would tend to discourage the assistance of litigants for the protection of the litigants' legal rights. Such limited assistance is not deemed to be in violation of RPC 8.4(c)." (emphasis added)).
- New Jersey LEO 713 (1/28/08) (holding that a lawyer may assist a pro se litigant in "ghostwriting" a pleading if the lawyer is providing "unbundled" legal services as part of a non-profit program "designed to provide legal assistance to people of limited means"; however, such activity would be unethical "where such assistance is a tactic by lawyer or party to gain advantage in litigation by invoking traditional judicial leniency toward pro se litigants while still reaping the benefits of legal assistance"; specifically rejecting many other state Bars' opinions that a lawyer providing a certain level of assistance must disclose his role, and instead adopting "an approach which examines all of the circumstances"; "Disclosure is not required if the limited assistance is part of an organized R. 1:21(e) non-profit program designed to provide legal assistance to people of limited means. In contrast,

where such assistance is a tactic by a lawyer or party to gain advantage in litigation by invoking traditional judicial leniency toward pro se litigants while still reaping the benefits of legal assistance, there must be full disclosure to the tribunal. Similarly, disclosure is required when, given all the facts, the lawyer, not the pro se litigant, is in fact effectively in control of the final form and wording of the pleadings and conduct of the litigation. If neither of these required disclosure situations is present, and the limited assistance is simply an effort by an attorney to aid someone who is financially unable to secure an attorney, but is not part of an organized program, disclosure is not required.").

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

Interestingly, one bar seems to have taken the opposite direction.

In Florida LEO 79-7 (1979; revised 6/1/05), the Florida Bar indicated that "[i]t is ethical for an attorney to prepare pleadings without signing as attorney for a party." The Florida Bar explained that

there is no affirmative obligation on any attorney to sign pleadings prepared by him if he is not an attorney of record. It is not uncommon for a lawyer to offer limited services in assisting a party in the drafting of papers while stopping short of representing the party as attorney of record. Under these circumstances, there is no ethical impropriety if the attorney fails to sign the pleadings.

Florida LEO 79-7 (6/1/05). The Florida Bar reconsidered this opinion on February 15, 2000, and again on June 1, 2005, and did not renumber. In the second version of Florida LEO 79-7, the Florida Bar indicated that

[a]ny pleadings or other papers prepared by an attorney for a pro se litigant and filed with the court must indicate "Prepared with the Assistance of Counsel." An attorney who drafts pleadings or other filings for a party triggers an

attorney-client relationship with that party even if the attorney does not represent the party as attorney of record.

Florida LEO 79-7 Reconsidered (2/15/00). The Florida Bar explained why it reconsidered its earlier opinion.

County Court Judges who responded to an inquiry from the Committee about Opinion 79-7 expressed concern about pro se litigants who appear before them having received limited assistance from an attorney and having little or no understanding of the contents of pleadings these litigants have filed. Almost unanimously the judges who responded believed that disclosure of professional legal assistance would prove beneficial, at least where the lawyer's assistance goes beyond helping a party fill out a simple standardized form designed for use by pro se litigants. The Committee concurs.

Id.

Court Approach

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

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

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

- Johnson v. Board of County Comm'rs, 868 F. Supp. 1226, 1231, 1232 (D. Colo. 1994) ("It is elementary that pleadings filed pro se are to be interpreted liberally. . . . Cheek's pleadings seemingly filed pro se but drafted by an attorney would give him the unwarranted advantage of having a liberal pleading standard applied whilst holding the plaintiffs to a more demanding scrutiny. Moreover, such undisclosed participation by a lawyer that permits a

litigant falsely to appear as being without professional assistance would permeate the proceedings. The pro se litigant would be granted greater latitude as a matter of judicial discretion in hearings and trials. The entire process would be skewed to the distinct disadvantage of the nonoffending party."; "Moreover, ghost-writing has been condemned as a deliberate evasion of the responsibilities imposed on counsel by Rule 11, F.R.Civ.P."; "I have given this matter somewhat lengthy attention because I believe incidents of ghost-writing by lawyers for putative pro se litigants are increasing. Moreover, because the submission of misleading pleadings and briefs to courts is inextricably infused into the administration of justice, such conduct may be contemptuous irrespective of the degree to which it is considered unprofessional by the governing bodies of the bar. As a matter of fundamental fairness, advance notice that ghost-writing can subject an attorney to contempt of court is required. This memorandum opinion and order being published thus serves that purpose.").

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

- Ricotta v. California, 4 F. Supp. 2d 961, 986-87, 987 (S.D. Cal. 1998) ("The threshold issue that this Court must address is what amount of aid constitutes ghost-writing. Ms. Kelly contends that she acted as a 'law-clerk' and provided a draft of sections of the memorandum and assisted Plaintiff in research. Implicit in the three opinions addressing the issue of ghost-writing, is the observation that an attorney must play a substantial role in the litigation."; "In light of these opinions, in addition to this Court's basic common sense, it is this Court's opinion that a licensed attorney does not violate procedural, substantive, and professional rules of a federal court by lending some assistance to friends, family members, and others with whom he or she may want to share specialized knowledge. Otherwise, virtually every attorney licensed to practice would be eligible for contempt proceedings. Attorneys cross the line, however, when they gather and anonymously present legal arguments, with the actual or constructive knowledge that the work will be presented in some similar form in a motion before the Court. With such participation the attorney guides the course of litigation while standing in the shadows of the Courthouse door [sic]. This conclusion is further supported by the ABA Informal Opinion of 1978 that 'extensive undisclosed participation by a lawyer . . . that permits the litigant falsely to appear as being without substantial professional assistance is improper.'"; In the instant case it appears to the Court that Ms. Kelly was involved in drafting seventy-five to one hundred percent of Plaintiff's legal arguments in his oppositions to the Defendants' motions to dismiss. The Court believes that this assistance is more than informal advice to a friend or family member and amounts to unprofessional conduct."; "However, even though Ms. Kelly's behavior was improper this Court is not comfortable with the conclusion that holding her and/or Plaintiff in contempt is appropriate. The courts in Johnson and Laremont explained that because there were no specific rules dealing with ghost-writing, and given that it was only recently addressed by various courts and bar associations, there was insufficient evidence to find intentional wrongdoing that warranted contempt sanctions."; declining to hold the lawyer for the plaintiff in contempt of court).
- In re Meriam, 250 B.R. 724, 733, 734 (D. Colo. 2000) ("While it is true that neither Fed. R. Bank[r]. P. 9011, nor its counterpart Fed. R. Civ. P. 11, specifically address the situation where an attorney prepares pleadings for a party who will otherwise appear unrepresented in the litigation, many courts in this district, and elsewhere, disapprove of the practice known as ghostwriting. . . . These opinions highlight the duties of attorneys, as officers of the court, to be candid and honest with the tribunal before which they appear. When an attorney has the client sign a pleading that the attorney prepared, the attorney creates the impression that the client drafted the pleading. This violates both Rule 11 and the duty of honesty and candor to the court. In addition, the situation 'places the opposite party at an unfair disadvantage' and "interferes with the efficient administration of justice. . . . According to these decisions, ghostwriting is sanctionable under Rule 11 and

as contempt of court."; "The failure of an attorney to sign a petition he or she prepares potentially misleads the Court, the trustee and creditors, and distorts the bankruptcy process. From a superficial perspective, there is no apparent justification for excusing an attorney who prepares a petition from signing it when a petition preparer is required to do so. But regardless of whether it is an attorney or petition preparer who prepares the petition, if such person does not sign it the Court, trustee and creditors do not know who is responsible for its contents. Should the Court hold a debtor responsible for the petition's accuracy and sufficiency if it was prepared by an attorney? Can such debtor assert that the contents of the petition result from advice of counsel in defense of a motion to dismiss or a challenge to discharge for false oath?" (footnotes omitted); nevertheless declining to reduce the lawyer's fees, and inviting the lawyer to sign a corrected pleading).

- Ostevoll v. Ostevoll, Case No. C-1-99-961, 2000 U.S. Dist. LEXIS 16178, at *30-32 (S.D. Ohio Aug.16, 2000) ("Ghostwriting of legal documents by attorneys on behalf of litigants who state that they are proceeding pro se has been held to be inconsistent with the intent of procedural, ethical and substantive rules of the Court. . . . We agree. Thus, this Court agrees with the 1st Circuit's opinion that, if a pleading is prepared in any substantial part by a member of the bar, it must be signed by him. . . . Thus, Petitioner, while claiming to be proceeding pro se, is obviously receiving substantial assistance from counsel. . . . We find this conduct troubling. As such, we feel the need to state unequivocally that this conduct violates the Court's Rules and will not be tolerated further.").
- Duran v. Carris, 238 F.3d 1268, 1271-72, 1273 (10th Cir. 2001) ("Mr. Snow's actions in providing substantial legal assistance to Mr. Duran without entering an appearance in this case not only affords Mr. Duran the benefits of this court's liberal construction of pro se pleadings, . . . but also inappropriately shields Mr. Snow from responsibility and accountability for his actions and counsel."; "We recognize that, as of yet, we have not defined what kind of legal advice given by an attorney amounts to 'substantial' assistance that must be disclosed to the court. Today, we provide some guidance on the matter. We hold that the participation by an attorney in drafting an appellate brief is per se substantial, and must be acknowledged by signature. In fact, we agree with the New York City Bar's ethics opinion that 'an attorney must refuse to provide ghostwriting assistance unless the client specifically commits herself to disclosing the attorney's assistance to the court upon filing.' . . . We caution, however, that the mere assistance of drafting, especially before a trial court, will not totally obviate some kind of lenient treatment due a substantially pro se litigant. . . . We hold today, however, that any ghostwriting of an otherwise pro se brief must be acknowledged by the signature of the attorney involved." (footnote omitted); admonishing the lawyer; concluding that "this circuit [does not] allow ghostwritten briefs," and

"this behavior will not be tolerated by this court, and future violations of this admonition would result in the possible imposition of sanctions").

- Washington v. Hampton Roads Shipping Ass'n, No. 2:01CV880, 2002 WL 32488476, at *5 & n.6 (E.D. Va. May 30, 2002) (explaining that pro se plaintiffs are "given more latitude in arguing the appropriate legal standard to the court"; holding that "[g]host-writing is in violation of Rule 11, and if there were evidence of such activity, it would be dealt with appropriately").
- In re Mungo, 305 B.R. 762, 767, 768, 768-69, 769, 770, 771 (Bankr. D. S.C. 2003) ("Ghost-writing is best described as when a member of the bar represents a pro se litigant informally or otherwise, and prepares pleadings, motions, or briefs for the pro se litigant which the assisting lawyer does not sign, and thus escapes the professional, ethical, and substantive obligations imposed on members of the bar."; "Policy issues lead this Court to prohibit ghostwriting of pleadings and motions for litigants that appear pro se and to establish measures to discourage ghostwriting."; "[G]hostwriting must be prohibited in this Court because it is a deliberate evasion of a bar member's obligations, pursuant to Local Rule 9010-1(d) and Fed R. Civ. P. Rule 11."; "[T]he Court will, in its discretion, require pro se litigants to disclose the identity of any attorneys who have ghost written pleadings and motions for them. Furthermore, upon finding that an attorney has ghost written pleadings for a pro se litigant, this Court will require that offending attorney to sign the pleading or motion so that the same ethical, professional, and substantive rules and standards regulating other attorneys, who properly sign pleadings, are applicable to the ghost-writing attorney."; "[F]ederal courts generally interpret pro se documents liberally and afford greater latitude as a matter of judicial discretion. Allowing a pro se litigant to receive such latitude in addition to assistance from an attorney would disadvantage the non-offending party."; "[T]herefore, upon a finding of ghost-writing, the Court will not provide the wide latitude that is normally afforded to legitimate pro se litigants."; "[T]his Court prohibits attorneys from ghost-writing pleadings and motions for litigants that appear pro se because such an act is a misrepresentation that violates an attorney's duty and professional responsibility to provide the utmost candor toward the Court."; "The act of ghost-writing violates SCRPC Rule 3.3(a)(2) and SCRPC Rule 8.4(d) because assisting a litigant to appear pro se when in truth an attorney is authoring pleadings and necessarily managing the course of litigation while cloaked in anonymity is plainly deceitful, dishonest, and far below the level of disclosure and candor this Court expects from members of the bar."; publicly admonishing the lawyer for "the unethical act of ghost-writing pleadings for a client").
- In re West, 338 B.R. 906, 914, 915 (Bankr. N.D. Okla. 2006) ("The practice of 'ghostwriting' pleadings by attorneys is one which has been met with

universal disfavor in the federal courts."; "This Court has been able to Find no authority which condones the practice of ghostwriting by counsel.").

- Johnson v. City of Joliet, No. 04 C 6426, 2007 U.S. Dist. LEXIS 10111, at *5-6, *6, *8 (N.D. Ill. Feb. 13, 2007) ("As an initial matter, before addressing Johnson's motions, the court needs to address a serious concern with Johnson's pleadings. Johnson represents that she is acting pro se, yet given the arguments she raises and the language and style of her written submissions, it is obvious to both the court and defense counsel that someone with legal knowledge has been providing substantial assistance and drafting her pleadings and legal memoranda. We suspect that Johnson is working with an unidentified attorney, although it is possible that a layperson with legal knowledge is assisting her. Regardless, neither scenario is acceptable."; "If, as we suspect, a licensed attorney has been ghostwriting Johnson's pleadings, this presents a serious matter of unprofessional conduct. Such conduct would circumvent the requirements of Rule 11 which 'obligates members of the bar to sign all documents submitted to the court, to personally represent that there are grounds to support the assertions made in each filing.' . . . Moreover, federal courts generally give pro se litigants greater latitude than litigants who are represented by counsel. . . . It would be patently unfair for Johnson to benefit from the less-stringent standard applied to pro se litigants if, in fact, she is receiving substantial behind-the-scenes assistance from counsel."; "Here, there is no doubt that Johnson has been receiving substantial assistance in drafting her pleadings and legal memoranda. (When asked at her deposition to disclose who was helping her, Johnson reportedly declined to answer and (improperly) invoked the Fifth Amendment). This improper conduct cannot continue. We therefore order Johnson to disclose to the court in writing the identity, profession and address of the person who has been assisting her by February 20, 2007.").
- Delso v. Trustees for Ret. Plan for Hourly Employees of Merck & Co., Civ. A. No. 04-3009 (AET), 2007 U.S. Dist. LEXIS 16643, at *37, *40-42, *42-43, *53 (D.N.J. Mar. 5, 2007) ("Defendant asserts that Shapiro should be barred from 'informally assisting' or 'ghostwriting' for Delso in this matter. The permissibility of ghostwriting is a matter of first impression in this District. In fact, there are relatively few reported cases throughout the Federal Courts that touch on the issue of attorney ghostwriting for pro se litigants. Moreover, a nationwide discussion regarding unbundled legal services, including ghostwriting, has only burgeoned within the past decade."; "Courts generally construe pleadings of pro se litigants liberally. . . . Courts often extend the leniency given to pro se litigants in filing their pleadings to other procedural rules which attorneys are required to follow. . . . Liberal treatment for pro se litigants has also been extended for certain time limitations, service requirements, pleading requirements, submission of otherwise improper sur-reply briefs, failure to submit a statement of uncontested facts pursuant to

[D.N.J. Local R. 56.1], and to the review given to stated claims."; "In many of these situations an attorney would not have been given as much latitude by the court. . . . This dilemma strikes at the heart of our system of justice, to wit, that each matter shall be adjudicated fairly and each party treated as the law requires. . . . Simply stated, courts often act as referees charged with ensuring a fair fight. This becomes an obvious problem when the Court is giving extra latitude to a purported pro se litigant who is receiving secret professional help."; "It is clear to the Court that Shapiro's 'informal assistance' of Delso fits the precise description of ghostwriting. The Court has also determined that undisclosed ghostwriting is not permissible under the current form of the RPC in New Jersey. Although the RPC's are restrictive, in that they assume traditional full service representation, all members of the Bar have an obligation to abide by them. In this matter, Shapiro's ghostwriting was not affirmatively disclosed by himself or Delso. Delso's Cross Motion for Summary Judgment, on which Shapiro assisted, was submitted to the Court without any representation that it was drafted, or at least researched, by an attorney. Thus, for the aforementioned reasons the Court finds that undisclosed ghostwriting of submissions to the Court would result in an undue advantage to the purportedly pro se litigant.").

- Anderson v. Duke Energy Corp., Civ. Case No. 3:06cv399, 2007 U.S. Dist. LEXIS 91801, at *2 n.1 (W.D.N.C. Dec. 4, 2007) ("[I]f counsel is preparing the documents being filed by the Plaintiff in this action, the undersigned would take a dim view of that practice. The practice of 'ghostwriting' by an attorney for a party who otherwise professes to be pro se is disfavored and considered by many courts to be unethical.").
- Kircher v. Charter Township of Ypsilanti, Case No. 07-13091, 2007 U.S. Dist. LEXIS 93690, at *11 (E.D. Mich. Dec. 21, 2007) ("Although attorney Ward may not have drafted the Complaint, it is evident that he provided the Plaintiff with substantial assistance. All three Complaints are similar, and attorney Ward was able to provide Defendants' counsel with the reasoning that motivated Plaintiff to file the pro se Complaint. . . . This shows that he may have spoken with and assisted Plaintiff with his pro se pleading."; "While the Court declines to issue sanctions or show cause attorney Ward, he is forewarned that the Court may do that in the future if he persists in helping Plaintiff file pro se pleadings and papers.").

Thus, courts have uniformly condemned undisclosed lawyer participation in preparing pleadings, while bars have moved toward a more liberal approach.

Best Answer

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

Assisting an Unrepresented Person in Advancing Claims

Hypothetical 7

Your neighbor occasionally asks for your advice about everything from shrubbery to legal matters. You know that he has struggled with his ex-wife over child custody matters. Your neighbor just told you that he has filed a pro se pleading in court, seeking additional visitation rights. He has a few questions about what happens next.

May you give advice to your neighbor about the visitation rights matter he is now litigating against his ex-wife?

YES (PROBABLY)

Analysis

Lawyers' interaction with pro se parties can range from very general advice to ghostwriting all of the pro se parties' pleadings.

Not surprisingly, bars and courts have had great difficulty determining where to draw the line between permissible and impermissible conduct. No one would think of disciplining a lawyer who provides some cocktail party advice to an unrepresented neighbor. On the other hand, some bars and nearly every court would strongly condemn a lawyer who prepares all the pleadings for, and specifically directs all the legal strategies of, an unrepresented litigant.

The ABA has dealt with this issue twice, with a dramatic switch in direction.

In 1978, the ABA criticized a lawyer's "extensive" participation in assisting a pro se plaintiff, but also explained that "[w]e do not intend to suggest that a lawyer may never give advice to a litigant who is otherwise proceeding pro se." ABA Informal Op. 1414 (6/6/78). About twenty years later, the ABA completely reversed course, and

held that in nearly every situation lawyers can prepare ghostwritten pleadings for pro se plaintiffs. ABA LEO 446 (5/5/07).

State bars' analyses have reflected the same basic trend.

In one of the earliest legal ethics opinions dealing with this issue, the New York City Bar explained that "what constitutes 'active and substantial legal assistance' will vary with the facts of the case," but that such assistance would have to be disclosed. New York City LEO 1987-2 (3/23/87). The New York City Bar explicitly equated the "drafting of pleadings" with that level of assistance, which thus required disclosure. In contrast, the New York City Bar indicated that lawyers could assist pro se plaintiffs in filling out "a previously prepared form devised particularly for use by pro se litigants" or "the making available of manuals in pleading forms." Id.

In the next decade, bars took varying positions. Several bars described the preparation of pleadings as the type of substantial assistance requiring disclosure, but without much explanation of a lesser form of assistance that could go undisclosed.¹ A few bars indicated that lawyers could prepare initial pleadings without disclosing their role, but could not continue to control the litigation in some way. Tennessee LEO 2007-F-153 (3/23/07); Delaware LEO 1994-2 (5/6/94).

More recently, the Virginia Bar indicated that a lawyer could type up a document dictated by a pro se litigant, but could not provide any other advice.²

Thus, most bars recognize pleadings as the "line in the sand" for purposes of determining a lawyer's disclosure obligation. However, bars have not dealt with the

¹ Connecticut Informal Op. 98-5 (1/30/98); Kentucky LEO E-343 (1/91); New York LEO 613 (9/24/90); Virginia LEO 1127 (11/21/88).

² Virginia LEO 1803 (3/16/05).

more subtle issue within the pleading context. For instance, is it permissible for a lawyer to review and slightly revise a pleading that a pro se litigant initially prepares? Can a lawyer provide pleadings that she has used in other cases, and then suggest how the pro se litigant could customize them?

Courts have provided a somewhat more thorough explanation of the line between permissible and impermissible conduct.

As with bars' analyses, at least one court held that "participation" in drafting an appellate brief was "per se substantial" and thus triggered the disclosure obligation. Duran v. Carris, 238 F.3d 1268, 1273 (10th Cir. 2001).

In 1998, the Southern District of California acknowledged that lawyers may provide "some assistance" to pro se litigants without disclosing their role. Ricotta v. California, 4 F. Supp. 2d 961, 987 (S.D. Cal. 1998). The court somehow concluded that the undisclosed lawyer in that case was involved in drafting "seventy-five to one-hundred percent" of the pro se plaintiff's legal arguments. Id. The court found that level of assistance to be improper.

Similarly, the Northern District of Illinois found that it was "obvious" that a pro se litigant was receiving substantial assistance" either from "an unidentified attorney" or "a layperson with legal knowledge." Johnson v. City of Joliet, No. 04 C 6426, 2007 U.S. Dist. LEXIS 10111, at *5 (N.D. Ill. Feb. 13, 2007). The court ordered the pro se plaintiff to identify the misbehaving lawyer or layman. More recently, the Eastern District of Michigan concluded that a lawyer may not have drafted a pro se plaintiff's complaint, but found it "evident" that the lawyer provided the plaintiff "with substantial assistance."

Kircher v. Charter Twp. of Ypsilanti, Case No. 07-13091, 2007 U.S. Dist. LEXIS 93690, at *11 (E.D. Mich. Dec. 21, 2007). The court warned the lawyer not to play such a role.

Perhaps it is not surprising that bars and even courts have had difficulty determining what level a lawyer's assistance to a pro se litigant triggers the disclosure obligation (and thus implicitly an ethics violations absent disclosure). The spectrum of a lawyer's possible involvement with a pro se litigant ranges from a 30-second comment over the back fence to preparing every word of a pro se litigant's opening argument.

Best Answer

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

Filing Claims Subject to an Affirmative Defense

Hypothetical 8

One of your neighbors became quite ill on a Caribbean cruise several years ago. He never filed a claim against the cruise line, but recently has been telling you over the backyard fence that he "was never really the same" after the illness. You finally convince him to explore a possible lawsuit against the cruise line, but discover that the claim would be time-barred under a stringent federal statute. Although that statute also covers claims against the travel agent which booked the cruise, you think that there is some possibility that the lawyer likely to represent the local travel agent would not discover the federal statute.

May you file an action against the local travel agent after the cut-off date under the federal statute?

YES (PROBABLY)

Analysis

This analysis highlights the tension between: (1) the ethics rules' prohibition on filing frivolous claims; and (2) the ethics rules' general requirement that each lawyer must diligently assert available defenses for her client, rather than rely on the other side to alert the lawyer about those defenses.

Lawyers clearly cannot file baseless claims against an adversary, hoping that the adversary defaults or otherwise fails to assert dispositive defenses (such as failure to state a claim). In other words, a lawyer could not file a claim alleging that her client suffered an injury in an automobile accident that never occurred -- hoping that the defendant would not defend the claim.

On the other hand, claims subject to affirmative defenses greatly complicate the analysis. One article explained the nature of affirmative defenses.

The affirmative defense has its origin in the common law plea of confession and avoidance. At the risk of stating the

obvious, it is a matter not within the elements of plaintiff's prima facie case that defeats plaintiff's claim. It differs from a defense in that it does not controvert plaintiff's prima facie case, rather it raises matters outside of plaintiff's claim that, if proven, defeat plaintiff's established prima facie case.

David H. Taylor, Filing With Your Fingers Crossed: Should A Party Be Sanctioned For Filing A Claim To Which There Is A Dispositive, Yet Waivable, Affirmative Defense?, 47 Syracuse L. Rev. 1037, 1040-41 (1996-1997) (footnotes omitted).

Thus, the question becomes whether a plaintiff's lawyer may ethically file a claim for which the defendant has a winning affirmative defense. After all, the plaintiff's claim is not frivolous, because it has some basis in fact and in law. However, the plaintiff will lose if the defendant recognizes the affirmative defense.

Interestingly, bars seem to unanimously find that lawyers may file such claims, while courts have struggled with this issue.

Bar Analysis

For several decades, bars have essentially found that a plaintiff's lawyer may ethically file time-barred claims.

- New York LEO 475 (10/14/77) ("Lawsuits predicated upon causes of action which have been extinguished through the passage of time may not properly be instituted. Since the right no longer exists, the institution of an action purportedly based on the existence of that right would violate DR 7-102 (A)(2) which requires that a lawyer not 'knowingly advance a claim . . . that is unwarranted under existing law' or which cannot 'be supported by good faith argument for an extension, modification, or reversal of existing law.' . . . If, as a matter of law, the passage of time merely gives rise to an affirmative defense that may be waived, however, there would be no impropriety in causing suit to be instituted. This is the usual case and the period of limitations does not destroy the right but merely serves to bar the remedy. Indeed, because this is by far the more usual case, in announcing the ethical rule, the authorities have failed to distinguish cases where the period of limitations extinguishes the client's right and they have uniformly held it proper to advance a claim against which the period has run without further

qualification. . . . The ethical rule can thus be easily stated. What problems occur in applying the rule derive from the uncertain state of the law, for it is not always clear whether the passage of time affects the right or merely the remedy." (emphasis added)).

- Virginia LEO 491 (9/3/82) ("It is not improper for an attorney to file suit on an overdue account after the statute of limitations has run since the limitation of action is an affirmative defense which becomes effective only if so raised.").

The ABA dealt with this issue in 1994. In ABA LEO 387, the ABA addressed the issue of a time-barred claim in both the settlement negotiation context and in the litigation context. The ABA had no trouble with permitting the lawyer to proceed in negotiations.

Applying these general [settlement ethics] principles where the lawyer knows that her client's claim may not be susceptible [to] judicial enforcement because the statute of limitations has run, we conclude that the ethics rules do not preclude a lawyer's nonetheless negotiating over the claim without informing the opposing party of this potentially fatal defect. Indeed, the lawyer may not, consistent with her responsibilities to her client, refuse to negotiate or break off negotiations merely because the claim is or becomes time-barred.

ABA LEO 387 (9/26/94) (emphasis added). The ABA thus took the same attitude toward filing a time-barred claim in court.

We conclude that it is generally not a violation of either of these rules to file a time-barred lawsuit, so long as this does not violate the law of the relevant jurisdiction. The running of the period provided for enforcement of a civil claim creates an affirmative defense which must be asserted by the opposing party, and is not a bar to a court's jurisdiction over the matter. A time-barred claim may still be enforced by a court, and will be if the opposing party raises no objection. And, opposing counsel may fail to raise a limitations defense for any number of reasons, ranging from incompetence to a considered decision to forego the defense in order to have vindication on the merits or to assert some counterclaim. In such circumstances, a failure by plaintiff's counsel to call attention to the expiration of the limitations period cannot be

characterized either as the filing of a frivolous claim in violation of Rule 3.1, or a failure of candor toward the tribunal in violation of Rule 3.3. As long as the lawyer makes no misrepresentations in pleadings or orally to the court or opposing counsel, she has breached no ethical duty towards either. . . . The result under Rules 3.1 and 3.3 might well be different if the limitations defect in the claim were jurisdictional, and thus affected the court's power to adjudicate the suit; if it constituted the sort of substantive insufficiency in the claim that would result in its being dismissed without any action on the part of the opposing party; or if the circumstances surrounding the time-barred filing indicated bad faith on the part of the filing party. Short of such additional defects, however, and in the absence of any affirmative misstatements or misleading concealment of facts, we do not believe it is unethical for a lawyer to file suit on a time-barred claim.

Id. (emphases added; footnotes omitted).

Since the ABA issued its analysis in 1994, more state bars have taken the same approach.

- Pennsylvania LEO 96-80 (6/24/96) ("Adopting the reasoning of ABA Formal Opinion 94-387, it would be ethically permissible for you to file a claim on behalf of a client which you know or believe to be barred by the statute of limitations 'unless the rules of the jurisdiction preclude it.' It is not entirely clear what the ABA Committee means by the 'rules of the jurisdiction', although that phrase appears to encompass primarily jurisdictional 'defects' in the action which would be grounds for dismissal without regard to any actions taken by the opposing party.").
- North Carolina LEO 2003-13 (1/16/04) ("The question is whether filing a time-barred claim is 'frivolous' under Rule 3.1 of the Rules of Professional Conduct. . . . Filing suit after the limitations period has expired does not affect the validity of the claim, nor does it divest a court from having jurisdiction to hear the matters raised therein. ABA Formal Opinion 94-387, 1001:235, 237 (1994). Instead, the statute of limitations is merely an affirmative defense to an otherwise enforceable claim. *Id.* The defendant must plead the statute of limitations in his answer or it is waived. *Northampton County Drainage Dist. No. 1 v. Bailey*, 92 N.C. App. 68, 373 S.E.2d 560 (1988), rev'd in part and aff'd in part, 326 N.C. 742, 392 S.E.2d 352 (1990). In addition, the expiration of the limitations period does not prevent a plaintiff from continuing to negotiate settlement with an opposing party who is unaware of the limitations period. ABA Formal Opinion 94-387

at 236-237. Because a time-barred claim can be enforced by a court if the defense raises no objection, filing suit under these circumstances would not violate the prohibition against an attorney advancing a frivolous claim under Rule 3.1.").

- Oregon LEO 2005-21 (8/05) (holding that a lawyer may "file a complaint against Defendant notwithstanding Lawyer's knowledge of the valid affirmative defense"; "As long as Lawyer has a 'basis in law and fact . . . that is not frivolous,' within the meaning of Oregon RPC 3.1, there is no reason why Lawyer cannot proceed. Frivolous is defined as 'without factual basis or well-grounded legal argument.' . . . Lawyer does not represent Defendant, and it is up to Defendant or Defendant's own counsel to look after Defendant's interests and to discover and assert any available defenses.").

Thus, bars unanimously acknowledge the ethical propriety of lawyers filing time-barred claims, or other claims for which there might be valid affirmative defenses.

Although it might seem unfair for a defendant to suffer some harm because her lawyer overlooks an affirmative defense, one article noted that the very statute of limitations defense itself permits parties to escape liability due to their own or their lawyer's oversight of claims.

An adversarial imbalance occurs because the defendant is allowed to escape adjudication of liability due to the inadvertence of plaintiff in letting the limitations period expire. The defendant gains from an adversarial advantage while the plaintiff is sanctioned if seeking to take advantage of the exact same sort of adversarial "cat and mouse game." If the dispute were truly to be resolved without adversarial gamesmanship, underlying liability and the attendant equities would be the sole focus of the matter. Yet the system remains one of adversaries and removing that nature from one small aspect creates an imbalance.

David H. Taylor, Filing With Your Fingers Crossed: Should A Party Be Sanctioned For Filing A Claim To Which There Is A Dispositive, Yet Waivable, Affirmative Defense?, 47 Syracuse L. Rev. 1037, 1051 (1996-1997). The article provides many other examples of seemingly other unfair results based on a lawyer's mistakes.

In most aspects of litigation, opponents profit from an adversary's mistakes and oversights. Averments in pleadings not specifically denied are deemed admitted. Requests to admit not denied within thirty days are deemed admitted. Claims not filed within the applicable limitations period may be dismissed with prejudice.

Id. (footnotes omitted).

This article highlights the basic nature of the adversarial system. Lawyers act as their clients' champions, and in nearly all circumstances may (and should) take advantage of an adversary's oversight or other mistake.

Bars' unanimous approval of lawyers filing time-barred claims reflects their recognition of this basic concept underlying the adversarial system.

Case Law

Interestingly, courts have vigorously debated the propriety (under various rules and statutes -- not ethics principles) of lawyers filing claims that they know are vulnerable to dispositive affirmative defenses.

Perhaps this debate implicates principles other than the type of balancing inherent in the ethics rules. After all, courts might believe that plaintiffs filing such vulnerable claims not only put defendants at risk of liability that they might not deserve (had they hired a competent lawyer), but also use up valuable judicial time and resources. In other words, courts might be focusing as much on their own dockets as on the purity of the adversarial system.

In 1991, the Fourth Circuit issued an opinion that has come to typify judicial criticism of plaintiffs filing a complaint in the face of an obvious dispositive affirmative defense. In Brubaker v. City of Richmond, 943 F.2d 1363 (4th Cir. 1991), plaintiffs filed a defamation action after Virginia's one-year limitation period had expired. To be sure,

plaintiffs did not drop their claim after defendants raised the statute of limitations issue.

The court explained that "[i]t was not until the district judge later questioned [plaintiff] specifically about the defamation count that [plaintiff] conceded that the statute of limitations is one year on a defamation count." Id. at 1384.

The court harshly condemned plaintiff.

Even had Brubaker dropped the claim as soon as the limitations argument was raised, we would still conclude that a plaintiff cannot avoid Rule 11 sanctions merely because a defense to the claim is an affirmative one. A pleading requirement for an answer is irrelevant to whether a complaint is well grounded in law. Were we to follow plaintiffs' suggestion, we would be permitting future plaintiffs to engage in the kind of "cat and mouse" game that Brubaker engaged in here: alleging a time-barred claim to see whether the defendants would catch this defense, continuing to pursue the claim after a defendant pointed out that it was time-barred, urging the court not to dismiss the claim, and finally conceding without argument to the contrary that the claim was time-barred. . . . Where an attorney knows that a claim is time-barred and has no intention of seeking reversal of existing precedent, as here, he makes a claim groundless in law and is subject to Rule 11 sanctions.

Id. at 1384-85 (emphases added; footnote omitted). The Fourth Circuit extensively condemned what it called the "cat and mouse game" inherent in filing a time-barred claim.

We note that we can see no logical reason why the "cat and mouse game" would not be extended beyond situations concerning affirmative defenses. A future plaintiff could raise any claim invalid according to existing precedent, hoping that the defendant would be careless and not find that precedent. In a hearing for Rule 11 sanctions, the plaintiff could then claim that it was up to the defendant to argue that the precedent barred the plaintiff's claim. Were we to accept plaintiffs' theory in our case, that future plaintiff would successfully avoid Rule 11 sanctions. Such a result would effectively abolish Rule 11.

Id. at 1384 n.32. The court ultimately upheld Rule 11 sanctions against the plaintiff.

The Fourth Circuit's opinion has received widespread criticism. For instance, noted authors Geoffrey Hazard and W. William Hodes included the following critique in their widely-quoted The Law of Lawyering.

Theoretically, opposing counsel may fail to assert the statute of limitations defense because of incompetence, for example, or because counsel has successfully urged that the client forego the defense on moral or social grounds. Furthermore, a defendant might waive the defense because he wants to achieve vindication in a public forum, or to reassert the allegedly defamatory remarks. . . .

. . . .

In the Brubaker case, however, the Fourth Circuit rejected this line of reasoning, characterizing L's litigating strategy as "a cat and mouse game" in which she would catch the opposition unawares if she could, but would otherwise quickly dismiss the suit in an attempt to avoid sanctions. This approach seems wrong, for it requires the plaintiff's attorney to anticipate defendant's every move. . . . The whole point of an adversarial system is that parties are entitled to harvest whatever windfalls they can from the miscues or odd judgments of their opponents.

Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering, §3.1:204-2, at 558.2 to 558.4 (1996 Supp.) (emphasis added; footnote omitted).

Since the Fourth Circuit's harsh decision in Brubaker, courts have continued to debate the proper judicial reaction to a claim for which there is an affirmative defense.

Some courts follow the Brubaker approach. See, e.g., Gray Diversified Asset Mgmt. v. Canellis, No. CL 2007-15759, 2008 Va. Cir. LEXIS 147, at *11 (Va. Cir. Ct. Oct. 7, 2008) (Thacher, J.) ("The Court finds that either reviewing the Court's file or reviewing the trial transcript would have placed a reasonable and competent attorney on notice that the claims pressed in the instant action are barred by res judicata."; awarding

sanctions of over \$25,000 against a lawyer from the Venable law firm for filing a claim that the court found was barred by res judicata).

Interestingly, a district court within the Fourth Circuit took exactly the opposite approach. In In re Varona, 388 B.R. 705 (Bankr. E.D. Va. 2008), the Eastern District of Virginia Bankruptcy Court addressed several proofs of claim that an assignee of credit card debt filed five years after the statute of limitations had expired. When the debtors noted that the proofs of claim were time-barred, the assignee creditor sought to withdraw the claims. The debtors resisted the motion to withdraw, and sought sanctions for filing "false" or "fraudulent" claims under a bankruptcy rule. Thus, the court dealt with time-barred claims in the context of a bankruptcy rule rather than under Rule 11, the ethics rules or some other prohibition on filing frivolous claims. Surprisingly, the court did not cite Brubaker, despite its holding in this analogous context.

In Varona, the assignee creditor (PRA) stipulated to the procedure that it often followed in bankruptcy cases.

In the ordinary course of business, PRA files proofs of claim in bankruptcy cases across the country. It is not uncommon for PRA to file proofs of claim on accounts that would be beyond the applicable statute of limitations for filing a collection suit. If an objection is filed to such a claim and such objection properly asserts the affirmative defense of the statute of limitations, PRA is willing to withdraw its claim or to allow such objection to be sustained.

Id. at 710 (emphasis added).

The Court first explained that

[i]n Virginia, a debt for which collection action has become barred by the running of a statute of limitations is not extinguished; rather, the bar of the statute operates to prevent enforcement.

Id. at 722. Thus, Virginia recognizes the statute of limitations as an affirmative defense.

Where a party pleads the statute of limitations as a defense, that party has the burden of showing by a preponderance of the evidence that the cause of action arose prior to the statutory period before the action was instituted.

Id. at 723. The Court had no problem with the assignee PRA filing knowingly time-barred proofs of claim.

An examination of Claim Number 1 and Claim Number 9 convinces the Court that these claims are neither false nor fraudulent. The claims facially indicate the circumstances under which they were incurred; there is no attempt to obfuscate the timing of their incurrence so as to mask the potential bar of time. Most importantly, while collection of the claims is arguably time-barred, under Virginia law the debts continue to exist. The bar of the statute of limitations raised by the Varonas in their Claim Objections prevents enforcement of the claims, but the claims are not extinguished. As such, asserting the claims in the bankruptcy of the Varonas does not render the claims either "false" or "fraudulent," and the imposition of sanctions is not appropriate.

Id. at 723-24 (emphases added). The Court likewise seemed untroubled by PRA's admission that it filed time-barred claims in the "ordinary course" of its business, but withdraws the claims (or allows objections to be sustained) whenever a debtor asserts the statute of limitations as an affirmative defense.

Other courts have tried to craft a middle ground position. Even before the Brubaker decision, the Tenth Circuit articulated a standard that analyzed whether the plaintiff could present a "colorable argument" why an obvious affirmative defense did not apply. If so, they could avoid sanctions for filing a claim subject to a dispositive affirmative defense.

We agree that sanctions are appropriate in this case, not because plaintiffs failed to inquire into the facts of their

claims, but because they failed to act reasonably given the results of their inquiries. In their pleadings, plaintiffs did occasionally question the existence or facial validity of the releases; however, they pleaded in the alternative that the releases were void. Thus, plaintiffs appear to have been aware of the releases, and the issue is whether they were justified in ignoring them. The argument that the releases were void was later held frivolous by the district court.

Part of a reasonable attorney's prefiling investigation must include determining whether any obvious affirmative defenses bar the case. . . . An attorney need not forbear to file her action if she has a colorable argument as to why an otherwise applicable affirmative defense is inapplicable in a given situation. For instance, an otherwise time-barred claim may be filed, with no mention of the statute of limitations if the attorney has a nonfrivolous argument that the limitation was tolled for part of the period. The attorney's argument must be nonfrivolous, however; she runs the risk of sanctions if her only response to an affirmative defense is unreasonable.

White v. General Motors Corp., 908 F.2d 675, 682 (10th Cir. 1990) (emphasis added).

Several years later, the Eleventh Circuit took essentially the same approach in

Souran v. Travelers Insurance Co.:

[P]laintiffs need not refrain from filing suit to avoid Rule 11 sanctions simply because they know that defendants will interpose an affirmative defense. Two other circuits have held that the assertion of a claim knowing that it will be barred by an affirmative defense is sanctionable under Rule 11. See Brubaker v. City of Richmond, 943 F.2d 1363, 1383-85 (4th Cir. 1991); White v. General Motors Corp., 908 F.2d 674, 682 (10th Cir. 1990). Here, however, Souran did not know that counts I and II would suffer defeat at the hands of Travelers' fraudulent procurement defense. 'An attorney need not forbear to file her action if she has a colorable argument as to why an otherwise applicable affirmative defense is inapplicable in a given situation.' White, 908 F.2d at 682. In no way do the facts unequivocally establish that Travelers' affirmative defense of fraudulent procurement would succeed. At most, the facts are inconclusive and present a jury question as to whether Mr. Von Bergen fraudulently procured the policy. In the fact

of such uncertainty, Rule 11 sanctions on counts I and II were not proper.

Souran v. Travelers Ins. Co., 982 F.2d 1497, 1510 (11th Cir. 1993).¹

One article also suggested this type of middle ground.

While laudable as an effort to deter hopeless filings and preserve court and party resources, treating a claim as legally or factually deficient and subject to Rule 11 sanctions because of an affirmative defense that a defendant may or may not assert constitutes a reordering of the burdens of pleading as defined by the underlying substantive law. The goal of deterrence can be better accomplished by judicially imposed sanctions, not for factual or legal deficiency, but rather as a pleading asserted for an improper purpose. When a defense is obvious, that is, when plaintiff has access to all information necessary to assess the merits of the defense that plaintiff knows defendant will assert, there can be no proper reason for filing a claim which has no chance of succeeding and court initiated Rule 11 sanctions should be imposed. Where plaintiff does not know whether the defense will be raised and files the action, sanctions should follow if the plaintiff refuses to immediately dismiss the action once a dispositive affirmative defense is asserted. With this approach, deterrence is accomplished and no one's time is wasted by a plaintiff who refuses to accept the obvious. Most importantly, a rule of procedure is not used to add to the elements of plaintiff's prima facie case, and traditional burdens of pleading are preserved.

¹ Accord Leeds Bldg. Prods., Inc. v. Moore-Handley, Inc. (In re Leeds Bldg. Prods., Inc.), 181 B.R. 1006, 1010, 1011 (Bankr. N.D. Ga. May 10, 1995) ("Affirmative defenses normally are raised after an action is commenced, and the evidence needed to establish the merits of such a defense is sought through the discovery process. To accept the argument Moore-Handley current is asserting, however, would, in effect, require a plaintiff to conduct discovery prior to filing a complaint. Such a requirement contravenes the purpose of notice pleading embodied in the Federal Rules of Civil and Bankruptcy Procedure. Therefore, this Court declines to find a general requirement in Rule 9011 that a plaintiff has to make a prefiling investigation into possible affirmative defenses. Instead, the Court concludes that Rule 9011, and likewise Rule 11, places no prefiling duty upon a plaintiff to conduct an inquiry into possible affirmative defenses, except in those unusual or extreme circumstances where such a defense is obvious and needs no discovery to establish." (emphasis added); "In fact, the Court finds it hard to imagine any preference action in which the ordinary course of business defense would be so obvious as to make a preference complaint a bad faith filing. It was proper in this proceeding for Leeds to first file its complaint and then utilize the discovery process to determine the validity of Moore-Handley's defense. . . . [T]he fact that Moore-Handley notified Leeds that it would assert such a common defense did not make the defense an obvious one."; denying sanctions).

David H. Taylor, Filing With Your Fingers Crossed: Should A Party Be Sanctioned For Filing A Claim To Which There Is A Dispositive, Yet Waivable, Affirmative Defense?, 47 Syracuse L. Rev. 1037, 1063-64 (1996-1997).

The Hazard and Hodes text which criticized Brubaker's extreme position also criticizes the courts taking the other extreme (which allows a responding party to assert essentially any conceivable affirmative defense, regardless of its merits).

However, this objection to the result in Brubaker is itself troublesome, for it has no limiting point and would completely swallow Rule 11: it could justify filing the most bizarre court papers, so long as it remained theoretically possible that the opposition would bungle or waive any objections. The Fourth Circuit may have drawn the line at the wrong place in Brubaker, but its recognition that a line must be drawn is correct.

Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering §3.1:204-2, at 558.4 (1996 Supp.) (emphases added).

These courts' efforts to draw such a fine line create a standard nearly impossible to define with any certainty. In essence, it creates two levels of analysis. First, the litigant asserting a claim would have to establish that the claim was not frivolous under some vaguely defined standard. Second, the party responding to the claim with some affirmative defense would have to establish that the affirmative defense is not frivolous -- under some equally vague standard.

Best Answer

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

Risk of Asserting Affirmative Defenses

Hypothetical 9

You are considering every affirmative defense that you might file in response to a complaint. Among other things, you worry that filing certain affirmative defenses might waive the attorney-client privilege and the work product protection.

- (a) Will your client waive any privilege/work product protections by filing an affirmative defense alleging reliance on advice of counsel?

YES

- (b) Will your client waive any privilege/work product protections by answering the plaintiff's lawyer's deposition question, "Did you rely on your lawyer's advice before signing this contract?" with the following answer: "I always rely on my lawyer's advice before taking an important step like that."?

NO (PROBABLY)

Analysis

Every state's ethics rules require lawyers to protect their clients' confidential information. ABA Model Rule 1.6. In litigation, this issue often plays out in the context of an attorney-client privilege or work product claim, rather than as an ethics issue.

Clients or their lawyers can waive the attorney-client privilege or the work product doctrine protection in one of two ways.

First, actually disclosing privileged communications or work product material might cause an "express" waiver of the protection. Disclosing privileged communications to any third party generally causes an express waiver, and disclosing work product material to an adversary generally causes an express waiver of that separate protection.

This hypothetical deals with the other type of waiver -- called an "implied" waiver. In implied waiver situations, clients or lawyers do not disclose any communication or protected material. Instead, they rely on the fact of the communication or the existence of the material to seek some advantage (usually in litigation).

(a) Perhaps the most obvious type of implied waiver involves a litigant filing an affirmative defense that the litigant relied on a lawyer's advice.

Such a filing does not disclose the advice, and therefore does not trigger an express waiver. However, simple fairness requires that the litigant disclose both the advice and the communication to the lawyer if the litigant wants to seek some advantage by pointing to the advice.¹

Companies sometimes have trouble determining at the beginning of a case whether they will need to rely on advice of counsel. For instance, in one case defendant H&R Block represented to the court that it would not rely on advice of counsel in defending a Fair Credit Reporting Act case -- but eventually changed its mind and advised the court that it would in fact rely on advice of counsel as a defense.²

(b) It can be very difficult to draw the line between reliance on legal advice and reference to legal advice.

A litigant clearly relies on legal advice if she files an affirmative defense mentioning legal advice. A litigant can also trigger an implied waiver by relying on the

¹ Ropak Corp. v. Plastikan, Inc., No. 04 C 5422, 2006 U.S. Dist. LEXIS 19912 (N.D. Ill. Apr. 17, 2006).

² In re H&R Block Mortgage Corp., Cause No. 2:06-md-230 (MDL 1767), 2008 U.S. Dist. LEXIS 21491 (N.D. Ind. Mar. 18, 2008).

lawyer's advice in testimony -- even if not included in a formal affirmative defense.³ For instance, a client could not withhold privileged communications during discovery if the client testified during a deposition (and intended to testify at trial) that "I don't think I did anything wrong here, because I explored all of this with my lawyer."

In contrast, several courts have dealt with a litigant's fleeting reference to legal advice -- which usually occurs during a fast-paced deposition. The analysis here can be fairly subtle. For instance, courts have held that deponents did not trigger an implied waiver by testifying that they: would not act without a lawyer's approval;⁴ filed a complaint after talking with the lawyer;⁵ changed deposition testimony after speaking with a lawyer;⁶ relied on the lawyer's advice;⁷ signed a document on advice of a lawyer;⁸ do not remember speaking with a lawyer;⁹ worded a termination notice on advice of a lawyer.¹⁰

It can frequently be very difficult to distinguish between disclosure of non-privileged facts about a privileged communication (which does not cause a waiver) and disclosure of the privileged communication itself (which causes a waiver). For instance, one court analyzed the waiver effect of statements in a client's e-mail to a third party: (1) "after consultation with counsel, we are willing to provide the detailed information";

³ United States v. Workman, 138 F.3d 1261, 1263-64 (8th Cir. 1998).

⁴ United States v. Gasparik, 141 F. Supp. 2d 361 (S.D.N.Y. 2001).

⁵ Refuse & Env'tl. Sys., Inc. v. Industrial Servs. of Am., 120 F.R.D. 8, 11 (D. Mass. 1988).

⁶ Feltner v. Internationale Nederlanden Post Bank Groep, N.V., 622 So. 2d 123, 125 (Fla. Dist. Ct. App. 1993).

⁷ Sanofi-Synthelabo, Inc. v. Apotex Inc., 363 F. Supp. 2d 592, 595 (S.D.N.Y. 2005).

⁸ In re Bakalis, 199 B.R. 443, 450-51 (Bankr. E.D.N.Y. 1996).

⁹ Derrick Mfg. Corp. v. Southwestern Wire Cloth, Inc., 934 F. Supp. 813, 817 (S.D. Tex. 1996).

¹⁰ Miteva v. Third Point Mgmt. Co., 218 F.R.D. 397, 398 (S.D.N.Y. 2003).

and (2) "the proposed solution regarding the meeting . . . would not cure the issue that counsel has, which is that any meeting, which necessarily involves reactions and feedback, would taint our communications."¹¹ The court held: (1) that the first sentence did not waive the privilege, because it merely stated that the client "had decide[d] to pursue a particular course after consultation with counsel"; but (2) that the second sentence described the lawyer's advice, and therefore waived the privilege.¹²

In another example, a federal court found that the following deposition exchange caused a waiver:

Q: You made the determination to put this information in and not the other information.

A: My lawyers drafted this document and they made the determination of what to put in there and what not to after speaking with me, so they sent it to me, I would look at it, I would have a communication with Mr. George, we would agree and I would authorize them to send it in.

Q: You didn't have any participation in making determinations of what did or di[d] not go into the Patent Office?

A: No, I relied on my attorneys to tell me what was required.¹³

Less than six months later, another federal court refused to find an implied waiver based on a company executive's deposition testimony "that 'at the end of the day, . . . the board depended upon the advice of counsel.'"¹⁴

¹¹ Transocean Capital, Inc. v. Fortin, No. 2005-0955-BLS2, 2006 Mass. Super. LEXIS 504, at *5 (Mass. Super. Ct. Oct. 20, 2006) (internal quotations omitted).

¹² Transocean Capital, Inc. v. Fortin, 2006 Mass. Super. LEXIS 504, at *12.

¹³ A&E Prods. Group, L.P. v. Mainetti USA Inc., No. 01 Civ. 10820 (RPP), 2004 U.S. Dist. LEXIS 7148, at *2-3 (S.D.N.Y. Apr. 27, 2004).

¹⁴ PostX Corp. v. Secure Data in Motion, Inc., No. C 02-04483 SI, 2004 U.S. Dist. LEXIS 24260, at *16, *19-20 (N.D. Cal. Nov. 20, 2004).

Given this degree of judicial hair-splitting, lawyers must be very careful when preparing witnesses for depositions. They might also be prepared to explicitly disclaim any reliance on advice of counsel.

Best Answer

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

"At Issue" Doctrine

Hypothetical 10

You represent a surgeon sued for malpractice by one of his former patients. The plaintiff missed the statute of limitations, but claims that the statute should not have begun running until several months after her surgery -- because she did not realize until then that she had been injured in the surgery. Your investigators just discovered that the plaintiff spoke with a personal injury lawyer just a few days after her surgery. You obviously want to find out what the plaintiff talked about with the personal injury lawyer, but you expect the plaintiff to claim privilege protection.

Are you likely to overcome the plaintiff's privilege assertion for communication she had with the lawyer shortly after her surgery?

YES (PROBABLY)

Analysis

A number of courts have taken the implied waiver principle to the extreme -- adopting an approach called the "at issue" doctrine.¹

The traditional implied waiver concept involves clients explicitly mentioning or pointing to privileged communications to gain some advantage. It is understandable how notions of fairness do not permit clients to withhold those communications from the adversary.

In contrast, the "at issue" doctrine involves a client asserting some other position (usually affirmatively, but sometime defensively) in litigation -- the full exploration and consideration of which might require assessment of privileged communications.² Thus,

¹ Williams v. Sprint/United Mgmt. Co., 464 F. Supp. 2d 1100 (D. Kan. 2006).

² Hearn v. Rhay, 68 F.R.D. 574 (E.D. Wash. 1975); see also Conkling v. Turner, 883 F.2d 431 (5th Cir. 1989).

a client can trigger an "at issue" waiver without even mentioning or pointing to a privileged communication or to a lawyer.

The "at issue" doctrine might apply in several contexts.

Courts taking a narrow view of the "at issue" doctrine apply it only when a litigant's assertion will eventually require it to disclose privileged communications. This is called the "anticipatory waiver" doctrine.³

In the most common formulation of the "at issue" doctrine,⁴ a litigant triggers an "at issue" waiver if she affirmatively⁵ takes a position on a vital,⁶ integral⁷ or outcome determinative⁸ issue, and denying the adversary pertinent communication could prejudice the adversary⁹ because the information is unavailable elsewhere.¹⁰

For instance, under what is called the "Faragher/Ellerth doctrine," corporations sometimes seek to avoid or reduce liability for certain sexual harassment or discrimination claims by demonstrating that they investigated the alleged wrongdoing

³ Hawthorne Land Co. v. Occidental Chem. Co., Civ. A. No. 01-0881 SECTION "M"(1), 2003 U.S. Dist. LEXIS 11493, at *5 (E.D. La. June 26, 2003).

⁴ Hearn v. Rhay, 68 F.R.D. 574, 580-82 (E.D. Wash. 1975).

⁵ Wachtel v. Guardian Life Ins., Civ. Dkt. Nos. 01-4183 & 03-1801, 2006 U.S. Dist. LEXIS 27591, at *3 n.2 (D.N.J. May 5, 2006) (not for publication), vacated and remanded on other grounds, 453 F.3d 179 (3d Cir. 2006).

⁶ Marcoux v. Am. Airlines, Inc., No. 04 CV 1376(NG) (KAM), 2006 U.S. Dist. LEXIS 88322, at *14-15 (E.D.N.Y. Dec. 6, 2006).

⁷ Boudreau v. Gonzalez, Case No. 3:04cv1471 (PCD), 2006 U.S. Dist. LEXIS 86599, at *7-8 (D. Conn. Nov. 29, 2006).

⁸ Electronic Data Sys. Corp. v. Steingraber, No. 4:02 CV 225, 2003 U.S. Dist. LEXIS 11818, at *9-10 (E.D. Tex. July 9, 2003).

⁹ FTC v. Stefanchik, Case No. C04-1852RSM, 2006 U.S. Dist. LEXIS 87628 (W.D. Wash. Nov. 30, 2006).

¹⁰ CSI Inv. Partners II, L.P. v. Cendant Corp., No. 00 Civ. 1422 (DAB) (DFE), 2006 U.S. Dist. LEXIS 9929, at *7-8 (S.D.N.Y. Mar. 12, 2006).

and took reasonable remedial measures.¹¹ Courts uniformly hold that corporations asserting this defense impliedly waive the attorney-client privilege that would otherwise protect communications taking place during those investigations.¹²

Courts sometimes find an "at issue" waiver triggered when a litigant claims certain knowledge in an effort to obtain some advantage. Examples include: a good faith and reasonable basis for the litigant's position;¹³ intent to comply with what the litigant understood to be the law;¹⁴ good faith reliance on a government representation.¹⁵

In contrast, courts have rejected application of the "at issue" doctrine in situations involving a litigant's claimed knowledge. Examples include a litigant's: denial that it acted in bad faith;¹⁶ assertion that it was confident it would prevail in the litigation;¹⁷ assertion that a litigant's investigation was thorough;¹⁸ that it relied on previous government decisions.¹⁹

¹¹ Jones v. Rabanco, Ltd., No. C03-3195P, 2006 U.S. Dist. LEXIS 58178, at *9-10 (W.D. Wash. Aug. 18, 2006).

¹² Austin v. City & County of Denver, Civ. A. No. 05-cv-01313-PSF-CBS, 2006 U.S. Dist. LEXIS 32048, at * 21-22 (D. Colo. May 19, 2006).

¹³ Roehrs v. Minnesota Life Ins. Co., 228 F.R.D. 642, 646-47 (D. Ariz. 2005).

¹⁴ Cox v. Administrator United States Steel & Carnegie, 17 F.3d 1386, 1419 (11th Cir. 1994), cert. denied, 513 U.S. 1110 (1995).

¹⁵ United States v. Exxon Corp., 94 F.R.D. 246 (D.D.C. 1981).

¹⁶ American Nat'l Bank & Trust Co. v. Allmerica Fin. Life Ins. & Annuity Co., No. 02 C 5251, 2005 U.S. Dist. LEXIS 14254, at *6-7 (N.D. Ill. July 14, 2005).

¹⁷ Buster v. George W. Moore, Inc., 783 N.E.2d 399, 415 (Mass. 2003).

¹⁸ Robinson v. Time Warner, Inc., 187 F.R.D. 144, 146-47 (S.D.N.Y. 1999).

¹⁹ In re AT&T Access Charge Litig., 451 F. Supp. 2d 651, 656-57 (D.N.J. 2006).

Litigants might also trigger an "at issue" waiver by asserting their ignorance of relevant facts. Examples include a litigant's: assertion that it was defrauded;²⁰ reliance on fraudulent concealment to avoid the running of the statute of limitations;²¹ lack of understanding of a document drafted by its lawyer (supporting a mutual mistake claim);²² lack of intent to create a mortgage;²³ lack of understanding of a release;²⁴ lack of knowledge about a document.²⁵

One case highlighted how this type of "at issue" doctrine can have a surprisingly broad effect. In that case, plaintiffs sued their accountant for malpractice -- alleging that the accountant had provided bad advice about whether to sign a release in connection with the plaintiffs' sale of a company. The accountant sought documents from the law firm of Akin Gump, which had also provided advice to plaintiffs when they sold their company. The accountant argued that the plaintiff had placed Akin Gump's legal advice "at issue" by arguing that they relied on the accountant's advice in signing the release. The court agreed with the accountant, noting that if "Akin Gump was advising the plaintiffs not to sign the release even after and despite [the accountant's] determination that there would be no adverse consequence to the plaintiffs, then the existence of any causal link between [the accountant's] advice and the plaintiffs' damages can only be

²⁰ CSI Inv. Partners II, L.P. v. Cendant Corp., No. 00 Civ. 1422 (DAB) (DFE), 2006 U.S. Dist. LEXIS 9929 (S.D.N.Y. Mar. 12, 2006).

²¹ Conkling v. Turner, 883 F.2d 431, 434-35 (5th Cir. 1989).

²² Galt Capital, LLP v. Seykota, Civ. No. 2002-63, 2004 U.S. Dist. LEXIS 2183, at *5-6 (D.V.I. Feb. 9, 2004) (not for publication).

²³ New York TRW Title Ins. Inc. v. Wade's Canadian Inn & Cocktail Lounge, Inc., 638 N.Y.S.2d 800 (N.Y. App. Div. 1996).

²⁴ Livingstone v. North Belle Vernon Borough, 91 F.3d 515, 537 (3d Cir. 1996), cert. denied, 520 U.S. 1142 (1997).

²⁵ FTC v. Stefanchik, Case No. C04-1852RSM, 2006 U.S. Dist. LEXIS 87628, at *5 (W.D. Wash. Nov. 30, 2006).

assessed by invading the privilege and examining the nature of the advice that Akin Gump gave to plaintiffs."²⁶

In contrast, courts have found the "at issue" doctrine inapplicable when a litigant has asserted: that it was defrauded;²⁷ fraudulent concealment sufficient to avoid the statute of limitations;²⁸ that it had no memory of performing certain work.²⁹

In some situations, a litigant's assertion that it took some action (or failed to take some action) triggers an "at issue" doctrine waiver. Examples include a litigant's: defense to employees' claim for benefits based on an alleged novation;³⁰ claim it was compelled to arbitrate overseas (so an arbitration should not be given preclusive effects);³¹ allegation that a law firm did not represent it at a certain time;³² denial of a communication with a lawyer;³³ assertion of a timely compliance with a condition

²⁶ Chin v. Rogoff & Co., P.C., No. 05 Civ. 8360 (NRB), 2008 U.S. Dist. LEXIS 38735, at *17 (S.D.N.Y. May 6, 2008).

²⁷ Nationwide Life Ins. Co. v. St. Clair Mobil Home Parks, LLC, Case No. 4:04CV01746 AGF, 2005 U.S. Dist. LEXIS 30348, at *17-18 (E.D. Mo. Dec. 1, 2005).

²⁸ Asset Value Fund Ltd. P'ship v. Care Group, Inc., No. 97 Civ.1487 (DLC) (JCF), 1997 WL 706320, at *3 (S.D.N.Y. Nov. 12, 1997).

²⁹ Genentech, Inc. v. Insmad Inc., 236 F.R.D. 466, 469 (N.D. Cal. 2006).

³⁰ Miller v. Pharmacia Corp., Case No. 4:04CV981 RWS, 2006 U.S. Dist. LEXIS 29791, at *10-11 (E.D. Mo. May 16, 2006).

³¹ Weizmann Inst. of Sci. v. Neschis, Nos. 00 Civ. 7850 & 01 Civ. 6993 (RMB) (THK), 2004 U.S. Dist. LEXIS 4254, at *16-17, *19 (S.D.N.Y. Mar. 16, 2004).

³² E.I. DuPont de Nemours & Co. v. Conoco, Inc., Civ. A. No. 17686, 2001 Del. Ch. LEXIS 99 (Del. Ch. Feb. 6, 2001).

³³ Hawkins v. Stables, 148 F.3d 379, 381, 384 & n.4 (4th Cir. 1998).

precedent;³⁴ claim to have timely notified an insurance company;³⁵ argument that it did not make an insurance coverage decision until it received written advice.³⁶

In contrast courts have found the "at issue" doctrine inapplicable when a litigant has asserted: that it was justified in delaying a certain action;³⁷ denial of inequitable conduct;³⁸ claim of innocence to a criminal charge;³⁹ that it has a legitimate defense;⁴⁰ that its actions were reasonable, appropriate and legal;⁴¹ that it met with someone at its lawyer's request;⁴² that it acted in good faith;⁴³ that it did not violate any laws;⁴⁴ that it did not act in bad faith;⁴⁵ that it did not exercise control over credit card companies.⁴⁶

³⁴ Royal Indem. Co. v. Salomon Smith Barney, Inc., No. 125889/99, 2004 N.Y. Slip Op. 50739U, at *9-10 (N.Y. Sup. Ct. June 29, 2004).

³⁵ Century 21, Inc. v. Diamond State Ins. Co., No. 03 Civ. 5163 (GEL), 2006 U.S. Dist. LEXIS 56733, at *7-8, *10-11 (S.D.N.Y. Aug. 10, 2006).

³⁶ North Am. Foreign Trading Corp. v. Mitsui Sumitomo Ins. USA, Inc., Nos. 05 Civ. 5827 & 05 Civ. 4807 (SAS)(KNF), 2006 U.S. Dist. LEXIS 75385, at *5-6 (S.D.N.Y. Oct. 16, 2006), rev'd on other grounds, 292 F. App'x 73 (2d Cir. 2008) (unpublished opinion).

³⁷ United States Fire Ins. Co. v. Asbestospray, Inc., 182 F.3d 201, 212 (3d Cir. 1999).

³⁸ Schofield v. U.S. Steel Corp., Cause No. 2:04-CV-520-PRC, 2005 U.S. Dist. LEXIS 30471, at *16-17 (N.D. Ind. Nov. 28, 2005).

³⁹ In re Lott, 424 F.3d 446 (6th Cir. 2005), cert. denied, 547 U.S. 1092 (2006) .

⁴⁰ Delta Fin. Corp. v. Morrison, 12 Misc. 3d 807, 813-14 (N.Y. Sup. Ct. 2006).

⁴¹ Sayre Enters., Inc. v. Allstate Ins. Co., Civ. No. 5:06cv00036, 2006 U.S. Dist. LEXIS 89097, at *12-13 (W.D. Va. Dec. 8, 2006).

⁴² Boudreau v. Gonzalez, Case No. 3:04cv1471 (PCD), 2006 U.S. Dist. LEXIS 86599, at *7-8 (D. Conn. Nov. 29, 2006).

⁴³ Williams v. Sprint/United Mgmt. Co., 464 F. Supp. 2d 1100 (D. Kan. 2006); Boudreau v. Gonzalez, 2006 U.S. Dist. LEXIS 86599, at *7-8.

⁴⁴ Boudreau v. Gonzalez, 2006 U.S. Dist. LEXIS 86599, at *7-8.

⁴⁵ Quality Croutons, Inc. v. George Weston Bakeries, Inc., Case No. 05 C 4928, 2006 U.S. Dist. LEXIS 60715, at *11-12 (N.D. Ill. Aug. 14, 2006).

⁴⁶ Discover Fin. Servs., Inc. v. Visa U.S.A., Inc., Nos. 04 Civ. 7844 & 04 Civ. 8967 (BSJ) (DFE), 2006 U.S. Dist. LEXIS 71106, at *17-18 (S.D.N.Y. Sept. 27, 2006).

As with other implied waivers, litigants can sometimes avoid an "at issue" waiver by retracting⁴⁷ or agreeing not to take certain positions.⁴⁸

This hypothetical comes from an Illinois appellate court decision.⁴⁹ In that paradigm example of the "at issue" doctrine, a divided Illinois Appellate Court dealt with a malpractice plaintiff who missed the statute of limitations in suing a surgeon. When the surgeon asserted a statute of limitations defense, the plaintiff argued that she was not aware that she had been injured until long after the surgery. However, the surgeon found that the plaintiff's husband had spoken with a personal injury lawyer shortly after the surgery. Over a strong dissent, the court held that plaintiff had put her ignorance of injury "at issue," and thus impliedly waived any privilege that would otherwise have protected communications between her husband and the personal injury lawyer.

Best Answer

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

⁴⁷ Weizmann Inst. of Sci. v. Neschis, Nos. 00 Civ. 7850 & 01 Civ. 6993 (RMB) (THK), 2004 U.S. Dist. LEXIS 4254, at *19 (S.D.N.Y. Mar. 16, 2004).

⁴⁸ In re AT&T Access Charge Litig., 451 F. Supp. 2d 651 (D.N.J. 2006).

⁴⁹ Lama v. Preskill, 818 N.E.2d 443, 450, 449 (Ill. App. Ct. 2004), appeal denied, 829 N.E. 2d 788 (Ill. 2005) (unpublished opinion).

Collaborative Lawyering

Hypothetical 11

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 negotiate a possible resolution of the dispute. If the negotiations fail, 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 (6/05) (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 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

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.

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

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.")

In ABA LEO 447, 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 ends the debate about the ethical propriety of such an arrangement.

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**.

Arranging for an Opponent's Endorsement

Hypothetical 12

You represent your neighbor in pursuing litigation against a local tree surgeon who accidentally damaged your neighbor's house while attempting to cut down a tree. The tree surgeon has chosen to represent himself. Your neighbor and the tree surgeon have worked out a settlement which must be endorsed by the parties and entered by the court.

May you prepare the settlement order and present it to the unrepresented tree surgeon for his signature?

YES (PROBABLY)

Analysis

The ABA has a somewhat surprising rule dealing with lawyers who interact with unrepresented parties.

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

ABA Model Rule 4.3.

Interestingly, lawyers do not have to identify themselves as lawyers, must not investigate the person's possible misunderstanding and must make only "reasonable efforts" to correct the person's misunderstanding about the lawyer's role.

A comment addresses the situation raised in this hypothetical.

This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations.

ABA Model Rule 4.3 cmt. [2] (emphases added).

The Restatement takes essentially the same approach.

In the course of representing a client and dealing with a nonclient who is not represented by a lawyer:

(1) the lawyer may not mislead the nonclient, to the prejudice of the nonclient, concerning the identity and interests of the person the lawyer represents; and

(2) when the lawyer knows or reasonably should know that the unrepresented nonclient misunderstands the lawyer's role in the matter, the lawyer must make reasonable efforts to correct the misunderstanding when failure to do so would materially prejudice the nonclient.

Restatement (Third) of Law Governing Lawyers § 103 (2000).

A comment covers this scenario.

In a transaction in which only one of the parties is represented, that person is entitled to the benefits of having a lawyer (see Comment b). The lawyer may negotiate the terms of a transaction with the unrepresented nonclient and prepare transaction documents that require the signature of that party. The lawyer may advance the lawful interests of the lawyer's client but may not mislead the opposing party as to the lawyer's role. See also § 116, Comment d (lawyer has no obligation to inform unrepresented nonclient witness of privilege to refuse to testify or to answer questions that may incriminate).

Formerly, a lawyer-code rule prohibited a lawyer from giving "legal advice" to an unrepresented nonclient. That

restriction has now been omitted from most lawyer codes in recognition of the implicit representations that a lawyer necessarily makes in such functions as providing transaction documents to an unrepresented nonclient for signature, seeking originals or copies of documents and other information from the nonclient, and describing the legal effect of actions taken or requested.

Restatement (Third) of Law Governing Lawyers § 103 cmt. d (2000).

Most states take essentially the same approach.

For instance, Illinois follows the ABA principle, but without indicating what the lawyer can and cannot do for the unrepresented person.

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Illinois Rule 4.3.¹

¹ See Illinois LEO 99-07 (11/99) ("A lawyer for a lender has an obligation to correct a home loan applicant's misunderstanding that the lawyer also represents the applicant in the home financing transaction if the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter."); Illinois LEO 98-06 (1/99) ("a lawyer for one spouse in a divorce may not give legal advice to an unrepresented spouse in the case on the effect or implications of the divorce or documents generated by it, nor may the lawyer imply to the unrepresented spouse that the lawyer is disinterested in the matter"); Illinois LEO 93-14 (3/94) ("Even when communicating with an unrepresented party, an attorney is subject to certain restrictions. An attorney may communicate with an unrepresented party provided that the attorney does not give any advice to the party or foster the unwarranted assumption that the attorney is a 'disinterested' party."); Illinois LEO 88-03 (8/88) ("It is improper for a lawyer for petitioning spouse to give legal advice to the respondent spouse who may be unrepresented in a dissolution of marriage as to legal implications of unrepresented respondent's participation, especially where such advice is misleading and tends to create the impression that the petitioner's lawyer is disinterested and will protect the interests of the unrepresented respondent."); Illinois LEO 86-11 (1/87) ("[A]n attorney for one spouse may properly draft an appearance for the signature of an unrepresented spouse in a dissolution of marriage case and submit it to that unrepresented spouse as long as the attorney does not give any advice to that spouse of the effect of signing and filing the appearance. If the unrepresented spouse returns the signed appearance to the attorney representing the other spouse, the attorney may file that appearance with the court, again as long as no advice is given to the unrepresented spouse as to the effect of this filing. The opinions indicate there is no per se violation in drafting an appearance for signature by an unrepresented party as long as no advice is given as to the effect of signing the appearance. It should be noted, however, that it will be difficult for an attorney to prove that no advice was given with respect to the preparation and filing of the appearance if the contrary

Virginia essentially follows the ABA approach, but it splits the rule into two parts.

- (a) In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.
- (b) A lawyer shall not give advice to a person who is not represented by a lawyer, other than the advice to secure counsel, if the interests of such person are or have a reasonable possibility of being in conflict with the interest of the client.

Virginia Rule 4.3. Virginia legal ethics opinions provide further analysis.²

position is later asserted by the unrepresented party. If the client spouse insists that the attorney draft and submit on [sic] appearance to the unrepresented spouse, the potential vulnerability of any subsequent judgment to attack should be discussed in advance with the client spouse").

² Virginia LEO 1436 (11/1/91) (a lawyer representing a lender who sends documents to the borrower for signature should advise the borrower that the lawyer is representing the lender; because the lawyer should not give any legal advice to non-clients, the lawyer is not required to advise the borrower of the opportunity to purchase title insurance; if the lawyer is to represent the borrower and lender, the lawyer must advise the borrower (and obtain the borrower's consent) if the lawyer serves on the lender's board of directors; if the lawyer represents both the borrower and lender, the lawyer should advise the borrower about the availability of title insurance); Virginia LEO 1401 (3/12/91) (a lawyer for a buyer in a real estate transaction asked that the seller execute a power of attorney authorizing the lawyer to sign necessary documents; such a request would be improper if the seller was represented, and would be proper if the seller was unrepresented only if there was full disclosure of the lawyer's adversarial role and the seller's right to hire separate counsel); Virginia LEO 1344 (5/31/90) (an insurance carrier's lawyer may prepare settlement documents to be executed by a decedent's personal representative, but must include with the papers a description of the nature of the lawyer's work and the fact that the lawyer had advised the unrepresented personal representative to seek independent counsel); Virginia LEO 890 (8/1/87) (a lawyer may obtain an endorsement on a consent order from an unrepresented party in a divorce matter as long as the lawyer advises the party to secure counsel and that the lawyer represents a party with adverse interests); Virginia LEO 876 (2/2/87) (a lawyer may prepare a separation agreement for an unrepresented party in a domestic dispute if the lawyer advises the party that the lawyer represents the client (who has adverse interests), and advises the party to obtain counsel); Virginia LEO 689 (5/10/85) (a lawyer in a divorce case may prepare an acceptance of service form to be signed by an unrepresented party as long as the signature involves an administrative function only); Virginia LEO 644 (1/16/85) (a lawyer may prepare the acceptance of service of process notice for an adverse party as long as the document is limited to a simple administrative matter). Interestingly, a specific Virginia statute overruled two more limiting legal ethics opinions. See Virginia LEO 1112 (9/1/88) (LEOs 535 and 669 (regarding a lawyer preparing a waiver of notice for an unrepresented party in a domestic relations matter) are overruled by Va. Code § 20-99.1:1).

Some states limit the type of pleading that a lawyer may present for endorsement by an unrepresented adversary.

For instance, the North Carolina Bar has indicated that a lawyer representing one spouse may not send an unrepresented adversary a pleading for endorsement that admits the important allegations against him or her. North Carolina LEO 2002-6 (1/24/03) ("The Ethics Committee has been asked, on a number of occasions, whether a lawyer representing one spouse in an amiable marital dissolution may prepare for the other, unrepresented, spouse simple responsive pleadings that admit the allegations of the complaint. It is argued that, if this practice is allowed, the expense of additional legal counsel will be avoided and the proceedings will be expedited. The committee has consistently held, however, that a lawyer representing the plaintiff may not send a form answer to the defendant that admits the allegations of the divorce complaint nor may the lawyer send the defendant an 'acceptance of service and waiver' form waiving the defendant's right to answer the complaint. . . . The basis for these opinions is the prohibition on giving legal advice to a person who is not represented by counsel." (emphasis added)).

Best Answer

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

Multiple Representations -- Special Rules for Aggregate Settlements

Hypothetical 13

You have built a lucrative practice representing homeowners in lawsuits against pest control companies for negligent termite treatment of new homes. In some cases, you represent incorporated neighborhood associations, and in other situations you represent groups of homeowners who have jointly hired you to pursue their claims. In recent years, you have found that defendants generally like to "wrap up" litigation by paying one lump sum to settle an entire lawsuit. To ease your administrative burden, your standard retainer agreement calls for your clients to agree in advance to decide whether or not to take such a "lump sum" settlement offer by majority vote of the homeowners involved.

- (a) Is such an approach ethical in cases where you represent an incorporated neighborhood association?

YES

- (b) Is such an approach ethical in cases where you represent a group of individual homeowners?

NO

Analysis

(a) If a lawyer represents a corporate entity, the lawyer must follow the directions of the corporation's duly represented board and management. If your corporate client has set up a procedure for deciding whether to accept an offer, you may follow the results of that process.

(b) Most states' ethics rules contain a specific provision covering what are called "aggregate settlements." These are settlements that are contingent on all of the clients accepting the settlement -- each of the lawyer's clients may essentially "veto" the settlement by refusing to accept it.

ABA Rule 1.8(g) prohibits lawyers from entering into such aggregate settlements unless each client approves the settlement, after full disclosure of what all of the other clients are receiving in the settlement.

A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

ABA Rule 1.8(g).

The ABA recently provided some explanation of how the aggregate settlement rule works. In ABA LEO 438 (2/10/06), the ABA noted that such settlements are not defined in the Model Rules, but do not include certified class actions or derivative actions.

The ABA's description of the type of arrangements subject to the aggregate settlement rule highlights the vagueness of the concepts and the possible breadth of the rule. For example, aggregate settlements occur "when two or more clients who are represented by the same lawyer together resolve their claims or defenses or pleas," even if all of the lawyer's clients do not face criminal charges, have the same claims or defenses, or "participate in the matter's resolution." ABA LEO 438 (2/10/06).

Aggregate settlements may arise in connection with a joint representation in the same matter, but "[t]hey also may arise in separate cases" -- as with "claims for breach of warranties against a home builder brought by several home purchasers represented by the same lawyer, even though each claim is filed as a separate law suit and arises with respect to a different home, a different breach, and even a different subdivision." Id.

Similarly, the ABA explained how settlement offers can trigger the aggregate settlement rule. For instance, "a settlement offer may consist of a sum of money offered to or demanded by multiple clients with or without specifying the amount to be paid to or by each client." Id. The aggregate settlement rule can also become an issue when "a claimant makes an offer to settle a claim for damages with two or more defendants," or when "a prosecutor accepts pleas from two or more criminal defendants as part of one agreement." Thus, a lawyer's adversary has the perverse power to trigger the aggregate settlement rule in the way that the adversary frames a settlement offer.

As the ABA explained it, Model Rule 1.8(g) "deters lawyers from favoring one client over another in settlement negotiations by requiring that lawyers reveal to all clients information relevant to the proposed settlement." Id.

The ABA cited several decisions confirming that lawyers may not enter into agreements "that allow for a settlement based upon a 'majority vote' of the clients" the lawyer represents. The ABA explained that "[b]est practices would include the details of the necessary disclosures in . . . writings signed by the clients." Information required to be disclosed under ABA Model Rule 1.8(g) might be protected by Model Rule 1.6, which requires the clients' consent for disclosure to the other clients. The ABA also explained that

[t]he best practice would be to obtain this consent at the outset of representation if possible, or at least to alert the clients that disclosure of confidential information might be necessary in order to effectuate an aggregate settlement or aggregated agreement.

Id. ABA LEO 438 (2/10/06). Lawyers should also advise their clients "of the risk that if the offer or demand requires the consent of all commonly-represented litigants, the

failure of one or a few members of the group to consent to the settlement may result in the withdrawal of the offer or demand." Id.

State bars generally follow this approach. See, e.g., Virginia LEO 616 (11/13/84) (a lawyer representing several insureds may not arrange an aggregate settlement to which one of the clients objects).

Courts agree that because each client must accept the settlement after full disclosure, this rule prohibits lawyers from having their clients agree in advance to be bound by a "majority vote" of all of the clients at the time they receive a settlement offer. Hayes v. Eagle-Picher Indus., Inc., 513 F.2d 892 (10th Cir. 1975) (a lawyer cannot settle a case for multiple plaintiffs by majority vote).

In some situations, there might be some debate about whether a settlement for multiple clients amounts to an "aggregate settlement" governed by the rule. For instance, in Arthurlee v. Tuboscope Vetco International, Inc., 274 S.W. 3d 111 (Tex. App. 2008), petition for review filed, No. 08-0990 (Tex. Nov. 25, 2008), a plaintiff's lawyer represented 176 plaintiffs alleging injury caused by exposure to silica while working for one of the defendants. The lawyer notified all of his clients of an upcoming mediation, and urged all of them to attend the mediation. Eventually the settlement discussion settled on a total figure for all of the plaintiffs.

After several days of fruitless mediation about which factors should be used to value the plaintiffs' claims, they switched gears and decided to talk about a total amount of money needed to resolve all the claims at one time. Appellees' [defendants] attorney agreed that so long as the individual demands did not exceed \$45 million, he would recommend to his clients and their many insurance carriers to settle the claims, but only if 95% of Smith's clients agreed. They signed a Rule 11 agreement memorializing their understanding, although the Rule 11 agreement did not

include the \$45 million figure -- or any sum of money -- for settling Smith's inventory of claims.

274 S.W.3d at 116 (footnote omitted). The plaintiffs' lawyer then sent each of his clients a letter with a calculated amount of that client's settlement using a matrix that the lawyer had devised.

The letters were substantially the same, except for the settlement amounts, which, for the appellants, ranged from \$209,000 to \$662,000, and which were characterized as a "final offer" made by defendants. All but one or two plaintiffs of the 178 or 179 pending claims agreed to settle.

Id. (footnote omitted).

Approximately three years after signing their settlement agreements, several of the plaintiffs later fired their lawyer and hired another lawyer. Among other things, they claimed that their first lawyer had "fraudulently induced them to enter into an impermissible aggregate settlement." Id. at 117. The plaintiffs sought to void their original settlements as improper under Texas's aggregate settlement rule.

In denying plaintiffs' claims, the court held that

[a]n aggregate settlement occurs when an attorney, who represents two or more clients, settles the entire case on behalf of those clients without individual negotiations on behalf of any one client.

Id. at 120. The court found that plaintiffs had not been involved in an aggregate settlement governed by the Texas rule.

We find no authority -- and they do not direct us to any -- that proscribes the manner in which negotiations must occur or that requires haggling or horse-trading between the parties. After the mediation, appellants made settlement demands on appellees, based on factors specific to each of their claims, and appellees accepted their demands and paid them. This is the essence of negotiation.

Thus, there were individual negotiations on behalf of appellants. The Rule 11 agreement did not actually settle any case, let alone all of the cases as an aggregate settlement. No amount of money was stated in the Rule 11 agreement, and, indeed, the Rule 11 agreement did not bind the defendants to a lump sum to be paid to the plaintiffs' lawyers and divided among his clients.

Id. at 121. The court also noted that "each appellant's case was settled individually, after a lengthy negotiation process involving individual offers and acceptances. Shank [counsel for defendants] explained that each settlement had to be negotiated individually in order to determine issues of insurance coverage and allocation." Id.

Interestingly, a dissenting judge vehemently disagreed with the majority, and contended that the plaintiff's first lawyer had violated the aggregate settlement rule.

It is undisputed that, in this case, appellants' counsel violated Rule 1.08(f). The plaintiffs' attorneys not only failed to disclose to their clients, including appellants, "the existence and nature of all the claims or pleas" involved in the settlement and "the nature and extent of the participation of each person in the settlement," they also actively misrepresented that the settlement was not an aggregate settlement when it was, that their claims had been individually negotiated when they had not been, and that the number of claimants was smaller than in fact it was. . . . Therefore, appellants' counsel *not only violated Rule 1.08(f) and breached their fiduciary duties to their clients, they also committed fraud.*

Id. at 126-27 (Keyes, J. dissenting) (emphasis in italics added). The dissenter contended that all the settlements were part of a single \$45,000,000 amount discussed during the mediation.

The majority's factual finding that the plaintiffs' claims were individually negotiated is belied by the record, which plainly shows that all claims were negotiated as part of a single global settlement of the claims of all plaintiffs represented by Smith for a fixed sum of money and apportioned according to a matrix agreed upon by counsel for both plaintiffs and

defendants. Its conclusion that a single global settlement of the claims of multiple individual plaintiffs that satisfies these criteria is not an aggregate settlement is contradictory to the definition of an aggregate settlement

Id. at 129. The dissenter also thought that the defendants had participated in the fraud.

[T]he settling defendants withheld the information that each plaintiff's settlement was part of a \$45 million aggregate settlement, and they falsely represented to each plaintiff in documents they drafted that "Defendant's payment of the settlement amounts stated herein are independent of its agreement to make payments to other plaintiffs in the same or related lawsuits"; that "Plaintiff and Defendants have negotiated this settlement based on the individual merits of the Plaintiff's claims"; and that "Defendants have not made any aggregate offer and this settlement is not part of any aggregate settlement."

Id. at 130.

Best Answer

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

Disclosure During Settlement Negotiations

Hypothetical 14

You are engaged in furious settlement negotiations, trying to resolve a case over the weekend so you can avoid a Monday morning trial. You think that disclosing some protected documents might help resolve the case.

- (a) Will disclosing privileged communications during the settlement negotiations waive that protection?

YES (PROBABLY)

- (b) Will disclosing protected work product documents during the settlement negotiations waive that protection?

MAYBE

Analysis

Courts' application of privilege and work product waiver issues in the context of settlement negotiations reflects the tension between traditional waiver principles and the law's encouragement of negotiated settlements.

- (a) Given the fragility of the attorney-client privilege, it should come as no surprise that 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) The work product doctrine is not as fragile as the attorney-client privilege.

Disclosing work product to a third party 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.⁸ 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.⁹

Courts have held that disclosure to the following third parties did not waive the work product protection: advertising agency;¹⁰ public relations consultant;¹¹ independent accountant;¹² accountant acting as consultant;¹³ investment banker;¹⁴ corporate employee outside the control group (which would otherwise cause a waiver in Illinois);¹⁵ daughter (by Martha Stewart).¹⁶

⁸ BASF Aktiengesellschaft v. Reilly Indus., Inc., 224 F.R.D. 438, 443 (S.D. Ind. 2004).

⁹ 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).

¹⁰ 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).

¹¹ 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).

¹² Gramm v. Horsehead Indus., Inc., No. 87 CIV. 5122 (MJL), 1990 WL 142404, at *5-6 (S.D.N.Y. Jan. 25, 1990).

¹³ Samuels v. Mitchell, 155 F.R.D. 195, 201 (N.D. Cal. 1994).

¹⁴ 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).

¹⁵ 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).

¹⁶ United States v. Stewart, 287 F. Supp. 2d 461 (S.D.N.Y. 2003).

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.¹⁷

Some courts find that disclosing work product during settlement negotiations causes a waiver of that protection -- noting that the negotiating parties clearly are in an adversarial position.¹⁸

¹⁷ 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).

¹⁸ 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

On the other hand, some courts find that such disclosure does not cause a waiver.¹⁹

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

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.")

¹⁹ *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 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).

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

Disclosure of Facts

Hypothetical 15

You represent a Fortune 50 company facing a government investigation and possible indictment. You think that you might be able to settle the government's claim against your client, but you wonder about the effect of disclosures that you and your client are considering making to the government during upcoming settlement negotiations.

- (a) Are you likely to waive the attorney-client privilege by sharing privileged communications with the government during settlement negotiations?

YES

- (b) Are you likely to waive the work product doctrine protection by sharing protected communications with the government during settlement negotiations?

YES

- (c) Are you likely to waive either the attorney-client privilege or the work product doctrine protection by sharing the fruits of your internal corporate investigation with the government during settlement negotiations?

NO (PROBABLY)

Analysis

Because the government always is a third party, and nearly always is a private company's adversary, disclosure of protected communications or material to the government nearly always waives the attorney-client and the work product doctrine protections. However, this does not mean that companies may not provide some information when the government asks about the results of any internal corporate investigations.

(a) Nearly every court finds that disclosing privileged communications to the government waives that protection.¹ A recent Tenth Circuit decision continued this trend.²

A very small number of courts hold out hope that a corporation can disclose privileged communications to the government without causing a waiver, as long as there is a confidentiality agreement.³

(b) Although the work product doctrine is not as fragile as the attorney-client privilege, most courts recognize the inherently adversarial relationship between the government and private companies.

Most courts have held that companies always waive the work product protection by disclosing work product to the government.⁴ The most recent circuit court decision found that a company disclosing work product to the government waived that protection (although it affirmed the lower courts ruling that allowed redaction of opinion work product before ordering disclosure to a private plaintiff).⁵ One recent decision from the Southern District of New York firmly held that disclosing work product to the government waived that protection.⁶

As a theoretical matter, some courts hold out the possibility that disclosing work product to the government does not trigger a waiver. For instance, if a private party has

¹ Fru-Con Constr. Corp. v. Sacramento Mun. Util. Dist., Civ. No. S-05-0583 LKK GGH, 2006 U.S. Dist. LEXIS 59066, at *10 (E.D. Cal. Aug. 7, 2006).

² In re Qwest Commc'ns Int'l Inc., 450 F.3d 1179 (10th Cir.), cert. denied, 549 U.S. 1031 (2006).

³ Salomon Bros. Treasury Litig. v. Steinhardt Partners, L.P. (In re Steinhardt Partners, L.P.), 9 F.3d 230, 236 (2d Cir. 1993).

⁴ SEC v. Brady, 238 F.R.D. 429, 444 (N.D. Tex. 2006).

⁵ In re Qwest Commc'ns Int'l Inc., 450 F.3d at 1192.

⁶ In re Initial Pub. Offering Sec. Litig., 249 F.R.D. 457 (S.D.N.Y. 2008).

an interest allied with the government's interest, disclosing work product to the government may not waive the work product protection.⁷ Only a few cases have held that such disclosure does not cause a waiver,⁸ but it is too early to tell if these cases are an aberration or represent a new trend.

Some courts have held that disclosing work product to the government waives the protection applicable to fact work product, but not opinion work product.⁹

Given this uncertainty, companies should never assume that they can disclose work product to the government without waiving that protection.

(c) A waiver occurs only upon disclosure of privileged communications. Disclosing non-privileged communications or historical facts should not cause a waiver.¹⁰

It can frequently be very difficult to distinguish between disclosure of non-privileged facts about a privileged communication (which does not cause a waiver) and disclosure of the privileged communication itself (which causes a waiver). For instance, one court analyzed the waiver effect of statements in a client's e-mail to a third party: (1) "after consultation with counsel, we are willing to provide the detailed information"; and (2) "the proposed solution regarding the meeting . . . would not cure the issue that

⁷ In re Visa Check/Mastermoney Antitrust Litig., 190 F.R.D. 309, 314 (E.D.N.Y. 2000).

⁸ Silverman v. Hidden Villa Ranch (In re Suprema Specialties, Inc.), Ch. 7 Case No. 02-10823 (JMP), Adv. No. 04-01078 (JMP), 2007 Bankr. LEXIS 2304, at *20 (Bankr. S.D.N.Y. July 2, 2007) (unpublished opinion); Lawrence E. Jaffee Pension Plan v. Household Int'l, Inc., 244 F.R.D. 412, 433 (N.D. Ill. 2006); In re Natural Gas Commodity Litig., 232 F.R.D. 208 (S.D.N.Y. 2005); Maruzen Co. v. HSBC USA, Inc., Nos. 00 Civ. 1079 & 1512 (RO), 2002 U.S. Dist. LEXIS 13288 (S.D.N.Y. July 18, 2002).

⁹ In re Martin Marietta Corp., 856 F.2d 619, 625 (4th Cir. 1988), cert. denied, 490 U.S. 1011 (1989).

¹⁰ Kovacs v. Hershey Co., Civ. A. No. 04-cv-01881-WYD-BNB, 2006 U.S. Dist. LEXIS 48138, at *36 (D. Colo. July 13, 2006), aff'd in part, rev'd in part and remanded on other grounds, 2006 U.S. Dist. LEXIS 69342 (D. Colo. Sept. 26, 2006).

counsel has, which is that any meeting, which necessarily involves reactions and feedback, would taint our communications." Transocean Capital, Inc. v. Fortin, No. 2005-0955-BLS2, 2006 Mass. Super. LEXIS 504, at *5 (Mass. Super Ct. Oct. 20, 2006) (internal quotations omitted). The court held: (1) that the first sentence did not waive the privilege, because it merely stated that the client "had decide[d] to pursue a particular course after consultation with counsel"; but (2) that the second sentence described the lawyer's advice, and therefore waived the privilege. Id. at *12.

Although this concept makes sense, applying it can involve very subtle issues. For instance, one court explained that disclosure of a non-privileged fact can cause a waiver if another disclosure links that fact to a privileged communication.

Mere disclosure of the underlying fact would not waive the privilege or protection as to a communication containing that fact. But revealing that a communication contained that fact discloses the substance of the communication and, thus, waives the privilege.

LaSalle Bank N.A. v. Mobile Hotel Props., LLC, Civ. A. No. 03-2225 SECTION: "E" Div. 3, 2004 U.S. Dist. LEXIS 10185, at *6 (E.D. La. June 3, 2004) (footnote omitted), vacated, recalled on other grounds, 2004 U.S. Dist. LEXIS 17996 (E.D. La. Sept. 7, 2004). Thus, analyzing the waiver implications of revealing non-privileged communications might require an examination of other disclosures to see if such a link-up occurred.

Corporations should be able to rely on this legal principle to avoid waiving privilege and work product protection for communications occurring during an internal corporate investigation by disclosing the facts uncovered during that investigation.

One court explained this concept as follows:

[D]isclosure of the time, manner, purpose, and identities of those conducting the investigation, as distinct from the communications themselves, would not be privileged matter. The privilege protects communications; it does not protect facts related to a communication, such as the fact that a communication took place, or the time, date, and participants in the communication; it does not prevent disclosure of underlying facts which may be referred to within a qualifying communication. . . . It is not a violation of the privilege for a participant in an investigation to divulge the existence of documents or other evidence that were uncovered during the investigation. . . . Relevant case law makes it clear that mere disclosure of the fact that a communication between client and attorney occurred does not amount to disclosure of the specific content of that communication, and as such does not necessarily constitute a waiver of the privilege. . . .

Thus, the Court concludes that Plaintiff has not established that disclosure of the time, manner, purpose, and identities of those conducting the investigation, and the limited findings of the investigation at deposition, constituted a waiver

AMCO Ins. Co. v. Madera Quality Nut LLC, No. 1:04-cv-06456-SMS, 2006 U.S. Dist. LEXIS 21205, at *32-34 (E.D. Cal. Apr. 10, 2006) (emphases added).

In another decision dealing with corporate investigations, a court held that a company did not waive its attorney-client privilege by releasing a two-page press release summarizing the corporate investigation's "findings" and "conclusions." As the court explained, the company did not release a "significant part" of the investigation report, "it merely released the findings of the report." In re Dayco Corp. Derivative Sec. Litig., 99 F.R.D. 616, 619 (S.D. Ohio 1983).

Fortunately, most courts recognize and apply this common-sense principle. United States v. Castillo, Nos. CV-08-0168-PHX-GMS (MEA) & CR-05-0281-PHX-GMS, 2008 U.S. Dist. LEXIS 84084 (D. Ariz. Oct. 15, 2008) (finding that a criminal defendant's lawyer had not waived the privilege by providing facts to the government); LeFevre v.

Cain, Civ. A. No. 05-6288 SECTION: "J"(6), 2008 U.S. Dist. LEXIS 19976 (E.D. La. Mar. 14 2008); GSI Group, Inc. v. Sukup Mfg. Co., No. 05-3011, 2007 U.S. Dist. LEXIS 93741 (C.D. Ill. Dec. 21, 2007) (analyzing privilege issues in a patent case; finding that plaintiff GSI had not waived the attorney-client privilege by providing information to the USPTO, because GSI had not disclosed the substance of any privileged communications to the government); In re Tyco Int'l Ltd., Case No. 02-md-1335-PB, 2007 U.S. Dist. LEXIS 20218, at *13 & n.3 (D.N.H. Mar. 7, 2007); Lawrence E. Jaffee Pension Plan v. Household Int'l, Inc., 244 F.R.D. 412, 429 (N.D. Ill. 2006); United States ex rel. Fago v. M & T Mortgage Corp., Civ. A. No. 03-1406 (GK/JMF), 2006 U.S. Dist. LEXIS 61337 (D.D.C. Aug. 30, 2006); AMCO Ins. Co. v. Madera Quality Nut LLC, No. 1:04-cv-06456-SMS, 2006 U.S. Dist. LEXIS 21205, at *32 (E.D. Cal. Apr. 10, 2006).

Unfortunately, some courts use sloppy language, which can cause confusion.

- One court held that the work product doctrine protected Davis Polk's internal investigation report to a client's audit committee, but that Davis Polk waived the work product protection when it "presented the conclusions of its investigation to the SEC Staff." The court ordered Davis Polk and the client to provide securities plaintiffs with Davis Polk's background material generated during its internal investigation. The court did not explain whether the "conclusions" Davis Polk provided to the SEC consisted of historical facts (which should have not caused a waiver) or the substance of protected communications (which normally would cause a waiver).¹¹
- Another court adopted a Special Master's Report concluding that Intel must produce witness interview memoranda prepared by Weil Gotshal during its investigation of Intel's failure to produce responsive electronic documents -- holding that a privilege waiver results "with equal force to the voluntary disclosure of the verbatim privileged communication itself, a full report

¹¹ In re Stone Energy Corp., Civ. A. No. 05-2088 (Lead), 2008 U.S. Dist. LEXIS 94756 (W.D. La. Nov. 4, 2008).

containing references to same, or to a memorandum or summary of the privileged communication."¹²

- In another case, Brocade Communications hired Morrison & Foerster and Wilson Sonsini to conduct an internal corporate investigation of its stock-option grants. Both law firms provided oral briefings to the SEC and DOJ. After the United States indicted Brocade's former CEO, he sought access to the law firms' background material. The court ultimately found that the law firms had waived both the privilege and the work product protection -- but the court's troubling imprecision casts doubt on its conclusions. At various points, the court explained that the two law firms waived both protections when they disclosed the materials' "contents," "the substance of their investigative interviews," and "information contained in any of the written material." However, elsewhere, the court noted that the law firms had "shared their confidential communications and work product" with the government.¹³ The opinion nowhere deals with the distinction between disclosing: (1) historical facts uncovered and compiled during the investigation; and (2) communications occurring during the investigation.

This ambiguous language complicates what should be a fairly easy principle to apply -- corporations do not waive the attorney-client privilege or the work product protection by disclosing historical facts to the government, an outside auditor, or any other third party.

On reflection, the majority view is the only position that makes any sense. Telling the government that an employee traveled to Brazil in 2003, or transferred money from one account to another account, should not waive the attorney-client privilege or the work product doctrine that might protect the communications or the documents generated during the investigation that uncovered those historical facts. If publicly disclosing historical facts waived the protection, a litigant whose lawyer just gave an opening statement would have to turn over all the lawyer's trial preparation materials.

¹² Advanced Micro Devices, Inc. v. Intel Corp. (In re Intel Corp. Microprocessor Antitrust Litig.), MDL No. 05-1717-JJF, 2008 WL 2310288, at *12 (D. Del. June 4, 2008).

¹³ United States v. Reyes, 239 F.R.D. 591, 602 & 604 (N.D. Cal. 2006).

Thus, corporations should feel safe in providing purely factual reports of historical events to the government without fear of waiving any protection.

This is not to say that the corporations can disclose the substance of protected communications with employees, or share their lawyer's conclusions about those historical facts. However, an entirely factual recitation to the government should not trigger a waiver.

In addition to the actual disclosure of privileged communications (which can cause an "express" waiver), lawyers must consider the other kind of waiver -- an "implied" waiver.

Disclosures of intrinsically unprotected historical facts might cause an implied waiver if the court determines that the client seeks an advantage by relying on the fact of the investigation, rather than on any specific privileged communications.

One court held that a company under investigation had impliedly waived the work product doctrine by relying on the fact of an otherwise privileged investigation report in an effort to avoid regulatory sanctions, essentially relying on privileged communications in what might be called the "court of public opinion."¹⁴

Similarly, in In re Royal Ahold N.V. Securities & ERISA Litigation, 230 F.R.D. 433, 437 (D. Md. 2005), the court found that Royal Ahold had waived the work product doctrine protection covering witness interview memoranda by disclosing "information obtained from the witness interviews" to (1) "the public in [Royal Ahold's] Form 20-F

¹⁴ In re Subpoena Duces Tecum Served on Wilkie Farr & Gallagher, No. M8-85 (JSM), 1997 WL 118369 (S.D.N.Y. Mar. 14, 1997).

filing with the SEC"; and (2) the plaintiffs by giving them some of the reports. The court explained

to the extent that Royal Ahold offensively has disclosed information pertaining to its internal investigation in order to improve its position with investors, financial institutions, and the regulatory agencies, it also implicitly has waived its right to assert work product privilege as to the underlying memoranda supporting its disclosures.

Id. (emphases added).

The court ordered Royal Ahold to produce all interview memoranda "containing factual information underlying the public disclosures, including the 20-F and the investigative reports provided to plaintiffs . . . unless a specific showing of opinion work product can be made to the court." Id. at 438.

This extreme example of an implied waiver places companies in a nearly untenable position. The court based its finding on the company's disclosure of "information," rather than the disclosure of any particular communications subject to the attorney-client privilege. What company does not disclose "information" in an effort to "improve its position with investors"? It is difficult to imagine that such action could result in an implied waiver of the work product doctrine. Fortunately, the court took the sting out of its broad holding by allowing the redaction of opinion work product. Still, finding an implied waiver based on companies disclosing information in securities filings and in the "court of public opinion" represents the far reach of the implied waiver doctrine.

On the other hand, it is easy to see in an extreme situation how a company could impliedly waive the privilege by pursuing a concerted public relations campaign that explicitly relies on legal advice. For instance, a company might run television advertisements saying: "Please write your Senator to support legislation exempting us

from government oversight -- we hired the best lawyer in America to investigate our practices, and that lawyer found no problem." In a more normal situation, however, a company should not be found to have impliedly waived the privilege simply by reporting that it hired a lawyer who was conducting an investigation, even though such a public statement might generate a slightly more favorable public opinion of the company.

Given both the lack of case law and the vagaries of the implied waiver's application to non-litigation statements, companies should be wary of issuing press releases or other public statements hoping to capitalize on a lawyer's involvement.

Best Answer

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

Affirmative Statements of Fact

Hypothetical 16

You are preparing for settlement negotiations in an important case, and you have several questions about the type of statements that you may ethically make.

- (a) If your client's medical bills total \$35,000, may you tell the other side that the medical bills actually total \$50,000?

NO

- (b) May you tell the other side that another defendant has agreed to a stipulated judgment of \$50,000 (which is literally true, although you also agreed with the other defendant that it can satisfy that judgment by paying only \$100)?

NO (PROBABLY)

Analysis

The analysis for this hypothetical begins with ABA Model Rule 4.1.

In 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. 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].

Academics have debated the essential nature of settlement negotiations. A thoughtful article published by the American Bar Foundation bluntly states that all settlement negotiations involve deception.

On the one hand the negotiator must be fair and truthful; on the other he must mislead his opponent. Like the poker player, a negotiator hopes that his opponent will overestimate the value of his hand. Like the poker player, in a variety of ways he must facilitate his opponent's inaccurate assessment. The critical difference between those who are successful negotiators and those who are not lies in this capacity both to mislead and not to be misled.

James J. White, Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation, 1980 Am. B. Found. Res. J. 926, 927 (1980).

Some authorities take what only can be described as a "goofy" approach to how lawyers should approach settlement negotiations.

In my opinion, the solution to finding a more truthful course in negotiation may lie in the practice of mindfulness.

Mindfulness is an ancient Buddhist practice which has profound relevance for our present-day lives. This relevance has nothing to do with Buddhism per se or with becoming a Buddhist, but it has everything to do with waking up and living in harmony with oneself and with the world. It has to do with examining who we are, with questioning our view of the world and our place in it, and with cultivating some appreciation for the fullness of each moment we are alive. Most of all, it has to do with being in touch.

. . . To the extent that mindfulness frees the lawyer from limiting mindsets that tend to obfuscate opportunities to

create value, it provides the lawyer with the opportunity to find greater truth and harmony within herself and, in turn, within her negotiation practices.

Van M. Pounds, Promoting Truthfulness in Negotiation: A Mindful Approach, 40 Willamette L. Rev. 181, 183 (2004) (footnotes omitted).

(a) Lawyers clearly may not affirmatively misrepresent facts during settlement negotiations.

For instance, several courts have sanctioned lawyers for affirmatively misrepresenting the extent of insurance coverage. Slotkin v. Citizens Cas. Co., 614 F.2d 301 (2d Cir. 1979) (finding such deception actionable); In re McGrath, 468 N.Y.S.2d 349 (N.Y. App. Div. 1983) (suspending a lawyer for such misconduct).

The ABA has explained what type of statement amounts to a representation of fact that cannot be inaccurate.

An example of a false statement or material fact would be a lawyer representing an employer in labor negotiations stating to union lawyers that adding a particular employee benefit will cost the company an additional \$100 per employee, when the lawyer knows that it actually will cost only \$20 per employee. Similarly, it cannot be considered "posturing" for a lawyer representing a defendant to declare that documentary evidence will be submitted at trial in support of a defense when the lawyer knows that such documents do not exist or will be inadmissible. In the same vein, neither a prosecutor nor a criminal defense lawyer can tell the other party during a plea negotiation that they are aware of an eyewitness to the alleged crime when that is not the case.

ABA LEO 439 (4/12/06).

Surprisingly, California recognizes an absolute litigation privilege even for deceptive communications. Home Ins. Co. v. Zurich Ins. Co., 116 Cal. Rptr. 2d 583,

(Cal. Ct. App. 2002), review denied, No. S105332, 2002 Cal. LEXIS 3599 (Cal. May 22, 2002) (unpublished opinion).

Under Civil Code section 47, subdivision (b), "A privileged publication or broadcast is one made: . . . (b) In any . . . judicial proceeding, . . ." "Despite its explicit wording, the privilege described by section 47(b) has been given expansive application by California courts. Although originally enacted with reference to defamation actions alone . . . , the privilege has been extended to any communication, whether or not it is a publication, and to all torts other than malicious prosecution. . . . Thus, the privilege has been applied to suits for fraud . . . , negligence and negligent misrepresentation . . . , and interference with contract"

Id. at 587. Although the court acknowledged that "[t]here is an exception to the litigation privilege for concealing the existence of insurance policies," the court also found that the exception did not apply because "[t]he alleged misrepresentation did not conceal the existence of any insurance policy; it concealed only the terms of the policy." Id. at 588. Similarly, the court acknowledged that "[t]he litigation privilege does not apply to an equitable action to set aside a settlement agreement for extrinsic fraud," but found that the extrinsic fraud exception did not apply either. Id. at 590. The court therefore affirmed dismissal of a complaint based on a litigant's misrepresentation of an insurance policy.

Home Insurance Company appeals from a judgment of dismissal in favor of Zurich Insurance Company after a demurrer to its first amended complaint for fraud, declaratory relief, and subrogation or indemnity was granted without leave to amend. Home's action is premised on an alleged misrepresentation by counsel for Zurich's predecessor. Counsel allegedly misrepresented the available insurance policy limits to induce settlement of a lawsuit. Since any such statement is absolutely privileged under the litigation privilege of Civil Code section 47, subdivision (b), it will not support a direct fraud action for damages. In addition, such

a misrepresentation constitutes intrinsic, not extrinsic, fraud and provides no basis for equitable relief. We affirm the judgment.

Id. at 585.

(b) It can be much more difficult to analyze the ethical propriety of statements that might mislead the other side, even if literally true.

For instance, the Restatement explains that

A statement can also be false because only partially true. If constrained from conveying specific information to a nonclient, for example due to confidentiality obligations to the lawyer's client, the lawyer must either make no representation or make a representation that is not false.

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

This hypothetical comes from a First Circuit case.

In Sheppard v. River Valley Fitness One, L.P., 428 F.3d 1 (1st Cir. 2005), the issue came to the lower court when the lawyer unsuccessfully resisted discovery of the true nature of the settlement he had negotiated with the other defendant. The lower court found that the lawyer had engaged in discovery misconduct, and issued an order assessing approximately \$6,500 in attorney's fees as sanctions. The First Circuit affirmed.

It is evident from the letter, read in its entirety, that Whittington wanted Sheppard to believe that the Aubin case had settled for a payment of \$50,000. True, Whittington did not say so explicitly. However, he managed to convey that impression anyway by selecting certain words and omitting certain details with studied precision. As the district court wrote: "The words used (and not used) by Whittington seem carefully chosen, and, if dissected and construed from a minimalist point of view, are defensible as literally true. But it is likewise plainly apparent that those words were meant to convey more." After all, the letter's purpose -- to encourage Sheppard to pay \$50,000 to settle her case -- depended

considerably on leaving the impression that Aubin, in a similar position, had already committed to doing the same thing.

We are not saying that Whittington had a general obligation to disclose the full terms of the Aubin settlement just by mentioning the fact of the settlement. However, Whittington did more than that. He chose to disclose the face dollar value of the judgment against Sheppard without disclosing the real dollar value of the settlement, in an attempt to induce Sheppard to settle on terms comparable to the Aubin judgment. Having made that choice, Whittington had an obligation not to misrepresent, affirmatively or by omission, the true value of the settlement. In other words, Whittington's overall conduct created the very circumstances under which his failure to act, i.e. his failure to inform Sheppard's counsel of the real dollar value of the settlement, became a misrepresentation. Therefore, the magistrate judge correctly concluded that Whittington's too-artful words "intentionally misled the plaintiffs into believing that Aubin did commit to a \$50,000 payment in order to intimidate them into a \$50,000 settlement in this case."

Id. at 10.

Although a different standard might apply to a witness's statements during trial or (especially) deposition testimony, it is worth noting courts' analyses of statements in that setting.

The United States Supreme Court dealt with a perjury case involving a literally true statement that clearly misled the questioner. In Bronston v. United States, 409 U.S. 352 (1973), a creditor's lawyer engaged in the following exchange with a bankrupt company's owner:

"Q. Do you have any bank accounts in Swiss banks, Mr. Bronston?

"A. No, sir.

"Q. Have you ever?

"A. The company had an account there for about six months, in Zurich.

"Q. Have you any nominees who have bank accounts in Swiss banks?

"A. No, Sir.

"Q. Have you ever?

"A. No, sir."

Id. at 354. As it turns out, Bronston had a personal bank account in Geneva, Switzerland for several years. The government argued that Bronston

answered the second question with literal truthfulness but unresponsively addressed his answer to the company's assets and not to his own -- thereby implying that he had no personal Swiss bank account at the relevant time.

Id. Bronston argued that his answer to the "have you ever" issue was whether Bronston's non-responsive but accurate answer amounted to a perjurious deception. The Supreme Court held that it did not, and reversed his perjury conviction.

Perhaps the most famous recent example of such linguistic fine-tuning was President Clinton's response to a question by a Deputy Independent Counsel at an August 17, 1998, deposition.

The Deputy Independent Counsel asked President Clinton why he had not corrected a statement that President Clinton's lawyer Robert Bennett had made in front of Federal District Court Judge Wright at an earlier deposition in the Paula Jones case. During that deposition, Robert Bennett had stated to Judge Wright that Ms. Lewinsky had filed an affidavit "saying that there is absolutely no sex of any kind in any manner,

shape or form, with President Clinton."¹ When the Deputy Independent Counsel later asked President Clinton at his deposition to confirm that Robert Bennett's statement was incorrect, President Clinton answered as follows:

It depends on what the meaning of the word "is" is. If the -- if he -- if "is" means is and never has been, that is not -- that is one thing. If it means that there is none, that was a completely true statement.

Videotaped Testimony of William Jefferson Clinton, Tr. 58, Aug. 17, 1998 (Office of the Independent Counsel).

The Deputy Independent Counsel later posed a question that put President Clinton's answer in perspective.

I just want to make sure I understand, Mr. President. Do you mean today that because you were not engaging in sexual activity with Ms. Lewinsky during the deposition that the statement that Mr. Bennett made might be literally true?

Id. at 60. President Clinton explained that his improper relationship with Ms. Lewinsky had ended several months earlier, so that "the present tense encompass[ed] many months." Id. at 61.

A later Georgetown Journal of Legal Ethics article quoted President Clinton's lawyer David Kendall explaining President Clinton's deposition answering technique.

"[H]e answered the questions narrowly, but truthfully. There was no perjury there. Was he trying to mislead the Paula Jones lawyers, absolutely." He added: "You ought not if asked your name to give your name and address. The trick is to try to answer questions and any lawyer will tell you this."

¹ Videotaped Testimony of William Jefferson Clinton, Tr. 57, Aug. 17, 1998 (Office of the Independent Counsel).

E. Cliff Martin & T. Karena Dees, The Truth about Truthfulness: The Proposed Commentary to Rule 4.1 of the *Model Rules of Professional Conduct*, 15 Geo. J. Legal Ethics 777, 780 (2001-2002) (emphasis added).

Best Answer

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

Affirmative Statements of Value or Intent

Hypothetical 17

You are preparing for settlement negotiations, 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 understood by nonclients to be making nonimpartial statements, in the same manner as would the lawyer's client.

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.")

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 a statement 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 an 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 **(A) YES**; the best answer to (b) is **(A) MAYBE YES**; the best answer to (c) is **MAYBE**.

1/15

Silence about the Law

Hypothetical 18

You are preparing to begin serious settlement negotiations with a plaintiff's lawyer, and you have several questions about whether you can stay silent in certain circumstances that you expect might arise.

May you remain silent if the plaintiff's lawyer tells you that he realizes that the plaintiff's available damages are capped at \$250,000 by a state statute -- which you know the legislature to have raised just last week to \$500,000?

MAYBE

Analysis

Several authorities have dealt with this issue.

For instance, the Rhode Island Bar has indicated that a lawyer does not have to disclose such changes in the law.

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.

Rhode Island LEO 94-40 (7/27/94) (emphasis added).

Courts have also dealt with a litigant's silence about the law. To be sure, the courts examining such conduct review a much broader set of considerations than a

bar's more narrow analysis of whether silence in this setting falls short of a lawyer's ethical duty.

The West Virginia Supreme Court invalidated a settlement agreement in a similar situation -- 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.

Hamilton v. Harper, 404 S.E.2d 540, 542 n.3 (W. Va. 1991). The court found that the settlement agreement was unenforceable for "failure of consideration," rather than concluding that the plaintiff's lawyer had engaged in fraudulent conduct. Id. at 544.

Best Answer

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

b 8/11

Silence about Facts

Hypothetical 19

You are preparing for settlement negotiations with several lawyers who have been less than diligent in pursuing their clients' cases. You expect your adversaries to make mistakes, and you wonder about your right to remain silent in certain circumstances.

- (a) May you remain silent if an adversary demands the full amount of what it understands to be your client's insurance coverage (based on statements that your client made to the adversary before hiring you, but which your client has since admitted to you were incorrect)?

NO

- (b) May you remain silent if an adversary demands the full amount of what it has determined to be the available insurance coverage -- when you know that there is an additional policy that the adversary could have discovered by checking available documents?

MAYBE

- (c) May you remain silent when an adversary makes a \$100,000 settlement demand -- which you take as a clear indication that the other side must not know that your client also has a \$1,000,000 umbrella liability policy?

MAYBE

Analysis

As in other settlement contexts, the analysis begins with ABA Model Rule 4.1.

In 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.

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).

This hypothetical deals with silence rather than affirmative statements. Not surprisingly, bars and courts often have a very difficult time determining whether a lawyer may ethically remain silent during settlement negotiations.

(a) The issue here is whether a lawyer must correct a client's misrepresentation to an adversary.

A lawyer must correct such misstatements. For instance, an ABA Section of Litigation article explained that a lawyer learning that her client had lied to the other side must correct the client's lie before consummating a settlement. Edward M. Waller, Jr., There are Limits: Ethical Issues in Settlement Negotiations, Litigation Ethics (ABA Section of Litig., Ethics & Professionalism Comm.), Summer 2005, 1.

(b) In this scenario, the adversary has investigated your client's insurance coverage on its own, and failed to discover an insurance policy. Neither you nor your client has misstated anything.

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

For instance, the New York County Bar has indicated 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.

The New York County Bar provided its review of lawyers' duties during negotiations.

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.

N.Y. Cnty. Law. Ass'n LEO 731 (9/1/03) (emphases added).

On the other hand, in Pennsylvania LEO 97-107, a settlement agreement was premised on a client's inability to convey a time share by deed. After negotiating the settlement agreement but before consummating the settlement, the client's lawyer learned that his client could convey the time share by deed. The bar held that the lawyer must disclose the fact that the parties' mutual premise was incorrect.

Based on my review of these rules, and most importantly that the opposing lawyer by letter to you has expressly stated that the settlement is conditioned on the inability of your client to convey the first time share unit, I am of the opinion that you do have the duty to apprise the opposing lawyer that your client may now be able to convey her interest in her time sharing unit to the second development company. Under the circumstances, to remain silent may be a representation of a material fact by the affirmation of a statement of another person that you know is false.

Pennsylvania LEO 97-107 (8/21/97) (emphasis added).

Courts also disagree about what a lawyer must do in this setting.

In Brown v. County of Genesee, 872 F.2d 169 (6th Cir. 1989), the Sixth Circuit reversed 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). The court first noted 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." Id. at 175. The circuit court then criticized 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)."

Id. (emphasis added) (citation omitted).

The Sixth Circuit decision noted 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.

Id. at 173. It is unclear whether the court would have reached a different conclusion if the county was certain rather than simply suspicious of the other side's misunderstanding.

More recently, a North Carolina court dealt with a plaintiff's effort to rescind his settlement with a boat manufacturer in an action for breach of warranty and other claims. After settling all of his claims against the boat manufacturer except for post-settlement work on the boat, the plaintiff discovered that while being shipped from the manufacturer's factory to North Carolina, the boat "had been involved in a collision with a tree." Hardin v. KCS Int'l, Inc., 682 S.E.2d 726, 731 (N.C. Ct. App. 2009).¹ Plaintiff sought to overturn his settlement, but the court rejected his effort.

¹ 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";

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.

Id. at 734. The court also explained 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.

Id. at 736.

On the other hand, at least one court had punished a lawyer who did not disclose the existence of an additional insurance policy when learning that the other side was not aware of its existence.

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 collusion. 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.").

- State ex rel. Neb. State Bar Ass'n v. Addison, 412 N.W.2d 855, 856 (Neb. 1987) (suspending for six months a lawyer who "became aware" at a meeting with a hospital that the hospital was unaware of a third liability insurance policy from which it might seek reimbursement for medical expenses that it paid to the lawyer's client; noting that "[r]ather than disclose the third policy, [the lawyer] negotiated for a release of the hospital's lien based upon [the hospital executive's] limited knowledge"; agreeing that the lawyer "had a duty to disclose . . . the material fact of the [insurance] policy").
- Slotkin v. Citizens Cas. Co. of New York, 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).

(c) In this scenario, the lawyer reasonably believes that the other side misunderstands the extent of insurance coverage (based on the size of its demand), but does not know for sure that the other side is unaware of the insurance coverage.

One would think that the lawyer's duty in this setting would be somewhat lower than the scenario in which the lawyer knows for sure that the other side is relying on inaccurate factual information.

The New York County Legal Ethics Opinion discussed above apparently would apply the general rule (not requiring disclosure) to a situation in which the adversary's settlement demand was so low that the adversary must not be aware of a large insurance policy.

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.

N.Y. Cnty. Law. Ass'n LEO 731 (9/1/03).

As explained above, in Brown v. County of Genessee, 872 F.2d 169 (6th Cir. 1989), the Sixth Circuit noted that the county's lawyer assumed (but did not know for sure) that a claimant's lawyer misunderstood an important fact. The Sixth Circuit did not indicate whether it would have reached a different conclusion in the case had the county's lawyer known for certain that the claimant's lawyer misunderstood the important fact.

Best Answer

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

b 8/11

Silence about Errors in the Settlement Agreement

Hypothetical 20

You and your client have been furiously negotiating settlement documents with the other side in a big case -- frequently working well into the early morning. Late last night you and the other side agreed to add a certain indemnity provision into the documents, but you realize this morning that the other side had not included the agreed-upon provision in the draft they sent you at 3 a.m.

(a) Must you tell the adversary of its oversight?

YES

(b) Must you advise your client of the adversary's oversight?

NO (PROBABLY)

Analysis

The issue here is whether you must disclose what amounts to a typographical error by the adversary.

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

The ABA dealt with this situation in ABA Informal Op. 86-1518 (2/9/86). The ABA ultimately 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).

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

- See, e.g., Alan Cooper, Lawyer reprimanded in case with divorce drafting error, Va. Law. Wkly., Nov. 15, 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 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."

Several courts have dealt with this situation. 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.

(b) In some ways, the more difficult question is whether the lawyer must advise her client of the adversary's mistake, and how the lawyer must or should react to the client's possible direction to keep the mistake secret.

In ABA Informal Op. 86-1518 (2/9/86), the ABA "conclude[d] that the error is appropriate for correction between the lawyers without client consultation." The ABA indicated that a lawyer's obligation under ABA Model Rule 1.4 to keep the client adequately informed does not require disclosure of a typographical error, because the client does not need to make an "informed decision" in connection with the matter. Id.

As the ABA explained it, "the decision on the contract has already been made by the client." Id. The ABA also pointed to a comment to ABA Model Rule 1.2 (now Comment [2]) indicating that lawyers generally have responsibility for "technical" matters involving the representation. Id.

"Assuming for purposes of discussion" that the error was protected by the general confidentiality rule in ABA Model Rule 1.6, the ABA concluded that the lawyer would have "implied authority" to disclose the other side's error, in order to complete the "commercial contract already agreed upon and left to the lawyers to memorialize." Id.

Interestingly, the ABA indicated that "[w]e do not here reach the issue of the lawyer's duty if the client wishes to exploit the error." Id. A lawyer presumably will never face this issue if she discloses the error to the adversary without disclosing it to her own client.

Best Answer

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

Silence about the Death of a Client or a Witness

Hypothetical 21

You represent the plaintiff in a personal injury case. After several months of intense negotiations, it appears that you are nearing a settlement agreement with the defendant. You just learned that your client and his brother (whom the defendant recently deposed, and whom you envisioned as a trial witness) were killed in a car accident.

- (a) Must you inform the defendant's lawyer that your client has died?

YES

- (b) Must you inform the defendant's lawyer that a witness has died?

MAYBE

Analysis

This hypothetical raises the issue of a litigant's duty to update the adversary on potentially material facts as they develop.

- (a) The ABA has explicitly indicated that a lawyer engaged in settlement discussions with an adversary must disclose his client's death to opposing counsel.

In ABA LEO 397 the ABA noted that a lawyer whose client has died begins acting on behalf of another principal (normally, the executor). The ABA explained that the presence of a new principal amounted to the type of material fact that a lawyer must disclose.

The Committee agrees with the . . . conclusion that counsel has a duty to disclose the death of her client to opposing counsel and to the court when counsel next communicates with either. The death of a client means that the lawyer, at least for the moment, no longer has a client and, if she does thereafter continue in the matter, it will be on behalf of a different client. We therefore conclude that a

failure to disclose that occurrence is tantamount to making a false statement of material fact within the meaning of Rule 4.1(a).6. (As noted above, Comment [1] to Rule 4 states that misrepresentations can "occur by failure to act.") Prior to the death, the lawyer acted on behalf of an unidentified client. When, however, the death occurs, the lawyer ceases to represent that identified client. Accordingly, any subsequent communication to opposing counsel with respect to the matter would be the equivalent of a knowing, affirmative misrepresentation should the lawyer fail to disclose the fact that she no longer represents the previously identified client.

ABA LEO 397 (9/18/95) (emphasis added).

Not surprisingly, most states agree with this conclusion. For instance, the Illinois Bar explained that

[t]he Committee believes that the ABA's conclusion regarding the lawyer's duty under ABA Model Rule 4.1(a) would be the same under Illinois Rule 4.1(a). In addition, if the lawyer is authorized to continue the prosecution of whatever claim or claims exist on behalf of the decedent's estate, the Committee believes that the death of the claimant is a "material fact" within the meaning of Illinois Rule 4.1(b) as well. Therefore, disclosure to the adverse party is necessary to avoid assisting a fraudulent act on the part of the lawyer's new client, the executor or administrator of the decedent's estate. Finally, the failure to make such disclosure might well be considered conduct involving "deceit or misrepresentation" within the meaning of Rule 8.4(a)(4). For these reasons, the lawyer must make timely disclosure of the client's death with respect to the pending personal injury matter.

Illinois LEO 96-3 (7/96) (emphasis added).

Courts generally agree with this analysis.

- Harris v. Jackson, 192 S.W.3d 297, 306 (Ky. 2006) (holding that a lawyer had acted improperly in failing to disclose a death of one of his clients "until the period to revive the action against Harris's estate has lapsed. Not only did he fail to disclose, he continued to participate in discussions, negotiations, depositions, and other pre-trial activities, even with the court, as if Harris was still alive.").

- In re Becker, 804 N.Y.S.2d 4, 5 (N.Y. App. Div. 2005) (suspending a New York lawyer for three months for failing to disclose his client's death before settling a slip and fall case against the City; "Respondent's misconduct occurred while handling a personal injury matter for Ruth Kurtz as a result of her 1993 trip and fall on a sidewalk and consequent ankle fracture. Mrs. Kurtz died in 1994 as a result of bone cancer, but respondent did not discover this until 1997 after he received a \$55,000 settlement offer from the defendant, the City of New York, and forwarded the proposed settlement to Mrs. Kurtz."; explaining that the lawyer submitted settlement documents to New York City without disclosing that his client had died nearly three years earlier; also noting that the lawyer endorsed the settlement check along with the deceased client's son).
- Ky. Bar Ass'n v. Geisler, 938 S.W.2d 578, 580 (Ky. 1997) ("[W]e hold that the respondent's failure to disclose her client's death to opposing counsel amounted to an affirmative misrepresentation in violation of our SCR 3.130-4.1. While the comments to SCR 3.130-4.1 do indicate that there is no duty to disclose 'relevant facts,' those same comments go on to state that: '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 failure to act.' Consequently, respondent cannot reasonably argue that her failure to reveal this critical piece of information constituted ethical conduct within the framework of SCR 3.130-4.1."). Thus, a lawyer must disclose his client's death in the course of settlement negotiations.

One older Virginia legal ethics opinion takes the opposite approach,¹ although it would not be surprising if the Virginia Bar took the majority view if asked again.

(b) It is not as clear that a witness's death is the type of material fact that a lawyer must disclose during settlement negotiations.

Depending on the witness's importance, it would be easy to envision a court or bar reaching the same conclusion about a witness's death as it would about the client's

¹ Virginia LEO 952 (7/31/87) ("A client authorized an attorney to settle his personal injury case within a range of values. A demand was made and a counteroffer was received from the insurer. Following receipt of the counteroffer, the client died and the administrator of the estate authorized the attorney to accept the last settlement offer which was within the range authorized by the client. It is not improper, given the above, for the attorney not to disclose the death of his client to the insurance company absent a direct inquiry from the insurance company regarding the client's health. The committee opines that in order to avoid an appearance of impropriety, the attorney should disclose the death of his client at the time he accepts the offer of settlement and let the opposing side know that the client authorized the range for settlement prior to his death and that the estate's administrator has also authorized the settlement.")

own death. In addition, it might be necessary for a lawyer to update discovery responses, lists of possible trial witnesses, etc.

On the other hand, a witness's death does not dramatically alter the attorney-client relationship, and therefore would not as clearly fall into the category of material facts that require disclosure as does the client's death.

Best Answer

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

Enforcing Settlement Agreements: General Rule

Hypothetical 22

You recently spent two years litigating a hotly contested case in Washington, D.C. Last week, you attended a private mediation session. After you and the plaintiff's lawyer reached a tentative settlement, the plaintiff's lawyer said that she needed a ten-minute break, and left the meeting for a short time. When the plaintiff's lawyer returned to the meeting, you and she shook hands on what she said was an acceptable settlement. However, you just received a call from the plaintiff's lawyer. She tells you that her client claims not to have given her authority to settle, and therefore refuses to honor the settlement.

May you assure your client that you will be able to enforce the settlement that you reached with the plaintiff's lawyer?

NO

Analysis

This hypothetical comes from a Washington, D.C., case (discussed below), and highlights the states' various approaches to lawyers' authority to settle litigation. The issue involves a mix of statutory law, common law agency principles, and ethics rules.¹

In most agency situations, an agent can bind a principal under several circumstances. First, the agent might have actual authority to act on the principal's behalf in entering into a contract. The actual authority can be express (explicitly given by the principal to the agent) or implied (based on dealings between the principal and the agent). Second, the agent might have "apparent" authority to act on the principal's behalf. This "apparent" authority comes from statements or conduct creating a

¹ Several law review articles have outlined the dramatic differences among states' approaches. Jeffrey A. Parness & Austin W. Bartlett, Unsettling Questions Regarding Lawyer Civil Claim Settlement Authority, 78 Or. L. Rev. 1061 (1999); Grace M. Giesel, Enforcement of Settlement Contracts: The Problem of the Attorney Agent, 12 Geo. J. Legal Ethics 543 (1999).

reasonable belief in the other side that the agent can act for and therefore bind the principal.

Judicial and bar analyses represent a spectrum -- from essentially automatically enforcing agreed settlements to essentially ignoring such settlements if the client balks.

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 mediation.

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.

This hypothetical comes from a District of Columbia Court of Appeals decision.

In Makins v. District of Columbia, 861 A.2d 590 (D.C. 2004), the court addressed a question certified by the U.S. Court of Appeals for the District of Columbia Circuit:

"Under District of Columbia law, is a client bound by a settlement agreement negotiated by her attorney when the client has not given the attorney actual authority to settle the case on those terms but has authorized the attorney to attend a settlement conference before a magistrate judge and to negotiate on her behalf and when the attorney leads the opposing party to believe that the client has agreed to those terms."

Id. at 592. The court explained the factual background of the settlement, and specifically noted that the plaintiff did not attend the settlement conference. The court also explained that after plaintiff's lawyer reached a deal with the defendant's lawyer, he "left the hearing room with cell phone in hand, apparently to call [the plaintiff]. When he returned, the attorneys 'shook hands' on the deal and later reduced it to writing." Id.

The court answered the certified question in the negative.

These ethical principles are key to the issue before us, because they not only govern the attorney-client relationship, they inform the reasonable beliefs of any opposing party involved in litigation in the District of Columbia, as well as the reasonable beliefs of the opposing party's counsel, whose practice is itself subject to those ethical constraints. It is the knowledge of these ethical precepts that makes it unreasonable for the opposing party and its counsel to believe that, absent some further client manifestation, the client has delegated final settlement authority as a necessary condition of giving the attorney authority to conduct negotiations. And it is for this reason that opposing parties -- especially when represented by counsel, as here -- must bear the risk of unreasonable expectations about an attorney's ability to settle a case on the client's behalf. . . .

Applying these principles, we conclude that the two client manifestations contained in the certified question -- sending the attorney to the court-ordered settlement conference and permitting the attorney to negotiate on the client's behalf -- were insufficient to permit a reasonable belief by the District that Harrison [plaintiff's lawyer] had been delegated authority to conclude the settlement. Some additional manifestation by Makins was necessary to establish that she had given her attorney final settlement authority, a power that goes beyond the authority an attorney is generally understood to have.

Id. at 595-96.

Best Answer

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

b 8/11; n 2/15

Retainer Agreements Giving Lawyers Authority to Settle

Hypothetical 23

Having been "burned" once by a client who reneged on a settlement agreement that you thought the client had authorized, you recently insisted that a client sign a retainer agreement with the following provision:

"The undersigned client further agrees that the said attorney shall have full power and authority to settle, compromise, or take such action as he might deem proper for the best interest of the client, and the client does hereby appoint the said attorney as attorney-in-fact, with full power to execute any and all instruments and documents in behalf or in the name of said client, which are necessary to settle or make other disposition of said matter, including endorsement of checks or drafts received as proceeds of recovery."

Relying on this provision, you recently settled a personal injury case for your client. However, the client repudiated the settlement.

Will your client be bound by the settlement?

NO (PROBABLY)

Analysis

Several courts have dealt with retainer agreements which purport to give a lawyer full authority to settle cases.

Some courts honor such provisions. For instance, in Beverly v. Chandler, 564 So. 2d 922 (Ala. 1990), the Alabama Supreme Court affirmed a trial court's enforcement of a settlement agreement entered into by a lawyer pursuant to such a provision. The court first pointed to an Alabama statute emphasizing lawyers' power to settle cases.

"Section 34-3-21, Code of Alabama 1975, as amended, vests in an attorney authority to bind his or her client in all matters that relate to the cause, including the right to settle all questions involved in the case. Such agreements are not

only authorized, but encouraged, to promote justice and fair dealing and to terminate properly or prevent litigation."

Id. at 923 (citation omitted). The court specifically rejected the client's argument that the retainer agreement was "void as an illegal contract against public policy." Id. at 924.

In this case, the contract entered into between Mary Beverly and her attorneys expressly authorized them to settle or resolve her case. The authority given them was clear and unequivocal, with no limitations or restrictions expressly placed upon the power to compromise or settle. Furthermore, the record is devoid of any evidence to indicate that Mary Beverly ever revoked this express grant of authority to her attorneys.

Id.

However, some authorities take a dramatically different approach. For instance, the Restatement (Third) of Law Governing Lawyers

[p]rohibits an irrevocable contract that the lawyer will decide on the terms of settlement. A contract that the lawyer as well as the client must approve any settlement is also invalid.

Restatement (Third) of Law Governing Lawyers § 22 cmt. c (2000) (emphasis added).

This hypothetical comes from In re Lewis, 463 S.E.2d 862 (Ga. 1995). The Supreme Court pointed to a Georgia Disciplinary Standard stating that lawyers shall not "settle a legal proceeding or claim without obtaining proper authorization from his client." Id. at 863.

As part of this court's duty to regulate the practice of law in the public's interest, we interpret Standard 45 as precluding Lewis [lawyer] from settling Uselton's [client's] claim without consulting her about the \$22,500 settlement offer and obtaining her consent to accept it. A client who enters into a contingent fee contract with an attorney cannot relinquish the right to decide whether to accept a settlement offer. To allow a client to waive that right by general contract creates a conflict of interest that violates an attorney's fiduciary obligations to a client.

Id. The court upheld the state disciplinary board's 18-month suspension of the lawyer.

Best Answer

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

b 8/11

Arguing that a Lawyer Lacked Authority To Settle

Hypothetical 24

Your client was pleased when you were able to settle a plaintiff's claim for less than the client expected to pay. However, you just received a call from a new lawyer claiming to represent the plaintiff, and advising you that the plaintiff now claims not to have authorized his first lawyer to settle the case. The plaintiff's new lawyer says that she will file an affidavit from her client claiming that the client never even spoke with the first lawyer about a possible settlement. Not surprisingly, you and your client want to do all you can to enforce the settlement.

Can you successfully argue that the plaintiff has waived any attorney-client privilege covering communications with his first lawyer by claiming that he never discussed settlement with that lawyer?

YES

Analysis

In most situations, a client or lawyer waives the attorney-client privilege by actually disclosing privileged communications (called an "express" waiver). An express waiver can either be intentional or inadvertent.

In some situations, clients or lawyers can waive the attorney-client privilege by relying on the fact of a communication to gain some advantage -- usually called an "implied waiver." The classic case involves a litigant relying on "advice of counsel" to avoid liability or reduce damages.

At first blush, it would seem that a client would not waive the attorney-client privilege by denying the existence of any communication. Such an argument certainly does not disclose any privileged communication. Similarly, the argument does not rely on the fact of a communication to gain some advantage -- the argument rests on the lack of any communication.

An argument like this implicates the most extreme form of implied waiver -- called an "at issue" waiver. Such a waiver occurs when a client takes some position in litigation, the full exploration of which necessarily includes privileged communications. In a few cases, courts have held that a client's denial of communications with a lawyer triggers such an "at issue" waiver. Both situations come from the criminal world.¹

This hypothetical comes from a trilogy of recent cases finding that plaintiffs had triggered an "at issue" waiver by seeking to repudiate settlements entered into by their lawyer -- by arguing that they had never authorized the lawyer to settle on their behalf.

- Rubel v. Lowe's Home Centers, Inc., 580 F. Supp. 2d 626, 628, 629 (N.D. Ohio 2008) (assessing a situation in which a plaintiff repudiated a settlement that his lawyer had reached with the defendant; finding that the plaintiff had impliedly waived the attorney-client privilege that would otherwise have protected his communications with his lawyer; "Rubel testified in his sworn affidavit and deposition that he never authorized Dzienny to accept a

¹ Hawkins v. Stables, 148 F.3d 379, 381, 384, 384 n.4 (4th Cir. 1998) (holding that a former wife had waived the attorney-client privilege by answering "no" to the following deposition question: "Is it true or not that Larry Diehl, in his capacity as your [divorce] attorney, told you to take a wiretap off the phone at the marital residence?"; at a later trial the former wife asserted the attorney-client privilege and refused to answer questions about her conversations with Diehl; Diehl also refused to answer questions when called to the stand at the trial; "Although the question asked during the deposition clearly elicited information regarding confidential communications Stables may have had with Diehl, and was objectionable on its face on the ground of attorney-client privilege, neither Stables nor her attorney asserted an objection. In response to the question, Stables simply stated that she never had a discussion of the matter with her attorney. By answering the question as she did, Stables both waived her privilege and provided probative evidence that she had had no conversation with her attorney on the subject of a phone tap. Without a communication, there is nothing to which the privilege can attach. Based on her own testimony, Stables cannot meet her burden of proof [to move the privilege's applicability, which the district court had erroneously placed on the former husband rather than the former wife]." (footnotes omitted); holding that Stables' waiver of the privilege "also waives the privilege as to the subject matter of the disclosure"; "In this case, the subject matter revealed related to the wiretap. Thus, on remand Diehl's testimony should be limited to the wiretapping issue. Stables' subject matter waiver does not open up the possibility of a fishing expedition of all confidential communications that she had with Diehl during the course of the divorce representation."); United States v. Pinho, Crim. No. 02-814, 2003 U.S. Dist. LEXIS 12244, at *11, *11 n.4 (E.D. Pa. July 8, 2003) (finding that a criminal defendant had waived the attorney-client privilege by denying that she had communicated with her lawyer; during preparations for defendant's retrial after a hung jury, explaining that in her earlier testimony she did not have a discussion with her lawyer about a specific subject amounted to testimony "to the content of all conversations that she had with her attorney regarding the specific subject"; noting that "[d]efendant could have claimed privilege and not answered the question about whether she had a conversation with her attorney on a specific subject"; finding that the waiver covered only conversations (if any) about the specific subject that the defendant was asked about in the earlier case).

settlement on his behalf. Plaintiff's testimony impliedly waived his attorney-client privilege as to any subject to which he testified and pertinent to his claim, namely settlement authority. It is irrelevant that Rubel's testimony did not specifically refer to any conversations with his former attorney."; "Rubel thus put his communications with his former attorney about the putative lack of settlement authority in issue; he cannot now use the privilege to bar questions to Dzienny about those communications."; "To permit Rubel to assert the privilege to bar questions to Dzienny about their discussions about settlement would enable him, and other similarly-situated litigants, easily and successfully to repudiate settlements that they, in fact, had approved."; also holding that the communication about settlement authority did not deserve privilege to begin with because it was intended not to be kept confidential).

- Ford Motor Credit Co. v. Meehan, No. CV 05-4807 (DRH) (AKT), 2008 U.S. Dist. LEXIS 53192 (E.D.N.Y. July 11, 2008) (assessing a situation in which a defendant claimed not to have approved a settlement negotiated by his lawyer; applying at-issue waiver doctrine and allowing Ford to depose defendant's lawyer).
- Baratta v. Homeland Housewares, LLC, 242 F.R.D. 641, 643 (S.D. Fla. 2007) (assessing the scope of an implied waiver caused by a client contending that his lawyer did not have authority to enter into an agreement with an adverse party; "Baratta [client] waived the attorney-client privilege with regard to his communications with his attorneys regarding settlement. This waiver was reaffirmed when, on February 13, 2007, and again on March 22, 2007, Baratta appeared for deposition and testified regarding what he alleges were his communications to his litigation counsel, Martin."; "In this case, to allow Mr. Baratta to testify that he never gave Mr. Martin settlement authority, while at the same time disallowing Defendant to inquire into the subject matter of his and his litigation attorney's exchanges regarding settlement, would result in a sword/shield situation whereby Mr. Baratta would be permitted to give his one-sided version of the story, while shielding himself from potentially harmful testimony of another. The Court agrees with Defendant that the law does not permit Mr. Baratta to maintain such a convenient position, in frustration of Defendant's right to discovery of critical facts and information that cannot be obtained from any source other than Mr. Greenberg [Baratta's patent lawyer]."; holding that the implied waiver extended to all of the lawyers with whom Baratta dealt).

These recent cases highlight the expansive nature of the "at issue" doctrine.

Best Answer

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