PROFESSIONALISM FOR THE ETHICAL VIRGINIA LAWYER

Hypotheticals and Analyses

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Difference between Ethics and Professionalism

Hypothetical 1

You and your law school roommate have continued to stay in touch with each other, and debate some of the issues that you covered together in law school. Over one recent lunch, your friend took the position that lawyers could be professionally sanctioned for discourteous behavior. You have always tried to act as courteously as possible, but you wonder whether lawyers falling short of such behavior could suffer bar discipline.

Do the ethics rules prohibit discourteous behavior?

NO (EXCEPT AT THE EXTREME)

Analysis

It is important to distinguish between ethics and professionalism/civility.

Every state's ethics rules represent a balance between lawyers' primary duty to diligently represent their clients, and some countervailing duty to others within the justice system (or sometimes, to the system itself). In many situations, lawyers following the ethics rules might have to take steps that the public could consider unprofessional. For example, lawyers often must maintain client confidences when the public might think they should speak up -- disclosing a client's past crime, warning the victim of some possible future crime, etc. In less dramatic contexts, lawyers generally must remain silent if their adversary's lawyer misses some important legal argument or defense, etc. Thus, ethics principles focus on lawyers' duties to their clients, and the limited ways in which those duties can be "trumped" by duties to others.

In contrast, professionalism has a much more modest focus. Professionalism speaks to lawyers' day-to-day interaction with other lawyers, with clients, with courts, and with others. Professionalism involves courtesy, civility, and the Golden Rule.

When the ethics rules require lawyers to disagree with adversaries or their lawyers, professionalism calls for lawyers to do so without being personally disagreeable.

Historical Articulations

Lawyers have always faced the tension between: (1) their ethical duty to diligently serve their clients; and (2) their impulse to act courteously.

In 1820, one of the greatest English lawyers of the age – Lord Brougham – articulated lawyers' ethics duty of diligence in his defense of Queen Caroline in George IV's attempt to divorce her.

> Lord Brougham, in his defense of Queen Caroline, in her divorce case, told the House of Lords: "I once before took occasion to remind your Lordships, which was unnecessary, but there are many whom it may be needful to remind, that an advocate, by the sacred duty which he owes his client, knows in the discharge of that office but one person in the world -- that client and no other. . . . Nay, separating even the duties of a patriot from those of an advocate, and casting them if need be to the wind, he must go on reckless of the consequences, if his fate it should unhappily be to involve his country in confusion for his client's protection.

Charles P. Curtis, The Ethics of Advocacy, 4 Stan. L. Rev. 3 (Dec. 1951), at 3-4.

Lord Brougham later explained his vigorous statement's goal -- threatening to disrupt English politics by disclosing that George IV was ineligible to sit on the throne because George had earlier been secretly married to a Catholic.

> The real truth is, that the statement was anything rather than a deliberate and well-considered opinion. It was a menace, and it was addressed chiefly to George IV, but also to wiser men, such as Castlereagh and Wellington. I was prepared, *in case of necessity*, that is, in case the Bill passed the Lords, to do two things -- first, to resist it in the Commons *with the country at my back*; but next, if need be, to dispute the King's title, to show he had forfeited the crown by marrying a Catholic, in the words of the Act, "as if he were naturally dead." What I said was fully understood by Geo.

> IV; perhaps by the Duke and Castlereagh, and I am confident it would have prevented them from pressing the Bill beyond a certain point.

Id. at 4. The threat worked – the House of Lords rejected George IV's attempt to divorce Caroline.

Of course, Lord Brougham presumably was a properly courteous English gentlemen – not a jerk.

About 150 years later, another paradigmatic gentleman – Justice Lewis Powell – wrote essentially the same thing.

- In re Griffiths, 413 U.S. 717, 72, n14 (1973) ("Lawyers frequently represent foreign countries and the nationals of such countries in litigation in the courts of the United States, as well as in other matters in this country. In such representation, the duty of the lawyer, subject to his role as an 'officer of the court,' is to further the interests of his clients by all lawful means, even when those interests are in conflict with the interests of the United States or of a State. But this representation involves no conflict of interest in the invidious sense. Rather, it casts the lawyer in his honored and traditional role as an authorized but independent agent acting to vindicate the legal rights of a client, whoever it may be. (emphases added)

Lord Brougham and Justice Lewis Powell were not scorched-earth litigators, they were courtly gentlemen. Their statements reflect what they properly viewed as lawyers' prime duty – serving their clients.

But good lawyers often feel the pull of another, sometimes countervailing, impulse – to be courteous. Perhaps predictably, another polished English lawyer articulated this laudable urge – which he called "obedience to the unenforceable."

- John Fletcher Moulton, Law and Manners, Atlantic Monthly, July 1924, at 1, 1-2, 2, 4 ("In order to explain this extraordinary title I must ask you to follow me in examining the three great domains of Human Action. First comes the domain of Positive Law, where our actions are prescribed by laws binding upon us which must be obeyed. Next comes the domain of Free Choice, which includes all of those actions as to which we claim and enjoy complete freedom. But between these two there is a third large and important domain

> in which there rules neither Positive Law nor Absolute Freedom. In that domain there is no law which inexorably determines our course of action, and yet we feel that we are not free to choice as we would. . . . [I]t is the domain of Obedience to the Unenforceable. The obedience is the obedience of a man to that which he cannot be forced to obey. He is the enforcer of the law upon himself."; "This country which lies between Law and Free Choice I always think of as the domain of Manners. To me, Manners in this broad sense signifies the doing that which you should do although you are not obligated to do it. I do not wish to call it Duty, for that is too narrow to describe it, nor would I call it Morals for the same reason. It might include both, but it extends beyond them. It covers all cases of right doing where there is no one to make you do it but yourself."; "The dangers that threaten the maintenance of this domain of Manners arise from its situation between the region of Absolute Choice and the region of Positive Law. There are countless supporters of the movements to enlarge the sphere of Positive Law. In many countries – especially in the younger nations – there is a tendency to make laws to regulate everything. On the other hand, there is a growing tendency to treat matters that are not regulated by Positive Law as being matters of Absolute Choice. Both these movements are encroachments on the middle land, and to my mind the real greatness of a nation, its true civilization, is measured by the extent of this land of Obedience to the Unenforceable. It measures the extent to which the nation trusts its citizens, and its existence and area testify to the way they behave in response to that trust. Mere obedience to Law does not measure the greatness of a Nation. It can easily be obtained by a strong executive, and most easily of all from a timorous people. Nor is the license of behavior which so often accompanies the absence of Law, and which is miscalled Liberty, a proof of greatness. The true test is the extent to which the individuals composing the nation can be trusted to obey self-imposed law."; "The great principle of Obedience to the Unenforceable is no mere ideal, but in some form or other it is strong in the hearts of all except the most depraved. If you wish to know how strong, remember the account of the Titanic disaster [1921]. The men were gentlemen to the edge of death. 'Ladies first.' What was that? Law did not require it. Force could not have compelled it in the face of almost certain death. It was merely a piece of good Manners in the sense in which I have used the phrase. The feeling of obedience to the Unenforceable was so strong that at that terrible moment all behaved as, if they could look back, they would wish to have behaved.") (emphases added).

Most if not all lawyers face this tension between their duty of diligence and their urge to be civil.

Virginia Supreme Court Articulation

In 2016, Virginia Chief Justice Lemons articulated the difference between lawyers' mandatory ethics duty of diligence and their aspirational goal of professionalism.

- Env't Specialist, Inc. v. Wells Fargo Bank Nw., N.A., 782 S.E.2d 147, 148, 150, 151-52, 152 (Va. 2016) (reversing a trial court's $1200 sanction against the plaintiff's lawyer for refusing defendant Wells Fargo's request for an extension to answer a mechanic's lien case; "The trial court . . . stated that it had issued the $1200 sanctions award against ESI's counsel 'for its failure to voluntarily extend the time in which Wells Fargo might file its answer.' In its order, the trial court recites no statute or rule authorizing its award, nor does it invoke its inherent authority to do so."; "While professionalism embraces aspirational values of civility, courtesy, public service and excellent work product, legal ethics rules and statutory provision of sanctions express the lowest level of permissible conduct at the Bar, below which an attorney may be subject to discipline or sanctions. The legal profession has been self-regulating, and its attempts to regulate the conduct of its members has created a tension between the aspirational goals of professionalism and the bare minimum of ethical requirements and conduct required by written rules and statutes."; "It is important to recognize, however, that the principles of professionalism are aspirational, and, as we stated when this Court approved their adoption, they 'shall not serve as a basis for disciplinary action or for civil liability.' . . . Moreover, the principles themselves recognize that conflicts may arise between an attorney's obligations to a client's best interests and the professional courtesy of agreeing to an opposing counsel's request for an extension of time. . . . In this case, it is clear that the trial court sanctioned plaintiff's counsel 'for its failure to voluntarily extend the time in which Wells Fargo might file its answer.' However, in this case, counsel may not have been acting in his client's best interests if he had agreed to the requested extension of time. In fact, ESI directed counsel not to agree to the requested extension."; "We applaud the bench and the bar as they encourage the aspirational values of professionalism. But there is a difference between behavior that appropriately honors an attorney's obligation to his client's best interest, behavior that falls short of aspirational standards, and behavior that is subject to discipline and/or sanctions. In this case, Wells Fargo was in default. Counsel for ESI satisfied his obligation to pursue his client's best interest, and in this case followed the client's express direction. Counsel did not engage in behavior that could be characterized as unprofessional, an ethics violation or behavior that is subject to statutory sanctions. Accordingly, we reverse the trial court's order awarding $1200 in sanctions against plaintiff's counsel for counsel's failure to voluntarily extend the time in which Wells Fargo could file its answer." (emphasis added)).

Several years earlier, Virginia Supreme Court Justice Mims wrote a refreshing opinion pointing to a lawyer's laudable civility in overturning the Bars' sanction of the lawyer for not immediately hanging up on a represented adversary who initiated an ex parte call to her firm and spoke to her for 60 seconds.

- Zaug v. Va. State Bar, 737 S.E.2d 914, 915, 916, 918, 919 (Va. 2013) (reversing the sanction of a dismissal de minimis of a lawyer who spoke for sixty seconds to a represented plaintiff who had called the lawyer's partner but was transferred to the lawyer; explaining what occurred during the phone call; "The parties agree that Yanira [a represented plaintiff, who along with two other plaintiffs was pursuing a malpractice case against a doctor represented by Zaug's firm] was distraught. According to Zaug [lawyer whose partner was representing the defendant doctor in the malpractice case, and to whom the call was transferred because the lawyer representing the doctor was not available], the call lasted approximately 60 seconds. It is undisputed that Yanira told Zaug about the toll the litigation was taking on her family and that Vincent's [Yanira's husband, and co-plaintiff] deposition needed to be cancelled. According to Zaug, she apologized and told Yanira that she could not help her and that Yanira needed to contact Cofield [plaintiffs' lawyer]."; "According to Zaug, she then attempted to terminate the call but Yanira resisted 'with an outpouring of emotion.' Yanira said that she had been unable to reach Cofield and that she wanted to speak to Nagle [Zaug's partner, who was representing the doctor in the malpractice case]. Zaug reiterated that '[w]e can't help you. You need to try to reach Ms. Cofield. I'll try to contact Mr. Nagle and they'll have to sort this out.' She then terminated the call."; noting that plaintiff unsuccessfully sought to disqualify Zaug as counsel, and that plaintiff's lawyer filed a bar complaint against Zaug; noting the circuit court's failure to make any factual findings about when Zaug knew the identity of the caller and the subject of the communication; noting that Rule 4.2 cmt. 3 requires lawyers to "immediately terminate" any communication initiated by a represented adversary; quoting Virginia's oath taken by all new lawyers that they will "professionally and courteously" demean" themselves, and Virginia's Principles of Professionalism published on the State Bar website; "Professionalism embraces common courtesy and good manners, and it informs the Rules and defines their scope. Accordingly, we will not construe the Rule to penalize an attorney for an act that is simultaneously non-malicious and polite."; "The Rule categorically and unambiguously forbids an attorney from initiating such communications and requires an attorney to disengage from such communications when they are initiated by others. But the Rule does not require attorneys to be discourteous or impolite when they do so."; "In this case, it is undisputed that Zaug did not initiate the telephone call. There is no evidence in the record,

> and the State Bar does not assert, that Zaug intended to gain advantage from it. Likewise, there is no evidence that Zaug deliberately or affirmatively prolonged it. On these specific and narrow facts, and construing Rule 4.2 to advance behavior that is both professional and ethical, we conclude that no violation occurred in this case." (emphases added)).

Applicable Ethics Rules

To be sure, the Bar can discipline lawyers for extreme misconduct amounting to a lack of courtesy.

For instance, under Virginia Rule 3.4(j),

> [a] lawyer shall not: . . . [f]ile a suit, initiate criminal charges, assert a position, conduct a defense, delay a trial, or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.

Virginia Rule 3.4(j) (emphasis added).

Similarly, under Virginia Rule 4.4,

> [i]n representing a client, a lawyer shall not use means that have no purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

Virginia Rule 4.4 (emphasis added).

These ethics rules obviously set a very low minimum standard of conduct. They do not condemn all actions that harass, injure, or embarrass someone. They do not even prohibit actions that primarily have that effect. Instead, these ethics rules only condemn actions that serve "merely" to have such ill effects, and "have no purpose other than to" harm someone. Not surprisingly, not many actions fall below this line. Even the dimmest of lawyers can normally find some other arguable reason to have undertaken an unprofessional act.

Virginia Bar's Analysis

The Virginia Bar has apparently dealt only once with the difference between ethics and professionalism.

In Virginia Legal Ethics Opinion 1700 (6/24/97), the Bar addressed a number of actions taken by a lawyer representing a wife in a proceeding to reduce child support. One of the lawyer's former colleagues had represented the husband in the original child support case, and objected to the lawyer's representation of the wife. Among other things, the wife's lawyer took "action to effect a change of venue, with no notification" to his former colleague. The wife's lawyer then "without obtaining dates from [his former colleague] filed a notice of hearing under the name of his associate." Virginia LEO 1700 (6/24/97).

The Virginia Bar discussed the difference between ethics and professionalism.

> Your second inquiry concerns the failure of Attorney B [the wife's lawyer] to notify Attorney A [the former colleague who objects to the lawyer's representation of the wife] of an action to transfer venue and filing a notice of hearing without obtaining available dates from Attorney A. The committee believes that Attorney B's conduct is governed by the applicable Rules of Court, local rules, custom and professional courtesy, but not the Code of Professional Responsibility, unless it can be shown that Attorney B intentionally or habitually violated an established rule of procedure or disregarded a standing rule of a tribunal. DR 7-105(A); DR 7-105(C)(5).

Id. (emphasis added).

Thus, the Virginia Bar explained that a lawyer's obligation to schedule hearings with the other side's cooperation rises to an ethics violation only if it violates a court's rule or order -- and even then only if it amounts to an intentional or habitual violation.

Best Answer

The best answer to this hypothetical is **NO (EXCEPT AT THE EXTREME)**.

Unique Virginia Rule Provisions Encouraging Professional Behavior

Hypothetical 2

One of your law school roommates had practiced in another state for several years, but just moved to Virginia. You have bragged about the benefits of practicing law in Virginia, including recent efforts to emphasize civility among Virginia lawyers. Your roommate tells you that her former state followed the ABA Model Rules almost completely, and did not include any ethics provisions even mentioning day-to-day civility. She asks you whether the Virginia rules have any provisions of that sort.

Do the Virginia ethics rules contain any provisions dealing with day-to-day lawyer civility?

YES

Analysis

The ethics rules generally set the minimum standard for lawyer conduct. However, Virginia's ethics rules contain several unique provisions that set Virginia apart from other states' approach.

The Virginia Rules' Preamble follows the ABA Model Rules in providing some general guidance.

> A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.
>
> . . . .
>
> . . . [A] lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.
>
> . . . .

> . . . Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.

Virginia Rules, Preamble (emphases added).

The Virginia Rules' Scope explains that

> The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.

Id. Preamble.

Unlike the ABA Model Rules, the Virginia rules also contain two specific provisions encouraging day-to-day lawyer civility.

First, one provision provides advice about how lawyers should treat others "involved in the legal process."

> In the exercise of professional judgment on those decisions which are for the lawyer's determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of a client. However, when an action in the best interest of a client seems to the lawyer to be unjust, the lawyer may ask the client for permission to forego such action. The duty of lawyer to represent a client with zeal does not militate against his concurrent obligation to treat, with consideration, all persons involved in the legal process and to avoid the infliction of needless harm. Under this Rule, it would be improper to ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade any witness or other person.

Virginia Rule 3.4 cmt. [7] (emphasis added). Although this rule uses the term "obligation," it appears that the comment primarily refers to a lawyer's duty to avoid harming others -- which essentially defines the minimum standard of lawyer conduct.

Second, the Virginia rules contain a more limited statement of how litigators should act.

> In adversary proceedings, clients are litigants and though ill feeling may exist between the clients, such ill feeling should not influence a lawyer's conduct, attitude or demeanor towards opposing counsel. A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system. A lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, waiver of procedural formalities, and similar matters which do not prejudice the rights of the client. A lawyer should follow the local customs of courtesy or practice, unless the lawyer gives timely notice to opposing counsel of the intention not to do so. A lawyer should be punctual in fulfilling all professional commitments.

Virginia Rule 3.4 cmt. [8] (emphases added).

Although it obviously has some significance that Virginia has included these comments while the ABA and most states have not, it is also important to recognize that the comments use the verb "should"[1] rather "shall" or "must."

Thus, these comments represent aspirational statements, rather than mandatory standards.

Best Answer

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

[1] The Virginia Rules' Terminology explains that "'[s]hould' when used in reference to a lawyer's action denotes an aspirational rather than a mandatory standard."

Duty to Supervise Lawyers and Nonlawyers

Hypothetical 3

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

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

YES

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

YES

Analysis

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

Interestingly, Virginia did not adopt the ABA Model Rule providing guidance to a subordinate lawyer (ABA Model Rule 5.2). That ABA Model Rule provision generally indicates that subordinate lawyers can face punishment if they violate the ethics rules even at a supervisor's direction, but that they may follow the supervisor's guidance if there is a close question. Although Virginia chose not to adopt this ABA Model Rule in 2000, there is no reason to think that the Virginia Bar would not take essentially the same approach if considering a subordinate's alleged ethics violations.

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

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

Virginia Rule 5.1(a).

Thus, lawyers who manage other lawyers must take reasonable steps to put in place "measures" that provide at least reasonable assurance that lawyers in the firm comply with the ethics rules. Comment [2] to that rule mentions such "internal policies and procedures" as those designed to identify conflicts, assure that filing and other deadlines are met, provide for proper trust account processes, etc. Virginia Rule 5.1 cmt. [2] Comment [3] explains that the measures lawyers may take to comply with this managerial responsibility can vary according to the size of the law firm.

> In a small firm, informal supervision and periodic review ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members and the partners or those lawyers with managerial authority may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

Virginia Rule 5.1 cmt. [3].

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

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

Virginia Rule 5.1(b).

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

> With respect to a nonlawyer employed or retained by or associated with a lawyer:
>
> (a) a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer; and
>
> (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer . . . .

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

The **Principles of Professionalism** indicate that:

> In my conduct toward everyone with whom I deal, I should:
>
> - Encourage those I supervise to act with the same professionalism to which I aspire.

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

> (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
>
> (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner or has managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of

> the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Virginia Rule 5.1.

> (c) [A] lawyer shall be responsible for conduct of such a person [nonlawyer employed or retained by or associated with a lawyer] that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
>
> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner or has managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Virginia Rule 5.3.

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

The **Principles of Professionalism** indicate that:

> In my conduct toward everyone with whom I deal, I should:
>
> - Encourage those I supervise to act with the same professionalism to which I aspire.

Best Answer

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

Avoiding Discrimination and Bigotry

Hypothetical 4

One of your senior partners has the habit of telling racial jokes.

What should you do?

REMIND THE SENIOR PARTNER THAT SUCH JOKES ARE INAPPROPRIATE IN TODAY'S WORLD

Analysis

An extreme form of bigotry or prejudice could run afoul of the Virginia rules' prohibition on taking an action that "merely" harasses or injures another (Virginia Rule 3.4(j)) or an action that has "no purpose other than to embarrass" a third person. Virginia Rule 4.4.[1]

The Virginia Rules do not contain a specific provision addressing lawyer misconduct involving discrimination or bigotry.[2]

The **Principles of Professionalism** indicate that:

> In my conduct toward everyone with whom I deal, I should:
>
> - Avoid all bigotry, discrimination, or prejudice.

In stark contrast, the ABA has dealt with these issues, with considerable controversy.

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[1] Unlike the ABA Model Rules, the Virginia rules contain comments encouraging (although not requiring) courteous conduct. Virginia Rule 3.4 cmt. [7] mentions a lawyer's "concurrent obligation to treat, with consideration, all persons involved in the legal process" (the Comment seems to equate such behavior with the otherwise required duty to "avoid the infliction of needless harm"). Virginia Rule 3.4 cmt. [8] suggests that litigators "should be courteous" to opposing counsel and otherwise should avoid unprofessional behavior in "adversary proceedings." Thus, Virginia's ethics rules include some aspirational statements of lawyer civility, in addition to setting the standards below which the Bar can discipline a lawyer's conduct. See, e.g., Virginia Rule 3.4(j); Virginia Rule 4.4.

[2] Virginia explicitly declined to adopt former ABA Model Rule 8.4 cmt. [3], which is discussed below.

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

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

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

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

This former ABA Model Rule Comment was fairly limited. First, it applied only to a lawyers' conduct "in the course of representing a client." Other ABA Model Rule prohibitions begin with the same or similar phrase, such as the prohibition on false statements of material fact (ABA Model Rule 4.1), or the prohibition on ex parte communications with represented persons (ABA Model Rule 4.2). This limiting language contrasts with the introductory phrase of ABA Model Rule 8.4: "It is professional misconduct for a lawyer to . . . ." Those prohibitions apply whenever the lawyer acts in any context, professionally or personally. Second, the former ABA Model Rule Comment prohibited only "knowing" misconduct. Third, the former ABA Model Rule Comment did not prohibit discrimination. It prohibited "bias or prejudice," if such conduct was "based upon" the stated attributes. The ABA Model Rules did not define

those two terms, but presumably, they describe improper (and perhaps even unlawful) conduct that is a subset of discrimination. If the terms were meant to describe the more generic conduct of "discrimination," the ABA could have used that one word rather than the two words. Fourth, the former ABA Model Rule Comment prohibited the misconduct only when it was "prejudicial to the administration of justice." That vague standard paralleled the black letter ABA Model Rule 8.4(d)'s prohibition on any "conduct that is prejudicial to the administration of justice." In fact, the general language of ABA Model Rule 8.4(d) thus already prohibited the specific conduct described in former ABA Model Rule 8.4 cmt. [3].

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

> It is professional misconduct for a lawyer to: engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.

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

The new black letter rule provision expands the scope of the previous Comment. First, the rule applies to lawyers' conduct "related to the practice of law." This is far broader than conduct lawyers undertake "in the course of representing a client." But it is still narrower than other ABA Model Rule 8.4 provisions, which apply to all of lawyers' professional and private conduct. Second, the rule applies when a lawyer "knows or reasonably should know" that she is engaged in the articulated misconduct. This contrast with the previous Comment's "knowing" standard. Third, the rule prohibits "discrimination" -- in contrast to the old Comment's "bias or prejudice." As explained below, inclusion of this prohibition on any and all "discrimination" is the most interesting

new addition. Fourth, the rule prohibits the described conduct whether or not it is "prejudicial to the administration of justice."

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

> This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.6. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

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

ABA Model Rule 8.4(g) is also notable for a word that is missing from the black letter rule. The language could have the word "unlawfully" in describing the prohibited conduct. New York's and California's ethics rules both prohibit lawyers from "unlawfully" discriminating in practicing law. New York Rule 8.4(g); California Rule 2-400(B); proposed California Rule 8.4.1(b). Adding that word presumably would have imported into the ABA Model Rule prohibition constitutional and other case law drawing the line between permissible and impermissible consideration of race, sex, etc. Instead, ABA Model Rule 8.4(g) contains a per se prohibition of any such consideration.

The new ABA Model Rule is supplemented by two comments.

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

> Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct.

> Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

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

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

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

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

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

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

ABA Model Rule 8.4 cmt. [4].

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

First, as the ABA Model Rules themselves explain,

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

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

Perhaps that sentence was meant to equate "diversity" with discrimination on the basis of race, sex, etc. But that would be futile -- because it would fly in the face of the explicit authoritative prohibition in the black letter rule. It would also be remarkably cynical, by forbidding discrimination in plain language while attempting to surreptitiously allow it by using a code word.

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

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

and law school diversity. Comment [4] allows such diversity and inclusion efforts. Those types of diversity and inclusion efforts would not involve discrimination prohibited in the black letter rule.

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

The black letter rule thus prohibits such discrimination as women-only bar groups or networking events, minority-only recruitment days or mentoring sessions, etc. Law firms will no longer be able to schedule social events or conferences limited to their LGBT lawyers.

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

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

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

The ABA's bizarre approach to ABA Model Rule 8.4(g) was on full display in the October 2017 ABA Journal. In that ABA Journal, noted Stanford Law School Professor

Deborah Rhode essentially acknowledged that new ABA Model Rule 8.4(g) cannot (or at least will not) be used for disciplinary purposes.

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

David L. Hudson, Jr., Constitutional Conflict: States split on Model Rule limiting harassing conduct, 103 A.B.A.J. 25, 26, Oct. 2017 (emphases added).[3] So even one of the country's leading ethics authorities concluded that ABA Model Rule 8.4(g) merely "provides a useful symbolic statement and educational function." That is not the ABA Model Rules' purpose, and adopting disciplinary rules merely for symbolic or educational purposes carries frightening implications.

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

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

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

It is also worth examining another example of discrimination that would violate ABA Model Rule 8.4(g) if it were "related to the practice of law." In Grutter v. Bollinger, 539 U.S. 306 (2003), the United States Supreme Court indicated that a university or a law school (as in that case) may "consider race or ethnicity . . . flexibly as a 'plus' factor in the context of individualized consideration of each and every applicant." Id. at *334 (quoting Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 317 (1978)). In their brief supporting respondents in more recent litigation over the University of Texas's race-conscience admissions, the Yale Law School and Harvard Law School deans acknowledged using race as a factor in admitting students to those law schools. Brief of *Amici Curiae* Post & Minow at 2, Fisher v. Univ. of Tex., U.S. (Aug. 13, 2012 (No. 11-345), 2012 WL 3418596, at *1 ("In both schools' admissions programs, 'race or ethnic background may be deemed a "plus" in a particular applicant's files."). The United States Supreme Court ultimately upheld the University of Texas's race conscious admissions process – emphasizing the unique educational benefits of a diverse student body. Fisher v. Univ. of Tex., 133 S. Ct. 2411 (2013).

As with the awkwardly timed ABA Resolution urging courts to use race as a factor in selecting magistrate judges, and hiring law clerks, the law school admissions process presumably does not involve "conduct related to the practice of law." But if it did, would Yale's and Harvard's deans run afoul of ABA Model Rule 8.4(g)? Of course

they would. In both Grutter and Fisher, the United States Supreme Court did not deny that those admissions processes involved race discrimination. To the contrary, the United States Supreme Court acknowledged that the processes involved race discrimination -- but found it constitutional in those specific contexts. So Yale's and Harvard's use of race as a "plus" might be "lawful" discrimination – but ABA Model Rule 8.4(g) prohibits all discrimination.

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

Best Answer

The best answer to this hypothetical is **REMIND THE SENIOR PARTNER THAT SUCH JOKES ARE INAPPROPRIATE IN TODAY'S WORLD**.

Offering Candid Advice

Hypothetical 5

You are representing a particularly ornery client, who clearly does not like having to deal with lawyers. You believe that this client frequently makes the wrong decisions, and you would like to provide advice to the client. However, you want to make sure that you do not fall short of your duty to diligently represent even difficult clients.

(a) May you offer your advice to your client before he seeks it?

YES

(b) May you offer advice to your client even if you know that the client will not like it?

YES

(c) May your advice include a moral as well as a legal component?

YES

Analysis

Although lawyers primarily act as advisers who respond to their clients' requests for legal advice, the ethics rules give lawyers considerable freedom to provide advice to their clients.

Lawyers might well point to several rules provisions when advising their clients of the advantages of the lawyer acting professionally.

(a) First, lawyers are free to provide clients legal advice without being asked for it.

> In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal, moral or ethical consequences to the client or to others, duty to the client under Rule 1.4 may require that the lawyer act if the client's course of action is

> related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

Virginia Rule 2.1 cmt. [5] (emphasis added).

The **Principles of Professionalism** indicate that:

> In my conduct toward my clients, I should:
>
> - Act with diligence and dedication -- tempered with, but never compromised by, my professional conduct toward others.
>
> - Explain to clients that my courteous conduct toward others does not reflect a lack of zeal in advancing their interests, but rather is more likely to successfully advance their interests.

(b) Second, lawyers can give advice even if they know the clients will not like that advice.

> A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

Virginia Rule 2.1 cmt. [1] (emphasis added).

As indicated above, the **Principles of Professionalism** mirror this approach.

(c) Third, lawyers can provide moral as well as legal advice to their clients.

> It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

Virginia Rule 2.1 cmt. [2a] (emphasis added).

The **Principles of Professionalism** take the same basic approach.

Best Answer

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

Advising Clients of the Benefits of Courtesy

Hypothetical 6

Your client tends to be a "hands on" participant in her legal matters. Over the past few months, she has expressed some frustration at the civility that you have shown toward the lawyer representing your client's adversary. She tells you that she thinks the other lawyer is taking advantage of you, and wants you to start being a little "tougher" when you deal with the other lawyer.

What should you do?

EXPLAIN TO YOUR CLIENT THE BENEFITS OF COURTESY

Analysis

Every lawyer has been in this difficult situation -- attempting to act with civility, although the adversary's lawyer is not.[1]

As difficult as it is, lawyers in this situation should explain that their civility toward the adversary's lawyer does not mean that they will be any less of a diligent advocate for the client. In addition, to the extent that civility ultimately is returned, courteous behavior can save both clients money and effort by allowing them and their lawyers to focus on the areas of disagreement rather than the peripheral type of issues that make any transaction or litigation more expensive and troublesome. Acting with courtesy may also ultimately benefit the client to the extent that a judge, arbitrator, or other third party becomes involved.

---

[1] Unlike the ABA Model Rules, the Virginia rules contain comments encouraging (although not requiring) courteous conduct. Virginia Rule 3.4 cmt. [7] mentions a lawyer's "concurrent obligation to treat, with consideration, all persons involved in the legal process" (the Comment seems to equate such behavior with the otherwise required duty to "avoid the infliction of needless harm"). Virginia Rule 3.4 cmt. [8] suggests that litigators "should be courteous" to opposing counsel and otherwise should avoid unprofessional behavior in "adversary proceedings." Thus, Virginia's ethics rules include some aspirational statements of lawyer civility, in addition to setting the standards below which the Bar can discipline a lawyer's conduct. See, e.g., Virginia Rule 3.4(j); Virginia Rule 4.4.

Experienced lawyers may have the reputation to resist a client's suggestion more easily than newer lawyers, but all lawyers should tell clients essentially the same thing: "I am acting as I do both because that is the way I conduct myself professionally, and also because I think it ultimately serves your interests."

The **Principles of Professionalism** indicate that:

> In my conduct toward my clients, I should:
>
> - Explain to clients that my courteous conduct toward others does not reflect a lack of zeal in advancing their interests, but rather is more likely to successfully advance their interests.
>
> In my conduct toward opposing counsel, I should:
>
> - Avoid reciprocating any unprofessional conduct by opposing counsel, explaining to my clients that such behavior harms rather than advances the clients' interests.
>
> - Resist being affected by any ill feelings opposing clients may have toward each other, remembering that any conflict is between the clients and not between the lawyers.

Best Answer

The best answer to this hypothetical is **EXPLAIN TO YOUR CLIENT THE BENEFITS OF COURTESY**.

Withdrawal in the Face of a Client's Desire to Pursue Offensive Conduct

Hypothetical 7

You have had difficulty from the start dealing with an overly aggressive client. Now she has asked you to take several actions that you consider inappropriate and unprofessional -- both in the transactional and litigation work you are handling for the client. You satisfy yourself that the actions would not be unethical. However, you still balk at following your client's direction, and you wonder if you can withdraw from the representation without violating your duties to the client.

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

YES

Analysis

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

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

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

- Second, during the course of the representation the client generally sets the objectives, but the lawyer "has professional discretion in determining the means by which a matter should be pursued" (Virginia Rule 1.3 cmt. [1]) and "should assume responsibility for technical and legal tactical issues." Virginia Rule 1.2 cmt. [1].

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

- Fourth, although a client might ask a lawyer to undertake steps that "seems to the lawyer to be unjust, the lawyer may ask the client for permission to forego such action." Virginia Rule 3.4 cmt. [7].

- Fifth, "a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so." Virginia Rule 1.2 cmt. [1].

- Sixth, a lawyer may withdraw from representing a client (even if there is "material adverse effect on the interests of the client") if "the client persists in a course of action involving a lawyer's services that the lawyer reasonably believes is illegal or unjust," or if "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent." Virginia Rule 1.16(b)(1), (3).

This hypothetical focuses on the sixth situation.

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

> A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.

Virginia Rule 1.3(b). Thus, lawyers act primarily as their clients' advocates.

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

> shall withdraw from the representation of a client if [among other things]: (1) the representation will result in violation of the Rules of Professional Conduct or other law.

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

Second, the Virginia rules also permit withdrawal in several circumstances that might apply to a lawyer representing a client urging inappropriate conduct. Under Virginia Rule 1.16(b), lawyers may withdraw from a representation at any time if

"withdrawal can be accomplished without material adverse effect on the interests of the client." Although the Virginia Bar has not fully explored the meaning of that phrase, lawyers generally can withdraw at the very beginning of a representation without any looming deadlines, during a lull in activity, etc. Of course, withdrawal from a court case also requires judicial permission. Lawyers might rely on this permissible withdrawal provision if they find themselves representing a client pushing them to act inappropriately.

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

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

> (1) the client persists in a course of action involving a lawyer's services that the lawyer reasonably believes is illegal or unjust.
>
> . . . .
>
> (3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent.

Virginia Rule 1.16(b) (emphases added).

A comment provides some explanation of this principle.

> A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is illegal or unjust, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it. Withdrawal is also permitted if the lawyer's services were misused in the past even if that would materially prejudice the client. The lawyer also may

> withdraw where the client insists on a repugnant or imprudent objective.

Virginia Rule 1.16 cmt. [7] (emphases added).

The **Principles of Professionalism** indicate that:

> In my conduct toward everyone with whom I deal, I should:
>
> - Remember that I am part of a self-governing profession, and that my actions and demeanor reflect upon my profession.
> - Treat everyone as I want to be treated -- with respect and courtesy.
>
> In my conduct toward opposing counsel, I should:
>
> - Treat both opposing counsel and their staff with respect and courtesy.

Best Answer

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

Returning Phone Calls and E-Mails

Hypothetical 8

Your first supervisor frequently reminded you to try your best to return all telephone calls (or have your assistant return them) by the end of each day. This has become increasingly difficult as e-mails have either supplemented or replaced telephone calls. One of your newest associates just asked you several questions about this type of constant communication.

(a) Should he still try to respond to each communication on the same day (in light of the deluge of modern electronic communications)?

YES

(b) What should he do if the adversary's lawyer does not return his phone calls or e-mails?

KEEP TRYING TO ENCOURAGE PROMPT RESPONSES, AND AVOID RECIPROCATING DISCOURTEOUS BEHAVIOR

Analysis

At the extreme, a failure to communicate could run afoul of the Virginia rules' prohibition on taking an action that has only an improper purpose. Virginia Rule 4.4.[1]

(a) Returning communications promptly can be increasingly difficult in today's world of electronic communications.

There obviously will be occasions when lawyers cannot return communications by the end of each day, but that should always be the goal. Even having an assistant

[1] Unlike the ABA Model Rules, the Virginia rules contain comments encouraging (although not requiring) courteous conduct. Virginia Rule 3.4 cmt. [7] mentions a lawyer's "concurrent obligation to treat, with consideration, all persons involved in the legal process" (the Comment seems to equate such behavior with the otherwise required duty to "avoid the infliction of needless harm"). Virginia Rule 3.4 cmt. [8] suggests that litigators "should be courteous" to opposing counsel and otherwise should avoid unprofessional behavior in "adversary proceedings." Thus, Virginia's ethics rules include some aspirational statements of lawyer civility, in addition to setting the standards below which the Bar can discipline a lawyer's conduct. See, e.g., Virginia Rule 3.4(j); Virginia Rule 4.4.

return a call or e-mail with an explanation of the delay shows respect for the person communicating.

Lawyers can, and should also try to, change their voicemail and e-mail greetings on a daily basis if possible -- so someone calling or e-mailing will understand any delay caused by travel, busy schedules, etc. Thus, in some ways it can be easier in the age of electronic communications to either respond quickly or explain why you cannot.

The **Principles of Professionalism** indicate that:

> In my conduct toward everyone with whom I deal, I should:
>
> - Treat everyone as I want to be treated -- with respect and courtesy.
>
> In my conduct toward opposing counsel, I should:
>
> - Return telephone calls, e-mails and other communications as promptly as I can, even if we disagree about the subject matter of the communication, resolving to disagree without being disagreeable.

(b) Unfortunately, it can sometimes be difficult to encourage other lawyers to return communications.

In some situations, there may be little that a lawyer can do to encourage civility from the adversary's lawyer. At the least, it might make sense to remind the other lawyer that everyone benefits when the lawyers communicate with each other.

A lawyer whose counterpart does not return phone calls or e-mails might find it necessary to primarily communicate by e-mail -- in case it ever becomes necessary to document the lack of responsiveness.

As difficult as it is to resist, lawyers should avoid reciprocating rude behavior by the adversary's lawyer.

The **Principles of Professionalism** indicate that:

In my conduct toward opposing counsel, I should:

- Avoid reciprocating any unprofessional conduct by opposing counsel, explaining to my clients that such behavior harms rather than advances the clients' interests.

Best Answer

The best answer to **(a)** is **YES**; the best answer to **(b)** is **KEEP TRYING TO ENCOURAGE PROMPT RESPONSES, AND AVOID RECIPROCATING DISCOURTEOUS BEHAVIOR.**

Avoiding Nasty Communications

Hypothetical 9

One of your newest associates has followed your advice to answer voicemail and e-mail messages as quickly as he can conveniently do so. Unfortunately, his responsive e-mails sometimes reflect a quick temper, and contain angry words that you think inappropriate.

What should you do?

SUGGEST THAT THE ASSOCIATE RESTRAIN HERSELF OR "COOL OFF" BEFORE SENDING E-MAILS, AND WARN THE ASSOCIATE OF THE CONSEQUENCES OF SUCH UNPROFESSIONAL CONDUCT

Analysis

All lawyers who are diligently serving their clients risk sending discourteous oral or written communications.[1] This risk has risen in the real-time world of modern electronic communications.

It should be obvious that no lawyer should put in writing (or leave on a voicemail) any message that he would not want printed as a headline in the local newspaper. In today's world, perhaps the better way to phrase this timeless principle would be to think of the voicemail or e-mail being circulated worldwide on the Internet. In fact, some lawyers' embarrassingly profane voicemail messages have found their way across the globe.

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[1] Unlike the ABA Model Rules, the Virginia rules contain comments encouraging (although not requiring) courteous conduct. Virginia Rule 3.4 cmt. [7] mentions a lawyer's "concurrent obligation to treat, with consideration, all persons involved in the legal process" (the Comment seems to equate such behavior with the otherwise required duty to "avoid the infliction of needless harm"). Virginia Rule 3.4 cmt. [8] suggests that litigators "should be courteous" to opposing counsel and otherwise should avoid unprofessional behavior in "adversary proceedings." Thus, Virginia's ethics rules include some aspirational statements of lawyer civility, in addition to setting the standards below which the Bar can discipline a lawyer's conduct. See, e.g., Virginia Rule 3.4(j); Virginia Rule 4.4.

Traditionally, some lawyers advised their emotionally overcharged subordinates to "put a nasty draft letter in a drawer overnight before sending it" -- accurately predicting that in nearly every case the subordinate would re-write the letter. That sort of wise advice does not easily fit in today's real-time world, but the same wisdom applies. Lawyers who send angry e-mails risk embarrassment, defamation actions, and other liability -- for themselves, their firm, and even their clients.

In some situations, it may even be necessary to make continued employment contingent on changed behavior.

The **Principles of Professionalism** indicate that:

> In my conduct toward everyone with whom I deal, I should:
>
> - Encourage those I supervise to act with the same professionalism to which I aspire.
>
> In my conduct toward opposing counsel, I should:
>
> - Avoid ad hominem attacks, recognizing that in nearly every situation opposing lawyers are simply serving their clients as I am trying to serve my clients.
> - Avoid reciprocating any unprofessional conduct by opposing counsel, explaining to my clients that such behavior harms rather than advances the clients' interests.
> - Resist being affected by any ill feelings opposing clients may have toward each other, remembering that any conflict is between the clients and not between the lawyers.

Best Answer

The best answer to this hypothetical is **SUGGEST THAT THE ASSOCIATE RESTRAIN HERSELF OR "COOL OFF" BEFORE SENDING E-MAILS, AND WARN THE ASSOCIATE OF THE CONSEQUENCES OF SUCH UNPROFESSIONAL CONDUCT.**

Treating Nonlawyer Staff with Respect

Hypothetical 10

Perhaps it is because you married your firm's long-time receptionist, but you are especially sensitive to the way lawyers treat nonlawyer staff working for an adversary's lawyer. Two recent incidents have raised this issue again.

(a) Your adversary's lawyer just acted discourteously toward your assistant -- what should you do?

APOLOGIZE TO YOUR ASSISTANT, AND TELL THE OTHER LAWYER TO DIRECT HIS ANGER AT YOU IF HE CAN'T CONTROL HIMSELF

(b) You just heard one of your newest associates react with inappropriate anger when communicating with the receptionist at your adversary's law firm -- what should you do?

PRIVATELY ADVISE YOUR NEW COLLEAGUE NEVER TO ACT LIKE THAT AGAIN

Analysis

Some lawyers focus only on how they treat other lawyers.[1] This approach overlooks the civility with which they should treat their nonlawyer colleagues, and those who work with the adversary's lawyers.

It should go without saying that lawyers should treat their own nonlawyer colleagues courteously. Of course, they should do so because it is the right thing to do. In addition, civility toward work colleagues improves morale, boosts efficiency, avoids

[1] Unlike the ABA Model Rules, the Virginia rules contain comments encouraging (although not requiring) courteous conduct. Virginia Rule 3.4 cmt. [7] mentions a lawyer's "concurrent obligation to treat, with consideration, all persons involved in the legal process" (the Comment seems to equate such behavior with the otherwise required duty to "avoid the infliction of needless harm"). Virginia Rule 3.4 cmt. [8] suggests that litigators "should be courteous" to opposing counsel and otherwise should avoid unprofessional behavior in "adversary proceedings." Thus, Virginia's ethics rules include some aspirational statements of lawyer civility, in addition to setting the standards below which the Bar can discipline a lawyer's conduct. See, e.g., Virginia Rule 3.4(j); Virginia Rule 4.4.

costly and disruptive staff turnover, and can deter embarrassing employment-related charges and lawsuits.

These other factors do not apply in the case of an adversary's lawyer's staff -- so lawyers must call upon their better nature to act courteously toward them. Nonlawyer staff working for the other side generally have not acted discourteously themselves, have far less at stake in any type of emotional competition among the lawyers, and almost certainly earn less than the lawyers involved in the matter (and thus deserve better treatment than the lawyers).

Some columnists providing advice about dating and marriage recommend that their readers rely on the "waiter rule" -- which says that you can tell someone's basic personality by how they treat waiters.

The **Principles of Professionalism** indicate that:

> In my conduct toward opposing counsel, I should:
>
> - Treat both opposing counsel and their staff with respect and courtesy.

(a) It might be difficult for a lawyer to seek or request courtesy for herself from the adversary's lawyer, but it should not be difficult to insist that the other lawyer treat her nonlawyer colleagues courteously.

After apologizing to your assistant or other nonlawyer colleague who has been treated discourteously by another lawyer, you might consider apologizing on behalf of the entire profession (this usually prompts a knowing nod or smile). You might then advise the other lawyer that if he wants to treat anyone with inappropriate anger, he should save that for you instead of taking it out on your nonlawyer colleagues.

In all situations, you should avoid reciprocating.

The **Principles of Professionalism** indicate that:

> In my conduct toward opposing counsel, I should:
>
> - Avoid reciprocating any unprofessional conduct by opposing counsel, explaining to my clients that such behavior harms rather than advances the clients' interests.

(b) You should train your new lawyers from the beginning to treat the adversary's lawyer's staff courteously.

If you see that one of your new lawyers is violating this principle, you should find a private time to advise him not to do so again.

The **Principles of Professionalism** indicate that:

> In my conduct toward everyone with whom I deal, I should:
>
> - Encourage those I supervise to act with the same professionalism to which I aspire.

Best Answer

The best answer to **(a)** is **APOLOGIZE TO YOUR ASSISTANT, AND TELL THE OTHER LAWYER TO DIRECT HIS ANGER AT YOU IF HE CAN'T CONTROL HIMSELF**; the best answer to **(b)** is **PRIVATELY ADVISE YOUR NEW COLLEAGUE NEVER TO ACT LIKE THAT AGAIN**.

Freedom to Seek a Mentor's Advice

Hypothetical 11

You recently started practicing on your own in a medium-sized Virginia city. You find yourself facing questions about substantive issues, but also about how to handle difficult clients, discourteous lawyers representing adversaries, etc. On a few occasions you have called law school classmates for their advice, but you feel awkward bothering them when they are just starting their careers too. You have already heard of several more experienced lawyers in town who have assisted other new lawyers, but you wonder about the ethical propriety of asking them for advice.

May you seek advice on such matters from another lawyer in a different firm?

YES

Analysis

Some folks who see a decline in lawyer professionalism point to the decreasing role of "mentors."

Traditionally, more experienced lawyers provided informal guidance to less experienced colleagues -- either in their law firm or even in other law firms. Within law firms, economics has largely eroded this practice. On a more general basis, both economics and worries about confidentiality have tended to dampen experienced lawyers' willingness to assist lawyers in other firms.

The Virginia Rules contain a unique comment that permits such mentoring.

> Lawyers frequently need to consult with colleagues or other attorneys in order to competently represent their clients' interests. An overly strict reading of the duty to protect client information would render it difficult for lawyers to consult with each other, which is an important means of continuing professional education and development. A lawyer should exercise great care in discussing a client's case with another attorney from whom advice is sought. Among other things, the lawyer should consider whether the communication risks a waiver of the attorney-client privilege or other applicable protections. The lawyer should endeavor when possible to

> discuss a case in strictly hypothetical or abstract terms. In addition, prior to seeking advice from another attorney, the attorney should take reasonable steps to determine whether the attorney from whom advice is sought has a conflict. The attorney from whom advice is sought must be careful to protect the confidentiality of the information given by the attorney seeking advice and must not use such information for the advantage of the lawyer or a third party.

Virginia Rule 1.6 cmt. [5a]. The unique comment developed after a Virginia legal ethics opinion took a fairly dim view of such consultations. Virginia LEO 1642 (6/9/95).[1]

The **Principles of Professionalism** encourage lawyers to provide such advice, indicating that:

> In my conduct toward everyone with whom I deal, I should:
>
> - Act as a mentor for less experienced lawyers and as a role model for future generations of lawyers.

Best Answer

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

[1] Virginia LEO 1642 (6/9/95) (a bar association wants to set up a question referral network under which lawyers from other firms will answer questions without obtaining specific confidential or secret information; holding that it is likely that the lawyer answering a question will acquire confidential or secret information, and that therefore the inquiring lawyer should obtain the client's consent before asking the questions; explaining that "the anonymous hypothetical approach to consultation encounters difficulties as more details are revealed during the consultation, and seemingly innocuous information may be harmful to the client if revealed to others"; noting that although no attorney-client relationship arises between the inquiring lawyer's client and the answering lawyer, a "special relationship" arises; explaining that the consultation "would give rise to a reasonable expectation of confidentiality," so the answering lawyer should arrange for a disclaimer making it clear that the lawyer need not maintain the information's secrecy; also explaining that although no attorney-client relationship arises, the answering lawyer may not be adverse to the inquiring lawyer's client without the client's consent; warning that to avoid possible disqualification, the answering lawyer should perform a conflicts check before answering any questions; also warning that the inquiring lawyer may not reveal the client's identity to the answering lawyer without the client's consent).

Serving the Community

Hypothetical 12

As a new lawyer, you feel pressure to bill as many hours as possible, and try to begin attracting business to your firm. However, your daughter's middle school principal just asked if you could serve on a board seeking to improve parent-teacher relations at your daughter's school.

Should you accept the principal's invitation?

YES

Analysis

Lawyers tend to become leaders of most groups in which they become involved.

There might be several reasons for this, including lawyers' driven personalities, organizational and communication skills, and knowledge of increasingly pervasive laws and regulations.

Whatever the reason, lawyers should invite such community involvement. Of course, the community benefits whenever lawyers become involved. Lawyers also help themselves when they participate in such activities. Inexperienced lawyers learn about organizing people and speaking in public. All lawyers engaging in community service gain insights into their local area that they can use in their practice (both in properly advising their clients who also live in the community, and even in their marketing efforts). Community leaders with whom the lawyers interact might retain the lawyers or recommend that others retain them.

Lawyers can also gain less tangible benefits. Most lawyers report that helping with community service projects makes their lives more rewarding.

The Virginia ethics rules address pro bono work.

> A lawyer should render at least two percent per year of the lawyer's professional time to pro bono publico legal services. Pro bono publico services include poverty law, civil rights law, public interest law, and volunteer activities designed to increase the availability of pro bono legal services.

Virginia Rule 6.1(a). The remainder of Rule 6.1 provides guidance to lawyers interested in fulfilling this aspirational standard.

The ethics rules deliberately adopt a fairly narrow definition of pro bono work. However, lawyers often find that they can enrich their community (and improve their own mental health) by providing a wider range of service. In fact, some studies show that lawyers joining the profession now are even more inclined to take a broader view of community service. Beyond the ethics rules, it makes sense to take an expansive view of how lawyers may serve their communities.

The **Principles of Professionalism** indicate that:

> In my conduct toward everyone with whom I deal, I should:
>
> - Contribute my skills, knowledge and influence in the service of my community.

Best Answer

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

Accepting Court Appointments

Hypothetical 13

As a new lawyer, you quickly signed up to accept court appointments in criminal matters. However, you now begin to wonder about the wisdom of your action -- the court just asked you to represent an accused child abuser.

Should you turn down the court appointment because you do not want to be associated with the accused child abuser?

NO

Analysis

Litigators asked by a court to represent an unpleasant defendant face a very difficult situation.

The Virginia ethics rules address a lawyer's reaction to such a court request. Under the Virginia rule for accepting appointments:

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

Virginia Rule 6.2 (emphasis added).

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

The Virginia rules also explain that a lawyer representing a client does not automatically endorse that client's activities.

> Legal representation should not be denied to people who are unable to afford legal services, or whose cause is controversial or the subject of popular disapproval. By the same token, a lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

Virginia Rule 1.2 cmt. [5] (emphasis added).

Lawyers might find it difficult to avoid the temptation to take the easy course, and turn down such difficult assignments. Lawyers who do the right thing in this context represent the profession's highest ideals. Lawyers who represent unpopular clients have provided heroic examples throughout our history -- from John Adams' representation of the hated British soldiers following the Boston Massacre to fictional lawyer Atticus Finch's representation of the wrongly accused defendant in To Kill a Mockingbird.

The **Principles of Professionalism** indicate that:

> In my conduct toward everyone with whom I deal, I should:
>
> - Remember that I am part of a self-governing profession, and that my actions and demeanor reflect upon my profession.

Best Answer

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

Timing of Filing Pleadings

Hypothetical 14

You are litigating a case in a circuit court known for complicated and quick deadlines for different kinds of motions. You wonder to what extent your duty of diligence to your client requires you to take advantage of the complex local rules to decrease the time your adversary has to respond.

(a) Should you file a motion at 4:59 p.m. to deprive the adversary of an extra day to respond to your motion?

MAYBE

(b) Should you file a motion on a Friday to assure that your adversary's lawyer will have to work over the weekend to prepare a response?

NO (PROBABLY)

Analysis

Lawyers deciding when and how to file motions must balance their duty of diligence to their client and their goal to act courteously if it does not materially harm the client.

Of course, lawyers must always diligently serve their clients – which sometimes might seem to conflict with their desire to be straight with courts and adversaries.

- McNally v. Rey, 659 S.E.2d 279, 281, 283 (Va. 2008) (holding that a lawyer does not have a duty to advise the adversary if the lawyer's client is planning to declare bankruptcy; explaining that defendant declared bankruptcy the evening before a scheduled Virginia Circuit Court trial, and that the Circuit Court had imposed sanctions upon the lawyer; explaining that the client's lawyer had asserted the attorney-client privilege in declining to answer the Circuit Court's questions about the circumstances of the bankruptcy filing; "McNally filed a letter with the circuit court on November 20, 2006, responding to the circuit court's consideration of sanctions against him for the bankruptcy filing. He stated 'it would have been an ethical violation for me to disclose my client's intention to file a bankruptcy (which was clearly a client confidence) unless the client specifically authorized me to do so.' McNally also asked that he be subject to a 'properly file[d]' motion and be given an opportunity to

> respond: 'I respectfully believe that I am entitled to due process on this issue.'" (emphasis added); noting that the court awarded sanctions against the lawyer after finding that "'the conduct of Mr. McNally in filing pleadings indicating an intent to try the case while in fact knowing that bankruptcy was to be filed was not in good faith and was for an improper purpose including to needlessly increase the cost of litigation to the Plaintiffs. As a result, Plaintiffs incurred unnecessary legal and expert fees and costs in preparing the case for trial. The Court on its own initiative as permitted by law believes the appropriate sanction is that Counsel for Defendant, John [J.] McNally personally pay the legal fees, expert charges, and costs incurred by Plaintiffs from November 8, 2006 until notified of the bankruptcy on the evening of November 14 as well as the cost of the jury.'"; finding that the lower court had abused its discretion in imposing sanctions; "There is simply nothing in the record before this Court that supports this finding. There is no evidence in the record that McNally's act of filing the witness and exhibit list was not well grounded in fact. There is nothing in the record before this Court that supports a finding that the witness and exhibit list was interposed for an improper purpose, such as to harass or cause unnecessary delay, or needless increase in the cost of litigation. . . . Simply stated, the record before this Court is devoid of any evidence that supports the circuit court's award of sanctions. McNally's act of filing the witness and exhibit list, as required by the circuit court's own pretrial order, did not violate Code § 8.01-271.1. Additionally, counsel of record in a state court proceeding, who represents a litigant contemplating filing a petition in bankruptcy in a federal bankruptcy court, does not have an obligation to inform opposing counsel or the circuit court that the attorney's client is considering filing a petition in bankruptcy. A litigant's decision to file a petition in bankruptcy while litigation is pending does not constitute a violation of Code § 8.01-271.1 provided such filing is in compliance with the federal Bankruptcy Code, 11 U.S.C. § 101, et seq. To hold otherwise would have a chilling effect upon the rights of litigants and their attorneys when such litigants seek to avail themselves of their statutory rights set forth in the federal Bankruptcy Code. Therefore, we hold that the circuit court abused its discretion by imposing sanctions upon McNally." (emphases added)).

The Virginia Bar has indicated that a lawyer dealing with such filings implicates the ethics rules only if the lawyer's failure to send a notice violates a court's rule or order -- and even then only if the lawyer has "intentionally or habitually violated" such a rule or order. Virginia LEO 1700 (6/24/97).

On the other hand, lawyers should be aware that the term "zealous" was explicitly dropped from the heading of an ethical rule when Virginia changed its rules in

2000. Although the term "zealous" still appears in the Preamble and in Comment [1] to Virginia Rule 1.3, the Virginia rules also contain several unique provisions expressing the type of courteous behavior to which lawyers should aspire.[1]

In addition to the explicit Virginia ethics rules encouraging professionalism, several other rules empower lawyers to act professionally. These provisions should encourage lawyers to decide for themselves when to file pleadings, or resist a client's push to file the pleading in a way that the lawyer believes is inappropriate.

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

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

- Second, during the course of the representation the client generally sets the objectives, but the lawyer "has professional discretion in determining the means by which a matter should be pursued" (Virginia Rule 1.3 cmt. [1]) and "should assume responsibility for technical and legal tactical issues." Virginia Rule 1.2 cmt. [1].

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

---

[1] Unlike the ABA Model Rules, the Virginia rules contain comments encouraging (although not requiring) courteous conduct. Virginia Rule 3.4 cmt. [7] mentions a lawyer's "concurrent obligation to treat, with consideration, all persons involved in the legal process" (the Comment seems to equate such behavior with the otherwise required duty to "avoid the infliction of needless harm"). Virginia Rule 3.4 cmt. [8] suggests that litigators "should be courteous" to opposing counsel and otherwise should avoid unprofessional behavior in "adversary proceedings." Thus, Virginia's ethics rules include some aspirational statements of lawyer civility, in addition to setting the standards below which the Bar can discipline a lawyer's conduct. See, e.g., Virginia Rule 3.4(j); Virginia Rule 4.4.

- Fourth, although a client might ask a lawyer to undertake steps that "seems to the lawyer to be unjust, the lawyer may ask the client for permission to forego such action." Virginia Rule 3.4 cmt. [7].

- Fifth, "a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so." Virginia Rule 1.2 cmt. [1].

- Sixth, a lawyer may withdraw from representing a client (even if there is "material adverse effect on the interests of the client") if "the client persists in a course of action involving a lawyer's services that the lawyer reasonably believes is illegal or unjust," or if "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent." Virginia Rule 1.16(b)(1), (3).

All of these provisions provide a framework for lawyers to act professionally while fulfilling their ethical duties.

The **Principles of Professionalism** indicate that:

> In my conduct toward my clients, I should:
>
> - Act with diligence and dedication -- tempered with, but never compromised by, my professional conduct toward others.
>
> - Explain to clients that my courteous conduct toward others does not reflect a lack of zeal in advancing their interests, but rather is more likely to successfully advance their interests.
>
> In my conduct toward opposing counsel, I should:
>
> - Cooperate as much as possible on procedural and logistical matters, so that the clients' and lawyers' efforts can be directed toward the substance of disputes or disagreements.

(a) Lawyers filing a motion at the very end of the day almost surely do not fall below any expected standards of courtesy.

Such action might be inappropriate if the lawyer filing the motion knows that the adversary's lawyer is sick, out of town, in trial, etc. Absent such circumstances, there

probably is nothing wrong with taking advantage of the complex local rules to reduce the amount of time the adversary has to prepare a response.

Lawyers might want to explore cooperative arrangements with the adversary's lawyer that maximize rather than minimize both sides' time to prepare and file responsive pleadings. Such arrangements benefit both clients by allowing a full airing of the legal issues, while avoiding the inefficient type of scrambling that frequently occurs when lawyers work around the clock to meet a court's strict deadline.

(b) If a lawyer's goal is simply to make the adversary's lawyer work over the weekend, one would hope that the lawyer would be guided by courtesy standards in resisting the temptation to do so.

There almost certainly is nothing unethical with taking that step, but lawyers should consider operating at a higher level of courtesy. As indicated above, lawyers might also want to consider entering into cooperative arrangements that maximize both parties' time to file responsive pleadings.

Best Answer

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

Scheduling Hearings, Depositions, Etc.

Hypothetical 15

You have always tried to cooperate with the other side in scheduling depositions, but you have had real trouble with one particular lawyer on the other side of a case. She either refuses to give you her avoid dates, or gives you so many avoid dates that you suspect she is making herself unavailable on the thinnest of pretenses.

What should you do?

IF COOPERATION IS UNSUCCESSFUL, NOTICE THE DEPOSITION AT A CONVENIENT TIME FOR YOU, AND OFFER TO ADJUST THE TIMING IF ABSOLUTELY NECESSARY

Analysis

Unless a court rule or order requires cooperation in setting deposition dates, a lawyer does not fall below the ethical standards by simply picking a date that works for her. See Virginia LEO 1700 (6/24/97) (explaining that a lawyer filing a notice of hearing without obtaining another lawyer's available dates had not fallen below the ethical minimum standard).

However, lawyers who do not hurt their clients by doing so should consider arranging for a mutually convenient date for depositions before sending out a notice.[1] In arranging both the time and place for deposition, lawyers should cooperate with the other side.

The **Principles of Professionalism** indicate that:

[1] Unlike the ABA Model Rules, the Virginia rules contain comments encouraging (although not requiring) courteous conduct. Virginia Rule 3.4 cmt. [7] mentions a lawyer's "concurrent obligation to treat, with consideration, all persons involved in the legal process" (the Comment seems to equate such behavior with the otherwise required duty to "avoid the infliction of needless harm"). Virginia Rule 3.4 cmt. [8] suggests that litigators "should be courteous" to opposing counsel and otherwise should avoid unprofessional behavior in "adversary proceedings." Thus, Virginia's ethics rules include some aspirational statements of lawyer civility, in addition to setting the standards below which the Bar can discipline a lawyer's conduct. See, e.g., Virginia Rule 3.4(j); Virginia Rule 4.4.

In my conduct toward opposing counsel, I should:

- Cooperate as much as possible on procedural and logistical matters, so that the clients' and lawyers' efforts can be directed toward the substance of disputes or disagreements.

- Cooperate in scheduling any discovery, negotiations, meetings, closings, hearings or other litigation or transactional events, accommodating opposing counsel's schedules whenever possible.

Lawyers dealing with an adversary's lawyer who is not constructively engaging in such scheduling issues might have to notice the deposition without input from the other lawyer. In such circumstances, the lawyer should offer to move the deposition if necessary (and if consistent with the lawyer's duty of diligence to her own client).

Lawyers should notify the other side immediately of any schedule changes.

The **Principles of Professionalism** indicate that:

In my conduct toward opposing counsel, I should:

- Notify opposing counsel of any schedule changes as soon as possible.

As a matter of courtesy, lawyers should also be punctual in attending depositions and other meetings.

The **Principles of Professionalism** indicate that:

In my conduct toward opposing counsel, I should:

- Be punctual in attending all scheduled events.

Best Answer

The best answer to this hypothetical is **IF COOPERATION IS UNSUCCESSFUL, NOTICE THE DEPOSITION AT A CONVENIENT TIME FOR YOU, AND OFFER TO ADJUST THE TIMING IF ABSOLUTELY NECESSARY**.

Responding to Requests for Extensions

Hypothetical 16

Your adversary has been fairly courteous, but occasionally acts in a way that you think is inappropriate. She just asked you for an extension of time to file a responsive pleading. You think that your client will want you to turn down the request.

What should you do?

SEEK YOUR CLIENT'S CONSENT FOR THE EXTENSION, IF IT WOULD NOT MATERIALLY HARM YOUR CLIENT

Analysis

Nothing in the ethics rules requires you to agree to the other side's request for extensions. Not surprisingly, clients sometimes direct their lawyers to turn down requests for extensions.

In 2016, the Virginia Supreme Court reversed a lower court's sanction of a lawyer who complied with his client's direction to deny a short extension of time to answer a mechanic's lien case. Chief Justice Lemon's opinion distinguished between lawyers' mandatory duty to serve their clients and their laudable desire to act professionally.

- Env't Specialist, Inc. v. Wells Fargo Bank Nw., N.A., 782 S.E.2d 147, 148, 150, 151-52, 152 (Va. 2016) (reversing a trial court's $1200 sanction against the plaintiff's lawyer for refusing defendant Wells Fargo's request for an extension to answer a mechanic's lien case; "The trial court . . . stated that it had issued the $1200 sanctions award against ESI's counsel 'for its failure to voluntarily extend the time in which Wells Fargo might file its answer.' In its order, the trial court recites no statute or rule authorizing its award, nor does it invoke its inherent authority to do so."; "While professionalism embraces aspirational values of civility, courtesy, public service and excellent work product, legal ethics rules and statutory provision of sanctions express the lowest level of permissible conduct at the Bar, below which an attorney may be subject to discipline or sanctions. The legal profession has been self-regulating, and its attempts to regulate the conduct of its members has created a tension between the aspirational goals of professionalism and the bare minimum of ethical requirements and conduct required by written rules

> and statutes."; "It is important to recognize, however, that the principles of professionalism are aspirational, and, as we stated when this Court approved their adoption, they 'shall not serve as a basis for disciplinary action or for civil liability.' . . . Moreover, the principles themselves recognize that conflicts may arise between an attorney's obligations to a client's best interests and the professional courtesy of agreeing to an opposing counsel's request for an extension of time. . . . In this case, it is clear that the trial court sanctioned plaintiff's counsel 'for its failure to voluntarily extend the time in which Wells Fargo might file its answer.' However, in this case, counsel may not have been acting in his client's best interests if he had agreed to the requested extension of time. In fact, ESI directed counsel not to agree to the requested extension."; "We applaud the bench and the bar as they encourage the aspirational values of professionalism. But there is a difference between behavior that appropriately honors an attorney's obligation to his client's best interest, behavior that falls short of aspirational standards, and behavior that is subject to discipline and/or sanctions. In this case, Wells Fargo was in default. Counsel for ESI satisfied his obligation to pursue his client's best interest, and in this case followed the client's express direction. Counsel did not engage in behavior that could be characterized as unprofessional, an ethics violation or behavior that is subject to statutory sanctions. Accordingly, we reverse the trial court's order awarding $1200 in sanctions against plaintiff's counsel for counsel's failure to voluntarily extend the time in which Wells Fargo could file its answer." (emphases added)).

In most situations, a short extension of time will not materially harm the client. In those circumstances, lawyers should try to accommodate the other side's schedule. There are a number of reasons why this approach makes sense: the other side presumably will reciprocate if you need an extension at some point; and the court will think less of the client and you if you take the court's time for a hearing on the issue.

Virginia ethics rules contain several provisions empowering lawyers to act courteously in situations such as this, if it would not harm their clients. The rules describe several occasions during the course of an attorney-client relationship when lawyers have more power than they might realize to act professionally -- without falling short of their clear ethical duty to act as diligent client advocates.

- First, lawyers establishing an attorney-client relationship can limit the scope of the representation so it "exclude[s] objectives or means that the lawyer

regards as repugnant or imprudent" (lawyers can either make their services available only under this condition, or agree with the client to such a limit). Virginia Rule 1.2 cmt. [6].

- Second, during the course of the representation the client generally sets the objectives, but the lawyer "has professional discretion in determining the means by which a matter should be pursued" (Virginia Rule 1.3 cmt. [1]) and "should assume responsibility for technical and legal tactical issues." Virginia Rule 1.2 cmt. [1].

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

- Fourth, although a client might ask a lawyer to undertake steps that "seems to the lawyer to be unjust, the lawyer may ask the client for permission to forego such action." Virginia Rule 3.4 cmt. [7].

- Fifth, "a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so." Virginia Rule 1.2 cmt. [1].

- Sixth, a lawyer may withdraw from representing a client (even if there is "material adverse effect on the interests of the client") if "the client persists in a course of action involving a lawyer's services that the lawyer reasonably believes is illegal or unjust," or if "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent." Virginia Rule 1.16(b)(1), (3).

Lawyers might rely on these provisions in situations such as this. Of course, it is always best to alert the client about the request, even if not required.

The **Principles of Professionalism** indicate that:

> In my conduct toward opposing counsel, I should:
>
> - Agree whenever possible to opposing counsel's reasonable requests for extensions of time that are consistent with my primary duties to advance my clients' interests.

If the client insists on declining the request for an extension, you will have to decide how vigorously to oppose the other side's motion for extension. Lawyers appearing in court must always advocate diligently for their clients, but might be

tempted to indicate through body language that the client insists that the lawyer resist the request. Of course, lawyers must avoid harming their clients by overdoing this.

Lawyers should always advise the adversary's lawyer of any schedule changes.

The **Principles of Professionalism** indicate that:

> In my conduct toward opposing counsel, I should:
>
> - Notify opposing counsel of any schedule changes as soon as possible."

Whatever schedule the litigants eventually agree upon or the court orders, lawyers should be punctual.

The **Principles of Professionalism** indicate that:

> In my conduct toward opposing counsel, I should:
>
> - Be punctual in attending all scheduled events.

Best Answer

The best answer to this hypothetical is **SEEK YOUR CLIENT'S CONSENT FOR THE EXTENSION, IF IT WOULD NOT MATERIALLY HARM YOUR CLIENT**.

Permissible Admissions

Hypothetical 17

The other side has filed a very extensive set of requests for admissions. Your client wants you to resist admitting as many facts as you can, and has directed you to do so.

May you ethically admit facts that cannot be reasonably denied?

YES

Analysis

Although lawyers must diligently represent their clients, the ethics rules contain a "safe harbor" permitting them to admit undeniable facts.

Under Comment 5 of Virginia Rule 1.6

> [a] lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed, or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Virginia Rule 1.6 cmt. [5] (emphasis added).

Lawyers should be thankful for this "safe harbor," because it may save them from court sanctions or intangible judicial disapproval.

The **Principles of Professionalism** indicate that:

> In my conduct toward my clients, I should:
>
> - Act with diligence and dedication -- tempered with, but never compromised by, my professional conduct toward others.
>
> In my conduct toward opposing counsel, I should:

- Cooperate as much as possible on procedural and logistical matters, so that the clients' and lawyers' efforts can be directed toward the substance of disputes or disagreements.

Best Answer

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

Dealing with an Adversary's Lawyer's Discourteous Deposition Conduct

Hypothetical 18

The lawyer representing your adversary has been troublesome from the beginning, but his lack of courtesy reached a crescendo yesterday at a deposition. He was loud, sarcastic, and demeaning. The deposition will resume next week, and you worry about a repeat performance.

What should you do?

WARN THE LAWYER ABOUT A REPEAT PERFORMANCE, AND CONSIDER VIDEOTAPING THE DEPOSITION

Analysis

Depositions seem to bring out the worst litigator behavior. Perhaps this is because lawyers sometimes use that opportunity to impress witnesses with their skills and aggressiveness -- in a setting where a court cannot immediately stop grossly discourteous conduct.

For whatever reason, most of the sanctions cases involving discourteous lawyer conduct involve depositions.

Even if discourteous deposition conduct does not violate the minimum standard in the ethics rules, it almost always falls short of professionalism standards.[1]

The **Principles of Professionalism** indicate that:

> In my conduct toward everyone with whom I deal, I should:

[1] Unlike the ABA Model Rules, the Virginia rules contain comments encouraging (although not requiring) courteous conduct. Virginia Rule 3.4 cmt. [7] mentions a lawyer's "concurrent obligation to treat, with consideration, all persons involved in the legal process" (the Comment seems to equate such behavior with the otherwise required duty to "avoid the infliction of needless harm"). Virginia Rule 3.4 cmt. [8] suggests that litigators "should be courteous" to opposing counsel and otherwise should avoid unprofessional behavior in "adversary proceedings." Thus, Virginia's ethics rules include some aspirational statements of lawyer civility, in addition to setting the standards below which the Bar can discipline a lawyer's conduct. See, e.g., Virginia Rule 3.4(j); Virginia Rule 4.4.

- Treat everyone as I want to be treated -- with respect and courtesy.

In my conduct toward opposing counsel, I should:

- Avoid ad hominem attacks, recognizing that in nearly every situation opposing lawyers are simply serving their clients as I am trying to serve my clients.

Lawyers encountering such behavior by the other side should resist the temptation to reciprocate.

The **Principles of Professionalism** indicate that:

In my conduct toward opposing counsel, I should:

- Avoid reciprocating any unprofessional conduct by opposing counsel, explaining to my clients that such behavior harms rather than advances the clients' interests.

In contrast to a transactional lawyer dealing with unprofessional behavior at a negotiation session or other meeting, litigators enjoy one advantage in dealing with discourteous deposition behavior. They can halt the deposition and seek a court's intervention at the time, or memorialize the deposition in a way that allows a court's later review. The recording itself might deter the discourteous conduct.

Best Answer

The best answer to this hypothetical is **WARN THE LAWYER ABOUT A REPEAT PERFORMANCE, AND CONSIDER VIDEOTAPING THE DEPOSITION**.

Avoiding Actions that Needlessly Embarrass an Adversary or Third Party

Hypothetical 19

You have scheduled several videotaped depositions of non-party witnesses. The lawyer representing your adversary just called to ask that you not videotape a witness who has a problem stuttering under stress.

What should you do?

ACCOMMODATE THE REQUEST, IF IT WOULD NOT MATERIALLY HARM YOUR CLIENT

Analysis

The ethics rules would prohibit the videotaping if "such action would serve merely to harass or maliciously injure" the deponent (Virginia Rule 3.4(j)), or if the deposition would "have no purpose other than to embarrass" the deponent. Virginia Rule 4.4.

Short of that extreme, you should generally avoid embarrassing any witnesses -- if taking the "high road" would not harm your client. Whether considering this issue themselves or wrestling with a client pushing them to act inappropriately, lawyers can look to Virginia's ethics rules.

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

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

- Second, during the course of the representation the client generally sets the objectives, but the lawyer "has professional discretion in determining the means by which a matter should be pursued" (Virginia Rule 1.3 cmt. [1]) and "should assume responsibility for technical and legal tactical issues." Virginia Rule 1.2 cmt. [1].

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

- Fourth, although a client might ask a lawyer to undertake steps that "seems to the lawyer to be unjust, the lawyer may ask the client for permission to forego such action." Virginia Rule 3.4 cmt. [7].

- Fifth, "a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so." Virginia Rule 1.2 cmt. [1].

- Sixth, a lawyer may withdraw from representing a client (even if there is "material adverse effect on the interests of the client") if "the client persists in a course of action involving a lawyer's services that the lawyer reasonably believes is illegal or unjust," or if "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent." Virginia Rule 1.16(b)(1), (3).

All of these provisions provide guidance to lawyers deciding how to treat adverse witnesses, and encourage lawyers to act professionally.

Technical considerations might buttress this decision -- if there is a risk that the other side will explicitly or implicitly try to incite the fact finder's anger or disgust by showing your videotape at the trial.

The **Principles of Professionalism** indicate that:

> In my conduct toward everyone with whom I deal, I should:
>
> - Treat everyone as I want to be treated -- with respect and courtesy.

Best Answer

The best answer to this hypothetical is **ACCOMMODATE THE REQUEST, IF IT WOULD NOT MATERIALLY HARM YOUR CLIENT**.

Dealing with the Court and its Personnel

Hypothetical 20

You just took one of your new associates to court for the first time. Unfortunately, she acted rudely to one of the judge's secretaries, and argued to the court that the lawyer representing the adversary "lied through his teeth" about an important matter.

What should you do?

PRIVATELY TEACH THE NEW ASSOCIATE TO ACT WITH MORE COURTESY, AND CONSIDER APOLOGIZING TO THE JUDGE AND THE SECRETARY

Analysis

As a matter of ethics, lawyers fall short of their required conduct when dealing with tribunals only if they

> [i]ntentionally or habitually violate any established rule of procedure or of evidence, where such conduct is disruptive of the proceedings.

Virginia Rule 3.4(g) (emphases added). Elsewhere, the Virginia ethics rules explain that

> [a] lawyer shall not engage in conduct intended to disrupt a tribunal.

Virginia Rule 3.5(f) (emphasis added). Thus, the ethics rules punish only extremely outrageous conduct toward a tribunal. The rules do not prohibit violating procedural or evidence rules. Virginia Rule 3.4 only condemns such violations if they are intentional or habitual, and if they disrupt the proceedings. Virginia Rule 3.5 only condemns misconduct in court that is "intended" to cause a disruption.

This surprising approach might result from bars' recognition that courts themselves can and should generally discipline such misconduct.

As a matter of professionalism, lawyers should act at a much higher level.

The **Principles of Professionalism** indicate that:

> In my conduct toward courts and other institutions with which I deal, I should:
>
> - Treat all judges and court personnel with respect and courtesy.
>
> - Avoid any conduct that offends the dignity or decorum of any courts or other institutions, such as inappropriate displays of emotion or unbecoming language directed at the courts or any other participants.
>
> In my conduct toward opposing counsel, I should:
>
> - Avoid ad hominem attacks, recognizing that in nearly every situation opposing lawyers are simply serving their clients as I am trying to serve my clients.

As a matter of common sense (and, in some situations, survival), lawyers should always treat courts with respect. Lawyers should also recognize that a court's nonlawyer staff has tremendous power to make life easier or more difficult for all lawyers practicing before the tribunal.

Courts should immediately correct lawyers who launch ad hominem attacks against other lawyers in court. This is precisely the type of situation in which lawyers should hope that judges insist on courteous behavior.

Depending on the situation, an experienced lawyer whose less experienced colleague engages in inappropriate conduct with the court or its personnel might consider apologizing to the judge and the court staff (in a way that does not violate Virginia Rule 3.5(e)'s prohibition on ex parte communications with the court).

Of course, lawyers should also train their subordinates to act professionally.

The **Principles of Professionalism** indicate that:

> In my conduct toward everyone with whom I deal, I should:

- Encourage those I supervise to act with the same professionalism to which I aspire.

Best Answer

The best answer to this hypothetical is **PRIVATELY TEACH THE NEW ASSOCIATE TO ACT WITH MORE COURTESY, AND CONSIDER APOLOGIZING TO THE JUDGE AND THE SECRETARY**.

Advising Clients to Act Courteously with the Court and its Personnel

Hypothetical 21

Your client attends most hearings on the case you are handling for him. At the last hearing, your client's emotions apparently got the better of him, and he used various facial expressions (grimaces, scowls, etc.) to express displeasure with the court's adverse rulings.

What should you do?

IF THE COURT DOES NOT TAKE ANY STEPS, ADVISE YOUR CLIENT NOT TO ENGAGE IN SUCH CONDUCT

Analysis

Of course, clients' conduct is not governed by the ethics rules, and lawyers generally cannot be sanctioned ethically for their clients' misconduct unless they direct or ratify the misconduct. To be sure, courts sometimes sanction lawyers for not stopping their clients' grossly inappropriate deposition conduct.

Presumably the court will say something to the client about such behavior. This is yet another example where judicial comments from the bench can have an enormously helpful effect on lawyer professionalism. Clients hearing their lawyer's or their own discourteous behavior criticized from the bench will see the futility of acting inappropriately. Judges who praise civility send essentially the same message.

Even if the court does not seem to notice the client's behavior, the lawyer should act. As a matter of professionalism and self-interest, lawyers should warn their clients that such discourteous courtroom conduct could hurt the client's case.[1] Clients should

[1] Unlike the ABA Model Rules, the Virginia rules contain comments encouraging (although not requiring) courteous conduct. Virginia Rule 3.4 cmt. [7] mentions a lawyer's "concurrent obligation to treat, with consideration, all persons involved in the legal process" (the Comment seems to equate such

readily understand the risk that a judge will be affected (even subconsciously) by such rudeness.

The **Principles of Professionalism** indicate that:

> In my conduct toward courts and other institutions with which I deal, I should:
>
> - Explain to my clients that they should also act with respect and courtesy when dealing with courts and other institutions.

Best Answer

The best answer to this hypothetical is **IF THE COURT DOES NOT TAKE ANY STEPS, ADVISE YOUR CLIENT NOT TO ENGAGE IN SUCH CONDUCT**.

behavior with the otherwise required duty to "avoid the infliction of needless harm"). Virginia Rule 3.4 cmt. [8] suggests that litigators "should be courteous" to opposing counsel and otherwise should avoid unprofessional behavior in "adversary proceedings." Thus, Virginia's ethics rules include some aspirational statements of lawyer civility, in addition to setting the standards below which the Bar can discipline a lawyer's conduct. See, e.g., Virginia Rule 3.4(j); Virginia Rule 4.4.

Limitation to Non-Litigation Matters

Hypothetical 22

You just received a call from a former client, who wants you to represent him in a construction contract dispute. You hesitate at first, because the client previously has been overly aggressive in dealing with adversaries. You particularly want to avoid representing the client in any litigation, because he was particularly disagreeable during the last litigation.

May you limit your representation to non-litigation matters only?

YES

Analysis

The Virginia ethics rules explicitly allow lawyers to limit the scope of their representation to include only non-litigation matters.

> A lawyer may limit the objectives of the representation if the client consents after consultation.

Virginia Rule 1.2(b).

Significantly, lawyers can also limit the scope of their representation in a way that fosters professionalism.

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

- First, lawyers establishing an attorney-client relationship can limit the scope of the representation so it "exclude[s] objectives or means that the lawyer regards as repugnant or imprudent" (lawyers can either make their services available only under this condition, or agree with the client to such a limit). Virginia Rule 1.2 cmt. [6].
- Second, during the course of the representation the client generally sets the objectives, but the lawyer "has professional discretion in determining the

means by which a matter should be pursued" (Virginia Rule 1.3 cmt. [1]) and "should assume responsibility for technical and legal tactical issues." Virginia Rule 1.2 cmt. [1].

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

- Fourth, although a client might ask a lawyer to undertake steps that "seems to the lawyer to be unjust, the lawyer may ask the client for permission to forego such action." Virginia Rule 3.4 cmt. [7].

- Fifth, "a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so." Virginia Rule 1.2 cmt. [1].

- Sixth, a lawyer may withdraw from representing a client (even if there is "material adverse effect on the interests of the client") if "the client persists in a course of action involving a lawyer's services that the lawyer reasonably believes is illegal or unjust," or if "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent." Virginia Rule 1.16(b)(1), (3).

This hypothetical deals with the first situation. Virginia Rule 1.2 cmt. [6] provides an explanation of this permissible limitation.

> The objectives or scope of services provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. When a lawyer has been retained by an insurer to represent an insured, the representation may be limited to matters related to the insurance coverage. The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or impudent.

Virginia Rule 1.2 cmt. [6] (emphases added). Lawyers sensing that their clients might want them to engage in unprofessional conduct might well rely on this ethics rule.

The **Principles of Professionalism** indicate that:

> In my conduct toward my clients, I should:

- Act with diligence and dedication -- tempered with, but never compromised by, my professional conduct toward others.

In my conduct toward opposing counsel, I should:

- Resist being affected by any ill feelings opposing clients may have toward each other, remembering that any conflict is between the clients and not between the lawyers.

Best Answer

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

Collaborative Lawyering

Hypothetical 23

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

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.

This type of arrangement started in Minnesota in approximately 1990. If both clients and their lawyers agree, all four enter into what is called a "four-way agreement" that limits the lawyers' role to negotiating and consummating a possible settlement without the threat of litigation. If the parties cannot settle their dispute, both lawyers agree in advance to withdraw from the representation -- requiring the clients to hire new lawyers to carry on in court. This type of arrangement obviously changes the atmosphere of the negotiations. In addition, it tends to encourage settlements by raising the clients' costs of litigating.

Until 2007, bars universally approved such collaborative law arrangements. See, e.g., New Jersey LEO 699 (12/12/05); Kentucky LEO E-425 (6/05); North Carolina LEO 2002-1 (4/19/02).

In 2007, the Colorado Bar held that lawyers could not enter into collaborative law arrangements because they impermissibly limited lawyers' representation, and created a conflict between lawyers' requirement to serve their clients (even through litigation) and their incentive to settle the dispute. Colorado LEO 115 (2/24/07). Further, the Colorado Bar even held that clients could not consent to collaborative law arrangements.

Within just a few months, the ABA flatly rejected the Colorado analysis, and explicitly approved the concept of collaborative lawyering. ABA LEO 447 (8/9/07). The

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

The **Principles of Professionalism** indicate that:

In my conduct toward my clients, I should:

- Act with diligence and dedication -- tempered with, but never compromised by, my professional conduct toward others.

In my conduct toward opposing counsel, I should:

- Resist being affected by any ill feelings opposing clients may have toward each other, remembering that any conflict is between the clients and not between the lawyers.

Best Answer

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

No Need to Press for Every Advantage

Hypothetical 24

You remember from law school that lawyers are supposed to represent their clients "zealously." Although you are not exactly sure what that term means, one of your partners just told you that she considers it to require her to seek every advantage for her client -- even if the client does not direct her to do so. You are now in the midst of representing a client in tough business negotiations, and you wonder how far you must go.

Are you required to seek every advantage for your client?

NO

Analysis

Before 2000, the Virginia ethics rules used the word "zealous" several times in headings. Virginia Code of Professional Responsibility Canon 7 ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law"); DR 7-101 ("Representing a Client Zealously" and "Limitations on Zealous Representation.")

The new Virginia ethics rules adopted in 2000 deleted that heading. Although the term "zealous" still appears in the Preamble and in several comments to Virginia Rule 1.3, that ethics rule also explains that lawyers do not have to press for every advantage for their clients.

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

- First, lawyers establishing an attorney-client relationship can limit the scope of the representation so it "exclude[s] objectives or means that the lawyer regards as repugnant or imprudent" (lawyers can either make their services

available only under this condition, or agree with the client to such a limit). Virginia Rule 1.2 cmt. [6].

- Second, during the course of the representation the client generally sets the objectives, but the lawyer "has professional discretion in determining the means by which a matter should be pursued" (Virginia Rule 1.3 cmt. [1]) and "should assume responsibility for technical and legal tactical issues." Virginia Rule 1.2 cmt. [1].

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

- Fourth, although a client might ask a lawyer to undertake steps that "seems to the lawyer to be unjust, the lawyer may ask the client for permission to forego such action." Virginia Rule 3.4 cmt. [7].

- Fifth, "a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so." Virginia Rule 1.2 cmt. [1].

- Sixth, a lawyer may withdraw from representing a client (even if there is "material adverse effect on the interests of the client") if "the client persists in a course of action involving a lawyer's services that the lawyer reasonably believes is illegal or unjust," or if "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent." Virginia Rule 1.16(b)(1), (3).

This hypothetical deals with the second and third situations.

A Rule 1.3 comment provides further guidance.

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. <u>However, a lawyer is not bound to press for every advantage that might be realized for a client.</u> <u>A lawyer has professional discretion in determining the means by which a matter should be pursued.</u> <u>See</u> Rule 1.2. A lawyer's work load should be controlled so that each matter can be handled adequately.

Virginia Rule 1.3 cmt. [1] (emphasis added). This limitation should provide comfort to lawyers knowing that they must represent their clients diligently, but also wishing to act professionally when they do so.

The **Principles of Professionalism** indicate that:

> In my conduct toward everyone with whom I deal, I should:
>
> - Treat everyone as I want to be treated -- with respect and courtesy.
>
> In my conduct toward my clients, I should:
>
> - Act with diligence and dedication -- tempered with, but never compromised by, my professional conduct toward others.
> - Explain to clients that my courteous conduct toward others does not reflect a lack of zeal in advancing their interests, but rather is more likely to successfully advance their interests.
>
> In my conduct toward opposing counsel, I should:
>
> - Treat both opposing counsel and their staff with respect and courtesy.

Best Answer

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

Requesting that Clients Forego Inappropriate Actions

Hypothetical 25

Despite the "lore" that clients involved in litigation become more emotional than those involved in transactional matters, one of your business clients has been quite a challenge for you. Your client tends to "fly off the handle," and sometimes engages in discourteous conduct himself or asks you to do so. You know that you have to loyally and diligently serve your client, but you wonder if you can ask your client to forego such inappropriate actions.

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

YES

Analysis

The Virginia ethics rules explicitly permit lawyers to ask their clients to forego inappropriate actions.

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

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

- Second, during the course of the representation the client generally sets the objectives, but the lawyer "has professional discretion in determining the means by which a matter should be pursued" (Virginia Rule 1.3 cmt. [1]) and "should assume responsibility for technical and legal tactical issues." Virginia Rule 1.2 cmt. [1].

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

- Fourth, although a client might ask a lawyer to undertake steps that "seems to the lawyer to be unjust, the lawyer may ask the client for permission to forego such action." Virginia Rule 3.4 cmt. [7].

- Fifth, "a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so." Virginia Rule 1.2 cmt. [1].

- Sixth, a lawyer may withdraw from representing a client (even if there is "material adverse effect on the interests of the client") if "the client persists in a course of action involving a lawyer's services that the lawyer reasonably believes is illegal or unjust," or if "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent." Virginia Rule 1.16(b)(1), (3).

This hypothetical deals with the fourth situation.

A Rule 3.4 comment provides further guidance.

> In the exercise of professional judgment on those decisions which are for the lawyer's determination in the handling of a legal matter, a lawyer should always act in a manner consistent with the best interests of a client. However, when an action in the best interest of a client seems to the lawyer to be unjust, the lawyer may ask the client for permission to forego such action. The duty of lawyer to represent a client with zeal does not militate against his concurrent obligation to treat, with consideration, all persons involved in the legal process and to avoid the infliction of needless harm. Under this Rule, it would be improper to ask any question that the lawyer has no reasonable basis to believe is relevant to the case and that is intended to degrade any witness or other person.

Virginia Rule 3.4 cmt. [7] (emphasis added).

Thus, lawyers do not fall short of their duty of diligence by asking their clients to forego "unjust" actions.

The **Principles of Professionalism** indicate that:

> In my conduct toward my clients, I should:
>
> - Explain to clients that my courteous conduct toward others does not reflect a lack of zeal in advancing their interests, but rather is more likely to successfully advance their interests.

In my conduct toward opposing counsel, I should:

- Avoid reciprocating any unprofessional conduct by opposing counsel, explaining to my clients that such behavior harms rather than advances the clients' interests.

- Resist being affected by any ill feelings opposing clients may have toward each other, remembering that any conflict is between the clients and not between the lawyers.

Best Answer

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

No Need to Always Follow the Client's Direction

Hypothetical 26

You realize that the ethics rules require you to diligently serve your client, and generally take the client's direction. However, in some situations you have wanted to refuse to follow the client's direction to engage in discourteous (although not unethical) actions. This issue just came to a head in contentious business negotiations, because your client has directed you to take some actions that you think are unprofessional.

May you refuse to follow a client's direction?

YES

Analysis

It should go without saying that lawyers in nearly every situation must follow their client's direction.

> A lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision, after consultation with the lawyer, whether to accept an offer of settlement of a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

Virginia Rule 1.2(a).

> A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under Rule 1.16.

Virginia Rule 1.3(b).

However, the ethics rules recognize exceptional circumstances where lawyers may refuse to follow a client's direction.

Virginia's ethics rules describe several occasions during the course of an attorney-client relationship when lawyers have more power than they might realize to

act professionally -- without falling short of their clear ethical duty to act as diligent client advocates.

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

- Second, during the course of the representation the client generally sets the objectives, but the lawyer "has professional discretion in determining the means by which a matter should be pursued" (Virginia Rule 1.3 cmt. [1]) and "should assume responsibility for technical and legal tactical issues." Virginia Rule 1.2 cmt. [1].

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

- Fourth, although a client might ask a lawyer to undertake steps that "seems to the lawyer to be unjust, the lawyer may ask the client for permission to forego such action." Virginia Rule 3.4 cmt. [7].

- Fifth, "a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so." Virginia Rule 1.2 cmt. [1].

- Sixth, a lawyer may withdraw from representing a client (even if there is "material adverse effect on the interests of the client") if "the client persists in a course of action involving a lawyer's services that the lawyer reasonably believes is illegal or unjust," or if "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent." Virginia Rule 1.16(b)(1), (3).

This hypothetical deals with the fifth situation.

A Rule 1.2 comment provides further guidance.

> Both lawyer and client have authority and responsibility in the objectives and means of representation. The client has ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by the law and the lawyer's professional obligations. Within those limits, a client also has a right to consult with the lawyer about the means to be used in pursuing those objectives. In that context, a lawyer shall advise the client about the advantages, disadvantages, and availability of dispute

> resolution processes that might be appropriate in pursuing these objectives. At the same time, a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so. A clear distinction between objectives and means sometimes cannot be drawn, and in many cases the client-lawyer relationship partakes of a joint undertaking. In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. These Rules do not define the lawyer's scope of authority in litigation.

Virginia Rule 1.2 cmt. [1] (emphasis added).

Thus, lawyers have at least some freedom to decline their client's direction. Some examples might include situations in which the client wishes the lawyer to act discourteously. Of course, lawyers finding themselves unable to adequately represent their clients in such situations would almost surely have to withdraw from the representation. In addition, they should be prepared for the client to fire them if the relationship becomes too strained.

The **Principles of Professionalism** indicate that:

> In my conduct toward everyone with whom I deal, I should:
>
> - Treat everyone as I want to be treated -- with respect and courtesy.
>
> In my conduct toward my clients, I should:
>
> - Act with diligence and dedication -- tempered with, but never compromised by, my professional conduct toward others.
>
> - Explain to clients that my courteous conduct toward others does not reflect a lack of zeal in advancing their interests, but rather is more likely to successfully advance their interests.
>
> In my conduct toward opposing counsel, I should:

- Treat both opposing counsel and their staff with respect and courtesy.

Best Answer

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

Dealing with a Discourteous Opponent

Hypothetical 27

You have tried to cooperate with the lawyer representing your adversary, but found that she has not relented in her remarkably discourteous behavior. Her rudeness is most apparent during telephone calls, when she tends to scream at you and then hang up. You had always thought that transactional lawyers tended to be somewhat more civil than litigators, but this lawyer has tested that generality.

What should you do?

CONTINUE ACTING PROFESSIONALLY, AND PERHAPS TRY TO ENGAGE THE OTHER LAWYER PERSONALLY, AND CONSIDER COMMUNICATING ONLY IN WRITING

Analysis

Some folks' personalities simply will never change, and you have no reasonable hope of convincing them to act courteously. You should nevertheless avoid the temptation to reciprocate.

Reciprocating discourteous conduct ultimately does not serve your client, and in most situations will make you feel worse about yourself and about your role as a lawyer.

The **Principles of Professionalism** indicate that:

> In my conduct toward opposing counsel, I should:
>
> - Avoid reciprocating any unprofessional conduct by opposing counsel, explaining to my clients that such behavior harms rather than advances the clients' interests.
>
> - Resist being affected by any ill feelings opposing clients may have toward each other, remembering that any conflict is between the clients and not between the lawyers.

Some lawyers have devised clever ways to personally engage discourteous lawyers. For instance, McGuireWoods partner Sid Kanazawa (who practices in that

firm's Los Angeles office) relies on an interesting tactic. Sid invites a troublesome lawyer to lunch at the beginning of a representation that he knows might be contentious. Sid pays for lunch, and they meet at a neutral site. The only condition is that they not talk about the case. Sid tries to engage the other lawyer in discussion about family, hobbies, etc. He has correctly found that human nature makes it more difficult to act discourteously toward someone with whom you have had such a personal conversation.

Although it clearly would be best if you could deal with an adversary's discourteous lawyer on the telephone or in person, in some situations you may want to consider limiting most or even all any communications to e-mails.

It would be best not to insist on this type of communication in every representation, but with particularly troublesome lawyers it might be appropriate to create a "paper trail" of the discourteous behavior. Folks tend to be somewhat more courteous in e-mails than in telephone calls (although not as courteous as they generally are in hard-copy letters).

Without being sanctimonious, it might make sense to tell the other lawyer that you think it would be best if you communicated generally (or exclusively) in written form, so that you can focus on the merits of the issues rather than becoming emotionally involved.

In situations like this, lawyers should also advise their clients of their goal in seeking professional conduct from the other lawyer, and how that helps the client.

The **Principles of Professionalism** indicate that:

> In my conduct toward my clients, I should:
>
> - Explain to clients that my courteous conduct toward others does not reflect a lack of zeal in advancing their

interests, but rather is more likely to successfully advance their interests.

Best Answer

The best answer to this hypothetical is **CONTINUE ACTING PROFESSIONALLY, AND PERHAPS TRY TO ENGAGE THE OTHER LAWYER PERSONALLY, AND CONSIDER COMMUNICATING ONLY IN WRITING**.

Scheduling Meetings

Hypothetical 28

You are working with your client to set up a series of negotiation sessions with the other side in a complex business transaction. Your client wants you to insist that the other side meet at a location of her choosing, and at a time that your client has selected (even though your client is free on the dates that the other side has suggested). Your client tells you that she thinks compromising on the date and place of the negotiation sessions will "show weakness."

What should you do?

TRY TO SATISFY YOUR CLIENT'S DESIRES, WHILE COMPROMISING WITH THE OTHER SIDE ABOUT LOGISTICS

Analysis

Logistical matters such as the time and place of meetings, etc. generally do not implicate ethics rules, and therefore fall into the realm of client relations and professionalism.

Lawyers scheduling meetings or working with clients to schedule meetings should remember the ethics rules provisions providing discretion for the lawyers to act professionally as they undertake such activities.

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

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

- Second, during the course of the representation the client generally sets the objectives, but the lawyer "has professional discretion in determining the means by which a matter should be pursued" (Virginia Rule 1.3 cmt. [1]) and "should assume responsibility for technical and legal tactical issues." Virginia Rule 1.2 cmt. [1].

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

- Fourth, although a client might ask a lawyer to undertake steps that "seems to the lawyer to be unjust, the lawyer may ask the client for permission to forego such action." Virginia Rule 3.4 cmt. [7].

- Fifth, "a lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so." Virginia Rule 1.2 cmt. [1].

- Sixth, a lawyer may withdraw from representing a client (even if there is "material adverse effect on the interests of the client") if "the client persists in a course of action involving a lawyer's services that the lawyer reasonably believes is illegal or unjust," or if "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent." Virginia Rule 1.16(b)(1), (3).

Lawyers might rely on these provisions when setting up the time and place of meetings.

Most experienced lawyers downplay the importance of such "face saving" issues, and try to focus on the merits of the negotiation at hand.

The **Principles of Professionalism** indicate that:

> In my conduct toward opposing counsel, I should:
>
> - Cooperate as much as possible on procedural and logistical matters, so that the clients' and lawyers' efforts can be directed toward the substance of disputes or disagreements.
>
> - Cooperate in scheduling any discovery, negotiations, meetings, closings, hearings or other litigation or transactional events, accommodating opposing counsel's schedules whenever possible.

Lawyers who schedule but later change the time or place of a meeting should alert the other side.

The **Principles of Professionalism** indicate that:

In my conduct toward opposing counsel, I should:

- Notify opposing counsel of any schedule changes as soon as possible.

Whenever lawyers schedule meetings, they should arrive on time.

The **Principles of Professionalism** indicate that:

In my conduct toward opposing counsel, I should:

- Be punctual in attending all scheduled events.

Best Answer

The best answer to this hypothetical is **TRY TO SATISFY YOUR CLIENT'S DESIRES, WHILE COMPROMISING WITH THE OTHER SIDE ABOUT LOGISTICS**.

Reacting to the Adversary's Drafting Errors in Transactional Documents

Hypothetical 29

You and your client have been furiously negotiating transactional documents with the other side in a big deal -- 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. 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."

The more recent 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 Emery Longan, Ethics in Settlement Negotiations: Foreword, 52 Mercer L. Rev. 807, 814-15 (2000-2001) ("the lawyer has the duty to correct the mistakes" if the lawyer notices typographical or calculation errors in a settlement agreement).

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. 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. 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.

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.

The **Principles of Professionalism** indicate that:

> In my conduct toward my clients, I should:
>
> - Act with diligence and dedication -- tempered with, but never compromised by, my professional conduct toward others.
>
> - Explain to clients that my courteous conduct toward others does not reflect a lack of zeal in advancing their interests, but rather is more likely to successfully advance their interests.

Best Answer

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