CONFLICTS BETWEEN LAWYERS AND THEIR CLIENTS: KEY ISSUES

Hypotheticals and Analyses*

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

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Hypothetical 1

You were surprised and disappointed to hear that a former client just sued your firm for malpractice, claiming that one of your favorite colleagues had violated your state's core conflict of interest rule. After reading the complaint, a few questions come to mind.

(a) Can an ethics rule violation support a cause of action against the lawyer?

NO

(b) Is breach of an ethics rule admissible in a civil case against the lawyer?

MAYBE

Analysis

Bars and courts have had some difficulty defining the role of ethics rules (and ethics rules violations) in nondisciplinary contexts.

The interplay between the ethics rules and substantive law continues to vex the courts.

- Christine Simmons, Line Between Lawyer Ethics and Crime To Highlight Ex-Big Law Partner's Trial, N.Y.L.J., Oct. 16, 2017 ("The trial starting this week against Evan Greebel, a former Kaye Scholer and Katten Muchin Rosenman partner and onetime adviser to Martin Shkreli, will not only dive into federal conspiracy charges, but also explore at what point federal prosecutors claim ethical violations by a lawyer can become a crime."; "In battling letters on the eve of trial to United States District Judge Kiyo Matsumoto in Brooklyn, Greebel's defense lawyers assert that the government is apparently contending that violations of attorney ethics rules relate to its criminal prosecution."; "'To set a precedent allowing the government to wield ethical guidelines as swords of criminal liability would be extremely damaging to the entire bar,' stated the October 13 letter from Gibson, Dunn & Crutcher partner Reed Brodsky. 'This is frightening for the legal profession and for every corporate lawyer in the United States simply doing their job representing clients.'").

(a) The ABA Model Rules and every state's ethics rules indicate that a lawyer's breach of an ethics rule should not create a cause of action against the lawyer.

> Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.

ABA Model Rule Scope note [20] (emphases added).

Courts agree with this approach.

- Speeney v. Rutgers, 673 F. App'x 149, 155 n.7 (3d Cir. 2016) ("Whether there is a genuine dispute of material fact relating to the formation (or not) of an attorney-client relationship is for the Court, not the experts, to determine. Moreover, we note that to the extent Plaintiffs seek to rely on the New Jersey Rules of Professional Conduct to support their claims, 'those rules do not, in themselves, create a duty, and a violation of those rules, standing alone, does not form the basis of a cause of action.'" (citation omitted)).

- Tucker v. Rogers, 778 S.E.2d 795, 798 (Ga. Ct. App. 2015) (quoting Georgia Rules of Professional Conduct, Chap. 1, Scope [18]: "'These Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.'). While a violation of the Professional Code does not per se establish legal malpractice liability, however, 'pertinent Bar Rules are relevant to the standard of care in a legal malpractice action.'" (citation omitted)).

- State v. Warren, Crim. A. No. CR-09-9716, 2010 Me. Super. LEXIS 30, at *7 (Me. Super. Ct. Apr. 7, 2010) ("The Rules of Professional Conduct are by their own terms 'not designed to be a basis for civil liability' or 'invoked by opposing parties as procedural weapons.'. . . The Rules of Professional Conduct are only guides for professional behavior. . . . Consequences for their violation are personal to the attorney, and have no bearing on questions of evidence of procedure.").

- Leonard v. Dorsey & Whitney LLP, 553 F.3d 609, 628 (8th Cir. 2009) ("We believe the bankruptcy court erred by relying too heavily on the Minnesota Rules of Professional Conduct. Demonstrating that an ethics rule has been violated, by itself, does not give rise to a cause of action against the lawyer and does not give rise to a presumption that a legal duty has been breached.").

- Bertelsen v. Harris, 537 F.3d 1047, 1058-59 (9th Cir. 2008) ("[U]nder Washington law, the award of disgorgement of fees is not mandatory even where the attorney who got the fees also violated Washington's Rules of Professional Conduct for attorneys; instead, whether to order disgorgement is placed firmly within the discretion of the trial court. . . . Here, the district court made a considered determination that the circumstances did not warrant disgorgement of fees. Whether or not the district court erred in its assessment of the merits of Appellants' breach of fiduciary duty claims -- an issue we do not reach -- it did not abuse its discretion when it declined to award disgorgement on this set of facts. We affirm its judgment on that basis.").

- Carter v. Williams, 431 S.E.2d 297, 301 (Va. 1993) ("[t]he Code of Professional Responsibility does not provide a basis for private causes of action").

(b) Although all bars agree that an ethics rule violation should not support a civil cause of action against a lawyer, they disagree about the admissibility and relevance of an ethics violation in a civil case.

Some ethics rules (including the ABA Model Rules of Professional Conduct) indicate that a lawyer's breach of an ethics rule can provide evidence of wrongdoing.

> Since the Rules do establish standards of conduct by lawyers, a lawyer's violation of a Rule may be evidence of breach of the applicable standard of conduct.

ABA Model Rule Scope cmt. [20].

States disagree about this issue. Some states follow the ABA approach, and thus allow the admission of ethics rules as defining a lawyer's standard of care.

- Tucker v. Rogers, 778 S.E.2d 795, 798 (Ga. Ct. App. 2015) (quoting Georgia Rules of Professional Conduct, Chap. 1, Scope [18]: "'These Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability.'). While a violation of the Professional Code does not per se establish legal malpractice liability, however, 'pertinent Bar Rules are relevant to the standard of care in a legal malpractice action.'" (citation omitted)).

- CenTra, Inc. v. Estrin, 538 F.3d 402, 410 (6th Cir. 2008) (holding that a client's previous consent did not justify a lawyer's handling of a matter adverse to the client; reversing a lower court's grant of summary judgment to the law firm in a malpractice case, and remanding the case for further proceedings; "Although Rule 1.0(b) makes it clear that a plaintiff cannot seek damages for a violation of the Michigan Rules of Professional Conduct, a violation of the rules may be probative in establishing an independent cause of action. For instance, the Michigan Court of Appeals considered the Michigan Rules of Professional Conduct in a civil contract action that determined that a fee agreement was unenforceable.").

- Byers v. Cummings, 87 P.3d 465, 470 (Mont. 2004) ("it is entirely appropriate to use the general language of ethical rules in describing one's ethical duty to a client, however, it is improper to explicitly refer to the specific rule or to instruct the jury by referring to the rule in question").

Similarly, one court has held that a civil judgment entered against the lawyer could act as collateral estoppel in a disciplinary proceeding.

- Office of Disciplinary Counsel v. Kiesewetter, 889 A.2d 47 (Pa. 2005) (holding that a civil judgment entered against a lawyer could act as collateral estoppel in a disciplinary proceeding).

Other states take exactly the opposite approach.

- Virginia Rules Scope ("[N]othing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.").

- Star Broad., Inc. v. Reed Smith Ltd. Liab. P'ship, Civ. A. No. 08-0616, 2009 U.S. Dist. LEXIS 14700, at *26, *26-27 (E.D. Va. Feb. 24, 2009) (holding that an expert on the ethical responsibilities of lawyer had nothing to offer in a malpractice case against a lawyer; "Mr. Rigsby has admitted his lack of qualifications to address the standard of care and breach issues, stating that his only opinion in this case concerns a general standard of care rooted in the Rules of Professional Conduct. He acknowledges that he cannot opine on a specific standard of care or a breach of that standard of care for an attorney practicing in commercial law or government contracts law. In addition, Mr. Rigsby admits that he did not consult with a government contracts lawyer to determine whether the Star/DeCA License Agreement raised issues that needed to be referred to such a specialist. Mr. Rigsby has no experience or training in commercial law or government contracts law and has not consulted with any government contracts lawyer, and cannot provide testimony as expert evidence concerning the standard of care, or the breach of that standard, for a commercial lawyer or a government contracts lawyer in this situation."; "The Rules of Professional Conduct make clear in their Preamble that '[v]iolation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached.' 'They are not designed to be a basis for civil liability . . .' Thus, Mr. Rigsby's opinion that the Rules of Professional Conduct required Mr. Mahone to consult a government contracts lawyer cannot, by itself, establish a claim of legal malpractice.").

- Allen v. Allison, 155 S.W.3d 682 (Ark. 2004) (holding that the ethics rules are inadmissible in a civil case against a lawyer).

Best Answer

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

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Lawyers' Wrongdoing Unrelated to Clients

Hypothetical 2

One of your law school classmates was always a hot-head, so you were not surprised to read that his girlfriend just accused him of killing her dog during a drunken argument with her. You assume that he will face animal cruelty charges, but you wonder whether he will also face professional discipline.

Can lawyers be punished professionally for conduct totally unrelated to their professional conduct?

YES

Analysis

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

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

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

The <u>Restatement</u> takes essentially the same approach.

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

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

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

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

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

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

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

States have struggled to define and apply those concepts.

- Andrew Strickler, Calif. Atty's Offense Behavior May Elude Discipline Rule, Law360, July 28, 2016) ("The racist behavior and displays of Nazi symbols by a California lawyer may sully the professional's reputation, experts say, but that doesn't mean he should worry about losing his license under the state's 'moral turpitude' misconduct standard."; "While Southern California attorney Wayne Spindler was arrested earlier this year after submitting a speaker card at a May council meeting bearing a cartoon of a burning cross and a robed figure holding a noose, no formal indictment was ever filed."; "That lack of a formal allegation -- even in a state with a strict professional code addressing lawyer immorality -- leaves bar authorities without a clear foundation for a disciplinary action focused on conduct outside the practice of law."; "'Moral turpitude is of course a vague and shifting concept, and the bar is simply not going to try to regulate distasteful statements from people who also happen to be attorneys,' said bar defense specialist Jerome Fishkin of Fishkin Slatter LLP."; "And while state disciplinary officials can in theory move against a lawyer for noncriminal conduct unassociated with a law practice, Fishkin said, 'I'm hard-pressed to think of a single instance where a lawyer was disciplined for a private act that didn't result in some kind of court or administrative proceeding.'"; "A California professional statute establishes a felony or misdemeanor conviction for a crime involving moral turpitude as grounds for disbarment or suspension. A section of the code also allows for disbarment for 'any act' involving moral turpitude committed in the course of an attorney's 'relations as an attorney or otherwise.'"; "The statute also does not limit the state Supreme Court's power to discipline any lawyer, including through a summary disbarment.").

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

In 2017, New York disbarred a lawyer who had killed his girlfriend's dog.

- In re Pastor, N.Y.S.3d 685, 685, 686 (N.Y. App. Div. 2017) (disbarring a lawyer who had killed his girlfriend's dog; "[R]espondent was found guilty of killing his girlfriend's dog. At sentencing, Justice Robert Mandelbaum said that respondent's repeated blows to the dog 'showed almost incomprehensible violence, and malice,' that the dog was in 'excruciating pain' up until she lost consciousness while respondent 'sat down at his computer in the most cold blooded manner, and went to work, knowing that the dog lay dying . . . on the floor behind him.'"; "Here, as respondent has been convicted of a felony under the laws of this state, he ceased to be an attorney by operation of law and therefore, his name should be stricken from the roll of attorneys pursuant to Judiciary Law § 904(4)(a) and (b) and 22 NYCRR 1240.12(c)(1).").

This approach is consistent with other states' professional discipline of lawyers for misconduct unrelated to their professional conduct.

- In re Hartke, 138 A.3d 478, 478, 478-79 (D.C. 2016) (per curiam) (suspending for six months a D.C. lawyer who was punished in Virginia for improper conduct during a CLE seminar; "In April 2015, respondent Wayne Richard Hartke was suspended from the practice of law in Virginia for six months. This court issued an order directing Mr. Hartke to show cause why this court should not impose identical reciprocal discipline. Mr. Hartke argues that he should not be sanctioned at all. We adopt Disciplinary Counsel's recommendation that we impose identical reciprocal discipline."; "The following facts were stipulated by Mr. Hartke and the Virginia State Bar Disciplinary Board. In January 2014, Mr. Hartke attended a Continuing Legal Education ('CLE') seminar in Virginia. During the morning session, Mr. Hartke fell asleep and began snoring, causing the seminar's coordinator to intervene and wake Mr. Hartke. During the afternoon session, Mr. Hartke began talking loudly at a video presentation and continued to do so after the seminar coordinator asked him to stop. In response to Mr. Hartke's continued outbursts, another attendee led Mr. Hartke from the room. That attendee smelled alcohol on Mr. Hartke's person. Another attendee saw a nearly empty liquor bottle among Mr. Hartke's possessions and noticed that Mr. Hartke appeared to be intoxicated. Mr. Hartke admitted to one attendee that he had been drinking."; "In a written response to the Virginia State Bar and orally to a Virginia State Bar investigator, Mr. Hartke denied bringing alcohol to the seminar and denied being intoxicated during the seminar. When speaking with the investigator, Mr. Hartke also denied falling asleep and snoring during the morning session, insisting that he had been taking notes. In a subsequent conversation with an Assistant Virginia Bar Counsel, however, Mr. Hartke admitted that those representations were not accurate and that he did not take the steps necessary to correct his misrepresentations.”).

- Cincinnati Bar Ass’n v. Wiest, 72 N.E.3d 621, 628, 629 (Ohio 2016) (per curiam) (suspending for two years a Thompson Hine lawyer who abused inside information; "Simply stated, the panel (and the board) found that Wiest's testimony regarding his motivation for purchasing the stock and his belief that the deal was not moving forward were not credible. Instead, the panel and board found that Wiest engaged in inherently dishonest and deceitful behavior not only by using confidential client information to purchase the stock for his own pecuniary benefit but also by failing to seek the informed consent of his client or his firm before doing so."; "Rather than pick up the phone and talk with his client, Wiest pieced together a string of evidence that no reasonable person, let alone an attorney, would rely upon to unilaterally determine that his client's proposed business deal was dead. He then failed to disclose his purchase of stock in the very company that his client had engaged his services to acquire. Not only did he conceal from his client his intention to purchase, he remained silent upon learning that his client was moving forward with its acquisition of that company and once again remained silent when the SEC issued a subpoena compelling him to produce his client's confidential information. Thus, it is Wiest's repeated concealment of information that he was duty-bound to communicate to his client from which we infer his intent to engage in dishonesty, fraud, deceit, or misrepresentation.").

- Iowa Sup. Ct. Att’y Disciplinary Bd. v. Taylor, 887 N.W.2d 369, 372-73, 373 (Iowa 2016) (suspending for six months a lawyer who had not paid her taxes for eleven years; "The Iowa Supreme Court Attorney Disciplinary Board brought a complaint against the respondent, Karen A. Taylor, alleging she committed misconduct and violated the Iowa Rules of Professional Conduct and the Iowa Code of Professional Responsibility for Lawyers by failing to file her federal and state income tax returns for tax years 2003 through 2013. Based on the facts stipulated to by the parties, a division of the Grievance Commission of the Supreme Court of Iowa concluded Taylor's conduct violated rule 32:8.4(b) and 32:8.4(c) of the Iowa Rules of Professional Conduct and recommended she be suspended for no more than thirty days."; "On our de novo review, we conclude the Board established by convincing preponderance of the evidence that Taylor violated rules 32:8.4(b) and 32:8.4(c) of the Iowa Rules of Professional Conduct and disciplinary rules 1-102(A)(3), 1-102(A)(4), and 1-102(A)(6) of the Iowa Code of Professional Responsibility for Lawyers. Under the circumstances of this case, we conclude the appropriate sanction is a suspension of Taylor's license to practice law for a minimum of six months.").

- In re Conduct of Herman, 348 P.3d 1125, 1126 (Or. 2015) (disbarring a lawyer for dishonesty in a business deal; "In this lawyer disciplinary proceeding, the Oregon State Bar (Bar) charged the accused with violating RPC 8.4(a)(3) (dishonesty and misrepresentation reflecting adversely on the accused's fitness to practice), arising from a filed corporate venture involving the accused and two business associates. A trial panel of the Disciplinary Board determined that the Bar proved that the accused violated that rule and that he should be disbarred. The accused now seeks review of that decision, which we review de novo. ORS 9.536(2); BR 10.6. For the reasons that follow, we agree with the trial panel that the Bar proved by clear and convincing evidence that the accused violated RPC 8.4(a)(3) and that disbarment is the appropriate sanction.").

- Lizzy McLellan, Attorney Disbarred for Nonlawyer Estate Planning Work, The Legal Intelligencer, Feb. 3, 2015 ("Montgomery County attorney Barry O. Bohmueller has been disbarred in Pennsylvania following his participation in an estate-planning company that had nonlawyers drafting trusts for the elderly."; "A three-justice majority of the court voted to disbar Bohmueller, according to a per curiam order filed January 23. Justices J. Michael Eakin and Max Baer dissented in favor of a five-year suspension."; "The Disciplinary Board of the Supreme Court, in a March 2014 opinion made public with the court's order, said Bohmueller allowed nonlawyers to counsel his clients, did not communicate properly with his clients concerning their individual estate planning, failed to inform clients of fee sharing and conflicts of interest and engaged in other dishonest and fraudulent conduct."; "'[Bohmueller's] status as a lawyer gave legitimacy to the estate planning businesses. It was the means by which the agents could persuade the potential clients to obtain the living trust, which brought the agents one step closer to their ultimate goal of selling annuities to the clients,' the opinion said. 'Not only did these senior citizens believe that the agents were working for [Bohmueller], the evidence demonstrates that at least several believed that the agent was a lawyer.'").

- In re Zulandt, 939 N.Y.S.2d 338, 339 (N.Y. App. Div. 2012) (suspending for three years a former Cravath lawyer who had assaulted his girlfriend; "On December 24, 2008, respondent pleaded guilty to a charge of assault in the third degree (Penal Law § 120.00), a class A misdemeanor. In accordance with his plea agreement, the court sentenced respondent to ten months of incarceration, ordered restitution in the amount of $8,272.55, and entered a final order of protection against him. On June 23, 2009, respondent was released from custody after serving approximately six months in jail."; "Respondent's criminal conviction stems from an argument that he had with the complainant, his former girlfriend, in her apartment on October 4, 2007. During the encounter, respondent repeatedly threw the complainant to the floor and slapped her about the face, causing physical injuries that required medical attention. During the assault, respondent called the complainant such derogatory names as 'slut' and 'whore.' Respondent also destroyed or damaged various items of the complainant's personal property, including a Cartier watch that he smashed with a hammer, a purse that he filled with water, a painting that he punctured, and a couch that he damaged with water and oil.").

- In re Williams, 85 So. 3d 583, 591 (La. 2012) (permanently disbarring a lawyer who had shot and killed someone, although his manslaughter conviction was eventually dismissed; "In a disciplinary proceeding against an attorney who has been convicted of a crime, the attorney is conclusively presumed to be guilty of the crime. *See* Supreme Court Rule XIX, § 19(E). In such cases, the ODC bears no additional burden to prove the attorney's criminal conduct; the sole issue to be determined is whether the crime warrants discipline and, if so, the extent thereof. *Id.*"; "The fact that an attorney has not been convicted of a crime does not preclude the ODC from proving the attorney committed a criminal act in violation of Rule 8.4(b) of the Rules of Professional Conduct.").

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

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

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

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

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

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

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

- In re Fahy, No. 05-O-05123, 2009 Calif. Op. LEXIS 1, at *4 (Cal. Bar Ct. Mar. 6, 2009) (disbarring a lawyer for switching his vote during his service as a juror, in order to return to his law practice; "On April 22, respondent concluded that Judge Ballati would not declare a mistrial due to the jury's impasse. He foresaw further lengthy deliberations that his busy law practice could not afford. Accordingly, on that day, he told the other jurors that if the judge would not declare a mistrial, respondent would change his vote for the defense to break the deadlock so he could return his attention to his law practice. On April 26, respondent changed his vote, thus creating a verdict in favor of the defendant.").

- Iowa Supreme Court Attorney Disciplinary Bd. v. Kress, 747 N.W.2d 530, 533, 533-34, 534, 534-35 (Iowa 2008) (suspending the license of a former University of Iowa Law Professor Kenneth Kress; explaining that Kress was a

UC Berkeley Law School graduate who "is particularly well-known as one of the leading scholars nationally in mental health law."; also noting that Kress's "significant other" was a "mental health advocate knowledgeable about psychological disorders"; further explaining that "Kress believed that he had been treated badly at the law school because he deserved to be appointed to a faculty chair, but had not yet received one."; explaining that Kress handed out student evaluation forms to an evening "mental health law seminar," and explained to the ten students in the seminar that his job was "on the line"; emphasizing that "[t]he only student who testified at the hearing indicated that Kress's demeanor was normal, that he spoke at his normal rate, did not exhibit frenzied excitement or seem confused, his speech was not disordered or rambling, and that he seemed logical."; noting that Kress's research assistant was suspicious when Kress violated University procedures by insisting that the evaluation forms be left in Kress's secretary's office that evening; explaining that an investigation of the forms showed that Kress had tampered with them; "The investigation determined that three neutral or unfavorable evaluations were discarded and replaced with favorable versions, two were altered in order to raise the scores, and two evaluations were unchanged. The effect of the changes was to raise Kress's composite teaching effectiveness score on a five point scale from 2.86, a relatively low score that might attract attention of law school administrators, to 4.86, a very high score that few members of the faculty were able to achieve. When confronted with the results of the investigation, Kress did not claim a medical or mental defense."; noting that "[a]t the hearing, Kress admitted in light of the evidence that he must have tampered with the evaluations. Kress asserted, however, that at the time he suffered from mental and physical illnesses that excused or mitigated his conduct."; reciting Kress's defense: "Kress noted that after going with his research assistant to his secretary's office, he woke up in his office, either from sleep or from a 'delirious loss of consciousness' after hallucinating about two dogs. He told the Commission that he believed that conspirators had succeeded in sending rays into the students' minds changing their neurons, and altering their answers on the evaluations. Kress further testified that in light of the mind-changing rays, he believed that it was only fair for him to change the evaluations back, so they would be correct. Kress believed he was confronted with a matter of life or death. He hallucinated about being in prison, where a medieval jury was laughing at him for failing to save the world from the parade of horribles that was coming. Changing the evaluations thus was transformed from a personal matter to a universal struggle between good and evil."; ultimately suspending Kress's license indefinitely with no possibility of reinstatement for three months, and holding that he could apply for reinstatement only after undergoing a comprehensive mental examination).

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

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

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

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

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

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

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

- In re Bikman, 760 N.Y.S.2d 5, 7 (N.Y. App. Div. 2003) (suspending for 18 months a New York lawyer who defrauded an apartment owner by concealing her sister's death and taking advantage of the lower rent-controlled rent by submitting checks in her deceased sister's name; "A lawyer's unethical conduct, even when it occurs outside the practice of law, is a proper concern of the Disciplinary Committee because it tends to reflect adversely on the legal profession as a whole;" citing earlier New York decisions in which lawyers were punished for making misrepresentations on a resume, issuing worthless checks and engaging in improper business practices).

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

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

- Iowa Supreme Court Disciplinary Bd. v. Templeton, 784 N.W.2d 761, 771, 764, 767, 767-68, 769 (Iowa 2010) (suspending an Iowa lawyer's license indefinitely "with no possibility of reinstatement for a period of three months," even though he had been on inactive status since 2000; explaining that "[i]n 2000 Templeton took inactive status and began managing a newspaper distribution business. In 2007 he distributed newspapers in four states and personally delivered the newspapers in the Des Moines area."; noting that the lawyer had been arrested for being a "Peeping Tom," and admitted to a psychological disorder; "We have the authority to take disciplinary action against an attorney even though the attorney's license is inactive and the attorney is not actively engaged in the practice of law. . . . This is true even if at the time of the misconduct the attorney was not acting as a lawyer. . . . Thus, even though Templeton's law license was on inactive status and his conduct was unrelated to his representation of clients or any other facet of the practice of law, we still have the authority to sanction him upon a finding that he has engaged in misconduct in violation of the Iowa Rules of Professional Conduct."; finding that the lawyer's conduct violated Iowa Rule 8.4(b), because it reflected adversely on the lawyer's "honesty, trustworthiness, or fitness as a lawyer in other respects."; "Here, Templeton engaged in a pattern of criminal conduct by repeatedly looking into the victims' windows. In doing so, he violated Doe's, Roe's, and Poe's privacy, and caused them to suffer emotional distress. Although his conduct was compulsive, the record also establishes he intentionally and knowingly invaded the privacy of these women. This conduct also raises serious misgivings about whether Templeton understands the concept of privacy and respects the law protecting individuals' privacy rights. For these reasons, we find Templeton's criminal acts of invading Doe's, Roe's, and Poe's privacy reflects adversely on his fitness to practice law in violation of rule 32:8 4(b)."; finding that the conduct was not "prejudicial to the administration of justice").

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

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

- In re Hinson-Lyles, 864 So. 2d 108, 117 (La. 2003) (the Louisiana Supreme Court denied admission to the Louisiana Bar of a woman who -- five years earlier while working as a teacher -- was found guilty of having sex with a fourteen-year-old student; the Court had earlier allowed the woman to take the Bar exam and ordered a Commissioner's report on her character and fitness, which the woman passed; a dissenting judge pointed to the woman's successful rehabilitation, excellent performance as a law clerk for a Louisiana judge after graduating from law school, and what he called the "disingenuous" conduct by the Court in allowing the woman to take the Bar exam -- and then denying the woman's application without providing any clear guidelines for when she might be able to re-apply).

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

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

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

Bars have had the most trouble dealing with lawyers' substance abuse and mental illness.

- In re Discipline of Treffinger, 393 P.3d 1084,1085 (Nev. 2017) (en banc) (holding that a lawyer could continue practicing after pleading guilty to heroin possession and entering a lawyer assistance program; "Timothy Treffinger is a Nevada-licensed lawyer who pleaded guilty to one count of possession of a controlled substance (heroin), a class E felony under NRS 453.336. The district judge who accepted Treffinger's plea placed him on probation for three years and in the diversion program NRS 453.3363 creates for first-time offenders. If Treffinger succeeds in the diversion program, the criminal charges against him will be dismissed, and he will avoid a final judgment of conviction.").

- In re Richard, 148 So. 3d 923 (La. 2014) (permanently disbarring a lawyer whom the bar established had been guilty of narcotics possession).

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

A 2010 article describes states' varied approach to substance-abusing lawyers.

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

Best Answer

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

n 9/21

Doing Business with Clients

Hypothetical 3

You represent the owner of a small suburban office building in her labor and employment matters (mostly relating to the small clerical staff she employs). You do not perform any real estate work for the owner. Your firm wants to open up a "satellite office" in the suburbs, and you just told your managing partner that the firm should consider leasing space from your client.

(a) May you lease office space from your client?

YES

(b) Must your client be separately represented in the lease negotiations?

NO

Analysis

Lawyers doing business with their clients confront both fiduciary duty and ethics challenges.

Fiduciary Duty

As a matter of common law fiduciary duty, lawyers entering into business transactions with their clients normally are presumed to have defrauded them -- and must overcome that presumption with clear and convincing evidence.

- Liggett v. Young, 877 N.E.2d 178, 184, 185 (Ind. 2007) (addressing contract between a lawyer and client contractor for the construction of the lawyer's home; reversing the trial court's award of summary judgment to the lawyer in a breach of contract action brought by the contractor; noting the argument pursued by the lawyer that the contract with his client/contractor fell within the "standard commercial transaction" exception to Rule 1.8(a), but also acknowledging that the contractor argued that the exception was inapplicable because the lawyer had drafted the contract; holding that a violation of the ethics rules does not support a cause of action, but that the contractor/client could rely upon a common law breach of fiduciary duty claim against the lawyer; explaining that contracts between fiduciaries and beneficiaries are "presumptively invalid" and that "[t]ransactions between an attorney and client are presumed to be fraudulent, so that the attorney has the burden of proving the fairness and honesty thereof" (quoting In re Smith, 572 N.E.2d 1280, 1285 (Ind. 1991)); noting that the lawyer was representing the contractor at the time of the contract on unrelated matters, and that the lawyer had not presented any evidence showing that the contract "was fair and honest, or was a standard commercial transaction that should be exempted from the common law presumption of invalidity due to undue influence"; remanding for further proceedings).

- Tower Investors, LLC v. 111 E. Chestnut Consultants, Inc., 864 N.E.2d 927, 943 (Ill. App. Ct.) (holding that a partner of the Chicago law firm of Sonnenschein, Nath & Rosenthal (who had invested in a law firm client through an entity separate from the law firm) could enforce a promissory note; explaining that "attorney-client transactions are not void, but rather, presumptively fraudulent"; explaining that the sophisticated client had not been defrauded, because the law firm had fully explained the conflict), appeal denied, 875 N.E.2d 1125 (Ill. 2007).

- In re Corporate Dissolution of Ocean Shores Park, Inc., 134 P.3d 1188 (Wash. Ct. App. 2006) (holding that a lawyer entering into a business transaction with a client must show that the transaction was fair).

- Thomas v. Turner's Adm'r, 12 S.E. 149, 153 (Va. 1890) ("According to that rule all dealings between attorney and client for the benefit of the former, are not only regarded with jealousy and closely scrutinized, but they are presumptively invalid, on the ground of constructive fraud; and that presumption can be overcome only by the clearest and most satisfactory evidence."; "All transactions between the parties, to be upheld in a court of equity must be uberrima fides, and the onus is on the attorney to show, not only that no undue influence was used, or advantage taken, but that he gave his client all the information and advice as against himself that was necessary to enable him to act understandingly. He must show, in other words, (1) that the transaction was perfectly fair; (2) that it was entered into by the client freely; and (3) that it was entered into with such a full understanding of the nature and extent of his rights, as to enable the client to thoroughly comprehend the scope and effect of it."; ultimately holding that the lawyer had not carried his burden of showing that the transaction was fair, although the client had signed the agreement after reading it, and also affirmed that she understood it).

ABA Model Rules

Building on this common law fiduciary duty principle, the ABA Model Rules contain a remarkably stringent standard for business transactions between lawyers and their clients.

> A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless
>
> (1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted <u>in writing</u> in a manner that can be reasonably understood by the client;
>
> (2) the client is advised <u>in writing</u> of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and
>
> (3) the client gives informed consent, <u>in a writing signed by the client</u>, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

ABA Model Rule 1.8(a) (emphases added).

Not surprisingly, this rule does not apply

> to standard commercial transactions between a lawyer and a client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has not advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

ABA Model Rule 1.8 cmt. [1].

Courts take this common sense principle to heart.

- <u>Liggett v. Young</u>, 877 N.E.2d 178, 184, 185 (Ind. 2007) (addressing contract between a lawyer and client contractor for the construction of the lawyer's home; reversing the trial court's award of summary judgment to the lawyer in a breach of contract action brought by the contractor; noting the argument pursued by the lawyer that the contract with his client/contractor fell within the "standard commercial transaction" exception to Rule 1.8(a), but also acknowledging that the contractor argued that the exception was inapplicable because the lawyer had drafted the contract; holding that a violation of the ethics rules does not support a cause of action, but that the contractor/client could rely upon a common law breach of fiduciary duty claim against the lawyer; explaining that contracts between fiduciaries and beneficiaries are "presumptively invalid" and that "[t]ransactions between an attorney and client are presumed to be fraudulent, so that the attorney has the burden of proving the fairness and honesty thereof" (quoting In re Smith, 572 N.E.2d 1280, 1285 (Ind. 1991)); noting that the lawyer was representing the contractor at the time of the contract on unrelated matters, and that the lawyer had not presented any evidence showing that the contract "was fair and honest, or was a standard commercial transaction that should be exempted from the common law presumption of invalidity due to undue influence"; remanding for further proceedings).

- Pennsylvania LEO 2001-100 (3/2001) (holding that Rule 1.8(a) does not apply to "standard commercial transactions" between lawyers and clients, such as those involving banking, brokerage and medical services, or a lawyer's purchase of products from clients; explaining that the ethics rules are inapplicable to those transactions because they take place on a "level playing field" in which the "lawyer's legal training and experience do not put her at an advantage over the client"; explaining that Pennsylvania's version of Rule 1.8(a) does not contain a provision requiring that the business transaction be "fair and reasonable to the client," but does require the lawyer to "expressly advise the client that she has, and should pursue, the right to an independent evaluation of the transaction by another lawyer.").

Restatement

The Restatement takes the same basic approach as the ABA Model Rules, but without the mandatory written disclosures and consents.

> A lawyer may not participate in a business or financial transaction with a client, except a standard commercial transaction in which the lawyer does not render legal services, unless:
>
> (1) the client has adequate information about the terms of the transaction and the risks presented by the lawyer's involvement in it;
>
> (2) the terms and circumstances of the transaction are fair and reasonable to the client; and
>
> (3) the client consents to the lawyer's role in the transaction under the limitations and conditions provided in § 122 after being encouraged, and given a reasonable opportunity, to seek independent legal advice concerning the transaction.

Restatement (Third) of Law Governing Lawyers § 126 (2000).

State Case Law

Every state has a rule dealing with lawyers doing business with their clients. These usually fall somewhere between the ABA Model Rules and the Restatement.

States have severely punished lawyers who violate the applicable rules.

- In re Torre, 127 A.3d 690, 691 (N.J. 2015) (suspending for one year a lawyer who borrowed money from a client without meeting the requirements of Rule 1.8; "This disciplinary matter involves an attorney who borrowed $89,250 from an elderly, unsophisticated client the attorney had known for many years. The loan amounted to about seventy percent of the client's life savings. The debt was unsecured, and counsel repaid only a fraction of it during the client's lifetime."; "Counsel prepared a promissory note to record the loan's sparse and unfair terms, but he did not advise his client in writing beforehand that it was desirable to seek independent legal advice about the transaction. Counsel admits that he violated the Rules of Professional Conduct, see RPC 1.8(a), and does not challenge the Disciplinary Review Board's (DRB) determination that he be censured. The Office of Attorney Ethics (OAE) requests that a three-month suspension be imposed."; "Because of the egregious circumstances this case presents, we impose an even lengthier period of suspension. Respondent caused substantial harm to a vulnerable, eighty-six-year-old victim. A one-year suspension is warranted to protect the public and guard against elder abuse by lawyers, and to help preserve confidence in the bar. We also note that misconduct of this nature will result in serious consequences going forward.").

- In re Spencer, 330 P.3d 528, 541, 542 (Ore. 2014) (suspending a lawyer for thirty days for a violation of Rule 1.8, based on the lawyer's acting as the client's real estate broker without meeting the standards of Rule 1.8; "[T]he accused concedes that he did not obtain written consent from Smith-Canfield after giving her the requisite advice. The question under RPC 1.8(a) accordingly reduces to whether, in agreeing to act as Smith-Canfield's real estate broker, the accused either entered into a 'business transaction' with her or 'knowingly acquir[ed] a pecuniary interest adverse to 'Smith-Canfield's interests."; "The accused argues that, when he agreed to act as Smith-Canfield's real estate broker, he was not entering into a 'business transaction' with her within the meaning of RPC 1.8(a). We reach a different conclusion.").

- Iowa Supreme Court Attorney Disciplinary Bd. v. Qualley, 828 N.W.2d 282, 291(Iowa 2013) (suspending two lawyers for 60 days, for failing to advise their clients that the lawyer had a personal interest in transactions; noting that the lawyers represented a homeowners' association in seeking payment of delinquent homeowner dues, but did not list their fees in the release sought during foreclosure proceedings; explaining that the lawyers advised the homeowners' association that they had a buyer for the property, but did not reveal that it was the lawyers themselves; "On July 27, 2010, in advance of the sheriff's sale, Bleyhl sent an email to Broadmoor's property manager. This email informed her that Broadmoor had the right to purchase the property at the sheriff's sale, but specifically recommended against exercising that right. This email also informed the property manager that Qualley and Bleyhl [lawyers and defendants] had found a 'potential buyer,' and further noted a 'potential conflict of interest' since they would be representing both the buyer and the seller (Broadmoor)."; "Qualley and Bleyhl have a longtime friend by the name of Izaah Knox. During the years prior to the events giving rise to this disciplinary action, the three of them had discussed investing in real estate with the idea of making money by 'flipping' real estate in a short period of time."; "To accomplish this, Qualley and Bleyhl organized Elite Real Estate, L.L.C. (Elite). Elite was recorded with the secretary of state on August 3, 2010. The initial capital of Elite was provided by Knox in the amount of $7000. Neither Qualley nor Bleyhl made any capital contribution to Elite."; "The actions of Qualley and Bleyhl represented more than mere negligence. They did not exercise sufficient diligence to ensure Broadmoor could make informed decisions regarding whether to bid at the sheriff's sale, the appropriate bid at the sheriff's sale, and whether Broadmoor would have wanted Elite as a buyer at the sheriff's sale. . . . [W]e agree with the findings of the commission that Qualley and Bleyhl violated rules 32:1.4(a)(1), (a)(2), and (b) governing client communication.").

- Iowa Supreme Court Disciplinary Bd. v. Wright, 840 N.W.2d 295, 297, 298, 299, 299 n.5, 300-301, 301-02 (Iowa 2013) ("Wright was admitted to the bar and began practicing law in 1981. He developed a general practice, handling criminal cases, family law matters, personal injury and workers' compensation claims, and employment discrimination cases. While representing Floyd Lee Madison in a criminal case in 2011, Wright was presented with documents purporting to evidence that Madison was the beneficiary of a large bequest from his long-lost cousin in Nigeria. Madison represented to Wright that upon payment of $177,660 in taxes owed on the inheritance in Nigeria, the sum of $18,800,000 would be released to Madison. He asked Wright to represent him in securing the transfer of the funds from Nigeria. In consideration for a fee equal to ten percent of the funds recovered, Wright agreed to represent Madison in the Nigerian transaction."; "In the course of his work on behalf of Madison in pursuit of the Nigerian inheritance, Wright communicated with persons he believed were representatives of the 'Central Bank of Nigeria,' the 'African Union,' and the President of Nigeria."; "Wright apparently transferred to others all of the loan proceeds he collected from his clients on behalf of Madison. As the story developed, Wright and Madison were told the inherited funds would be released by the Nigerian authorities for transfer to the Royal Bank of Canada. Later, however, Wright and Madison were told the inheritance -- in the form of U.S. currency -- had been shipped (for reasons not detailed in the record) in two trucks to Spain where the trunks supposedly came into the possession of a 'diplomat' in Madrid. The diplomat demanded payment of €25,000 (25,600 Euros) for his 'logistic charges' in return for possession of the trunks. He instructed Wright and Madison to conceal the foreign currency in their luggage and travel to Madrid where they were to pay the logistics charges and take possession of the property. Madison traveled to Spain and later told Wright he had seen the two suitcases but failed -- for reasons not explained in the record -- to obtain possession of them." (footnotes omitted); In an email, the "diplomat" instructed Madison to "have [the €25,000] hide in your trouser's [sic] and have the trouser fold careful package in your luggage."; "Wright is not the first Iowa lawyer who has become entangled in a deception with ostensible Nigerian connections. See Iowa Supreme Ct. Bd. Of Prof'l Ethics & Conduct v. Jones, 606 N.W. 2d 5, 9 (Iowa 2000) (noting the incidence of fraudulent transactions with purported connections to the country of Nigeria). Lawyers in other jurisdictions have also been entangled and deceived in such schemes in recent years. See, e.g., In re Maxwell, 334 B.R. 736, 738-41 (Bankr. M.D. Fla. 2005); Parker v. Williams, 977 So. 2d 476, 477-78 (Ala. 2007); Lappostato v. Terk, 143 Conn. App. 384, 71 A.3d 552, 559-60 (Conn. App. Ct. 2013); In re Reinstatement of Jones, 2009 OK 1, 203 P.3d 909, 912-13 (Okla. 2009); see also Lucas v. BankAtlantic, 944 So. 2d 1031, 1032 (Fla. Dist. Ct. App. 2006) (describing a deception originating in Africa)."; "We conclude Wright's undisclosed contingent fee interest in Madison's inheritance claim constituted a pecuniary interest that was adverse to the interests of Rynearson and Putz [clients in other cases, from whom Wright solicited loans to pay the "taxes"]. Madison and Wright urgently desired to obtain the funds to pay the taxes and fees demanded by the person who claimed control of the Nigerian inheritance. The willingness of Madison and Wright to risk their own time and resources on a transparently dubious enterprise may not have been identical to the willingness Rynearson and Putz had regarding the enterprise. Wright failed to advise Rynearson and Putz they should seek advice from an independent lawyer on the risky loan transactions. As we have already noted, Wright failed to obtain the clients' written informed consent to the proposition that he held a contingent fee interest in Madison's inheritance claim and was therefore not representing Rynearson and Putz in the transactions involving the loans he solicited from them. Wright also failed to counsel the affected clients about the importance of independent legal advice in the loan transactions.").

- In re Conduct of Hostetter, 238 P.3d 13, 15, 18, 20, 24 (Or. 2010) (suspending for 150 days a lawyer who "represented the borrower in the underlying loan transaction" and then "subsequently represented the lender in collecting the loans from the borrower's estate"; "This case presents a matter of first impression in Oregon -- that is, whether a former client, now deceased, is protected by the former-client conflict-of-interest rules. Oregon is not alone, as no jurisdiction appears to have directly addressed the issue. At best, a few jurisdictions have addressed the related issue of whether dissolved corporations are 'clients' for purposes of the former-client conflict-of-interest rules. Those jurisdictions are split on the issue. Some jurisdictions hold that, upon a corporation's dissolution, a conflict of interest cannot exist, because the entity is 'dead,' no longer exists, and, accordingly, cannot have interests adverse to the current client. . . . Conversely, other jurisdictions hold that a bankruptcy trustee 'stands in the shoes' of the corporation as former client, and the accused in later litigation may not represent an interest adverse to the successors in interests of the failed corporation."; "[W]e conclude that, pursuant to DR 5-105(C) and RPC 1.9(a), an attorney is prohibited from engaging in a former-client conflict of interest even when the former client is deceased, as long as the former client's interests survive his or her death and are adverse to the current client during the subsequent representation."; "The debt collection and loan transactions certainly <u>involved</u> the same transaction -- the underlying loan documents that the accused drafted on behalf of Ingle [deceased client]. The accused's representation of Hohn {lender to deceased client] involved his own work that he had completed on behalf of Ingle and, in that regard, the matters are substantially related. We therefore determine that the accused engaged in a matter-specific conflict in violation of RPC 1.9(a).").

- <u>Office of Lawyer Regulation v. Trewin</u>, 684 N.W.2d 121 (Wis. 2004) (suspending for five months a lawyer who engaged in a business transaction with a client without following the Wisconsin rule requiring lawyers to advise their clients in writing of the possible adverse effects of the relationship).

- <u>In re Timpone</u>, 804 N.E.2d 560, 563 (Ill. 2004) (suspending an Illinois lawyer for 42 months because he borrowed money from a client for whom the lawyer had just completed some work; explaining that the lawyer had "violated his fiduciary duty to his client by, among other things: (1) failing to advise [client] that there were limits on the types of transactions an attorney could enter into with a client; (2) failing to advise him to consult independent counsel before making the loan; and (3) providing no collateral for the loan and giving [client] no promissory note evidencing the loan or the interest rate until five years after the transaction").

Not surprisingly, courts generally refuse to enforce agreements between a lawyer and a client, based on these standards.

- New Hampshire LEO 2017-18/01 (11/16/17) ("Whether a lawyer who agrees at the outset of representation to receive compensation for legal services in kind, rather than in cash, must advise the client of the desirability of seeking the advice of independent legal counsel, and whether compliance with Rule 1.8 prevents the transaction from being voidable."; "The lawyer will need to comply with all the provisions of NHRPC Rule 1.8(a), including the requirement to advise the client in writing of the desirability of seeking the advice of independent legal counsel, in any agreement to exchange goods or services for legal fees entered into at the outset of legal representation or during the course of such representation. Even if the lawyer strictly complies with Rule 1.8(a), however, the courts may view the transaction as voidable if the client later feels aggrieved by the transaction.”).

- Calvert v. Mayberry, 2016 COA 60, ¶ 1 (Colo. App. 2016) ("If a lawyer enters into a contract with a client that violates Colo. RPC 1.8(a), one of the Colorado Rules of Professional Conduct, can the attorney later enforce the contract against the client? Appellate courts in Colorado have not previously addressed this question. We conclude that the answer to this question is 'no.'").

- Law Offices of Peter H. Priest, PLLC v. Coch, 780 S.E.2d 163, 164 (N.C. Ct. App. 2015) (holding that a lawyer could not enforce a business agreement with a client which did not comply with the applicable ethics rules; "This case presents as an issue of first impression the question of whether an attorney who enters into a business transaction with a client as compensation for a legal representation can be barred from enforcing the terms of their agreement based on the attorney's failure to comply with the explicit requirements of Rule 1.8(a) of the North Carolina Rules of Professional Conduct.").

- Gurvey v. Legend Films, Inc., Case No. 3:09-cv-00942 AJB (BGS), 2012 U.S. Dist. LEXIS 131547, at *5-6, *5, *30, *31, *31-32 (S.D. Cal. Sept. 14, 2012) (finding that a lawyer's failing to comply with ethics requirements and entering into a business transaction with a client for which the lawyer acted as general counsel rendered the agreement unenforceable; "On November 15, 2001, Plaintiff allegedly entered into an Employment Agreement (the 'Agreement') with the LLC to serve as the company's General Counsel. The Agreement was for an initial term of two years commencing January 1, 2002, with an annual base salary of $125,000 plus other renumeration and benefits, including an ownership stake in Legend. The Agreement also contained a provision that Plaintiff could only be terminated upon ninety days prior written notice with a reasonable opportunity to cure any alleged failure to perform. Additionally, upon termination Plaintiff would be entitled to salary, accrued time off, earned bonuses, stock options, and deferred compensation. Any termination without cause would obligate Legend to pay Plaintiff $100,000 as severance."; "Although Plaintiff's complaint appears to assert that the alleged Agreement was signed by both parties, no signed agreement has been produced."; "The Rules of Professional Conduct in California, New Jersey and New York all require Plaintiff to advise Legend to seek independent counsel before entering into a business transaction with them whereby she would acquire an ownership interest in the company. Plaintiff was also required to obtain Legend's written consent to any arrangement resulting in her having an ownership interest in the company."; "Plaintiff has failed to produce any writing indicating that she advised Defendants to seek counsel or that they subsequently consented to the grant of stock options to the Plaintiff.";

"Therefore, even if a contract existed between the parties, the contract would be unenforceable as it violates the rules of professional conduct. Raphael v. Shapiro, 154 Misc. 2d 920, 587 N.Y.S. 2d 68, 72 (1992) (violation of the Rules of Professional Conduct rendered contract void and unenforceable; plaintiff should not be permitted to reap the benefits of a void and unenforceable contract); Ford v. Albany Medical Center, 283 A.D.2d 843, 724 N.Y.S.2d 795, 797 (2001) (contract unenforceable because attorney violated the Code of Professional Responsibility); City of N.Y. v. 17 Vista Assocs., 192 A.D.2d 192, 599 N.Y.S.2d 549, 553 (1993) ('Contracts contrary to public policy are unenforceable and courts will not recognize rights purportedly arising from them.')."

- Fair v. Bakhtiari, 125 Cal. Rptr. 3d 765 (Cal. Ct. App. 2011) (addressing a situation in which a lawyer and client entered into a successful real estate business venture; explaining that the lawyer could not recover under a quantum meruit theory when the client rescinded the business venture, because the lawyer had not complied with the ethics rules governing business with clients).

- Johnson v. Riebesell (In re Riebesell), 586 F.3d 782 (10th Cir. 2009) (holding that a lawyer who had declared bankruptcy could not discharge a debt to a client from whom the lawyer had borrowed money, because the lawyer had not complied with Rule 1.8).

- Valley/50th Avenue, L.L.C. v. Stewart, 153 P.3d 186, 190, 190-91 (Wash. 2007) (reversing summary judgment for a law firm seeking to foreclose on a mortgage note agreed to by a client to secure payment of the lawyer's bills; noting that Washington Rule 1.8(a)(2) requires that "the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction"; "The parties dispute whether Rose had adequate opportunity to seek the advice of independent counsel. The opportunity to seek independent advice must be real and meaningful. It is not enough that at some moment in time an opportunity existed no matter how brief or fleeting that opportunity might have been. . . . The disclosures and notices required by RPC 1.8 are meaningless unless the client is given a reasonable amount of time to act upon the information disclosed and seek independent counsel. The definition of a 'reasonable opportunity' may depend on the circumstances of any given case, but it will always mean more than the mere physical ability to contact an attorney. . . . The burden is upon the lawyer to demonstrate that a real and meaningful opportunity to seek independent counsel was afforded to the client.").

- McLaughlin v. Amirsaleh, 844 N.E.2d 1105 (Mass. App. Ct. 2006) (finding that public policy prohibited enforcement of a mortgage that a lawyer had obtained in a client's real property to secure loans that the lawyer had made to the client).

Some courts give the client even a better deal -- finding the arrangement voidable by the client.

- BGJ Assocs. LLC v. Wilson, 7 Cal. Rptr. 3d 140 (Cal. Ct. App. 2003) (holding that a lawyer's transaction with a former client was voidable because the lawyer had not made the necessary disclosures in writing, and had not obtained the client's consent in writing).

- Petit-Clair v. Nelson, 782 A.2d 960 (N.J. 2001) (holding that clients could void a mortgage on their personal residence that they had given their lawyer to secure payment of legal fees; explaining that the lawyer had not advised the client of the advisability of seeking independent counsel in the transaction).

This approach allows clients to enforce favorable arrangements, while voiding unfavorable deals.

Other Possibly Applicable Principles

In addition to the overarching rule governing lawyer-client business transactions, lawyers may find themselves confronting other rules.

First, if the business transaction results in a lawyer obtaining a security interest related to fees, the lawyer must satisfy the "reasonableness" standard and comply with trust account procedures when acquiring possession of client property.

- ABA LEO 427 (5/31/02) (lawyers acquiring security interests in client property to secure the payment of fees must comply with the rules governing business transactions with clients (although fee agreements themselves generally do not require such compliance); lawyers executing on the security may only obtain a reasonable fee; lawyers taking possession of property under such an arrangement must comply with trust account procedures; lawyers may not retain collateral "exceeding the reasonable fee plus the reasonable costs of preserving and realizing on the security," despite any state law allowing the exercise of greater rights).

Second, if a business transaction gives a lawyer a proprietary interest in litigation, the lawyer might run afoul of the separate prohibition on such an arrangement. ABA Model Rule 1.8(a).

- See, e.g., Virginia LEO 1390 (3/12/91) (a divorce client grants a deed of trust on the marital home to a lawyer to secure the payment of attorneys' fees; because the divorce has not been concluded and the spouses are quarreling over their interests in the house, this arrangement impermissibly gives the lawyer a proprietary interest in the divorce action and may not be cured by consent.

Third, some courts take a very harsh view of lawyers competing with their clients in a business.

- See, e.g., Fla. Bar v. Herman, 8 So. 3d 1100 (Fla. 2009) (suspending for eighteen months a lawyer who created a company that competed with client's business).

Imputed Disqualification

Under ABA Model Rule 1.8(k), the prohibition involving a lawyer doing business with a client applies to all lawyers in the same firm.

Best Answer

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

n 9/21

Clients' Gifts to Lawyers

Hypothetical 4

You have been a very successful lawyer, in large part because you develop such a close personal relationship with your clients. However, this very trait has led you to pose some questions to your firm's "ethics guru."

(a) May you prepare a will for your childless elderly and very wealthy neighbor, who wants to name you as a minor beneficiary in her estate (the bequest is $50,000), and prepare her will?

NO

(b) May you prepare a will for your recently-deceased aunt's husband, who wants to leave most of his $500,000 estate to you?

MAYBE

(c) May you solicit substantial gifts from your clients to fund a scholarship named in your parents' honor at a local law school?

NO (PROBABLY)

Analysis

Because of the obvious possibility of a lawyer's exercise of undue influence in such situations, as well as the inherent conflict between the lawyer's and the client's interests in connection with client gifts to lawyers or their families, bars have always imposed limitations on such arrangements.

The limitations vary from rule to rule and from bar to bar.

ABA Model Rules

The ABA Model Rules impose two specific but related prohibitions.

> A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the

> lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

ABA Model Rule 1.8(c) (emphasis added).

The Comment to this Model Rule explains that these prohibitions relate to solicitation and document preparation, <u>not</u> acceptance.

> A lawyer may accept a gift from a client, if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If a client offers the lawyer a more substantial gift, paragraph (c) does not prohibit the lawyer from accepting it, although such a gift may be voidable by the client under the doctrine of undue influence, which treats client gifts as presumptively fraudulent. In any event, due to concerns about overreaching and imposition on clients, a lawyer may not suggest that a substantial gift be made to the lawyer or for the lawyer's benefit, except where the lawyer is related to the client as set forth in paragraph (c).

ABA Model Rule 1.8 cmt. [6].

Thus, lawyers may not solicit substantial gifts from clients (and may not prepare documents consummating those gifts), but lawyers may <u>accept</u> such gifts -- subject to general rules under which fiduciaries are presumed to have defrauded their clients in such circumstances.

As a practical matter, this latter principle might deter lawyers from ever accepting such gifts absent independent representation of the client in the arrangement, but the Rule does not require such separate representation.

Restatement

Unlike the ABA Model Rules, the Restatement articulates the obvious rationale for the rule.

> A client's valuable gift to a lawyer invites suspicion that the lawyer overreached or used undue influence. It would be difficult to reach any other conclusion when a lawyer has solicited the gifts. Testamentary gifts are a subject of particular concern, both because the client is often of advanced age at the time the will is written and because it will often be difficult to establish the client's true intentions after the client's death. At the same time, the client-lawyer relationship in which a gift is made is often extended and personal. A genuine feeling of gratitude and admiration can motivate a client to confer a gift on the lawyer. The rule of this Section respects such genuine wishes while guarding against overreaching by lawyers.

Restatement (Third) of Law Governing Lawyers § 127 cmt. b (2000).

In contrast to the ABA Model Rules, the Restatement does not prohibit solicitation (although a comment mentions it) -- but rather deals only with document preparation and acceptance.

Unlike the ABA Model Rules, the Restatement discusses the proportionality of gifts.

> A lawyer may not prepare any instrument effecting any gift from a client to the lawyer, including a testamentary gift, unless the lawyer is a relative or other natural object of the client's generosity and the gift is not significantly disproportionate to those given other donees similarly related to the donor. . . . A lawyer may not accept a gift from a client, including a testamentary gift, unless: (a) the lawyer is a relative or other natural object of the client's generosity; (b) the value conferred by the client and the benefit to the lawyer are insubstantial in amount; or (c) the client, before making the gift, has received independent advice or has been encouraged, and given a reasonable opportunity, to seek such advice.

Restatement (Third) of Law Governing Lawyers § 127 (2000) (emphasis added).

A Restatement illustration explains how this proportionality principle works in a family setting.

> Lawyer is one of Mother's five children. At Mother's instruction, Lawyer prepares her will leaving one-fifth of the estate to each of the children, including Lawyer. Lawyer's preparation of such an instrument is within the exceptions in § 127(2). However, if Lawyer received one-third of the estate, and the other four children each received one-sixth, in the event of a challenge, Lawyer would be required to persuade the tribunal that Lawyer did not overreach Mother.

Restatement (Third) of Law Governing Lawyers § 127 cmt. e, illus. 1 (2000).

The Restatement also provides an explanation of the "substantial gift" element, as well as an illustration.

> In determining whether a gift to a lawyer is substantial within the meaning of Subsection (2)(b), the means of both the lawyer and the client must be considered. To a poor client, a gift of $100 might be substantial, suggesting that such an extraordinary act was the result of the lawyer's overreaching. To a wealthy client, a gift of $1,000 might seem insubstantial in relation to the client's assets, but if substantial in relation to the lawyer's assets, it suggests a motivation on the part of the lawyer to overreach the client-donor, or at least not to have fully advised the client of the client's rights and interests. Under either set of circumstances, the lawyer violates the client's rights by accepting such a gift.

Restatement (Third) of Law Governing Lawyers § 127 cmt. f (2000). The illustration provides an obviously permissible situation.

> Client, who has a longstanding professional relationship with Lawyer, presents Lawyer with an antique locket, with a market value of under $50, that had belonged to Client's deceased sister. 'My sister always wanted to be a lawyer,' Client says to Lawyer, 'but that was difficult in her generation. I like to think she would have been as good a lawyer as you now are, and I think she would like you to have this.' Lawyer may accept the Client's gift.

Restatement (Third) of Law Governing Lawyers § 127 cmt. f, illus. 2 (2000).

The Restatement provides several other useful illustrations.

> Client has come to Lawyer for preparation of Client's will. 'I do not have living relatives and you have been my trusted friend and adviser for most of my adult life,' Client tells Lawyer. 'I want you to have a bequest of $50,000 from my estate.' Lawyer urges Client to ask another lawyer to advise Client about such a gift and prepare any will effecting it. Client refuses, saying 'I do not want anyone else to know my business.' Lawyer may not draft Client's will containing the proposed gift to Lawyer.

Restatement (Third) of Law Governing Lawyers § 127 cmt. g, illus. 3 (2000).

> The same fact as in Illustration 3, except that Client, professing the same wish to benefit Lawyer, tells Lawyer that Client is going to make a $50,000 cash gift to Lawyer. Lawyer encourages and gives Client a reasonable opportunity to seek independent advice about making a gift to Lawyer. Client does not do so. Lawyer may accept the inter vivos gift of $50,000 from Client, so long as Lawyer did not solicit the gift or prepare an instrument effecting the gift from Client.

Restatement (Third) of Law Governing Lawyers § 127 cmt. g, illus. 4 (2000).

ACTEC Commentaries

The ACTEC Commentaries essentially follow the ABA Model Rules and the Restatement approach.

> MRPC 1.8 generally prohibits a lawyer from soliciting a substantial gift from a client, including a testamentary gift, or preparing for a client an instrument that gives the lawyer or a person related to the lawyer a substantial gift. A lawyer may properly prepare a will or other document that includes a substantial benefit for the lawyer or a person related to the lawyer if the lawyer or other recipient is related to the client. The term "related person" is defined in MRPC 1.8 (c) and may include a person who is not related by blood or marriage but has a close familial relationship. However, the lawyer should exercise special care if the proposed gift to the lawyer or a related person is disproportionately large in relation to the gift the client proposes to make to others who are equally related. Neither the lawyer nor a person

> associated with the lawyer can assist an unrelated client in making a substantial gift to the lawyer or to a person related to the lawyer. . . . For purposes of this Commentary, the substantiality of a gift is determined by reference both to the size of the client's estate and to the size of the estate of the designated recipient. The provisions of this rule extend to all methods by which gratuitous transfers might be made by a client including life insurance, joint tenancy with right of survivorship, and pay-on-death and trust accounts.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.8, at 112 (4th ed. 2006), http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf.

Thus, the ACTEC Commentaries contain the same concept of "proportionality" that appears in the Restatement. This is a subtlety that does not appear in the ABA Model Rules, but which assures that lawyers cannot take advantage of other family members.

(a) Throughout the country, courts often take a harsh approach toward lawyers who have arranged for gifts from their clients.

Several cases highlight this unforgiving approach.

- In re Colman, 885 N.E.2d 1238 (Ind. 2008) (suspending for three years an Indiana lawyer who, among other things, arranged for one of his friends to prepare a will for one of the lawyer's clients who wanted to make the lawyer a beneficiary of his estate; noting that the friend who prepared the will never spoke directly with the client and did not charge the client for his services; also noting that the friend sent a paralegal to the hospital to go over the will with the hospitalized client before the client signed the will).

- Attorney Grievance Comm'n v. Stein, 819 A.2d 372, 375, 374, 376, 379 (Md. 2003) (suspending indefinitely a lawyer who had prepared a will under which he received a bequeath; explaining that the lawyer (Stein) (a) had practiced as a lawyer since 1961, and had never been sanctioned as a lawyer or received any warnings about any alleged misconduct during his entire practice, (b) represented a couple who had been clients and friends of Stein's father since the 1950s, and (c) prepared a will under which he was to receive a substantial gift; noting that Stein acknowledged that the gift was his suggestion; explaining that the lower court found that the testator was competent and that "there was no indication that any improper influence or duress was brought to bear upon the client" by Stein; noting that Stein suggested to the testator that she speak with one of Stein's partners, but did not explain to the testator "the necessity of seeing an independent attorney outside of the firm."; also noting that Stein claimed that he was unaware of Maryland Rule 1.8(c)(2), which requires that the client be separately represented by independent counsel in connection with a gift to a lawyer who is not a relative; explaining that the requirement of independent counsel was "express and mandatory," and that "the independent counsel required by the Rule must be truly independent -- the requirement of the Rule may not be satisfied by consultation with an attorney who is a partner of, shares space with, or is a close associate of the attorney-drafter"; acknowledging that Stein was 69 years old and semi-retired, and had never violated any other ethical rule since 1961, but harshly warning that "we consider a violation of Rule 1.8(c) to be most serious. Respondent's conduct undermines the public confidence in the legal profession in a particularly egregious manner.").

- In re Grevemberg, 838 So. 2d 1283, 1285, 1286 (La. 2003) (suspending for one year a lawyer who drafted a will under which the lawyer and his wife received most of the client's property; acknowledging that the testator was mentally competent when preparing the will, and that the lawyer "had not exercised any undue influence on her"; also recognizing that the lawyer had a "well-respected reputation and good character in the community," had exhibited a "cooperative attitude toward the proceedings" and had enjoyed an "unblemished record in the practice of law for over 56 years"; nevertheless noting that Louisiana's Rule 1.8 prohibits a lawyer from preparing any instrument of this sort).

- Toledo Bar Ass'n v. Cook, 778 N.E.2d 40 (Ohio 2002) (suspending for one year a lawyer who followed a client's suggestion that his will provide a benefit to a nursing home owned by the lawyer; noting that the lawyer resigned from her positions at the nursing home -- although her siblings continued to control the nursing home -- and prepared the will that the client suggested; explaining that when the testator died and his children questioned the bequest, the nursing home disclaimed any interest in the client's estate, and the lawyer apologized; citing Ohio's Rule that completely prohibits a lawyer from preparing any instrument under which the lawyer receives a benefit from a non-relative client; suspending the lawyer for one year (although reducing the suspension to six months if the lawyer took ethics CLE courses)).

Interestingly, there seems to be little case law on the enforceability of estate planning documents that clearly violate the lawyer's ethics rules -- but for which the lawyer would happily forfeit a law license (or accept other professional punishment) in order to keep the money.

Such a scenario would arise where ethics rules and fiduciary duty principles intersect. The former generally only governs the bar's discipline of lawyers, and does not provide the governing principles in situations arising outside the disciplinary context. Thus, the enforceability of an unethical testamentary or other document probably would involve common law fiduciary duty principles rather than ethics rules provisions.

One court struggled with an issue of invalidating a will that violated the ethics rules – highlighting courts' reluctance to apply those ethics rules standards in non-disciplinary settings.

- Mardigian v. Goldberg (In re Mardigian Estate), No. 152655, 2018 Mich. LEXIS 1156 (Mich. Sup. June 21, 2018) (rejecting a per se rule; "At issue is whether the rebuttable presumption of undue influence is applicable when the decedent's attorney breaches Michigan Rule of Professional Conduct (MRPC) 1.8(c), which generally prohibits an attorney from preparing an instrument giving the attorney or his or her close family a substantial gift. Appellants argue that a breach of MRPC 1.8(c) automatically renders an instrument void, while the appellee attorney argues that, rather than an invalidation of the instrument, a rebuttable presumption of undue influence arises in these circumstances. After considering the applicable provisions of the Estates and Protected Individuals Code (EPIC), MCL 700.1101 et seq., and the underlying principles of probate law, it becomes clear to us that a rebuttable presumption applies to these circumstances. And, as we will explain, creating a new per se rule as appellants advocate would not only be contrary to the fundamental principles of probate law and longstanding precedents of this state but would also run afoul of EPIC. Moreover, the adoption of MRPC 1.8(c) has no effect on this conclusion because a breach of this rule, like breaches of other professional conduct rules, only triggers the invocation of the attorney disciplinary process; it does not breach the statutory law of EPIC. For these reasons, we conclude the Court of Appeals correctly held that, in the instant circumstances, existing statutes and caselaw give rise only to a rebuttable presumption of undue influence.").

(b) ABA Model Rule 1.8(c) (and its parallel in most states) essentially allows lawyers to prepare wills for relatives under which the lawyer receives a benefit. As in many family contexts, finding the term "relative" can involve subtleties.

The Alabama Supreme Court reversed the Alabama Bar's disbarment of a lawyer who prepared a will for his late aunt's husband – explaining that a non-blood related "uncle" counted as a "relative" under the Alabama ethics rules.

- Cooner v. Alabama State Bar, 59 So. 3d 29, 40 (Ala. 2010) (reversing a disbarment of a lawyer who prepared a trust for his aunt's husband, which named himself as a beneficiary; concluding that the lawyer's aunt's husband was a "relative" under Rule 1.8; "A 'relative' is '[a] person connected with another by blood or affinity; a person who is kin with another.' Black's Law Dictionary 1315 (8th ed. 2004). Thus, a person is 'related' to another person, when the person is connected with another person by blood or affinity. . . . Therefore, we conclude that 'related' as that term is used in Rule 1.8(c), Ala. R. Prof. Cond., includes relationships by blood and by marriage and that an affinity relationship between an uncle and his nephew is within the meaning of the term 'related.'"; "Moreover, we decline to hold, as the State Bar urges us to do, that, for purposes of Rule 1.8(c), Ala. R. Prof. Cond., an affinity relationship arising from the marriage between a husband and blood relatives of the wife terminates with the death of the wife.").

(c) It is unclear how the ethics rules would apply to an intangible benefit a lawyer receives under a will or similar document the lawyer drafts for a non-relative.

Best Answer

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

n 9/21

Lawyers' Personal "Material Limitation" Conflicts

Hypothetical 5

Two years ago, you left a large downtown law firm on good terms, and started your own suburban practice. You frequently receive referrals from your former firm when it faces a conflict. You estimate that about five percent of your income comes from those referrals. A new client just asked you to represent her in medium-size breach of contract case against a client whom you know will be represented by your former firm.

Must you disclose to your prospective client the good relationship with your former firm (including your referral income)?

MAYBE

Analysis

Lawyers constantly confront possible conflicts that many lawyers overlook – but might arise in many settings.

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

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

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

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

An ABA Model Rule Comment provides some guidance, although the vague nature of such "material limitation" conflicts prevents much certainty about the analysis.

- ABA Model Rule 1.7 cmt [8] ("Even where there is no direct adverseness, a conflict of interest exists if there is a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities or interests. For example, a lawyer asked to represent several individuals seeking to form a joint venture is likely to be materially limited in the lawyer's ability to recommend or advocate all possible positions that each might take because of the lawyer's duty of loyalty to the others. The conflict in effect forecloses alternatives that would otherwise be available to the client. The mere possibility of subsequent harm does not itself require disclosure and consent. The critical questions are the likelihood that a difference in interests will eventuate and, if it does, <u>whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client</u>.") (emphasis added).

An ABA LEO provides some analysis of this type of "material limitation" conflict possibly created by lawyers' personal relationship with the adversary's lawyer.

- ABA LEO 494 (7/29/20) (An ABA Model Rule 1.7 (a)(2) "material limitation" conflict might arise because of a personal relationship between opposing lawyers. Some relationships would not trigger such a conflict, but (for example) "A lawyer's independent judgment is likely to be materially limited if due to the personal relationship with opposing counsel the lawyer would refrain from filing a well-founded motion for sanctions against opposing counsel." Lawyers assessing possible conflicts must consider "the lawyer's role in the matter," must avoid unintentionally disclosing protected client confidential information (for example, "if papers relating to the representation are left in view or telephone conversations are overheard"), and must withdraw if such a personal relationship prevents the lawyer from providing "competent and diligent representation to the client." Such "personal interest conflicts ordinarily are not imputed." There are three levels of personal relationships. First, lawyers " who cohabit in an intimate relationship should be treated similarly to married couples for conflicts purpose" - disclosing the relationship to their clients and proceeding only if "each client gets informed consent confirmed in writing." The "prudent course" would be for lawyers to follow the same course if they "are in some type of intimate relationship, but are not exclusive, engaged to be married or cohabiting." Second, the analysis triggered by friendship "turns on the closeness of the friendship."

> Opposing lawyers "should" follow the same course if they are "close" friends who exchange holiday gifts, "regularly socialize together," "routinely spend time at each other's homes," "vacation together with their families," "share a mentor - protégé relationship developed while colleagues," "share confidences and intimate details of their lives." Lawyers might be required to disclose to affected clients (but "will not ordinarily require consent" from those clients) if they once practiced together, "periodically meet for a meal when their busy schedules permit," "try to meet when one is in the other's hometown," were law school classmates and "stay in touch through occasional calls or correspondence, but not regularly see one another." Opposing lawyers usually do not need to disclose to their clients if they "may see each other at ["places of worship, professional or civil organization" gatherings], but "without feeling a close personal bond.") (emphasis added).

The Restatement of the Law Governing Lawyers contains essentially the same concept, focusing on lawyers' personal interests.

> Unless the affected client consents to the representation under the limitations and conditions provided in § 122, a lawyer may not represent a client if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's financial or other personal interests.

Restatement (Third) of Law Governing Lawyers § 125 (2000). B 5/16

A Restatement Comment provides guidance.

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

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

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

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

Best Answer

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

n 9/21

Conflicts Implications of Lawyers' Personal Conduct

Hypothetical 6

You majored in Civil War history in college, and you have maintained your interest in Civil War preservation work. Two months ago, you received an e-mail "alert" from a group dedicated to preserving Civil War battle sites, announcing the creation of an ad hoc group to resist development plans near a historically significant spot. You would like to help the group, but soon discover that your firm is representing the developer. Now you want to carefully assess what steps would be ethically permissible.

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

(a) Represent the ad hoc group in litigation?

NO

(b) Sign a petition supporting the "ad hoc" groups efforts?

YES (PROBABLY)

(c) Attend a rally supporting the ad hoc group?

YES

Analysis

Lawyers historically have taken on intensely unpopular causes of clients. In fact, some of American history's best-known representations have involved unpopular clients (such as John Adams's representation of the British officers and soldiers in the case arising from the Boston Massacre).

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

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

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

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

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

ABA Model Rule 1.2 cmt. [5].

The ethics rules deal with this issue in at least one other area. Lawyers are not supposed to turn down court appointments unless (among other things) "the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client." ABA Model Rule 6.2(c).

The Restatement also acknowledges the issue:

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

> interests of a lawyer and those of a client will be so substantial that client consent will not suffice to remove the disability.

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

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

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

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

The Restatement deals with a less extreme example.

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

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

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

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

Id.

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

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

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

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

> Lawyer represents Corporation in negotiating with the Internal Revenue Service to permit Corporation to employ accelerated depreciation methods for machinery purchased in a prior tax year. At the same time, Lawyer believes that the accelerated depreciation laws for manufacturing equipment reflect unwise public policy. Lawyer has been working with a bar-association committee to develop a policy statement against the allowance, and the committee chair has requested Lawyer to testify in favor of the report and its proposal to repeal all such depreciation allowances. Any new legislation, as is true generally of such tax enactments, would apply only for current and future tax years, thus not directly affecting Corporation's matter before the IRS. Although the proposed legislation would be against

> Corporation's economic interests, Lawyer may, without Corporation's consent, continue the representation of Corporation while working to repeal the allowance.

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

Bars have also dealt with this issue.

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

- N.Y. City LEO 1997-3 (1997) ("A lawyer may espouse a personal viewpoint adverse to the interest of a former or present client in a pending matter as long as client confidences and zealous representation of the client are not compromised."; "[I]t is difficult to see how a lawyer could speak publicly on one side of an issue knowing that he or she must personally argue the opposing side of that issue in front of a tribunal in a pending case. The possibility that a lawyer's publicly proclaimed personal opinion would become known to the tribunal, undermining his or her credibility and thereby jeopardizing the client representation, does warrant some curtailment on public expression of a personal viewpoint to preserve the integrity of a lawyer's advocacy. Of course, the question of whether zealous advocacy may be compromised can arise in numerous situations. A lawyer must exercise sound judgment in determining whether publicly and openly espousing his or her personal opinion would be directly deleterious to a representation of a particular client. In certain cases, while client consent may not be required, it may nevertheless be desirable to give the client an opportunity to terminate the representation before the lawyer openly takes an opposing personal position on the same subject." (footnote omitted); "The rule of imputed disqualification that applies with respect to legal services rendered by different lawyers within the same law firm, see DR 5-105(D), should not automatically extend to a case involving personal views espoused as such by a lawyer in the firm not working on the relevant matter. In any case where there may be a question, it is recommended that the lawyer begin his or her remarks with a disclaimer to the effect that the views expressed are his or her own. In the Committee's view, the interests of the legal system are best served by encouraging lawyers to speak out about their personal convictions, even if they are not always in harmony with the interest of a client." (footnote omitted)).

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

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

- Oasis West Realty, LLC v. Goldman, 106 Cal. Rptr. 3d 539, 544, 548, 549, 550, 551 (Cal. Ct. App. 2010) (reversing a judgment against a former Reed Smith lawyer who represented a real estate developer in connection with a Beverly Hills project, and then publicly opposed the project two years after the representation ended; explaining that "[o]n May 6, 2008 he [Reed Smith partner Kenneth Goldman] addressed the city council, opposing a rule which required individuals seeking signatures on the referendum petition to carry with them the entire EIR and other documents, totaling about 15 pounds. Goldman's statement was that the requirement was unnecessary and unfair 'whether you're for the Hilton or for the Referendum.'"; "On May 12, 2008, he and his wife spent about 90 minutes soliciting signatures on the referendum petition from their neighbors. At 4 or 5 houses, they left a 'dear neighbor' note which they both signed, expressing concern about the size of the project and the traffic impact, indicating that they would sign the referendum petition, and urging the neighbor to do the same."; "But Goldman never undertook a second employment, or developed any other relationship which could create conflicting fiduciary duties. He was not placed in the position of choosing between clients, because there was no second client."; "If, in opposing the Hilton project, Goldman had even hinted, or had by his conduct implied, that his opposition to the project was based on information obtained while he represented Oasis, he would have violated Business and Professions Code section 6068."; "However, there is no evidence that Goldman revealed any confidential information, or hinted that he had such information, or created circumstances which would encourage others to think that he did and that he was basing his opposition on that information. He did not trade on his former representation of Oasis to lend credence to his opposition. Such conduct would imply that he had confidential information and was basing his actions on that information, and would be tantamount to revealing confidential information."; "Our analysis does not end with the rules and the Business and

Professions Code. An attorney's duty to a client is defined not just by the rules and statutes, but by the general principles of fiduciary relationships. The Rules of Professional Conduct do not supersede common law obligations."; "[W]e turn again to the facts, and conclude that a finding that Goldman's statements to the City Council breached a duty of loyalty to Oasis would stretch that duty to cartoonish proportions."; "However, when Goldman asked his neighbors to sign the petition (indeed, when he signed it himself) he unquestionably acted against the interest of his former client, on the issue on which he was retained. Did this breach the duty of loyalty?"; "This is a sweeping statement, and read literally would bar Goldman not only from circulating the petition, but from signing it, indeed, from voting against Measure H. However, all the cases which recite this rule do so in the context of subsequent representations or employment. None involve the acts an attorney takes on his or her own behalf."; "Oasis seeks to impose something like a rule against the appearance of impropriety, but California has not adopted such a rule."; explaining that Professor Hazard [reporter for original ABA Model Rules] has called the "appearance of impropriety" standard a '"garbage" standard'" (citation omitted); "We thus see no authority for a rule which would bar an attorney from doing that Goldman did here: signing a petition in opposition to the Hilton project, and asking his neighbors to sign such a petition, when he had once represented the developer concerning the project. To the extent that Oasis asks us to create such a rule, we decline the invitation. We cannot find that by representing a client, a lawyer forever after forfeits the constitutional right to speak on matters of public interest."), reversed and superseded by 250 P.3d 1115 (Cal. 2011).

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

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

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

Best Answer

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

n 9/21

Representing Unpopular Clients

Hypothetical 7

Your large law firm recently circulated a memorandum to all associates seeking volunteers to represent (on a pro bono basis) one of the 9-11 terrorists in his effort to be released from Guantanamo Bay detention. Your heart sank when you read the memo, because your aunt died on September 11, 2001 when she jumped from the 90th floor of the North Tower before the fire engulfed her. You wonder what this representation means for you and your firm.

(a) May you assist in the pro bono representation of the terrorist?

NO (PROBABLY)

(b) If you face a "material limitation" conflict preventing you from representing the terrorist, is your conflict imputed to all of your law firm colleagues?

NO (PROBABLY)

Analysis

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

Historical Examples

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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

The case against Captain Preston was separated from the case against the soldiers, and came to trial about seven months later. http://www.bostonmassacre.net/trial/trial-summary2.htm. Sources say that Preston's trial was the first criminal trial in Massachusetts history that lasted more than one day. Webb Garrison, Great Stories of the American Revolution 40 (1990). The trial apparently represented the first time an American court had used the term "reasonable doubt." http://www.bostonmassacre.net/trial/trial-summary4.htm.

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

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

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

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

It turns out that Adams used all of his fees (and more) to repair damage to his house caused by angry townspeople. Id. After the trial, Adams went on to be elected to the Massachusetts legislature, and the Continental Congress. He later served as Commissioner to France, America's first vice president, and second president.

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

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

For instance, on April 25, 2011,

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

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

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

> I have chosen this year's Law Day theme, The Legacy of John Adams, From Boston to Guantanamo, to highlight our nation's first lawyer-president and to foster understanding of the historical and contemporary role of lawyers in defending the principle of due process and the rights of the accused.
>
> In 1770, John Adams, then a young leader in the American colonial resistance to British rule, defended the British officer and soldiers charged with firing into a crowd of protestors and killing five civilians in the "Boston Massacre." Adams ably defended those soldiers, despite risks to his safety and his livelihood, and regardless of the fact that many saw them as agents of an oppressive and unrepresentative British rule. He did so because of his faith in due process of law, in what he would later famously phrase as "a government of laws, not of men."

> John Adams is but one example of many noteworthy cases in American history in which lawyers have stepped forward to defend unpopular clients and the fundamental principle of the rule of law.

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

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

Id. at 11 (emphasis added).

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

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

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

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

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

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

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

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

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

- Michael D. Shear and John Schwartz, Law Firm Won't Defend Marriage Act, N.Y. Times, Apr. 26, 2011, at A1 ("The law firm hired by Republicans in the House of Representatives to defend the constitutionality of the Defense of Marriage Act withdrew Monday amid pressure from gay rights groups. The decision prompted the resignation of a prominent partner, who said he intended to take the case with him to another law office." (emphasis added); "Gay rights groups had fiercely criticized the law firm, the 126-year-old King & Spalding of Atlanta, saying that its agreement to defend the law, which prohibits federal recognition of same-sex marriages, would hurt its ability to recruit and retain lawyers. The firm's chairman, Robert D. Hays Jr., said in a statement Monday morning that the firm would no longer defend the law." (emphasis added); "King & Spalding, founded in 1885, is one of the nation's largest and most successful law firms, with offices around the world. American Lawyer magazine ranks it as the nation's 34th-largest, measured by gross revenue."; "Gay rights groups claimed victory, saying their criticism of the firm had its intended effect." (emphasis added); "Richard Socarides, the president of Equality Matters, an advocacy group for lesbian, gay, bisexual and transgender people, said Monday: 'Mr. Clement's statement misses the point entirely. While it is sometimes appropriate for lawyers to represent unpopular clients when a [sic] important principle is at issue, here the only principle he wishes to defend is discrimination and second-class citizenship for gay Americans.'"; "But Stephen Gillers, an expert in legal ethics at the New York University law school, said the firm caved in, adding that the 'firm's timidity here will hurt weak clients, poor clients and despised clients.'" (emphases added)).

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

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

After a brief flurry of news stories, the media seems to have lost interest in King & Spalding's withdrawal from representing its unpopular client -- just six days before the 2011 Law Day whose theme was "The Legacy of John Adams: From Boston to Guantanamo."

Ethics Rules

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

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

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

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

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

ABA Model Rule 6.2.

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

Second, the ethics rules provide more general guidance.

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

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

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

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

ABA Model Rule 1.2 cmt. [5].

The Restatement also acknowledges the issue:

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

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

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

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

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

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

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

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

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

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

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

A comment provides a further explanation.

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

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

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[1] The ABA Model Rules require such consent to be "confirmed in writing," but many states do not.
[2] Inexplicably, at least one state has not added this exception to its imputed disqualification rule. Virginia Rule 1.10(a).

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

Best Answers

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

n 9/21

Law Firm Non-Compete Arrangements

Hypothetical 8

After several years at a large law firm, you decided to go in-house, because you have become as interested in business operations in as the law. You just interviewed with a local company which has conditioned your employment on several non-compete provisions.

(a) May you agree to a non-compete provision prohibiting your practice as an in-house lawyer for specified competitors of your prospective employer?

NO

(b) May you agree to a non-compete provision prohibiting your accepting a business role in specified competitors of your prospective employer?

YES (PROBABLY)

Analysis

Unique among all employees or professionals, lawyers may not agree to non-competes.

General Rule

The ABA Model Rules indicate that

> [a] lawyer shall not participate in offering or making . . . a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except in an agreement concerning benefits upon retirement.

ABA Model Rule 5.6(a).

Somewhat surprisingly, the ABA's aversion to such non-competes is fairly recent.

The ABA apparently did not condemn such an employment agreement with non-compete provisions until 1961. The ABA issued an opinion that year based on its disapproval at least in part on such former employee lawyers' prohibition on soliciting any of her former firm's clients.

- ABA LEO 300 (8/7/61) (Lawyers may not hire a lawyer pursuant to an employment agreement that includes a non-compete. "It is unethical for an attorney employing another attorney to include as part of the employment contract a restrictive covenant prohibiting the employee from practicing law in the city and county for two years after the termination of employment." "Clients are not merchandise. Lawyers are not tradesmen. They have nothing to sell but personal service. An attempt therefore, to barter in clients, would appear to be inconsistent with the best concepts of our professional status. "It appears to this Committee that a restrictive covenant of the type described would be an attempt to 'barter in clients.'" <u>Even without a non-compete, lawyers formerly employed by a law firm may not solicit employment from the law firm's clients. "Canon 27 prohibits every form of solicitation of employment</u>. A former employee of a lawyer or law firm would be bound by these canons to refrain from any effort to secure the work of clients of his former employer." Such a non-compete "appears to this Committee to be an unwarranted restriction on the right of a lawyer to choose where he will practice and inconsistent with our professional status.") (emphasis added).

One year later, the ABA distinguished between non-competes in employment agreements and in partnership agreements – explicitly allowing the latter.

- ABA Informal LEO 521 (11/12/62) (The ABA's earlier prohibition on non-competes in law firm employment agreements does not apply to partnership agreements. "You call our attention to the fact that our Formal Opinion 300, released August 7, 1961, held that it was improper for a contract of employment between a lawyer or law firm and another lawyer restricting the employee from practicing law in the locality for some stated period after termination of his employment."; "In your letter you also make reference to the partnership agreements. We call your attention to the fact that we were not attempting to pass on restrictive covenants in partnership agreements in writing Formal Opinion 300. There the parties are dealing on an equal footing and we believe restrictive covenants within reasonable and legal limits as between the partners do not involve any questions of ethics.").

But just six years after that, the ABA issued a legal ethics opinion applying the same non-compete prohibition to partnership agreements – mentioning for the first time the justification that such non-competes restrict the public's right to hire lawyers of their choice.

- ABA Informal LEO 1072 (10/8/68) (Lawyers may not include non-competes in their partnership agreement; those restrictions impose improper limitations on the lawyers, and deprive prospective clients of availability of those lawyer's services; "The attorneys should not engage in an attempt to barter in clients, nor should their practice be restricted. The attorney must remain free to practice when and where he will and to be available to prospective clients who might desire to engage his services.").

The Restatement has essentially the same prohibition.

> A lawyer may not offer or enter into a law-firm agreement that restricts the right of the lawyer to practice law after terminating the relationship, except for a restriction incident to the lawyer's retirement from the practice of law.

Restatement (Third) of Law Governing Lawyers § 13(1) (2000). A Restatement Comment provides some guidance.

> [A] lawyer may not offer or enter into a restrictive covenant with the lawyer's law firm or other employer if the substantial effect of the covenant would be to restrict the right of the lawyer to practice law after termination of the lawyer's relationship with the law firm. The rationale for the rule is to prevent undue restrictions on the ability to present and future clients of the lawyer to make a free choice of counsel. The rule applies to all lawyers of the firm and prohibits both making and accepting such a restriction.

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

Every state has adopted such a restriction -- usually using the identical language.

Only one state seemed to have taken an opposite approach (at least until the late 1990's). Maine LEO 126 (9/25/92) (explaining that a law firm could require that an associate sign a non-compete as a condition of employment; "[i]t is not a violation of the Bar Rules for a law firm to require or utilize non-competition agreements"; explaining that most states specifically forbid non-competes, but that "no such provision in any form appears in the Maine Bar Rules"). Maine superseded this opinion in a February 1997 rules change.

The prohibition on law firm non-competition provisions is another example of how lawyers are treated differently from other professionals, most or all of whom may freely enter into non-competes.

In-House Lawyers

In-house lawyers face more subtle issues when determining whether they can limit their future conduct.

In- house lawyers might think they have an easier time than outside lawyers properly identifying their "client." When applying the ethics rules, in-house lawyers must remember that the law department in which they practice is within the definition of "firm" in every jurisdiction's ethics rules.

> "Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

ABA Model Rule 1.0(c).

An ABA Model Rule Comment confirms this approach, but then generates what many in-house and outside lawyers are surprised to learn is uncertainty about the client's identity.

> With respect to the law department of an organization, including the government, <u>there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct</u>. There can be uncertainty, however, as to the identity of the client. For example, <u>it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly employed</u>. A similar question can arise concerning an unincorporated association and its local affiliates.

ABA Model Rule 1.0 cmt. [3] (emphases added).

This type of uncertainty triggered one of America's largest bars to recommend steps that few if any in-house lawyers have ever taken -- treating their employer/client's subsidiaries (presumably even wholly-owned subsidiaries) as separate clients for both loyalty and information flow purposes.

- Illinois LEO 17-05 (5/2017) (analyzing the loyalty (conflicts) and confidentiality implications of parent company's in-house lawyer's dealings with corporate subsidiaries of the lawyer's client/employer; recommending: (1) that lawyer treat subsidiaries as separate clients for loyalty/conflicts purposes, including even obtaining consents or prospective consents in the event of any "competing interests"; and (2) also treat subsidiaries as separate clients for confidentiality purposes, including even analyzing how confidential information will be shared among the corporate affiliates; "<u>For the in-house lawyer, there is no one size fits all test for identifying the client. It may change depending on the circumstances of the representation</u>. Is it the single corporate parent (whose interests may be considered to preempt the interests of any subsidiary, or in any case, be able to provide informed consent to any conflict waiver or disclosure of confidential information)? Or is it the legally distinct individual subsidiaries? Recognizing subsidiaries as separate clients seems to be acknowledged in the IRPC noted above, particularly IRPC 1.13. For practical purposes, <u>treating subsidiaries as distinct clients would seem the better practice if for no other purpose than to focus the in-house lawyer's attention on identifying and addressing problematic legal and ethical issues</u>."; "With respect to conflicts of interests, when an in-house lawyers is called upon to provide legal services to a related corporate entity that is not the lawyer's direct employer, the lawyer must be careful to recognize the potential for competing interests. . . . As with any representation, the in-house lawyer must consider and, if applicable, apply IRPC 1.7. Although impacted by client identification, the interests of intra-family corporate entities may or may not be considered aligned. <u>If the interests are determined to conflict, an in-house lawyer can consider a number of actions to address and resolve the conflict. First and foremost is to obtain, if possible, the subsidiary's and parent's consent to the representation as permitted by IRPC 1.7(b). Counsel may also consider obtaining advance conflict waivers</u>, limiting the scope of the representation to eliminate the potential conflict, or retaining outside counsel."; "<u>Perhaps even thornier issues than conflicts arise with respect to confidentiality under IRPC Rule 1.6</u>. Virginia State Bar Opinion 1838 provides that an in-house lawyer must maintain a subsidiary's confidences unless the subsidiary consents to disclosure. In most corporate contexts, maintaining this confidentiality from the corporate parent, and perhaps other subsidiaries, is likely unworkable and doesn't reflect the work of an in-house legal department. . . . Attempting to maintain confidentiality between related corporate entities, but particularly between a subsidiary and a parent, tends to disregard corporate ownership and hierarchy. . . . In these situations, as with conflicts of interest, a prudent course for the in-house lawyer may be to memorialize in writing how confidential information will be treated, obtain advance consent for disclosure, or retain outside counsel." (emphases added)).

That the large and sophisticated Illinois Bar would recommend what many if not most in -house (and even outside) lawyers would understandably view as a far-fetched and unwieldy process highlights the challenges lawyers face when representing entities and their constituents (either other entities or real persons). But regardless of the challenges, in- house and outside lawyers must at all times always know whom they represent, and whom they don't represent.

In-house lawyers failing to recognize that their law departments constitute a "firm" under the ABA Model Rules and every state's parallel rules can result in severe adverse consequences.

For instance, some law departments do not vet new laterals hires (lawyers or nonlawyers), to avoid hiring an individually disqualified lawyer (or nonlawyer) whose individual disqualification might be imputed to the entire law department under ABA Model Rule 1.10(a). Such a lapse can result in imputed disqualification.

- Dynamic 3D Geosolutions LLC v. Schlumberger Ltd., 837 F.3d 1280, 1286, 1287, 1289, 1290, 1291, 1292 (Fed. Cir. 2016) (upholding the disqualification of an entire law department of a company that hired an individually disqualified lawyer, as well as that company's outside law firm which had been tainted with the individual disqualified lawyer's confidential information; explaining that in-house lawyer Charlotte Rutherford had worked seven years as an in-house intellectual property lawyer at Schlumberger, and specifically gained knowledge about and worked on patent matters; explaining that Ms. Rutherford moved from Schlumberger to Acacia, the parent company of Dynamic 3D, at which she arranged for her new employer to buy the patent about which she had gained information at Schlumberger, and a filed a patent infringement case against Schlumberger and others -- working closely with her new employer's outside law firm CEP; concluding that Ms. Rutherford was individually disqualified because of the "substantial relationship" of her earlier work as Schlumberger's in-house lawyer and her work with her new employer adverse to Schlumberger; "We agree with Schlumberger that the district court did not clearly err in finding that Rutherford's work for Schlumberger, and for Acacia and Dynamic 3D, were substantially related. Rutherford occupied senior counsel, director, and deputy general counsel positions in a large company's intellectual property department. The record documents her involvement at Schlumberger in a project specifically evaluating a product later accused of infringement by Acacia, and the risks of such an infringement suit. Rutherford's representation at Schlumberger included efforts to license Petrel when the later-accused features of the product existed in the older versions with which Rutherford was involved. We will therefore not disturb the district the district court's finding that Rutherford's employment with Schlumberger was more than tangentially related to the issues in the present suit."; "Even if we were to reweigh the evidence, which in our role as an appellate court would be inappropriate, Dynamic 3D's arguments that Rutherford was not involved in the current suit are thus way wide of the mark. Acacia itself admitted that it failed to screen her from the case . . . and both Dynamic 3D and Acacia provided privilege logs evidencing Rutherford's involvement in the present suit . . . . Rutherford is therefore irrebuttably presumed to have possessed Schlumberger's relevant confidential information and was properly found to have been disqualified."; "The district court affirmed the sound principle of not suborning the disloyalty of attorneys. It was inappropriate to hire a senior attorney, one intimately knowledgeable concerning a particular product, its competitors, and its associated business strategies and intellectual property, into a position in which she not only participated in but in fact played a significant role in acquiring a patent used to accuse her former employer's product of patent infringement."; noting that Ms. Rutherford's new employer had not screened her, so that her individual disqualification was imputed to the entire law department; "Acacia admitted at oral argument that there was no ethical screening wall or other objective measures implemented to prevent confidential information from being used, to disadvantage Schlumberger. Here, there was a clear conflict of interest for Rutherford, and the principles underlying the ethical standards mandate extending the disqualification to Acacia's other in-house attorneys."; also imputing Ms. Rutherford's individual disqualification to the outside law firm with whom she closely worked at her new employment; "We thus agree that the district court did not err in concluding that the disqualification should extend to CEP. Even beyond presumptions, there was sufficient evidence of Rutherford's involvement in the selection of CEP as outside counsel and in the litigation against Schlumberger to support a finding of communication by conduct."; "Dynamic 3D and Acacia's arguments focus on presumptions and actual disclosure, ignoring the totality of the duty owed to clients. Here, Rutherford disregarded the duty of loyalty and communicated confidential information not only to other in-house counsel but also to outside counsel, and thus the district court did not clearly err in imputing the conflict of interest to outside counsel as well as to in-house counsel."; "Dynamic 3D itself admits that, because of the disqualification of its attorneys, it would have to hire a new employee to manage the re-filing of the complaint, and retain new outside counsel. . . . Not only would those actions likely take more than 45 days and effectively impact the district court's docket, but also the potential for prejudice would continue from the improper use of Schlumberger's confidential information in preparing the original pleadings. Based on the district court's reasoning, forcing Dynamic 3D to break new ground with a fresh complaint and clean docket rather than to continue drawing from a poisoned well was not an abuse of discretion."; also dismissing Ms. Rutherford's new employer's patent law suit without prejudice; in a concurring opinion, one of the federal circuit court's judges mentioned professionalism issues; "I concur entirely with the majority's opinion, but write to briefly address the honor of our profession as attorneys. In the law, as in life, it is best if one's conduct is such that when accused of malefaction, the community responds as one that 'Ms. or Mr. __ simply doesn't act that way.' The standard is always aspirational for we are human, but if we do not strive to reach it, then perhaps we ought to consider that the game's not worth the candle." (Wallach, J. concurring); "Ms. Rutherford's conduct failed to meet minimal standards necessary to preserve public confidence in the legal system, and for that , she and others paid a price. That does not mean, however, that she should not, as a member of what is supposed to be an honorable profession, have held herself to a higher standard." (Wallach, J., concurring)).

Given the ABA Model Rules' and every state's parallel ethics rules' inclusion of law departments within the definition of "firm," it should come as no surprise that in-house lawyers may not enter into non-competes that prevent those in-house lawyers from practicing law elsewhere.

In a widely publicized case, the New Jersey Supreme Court condemned a non-compete agreement that BASF's general counsel reportedly required all of that chemical company's in-house lawyers to sign.

- New Jersey LEO 708 (7/3/06) (analyzing and ultimately finding unethical an employment agreement required by a company [identified in the press as BASF] of all of its in-house lawyers, under which the lawyers agreed that for a period of one year after the in-house lawyer left the company "'I will not become employed by, provide services to or assist, whether as a consultant, employee, officer, director, proprietor, partner or other capacity, any person, firm business or corporation which (i) is a Competitor of [Employer] (as defined in paragraph 9 below) or (ii) is seeking to become a Competitor of

[Employer]; provided however, that the provisions of this subparagraph (a) shall not apply if my employment is terminated by [Employer] without cause'"; noting that the ABA and several other states have found that the ethics rules generally prohibiting non-competes apply with equal force to in-house lawyers; holding that the "fact that the restrictive covenant agreement in question arises in the corporate context, rather than within a law firm, is of no moment"; also explaining that "[n]ot all duties of an in-house lawyer may involve the practice of law. It is conceivable that an in-house lawyer could obtain confidential information and/or trade secrets which would not be protected by RPC 1.6 or the attorney-client privilege. Therefore, it may be reasonable for a corporation to request its lawyers to sign a non-disclosure or confidentiality agreement, provided that it does not restrict in any way the lawyer's ability to practice law or seek to expand the confidential nature of information obtained by the in-house lawyer in the course of performing legal functions beyond the scope of the RPCs. Because the terms of the agreement presented by the inquirer make no reference either to the latter's functions and duties as a lawyer or to the RPCs, the requirements of Section 3 of the agreement in question are impermissible."; also finding that the ethics rules prohibited a "anti-raiding provision" in the retainer agreement required of the company's in-house lawyers).

Other states have also taken this approach.

- Virginia LEO 1615 (2/7/95) (a lawyer hired as a company's inside general counsel may not enter into a non-competition agreement with the company (under which the lawyer could not serve as any competitor's in-house counsel for a period of one year); noting that the lawyer must protect the former client's confidences and secrets if the lawyer begins to represent a competitor).

- Ohio LEO 2020-01 (2/7/20) ("Employment contracts between businesses and licensed professionals may include a restrictive covenant preventing the employee from accepting employment with a competitor for a period of time or within a geographic area. A covenant not to compete is generally enforceable in Ohio if it is found to be reasonable. Raimonde v. Van Vlerah, 42 Ohio St.2d 21, 26, 325 N.E.2d 544 (1975). However, this legal standard is not applicable to lawyers presented with a covenant not to compete by an employer."; "The prohibition in Prof.Cond.R. 5.6(a) has been interpreted as applying not only to a lawyer's employment in a traditional law firm setting, but also to situations involving employment arrangements offered by clients. See generally, ABA Op. 94-381, ABA Informal Op. 1301 (the right to practice law is granted by the state and cannot be restricted by an agreement with a client restricting future employment.) Some jurisdictions have specifically concluded that the client-lawyer relationship formed when a business or corporation employs an in-house lawyer is subject to the prohibition contained [sic] Prof.Cond.R. 5.6(a). Conn. Ethics. Op. 02-05 (2002), N.J. Ethics Op. 708 (2006). The Board similarly concludes that an employment contract offered by a client that restricts an in-house lawyer from providing legal services after separation from employment implicates the prohibition in Prof.Cond.R. 5.6(a). Consequently, a lawyer may not ethically agree to an employment contract with a covenant not to compete that will restrict his or her future legal practice after separation of employment.").

Given in-house lawyers' more intimate involvement in their employers' business, in-house lawyers' employers might wish to limit those lawyers' business-side role for competitors (among other companies). Thus, several legal ethics opinions have upheld non-competes limited to such post-employment business roles (by explicitly carving out and therefore permitting such in-house lawyers' post-employment legal employment for competitors or other companies).

- Ohio LEO 2020-01 (2/7/20) ("Lawyers occasionally are hired by businesses in positions providing a combination of both legal and business services. The prohibition in Prof.Cond.R. 5.6(a) applies to restrictions on a lawyer's provision of future legal services, but not to job functions the lawyer may perform that do not constitute the practice of law. See Conn. Ethics. Op. 02-05 (2002). A lawyer considering executing a contract with a covenant not to compete for a position that will provide both legal and business services should consider the extent the agreement will prevent the lawyer from providing legal services after separation of employment. As an alternative, a lawyer may execute an employment contract for an inhouse position that is drafted in a manner to permissibly restrict only those future activities that do not constitute the practice of law. For example, the inclusion of a clause in an employment cont[r]act limiting the covenant not to compete to matters other than the practice of law allows the lawyer to ethically execute the contract without implicating the prohibition in Prof.Cond.R. 5.6(a).").

- New York LEO 1151 (5/1/2018) ("A lawyer may not enter into an employment agreement that restricts the lawyer's right to practice law following termination of employment, even when the employment itself does not involve the practice of law, but a lawyer my [sic] agree to a post-employment restriction that is expressly made subject to applicable ethical rules.").

In addition to permissibly (if implicitly) allowing in-house lawyers' post-employment business role, in-house lawyers' post-employment restrictions may also confirm those lawyers' continuing confidentiality duty.

- New York LEO 858 (3/17/11) (addressing the following provision in an employment agreement a client asked in-house lawyers to sign: "'If I am a licensed attorney, this confidentiality provision is not meant to restrict my right to practice law, after I cease to be an employee, in violation of the applicable rules of professional conduct (such as Rule 5.6 or its equivalent), and the confidentiality provision shall be interpreted to be consistent with all such rules. The confidentiality provision shall not expand the scope of my duty to maintain privileged or confidential information under Rule 1.6, Rule 1.9, or other applicable rules of professional conduct."; ultimately concluding that "[a] general counsel licensed in New York may ethically require staff attorneys to sign a confidentiality agreement that arguably extends staff attorney confidentiality obligations, after their employment ends, to information not otherwise protected as confidential information under the New York Rules of Professional Conduct, if the agreement makes plain that such confidentiality obligations do not restrict the staff attorney's right to practice law after termination and do not expand the scope of the staff attorney's duty of confidentiality under the Rules."; explaining that "[i]f the proposed confidentiality agreement protects more information than Rules 1.6(a) and 1.9(c), a New York who enforces the agreement after an in-house legal employee terminates employment may be violating Rule 5.6(a)(1) by restricting the former in-house lawyer's practice of law. However, as a practical matter, because the definition of confidential information in Rule 1.6 is so broad, most contractual confidentiality provisions are not likely to exceed the scope of a New York lawyer's confidentiality obligations under the Rules."; "The effect of this 'savings clause' is to make plain that, to the extent the limitations imposed by the proposed agreement appear to be more stringent than the Rules, the limitations in the agreement apply only to an attorney's use and disclosure of information with respect to the practice of law. Thus, even if the contractual confidentiality provision on its face might be construed to expand the scope of an attorney's confidentiality obligations beyond those provided by the Rules, the savings clause keeps the agreement within the confines of the Rules and renders further analysis under Rule 5.6 unnecessary.").

- Arizona LEO 95-04 (4/18/95) (upholding a termination agreement between a corporation and an in-house lawyer which had strict confidentiality agreements; explaining that the provision essentially matched the lawyer's preexisting ethics duty of confidentiality, and was designed to give the corporation contractual remedies for the in-house lawyer's ethics breach).

- ABA Informal Op. 1301 (3/25/75) (explaining that a company's employment agreement provision restricting in-house lawyers from representing a competitor for two years in connection with any products about which the in-house lawyer acquired confidential information did not violate the ethics rules, but amounted to "undesirable surplusage").

The few cases addressing non-competition provisions have come to different conclusions.

A 2021 Southern District of New York case found in favor of the former in-house lawyer -- finding that her former employer's non-compete clause was "categorically unenforceable."

- Ipsos-Insight, LLC v. Gessel, No. 21-CV-3992 (JMF), 2021 U.S. Dist. LEXIS 124367, at *1-2, *2, *3, *3-4, *9, *15, *16, *21-22, *22-23, *26-27 (S.D.N.Y. July 2, 2021) (dismissing a former employer's lawsuit alleging a violation of the former in-house lawyer's employment agreement containing a practice restriction; "This case appears to present an issue of first impression: whether, under New York law, a non-compete agreement between a company and one of its in-house lawyers that restricts the lawyer's ability to work post-employment is per se unenforceable. Plaintiff Ipsos-Insight, LLC ('Ipsos') seeks to enforce such an agreement against a former in-house lawyer, Jacob Gessel, who now works for a competitor of Ipsos. Gessel, however, moves to dismiss, arguing that his non-compete agreement with Ipsos is per se unenforceable under New York law because it runs afoul of Rule 5.6(a) of the New York Rules of Professional Conduct, which provides that "[a] lawyer shall not participate in offering or making . . . a partnership, shareholder, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement." N.Y. RULES OF PRO. CONDUCT r. 5.6(a) (N.Y. State Bar Ass'n 2020)." (alterations in original); "Were the Court writing on a blank slate, it would almost certainly reject Gessel's argument. Having voluntarily entered the non-compete agreement with Ipsos, Gessel should not now be able to walk away from it. And because non-compete agreements are (assuming they meet certain requirements) enforceable under New York law against members of other learned professions, such as doctors and certified public accountants, there is little justification for treating lawyers differently. But the New York Court of Appeals has treated lawyers differently, holding that non-compete agreements between lawyers and law firms are unenforceable in light of Rule 5.6(a) (or its precursor), and this Court is bound by those decisions. As discussed below, the Court is therefore compelled to grant Gessel's motion to the extent that Ipsos's claim is premised on Gessel's alleged violation of his non-compete agreement."; "At all times during his employment, Gessel was subject to a Fair Competition Agreement containing a paid noncompete clause ('Non-Compete Clause'), which he was required to sign as a condition of his employment. Id. ¶¶11-13 & n.1; see also ECF No. 12-1 ('Fair Competition Agreement'). The operative version of the Non-Compete Clause states: '[Y]ou agree . . . that during your employment with [Ipsos], and for a period of twelve (12) months after the date of termination of your employment for any reason (the 'Non-Compete Period'), you will not directly or indirectly work for or with, own, invest in, render any services or provide advice to, or act as officer, director, employee, or independent contractor for, any person or entity that competes with [Ipsos] in the products or services it offers to its Clients at the time of the termination of your employment. You acknowledge that given the nature of the business of [Ipsos] and the geographical market of [Ipsos] (which you acknowledge is international in scope) combined with your role and responsibilities, the geographical area of the United States and Canada and the period of twelve (12) months are both reasonable.' Compl. ¶ 13 (emphasis omitted); Fair Competition Agreement § 5(b)." (alterations in original); "It follows that Gessel and any other lawyer at (or representing) Ipsos who participated in drafting the agreement or offering it to Gessel could be subject to discipline as members of the New York bar. The question presented here, however, is whether, given these violations of Rule 5.6(a), the agreement is unenforceable by Ipsos under New York law. Put differently, the question is whether a non-compete agreement between a company and one of its in-house lawyers is categorically unenforceable under New York law."; "<u>A per se rule against non-compete clauses for lawyers is all the more difficult to defend given that, under New York law, such clauses may be enforced — subject to the reasonableness analysis set forth above — against other professionals who hold positions of public trust and owe special ethical duties to their clients, such as physicians and certified public accountants."; "Additionally, as Ipsos argues, it is hard to swallow the proposition that Gessel can evade an agreement into which he entered voluntarily on the ground that, in doing so, he violated his own ethical obligations</u>."; "[R]easoning from first principles, the case for prohibiting non-compete agreements between companies and their in-house lawyers is even weaker than is the case for prohibiting such agreements between law firms and lawyers. As noted, the modern Rule 5.6(a) traces its origins to a 1961 ABA ethics opinion, which rested on the proposition that '[e]fforts, direct or indirect, in any way to encroach upon the business of another lawyer, are unworthy of those who should be brethren at the Bar." ABA Formal Op. 300 (internal quotation marks omitted); <u>see</u> <u>Cohen</u>, 550 N.E.2d at 411; WILLISTON § 13:7. For better or for worse, as Chief Justice Rehnquist observed as early as 1987, the private practice of law 'has become organized on more and more of a business basis, geared to the maximization of income,' with corresponding changes in the ethical mores of the profession, Chief Justice William H. Rehnquist, <u>Dedicatory Address</u>, 62 IND. L.J. 151, 154 (1987) — and these changes have only accelerated in the decades since Chief Justice Rehnquist's address. Indeed, since 1961, other ethical rules premised on the impropriety of competition among lawyers for clients, such as the prohibition on attorney advertising, have been relaxed or even retired." (second alteration in original); "Even assuming that the reasoning of ABA Formal Opinion 300 still applies with full force to agreements among firm lawyers, a non-compete agreement in an in-house lawyer's employment agreement is more similar to such an agreement in any other commercial employment agreement than to an attempt among lawyers 'to barter in clients' in a manner 'inconsistent with the best concepts of our professional status.' ABA Formal Op. 300. Additionally, in the in-house context, there is obviously no need to protect the interests of existing clients who might wish to follow their current lawyer to a new firm . . . ."; "[T]he Court concludes that it is compelled by the New York Court of Appeals's decisions in Cohen [Cohen v. Lord, Day & Lord, 550 N.E.2d 410, (N.Y. 1989)] and Denburg [Denburg v. Parker Chapin Flattau & Klimpl, 624 N.E.2d 995 (N.Y. 1993)] to accept Gessel's argument that the Non-Compete Clause is per se unenforceable against him. Given the sound criticisms of Rule 5.6(a) and the categorical approach to non-compete provisions involving lawyers, a strong case could certainly be made for reconsideration of Cohen and Denburg (if not Rule 5.6(a) itself). But such reconsideration would have to come from the Court of Appeals; this Court, of course, is bound by the decisions of that court. In light of the arguments for distinguishing non-compete agreements between companies and in-house counsel from noncompete agreements between law firms and their members, a strong case could perhaps also be made for limiting Cohen and Denburg to their facts and not extending their holdings to agreements with in-house counsel. But, as noted above, where New York law is unsettled, this Court's obligation is to predict what the New York Court of Appeals would decide. And while Cohen and Denburg are not on all fours with this case, the Court concludes that their holdings compel the conclusion that the Non-Compete Clause is categorically unenforceable. It is for the Court of Appeals, not this Court, to declare otherwise.") (emphases added).

In contrast, a 2017 Colorado state court found in favor of the former employer in a similar situation.

- DISH Network Corp. v. Shebar, Case No. 2017CV31079, 2017 Colo. Dist. LEXIS 87, at *2, *5-6, *6-7, *15, *15-16, *18-19, *19, *19-20, *22, *23 (Denver Cty. Dist. Ct. May 9, 2017) (granting an in-house lawyer's former employer's motion to enjoin its former in-house lawyer from working at a competitor; noting that former in-house lawyer defendant Shebar was granted several stock option agreements while working for plaintiff Dish that prohibited him from working for "any of the five largest domestic cable companies"; finding that Shebar did not advise Dish that he thought the employment restrictions were unenforceable as unethical; "Mr. Shebar testified that he believed that the non-competition provisions of the various stock agreements violated Colo. RPC 5.6 and were, therefore, unenforceable. . . . Candidly, weighing the testimony and credibility of the witnesses, it appears more likely than not that DISH was not told about Mr. Shebar's belief at the time Mr. Shebar accepted the terms of the stock agreements. In fact, based on the same considerations, it seems likely that Mr. Shebar did not reach the opinion that the agreements could be void against public policy for being contrary to Colo. RPC 5.6 until close to the time he made the decision to leave the company."; "Mr. Shebar was not forced to agree to the non-competition provision as a condition of his employment. Instead, he had the choice whether to accept the offered stock options knowing that his acceptance was conditioned upon his agreement to the non-competition provision. Although he claims to have realized at the time that the Code of Professional Conduct precluded him from entering into such an agreement, he rationalizes his action with the argument that the non-competition provisions were not only void in violation of public policy but were severable from the rest of the stock option agreements, and therefore, entering into the agreements would not be an ethical violation in his opinion."; noting that Shebar himself had violated the ethics rules if he thought that the stock options' non-competition provisions were unethical; declining to allow him to obtain the financial benefit of those options agreements while later challenging the accompanying practice restriction; "To the extent the non-competition provisions in the stock option agreements in this case are inconsistent with Colo. RPC 5.6(a), it was an ethical violation for Mr. Shebar—not DISH—to participate in the making of those agreements by accepting the non-competition provisions in order to receive the stock options. Mr. Shebar's position that it was acceptable for him to enter into what he believed was an ethically prohibited contract because it would be void for being in violation of public policy involves invalid circular logic. There are multiple ethical rules prohibiting attorneys from entering into certain agreements. If Mr. Shebar's rationale was valid, there could never be a violation of those rules." (footnote omitted); "The attorney-client relationship is distinctly a fiduciary relationship founded upon a special trust and confidence. [Accident & Injury Medical Specialists, P.C. v.] Mintz[, 2012 CO 50] at ¶ 25. The Rules of Professional Conduct govern the conduct of attorneys in order to promote that trust and confidence. Id. To permit one of those Rules to serve as a mechanism by which an in-house attorney could accept a substantial monetary benefit from his employer then avoid the condition upon which the benefit was offered would subvert the purpose for which the Rules exist in such a way as to enable an abuse of the attorney's fiduciary responsibility to his client. As observed in Norton Frickey, P.C. [v. James B. Turner, P.C., 94 P.3d 1266 (Colo. App. 2004)], an ethical rule should not serve as a license for an attorney to break a promise, go back on his word, or decline to fulfill an obligation, in the name of ethics. Id. at 1270."; "The non-competition provision in the first stock option agreement is entitled 'Covenant Not to Compete and Protection of Confidential Information.' The non-competition provisions in the subsequent agreements are entitled 'Covenant Not to Compete; Non-Solicitation; Protection of Confidential Information and Trade Secrets.' In addition to the titles that specifically reference confidential information and trade secrets, the terms of the provisions are clearly designed to inhibit the opportunity to expose trade secrets to a direct competitor by becoming employed by such a competitor, who in turn would benefit from the use of secret information to the disadvantage of DISH."; "Finally, it is of note that the short, one-year duration of the term of the non-competition provision appears to reflect the fleeting value of the type of information that an employee would have."; "Considering the above, the provisions are for the protection of trade secrets, and the provisions are reasonably limited in scope to the protection of those trade secrets."; "In light of the above analysis, the non-competition provisions are enforceable against Mr. Shebar either as a means to protect trade secrets or due to his capacity as an executive and management level employee. Assuming that, as an attorney, Mr. Shebar was prohibited by Colo. RCP 5.6(a) from agreeing to the restrictive covenants in the stock option agreements, Mr. Shebar may not use an ethical rule as a means to avoid an obligation to his client to the detriment of that client. Further, since the Colorado Rules of Professional Conduct serve to govern the actions of attorneys and are not binding upon non-attorneys, they cannot be used as a basis to preclude a client from enforcing an otherwise binding agreement against an attorney. Accordingly, DISH has demonstrated a reasonable probability of success on the merits."; "With regard to the equities, an attorney should not be able to utilize ethical rules designed to protect his clients in such a way as to benefit himself at the expense of a client. Mr. Shebar knowingly entered into the stock agreements, aware that they contained the non-competition provisions, and he realized the benefits of those agreements. It was Mr. Shebar's obligation to conform his actions to the Colorado Rules of Professional Conduct, not DISH's, and if there was a violation of those Rules, it was by Mr. Shebar and not DISH. In the end, the balance of equities favors the injunction."; "For the reasons discussed above, DISH's request for a preliminary injunction is GRANTED."; "Mr. Shebar is enjoined from working for Charter Communications during the pendency of this action, up to March 6, 2018.") (emphases added).

In 2019, a Kentucky Supreme Court case found in favor of the former employer, based on savings clause applying the non-compete only to the extent acceptable under applicable ethics rules.

- Greissman v. Rawlings & Assocs., PLLC, 571 S.W.3d 561, 563-64, 565-66, 567, 568 (Ky. 2019) (dismissing a former in-house lawyer's wrongful termination case against her former employer based on her refusal to sign an employment agreement that included a practice restriction; finding that a "'savings clause' exempting the solicitation of legal work from coverage under the non-solicitation provision meant that the agreement did not violate Kentucky Rule 5.6; "Absent an employment contract, Kentucky adheres to the doctrine of employment-at-will by which an employer may terminate an employee's employment for any or no reason. An exception to this rule exists when the termination violates public policy as expressed by the employee's exercise of a constitutional or statutory right, which may give rise to an action for wrongful termination. In this case, Carol Greissman, a licensed attorney in Kentucky, was terminated by Rawlings and Associates, PLLC (hereinafter, 'Rawlings & Associates') for refusing to sign an agreement providing, <u>inter alia</u>, for non-solicitation of Rawlings & Associates' customers or clients following cessation of employment. Greissman's refusal was based on her belief that the provision violated a Rule of Professional Conduct prohibiting non-competition agreements between lawyers and law firms. SCR 3.130, Rule 5.6. The primary issue we must resolve in this case is whether the Court of Appeals erred in opining that the Rules of the Kentucky Supreme Court do not establish public policy which in turn may form a basis for a wrongful termination claim. We hold that the Court of Appeals erred in holding that Greissman's complaint should have been dismissed for failure to state a claim, but nonetheless affirm on other grounds. The Oldham Circuit Court properly granted summary judgment in favor of Rawlings & Associates since the agreement at issue contained a savings clause which excepted the solicitation of legal work from coverage 'to the extent necessary to comply with rules of professional responsibility applicable to attorneys.' Thus, we agree with the circuit court that the agreement furnished to Greissman for signature did not violate SCR 3.130, Rule 5.6 as a matter of law." (footnote omitted); "The agreement furnished by Rawlings & Associates to Greissman provides in relevant part as follows: 'Non-Solicitation. <u>Except to the extent necessary to comply with the rules of professional responsibility applicable to attorneys</u>, I agree that for as long as I am employed and for three (3) years following termination of my employment, for any reason, I will not, without the prior written consent of Rawlings & Associates: (i) solicit, contact, interfere with, or attempt to divert any customer served by Rawlings & Associates, or any potential customer (defined as a prospective customer who was solicited by Rawlings & Associates within 5 years); or (ii) solicit any person then or previously employed by Rawlings & Associates to join me, whether as a partner, agent, employee, or otherwise, in any enterprise engaged in a business that competes with business engaged in by Rawlings & Associates at the time my employment ceases.' (emphasis added)."; "While an obligatory Rule of Professional Conduct as enacted by the Kentucky Supreme Court may qualify as public policy for purposes of a wrongful discharge claim, the professional rule must be designed to serve the interests of the public at large, rather than the sole interests of the profession. <u>Here, SCR 3.130, Rule 5.6 is designed to protect society at large by allowing clients to freely choose counsel who can best represent their interests and by not limiting an attorney's right to practice law. We believe the rule represents a fundamental and clear statement of public policy."; "On its face, the savings clause applies only to restrict Greissman's ability to solicit non-legal business; it exempts the solicitation of legal work from coverage under the non-solicitation clause, expressly noting that the signor does not agree to those terms to the 'extent necessary to comply with the rules of professional responsibility applicable to attorneys</u>.' Unambiguously, the signor agrees not to solicit Rawlings' non-legal business; the savings clause does not apply to the solicitation of legal work since that would violate the Rules of Professional Conduct. <u>Indeed, the savings clause expressly recognizes that the Rules of Professional Conduct</u>

govern if any conflict exists between them and the agreement. Since the plain language of the savings clause excludes any interpretation of the agreement that conflicts with the Rules of Professional Conduct, the agreement did not violate SCR 3.130, Rule 5.6.") (emphases added).

In 2018, the Eastern District of Wisconsin case found that the prohibition on non-competes for in-house lawyers did not represent such a sufficiently important public interest as to overcome Wisconsin's general at-will employment approach.

- Gaines v. Schneider National Inc., Case No. 18-C-898, 2018 U.S. Dist. LEXIS 182424, at *7, *12-13, *13 (E.D. Wis. Oct. 24, 2018) (dismissing a former Schneider in-house lawyer's wrongful discharge action against Schneider; finding that the Rule 5.6 limitation on practice restrictions was not a sufficiently important "public policy" issue to exempt the firing based on the lawyer's at-will employment status; "Gaines' claim raises novel questions under Wisconsin law. As an initial matter, the court must consider whether Wisconsin's Rules of Professional Conduct can be the basis of a wrongful discharge claim as a public policy exception to the employment-at-will doctrine."; "More specifically, as applied to the allegations in this case, Gaines has failed to articulate a clear public policy that the termination of her employment violates. Even if as a general matter, requiring an employee to violate Wisconsin's Rules of Professional Responsibility for Lawyers could fall within the public policy exception to the State's employment-at-will doctrine, SCR 20:5.6 does not clearly articulate the kind of 'fundamental and well-defined public policy' that Brockmeyer requires. 113 Wis. 2d at 574. Gaines' discharge for refusing to sign the noncompete agreement in this case does not 'contravene the public welfare and gravely violate the paramount requirements of public interest.' Wandry, 129 Wis. 2d at 43. This is because the application of SCR 20:5.6 to the kind of non-compete agreement that Schneider required of its in-house counsel is unclear on its face and questionable as to its purpose and effect."; "As one commentator has noted, '[t]here are compelling reasons for treating in-house counsel differently under Rule 5.6(a), and the early history of the Rule suggests that it was designed for the law-firm context.' Kevin D. Horvitz, An Unreasonable Ban On Reasonable Competition: The Legal Profession's Protectionist Stance Against Noncompete Agreements Binding In-House Counsel, 65 DUKE L.J. 1007, 1028 (2016). In-house counsel for corporate employers play a significantly different role than outside counsel. This is because in-house counsel provide both business and legal advice. As a result, the ethical rules on confidentiality that apply to all lawyers are inadequate to protect the corporate employer's legitimate interests. Id. at 1032-33. In any event, SCR 20:5.6 does not articulate the kind of clear and compelling public policy that Brockmeyer held was required to prevent an employer from terminating an employee who served at the will of both the employer and employee. For this reason, as well, Gaines has failed to state a claim upon which relief can be granted and her amended complaint must be dismissed.") (emphasis added).

Although not constituting a non-compete, an in-house lawyer's employment agreement provision prohibiting later adversity against the employer presumably would not pass ethical muster.

- ABA LEO 381 (5/9/94) (ABA Model Rule 5.6(a) prohibits an offer or acceptance of an agreement "never to represent anyone against a corporation in the future" by: (1) an outside lawyer representing the corporation; or (2) an in-house lawyer employed by the corporation. Such agreements impermissibly "limit a lawyer's 'professional autonomy '" and "limit 'the freedom of clients to choose a lawyer.'" "A lawyer may not ethically ask for nor may a lawyer agree to any further restriction [beyond that imposed by ABA Model Rule 1.9] unnecessarily compromising the strong policy in favor of providing the public with a free choice of counsel.").

Best Answer

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

n 9/21

Law Firms' Pre- and Post-Employment Restrictions

Hypothetical 9

As your firm's managing partner, you have asked for recommendations from a partnership committee about how to protect the firm and its clients from harm caused by lawyers suddenly leaving the firm (either individually or in groups).

May you include the following provisions in your partnership agreement:

(a) Partners must provide a sixty-day written notice of their departure, and forfeit all of their capital in the firm if they leave before the end of the sixty days?

MAYBE

(b) Partners who leave the firm and take clients with them must pay the firm a percentage of those clients' receipts for a one-year period after their departure?

NO (PROBABLY)

(c) Partners who leave the firm will be responsible for their pro rata share of any lease payments for the law firm's offices (unless the firm is able to replace the departed lawyers with others to occupy the space)?

MAYBE

Analysis

Law firms, law departments and lawyers who leave their employment face a myriad of often subtle issues. These can implicate ethics rules, contract provisions, employment agreements, common law fiduciary duties, and other restrictions.

Alone among professionals and non-professionals, lawyers may not agree to non-competition provisions preventing them from practicing law (and representing any clients) after they leave a law firm's or law department's employment. This obviously creates great challenges for law firms' and law departments' management.

All of these become more complicated because lawyers usually plan ahead after determining that they will leave their employment – which usually creates tension between their continuing duty to their employer (or partners) while still at the firm, and their freedom to take certain steps ahead of time to compete with the firm or law department they are planning to leave.

Partnership and Employment Agreements' Post-Termination Provisions

Imaginative law firms have tried numerous tactics to discourage lawyers from leaving their firms and taking business with them. In some cases, the motivation is purely pecuniary, but in other situations the firms act out of concern for the smooth transition of their clients' business.

Courts or bars nullify many of these creative techniques. These courts and bars apply the basic principle that law firms may not create a "financial disincentive" for lawyers who leave the firm and compete with it that is materially different from whatever disincentive applies to lawyers who leave the firm for other reasons.

The Restatement explains how the general prohibition on noncompetes affects this analysis.

> [A] lawyer may not offer or enter into a restrictive covenant with the lawyer's law firm or other employer if the substantial effect of the covenant would be to restrict the right of the lawyer to practice law after termination of the lawyer's relationship with the law firm. The rationale for the rule is to prevent undue restrictions on the ability to present and future clients of the lawyer to make a free choice of counsel. The rule applies to all lawyers of the firm and prohibits both making and accepting such a restriction.
>
> Beyond professional discipline, such rules preclude enforcement of a provision of a firm agreement under which a departing lawyer is denied otherwise-accrued financial benefits on entering into competitive law practice, unless the denial applies to all departing firm lawyers, whether entering

> into competitive practice or not (including, for example, lawyers who become judges, government counsel, or inside legal counsel for a firm client or who change careers, such as by entering teaching).

Restatement (Third) of Law Governing Lawyers § 13 cmt. b (2000).[1]

Bars and courts generally uphold provisions that apply the same way to lawyers who leave the firm and compete with the firm and lawyers who do not later compete with the firm.

- Pierce v. Morrison Mahoney LLP, 897 N.E.2d 562, 565 (Mass. 2008) ("In this case, we must decide whether that firm's amended partnership agreement, which imposes identical financial consequences on all partners who voluntarily withdraw from the firm, regardless of whether they compete with the firm after withdrawing, also violates [Supreme Judicial Court] rule 5.6. We conclude that it does not.").

- Hoffman v. Levstik, 860 N.E.2d 551 (Ill. Ct. App. 2006) (upholding a trial court's enforcement of a law firm's partnership agreement allowing the law firm to reduce repayment of the withdrawing partner's capital by up to $50,000 if the partner voluntarily withdrew; also upholding a partnership agreement provision allowing some discretion by the law firm in determining the date of a withdrawing partner's termination for calculating the withdrawing partner's share of the firm's profits; finding that under the partnership agreement's provisions a large contingent fee award should have been considered in calculating the withdrawing partner's share).

However, this basic principle creates an awkward restriction for law firms. A law firm might have difficulty attracting lawyers who would fear enormous financial penalties if they ever leave the firm. In addition, law firms may want to avoid disappointing or

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[1] Not surprisingly, the Restatement recognizes that law firms can restrict what their partners can do while in the firm.

> Also distinguishable are law-firm requirements restricting a lawyer's right to practice law prior to termination, such as the common restriction that the lawyer must devote his or her entire practice to clients of the firm. Similarly, an organization employing a lawyer does not violate the rule of this Section in requiring that the lawyer's practice is limited to the affairs of the organization. For example, governmental practice is often so limited.

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

angering those lawyers who leave for purposes other than to compete with the firm -- such as joining a client's law department, becoming judges, or even being gently squeezed out of the firm.

(a) Most courts or bars allow notice provisions such as this, as long as they do not harm clients' interests. But an uneven application of a notice provision might create ethics issues.

For instance, if a law firm routinely waived this penalty for lawyers that left the firm to enter public service, teach at a law school, etc. -- but enforced it against lawyers who joined competing law firms -- a court or bar might conclude that the notice requirement was intended to punish competitors rather than to protect clients.

More and more law firms are adding lengthier and lengthier notice provisions to their partnership and employment agreements. Few bars or courts seem to have dealt with these, although some articles have described law firms' attempts to enforce them.

- Amaris Elliott-Engel, Kline & Specter Injunction Bars Ex-Associate From Practicing Elsewhere for 60 Days, Legal Intelligencer, July 21, 2011 (issuing a preliminary injunction barring the former lawyer from practicing for sixty days after he left a law firm, because he had not provided the required sixty days notice mandated in the employment agreement; "At the start of the hearing in Kline & Specter v. Englert, Kline & Specter's counsel, Richard A. Sprague, said that Englert, who joined the firm after his graduation from the University of Pennsylvania Law School, had violated his employment contract. Under that contract, Sprague said, Englert is required to give 60 days' notice before leaving the firm. Sprague, of Sprague & Sprague, argued that [Judge] Sheppard should uphold the employment contract by issuing a preliminary injunction that would bar Englert from practicing law anywhere else but at Kline & Specter for 60 days."; "While Sheppard initially stated that the firm's request sounded like a restrictive covenant for lawyers, Sprague said that a preliminary injunction would be valid because Englert was free to leave to work somewhere else eventually but he needed and had failed to give 60 days' notice."; "Frank D'Amore of Attorney Career Catalysts said that the norm in the legal industry is for notice provisions in legal employment contracts to go unenforced. Once client notification has been arranged to be carried out in an orderly fashion, in the 'vast majority of cases, even if there is some saber rattling, almost all firms back down,' said D'Amore, who said he does not have knowledge of this specific case."; "The reasons to not enforce notice provisions include helping the firm's morale by not requiring an attorney who wants to exit the firm to remain; helping the firm's recruiting of new legal talent by not gaining a reputation for making it hard to leave; and abiding by the principle that the client's best interest must be served above all else, D'Amore said.").

- Brian Baxter, Waiting Game for Barnes & Thornburg Lateral Hires, American Law Daily, Oct. 13, 2010 ("So just how long will a group of litigators who gave notice at Wildman, Harrold, Allen & Dixon on October 1 have to wait before heading to their new home at Barnes & Thornburg? Maybe not as long as they claim they were initially told. On Tuesday, the Chicago Tribune reported that Wildman executive committee member H. Roderic Heard and five of his partners from the firm's Windy City office would be forced to wait out a 90-day-notice period after the attorneys tendered their resignations. The story quickly made its way around the legal blogosphere, with some poking fun at Wildman for delaying the move by insisting on enforcing a clause that's commonly found in partnership agreements but rarely raised. Wildman g-eneral counsel Stephen Landes, who chairs his firm's professional standards committee, claims that the furor over the six departures is much ado about nothing. 'We started this [process] on a Friday, it's moving right along, and I expect that by sometime next week we'll have this thing done,' Landes says. 'It's not an event that's going to have an adverse effect on us.' However out of the ordinary it seems to be for the firm to enforce the notice period, Wildman maintains it's merely conducting due diligence and protecting its clients. As Landes explains it, the firm wants to go to its clients not only with news of the departures, but also with a plan of action for how client matters will be handled once the six lawyers depart. 'The rules require us to take care of the clients, and they're our clients until they decide they're not our clients,' he says. 'We have to make sure they have all the information and instructions they need to make a decision, so down the line we haven't created a problem by rushing the process.'").

While law firms generally justify such notices as protecting clients, the dampening effect of such provisions on lawyer departures renders them vulnerable to attack. Challengers might also try to determine if law firms have applied such notice requirements evenhandedly. For instance, a law firm which enforces a lengthy notice period against lawyers moving to a competitor but not to lawyers moving to an academic setting or to a client's law department might well lose a fight over such provisions.

(b) Bars and courts normally nullify provisions requiring parting lawyers to pay back to their former firm a percentage of income they earn from representing clients that retain them and terminate their relationship with the firm in which the departed lawyer formally practiced. See, e.g., ABA/BNA Lawyers' Manual on Professional Conduct § 51:1205 (noting that courts have routinely condemned an agreement that "requires the lawyer to pay his former firm a percentage of the fees he is paid by clients who leave with him").

The reporter's note for the Restatement recognizes this.

> In the clear majority of jurisdictions a covenant in a partnership agreement that restricts the right of a former law-firm lawyer to practice by reason of a substantial financial penalty for competing with the former firm will be denied effect, on the ground that the covenant is unreasonable in that it violates the lawyer-code prohibition. In the majority of those decisions, the prohibition is applied only to income or other benefits accrued prior to departure from the firm.

Restatement (Third) of Law Governing Lawyers § 13 cmt. b, reporter's note (2000).

Courts and bars generally take this approach.

- Cincinnati Bar Ass'n v. Hackett, 950 N.E.2d 969, 971-72 (Ohio 2011) (issuing a public reprimand against a partner who hired an associate only after the associate signed an agreement that the associate would pay back part of any money earned from case that the associate took with him if he left the firm; "[R]espondent sought to restrain his former associates from taking clients with them when they left his firm. His employment contract required a departing associate who continued to represent the firm's former clients to remit 95% of the fees generated in the clients' cases to respondent regardless of the proportion of the work that each attorney performed. If enforced, this clearly excessive fee would create an economic deterrent for the departing attorney that would adversely affect the clients' right to retain an attorney of their own choosing. Therefore, we agree that respondent has violated both Prof. Cond. R. 1.5 and 5.6.").

- Texas LEO 590 (12/2009) ("Under the Texas Disciplinary Rules of Professional Conduct, a law firm may not seek to enter into an agreement with a member of the firm that would require, if the lawyer later left the firm, that the lawyer would not solicit the firm's clients and would pay to the firm a percentage of any fees collected by the lawyer from the firm's clients for work after the lawyer left the firm.").

- Arizona LEO 09-01 (5/2009) ("A law firm may not employ associate lawyers using a contract that requires a departing associate to pay $3,500 to the law firm for each instance in which the departing associate continued to represent a law firm client. This requirement would violate the policy underlying ER 5.6 that puts the commercial interests of law firms secondary to the need to preserve client choice."; "[T]he fee 'acts as a disincentive to representing the client' and, thereby, 'limits the client's ability to retain counsel of choice.' Phil. Bar Assn. Op. 89-3. [2] Cf. Stevens v. Rooks Pitts & Poust, 682 N.E. 2d 1125, 1132 (Ill. App. 1997) (holding that 'no law partnership agreement should restrict a departing partner's ability to practice law.'). 'Financial disincentives may involve either forfeiting compensation that is due to the departing lawyer or requiring that the departing lawyer remit to the firm a part of profits earned from representing former clients of the firm.' Legal Ethics, Law. Deskbk. Prof. Resp. § 5.6-1 (2008-09 ed.) See ABA/BNA Lawyer's Manual on Professional Conduct 51:1205 (2004) (examining financial disincentives involved in Rule 5.6). The fee here surely has such an effect because it must be paid each time that the departing associate continues the representation of a Firm client.").

- Law Offices of Ronald J. Palagi, P.C. v. Howard, 747 N.W.2d 1, 13 (Neb. 2008) (holding that the ethics rules prohibit the enforcement of a law firm employment agreement requiring a lawyer withdrawing from the firm to pay back to the firm any fees earned by cases that the withdrawing lawyer takes with him; "Based upon similar ethics rules in effect throughout the country, '[c]ourts do not enforce any agreement involving the employment of lawyers that appears to have restrictive and thus anticompetitive tendencies.' This is so whether the restriction on competition is direct or indirect. The prohibition against restrictive covenants in agreements between lawyers is generally reasoned to be necessary to ensure the freedom of clients to select counsel of their choice. Courts and commentators note a distinction between the business principles which govern commercial enterprises and the ethical principles that govern the practice of law and find that because 'clients are not merchandise' and '[l]awyers are not tradesmen,' restrictive covenants may not 'barter in clients.' Because the client's freedom of choice is the paramount interest the ethics rules attempt to serve, courts reason that any disincentive to competition is as detrimental to the public interest as an outright prohibition on competition. Thus, cases almost uniformly hold that financial disincentive provisions in Attorney Agreements are unenforceable as against public policy." (citation & footnotes omitted).

- North Carolina LEO 2001-10 (1/18/02) (condemning a provision in which a law firm ties deferred compensation to a withdrawing lawyer's competition with the firm; "The provision reduces the amount of deferred compensation payable to a shareholder if the shareholder decides to leave the firm. Deferred compensation is reduced by 75% if the departing shareholder engages in 'competitive activity' within a 50-mile radius of Law Firm's offices.").

On the other hand, at least one bar has upheld an agreement in which a law firm's employment agreement includes a financial disincentive for lawyers to leave the firm -- requiring them to pay back to the firm fees that they earn on cases the lawyers take with them.

- North Carolina LEO 2008-8 (10/24/08) (analyzing several law firm employment agreements under which a withdrawing lawyer would have to pay certain amounts back to the law firm; noting generally that "a lawyer may participate in the offering or making of an employment or other similar agreement that includes a provision for dividing fees following a lawyer's departure from a firm provided the formula or procedure for dividing fees is, at the time the agreement is made, reasonably calculated to compensate the firm for the resources expended by the firm on the representation as of the date of the lawyer's departure and will not discourage a departing lawyer from taking a case and thereby deny the client access to the lawyer of his choice"; explaining that some states (such as Ohio) find such arrangements unethical, but disagreeing with those states; "Although the opinion prohibits financial disincentives on the continued representation of the clients, it does not prohibit an agreement for repurchasing the shares of a withdrawing lawyer if the agreement 'represents a fair assessment of the forecasted devaluation in the ownership interest in the firm engendered by a lawyer's departure and does not penalize the lawyer for taking clients with him.' . . . [S]uch agreements may not be so financially onerous or punitive as to deter a withdrawing lawyer from continuing to represent a client if the client chooses to be represented by the lawyer after the lawyer's departure from the firm. Any financial disincentive in an employment agreement that deters a lawyer from continuing to represent a client restricts the lawyer's right to practice in violation of Rule 5.6(a); 2007 FEO 6. Each employment agreement must be analyzed individually to determine whether it violates Rule 5.6(a); however, some general principles can be articulated. The procedure or formula for dividing a fee must be reasonably calculated to protect the economic interests of the law firm while not restricting the right to practice law. It should fairly reflect the firm's investment of resources in the client's representation as of the time of the lawyer's departure and the investment of resources that will be required for the departing lawyer to complete the representation. . . . The formula may take into account the work performed on the representation prior to the lawyer's departure, non-lawyer resources that the firm allocated to the representation not including costs advanced for the client, firm overhead that can be fairly allocated to the client's representation prior to departure, and the legal work, non-lawyer resources, and overhead that will be required of the withdrawing lawyer to complete the representation."; finding that an agreement calling for the withdrawing lawyer to pay 70 percent of any fee recovery back to the firm is unethical because the amount is too large; also concluding that such an agreement may require the withdrawing lawyer to compensate the law firm for goodwill "that initially induced the client to seek the legal services of the law firm" (as long as the "goodwill is valued fairly and reasonably and is not such a significant proportion of the fee that it creates a financial disincentive for the departing lawyer to continue the representation of clients who desire her services"); also concluding that such an agreement may not require the withdrawing lawyer to reimburse the firm for the costs advanced on behalf of the client, because such advance costs are the client's responsibility -- and that such a provision "would have a chilling effect on the departing lawyer's willingness to continue the representation of a client"; finding that such arrangements do not violate the general prohibition on fee-splitting between lawyers who are not in the same firm, because the agreements are reached when the lawyers practice in the same firm; also concluding that such employment agreements may include a mandatory arbitration clause if there is a disagreement about how to calculate the payments; "Lawyers are urged to include such provisions in employment agreements to foster early resolution of disputes without litigation and without drawing clients into the disputes.").

(c) Courts and bars sometimes recognize that a lawyer's departure from a firm affects the firm's value -- and theoretically allows the law firm to take that diminution of value into account when determining what the law firm should pay the lawyer upon his or her withdrawal.

- North Carolina LEO 2007-6 (4/20/07) (analyzing the following provision in a law firm partnership or shareholder agreement describing a formula under which the law firm's repurchase of the withdrawing lawyer's interest shall be reduced as follows: "The purchase price shall be reduced . . . by an amount equal to one hundred twenty-five Percent (125%) of the work in process generated by employees of the corporation during the twelve (12) months preceding the event requiring or permitting the stock purchase on behalf of clients of the corporation for whom the shareholder or law firm with whom the shareholder is or becomes associated, performs legal services during the twelve (12) month period following the event requiring or permitting the stock purchase."; explaining that "Rule 5.6 protects two important ethical principles: the right of clients to legal counsel of their choice and lawyer mobility. Although this provision is not like a typical covenant not to compete in that it does not have geographical or temporal restrictions, it does tie the decrease in share value to the fact that the departed lawyer represents former clients of the firm. By so doing, the provision provides a disincentive for the departing lawyer to represent clients with whom the lawyer has a prior relationship, penalizes the departing lawyer for representing former clients of the firm, and restricts the lawyer's right to practice. Moreover, the provision does not appear to measure the devaluation of the lawyer's shares in the firm due to the lawyer's departure. If a provision in a firm agreement penalizes a lawyer for taking clients, will dissuade a lawyer from continuing to represent firm clients after his departure, or does not otherwise fairly represent the devaluation of ownership interest in the firm engendered by the lawyer's departure, it violates Rule 5.6(a)."; "Nevertheless, Rule 5.6(a) does not prohibit a repurchase provision in a firm agreement that takes into account the financial effect of a lawyer's departure from a firm. However, the provision must include a more refined approach for evaluating the loss of value due to the lawyer's departure. For example, a provision that takes into account various economic factors that affect the value of the firm's shares, such as long-term financial commitments to staff and for space and equipment leases originally made by the firm in reliance upon the departing lawyer's continued contribution to the firm, may be acceptable under the rule. To the extent that a contractual provision represents a fair assessment of the forecasted devaluation in the ownership interest in the firm engendered by a lawyer's departure and does not penalize the lawyer for taking clients with him, the provision might not violate Rule 5.6(a).").

- Shuttleworth, Ruloff & Giordano, P.C. v. Nutter, 493 S.E.2d 364, 367 (Va. 1997) (upholding an employment provision that required each lawyer to pay his or her "proportionate share" of lease payments for an eleven-year term of a lease; explaining that the agreement provided that the withdrawing lawyers would not have any obligations to share in the lease payments if they left the firm because of death or disability, if they were voluntarily terminated by the firm, or if they became a judge; explaining that this lease obligation would extend beyond the first five years of the lease only if the withdrawing lawyer was engaged in the private practice of law; reversed the lower court conclusion that the provision violated the ethics rules, and finding that the provision "[wa]s to ensure that Shuttleworth had the financial means with which to make the lease payments." (citation omitted)).

A provision like this does not appear to run afoul of the ethics rules on its face -- because it simply requires lawyers leaving the firm to help cover the firm's out-of-pocket expenses incurred because the lawyers were practicing there.

Restatement

The Restatement recognizes that a lawyer's withdrawal from a firm can raise a number of issues.

> A lawyer's departure from a law firm with firm clients, lawyers, or employees, unless done pursuant to agreement, can raise difficult legal issues. Departing a firm or planning to do so consistently with valid provisions of the firm agreement is not itself a breach of duty to remaining firm members. Thus, a lawyer planning a departure to set up a competing law practice may make such predeparture arrangements as leasing space, printing a new letterhead, and obtaining financing. It is also not a breach of duty to a former firm for a lawyer who has departed the firm to continue to represent former firm clients who choose such representation, so long as the lawyer has complied with the rules of Subsection (3). Delineating what other steps may permissibly be taken consistent with such duties requires consideration of the nature of the duties of the departing lawyer to the firm, the duty of the firm to the departing lawyer such as under the firm agreement, as well as the interests of clients in continued competent representation, in freely choosing counsel, and in receiving accurate and fair information from both the departing lawyer and the firm on which to base such a choice. . . . As a matter of the law of advertising and solicitation, under most lawyer codes in-person or telephonic contact with persons whom the lawyer has been or was formerly actively representing is not impermissible. Under decisions of the United States Supreme Court, direct-mail solicitation is constitutionally protected against an attempt by the state generally to outlaw it.
>
> However, as a matter of departing lawyer's duties to the law firm, the client is considered to be a client of the firm. . . . The departing lawyer generally may not employ firm resources to solicit the client, may not employ nonpublic confidential information of the firm against the interests of the firm in seeking to be retained by a firm client (when not privileged to do so, for example to protect the interests of the client), must provide accurate and reasonably complete information to the client, and must provide the client with a choice of counsel. As stated in Subsection (3), a departing lawyer accordingly may not solicit clients with whom the lawyer actually worked until the lawyer has either left the

> firm . . . or adequately informed the firm of the lawyer's intent to contact firm clients for that purpose . . . . Such notice must give the firm a reasonable opportunity to make its own fair and accurate presentation to relevant clients. In either event, the lawyer and the firm are in positions to communicate their interest in providing representation to the client on fair and equal terms. If a lawyer and firm agree that the lawyer is free to solicit existing firm clients more extensively than as provided in Subsection (3), their relationship is controlled by such agreement. For example, it might be agreed that a departing lawyer may seek to represent some clients as an individual practitioner or as a member of another firm.

Restatement (Third) of Law Governing Lawyers § 9 cmt. i (2000). The Restatement also emphasizes that the problem becomes even more complex if lawyers leave in groups.

> With respect to other firm lawyers and employees, a lawyer may plan mutual or serial departures from their law firm with such persons, so long as the lawyers and personnel do nothing prohibited to either of them (including impermissibly soliciting clients, as above) and so long as they do not misuse firm resources (such as copying files or client lists without permission or unlawfully removing firm property from its premises) or take other action detrimental to the interests of the firm or of clients, aside from whatever detriment may befall the firm due to their departure.

Restatement (Third) of Law Governing Lawyers § 9 cmt. i (2000).

Lawyers' Pre-Departure Actions

Perhaps some lawyers wake up one morning and decide to leave their law firm or law department that day. But most lawyers plan ahead. In other words, they decide to leave their law firm or law department -- but not immediately. They therefore face a tremendous tension between: (1) their continuing fiduciary and contractual duties to partners, colleagues and employers while still working at the law firm or law department;

and (2) their pre-departure actions intended to prepare for their eventual competition with their firm or law department.

First, most states permit lawyers planning to leave a law firm to make logistical arrangements for competition (such as renting office space, opening bank accounts, etc.).

Second, most states have condemned withdrawing lawyers' advance efforts to lure other lawyers or employees away from the firm. There are many common law fiduciary duty cases finding such conduct actionable.

Third, lawyers leaving their firms may not take with them client lists, trade secrets, etc.

Fourth, lawyers generally may solicit any firm client after the lawyer leaves the firm -- as long as the lawyer complies with applicable ethics rules about such marketing efforts.

Fifth, law firms considering merging with other firms may engage in the type of "stand-still" agreements to which corporations often agree.

- North Carolina LEO 2017-5 (10/27/17) (finding that law firms negotiating a possible merger may agree to a two-year hiatus on soliciting lawyers from the other firm if the firms do not consummate the merger; "Law Firm A entered into an agreement with Law Firm B to explore merger of the two law firms. In addition to provisions addressing non-disclosure of confidential client and proprietary firm information, the agreement included the following provision: Non-Solicitation. During the term of this Agreement and, should Law Firm A and Law Firm B decide not to merge, for a period of two (2) years after termination of this Agreement (the 'Non-Solicitation Period'), (i) Law Firm A agrees that it shall not induce or solicit any of the partners, associates, or other employees of Law Firm B to join Law Firm A; and (ii) Law Firm B agrees that it shall not induce or solicit any of the partners, associates, or other employees of Law Firm A to join Law Firm B. The foregoing restriction shall not apply to (i) associates or other employees who are hired through a party's recruiting efforts resulting from the placement of general media advertisements or the retention of 'headhunters' (provided that the headhunters are not specifically directed to solicit associates or other employees from the other party), or (ii) the hiring by a party of the other party's associates or other employees who make unsolicited contacts seeking employment so long as such individuals did not directly participate in meetings, negotiations, or similar discussions between the parties concerning the terms of the potential merger. Each party agrees not to hire or engage as partners or counsel any individual who is currently a partner or counsel with the other party to this Agreement for a period of two years from the termination of this Agreement."; "The term of the agreement is one year, but is subject to early termination based upon ten days' notice by a party. Therefore, the potential period of restriction may be as long as three years."; "Attorney X is a partner in Law Firm A and is interested in joining Law Firm B. She did not participate in meetings, negotiations, or discussions between the law firms relative to the agreement or to a potential merger with Law Firm B. Nevertheless, the managing lawyers for Law Firm B have refused to talk to her about becoming a partner because the period of restriction has not expired. Law Firm B will talk to Attorney X about joining the firm if she obtains a waiver of the restriction from Law Firm A."; "Is this provision of the agreement prohibited under Rule 5.6(a)?"; "No, because it imposes a *de minimis* restriction on the mobility of the lawyers in the firms, does not impair client choice, and is reasonable under the circumstances."; "The non-solicitation provision in this inquiry is primarily a restriction on the law firms that are a party to the agreement in that it restricts the recruiting activities of the firms. To the extent that the provision restricts the mobility of lawyers in the two firms, the restriction is for a relatively short, defined period of time and only with regard to employment with one other law firm; the lawyers in the firms are free to seek employment with any other law firm. In addition, the provision does not prevent or inhibit a client from following a lawyer who departs one of the firms for employment with a firm not subject to the agreement. Thus, the provision imposes a de minimis restriction on lawyer mobility and does not impair client choice."; "As noted in the Scope section of the Rules, '[t]he Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself.' Rule 0.2, cmt. [1]. It is surmised that the non-solicitation provision was included in the agreement to foster the trust necessary for both firms to disclose financial information about the productivity of the lawyers in the firms without fear that, should the merger negotiations be abandoned, the other firm would attempt to lure highly productive lawyers or 'rainmaker' lawyers away from the other firm. The provision was reasonable under the circumstances and, given its limited duration and effect, does not violate Rule 5.6(a)." (alteration in original) (footnote omitted)).

- Nixon Peabody LLP v. de Senilhes, Valsamdidis, Amsallem, Jonath, Flaicher Associes, 2008 NY Slip Op 51885U, at *2, *8 (N.Y. Sup. Ct. Sept. 16, 2008) (analyzing an agreement between the Nixon Peabody law firm and a French law firm that the firms entered into while discussing a possible law firm merger; explaining that under the agreement neither firm would "'for two years from the date of its agreement . . . employ or offer partnership directly or indirectly'" to any lawyer at the other firm (citation omitted); holding that the French law firm could not enforce the provision after Nixon Peabody hired several of the French law firm's partners when the law firm merger negotiations broke down; finding that the "non-solicitation clause upon which [the French law firm] relies is unenforceable as it violates this state's public policy"; granting summary judgment to Nixon Peabody; also granting summary judgment on the French law firm's claim that Nixon Peabody aided and abetted several French partners' breach of fiduciary duty to their firm; granting summary judgment to Nixon Peabody on the French law firm's claim that it tortuously interfered with contractual relations among the French lawyers in the firm).

In 2019, the ABA issued a legal ethics opinion providing guidance to withdrawing lawyers.

- ABA LEO 489 (12/4/19) (Law firms cannot restrict withdrawing lawyers from unilaterally notifying clients of their withdrawal "once the law firm has been notified or otherwise learns of the lawyer's intended departure." Law firms and withdrawing lawyers "should attempt to agree on a joint communication" to clients with whom the lawyer "has had significant contact" – which "would include a client identifying the departing lawyer, by name, as one of the attorneys representing the client," in contrast to a lawyer who "prepared one research memo on a client matter for another attorney in the firm but never spoke with the client or discussed legal issues with the client." If they cannot "promptly agree on the terms of a joint letter," the law firm "cannot prohibit the departing lawyer from soliciting firm clients." All unilateral or joint communications to clients must give them the choice of "remaining with the firm, going with the departing lawyer, or choosing another attorney." Both law firms and withdrawing lawyers must take reasonable steps to "coordinate to assure that all electronic and paper records for client matters are organized and up to date" -- so the client will be protected if it goes with the withdrawing lawyer, stays with the firm or chooses some other law firm. Withdrawing lawyers must "return and/or delete all client confidential information in their possession," unless the client goes with the withdrawing lawyer or the information is necessary for conflicts clearance. Law firms may impose "a reasonable notification period for withdrawing lawyers," but may not impose a notification period that "would affect a client's choice of counsel or serve as a financial disincentive to a competitive departure." For instance, lawyers may not be held to comply with "a pre-established notice period" if all of the clients' files are updated, and the lawyer either "has agreed to cooperate post-departure in final billing" or "does not seek to represent firm clients in the future." Such notification periods are the same as an improper financial disincentive "to a competitive departure," and are "problematic" when imposed only on withdrawing lawyers who plan to compete with the firm while routinely waived otherwise. Lawyers complying with a notification period should not be deprived of "adequate firm resources" needed to serve clients. After lawyers withdraw, law firms "should set automatic email responses and voicemail messages for the departed lawyer's email and telephones, to provide notice of the lawyer's departure, and offer an alternative contact at the firm for inquiries." A "supervising lawyer" should also review incoming emails, voicemails, etc. "in accordance with client direction and promptly forward communications to the departed lawyer for all clients continuing to be represented by that lawyer." Firms and lawyers complying with a notification period should also "discuss and clarify" how to treat new client matters that come in during that period.).

More recently, the California Bar offered extensive guidance.

- California LEO 2020-201 (2020) ("A lawyer is leaving her law firm ('Law Firm') and transitioning her practice to a new firm ('New Firm'). Prior to making this transition, the lawyer ('Lawyer' or 'Departing Lawyer') wants to know what ethical obligations arise for her and the Law Firm as a result of her departure."; "Departing Lawyer and Law Firm must be cognizant of the ethical obligations they have throughout the transition period, irrespective of whether the client decides to leave with Departing Lawyer, to stay at Law Firm, or choose otherwise. (See Cal. State Bar Opn. No.2014-190; see also rule 1.16.) These ethical obligations sometimes can be at odds with the business interests of Law Firm or Departing Lawyer. In such circumstances, the client's interest always remains paramount."; "During the transition process, Departing Lawyer and Law Firm also may have legal obligations to one another, which could include fiduciary duties and contractual obligations. To the extent possible, when there is a conflict between a lawyer's and a law firm's ethical obligations to a client and a lawyer's and a law firm's obligations to each other, the former should prevail. For example, Law Firm should not attempt to enforce contractual obligations on Departing Lawyer that would prevent Departing Lawyer from complying with ethical obligations to clients or interfere with the client's right to choice of counsel."; "The departure of a lawyer is a 'significant development' with respect to current clients of the law firm for whom the lawyer is providing meaningful legal services, as discussed below in subsection A. Thus, under rule 1.4(a)(3), Departing Lawyer and Law Firm must inform certain clients about Lawyer's departure as soon as reasonably practical to allow clients to make an informed choice in counsel and to provide for a smooth transition to avoid prejudice to clients."; "Departing Lawyer does not violate rule 7.3 by notifying current clients of her departure from Law Firm. Such notification does not constitute an impermissible solicitation and, as discussed above, Departing Lawyer is ethically obligated to communicate this information to current clients."; "Notice is only required as to clients whose matter(s) Departing Lawyer is responsible for, for whom she plays a principal role in Law Firm's delivery of legal services, and any client Departing Lawyer reasonably believes may wish to transfer its files to Departing Lawyer at New Firm."; "On the other hand, if Departing Lawyer had limited involvement in the client's matter, or the client has had little to no communication with Departing Lawyer, it is unlikely the client would consider Lawyer's departure as a 'significant development' in its case. In those circumstances, notice to the client is not required. However, whether Departing Lawyer played a principal role in the client's matter should be weighed from the client's perspective with any doubts being resolved in favor of informing the client."; "With respect to Departing Lawyer, absent circumstances where a delay in doing so would prejudice the client's interests or interfere with its right to choice of counsel, Departing Lawyer should not tell clients she is leaving until she tells her Law Firm. This allows both Departing Lawyer and Law Firm the opportunity to communicate with the client about the departure so that each can present options to the client about future representation and allow the client to make an informed choice regarding counsel."; "To the extent practical, Law Firm and Departing Lawyer should attempt to agree upon and provide joint written notice to all clients on whose matter(s) Departing Lawyer is responsible or for whom she plays a principal role in Law Firm's delivery of legal services. (Cal. State Bar Formal Opn. No. 1985-86.) Joint notice, if it is truly the result of a cooperative endeavor between the parties, is preferable to unilateral notice because it is a better way in which to protect clients' interests. (ABA Formal Opn. No. 99-414.)"; "However, since not all departures are amicable, if the parties cannot agree on joint notice, or drafting the joint notice is being used by a party to delay formal client notification while informal notice talks have already begun, unilateral notice is ethically permissible and may be required in some circumstances."; "If Departing Lawyer has already left Law Firm this includes information related to where Departing Lawyer is now practicing law. In addition, Law Firm should never withhold information from any client that asks for the whereabouts of Departing Lawyer or mislead the client about Departing Lawyer in any way."; "Law Firm may not, after being notified of Departing Lawyer's intent to leave, render Departing Lawyer's continued representation of any client unreasonably difficult or impossible. For example, Law Firm should not deprive Departing Lawyer access to documents or information needed to carry out the continued representation; nor should Law Firm take Departing Lawyer off of an ongoing matter that she is principally handling before she has actually left Law Firm, unless the client has already made the choice to stay with Law Firm notwithstanding Lawyer's departure."; "Rule 1.16(e) also addresses the client's right to the return of its file when the attorney-client relationship is terminated. Specifically, 'subject to any applicable protective order, non-disclosure agreement, statute or regulation, the lawyer promptly shall release to the client, at the request of the client, all client materials and property. "Client materials and property" includes correspondence, pleadings, deposition transcripts, experts' reports and other writings, exhibits, and physical evidence, whether in tangible, electronic or other form, and other items reasonably necessary to the client's representation, whether the client has paid for them or not.'"; "While an attorney-client fee agreement can hold a client responsible for costs of copying client files, a firm can never condition the return of client files or property on receipt of those costs or the payment of any outstanding legal fees. The client's papers and property belong to the client, not to the attorney. (Rose v. State Bar (1989) 49 Cal.3d 646, 655 [262 Cal.Rptr. 702].) The client's ownership is not altered by the circumstances or the timing of the termination of the attorney-client relationship, or by whether the attorney has been paid for his or her services.").

Practical Do's and Don'ts for Departing Lawyers and Their Firms

Although some courts and bars take a different position, most of them have reached a general consensus on the acceptable and unacceptable behavior by departing lawyers and their firms.

It is useful to consider the obligations and prohibitions at different times during this process.

Before the Departing Lawyer Advises the Firm

Before the departing lawyer advises the firm, the departing lawyer should recognize the following do's and don'ts.

Do

- Comply with all partnership or employment agreement provisions (unless they are trumped by the ethics requirements).
- Continue spending full time working for the firm (it would be best to engage in the permissible type of pre-departure activities before or after regular working hours, and through personal computers, telephones, etc. -- although there appears to be no per se prohibition on acting otherwise).
- Be careful when making plans to later compete with the firm (permissible activities include renting space, ordering stationery, opening a bank account, etc.).
- Accumulate the information that might be requested by a potential new employer. Although generally even the identity of a lawyer's clients deserve confidentiality protection, every bar recognizes what amounts to an unstated principle allowing lawyers to disclose to potential new employers the type of information the employers might need when checking conflicts (this unstated

principle allows disclosure of only the minimum amount of information required, and applies only when employment discussions become very serious).

Don't

- Advise clients of the departure (although this may be permissible if it is in the client's best interests, and has become less unacceptable as the ethics rules have evolved in this area) – so be sure to check the applicable ethics rules. If it is necessary to advise the client, be sure to emphasize that the client may choose whichever option is in the client's best interest.

- Seek to solicit others to leave the firm. Traditionally, the ethics rules frowned upon if not prohibited even advising colleagues of the departure, but the case law and bars' approach has become somewhat more liberal (for instance, the D.C. Bar indicates that this issue has little if any ethics ramifications). It would be best not to advise anyone else at the firm (either lawyers or staff) that you intend to leave. If you find it necessary to advise others of your intent, do not offer them a job at your new firm, or even hold out the promise of a job. At most, you should advise them that you cannot talk about that topic until you are at the new firm.

- Begin to compete with the firm (by advising clients not to open matters at the firm, but instead hold off -- either explicitly or implicitly encouraging the clients to retain the new firm).

- Take actions inconsistent with a fiduciary duty to the firm (for instance, a departing lawyer who is in a management position should not make hiring decisions, forecast profits, etc., partners should not vote on expansion plans, office leases, etc.).

- Provide a false response if someone at the firm asks about future plans, including a possible departure.

- Disclose any information requested by a potential new employer if the disclosure would substantially harm a client (as with embarrassing information, future business plans, etc.). In some situations vague information might suffice, but in other situations the inability to disclose client information might scuttle a possible job offer.

- Transfer any files or other documents to personal computers, or otherwise use client or firm documents in preparing to compete (without notifying the firm and attempting to reach an amicable resolution of issues relating to the use and retention of client files and more generic documents prepared while at the firm). The off-limits firm information includes client lists, billing rates, client revenues, realization rates, etc.

After the Departing Lawyer Advises the Firm (but Before He Leaves)

After the departing lawyer advises the firm (but before he leaves), the departing lawyer should recognize the following do's and don'ts.

Do

- Comply with partnership or employment agreement provisions such as notice provisions, etc.

- Offer to send a joint communication (with the firm) to the clients for whose matters you currently have a large degree of responsibility. The recipients of this communication should be determined on a matter-by-matter rather than a client-by-client basis. The communication should announce the departure and the date of departure, and emphasize the client's right to (1) stay with the firm; (2) move with the departing lawyer; or (3) choose another law firm.

- Consider sending a unilateral communication if the law firm balks at sending a joint communication, if the applicable ethics rules permit it (the unilateral communication must contain the same provisions as the preferable but not required joint communication).

- Respond in a neutral way to inquiries from clients who receive either a joint or unilateral communication about the departure.

Don't

- Begin to compete with the firm (in the ways described above). You can answer inquiries from clients, but should not actively solicit new business from them.

- Disparage the law firm.

- Violate any common law duties governing solicitation of colleagues to leave the firm. If you advise others of your intent to leave, or if anyone asks you about it, you should not offer a job at your new firm, or even hold out the hope of a job at your new firm.

During this time, the law firm should recognize the following do's and don'ts.

Do

- Try to agree on a joint communication to the clients (described above). It seems unlikely that the departing lawyer would balk at sending a joint communication, but if so the law firm may send a unilateral communication (which contains all of the provisions discussed above).

- Communicate with clients after the client receives the initial joint or unilateral communication offering the client the three choices discussed above (subject to the limitations discussed below).

- Try to amicably agree with the departing lawyer about the documents that he will take with him. Although files generally belong to clients and not law firms or lawyers, the ABA has indicated that departing lawyers generally may take "copies of documents that she herself has created for general use in her practice," and generally may "retain copies of client documents relating to her representation of former clients."

Don't

- Disparage the departing lawyer.

- Communicate with clients before the clients receive either a joint or unilateral communication providing the three choices discussed above. Even after such communication, don't simply advise the client that the firm will continue to represent the client.

- Try to prohibit contact between the departing lawyer and the clients on whose matters the departing lawyer has been primarily responsible.

- Deny contact information about clients (identified on a matter-by-matter basis) with whom the departing lawyer might need to communicate about the departure.

- Insist that the departing lawyer advise the firm of the identity of clients with whom the departing lawyer has communicated about her departure.

- Deny the departing lawyer access to any documents, firm resources, etc., that the departing lawyer needs to adequately provide legal services to any clients.

After the Departing Lawyer Leaves the Firm

After the departing lawyer leaves the firm, the departing lawyer should recognize the following do's and don'ts.

Do

- Follow the ethics rules on solicitation, direct mail and other marketing when contacting any of the firm's clients (acceptable post-departure targets of ethical marketing including those clients to whom you never provided any legal services).

Don't

- Disparage the law firm.

At this time, the law firm should recognize the following do's and don'ts.

Do

- Advise clients seeking to communicate with the departed lawyer of her new contact information. It is generally permissible to offer as a first choice to put the client in touch with someone at the firm who can help the client, but the law firm must always provide contact information for the departing lawyer upon request.

- Try to arrange a protocol with the departed lawyer about handling email (and the occasional snail mail) from a client that the law firm continues to represent. Presumably the law firm may be read (and need not forward to the departed lawyer) emails from a client that has chosen to stay with the law firm rather than leave with the departed lawyer. If email comes from a client that continues to rely on the law firm but has also moved some matters to the departed lawyer, a law firm representative presumably may quickly scan the email to see if it relates to a matter remaining with the firm or instead relates to a matter that the client has moved to the departed lawyer. In the latter situation, the law firm should immediately forward the email to the departed lawyer.

- Comply with the ethics rules governing files requested by clients who have chosen to retain the departed lawyer. There is no single national rule on this, so it is important to follow the pertinent state's ethics rules.

Don't

- Open or read emails directed to the departed lawyer if it relates to clients that the firm no longer represents.

- Disparage the departing lawyer.

- Try to condition release of a client's file or any other event on obtaining the client's release of liability.

Best Answer

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

n 9/21

Lawyers' Pre-Departure Notification to Clients

Hypothetical 10

You recently decided to move from one law firm to another law firm that seems to better suit your personality and (especially) your clients' needs. You have checked your state's ethics authorities to determine what you may and may not do while still employed at your current law firm. But one big question remains.

May you advise the clients for whom you are chiefly responsible of your planned departure and move to another law firm – before advising your current firm of your intended departure?

MAYBE

Analysis

Although law firms may not prohibit or even discourage their lawyers from leaving the firm and competing against it for clients, lawyers contemplating such withdrawal may not ignore their fiduciary duties to the firm.

Lawyers face many ethics, contractual and fiduciary duty issues when they withdrawal from a law firm or law department. Of course, entities cannot impose absolute non-competes, but may be able to impose certain limited post-withdrawal restrictive provisions. Lawyers face the most acute tension when trying to balance their continuing fiduciary and other duties to their current employer, while permissibly planning to compete against it once they leave.

One of the thorniest issues involves those lawyers' freedom (or even arguable obligation) to notify the clients for which they are chiefly responsible that they plan to change employment.

Under ABA Model Rule 1.4(a)(3), "[a] lawyer shall … keep the client reasonably informed about the status of the matter [that lawyer is handling for the client]." It seem obvious that such a lawyer's move to another law firm could be a material development affecting the lawyer's representation of that client. After all, the client will ultimately be called upon to decide whether to maintain a relationship with the law firm that no longer employs the individual lawyer, or chose to move with that departing lawyer to his or her new law firm. On the other hand, the lawyer's notification to such a client before the lawyer leaves the law firm seems to constitute actual competition with the law firm – not preparation for some later competition. Thus, notifying the client could be seen as violating the lawyer's continuing duties to his or her employer up until the moment that the lawyer departs.

Most bars traditionally prohibited lawyers from advising clients of their departure before the lawyers advised their own law firms.

The Restatement takes this strict approach.

> Absent an agreement with the firm providing a more permissive rule, a lawyer leaving a law firm may solicit firm clients: (a) prior to leaving the firm: (i) only with respect to firm clients on whose matters the lawyer is actively and substantially working; and (ii) only after the lawyer has adequately and timely informed the firm of the lawyer's intent to contact firm clients for that purpose; and (b) after ceasing employment in the firm, to the same extent as any other nonfirm lawyer.

Restatement (Third) of Law Governing Lawyers § 9(3) (2000) (emphasis added).

However, in 1999, the ABA explained that in some situations departing lawyers may not only be permitted to provide such advance notice to some clients -- but actually may be required to provide such advance notice.

- ABA LEO 414 (9/8/99) (a lawyer planning to leave a firm has an ethical obligation to inform the pertinent clients in a timely manner, but must comply with applicable restrictions on solicitation; any notice before the lawyer leaves the firm should be "limited to clients whose active matters the lawyer has direct professional responsibility at the time of the notice; should "not urge the client to sever its relationship with the firm, but may indicate the lawyer's willingness and ability to continue her responsibility for the matters upon which she currently is working," and should emphasize that the client may choose to stay with the firm or hire the withdrawing lawyer; despite implications to the contrary in earlier informal opinions [1457 and 1466], "we reject any implication . . . that the notices to current clients and discussions as a matter of ethics must await departure from the firm"; the departing lawyer "must ensure that her new law firm would have no disqualifying conflict of interest" preventing the new firm from representing the client; although it would be best for the firm and the departing lawyer to provide joint notice to the clients, the firm's failure to cooperate entitles the departing lawyer to send a separate notice; legal rules govern a departing lawyer's actions before the firm receives notice of the departure; "the departing lawyer may avoid charges of engaging in unfair competition and appropriation of trade secrets if she does not use any client lists or other proprietary information in advising clients of her new association, but uses instead only publicly available information and what she personally knows about the clients' matters"; citing the case of <u>Graubard Mollen Dannett & Horowitz v. Moskovitz</u>, 653 N.E.2d 1179 (N.Y. 1995) and providing helpful guidance on a departing lawyer's fiduciary duties, including the fact that "informing firm clients with whom the departing lawyer has a prior professional relationship about his impending withdrawal and reminding them of their right to retain counsel of their choice is permissible"; a withdrawing lawyer generally may retain documents the lawyer prepared or which are in the public domain, although "principles of property law and trade secret law" govern these issues; "When the departing lawyer reasonably anticipates that the firm will not cooperate on providing such a joint notice, she herself must provide notice to those clients for whose active matters she currently is responsible or plays a principal role in the delivery of legal services"; a lawyer "<u>does not violate any Model Rule in notifying the current clients of her impending departure by in-person or live telephone contact before advising the firm of her intentions to resign, so long as the lawyer also advises the client of the client's right to choose counsel and does not disparage her law firm or engage in conduct that involves dishonesty, fraud, deceit, or misrepresentation</u>. After her departure, she also may send written notice of her new affiliation to any firm clients regardless of whether she has a family or prior professional relationship with them." (emphasis added)).

In 2019, the ABA seemed to backtrack somewhat from ABA LEO 414 (9/8/99)'s explanation that lawyers do not violate any ABA Model Rule by notifying certain clients of their departure before notifying the law firm that they will be leaving.

- ABA LEO 489 (12/4/19) (Law firms cannot restrict withdrawing lawyers from unilaterally notifying clients of their withdrawal "once the law firm has been notified or otherwise learns of the lawyer's intended departure." Law firms and withdrawing lawyers "should attempt to agree on a joint communication" to clients with whom the lawyer "has had significant contact" – which "would include a client identifying the departing lawyer, by name, as one of the attorneys representing the client," in contrast to a lawyer who "prepared one research memo on a client matter for another attorney in the firm but never spoke with the client or discussed legal issues with the client." If they cannot "promptly agree on the terms of a joint letter," the law firm "cannot prohibit the departing lawyer from soliciting firm clients." All unilateral or joint communications to clients must give them the choice of "remaining with the firm, going with the departing lawyer, or choosing another attorney." Both law firms and withdrawing lawyers must take reasonable steps to "coordinate to assure that all electronic and paper records for client matters are organized and up to date" -- so the client will be protected if it goes with the withdrawing lawyer, stays with the firm or chooses some other law firm. Withdrawing lawyers must "return and/or delete all client confidential information in their possession," unless the client goes with the withdrawing lawyer or the information is necessary for conflicts clearance. Law firms may impose "a reasonable notification period for withdrawing lawyers," but may not impose a notification period that "would affect a client's choice of counsel or serve as a financial disincentive to a competitive departure." For instance, lawyers may not be held to comply with "a pre-established notice period" if all of the clients' files are updated, and the lawyer either "has agreed to cooperate post-departure in final billing" or "does not seek to represent firm clients in the future." Such notification periods are the same as an improper financial disincentive "to a competitive departure," and are "problematic" when imposed only on withdrawing lawyers who plan to compete with the firm while routinely waived otherwise. Lawyers complying with a notification period should not be deprived of "adequate firm resources" needed to serve clients. After lawyers withdraw, law firms "should set automatic email responses and voicemail messages for the departed lawyer's email and telephones, to provide notice of the lawyer's departure, and offer an alternative contact at the firm for inquiries." A "supervising lawyer" should also review incoming emails, voicemails, etc. "in accordance with client direction and promptly forward communications to the departed lawyer for all clients continuing to be represented by that lawyer." Firms and lawyers complying with a notification period should also "discuss and clarify" how to treat new client matters that come in during that period.).

Cases and state legal ethics opinions have also assessed lawyers' possible freedom (or even obligation) to give some clients advance word of their departure.

- Iowa LEO 17-01 (4/28/17) (giving guidance for lawyers leaving their firms; "The Committee is asked to provide guidance to lawyers and law firms terminating their relationship. Changing an employment or practice situation is fraught with client notification and conflicts of interest problems as well as issues concerning fiduciary duties owed to employers or partners and their clients. Even prospective law firms risk importing the new hire's conflicts, which can cause the firm to be disqualified from representing its existing clients. The problem is insidious and can even apply to the hiring of law student interns and clerks and possibly staff."; "When engaging in initial discussions, lawyers should be mindful that they owe multiple, often symbiotic fiduciary duties to their law firms and clients."; "Lawyers must remember that they owe fiduciary duties to their existing law firms and to clients."; "In preparing for preliminary discussions with potential new employers, the lawyer should study ABA Formal Op. 09-455 (2009) 'Disclosure of Conflicts When Lawyers Change Firms' which provides guidance concerning when, and under what circumstances the ACL can be disclosed without violating Model (Iowa) Rule of Professional Conduct 32:1.6."; "Notifying one's employer of an intended termination is stressful. Failing to notify the employer, disclosing the ACL to other law firms in the community, and being found out by one's employer or partners can generate hostility that can last a career and must be avoided at all cost."; "Both lawyer and law firm have legitimate interests to protect, and it is imperative they discuss, and hopefully conclude, how they will facilitate the disclosing process. While law firms may naturally be reluctant to authorize disclosure of the list, they have an ethical obligation to facilitate the disclosure. Likewise, the prospective law firm, in receiving the list, has an obligation to hold the information in confidence."; "Prior to entering into preliminary discussions for employment, both lawyers should review ABA Formal Op. 96-400 (1996) Job Negotiations with Adverse Firm or Party. The opinion cautions, and we agree, that all parties should consider notifying and obtaining the consent of their respective clients prior to engaging in negotiations."; "When a termination or separation date has been determined, clients must be notified of the separation and their right to change counsel."; "The client should be told they have the choice to remain with the law firm or have their representation transferred to the departing lawyer and how to do so. If the parties cannot agree, they should designate an independent transfer agent the clients could contact should they have questions regarding transfer of representation."; "The client's election should be sent to the law firm, or in the case of a unilateral notice . . . , the transfer agent, who will provide a copy to the departing lawyer and law firm if necessary."; "The law firm is responsible to facilitate the transfer without cost to the client or departing lawyer."; "Joint notification is highly encouraged. However, in rare instances if the parties cannot come to agreement Watson [Watson, P.C. v. Peterson, 650 N.W. 2d 562, 565 (Iowa 2002)] would authorize the departing lawyer to unilaterally send notice to all clients on the ACL. Before doing so, the law firm should be given twenty days written notice of the lawyer's intent to engage unilateral notification to the law firm, with a copy of the ACL, during which time neither the law firm nor the lawyer should send notification to the clients on the ACL. During this time, unless the parties can agree on joint notification, the departing lawyer shall appoint a lawyer not associated with either the departing lawyer, the new firm or the law firm to act as transfer agent who shall, after the expiration of the aforesaid time period, send notification to all clients on the ACL."; "From time to time, it will be necessary for the departed lawyer to consult with the prior law firm to check for conflicts of interest regarding new matters."; "The COIL [Conflict of Interest List] provides information concerning clients of the remaining members of the law firm. The lawyer who has left the practice will not have access to the law firm's COIL and without timely, accurate and complete information, complying with the imputed conflict rule, Iowa R. Prof'l. C. 32:1.10, becomes impossible. As previously indicated, lawyers and law firms have an obligation to facilitate each other's conflict of interest analysis."; "Conflicts between the lawyer, law firm and new law firm will undoubtedly arise. If the parties cannot come to accord, they should engage an independent, fair and confidential resolution process."; "Iowa R. Prof'l C. 32:8.4 (a) and (c) prohibit a lawyer or law firm from violating the Rules or otherwise engaging in dishonesty, fraud, deceit or misrepresentation. After the lawyer has departed, the law firm may receive phone, mail or electronic communication for the separated lawyer in which case the inquirer should be given the lawyer's current contact information. Likewise, the law firm should facilitate electronic transfer of the lawyer's email communication, however web pages and search engine optimization need only be reconfigured to eliminate reference to the lawyer who has left the practice."; "Recognizing that lawyer-law firm separations can sometimes be acrimonious, Iowa lawyers are reminded to take guidance from IA Sup. R. 33.2(4) 'We will not, absent good cause, attribute bad motives or improper conduct to other counsel or bring the profession into disrepute by unfounded accusations of impropriety.'"; "Law firms frequently create brief banks and form banks to expedite the building and delivery of their legal services. The brief or form bank may have been created as a result of the work of the employed lawyer as well as other lawyers acting within the scope of their duties, while being paid by the law firm. These resources can constitute works made for hire within the meaning of 17 U.S.C. § 101 ('A “work made for hire“ is – (1) a work prepared by an employee within the scope of his or her employment') Departing lawyers should be cautious when taking this type of product from the law firm without the law firm's knowledge and consent.").

- Arizona LEO 10-02 (3/2010) ("Termination of a lawyer’s employment or partnership with a firm, for whatever reason, requires the lawyer and firm involved to (1) provide timely notice to affected clients to permit those clients to make informed decisions regarding their continued representation, (2) work to ensure the continued competent and diligent representation of the client, (3) avoid charging excessive fees in connection with any work done as a result of the departure and related transitions, and (4) share information as necessary to permit the firm, the lawyer, and his or her future law firm to comply with their duties to avoid conflicts. Neither the lawyer nor the firm may impede or prevent the other's fulfillment of any ethical obligations or duties to a client or the court."; "This duty to inform the client of a lawyer's departure arises because the client, not the lawyer or law firm, chooses which lawyer will continue to represent the client."; "This analysis assumes that the departing lawyer had a significant enough role in the representation of the client that informing the client would be reasonable and necessary. The departing lawyer may have been only one of a many-member team of lawyers handling a matter or may have done only a very small amount of work on a matter (such a few hours of legal research). Whether the client needs to be informed of the lawyer's departure and reminded of the client's right to choose counsel depends on whether, viewed from the perspective of the client, the client's decision about who should continue the representation might depend on the continued involvement of the departing lawyer.").

- Joint Pennsylvania & Philadelphia LEO 2007-300 (6/2007) (providing a comprehensive analysis of law firm's and lawyer's obligation when the lawyer withdraws from the law firm; holding that <u>"[b]oth the departing lawyer and the old firm have independent ethical obligations to inform the client that its lawyer is leaving the old firm</u>"; "[t]he clients entitled to notice are those for whom the departing lawyer is currently handling active matters or plays a principal role in the current delivery of legal services"; <u>"[t]he law firm should preferably be notified before the clients are notified"; "[j]oint notification of clients is preferable"; explaining that "[a]ny suggestion that the departing lawyer should not be permitted to communicate the fact of departure until after that departing lawyer has left the old firm must be rejected"; "there is no ethical prohibition against the departing lawyer's giving notice to current clients (i.e., clients for whose active matters the departing lawyer currently is responsible or for whom the lawyer plays a principal role in the current delivery of legal services) in person or by telephone</u>"; noting that the law firm's and the departing lawyer's initial notice to the client should not disparage the other; also explaining the law firm's duty when receiving calls for the withdrawing lawyer after the lawyer departs; "In our prior opinion we also concluded, relying upon Opinion 94-30 of the Philadelphia Professional Guidance Committee, that where, following a partner's departure a client for whom the partner had worked, telephoned the law firm asking for the former partner, the firm was obligated to provide the contact information for that former partner prior to engaging in any other discussion with the client. . . . That advice was based on the need to allow the client to make prompt contact with the former attorney in order to facilitate the client's freedom of choice in the selection of counsel. . . We also concluded that after providing the contact information, the firm's representative was permitted to inquire whether the call was related to a legal matter, and if so, the firm's representative could properly propose the firm's assistance in the matter. . . . This conclusion was based upon the analysis that a client represented by one lawyer in a firm is a client of the firm. . . . Under Rule 7.3(a), we acknowledged the firm's right to communicate with a prospective client with whom the firm had a prior professional relationship. . . . We noted, however, that if the caller resisted the invitation or indicated a desire to talk only to the former partner, continued persistence or heavy- handedness by the firm would run the risk of violating Rule 7.3(b) which prohibits direct solicitation of persons who display a disinclination to deal with the firm. . . . We believe this guidance remains appropriate today."; also analyzing the timing of the withdrawing lawyer's duty to advise the firm of her departure; explaining that the issue is fact-intensive; providing examples of situations that might trigger the withdrawing lawyer's duty to advise the firm of her departure; "if the lawyer were, for example, working on a client matter at the old firm and the new firm were on the other side, any personal interest conflict arising in that circumstance would be one that the old firm would have an interest and an obligation to address"; "Similarly, a duty to disclose a possible departure in advance of any binding commitment or agreement to join a new firm could arise under the law of fiduciary duty. For example, if a partner with a substantial practice were aware that the old firm was making significant investments or undertaking significant commitments in terms of personnel, space, equipment, financing or other resources, to support that partner's practice, a fiduciary duty of disclosure may arise if the partner were to engage in substantive discussion that reasonably could result in that partner and the practice being taken elsewhere after the investments and commitments were entered. Similarly, if a partner or an associate engaged in substantive discussions with another firm about joining that firm, the partner or associate could not ethically deny the existence of such discussion if asked by his current firm."; ultimately explaining that in the absence of some partnership agreement or other contractual arrangement requiring notice as of a certain time, "the departing lawyer should give such notice as is fair and reasonable under all the circumstances. In determining what is fair and reasonable in this context, the guiding principles should be to ensure that client freedom of choice is maintained and to allow the old firm in a responsible and orderly way to discharge its ethical obligations to clients, although other factors may also be relevant." (emphases added)).

- District of Columbia LEO 273 (9/17/97) (explaining the duties of a lawyer considering withdrawing from a law firm; explaining that the lawyer had the duty to advise the clients whose matters the lawyer was handling; "Under the Rules of Professional conduct, a <u>lawyer responsible for a client's matter would be obligated to inform that lawyer's clients of his/her planned departure and of the lawyer's prospective new affiliation, and to advise the client whether the lawyer will be able to continue to represent it</u>. . . . In most situations, a lawyer's change of affiliation during the course of a representation will be material to a client, as it could affect such client concerns as billing arrangements, the adequacy of resources to support the lawyer's work for the client, and conflicts of interest." (emphasis added);

"Thus, not only does Rule 1.4 require the lawyer to communicate his prospective change of affiliation to the client, but such communication must occur sufficiently in advance of the departure to give the client adequate opportunity to consider whether it wants to continue the representation by the departing lawyer and, if not, to make other representation arrangements." (emphasis added); warning the lawyer that the notice to the clients should not include attempts to convince the client to move business to the new lawyer; "The lawyer's communication to the client should include the fact and date of the change in affiliation, and whether the lawyer wishes to continue the representation. The lawyer should also be prepared to provide to the client information about the new firm (such as fees and staffing) sufficient to enable the client to make an informed decision concerning continued representation by the lawyer at the new firm. The client would also need to be informed of any conflict of interest matters affecting its representation at the new firm. Any communication which exceeds that required by ethical rules -- for example, an active solicitation of the client to leave the lawyer's current firm and join the lawyer at the new firm -- could run afoul of the lawyer's obligations under partnership law (for departing partners), corporate law (for shareholders of a professional corporation) and the common law of obligations of employees (for lawyers who are employees of a firm). For example, solicitation of clients by a departing partner (i.e., activity going beyond neutrally informing a client of the lawyer's planned departure and new affiliation) may be a breach of a partner's fiduciary obligations to other partners and may constitute tortuous interference with the law firm's business relations."; indicating that the lawyer's possible duty to advise the law firm of the withdrawal before advising the clients is of "no ethical significance"; "Under partnership or other law, a departing lawyer may also be obliged to inform the lawyer's firm, at or around the time the lawyer so notifies clients, of his/her planned departure from the firm. (There appears to be no ethical significance to whether the client or the law firm is first informed of the lawyer's planned departure)." (emphasis added); also explaining that lawyer must be careful in asserting a retaining lien over files; "Where the lawyer or law firm whose relationship with the client is being terminated in this process is owed money for legal services provided, a retaining lien against client files is available only to a very limited extent in the District of Columbia."; pointing to other law as governing the withdrawing lawyer's recruitment of law firm lawyers or employees to leave with the withdrawing lawyer; "Another question frequently posed to the Bar's ethics counsel is whether a departing lawyer may, prior to departure, recruit lawyers or non-lawyer personnel to accompany the lawyer to the new firm. We believe that this issue is resolved primarily, if not entirely, under law other than ethics law, such as the common law of interference with business relations and fiduciary obligations."; also dealing with the lawyer's use of a law firm name; "Where a lawyer has departed one firm to practice elsewhere, it would plainly be misleading for the law firm to continue to use that lawyer's name in written materials used for external communications.").

- Kentucky Bar Ass'n v. Unnamed Attorney, 205 S.W.3d 204, 209 (Ky. 2006) ("[W]e adopt the ABA view that such a duty of notification arises when the departing attorney 'is responsible for the client's representation or . . . plays a principal role in the law firm's delivery of legal services currently in a matter[.]' . . . Clearly, the facts of this case show that the respondent was the only attorney responsible for the man's case and that he played a 'principal' role in delivering legal services to the respondent since no other attorneys from the firm were involved with the man's case until after the respondent left the firm.").

- Alaska LEO 2005-2 (9/8/05) (addressing a lawyer's ethical obligations when changing firms; essentially adopting ABA LEO 414).

- Dowd & Dowd, Ltd. v. Gleason, 816 N.E.2d 754 (Ill App. Ct.), appeal denied, 823 N.E.2d 964 (Ill. 2004) (upholding a law firm's judgment against two former partners of a law firm, who had solicited Allstate as a client before they left the firm; noting that the head of Allstate's Claims Department and a manager in that Claims Department testified under oath that "they had not been solicited by [the withdrawing partner] to move their business to the new firm" (id. at 764); instead confirming a former paralegal's testimony, who testified that one of the withdrawing partners told her that they had lined up Allstate before they left the firm; pointing to various other breaches of fiduciary duty by the withdrawing partners, including the updating and downloading of Allstate's service lists that the withdrawing partners took with them; upholding damages of nearly $2.5 million, including all of the law firm's payments to the partners during the time when they were breaching their fiduciary duties and profits the law firm would have earned had Allstate stayed with the firm.).

While legal ethics opinions' approach to this key issue has waxed and waned, two states have adopted rules restricting lawyers' pre-departure notices to clients.

In 2006 Florida adopted a black-letter ethics rule governing law firms' and withdrawing lawyers' obligations in Florida Rule 4-5.8.

Somewhat surprisingly, Florida Rule 4-5.8 prohibits withdrawing lawyers from notifying clients that they are leaving the firm, absent a prior notice to the law firm and attempted negotiations about a joint notice.

> Absent a specific agreement otherwise, a lawyer who is leaving a law firm shall not unilaterally contact those clients of the law firm for purposes of notifying them about the anticipated departure or to solicit representation of the

> clients unless the lawyer has approached an authorized representative of the law firm and attempted to negotiate a joint communication to the clients concerning the lawyer leaving the law firm and bona fide negotiations have been unsuccessful.

Florida Rule 4-5.8(c)(1).

Significantly, law firms apparently do not face such restrictions, and therefore presumably could immediately contact clients once the firm learns that one of its lawyers plans to withdraw. An ambiguous later provision envisions the withdrawing lawyer providing an even-handed notice to clients if the lawyer and the firm have not reached a satisfactory joint notice -- but mentions law firms' notice in the same provision.

> When a joint response has not been successfully negotiated, unilateral contact by individual members or the law firm shall give notice to clients that the lawyer is leaving the law firm and provide options to the clients to choose to remain a client of the law firm, to choose representation by the departing lawyer, or to choose representation by other lawyers or law firms.

Florida Rule 4-5.8(d)(1).

In 2015, Virginia adopted a similar rule. Virginia Rule 5.8.

<u>Law Firms' Actions Against Withdrawing Lawyers</u>

<u>Best Answer</u>

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

n 1/22

Litigation Settlements: Practice Restrictions

Hypothetical 11

You have successfully represented plaintiffs in several franchise lawsuits against an out-of-state franchisor. The franchisor's lawyer just called to offer an attractive settlement in the latest case that you brought. When you read the "fine print," you see that the franchisor wants you to agree not to bring similar cases against the franchisor on behalf of any other plaintiffs.

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

NO

Analysis

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

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

ABA Model Rule 5.6(b). The ABA has flatly indicated that this type of restriction violates the ethics rules. The only ABA Comment providing any guidance does not say much – although it articulates the most extreme interpretation of ABA Model Rule 5.6(b).

- ABA Model Rule 5.6 cmt. [2] ("Paragraph (b) prohibits a lawyer from agreeing not to represent other persons in connection with settling a claim on behalf of a client.).

In 1993, the ABA condemned a settlement agreement practice restriction that did not mention but certainly sounded like the Merck Vioxx settlement described below -- which academics all criticized -- but which a Connecticut federal court refused to block and which worked to resolve Merck's existence – threatening drug litigation.

- ABA LEO 371 (4/16/93) (Rule 5.6's limits on lawyers' agreements to limit their practice restrict what lawyers may offer or agree to in settlement agreements, despite "[t]he pressure to find creative solutions to mass tort litigation" (in an opinion presumably critical of the settlement agreement in mass tort litigation against Merck arising from the Vioxx crisis). "[A] lawyer cannot agree to refrain from representing present or future clients against a defendant pursuant to a settlement agreement on behalf of current clients even in the mass tort, global settlement context." "Certainly that situation is presented here where among the lawyer's present clients are (a) individuals who wish to accept the present settlement, (b) individuals who wish to go on the deferred docket and might be perfectly happy to accept the predetermined amount established in the proposed settlement at a later date, and (c) individuals who either now or, after being on the deferred docket a period of time, wish to have their claims individually adjudicated. There may also be a conflict simply among the lawyer's clients in category (c)." "Thus, we conclude that … the lawyer may not proceed with the settlement on behalf of his present clients unless he resolves this conflict among them by seeking an appropriate waiver, if that is possible, or securing, with the clients' consent, alternative counsel for those whose interests differ from those who wish to pursue that portion of the global settlement which provides predetermined settlement amounts.").

The <u>Restatement</u> takes the same basic position.

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

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

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

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

Despite the unanimous ethics consensus prohibiting such a restriction, it does not make much sense. Lawyers may not be compelled to represent anyone (unless perhaps there is some animus against certain protected class clients, etc.). Similarly, lawyers may generally withdraw from a representation under most circumstances (as long as it does not prejudice their clients). ABA Model Rule 1.16(b)(1). Clients can retire from the profession anytime they want, as long as they follow ethics guidelines. In other words, like all or nearly all service providers, lawyers may represent or not represent clients as they wish.

So what principle prevents a lawyer from obtaining a financial benefit by agreeing not to engage in conduct (later representations) that they cannot be compelled to engage in? Why can't a lawyer accept an additional amount of settlement from a defendant that seeks the lawyer's agreement not to represent other plaintiffs against that defendant? In fact, a lawyer turning down that offer actually harms her current client – who would presumably receive a large percentage of that extra amount.

Perhaps that scenario provides an insight into the flat prohibition's possible rationale. Lawyers fulfilling their duty to zealously represent a current client must (except on rare occasions) favor the client's interests over their own interests. That general principle presumably would require such lawyers to accept the enriched settlement in order to provide more money to their current client – favoring that interest over their own interest in possibly representing future clients against the settling defendant. So perhaps the flat prohibition intends to relieve such lawyers of that ethics dilemma.

In Stephen Gillers, A Rule Without a Reason: Let the Market, Not the Bar, Regulate Settlements that Restrict Practice, 79 A.B.A.J. 118 (Oct. 1993), Professor Stephen Gillers of New York University School of Law rejected the main arguments in favor of the prohibition. As Professor Gillers points out,

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

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

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

Id.

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

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

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

Not surprisingly, bars have condemned flat prohibitions on lawyers representing other plaintiffs against the same defendant.

- California LEO 1988-104 (1988) ("Actions were brought against several financial institutions alleging unfair business practices in violation of specific provisions of the Business and Professions Code. A proposed settlement agreement, prepared by defendant's attorney, precluded plaintiff's attorney from representing 'any person or entity in any litigation or arbitration proceeding against [defendant] or its affiliated entities; . . ." Plaintiff's attorney signed the agreement. An opinion on the propriety of this provision has been requested from the Committee. California Rule of Professional Conduct 2-109(A) provides: 'A member of the State Bar shall not be a party to or participate in an agreement, whether in connection with the settlement of a law suit or otherwise, if the agreement restricts the right of a member of the State Bar to practice law.'"; "It is the opinion of the Committee that the provision being considered places in the hands of opposing party the ability to control the attorney's representation of subsequent clients. Thus, it denies a potential client access to an attorney of their choice. This is especially important where the attorney has previous experience in pursuing a matter against the particular defendant. Indeed, it is this previous experience which may make the attorney more attractive to the potential client."; "Because the provision limits the autonomy of attorneys and the ability of clients to freely choose an attorney, it is the opinion of the Committee that the inclusion of the provision in the settlement agreement restricts the right of the attorney to practice law."; "The Committee acknowledges that plaintiff's attorney may find him or herself in an uncomfortable position if faced with a settlement offer that is in the best interests of the client but which includes the provision being considered. However, ethics opinions interpreting American Bar Association Model Code of Professional Conduct DR 2-108(B), which is substantially similar to California rule 2-109(A), have uniformly held that defendant's attorney may not directly (District of Columbia Bar Association Opinion 130 (1983)) or indirectly (Maryland State Bar Opinion 82-53 (1982); Oregon State Bar Opinion 258 (1974)) propose such a provision, nor may plaintiff's attorney accept it (State Bar of Ohio Opinion 81-10 (1981); Virginia State Bar Opinion 649 (1985)). Thus, both attorneys will be in violation of rule 2-109.").

Significantly, one court held that a defense lawyer proposing unethical practice restriction as part of a settlement violates the ethics rules even if the plaintiffs' lawyer does not accept the provision.

- In re Hager, 812 A.2d 904, 919 n.18 (D.C. 2002) ("We note that several bar opinions have stated that a defense attorney who proposes a restriction on practice provision as part of a settlement also engages in unethical conduct, even if the offer is rejected.").

And one legal ethics opinion has suggested that such a plaintiff's lawyer might even have an obligation to report such a defense lawyer's proposal.

- Philadelphia LEO 95-13 (8/1995) (reminding a plaintiff's lawyer who had received a settlement offer with such a restrictive provision that "you must consider whether you have an obligation to report defense counsel [to the Pennsylvania Bar] for their conduct in making the offer").

Also significantly, arranging for two separate agreements in connection with a settlement (one of which violates the ethics rules) does not immunize the latter from scrutiny.

- Cardillo v. Bloomfield 206 Corp., 988 A.2d 136, 137, 140 (N.J. Super Ct. App. Div. 2010) (analyzing a situation in which a plaintiff's lawyer agreed not to represent other clients adverse to a defendant with which her client had settled; noting that the lawyer herself can challenge the enforceability of the agreement to which she entered; "Attorneys may not circumvent the import of

RPC 5.6(b) by stating that the settlement of litigation is separate from the agreement to restrict the practice of law where the agreements were negotiated contemporaneously and are interconnected."; "Defendants argue that principles of equitable estoppel preclude Cardillo from challenging the validity of the Cardillo Agreement on the basis that it is tied to the *Rubinstein* litigation because she had consistently asserted during negotiations that the *Rubinstein* settlement and the Cardillo Agreement were separate and independent from each other."; "This equitable doctrine is not appropriately applied here. First, defendants, in negotiating an agreement that violated RPC 5.6(b), cannot be said to have acted with good reason or in good faith. Second, enforcement of RPC 5.6(b) will cause no injustice here. RPC 5.6(b) is designed in part to benefit the public; that purpose would be thwarted if equitable estoppel principles allowed the Cardillo Agreement to stand."; ultimately holding that the agreement was void and unenforceable under Rule 5.6).

Interestingly, one massive aggregate settlement proceeded despite obvious issues involving such ethics restrictions.

The settlement offered by Merck in the Vioxx cases required that plaintiff's lawyers handling any cases against Merck who recommended the settlement to one client must recommend it to <u>every</u> client -- and also required those lawyers to seek to withdraw from representing any of their clients who rejected the settlement.

As explained above, the ABA predictably condemned the arrangement.

- ABA LEO 371 (4/16/93) (Rule 5.6's limits on lawyers' agreements to limit their practice restrict what lawyers may offer or agree to in settlement agreements, despite "[t]he pressure to find creative solutions to mass tort litigation" (in an opinion presumably critical of the settlement agreement in mass tort litigation against Merck arising from the Vioxx crisis). "[A] lawyer cannot agree to refrain from representing present or future clients against a defendant pursuant to a settlement agreement on behalf of current clients even in the mass tort, global settlement context." "Certainly that situation is presented here where among the lawyer's present clients are (a) individuals who wish to accept the present settlement, (b) individuals who wish to go on the deferred docket and might be perfectly happy to accept the predetermined amount established in the proposed settlement at a later date, and (c) individuals who either now or, after being on the deferred docket a period of time, wish to have their claims individually adjudicated. There may also be a conflict simply among the lawyer's clients in category (c)." "Thus, we conclude that … the lawyer may not proceed with the settlement on behalf of his present clients unless he resolves this conflict among them by seeking an appropriate waiver, if that is possible, or securing, with the clients' consent, alternative counsel for those whose interests differ from those who wish to pursue that portion of the global settlement which provides predetermined settlement amounts.").

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

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

Best Answer

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

n 2/12

Litigation Settlements: Other Possible Provisions

Hypothetical 12

You defended your client in a number of product liability cases against the same plaintiff's lawyer, and you are looking for a way to prevent that lawyer from filing new cases against your client.

May you settle the next case only if the plaintiff's lawyer agrees:

(a) Not to solicit any new clients to bring similar cases against your client?

NO

(b) Not to assist or cooperate with any other parties or their lawyers in pursuing cases against your client?

NO

(c) To maintain in strict confidence the amount of the settlement and all pertinent documents?

YES

(d) To either represent your client or act as a "consultant" for your client, which would prevent the plaintiff's lawyer from pursuing other cases against your client without its consent?

NO

Analysis

A fairly simple (but largely undefined) restriction has generated enormous case law and ethics decisional analysis.

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

ABA Model Rule 5.6(b).

Given ABA Model Rule 5.6(b)'s significance in settlements of mass tort, employment and other cases, the ABA Model Rules' failure to provide any useful guidance is frustrating. ABA Model Rule 5.6 cmt. [2] simply states that ABA Model Rule 5.6(b) "prohibits a lawyer from agreeing not represent other persons in connection with settling a claim on behalf of a client."

Not surprisingly, bars have condemned flat prohibitions on lawyers representing other plaintiffs against the same defendant.

- California LEO 1988-104 (1988) ("Actions were brought against several financial institutions alleging unfair business practices in violation of specific provisions of the Business and Professions Code. A proposed settlement agreement, prepared by defendant's attorney, precluded plaintiff's attorney from representing 'any person or entity in any litigation or arbitration proceeding against [defendant] or its affiliated entities; . . ." Plaintiff's attorney signed the agreement. An opinion on the propriety of this provision has been requested from the Committee. California Rule of Professional Conduct 2-109(A) provides: 'A member of the State Bar shall not be a party to or participate in an agreement, whether in connection with the settlement of a law suit or otherwise, if the agreement restricts the right of a member of the State Bar to practice law.'"; "It is the opinion of the Committee that the provision being considered places in the hands of opposing party the ability to control the attorney's representation of subsequent clients. Thus, it denies a potential client access to an attorney of their choice. This is especially important where the attorney has previous experience in pursuing a matter against the particular defendant. Indeed, it is this previous experience which may make the attorney more attractive to the potential client."; "Because the provision limits the autonomy of attorneys and the ability of clients to freely choose an attorney, it is the opinion of the Committee that the inclusion of the provision in the settlement agreement restricts the right of the attorney to practice law."; "The Committee acknowledges that plaintiff's attorney may find him or herself in an uncomfortable position if faced with a settlement offer that is in the best interests of the client but which includes the provision being considered. However, ethics opinions interpreting American Bar Association Model Code of Professional Conduct DR 2-108(B), which is substantially similar to California rule 2-109(A), have uniformly held that defendant's attorney may not directly (District of Columbia Bar Association Opinion 130 (1983)) or indirectly (Maryland State Bar Opinion 82-53 (1982); Oregon State Bar Opinion 258 (1974)) propose such a provision, nor may plaintiff's attorney accept it (State Bar of Ohio Opinion 81-10 (1981); Virginia State Bar Opinion 649 (1985)). Thus, both attorneys will be in violation of rule 2-109.").

Significantly, one court held that a defense lawyer proposing unethical practice restriction as part of a settlement violates the ethics rules even if the plaintiffs' lawyer does not accept the provision.

- In re Hager, 812 A.2d 904, 919 n.18 (D.C. 2002) ("We note that several bar opinions have stated that a defense attorney who proposes a restriction on practice provision as part of a settlement also engages in unethical conduct, even if the offer is rejected.").

And one legal ethics opinion has suggested that such a plaintiff's lawyer might even have an obligation to report such a defense lawyer's proposal.

- Philadelphia LEO 95-13 (8/1995) (reminding a plaintiff's lawyer who had received a settlement offer with such a restrictive provision that "you must consider whether you have an obligation to report defense counsel [to the Pennsylvania Bar] for their conduct in making the offer").

Also significantly, arranging for two separate agreements in connection with a settlement (one of which violates the ethics rules) does not immunize the latter from scrutiny.

- Cardillo v. Bloomfield 206 Corp., 988 A.2d 136, 139-40, 140 (N.J. Super. Ct. App. Div. 2010) (analyzing a situation in which a lawyer representing a plaintiff entered into a settlement agreement with the defendant at about the same time that the lawyer entered into an agreement in which she agreed not to take any more cases against the same defendant; explaining that about five months later a lawyer brought an action seeking a court determination that the second agreement was void because it violated the New Jersey ethics rule prohibiting such restrictions; explaining that "[t]he parties cannot circumvent the import of RPC 5.6(b), and the reality of their transaction by expressly claiming during the negotiations that they are negotiating the two agreements separately and then by executing two separate agreements. Nor may they defeat application of the RPC by the device of arranging to execute the agreements on different days or with minor negotiations in the interim."; rejecting defendants' argument that the lawyer was prohibited by "principles of equitable estoppel" to challenge the agreement; "[E]nforcement of RPC 5.6(b) will cause no injustice here. RPC 5.6(b) is designed in part to benefit the public; that purpose would be thwarted if equitable estoppel principles allowed the Cardillo Agreement to stand."; affirming the lower court's finding that the second agreement was void).

Given lawyers' fertile imaginations, bars have dealt with a number of settlement provisions that arguably restrict plaintiffs' lawyers' practice. Nearly all of them have faced rejection or criticism.

The following are examples:

Provision prohibiting solicitation of new clients with similar claims

- New York LEO 1006 (4/2/2014) (analyzing possible settlement provisions arguably restricting the settling lawyer's right to practice law; "The inquiring attorney represents an organization against which one of its employees has asserted certain claims. The matter is in the process of being settled. The organization fears that similarly situated employees may assert additional claims. <u>As part of the settlement negotiation, the inquirer proposes to seek assurances from the claimant's lawyers that they will not solicit or refer further clients from among those similarly situated employees, although the inquirer accepts that if a further employee approached the attorney without being solicited, the attorney would have the right to represent that individual</u>."; "Solicitation of clients, once prohibited as an ethical matter, is now permitted subject to various constraints including those of Rule 7.3. Solicitation of clients in compliance with the Rules is an aspect of law practice that may be important or even crucial to a lawyer's ability to engage meaningfully in the profession. On that premise, the reasoning of N.Y. State [Bar Ethics Opinion] 730 guides the resolution of this inquiry as well. <u>While a lawyer's agreement not to solicit further clients would not 'directly' restrict that lawyer's right to practice law by precluding representation of clients who find the lawyer on their own, such an agreement could nonetheless have the practical effect of substantially restricting the lawyer's ability to undertake future representations. Accordingly, it is impermissible for any lawyer to settle or offer to settle a claim on the understanding that the lawyer for the claimant will not thereafter solicit new clients for the purpose of bringing similar claims against the settling party</u>."; "The second question concerns potential claimants whom the claimant's lawyer has not solicited, but who have on their own volition approached the claimant's lawyer for representation, information or guidance. The inquirer recognizes that it would be improper for a settlement agreement to provide that the lawyer may not <u>represent</u> such a person, but nonetheless asks whether an agreement could provide that the lawyer may not <u>refer</u> the person to be represented by another lawyer."; "Referral of prospective clients to other lawyers is, like solicitation of clients, integral to the practice of law. If a lawyer who is approached by a prospective client does not, for whatever reason, end up representing that person, the lawyer can nonetheless perform an important service by referring the prospective client to some other lawyer appropriate to the task. To perform this service well, the lawyer may need to ask the prospective client for information that will give rise to certain duties of legal ethics. See Rule 1.18 (duties as to confidentiality and conflicts). Then the lawyer will need to exercise legal judgment in assessing which other lawyers would be well suited to provide the representation. All of this helps achieve what Comment [1] to Rule 7.1 calls the 'important functions of the legal profession … to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.' Accordingly, a settlement agreement precluding future referrals would impermissible restrict the lawyer's right to practice law. See Colorado Opinion 92 (1993) (stating that improper restrictions in settlement agreements may include prohibiting settling lawyer's 'referral of potential clients to other counsel'); D.C. Opinion 35 (1977) (unethical for lawyer to agree to settlement term prohibiting referral to other lawyers of potential clients with claims against settling defendant)." (alterations in original) (emphases added)).

- Arizona LEO 90-06 (7/18/90) (analyzing a settlement agreement in which a lawyer representing franchisees should include the following limitations; "[T]he franchisees and the attorneys representing the franchisees agree to supply to the attorneys for Corporation A a full complete list of all Corporation A's franchisees who have been contacted by any of the foregoing, whether by mail or telephone, or by any other means, or who have communicated in any way with any of the foregoing concerning any legal action or potential legal action to be brought by any franchisee against Corporation A or any of the other parties named in this Release and Settlement Agreement. . . . The franchisees and the attorneys representing the franchisees hereby agree not to solicit or contact any franchisee of Corporation A concerning any legal action or potential legal action brought or to be brought by any franchisee against Corporation A or any of the other parties named in this Release and Settlement Agreement. The franchisees and their attorneys also hereby agree not to participate voluntarily in any way in any legal action brought or potential legal action to be brought by any franchisee against Corporation A or any of the other parties named in this Release and Settlement Agreement." (emphases added); finding that the provisions were improper; "[T]he Committee concludes that the inquiring attorney may not disclose the names of any franchisees who have consulted with him in any matters regarding Corporation A, unless they consent to have their name revealed after consultation. Otherwise, to do so would violate ER 1.6(a)."; "Of course, to the extent that the inquiring attorney has contacted any franchisees as third parties, outside of any attorney/client relationship and unrelated to the representation of any client, he may disclose these contacts to opposing counsel."; also finding that the lawyer could not agree to the second provision) (emphasis added).

Provision requiring disclosure of a list of possible plaintiffs with whom the settling plaintiff's lawyer has communicated

- Arizona LEO 90-06 (7/18/90) (analyzing a settlement agreement in which a lawyer representing franchisees should include the following limitations; "[T]he franchisees and the attorneys representing the franchisees agree to supply to the attorneys for Corporation A a full complete list of all Corporation A's franchisees who have been contacted by any of the foregoing, whether by mail or telephone, or by any other means, or who have communicated in any way with any of the foregoing concerning any legal action or potential legal action to be brought by any franchisee against Corporation A or any of the other parties named in this Release and Settlement Agreement. . . . The franchisees and the attorneys representing the franchisees hereby agree not to solicit or contact any franchisee of Corporation A concerning any legal action or potential legal action brought or to be brought by any franchisee against Corporation A or any of the other parties named in this Release and Settlement Agreement. The franchisees and their attorneys also hereby agree not to participate voluntarily in any way in any legal action brought or potential legal action to be brought by any franchisee against Corporation A or any of the other parties named in this Release and Settlement Agreement." (emphases added); finding that the provisions were improper; "[T]he Committee concludes that the inquiring attorney may not disclose the names of any franchisees who have consulted with him in any matters regarding Corporation A, unless they consent to have their name revealed after consultation. Otherwise, to do so would violate ER 1.6(a)."; "Of course, to the extent that the inquiring attorney has contacted any franchisees as third parties, outside of any attorney/client relationship and unrelated to the representation of any client, he may disclose these contacts to opposing counsel."; also finding that the lawyer could not agree to the second provision) (emphases added).

Provision prohibiting referral to other lawyers of claimants who contact the settling plaintiff's lawyer

- New York LEO 1006 (4/2/2014) (analyzing possible settlement provisions arguably restricting the settling lawyer's right to practice law; "The inquiring attorney represents an organization against which one of its employees has asserted certain claims. The matter is in the process of being settled. The organization fears that similarly situated employees may assert additional claims. As part of the settlement negotiation, the inquirer proposes to seek assurances from the claimant's lawyers that they will not solicit or refer further clients from among those similarly situated employees, although the inquirer accepts that if a further employee approached the attorney without being solicited, the attorney would have the right to represent that individual."; "Solicitation of clients, once prohibited as an ethical matter, is now permitted subject to various constraints including those of Rule 7.3. Solicitation of clients in compliance with the Rules is an aspect of law practice that may be important or even crucial to a lawyer's ability to engage meaningfully in the profession. On that premise, the reasoning of N.Y. State [Bar Ethics Opinion]

730 guides the resolution of this inquiry as well. While a lawyer's agreement not to solicit further clients would not 'directly' restrict that lawyer's right to practice law by precluding representation of clients who find the lawyer on their own, such an agreement could nonetheless have the practical effect of substantially restricting the lawyer's ability to undertake future representations. Accordingly, it is impermissible for any lawyer to settle or offer to settle a claim on the understanding that the lawyer for the claimant will not thereafter solicit new clients for the purpose of bringing similar claims against the settling party."; "The second question concerns potential claimants whom the claimant's lawyer has not solicited, but who have on their own volition approached the claimant's lawyer for representation, information or guidance. The inquirer recognizes that it would be improper for a settlement agreement to provide that the lawyer may not <u>represent</u> such a person, but nonetheless asks whether an agreement could provide that the lawyer may not <u>refer</u> the person to be represented by another lawyer."; "<u>Referral of prospective clients to other lawyers is, like solicitation of clients, integral to the practice of law. If a lawyer who is approached by a prospective client does not, for whatever reason, end up representing that person, the lawyer can nonetheless perform an important service by referring the prospective client to some other lawyer appropriate to the task</u>. To perform this service well, the lawyer may need to ask the prospective client for information that will give rise to certain duties of legal ethics. <u>See</u> Rule 1.18 (duties as to confidentiality and conflicts). Then the lawyer will need to exercise legal judgment in assessing which other lawyers would be well suited to provide the representation. All of this helps achieve what Comment [1] to Rule 7.1 calls the 'important functions of the legal profession … to facilitate the process of intelligent selection of lawyers, and to assist in making legal services fully available.' <u>Accordingly, a settlement agreement precluding future referrals would impermissible restrict the lawyer's right to practice law</u>. <u>See</u> Colorado Opinion 92 (1993) (stating that improper restrictions in settlement agreements may include prohibiting settling lawyer's 'referral of potential clients to other counsel'); D.C. Opinion 35 (1977) (unethical for lawyer to agree to settlement term prohibiting referral to other lawyers of potential clients with claims against settling defendant)." (alterations in original) (emphases added)).

- Colorado LEO 92 (6/19/93) ("[C]laimant's attorney should not agree to a settlement restriction giving the attorney significantly less discretion in the prosecution of a claim than an attorney independent of the agreement would have. <u>Such improper restrictions may include</u> conditioning settlement on an agreement by the claimant's attorney not to subpoena specified documents or persons in the course of his or her representation of non-settling claimants, barring the settling lawyer from using certain expert witnesses in future cases, imposing forum or venue limitations in future cases brought by the settling lawyer, and <u>prohibiting his or her referral of potential clients to other counsel</u>"; noting that "[e]thics committees in other jurisdictions have recognized the impropriety of practice restrictions that fall short of an outright bar to future or ongoing representation.") (emphases added).

Provision prohibiting disclosure of publicly available information (such as information in a court record)

- Ohio LEO 2018-3 (6/8/2018) ("A settlement agreement that prohibits a lawyer's disclosure of information contained in a court record is an impermissible restriction on the lawyer's right to practice. A lawyer may not participate in either the offer or acceptance of a settlement agreement that includes a prohibition on a lawyer's disclosure of information contained in a court record. A lawyer is not required to abide by a client's decision to settle a matter if the settlement is conditioned on a restriction to practice and must withdraw from the representation.") (emphasis added).

- Pennsylvania LEO 2016-300 (11/2016) (condemning settlement provisions that limit lawyers' ability to represent future clients against the same defendant; "[A]ny provision which prohibits a lawyer from representing future claimants is per se prohibited by Pa.R.P.C. 5.6(b)."; "The question is, then, whether the clause can, under Pa.R.P.C. 5.6(a), properly preclude Plaintiff's counsel from using information obtained in a previous representation in connection with a future matter."; "A non-disparagement or confidentiality clause which precludes any use of information obtained in a former representation in future actions would violate Pa.R.P.C. 5.6(b). ABA Comm. on Ethics & Prof'l Responsibility, Op. 00-417 (2000) addressed the issue of whether a confidentiality provision in an agreement was proper when it precluded the subsequent use of information gained in the representation of the client. The Committee determined that such a broad provision would create a material limitation on the lawyer's representation of future clients due to the lawyer's inability to use confidential information learned in the prior representation, effectively restricting the lawyer's right to practice law in violation of Model Rule 5.6(b). The Committee there found that a lawyer may not agree to a confidentiality agreement if that meant the lawyer could not ever oppose the other party. See also Philadelphia Bar Association Professional Guidance Committee Opinion 95-13. ('This Committee agrees with the American Bar Association that the injunction of Rule 1.2, to abide by the client's decision regarding settlement, must be read as limited by Rule 5.6(b), given the important public policies reflected in Rule 5.6. Accordingly, a lawyer cannot agree to refrain from representing other clients as a condition of settlement of present cases.'). Similarly, Colorado Bar Op. 92 (1993) advised that a settlement agreement may not prevent counsel from subpoenaing records or fact witnesses or using a certain expert in future cases. Recently, in Op. 16-02, the S.C. Bar Ethics Advisory Comm. found appropriate a clause that agreed 'to forego disclosure, [but contained] no language that would limit the individual attorneys' use of information gained in the course of the representation for development of legal strategy or other similar purposes.'" (alteration in original) (emphasis added); "Some ethics committees have interpreted Rule 5.6(b) to prohibit settlement clauses that restrict a lawyer from publicly naming the particular parties against whom their client has settled. See, e.g., S.C. Bar Ethics Advisory Comm., Ethics Advisory Op. 10-04 (2010); Bar Ass'n of San Francisco Ethics Comm., Op. 2012-1 (2012); D.C. Legal Ethics Comm., Op. 335 (2006)." (emphasis added); "Other ethics committees have concluded that lawyers may not agree to settlement provisions that prohibit them from disclosing publicly available information. See[,] e.g., N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 730 (2000) (agreement not to reveal 'any information concerning any matters relating directly or indirectly to the settlement agreement' would be too broad and would violate New York's then-current counterpart to Pa. R.P.C. 5.6(b)); State Bar Ass'n of N.D. Ethics Comm., Op. 1997-05 (1997) (lawyers may not agree to keep confidential information that does not constitute confidential client information, including information that is public record)." (emphasis added); "There is, however, no ethical prohibition, under Pa.R.P.C. 3.4(d) or otherwise, against the most common confidentiality provision, which prohibits disclosure of the terms of a specific settlement, including the amount of the payment. This information is unique to each particular claim, and is generally not 'relevant' within the meaning of Pa.R.P.C. 3.4(d), at least from a strictly evidentiary perspective, to strangers to the settlement agreement." (emphasis added); "Ethics opinions have found that a clause that restricts the right to criticize the defendant in a non-litigation context -- such as for publicity purposes -- does not violate Rule 5.6(b).") (emphases added).

- San Francisco LEO 2012-1 (2012) (holding that a defendant's lawyer cannot include a provision in a settlement agreement prohibiting plaintiff's lawyer from mentioning the case on which the lawyer worked or the lawyer's experience in that area of the law; "In the present scenario, the proposed settlement provisions do not bar Attorneys from representing other clients in similar litigation against the Defendant. Rather, they would prohibit Attorneys from (1) mentioning in their curricula vitae, website and other advertising materials, that they have worked on an LGBT case against the Defendant, or (2) that LGBT harassment cases are an area of expertise."; "A general prohibition on an attorney disclosing or advertising his or her areas of experience is a substantial restraint on the right to practice and the ability to provide adequate information to the public regarding the attorney's qualifications. Even if information about the attorney's areas of experience is not otherwise public, a bar on disclosing such information would be an impermissible restraint under Rule 1-500."; "Rule 1-500 prohibits defense counsel from demanding, and Attorneys from agreeing to, terms in a settlement agreement that would prohibit Attorneys from referencing in their resumes, website or other advertising materials, public information regarding the fact they have worked on a particular type of case against a specific defendant. Rule 1-500 would also prohibit a restriction that precludes Attorneys from disclosing that they have experience in a specific area of the law, regardless of whether that information is otherwise public." (emphasis added)).

Provision prohibiting use of any information gained in the settled litigation

- Pennsylvania LEO 2016-300 (11/2016) (condemning settlement provisions that limit lawyers' ability to represent future clients against the same defendant; "[A]ny provision which prohibits a lawyer from representing future claimants is per se prohibited by Pa.R.P.C. 5.6(b)."; "The question is, then, whether the clause can, under Pa.R.P.C. 5.6(a), properly preclude Plaintiff's counsel from using information obtained in a previous representation in connection with a future matter."; "A non-disparagement or confidentiality clause which precludes any use of information obtained in a former representation in future actions would violate Pa.R.P.C. 5.6(b). ABA Comm. on Ethics & Prof'l Responsibility, Op. 00-417 (2000) addressed the issue of whether a confidentiality provision in an agreement was proper when it precluded the subsequent use of information gained in the representation of the client. The Committee determined that such a broad provision would create a material limitation on the lawyer's representation of future clients due to the lawyer's inability to use confidential information learned in the prior representation, effectively restricting the lawyer's right to practice law in violation of Model Rule 5.6(b). The Committee there found that a lawyer may not agree to a confidentiality agreement if that meant the lawyer could not ever oppose the other party. See also Philadelphia Bar Association Professional Guidance Committee Opinion 95-13. ('This Committee agrees with the American Bar Association that the injunction of Rule 1.2, to abide by the client's decision regarding settlement, must be read as limited by Rule 5.6(b), given the important public policies reflected in Rule 5.6. Accordingly, a lawyer cannot agree to refrain from representing other clients as a condition of settlement of present cases.'). Similarly, Colorado Bar Op. 92 (1993) advised that a settlement agreement may not prevent counsel from subpoenaing records or fact witnesses or using a certain expert in future cases. Recently, in Op. 16-02, the S.C. Bar Ethics Advisory Comm. found appropriate a clause that agreed 'to forego disclosure, [but contained] no language that would limit the individual attorneys' use of information gained in the course of the representation for development of legal strategy or other similar purposes.'" (alteration in original) (emphasis added); "Some ethics committees have interpreted Rule 5.6(b) to prohibit settlement clauses that restrict a lawyer from publicly naming the particular parties against whom their client has settled. See, e.g., S.C. Bar Ethics Advisory Comm., Ethics Advisory Op. 10-04 (2010); Bar Ass'n of San Francisco Ethics Comm., Op. 2012-1 (2012); D.C. Legal Ethics Comm., Op. 335 (2006)." (emphasis added); "Other ethics committees have concluded that lawyers may not agree to settlement provisions that prohibit them from disclosing publicly available information. See[,] e.g., N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 730 (2000) (agreement not to reveal 'any information concerning any matters relating directly or indirectly to the settlement agreement' would be too broad and would violate New York's then-current counterpart to Pa. R.P.C. 5.6(b)); State Bar Ass'n of N.D. Ethics Comm., Op. 1997-05 (1997) (lawyers may not agree to keep confidential information that does not constitute confidential client information, including information that is public record)." (emphasis added); "There is, however, no ethical prohibition, under Pa.R.P.C. 3.4(d) or otherwise, against the most common confidentiality provision, which prohibits disclosure of the terms of a specific settlement, including the amount of the payment. This information is unique to each particular claim, and is generally not 'relevant' within the meaning of Pa.R.P.C. 3.4(d), at least from a strictly evidentiary perspective, to strangers to the settlement agreement." (emphasis added); "Ethics opinions have found that a clause that restricts the right to criticize the defendant in a non-litigation context -- such as for publicity purposes -- does not violate Rule 5.6(b).") (emphasis added).

- South Carolina LEO 16-02 (2016) ("Lawyer A, in an effort to settle a case, proposes the following terms to opposing counsel Lawyer B: All terms of this Agreement are and shall remain confidential and shall not be disclosed to any person or entity by any party hereto, or by the attorney of any party, except as permitted herein. Each party expressly represents and warrants that it will not publicize in any manner, either personally or through an agent or representative, or undertake to or aid or assist any third party in publicizing or exploiting in any form whatsoever, by any means whatsoever, in any medium whatsoever, the terms of this Agreement."; "Notwithstanding the foregoing, the parties may disclose solely that the matters described herein have been 'amicably resolved.' Disclosure of the terms of this Agreement to a third party may occur, to the minimum extent necessary, in the following situations: (i) insofar as disclosure is required pursuant to a subpoena issued by a court of competent jurisdiction or legislative body or otherwise required by law; (ii) as reasonably required for purposes of complying with state and federal tax laws, or (iii) if necessary to enforce the terms of this Agreement in any proceeding."; "A lawyer may accept the proposed terms of settlement, provided that they are permitted by Rule 41.1 of the SC Rules of Civil Procedure, as the terms do not restrict use of information gained in the course of representation, but instead are limited to a prohibition of disclosure and publication of the settlement." (emphasis added)).

- New Hampshire LEO 2009-10/6 (2009) ("It would violate New Hampshire Rules of Professional Conduct 5.6(b) for defense counsel to request, as a term of a settlement agreement, that plaintiff's counsel refrain from disclosing information concerning the suit that is public, if doing so would have the effect of restricting the right of plaintiff's counsel to practice law or the public's right to identify and retain qualified counsel."; "Formal Opinion 93-371 articulates three policy considerations underlying the Rule 5.6(b) restriction on settlement agreements. First, allowing an attorney to enter into a settlement agreement that limits an attorney's right to practice restricts the public's access to counsel who, by virtue of specific knowledge and experience, may be the most qualified for such representation. Second, a restriction on the right to practice may be motivated by an intent to 'buy off' counsel, rather than resolve the controversy. Third, a restriction on the right to practice may place an attorney in a conflict position, pitting the objectives of a present client against the interests of future clients."; "By prohibiting attorneys from offering or accepting a restriction on the representation of other clients, Rule 5.6(b) protects the rights of as-yet unknown claimants by preventing defense counsel from buying off plaintiff's counsel, thus ensuring that settlement agreements do not reduce the pool of experienced attorneys available to the public."; "Settlement agreements that impose restrictions on an attorney's right to practice other than a ban on the representation of other current or future clients still may violate Rule 5.6(b). For instance, a settlement agreement that prohibits plaintiff's counsel from using any information learned during a current controversy, especially against the same defendant, may prevent the attorney from representing future claimants in similar controversies. The ABA has opined that a bar on the 'use' of information gained during the course of representation could materially limit an attorney's effective representation of future clients and, thus, impair the attorney's ability to provide competent and diligent representation. Consequently, a bar on the use of such information would violate Rule 5.6(b)." (emphasis added); "In addition to violating Rule 5.6(b), restricting an attorney's right to use information gained during the representation of a client raises significant practical problems. It would be difficult, if not impossible, for an attorney to compartmentalize or disregard all that has been learned during such representation or recall with any precision when the information was obtained."; "Moreover, an attorney who agrees to refrain from using information gained during the representation may create a conflict of interest between the interests of the current client and those of future clients with similar claims."; "Taking guidance from the ABA and state ethics opinions, this Committee concurs that provisions in a settlement agreement that require an attorney to refrain from disclosing specific settlement terms, such as the amount and existence of a settlement, are sufficiently narrow in scope and arguably serve to protect otherwise private information from public disclosure. In most cases, a narrowly drawn settlement agreement that limits the disclosure of specific information in which the parties or a party has a privacy interest will not be an impermissible restriction on the right to practice under Rule 5.6(b)."; "A settlement agreement sought by defense counsel that requires plaintiff's counsel to refrain from disclosing public information might well result in limiting an attorney's ability to disclose his or her expertise, thus limiting the public's ability to identify and obtain the most qualified counsel. Conversely, some non-disclosure agreements concerning public information likely would not result in an impermissible restriction on an attorney's right to practice due to the nature of the information to be protected. One example would be a settlement agreement that bars plaintiff's counsel from disclosing that a company has been sued 'x' times, which information is part of public court filings. This restriction does not violate Rule 5.6(b) because the restricted information -- the number of times the company has been sued -- does not impair the attorney's ability to effectively represent future clients or the ability of potential clients to identify experienced counsel."; "On the other hand, an agreement that precludes plaintiff's counsel from disclosing, for example, a published epidemiological study that resulted in a defendant drug company changing its published warnings concerning a drug, would violate Rule 5.6(b) because it prohibits plaintiff's counsel from discussing the study during the representation of future clients with claims against the same drug company. Similarly, an agreement that restricts an attorney's ability to disclose the fact that the attorney had previously sued the drug company also would violate the Rule because it would impermissibly limit the public's ability to identify the most experienced counsel for representation." (emphasis added); "Accordingly, in the absence of countervailing considerations such as those described above, this Committee finds that if a settlement agreement that precludes plaintiff's counsel from disclosing publicly available information about a case would have the effect of restricting an attorney's right to practice or of limiting the public's ability to identify qualified legal counsel, then the settlement agreement would be a violation of Rule 5.6(b).") (emphasis added).

- New York LEO 730 (7/27/00) (finding that a confidentiality provision could violate the prohibition on practice restrictions if its "practical effect" is the same as a practice restriction; noting that the confidentiality provision applied "to some information that, ordinarily, the plaintiff's lawyer would have no duty to keep confidential"; "<u>These provisions would restrict the lawyer's right to practice law by requiring the lawyer to avoid representing future clients in cases where the lawyer might have occasion to use information that was not protected as a confidence or secret under DR 4-101 but was nevertheless covered by the settlement terms</u>. A settlement proposal that calls on the lawyer to agree to keep confidential, for the opposing party's benefit, information that the lawyer ordinarily has no duty to protect, creates a conflict between the present client's interests and those of the lawyer and future clients -- precisely the problem at which DR 2-108(B) is aimed." (emphasis added)).

- ABA LEO 417 (4/7/00) (addressing the following question: "The Committee has been asked whether, under the ABA Model Rules of Professional Conduct, a lawyer representing a party in a controversy may agree to a proposal by opposing counsel that settlement of the matter be conditioned on the lawyer not using any of the information learned during the current representation in any future representation against the same opposing party. The proposed settlement would be favorable to the lawyer's client. The Committee notes that, while this particular situation is most likely to arise in litigation, it could also arise in transactional matters."; explaining that the proposed limitation would amount to a restriction on the lawyer's practice; "<u>In this case, the proposed settlement provision would not be a direct ban on any</u>

future representation. Rather, it would forbid the lawyer from using information learned during the representation of the current client in any future representations against this defendant. As a practical matter, however, this proposed limitation effectively would bar the lawyer from future representations because the lawyer's inability to use certain information may materially limit his representation of the future client and, further, may adversely affect that representation." (emphasis added); explaining the difference between a permissible restriction on the lawyer's disclosure of client confidences and an impermissible restriction on the lawyer's use of client confidences; "A proposed settlement provision, agreed to by the client, that prohibits the lawyer from disclosing information relating to the representation is no more than what is required by the Model Rules absent client consent, and does not necessarily limit the lawyer's future practice in the matter accomplished by a restriction on the use of information relating to the opposing party in the matter. Thus, Rule 5.6(b) would not proscribe offering or agreeing to a nondisclosure provision."; "Although the Model Rules also place a restraint on the 'use' of information relating to the former client's representation, it applies only to use of the information to the disadvantage of the former client. Even in this circumstance, the prohibition does not apply when the information has become generally known or when the limited exceptions of Rule 1.6 or 3.3 (Candor Towards the Tribunal) apply. This prohibition has been interpreted to mean that a lawyer may not use confidential information against a former client to advance the lawyer's own interests, or advance the interests of another client adverse to the interests of the former client. If these circumstances are not applicable, using information acquired in a former representation in a later representation is not a violation of Rule 1.9(c). Thus, from a policy point of view, the subsequent use of information relating to the representation of a former client is treated quite liberally as compared to restrictions regarding disclosure of client information." (footnotes omitted); concluding that "[a]lthough a lawyer may participate in a settlement agreement that prohibits him from revealing information relating to the representation of his client, the lawyer may not participate or comply with a settlement agreement that would prevent him from using information gained during the representation in later representations against the opposing party, or a related party, except to the limited extent described above. An agreement not to use information learned during the representation would effectively restrict the lawyer's right to practice and hence would violate Rule 5.6(b).") (emphasis added).

Provision prohibiting a settling plaintiff's lawyer from describing her experience in a particular or type of case

- Pennsylvania LEO 2016-300 (11/2016) (condemning settlement provisions that limit lawyers' ability to represent future clients against the same defendant; "[A]ny provision which prohibits a lawyer from representing future claimants is per se prohibited by Pa.R.P.C. 5.6(b)."; "The question is, then, whether the clause can, under Pa.R.P.C. 5.6(a), properly preclude Plaintiff's counsel from using information obtained in a previous representation in connection with a future matter."; "A non-disparagement or confidentiality clause which precludes any use of information obtained in a former representation in future actions would violate Pa.R.P.C. 5.6(b). ABA Comm. on Ethics & Prof'l Responsibility, Op. 00-417 (2000) addressed the issue of whether a confidentiality provision in an agreement was proper when it precluded the subsequent use of information gained in the representation of the client. The Committee determined that such a broad provision would create a material limitation on the lawyer's representation of future clients due to the lawyer's inability to use confidential information learned in the prior representation, effectively restricting the lawyer's right to practice law in violation of Model Rule 5.6(b). The Committee there found that a lawyer may not agree to a confidentiality agreement if that meant the lawyer could not ever oppose the other party. See also Philadelphia Bar Association Professional Guidance Committee Opinion 95-13. ('This Committee agrees with the American Bar Association that the injunction of Rule 1.2, to abide by the client's decision regarding settlement, must be read as limited by Rule 5.6(b), given the important public policies reflected in Rule 5.6. Accordingly, a lawyer cannot agree to refrain from representing other clients as a condition of settlement of present cases.'). Similarly, Colorado Bar Op. 92 (1993) advised that a settlement agreement may not prevent counsel from subpoenaing records or fact witnesses or using a certain expert in future cases. Recently, in Op. 16-02, the S.C. Bar Ethics Advisory Comm. found appropriate a clause that agreed 'to forego disclosure, [but contained] no language that would limit the individual attorneys' use of information gained in the course of the representation for development of legal strategy or other similar purposes.'" (alteration in original) (emphasis added); "Some ethics committees have interpreted Rule 5.6(b) to prohibit settlement clauses that restrict a lawyer from publicly naming the particular parties against whom their client has settled. See, e.g., S.C. Bar Ethics Advisory Comm., Ethics Advisory Op. 10-04 (2010); Bar Ass'n of San Francisco Ethics Comm., Op. 2012-1 (2012); D.C. Legal Ethics Comm., Op. 335 (2006)." (emphasis added); "Other ethics committees have concluded that lawyers may not agree to settlement provisions that prohibit them from disclosing publicly available information. See[,] e.g., N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 730 (2000) (agreement not to reveal 'any information concerning any matters relating directly or indirectly to the settlement agreement' would be too broad and would violate New York's then-current counterpart to Pa. R.P.C. 5.6(b)); State Bar Ass'n of N.D. Ethics Comm., Op. 1997-05 (1997) (lawyers may not agree to keep confidential information that does not constitute confidential client information, including information that is public record)." (emphasis added); "There is, however, no ethical prohibition, under Pa.R.P.C. 3.4(d) or otherwise, against the most common confidentiality provision, which prohibits disclosure of the terms of a specific settlement, including the amount of the payment. This information is unique to each particular claim, and is generally not 'relevant' within the meaning of Pa.R.P.C. 3.4(d), at least from a strictly evidentiary perspective, to strangers to the settlement agreement." (emphasis added); "Ethics opinions have found that a clause that restricts the right to criticize the defendant in a non-litigation context -- such as for publicity purposes -- does not violate Rule 5.6(b).") (emphasis added).

- Indiana LEO 2014-1 (2014) ("The Indiana State Bar Association's Standing Committee on Legal Ethics ("the Committee") has received an inquiry concerning the ethics issues implicated when an attorney for a party is asked to assume obligations to an adverse party as a condition to a settlement that is agreeable to the attorney's client. The particular inquiry concerns "non-disparagement" clauses that are sometimes contained in settlements of various types of civil matters. For the reasons discussed in further detail below, the Committee believes that ethical prohibitions applicable to counsel for both parties come into play, depending on the scope and interpretation of the particular clause. More specifically, the Committee believes that clauses that would extend to the attorney's advocacy on the part of other clients or that would prohibit the attorney from providing information to the public concerning the attorney's experience in the particular type of case or other matters are prohibited by Ind. R. Prof. Cond. 5.6(b), and that such agreements also raise issues under Ind. R. Prof. Cond. 3.4(f). Whether such provisions are enforceable in light of the applicable ethics rules, the First Amendment to the Constitution of the United States of America, or Article 1, §§ 9 and 10 of the Constitution of Indiana, are beyond the scope of this opinion."; "Several other bar associations have considered whether other restrictions on an attorney's conduct in a settlement agreement violate Rule 5.6(b). For example, both the ABA and several state and local bar associations have opined that a portion of a confidentiality clause prohibiting an attorney from "using" any information gained from a case in the future violates the Rule because such a provision "effectively would restrict the lawyer's right to practice and hence would violate Rule 5.6(b)." ABA Formal Op. 00-417; accord D.C. Bar Legal Ethics Committee Opinion No. 35 (1977); Arizona Opinion No. 90-6 (1990); Colorado Bar Ethics Committee Opinion No. 92 (1993). Some have opined that settlement provisions that prevent an attorney from advertising that the attorney has handled a particular type of case or cases against a particular opponent also violate the Rule. South Carolina Opinion 10-04 (2010); San Francisco Bar Association Opinion 2012-1. Other opinions conclude that agreements forbidding an attorney from disclosing publicly available facts about litigation against a defendant in law firm promotional materials violate the Rule. D.C. Bar Legal Ethics Committee Opinion 335 (2006). The Indiana Supreme Court has left open the question of whether agreements to restrict advertising may violate Rule 5.6. Blackburn v. Sweeney, 659 N.E.2d 131, 133 (Ind. 1995)." (emphases added)).

- San Francisco LEO 2012-1 (2012) (holding that a defendant's lawyer cannot include a provision in a settlement agreement prohibiting plaintiff's lawyer from mentioning the case on which the lawyer worked or the lawyer's experience in that area of the law; "In the present scenario, the proposed settlement provisions do not bar Attorneys from representing other clients in similar litigation against the Defendant. Rather, they would prohibit Attorneys from (1) mentioning in their curricula vitae, website and other advertising materials, that they have worked on an LGBT case against the Defendant, or (2) that LGBT harassment cases are an area of expertise."; "A general prohibition on an attorney disclosing or advertising his or her areas of experience is a substantial restraint on the right to practice and the ability to provide adequate information to the public regarding the attorney's qualifications. Even if information about the attorney's areas of experience is not otherwise public, a bar on disclosing such information would be an impermissible restraint under Rule 1-500."; "Rule 1-500 prohibits defense counsel from demanding, and Attorneys from agreeing to, terms in a settlement agreement that would prohibit Attorneys from referencing in their resumes, website or other advertising materials, public information regarding the fact they have worked on a particular type of case against a specific defendant. Rule 1-500 would also prohibit a restriction that precludes Attorneys from disclosing that they have experience in a specific area of the law, regardless of whether that information is otherwise public." (emphasis added)).

Provision prohibiting a settling plaintiff's lawyer from publicly describing her experience in handling a matter against a specific defendant

- Indiana LEO 2014-1 (2014) ("The Indiana State Bar Association's Standing Committee on Legal Ethics ("the Committee") has received an inquiry concerning the ethics issues implicated when an attorney for a party is asked to assume obligations to an adverse party as a condition to a settlement that is agreeable to the attorney's client. The particular inquiry concerns "non-disparagement" clauses that are sometimes contained in settlements of various types of civil matters. For the reasons discussed in further detail below, the Committee believes that ethical prohibitions applicable to counsel for both parties come into play, depending on the scope and interpretation of the particular clause. More specifically, the Committee believes that clauses that would extend to the attorney's advocacy on the part of other clients or that would prohibit the attorney from providing information to the public concerning the attorney's experience in the particular type of case or other matters are prohibited by Ind. R. Prof. Cond. 5.6(b), and that such agreements also raise issues under Ind. R. Prof. Cond. 3.4(f). Whether such provisions are enforceable in light of the applicable ethics rules, the First Amendment to the Constitution of the United States of America, or Article 1, §§ 9 and 10 of the Constitution of Indiana, are beyond the scope of this opinion."; "Several other bar associations have considered whether other restrictions on an attorney's conduct in a settlement agreement violate Rule 5.6(b). For example, both the ABA and several state and local bar associations have opined that a portion of a confidentiality clause prohibiting an attorney from "using" any information gained from a case in the future violates the Rule because such a provision "effectively would restrict the lawyer's right to practice and hence would violate Rule 5.6(b)." ABA Formal Op. 00-417; accord D.C. Bar Legal Ethics Committee Opinion No. 35 (1977); Arizona Opinion No. 90-6 (1990); Colorado Bar Ethics Committee Opinion No. 92 (1993). Some have opined that settlement provisions that prevent an attorney from advertising that the attorney has handled a particular type of case or cases against a particular opponent also violate the Rule. South Carolina Opinion 10-04 (2010); San Francisco Bar Association Opinion 2012-1. Other opinions conclude that agreements forbidding an attorney from disclosing publicly available facts about litigation against a defendant in law firm promotional materials violate the Rule. D.C. Bar Legal Ethics Committee Opinion 335 (2006). The Indiana Supreme Court has left open the question of whether agreements to restrict advertising may violate Rule 5.6. Blackburn v. Sweeney, 659 N.E.2d 131, 133 (Ind. 1995)." (emphasis added)).

- San Francisco LEO 2012-1 (2012) (holding that a defendant's lawyer cannot include a provision in a settlement agreement prohibiting plaintiff's lawyer from mentioning the case on which the lawyer worked or the lawyer's experience in that area of the law; "In the present scenario, the proposed settlement provisions do not bar Attorneys from representing other clients in similar litigation against the Defendant. Rather, they would prohibit Attorneys from (1) mentioning in their curricula vitae, website and other advertising materials, that they have worked on an LGBT case against the Defendant, or (2) that LGBT harassment cases are an area of expertise."; "A general prohibition on an attorney disclosing or advertising his or her areas of experience is a substantial restraint on the right to practice and the ability to provide adequate information to the public regarding the attorney's qualifications. Even if information about the attorney's areas of experience is not otherwise public, a bar on disclosing such information would be an impermissible restraint under Rule 1-500."; "Rule 1-500 prohibits defense counsel from demanding, and Attorneys from agreeing to, terms in a settlement agreement that would prohibit Attorneys from referencing in their resumes, website or other advertising materials, public information regarding the fact they have worked on a particular type of case against a specific defendant. Rule 1-500 would also prohibit a restriction that precludes Attorneys from disclosing that they have experience in a specific area of the law, regardless of whether that information is otherwise public." (emphasis added)).

- South Carolina LEO 10-04 (9/8/10) (holding that a plaintiff's lawyer cannot agree as part of a settlement not to mention the defendant's name in seeking future clients; explaining the context: "A lawsuit is filed in a SC Court. A settlement is reached whereby the defendant agrees to pay the plaintiff a sum of money. The settlement does not require court approval. As part of the proposed settlement, defendant desires that Lawyer A, the lawyer for the plaintiff, agree that Lawyer A may not identify or use the defendant's name for 'commercial or commercially-related publicity purposes.' Lawyer A may identify generally 'a settlement was achieved against an industry' -- ie: trucking or retail store. The fact that Lawyer A has sued the defendant is a matter of public record and nothing filed in the case was under seal."; explaining that "Rule 5.6 was not intended to merely protect against specific practice-of-law prohibitions but is aimed more broadly at lawyers' access to legal markets and, more importantly, clients' access to lawyers of their choosing. Thus advertising and solicitation need not themselves be regarded as the practice of law in order for them to be protected by Rule 5.6.") (emphases added).

- New Hampshire LEO 2009-10/6 (2009) ("It would violate New Hampshire Rules of Professional Conduct 5.6(b) for defense counsel to request, as a term of a settlement agreement, that plaintiff's counsel refrain from disclosing information concerning the suit that is public, if doing so would have the effect of restricting the right of plaintiff's counsel to practice law or the public's right to identify and retain qualified counsel." (emphasis added); "Formal Opinion 93-371 articulates three policy considerations underlying the Rule 5.6(b) restriction on settlement agreements. First, allowing an attorney to enter into a settlement agreement that limits an attorney's right to practice restricts the public's access to counsel who, by virtue of specific knowledge and experience, may be the most qualified for such representation. Second, a restriction on the right to practice may be motivated by an intent to 'buy off' counsel, rather than resolve the controversy. Third, a restriction on the right to practice may place an attorney in a conflict position, pitting the objectives of a present client against the interests of future clients."; "By prohibiting attorneys from offering or accepting a restriction on the representation of other clients, Rule 5.6(b) protects the rights of as-yet unknown claimants by preventing defense counsel from buying off plaintiff's counsel, thus ensuring that settlement agreements do not reduce the pool of experienced attorneys available to the public."; "Settlement agreements that impose restrictions on an attorney's right to practice other than a ban on the representation of other current or future clients still may violate Rule 5.6(b). For instance, a settlement agreement that prohibits plaintiff's counsel from using any information learned during a current controversy, especially against the same defendant, may prevent the attorney from representing future claimants in similar controversies. The ABA has opined that a bar on the 'use' of information gained during the course of representation could materially limit an attorney's effective representation of future clients and, thus, impair the attorney's ability to provide competent and diligent representation. Consequently, a bar on the use of such information would violate Rule 5.6(b)."; "In addition to violating Rule 5.6(b), restricting an attorney's right to use information gained during the representation of a client raises significant practical problems. It would be difficult, if not impossible, for an attorney to compartmentalize or disregard all that has been learned during such representation or recall with any precision when the information was obtained."; "Moreover, an attorney who agrees to refrain from using information gained during the representation may create a conflict of interest between the interests of the current client and those of future clients with similar claims."; "Taking guidance from the ABA and state ethics opinions, this Committee concurs that provisions in a settlement agreement that require an attorney to refrain from disclosing specific settlement terms, such as the amount and existence of a settlement, are sufficiently narrow in scope and arguably serve to protect otherwise private information from public disclosure. In most cases, a narrowly drawn settlement agreement that limits the disclosure of specific information in which the parties or a party has a privacy interest will not be an impermissible restriction on the right to practice under Rule 5.6(b)."; "A settlement agreement sought by defense counsel that requires plaintiff's counsel to refrain from disclosing public information might well result in limiting an attorney's ability to disclose his or her expertise, thus limiting the public's ability to identify and obtain the most qualified counsel. Conversely, some non-disclosure agreements concerning public information likely would not result in an impermissible restriction on an attorney's right to practice due to the nature of the information to be protected. One example would be a settlement agreement that bars plaintiff's counsel from disclosing that a company has been sued 'x' times, which information is part of public court filings. This restriction does not violate Rule 5.6(b) because the restricted information -- the number of times the company has been sued -- does not impair the attorney's ability to effectively represent future clients or the ability of potential clients to identify experienced counsel."; "On the other hand, an agreement that precludes plaintiff's counsel from disclosing, for example, a published epidemiological study that resulted in a defendant drug company changing its published warnings concerning a drug, would violate Rule 5.6(b) because it prohibits plaintiff's counsel from discussing the study during the representation of future clients with claims against the same drug company. Similarly, an agreement that restricts an attorney's ability to disclose the fact that the attorney had previously sued the drug company also would violate the Rule because it would impermissibly limit the public's ability to identify the most experienced counsel for representation." (emphasis added); "Accordingly, in the absence of countervailing considerations such as those described above, this Committee finds that if a settlement agreement that precludes plaintiff's counsel from disclosing publicly available information about a case would have the effect of restricting an attorney's right to practice or of limiting the public's ability to identify qualified legal counsel, then the settlement agreement would be a violation of Rule 5.6(b).") (emphases added).

- District of Columbia LEO 335 (7/2006) ("A settlement agreement may not compel counsel to keep confidential and not further disclose in promotional materials or on law firm websites public information about the case, such as the name of the opponent, the allegations set forth in the complaint on file, or the fact that the case has settled. Such conditions have the purpose and effect of preventing counsel from informing potential clients of their experience and expertise, thereby making it difficult for future clients to identify well-qualified counsel and employ them to bring similar cases. By diminishing the opportunity for the lawyer to represent future clients in similar matters, such conditions violates D.C. Rule 5.6(b), which prohibits lawyers from offering or making a settlement agreement that restricts a lawyer's right to practice. A settlement agreement may provide that the terms of the settlement and other non-public information may be kept confidential, but it may not require that public information be confidential.") (emphasis added).

Provision prohibiting a settling plaintiff's lawyer's participation in any way in any other actions against the same defendant

- Arizona LEO 90-06 (7/18/90) (analyzing a settlement agreement in which a lawyer representing franchisees should include the following limitations; "[T]he franchisees and the attorneys representing the franchisees agree to supply to the attorneys for Corporation A a full complete list of all Corporation A's franchisees who have been contacted by any of the foregoing, whether by mail or telephone, or by any other means, or who have communicated in any way with any of the foregoing concerning any legal action or potential legal action to be brought by any franchisee against Corporation A or any of the other parties named in this Release and Settlement Agreement. . . . The franchisees and the attorneys representing the franchisees hereby agree not to solicit or contact any franchisee of Corporation A concerning any legal action or potential legal action brought or to be brought by any franchisee against Corporation A or any of the other parties named in this Release and Settlement Agreement. <u>The franchisees and their attorneys also hereby agree not to participate voluntarily in any way in any legal action brought or potential legal action to be brought by any franchisee against Corporation A or any of the other parties named in this Release and Settlement Agreement</u>."; finding that the provisions were improper; "[T]he Committee concludes that the inquiring attorney may not disclose the names of any franchisees who have consulted with him in any matters regarding Corporation A, unless they consent to have their name revealed after consultation. Otherwise, to do so would violate ER 1.6(a)."; "Of course, to the extent that the inquiring attorney has contacted any franchisees as third parties, outside of any attorney/client relationship and unrelated to the representation of any client, he may disclose these contacts to opposing counsel."; also finding that the lawyer could not agree to the second provision) (emphases added).

Provision prohibiting a settling plaintiff's lawyer from using information from the settled case

- North Dakota LEO 97-05 (6/30/97) ("to the extent the provisions are interpreted to require Attorney B to turn over documents protected by the attorney work product doctrine, the provisions may be prohibited by Rule

5.6(b). That is, Attorney B may not agree to turn over any work product materials as part of the settlement if that action will restrict his representation of other clients. Whether providing the opposing side access to or losing his or her own access to work product materials would restrict the attorney's representation of other clients is a factual question the attorney must decide based on the document(s) involved and the facts and circumstances of the case."; "under Rule 5.6(b) Attorney B may not enter into an agreement restricting his use of any information that would not constitute protected client information under Rule 1.6 if that restraint would restrict his ability to represent other clients. For example, Attorney B could not agree to keep 'confidential' information that is a public record or that he could otherwise obtain through channels, such as discovery, and use in subsequent cases, but for the proposed confidentiality agreement. Restricting Attorney B's use of information that a lawyer other than Attorney B could learn and use in litigation on behalf of a client would restrain Attorney B's exercise of independent judgment on behalf of other clients to an extent greater than that of an independent attorney not subject to such a limitation. Therefore, the proposed agreements would violate Rule 5.6(b) if they were construed to prohibit Attorney B from disclosing information that is a public record or he could otherwise obtain."; "Applying the test of the propriety of a restriction in a settlement agreement set out above, if the Confidentiality Agreement and Release were construed to restrict Attorney B's use of attorney work product – mental impressions, conclusions, opinions, legal theories or strategies, etc. – in a manner that would inhibit Attorney B's ability to represent future clients, those agreement would violate Rule 5.6(b). It is difficult to imagine how an attorney could 'unlearn' theories or knowledge of law acquired as part of preparation for a case and not use that knowledge in representation of clients in similar cases in the future. If an agreement prohibiting the future use of such knowledge or information were permissible, therefore, defense counsel could use such agreements to 'accomplish indirectly what they cannot accomplish by directly precluding the attorney from representing other plaintiffs with similar claims,' State Bar of New Mexico Advisory Opinions Committee Advisory Opinion 1985-5 (Oct. 23, 1985). Accordingly, if the agreements at issue here were construed as a broad prohibition on Attorney B's 'using any knowledge, expertise, or information gained in the lawsuit in any future lawsuit,' the agreements would be prohibited by Rule 5.6(b).") (emphasis added).

Provision requiring a settling plaintiff's lawyer to turn over all her work product to the defendant

- Tennessee LEO 2016-F-161 (2016) ("The inquiring lawyer has encountered a condition to settlement in product liability cases against a certain defendant that requires plaintiff's counsel to release his work product."; "Plaintiff's counsel received from Defendant 541,927 pages in image form and had to electronically convert every single page to a pdf document. Plaintiff's counsel then processed the 541, 927 pages with optical character recognition to make each document searchable. The documents were then organized by relevant subtopics and incorporated into demonstrative exhibits. Creating this work product was the only way to understand the complex issues in the case, articulate the product defects, depose experts, present claims, and ultimately reach a successful settlement for the client. Plaintiff's counsel relied on the produced materials to cut a full-size vehicle into parts for use in explaining complex engineering, vehicle dynamics, and safety mechanisms to the jury. This demonstrative evidence is useless without the underlying work product."; "The parties agreed on a settlement amount, and as a condition precedent to signing the settlement agreement Defendant demanded return of all documents produced which included Plaintiff counsel's work product."; "Any type of restriction of a plaintiff's attorney on representing future claimants against the same defendant are ethically inappropriate and violates RPC 5.6(b) and pertains to impermissible restrictions on a lawyer's practice. Other types of restrictions that are less onerous than a complete prohibition against subsequent representation of clients against a settling party defending a claim may similarly violate RPC 5.6(b) which says 'A lawyer shall not participate in offering or making . . . (b) an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy.'" (footnote omitted); "Ethics committees in other jurisdictions have recognized the impropriety of practice restrictions that fall short of an outright bar to future or ongoing representation."; "The test of the propriety of a settlement provision under Rule 5.6(b) is whether it would restrain a lawyer's exercise of independent judgment on behalf of other clients to an extent greater than that of an independent attorney not subject to such a limitation. The tests formulated by other jurisdictions are useful. 'While these tests are worded differently, they all boil down to one essential question: how does a particular settlement provision affect an attorney's ability to represent another client in a matter involving the same or a related opposing party?' If the provision has no effect, it will not violate Rule 5.6(b). On the other hand, if a provision does affect a lawyer's ability to represent another client and that effect is negative, the provisions would be impermissible under Rule 5.6(b)." (footnotes omitted); "Although some jurisdictions have found that the returning of documents obtained in discovery as a condition for settlement is not unethical in proper circumstances, attorney work product materials raise a separate but related question." (footnote omitted); "The State Bar Association of North Dakota Ethics Committee addressed the return of documents produced in discovery as a condition of settlement and concluded that Rule 5.6(b) does not prohibit the agreement to return documents produced in discovery if the documents in question do not constitute work product. 'However, to the extent the provisions are interpreted to require Attorney B to turn over documents prohibited by Rule 5.6(b). That is Attorney B may not agree to turn over any work product materials as part of the settlement if that action will restrict his representation of other clients. Whether providing the opposing side access to or losing his or her own access to work product materials would restrict the attorney's representation of other clients is a factual question the attorney must decide based on the documents involved and the facts and circumstances of the case.'" (emphasis added); "The State Bar Association of North Dakota Ethics Committee concluded in their Ethics Opinion 97-05 'Under Rule 5.6(b) an attorney may not agree -- even at a client's request: To turn over to opposing party or counsel documents protected by the attorney work product doctrine if that action would restrict the attorney's representation of other clients. . .'." (alteration in original); "If an attorney is required to disclose his/her entire work product, it may inhibit representation of subsequent clients. If this were to occur, defense counsel would accomplish indirectly what they cannot accomplish by directly precluding the attorney from representing other plaintiffs with similar claims. Further, it appears to create a conflict between the lawyer who has an interest in preserving work product to aid in the representation of future clients and the lawyer's current client who has an interest in obtaining the settlement funds." (footnote omitted); "It is improper for a lawyer to propose or accept a provision in a settlement agreement that requires release of work product which would restrict the lawyer's representation of other clients as prohibited by Tennessee Rules of Professional Conduct 5.6(b)." (emphasis added)).

- North Dakota LEO 97-05 (6/30/97) ("to the extent the provisions are interpreted to require Attorney B to turn over documents protected by the attorney work product doctrine, the provisions may be prohibited by Rule 5.6(b). That is, Attorney B may not agree to turn over any work product materials as part of the settlement if that action will restrict his representation of other clients. Whether providing the opposing side access to or losing his or her own access to work product materials would restrict the attorney's representation of other clients is a factual question the attorney must decide based on the document(s) involved and the facts and circumstances of the case."; "under Rule 5.6(b) Attorney B may not enter into an agreement restricting his use of any information that would not constitute protected client information under Rule 1.6 if that restraint would restrict his ability to represent other clients. For example, Attorney B could not agree to keep 'confidential' information that is a public record or that he could otherwise obtain through channels, such as discovery, and use in subsequent cases, but for the proposed confidentiality agreement. Restricting Attorney B's use of information that a lawyer other than Attorney B could learn and use in litigation on behalf of a client would restrain Attorney B's exercise of independent judgment on behalf of other clients to an extent greater than that of an independent attorney not subject to such a limitation. Therefore, the proposed agreements would violate Rule 5.6(b) if they were construed to prohibit Attorney B from disclosing information that is a public record or he could otherwise obtain."; "Applying the test of the propriety of a restriction in a settlement agreement set out above, if the Confidentiality Agreement and Release were construed to restrict Attorney B's use of attorney work product

– mental impressions, conclusions, opinions, legal theories or strategies, etc. – in a manner that would inhibit Attorney B's ability to represent future clients, those agreement would violate Rule 5.6(b). It is difficult to imagine how an attorney could 'unlearn' theories or knowledge of law acquired as part of preparation for a case and not use that knowledge in representation of clients in similar cases in the future. If an agreement prohibiting the future use of such knowledge or information were permissible, therefore, defense counsel could use such agreements to 'accomplish indirectly what they cannot accomplish by directly precluding the attorney from representing other plaintiffs with similar claims,' State Bar of New Mexico Advisory Opinions Committee Advisory Opinion 1985-5 (Oct. 23, 1985). Accordingly, if the agreements at issue here were construed as a broad prohibition on Attorney B's 'using any knowledge, expertise, or information gained in the lawsuit in any future lawsuit,' the agreements would be prohibited by Rule 5.6(b).") (emphasis added).

- New Mexico LEO 1985-5 (1985) (addressing a plaintiff's lawyer's inquiry about what restrictions the lawyer may agree to as part of a settlement; concluding that the lawyer may agree that she and her client will maintain the confidentiality of the amount in terms of the settlement; also concluding that the lawyer may not agree to refrain from handling other similar cases against the defendant; finding that the plaintiff may agree to keep the file confidential, although even that restriction would be improper it if would essentially prevent the plaintiff from representing other clients; "<u>It is the Committee's position that if the attorney is required to disclose her entire work product, it may inhibit her representation of subsequent clients. If this were to occur, defense counsel would accomplish indirectly what they cannot accomplish by directly precluding the attorney from representing other plaintiffs with similar claims. . . . The attorney cannot agree to any condition which restricts his or her right to practice law.</u>" (emphasis added); "The attorney's work product papers may reveal her client's position which could affect her representation of future clients whose weaknesses and settlement positions are similar to those of the settling client. Also, the attorney may not be able recreate her work product if it is sealed by defense counsel. Therefore, <u>with regard to work product, the attorney must first determine whether the condition will restrict her right to practice law. If it will, the attorney cannot agree to the condition</u>. If it will not, the attorney may agree to the condition. One method of making this determination may be to consider what the attorney will discard or keep in closing her file. If the client consents to sealing and delivering the files to defense counsel with the stipulation that they remain sealed and if the attorney believes that the absence of her work product <u>will not</u> restrict her future practice of law, the attorney should keep the work product in the file for sealing as part of the stipulation. If the attorney believes that the absence of her work product <u>will</u> restrict her future practice of law, the attorney should keep the work product in her own files as part of the stipulation, and not seal it with the file." (first emphasis added)). B 8/12Colorado LEO 92 (6/19/93)

("[C]laimant's attorney should not agree to a settlement restriction giving the attorney significantly less discretion in the prosecution of a claim than an attorney independent of the agreement would have. Such improper restrictions may include conditioning settlement on an agreement by the claimant's attorney not to subpoena specified documents or persons in the course of his or her representation of non-settling claimants, barring the settling lawyer from using certain expert witnesses in future cases, imposing forum or venue limitations in future cases brought by the settling lawyer, and prohibiting his or her referral of potential clients to other counsel"; noting that "[e]thics committees in other jurisdictions have recognized the impropriety of practice restrictions that fall short of an outright bar to future or ongoing representation.") (emphases added).

Provision prohibiting a lawyer from subpoenaing specific documents from a defendant

- Colorado LEO 92 (6/19/93) ("[C]laimant's attorney should not agree to a settlement restriction giving the attorney significantly less discretion in the prosecution of a claim than an attorney independent of the agreement would have. <u>Such improper restrictions may include conditioning settlement on an agreement by the claimant's attorney not to subpoena specified documents or persons in the course of his or her representation of non-settling claimants</u>, barring the settling lawyer from using certain expert witnesses in future cases, imposing forum or venue limitations in future cases brought by the settling lawyer, and prohibiting his or her referral of potential clients to other counsel"; noting that "[e]thics committees in other jurisdictions have recognized the impropriety of practice restrictions that fall short of an outright bar to future or ongoing representation.") (emphasis added).

Provision prohibiting a lawyer from agreeing not to use experts in future cases

- Colorado LEO 92 (6/19/93) ("[C]laimant's attorney should not agree to a settlement restriction giving the attorney significantly less discretion in the prosecution of a claim than an attorney independent of the agreement would have. <u>Such improper restrictions may include</u> conditioning settlement on an agreement by the claimant's attorney not to subpoena specified documents or persons in the course of his or her representation of non-settling claimants, <u>barring the settling lawyer from using certain expert witnesses in future cases</u>, imposing forum or venue limitations in future cases brought by the settling lawyer, and prohibiting his or her referral of potential clients to other counsel"; noting that "[e]thics committees in other jurisdictions have recognized the impropriety of practice restrictions that fall short of an outright bar to future or ongoing representation.") (emphasis added) (emphases added).

Provision imposing form or venue limitations on claims brought by a settling plaintiff's lawyer

- Colorado LEO 92 (6/19/93) ("[C]laimant's attorney should not agree to a settlement restriction giving the attorney significantly less discretion in the prosecution of a claim than an attorney independent of the agreement would have. Such improper restrictions may include conditioning settlement on an agreement by the claimant's attorney not to subpoena specified documents or persons in the course of his or her representation of non-settling claimants, barring the settling lawyer from using certain expert witnesses in future cases, imposing forum or venue limitations in future cases brought by the settling lawyer, and prohibiting his or her referral of potential clients to other counsel"; noting that "[e]thics committees in other jurisdictions have recognized the impropriety of practice restrictions that fall short of an outright bar to future or ongoing representation.") (emphases added).

Provision requiring a settling plaintiff's lawyer to return portions of the settlement if she represented other plaintiffs against the same defendant.

- Philadelphia LEO 95-13 (8/1995) (advising a plaintiff's lawyer that he could not agree to a settlement provision in which he agreed to return $50,000 (allocated to "reimbursement of fees and costs") if the plaintiff "directly or indirectly" represented another plaintiff in similar cases against the defendant, and reminding the plaintiff's lawyer that "you must consider whether you have an obligation to report defense counsel [to the Pennsylvania Bar] for their conduct in making the offer" (emphases omitted)).

Some point to a 1997 New York case indicating that "[a]n agreement restricting a lawyer's right to practice law may be enforceable even if it violates the disciplinary rule."

- Feldman v. Minars, 658 N.Y.S.2d 614, 615, 616, 616-17, 617 (N.Y. Sup. Ct. June 12, 1997) ("Defendants moved to disqualify the law firm of Beigel Schy Lasky Rifkind Goldberg Fertik & Gelber (the Beigel firm) from representing plaintiffs in this action on the ground that such representation breached a settlement agreement entered into in an Illinois action by the Beigel firm and defendant Haber and others. Pursuant to the settlement agreement, dated July 12, 1990, plaintiff investors settled their claims against Haber and others for alleged violations of various Federal and State security and related laws. The agreement also provided: 'As an inducement to the settling defendants [including Haber] to enter into this Settlement Agreement, and as a material condition thereof, [the Beigel firm] warrants and represents to the settling defendants that neither such firm nor any of its employees, agents, or representatives will assist or cooperate with any other parties or attorneys in any such action against the settling defendants arising out of, or related in any way to the investments at issue in the actions or any other offerings heretofore or hereafter made by the settling defendants . . . nor shall they encourage any other parties or attorneys to commence such action or proceeding.'" (alteration in original); "There is no question that a strong case can be made for the proposition that such a provision constitutes an impermissible restraint on the law firm's practice of law in violation of the Code of Professional Responsibility DR 2-108 (B). DR 2-108 (B) (22 NYCRR 1200.13 [b]) reads, in full: '"In connection with the settlement of a controversy or suit, a lawyer shall not enter into an agreement that restricts the right of a lawyer to practice law."'"; "Even assuming, arguendo, that a settlement agreement that forbids an attorney to represent other clients against the settling defendants in similar litigation is against public policy, as expressed in the Code of Professional Responsibility, an agreement not to solicit clients is not likewise against public policy. In fact, until recently, solicitation of clients, even without an agreement, was barred by applicable disciplinary rules. The above letter was clearly a solicitation of plaintiffs barred by the settlement agreement. Accordingly, for that reason alone, the Beigel firm should have been disqualified from representing plaintiffs in this action."; "Since our Court of Appeals has not dealt with the issue raised herein and, in fact, strictly limited its finding in Cohen v Lord, Day & Lord (supra) to the facts before it, we would conclude that an agreement by counsel not to represent similar plaintiffs in similar actions against a contracting party is not against the public policy of the State of New York. At the least, failure to enforce a freely entered-into agreement would appear unseemly, and the 'clean hands' doctrine would preclude the offending attorneys from using their own ethical violations as a basis for avoiding obligations undertaken by them. Even if it is against the public policy of this State, the 'violation' can be addressed by the appropriate disciplinary authorities (see, Shebay v Davis, 717 SW2d 678, 682 [Tex Ct App]; Lee v Florida Dept. of Ins., 586 S2d 1185, 1188 [Fla Dist Ct App]). Finally, as noted above, the reason for our disqualification of the Beigel firm lies in the fact that it 'solicited' plaintiffs in violation of its agreement.").

But Feldman has been widely criticized, even by the New York State Bar.

- New York LEO 1006 (4/2/14) ("The contrary result was reached in Feldman v. Minars, 230 A.D.2d 356, 658 N.Y.S.2d 614 (1st Dept. 1997), but that opinion is of limited weight here. In Feldman, the court held that plaintiff's law firm should be disqualified, based in part on the firm's solicitation of the plaintiffs in violation of a prior settlement in which the firm had agreed not to 'encourage any other parties or attorneys to commence such action or proceeding.' The firm sought to be relieved from that prior agreement on the ground that it violated public policy as expressed in DR 2-108. The court rejected that argument on a number of grounds, most of which do not apply here. However, the court also briefly addressed the ethical issue at hand: 'Even assuming, arguendo, that a settlement agreement that forbids an attorney to represent other clients against the settling defendants in similar litigation is against public policy, as expressed in the Code of Professional Responsibility, an agreement not to solicit clients is not likewise against public policy.'" "Feldman, 230 A.D.2d at 359 (original emphasis). The basis for that conclusion was suggested in the sentence that followed: 'In fact, until recently, solicitation of clients, even without an agreement, was barred by applicable disciplinary rules.' Id. But as noted above, solicitation of clients, when done in accordance with applicable rules, is no longer ethically suspect. A settlement agreement effectively restricting the right to practice is impermissible, and it does not matter that the restriction would be achieved only through limits on otherwise appropriate solicitation. See N.Y. State [Bar Ethics Opinion] 730 at n.2 (noting that Feldman decision had been strongly criticized insofar as it found 'that an agreement not to solicit clients would not violate the rule')." (footnote omitted)).

Not surprisingly, courts and bars do not condemn settlement agreement provisions prohibiting either party from disclosing non-public information such as the settlement amount, etc..

The only other restriction that seems to have passed judicial muster appeared in a 2006 New Jersey federal court case.

- Desantis v. Snap-On Tools Co., LLC, Civ. A. No. 06-cv-2231 (DMC), 2006 U.S. Dist. LEXIS 78362 *33-34 (D.N.J. Oct. 27, 2006) ("Uhle argues that Class Counsel have a conflict of interest because the Settlement Agreement improperly restricts Class Counsels' practice of law and the Marks firm has been limited from representing potential clients against Snap-on. Specifically, Uhle points to language in the Settlement Agreement which states that Class Counsel had 'no present intention of representing any persons who are not Class Members with respect to defendants.' This is not an agreement but mere attempt by one negotiating party to achieve finality through the settlement. The Settlement Agreement does not restrict Class Counsel's right to represent any future clients and therefore does not create any impermissible conflict of interest (emphasis added).

But notably, no court since 2006 seems to have approved a similar settlement agreement provision.

Best Answer

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

n 2/12

Litigation Settlements: Defendant's Retention of Plaintiff's Lawyer

Hypothetical 13

Your client has been vexed by numerous employment claims, and has successfully settled for large amounts several suits by a skilled and tenacious plaintiff's lawyer. Your research has found numerous ethics opinions condemning various settlement provisions restricting a plaintiff's lawyer from representing other plaintiffs. One of your resourceful young associates has proposed what seems like the perfect strategy for immunizing your client from future claims brought by that plaintiff's lawyer – having your client offer to retain her. You do not envision her being a "no show" lawyer. Instead, you plan to rely on her experience, intelligence and good judgement in helping your client restructure some of its policies to minimize such employment claims after her retention, and defend against any future claims. Of course, the lawyer would thus be ethically prohibited from representing other claimants against your client.

May you avoid ethics criticism by arranging for your client's retention of the lawyer who had successfully represented claimants against your client?

NO (ALMOST CERTAINLY)

Analysis

A clever defendant might seek to hire the plaintiff's lawyer, which of course would bar that lawyer from later adversity to the defendant. A 1998 Virginia legal ethics opinion accepted that arrangement, although it has faced criticism since then.

- Virginia LEO 1715 (2/24/98) (defendants in an employment discrimination case may arrange a settlement under which the plaintiff's lawyers will represent the defendants (thereby implicitly prohibiting the lawyers from representing other plaintiffs against the same defendants without their consent); although such an arrangement could be seen as "merely a ruse" to circumvent the Code's ban on settlements that "broadly restrict" a lawyer's right to practice law, the lawyers here "have not represented any other clients adverse to defendants and do not have a present expectation of such representation in the future," and could "provide valuable advice to defendants" on employment discrimination law; furthermore, the facts did not suggest that the defendants were trying to "buy off" plaintiff's counsel or "conflict out" plaintiff's counsel by hiring him or her; determining if such a settlement agreement "broadly restricts" the lawyers' practice requires a factual determination, but a settlement agreement like this entered into by a large firm with many practice areas might survive, while the Code might prohibit a similar arrangement entered into by a small "boutique" firm giving up a substantial portion of its practice; here, the settlement agreement did not completely restrict the lawyers' right to practice, since they could take cases against the defendants with consent).

Since then, some courts have condemned such an arrangement – and suspended defense lawyers for offering the arrangement and plaintiffs' lawyers for accepting such an arrangement.

In re Hager, 812 A.2d 904 (D.C. 2002). Mark Hager was a plaintiff's lawyer who was representing plaintiffs in litigation against Warner-Lambert regarding its head-lice shampoo. As part of a settlement agreement, Hager agreed to be retained by Warner-Lambert (for which he was paid $225,000). Noting that Hager had not advised his clients of this retention, the D.C. Bar suspended Hager from practice for one year.

Adams v. BellSouth Telecommunications, Inc., Case No. 96-2473-CIV-MIDDLEBROOKS, 2001 U.S. Dist. LEXIS 24821 (S.D. Fla. Jan. 29, 2001). A plaintiff's firm represented a group of 56 plaintiffs in litigation against BellSouth. The plaintiffs' firm dealt with two in-house BellSouth lawyers, Francis Semmes and Keith Kochler.

Francis Semmes graduated summa cum laude from the University of Alabama, and received his J.D. degree from Duke in 1979. He is now BellSouth's General Counsel, Regulatory Alabama. Keith Kochler graduated cum laude from Franklin & Marshall College, where he was Phi Beta Kappa -- and earned his J.D. degree from George Washington University in 1979. He practiced at Smith, Currie & Hancock until joining BellSouth in 1983. He left BellSouth to start King & Spalding's labor and employment practice, and returned to BellSouth in 1986. He eventually rose to become BellSouth's Chief Labor and Employment Counsel. He left BellSouth in 2002 to join Kilpatrick Stockton in its Atlanta office.

The plaintiffs' law firm suggested to Semmes and Kochler that they would enter into a "global settlement" for $1.5 million, which could include their agreement not to take any other cases against BellSouth for one year. Someone at the plaintiffs' firm suggested that such a provision would be unethical, so the lawyers eventually agreed that BellSouth would hire the plaintiffs' firm as "consultants."

When this arrangement came to the court's attention, the court considered sanctions both against the plaintiffs' law firm and against BellSouth's lawyers, Semmes and Kochler. The court first found that it was as ethically impermissible to offer an improper restriction as part of a settlement agreement as it was to accept it. The court found "the most disturbing facet" of BellSouth's lawyers' conduct to be pitting the plaintiffs' law firm against its own clients -- by insisting that the consulting fees come from the already-agreed-upon $1.5 million settlement. Id. at *36.

The court (1) prohibited Semmes and Kochler from appearing in the Southern District of Florida until they had provided "certified proof" that they had taken five hours of Florida ethics MCLE, and (2) ordered the lawyers to provide a copy of the court's order "to the regulating authority of any state bar to which they are admitted." Id. at *45.

In re Conduct of Brandt, 10 P.3d 906 (Or. 2000). Brandt and Griffin practiced in Oregon, and successfully represented distributors of tools manufactured by a subsidiary of Stanley. Stanley's vice president discussed a global settlement of all of the claims being pursued by Brandt and Griffin, but said that he wanted to avoid future litigation against Stanley, and "that the only way that he could be assured of that would be to retain the plaintiffs' lawyers to represent Mac Tools [the subsidiary] and Stanley in the future." Id. at 911.

The plaintiffs' lawyers were careful not to make their possible employment by Stanley a condition of the settlement. A mediator suggested that he hold retainer agreements between the plaintiffs' lawyers and Stanley "in escrow" until all of the settlement proceeds had been disbursed and the case was dismissed. Id. at 913.

Griffin called the Oregon Bar's General Counsel, because he was still worried about such a provision. The Bar's General Counsel told Griffin that the proposed arrangement was "hypothetically possible." Id. at 914.

Brandt and Griffin then entered into the settlement agreement, which explicitly disclaimed any connection to their being hired by Stanley. Brandt and Griffin later advised their clients of their retention by Stanley, noting that "we are disclosing this information to you because we feel that we have an obligation to do so." Id. at 915.

One of the plaintiffs balked at the settlement, and filed complaints with the Bar against Brandt and Griffin.

Brandt and Griffin first argued that they could not be disciplined because they had consulted with the Oregon Bar's General Counsel, and had relied on the General Counsel's "advice that putting the retainer agreements into escrow with the mediator was a way to avoid the prohibition" of practice restrictions in settlements. Id. at 918. The court rejected that argument, holding that "favorable advice by the Bar's general counsel does not provide a defense to disciplinary violations. Id.

The Oregon Supreme Court held that Brandt and Griffin had violated the prohibition on practice restrictions as part of settlements. The court also found that the lawyers' disclosure to their client was inadequate, because they did not advise their clients that their retention by Stanley was a condition of the settlement, and that they had signed retainer agreements before their clients had signed the settlement agreement.

The Supreme Court suspended Griffin from practicing law for 12 months, and suspended Brandt for 13 months.

. . .

In 2011, the Second Circuit even upheld a law firm's former clients' breach of fiduciary duty action against the law firm based on its settlement against Nextel – in which the law firm agreed to represent Nextel after the settlement's conclusion, for $1,000,000 per year.

- Johnson v. Nextel Commc'ns, Inc., 660 F.3d 131, 139, 141, 142 (2d Cir. 2011) (finding that former clients of a law firm could pursue an action against the law firm and against Nextel, the defendant in the case that law firm had pursued on behalf of its then-clients and current plaintiffs; noting that the law firm of Leeds, Morelli & Brown ("LMB") had settled with Nextel in an arrangement in which the law firm had a financial incentive to arrange for all five hundred eighty-seven individual clients to resolve their dispute against Nextel under a specified dispute resolution process, after which the law firm would begin to represent Nextel; "The overriding nature of the conflict is underscored by the fact that, when fourteen of the 587 clients failed to agree, Nextel's final, but pre-consultancy, payment to LMB was reduced from $2 million to $1,720,000, or $20,000 per non-agreeing client. Under the DRSA [dispute resolution process], after obtaining the waivers, LMB would be paid $1.5 million when half of the claimants' claims were resolved through the DRP, regardless of the individual outcomes. Another $2 million ($1,720,000 after Amendment 2) would be paid to LMB when the remaining claims were resolved, again without regard to individual outcomes. However, the $2 million would be reduced on a sliding scale if less than all the claims were resolved within forty-five weeks from the effective date. To become entitled to the $2 million, LMB would have to process over thirteen claims per week starting on the effective date, or over two claims per work day."; "Once all the claims were processed, LMB would formally go to work for Nextel as a consultant for two years at $1 million per year. LMB also promised in the DRSA not to accept new clients with claims against Nextel, not to refer any such client to another lawyer or firm, and not to accept compensation for any prior referral."; finding that the arrangement was improper; "[W]e express our candid opinion that the DRSA was an employment contract between Nextel and LMB designed to achieve an en masse processing and resolution of claims that LMB was obligated to pursue individually on behalf of each of its clients."; "To be sure, the claimants were allowed to consult with another attorney, but an initial attorney hired to bring a discrimination action does not fulfill his or her representational obligations by presenting a client with a proposal that can be considered in an informed manner only by hiring a second attorney."; finding that the plaintiffs could also sue Nextel for aiding and abetting the law firm's misconduct; "Viewed in the light most favorable to appellants, therefore, they have sufficiently alleged that Nextel negotiated and signed the DRSA with the knowledge, and intent, that it would undermine LMB's ability to fairly represent appellants. We therefore vacate the district court's dismissal of appellants' claim against Nextel for aiding and abetting LMB's breach of fiduciary duty.").

Best Answer

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

Limiting Liability

Hypothetical 14

You have been asked to represent a contentious and litigious local businessman, and want to assure certainty to your possible exposure ahead of time.

May you enter into a retainer agreement that limits your liability to return of the fees that your client has paid?

MAYBE

Analysis

When lawyers enter into arrangements with their clients, the ethics rules recognize a spectrum of possible disclosure and substantive protective measures.

The following is a list of the rules obligations imposed on lawyers in those situations (in increasing order of severity):

- Lawyers must explain the arrangement to their clients
- Lawyers must explain the arrangement to their clients, "preferably in writing" (this is ABA Model Rule 1.5(b)'s burden for fee arrangements)
- Lawyers must "fully disclose [] and transmit [] in writing" the terms of the arrangement "in a manner that can be reasonably understood by the client" (this is ABA Model Rule 1.8(a)(1)'s requirement for the lawyer's business transaction with a client (among other requirements))
- Lawyers must describe the arrangement to their client "in a writing signed by the client" (this is ABA Model Rule 1.5(c)'s requirement; many states require this for all fee arrangements)
- Lawyers must obtain a client's "informed consent" to the arrangement (this is ABA Model Rule 1.8(f)(1)'s requirement for an arrangement under which a third party pays the lawyer)
- Lawyers must obtain the client's informed consent to the arrangement in writing

- Lawyers must obtain the client's informed consent "in a writing signed by the client" (this is ABA Model Rule 1.8(g)'s requirement for lawyers in an aggregate settlement situation)

- Lawyers must give the client an opportunity to seek independent legal advice

- Lawyers must explain in writing that the client has a reasonable opportunity to seek independent legal advice

- Lawyers must advise the client of the "desirability" of seeking such independent legal advice

- Lawyers must advise the client "in writing of the desirability of seeking and is given a reasonably opportunity to seek the advice of independent legal counsel" (this is ABA Model Rule 1.8(a)(2)'s requirement for a lawyer to enter into a business transaction with a client), and ABA Model Rule 1.8(h)(2)'s requirement if a lawyer settles a "claim or potential claim" for liability "with an unrepresented client or former client")

- Lawyers may not enter into the arrangement unless the client is independently represented in making the arrangement (this is ABA Model Rule 1.8(h)(1)'s requirement for an agreement prospectively limiting the lawyer's liability to a client for malpractice)

- Lawyers may not enter into the arrangement regardless of disclosure, consent, etc. (this is ABA Model Rule 1.8(c)'s prohibition on a lawyer's soliciting or accepting gifts from a client, ABA Model Rule 1.8(d)'s prohibition on a lawyer obtaining "literary or media rights" from a client in specified circumstances, and ABA Model Rule 1.8(j)'s prohibition on the lawyer's commencement of a sexual relationship with a client after the "client-lawyer relationship lawyer commenced")

Arrangements in which lawyers limit their malpractice liability to clients falls near the more demanding end of that spectrum. The ABA and many state bars (in contrast to the Restatement) have retreated from what was once a strict prohibition on limiting liability to clients in advance of the work.

Under the current ABA Model Rules,

> A lawyer shall not . . . make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement.

ABA Model Rule 1.8(h)(1) (emphasis added).

A comment to this Model Rule provides an explanation.

> Agreements prospectively limiting a lawyer's liability for malpractice are prohibited unless the client is independently represented in making the agreement because they are likely to undermine competent and diligent representation. Also, many clients are unable to evaluate the desirability of making such an agreement before a dispute has arisen, particulary if they are then represented by the lawyer seeking the agreement. This paragraph does not, however, prohibit a lawyer from entering into an agreement with the client to arbitrate legal malpractice claims, provided such agreements are enforceable and the client is fully informed of the scope and the effect of the agreement. Nor does this paragraph limit the ability of lawyers to practice in the form of a limited-liability entity, where permitted by law, provided that each lawyer remains personally liable to the client for his or her own conduct and the firm complies with any conditions required by law, such as provisions requiring client notification or maintenance of adequate liability insurance. Nor does it prohibit an agreement in accordance with Rule 1.2 that defines the scope of the representation, although a definition of scope that makes the obligations of representation illusory will amount to an attempt to limit liability.

ABA Model Rule 1.8 cmt. [14].

Interestingly, the Restatement still takes a very strict approach prohibiting such prospective limitations of liability.

> For purposes of professional discipline, a lawyer may not: (a) make an agreement prospectively limiting the lawyer's liability to a client for malpractice.

Restatement (Third) of Law Governing Lawyers § 54(4) (2000).

To emphasize the point, the Restatement elsewhere indicates that

> An agreement prospectively limiting a lawyer's liability to a client for malpractice is unenforceable.

Id. § 54(2). A comment explains the Restatement's approach.

> An agreement prospectively limiting a lawyer's liability to a client . . . is unenforceable and renders the lawyer subject to professional discipline. The rule derives from the lawyer codes, but has broader application. Such an agreement is against public policy because it tends to undermine competent and diligent legal representation. Also, many clients are unable to evaluate the desirability of such an agreement before a dispute has arisen or while they are represented by the lawyer seeking the agreement.

Id. § 54 cmt. b.

Given this stark contrast between the ABA Model Rules and the Restatement, it should come as no surprise that not every state follows the liberal ABA Model Rule approach.

For instance, Virginia follows a more traditional approach, which prohibits all outside lawyers from limiting their liability in any fashion. See, e.g., Virginia Rule 1.8(h) ("[a] lawyer shall not make an agreement prospectively limiting the lawyer's liability to a client for malpractice, except that a lawyer may make such an agreement with a client of which the lawyer is an employee as long as the client is independently represented in making the agreement").

The Texas Bar dealt with a related issue.

- Texas LEO 581 (4/2008) ("Under the Texas Disciplinary Rules of Professional Conduct, a lawyer-client engagement letter may include a provision under which the client agrees to pay the defense expenses incurred by the lawyer in the event of a joinder of the lawyer as a defendant in the client's litigation provided that (1) the agreement does not prospectively limit in any way the lawyer's liability to the client for malpractice and (2) the obligation for payment of the lawyer's legal defense fees and the obligation to pay the fees billed by the lawyer for his work do not taken together constitute a compensation arrangement that would be unconscionable within the meaning of Rule 1.04(a).").

A Texas state court also dealt with a number of interesting issues involving claims against the former law firm of Keck, Mahin & Cate. In National Union Fire

Insurance Co. v. Keck, Mahin & Cate, 154 S.W.3d 714 (Tex. App. 2004), the court analyzed a release of Keck's liability. Among other things, the court analyzed a prospective limitation on liability while covering only past conduct.

> While it is true the release covers past conduct, the disciplinary rule does not speak in terms of conduct. Rather, it speaks in terms of liability. We find the release between KMC [the law firm] and Grenada is an agreement to prospectively limit KMC's malpractice liability because it seeks to limit liability that had not yet accrued.

Id. at 723.

Because the client was not independently represented, the prospective limitation violated the Texas Ethics Rules. The court then addressed whether the ethics violation invalidated the release -- finding that it did not.

> However, a violation of Rule 1.08(g) does not automatically render the release invalid. . . . Because violating Rule 1.08(g) does not invalidate the release as a matter of law, we overrule National Union's first issue.

Id. at 724. Thus, the court enforced the release despite the ethics violation.

Best Answer

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

n 9/21

Duty to Disclose Possible Malpractice

Hypothetical 15

You have been supervising a new associate in her handling of a relatively small case for a new client. You just realized that the associate forgot to include a potential cause of action in her complaint, and it is now too late to add a claim under your state's pleading rules. The forfeited claim would not have justified a large additional damage figure, and you wonder what obligations you have.

Must you advise the client of your firm's malpractice?

YES

Analysis

Under ABA Model Rule 1.4(a)(3) lawyers "shall … keep the client reasonably informed about the status of the matter." And under ABA Model Rule 1.4(b), lawyers "shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

As painful as it might be for lawyers, these communication duties understandably require lawyers to disclose to their clients the lawyers' malpractice.

In 2018, the ABA explained the scope of this duty.

- ABA LEO 481(4/17/18) ("The Model Rules require a lawyer to inform a current client if the lawyer believes that he or she may have materially erred in the client's representation. Recognizing that errors occur along a continuum, an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. The lawyer must so inform the client promptly under the circumstances. Whether notification is prompt is a case- and fact-specific inquiry." "No similar duty of disclosure exists under the Model Rules where the lawyer discovers after the termination of the attorney-client relationship that the lawyer made a material error in the former client's representation." "Good business and risk management reasons may exist for lawyers to inform former clients of their material errors when they can do so in time to avoid or mitigate any potential harm or prejudice to the former client." An attorney-client relationship ends when: the engagement letter specifies such a time; the lawyer or the client explicitly end the relationship; "when overt acts inconsistent with the continuation of the attorney-client relationship indicate that the relationship has ended"; or "when it would be objectively unreasonably to continue to bind the parties to each other." An "episodic" client might be a continuing client in the absence of any ongoing matter if the client periodically engaged the lawyer, and the client "reasonably expects that the professional relationship will span any [such] intervals and that the lawyer will be available when the client next needs representation.").

The ABA's recognition of this duty followed many states' articulation of such an obligation.

- North Carolina LEO 2015-4 (7/17/15) (explaining lawyers' duty to disclose any material mistakes to their clients; "In the spectrum of possible errors, material errors that prejudice the client's rights or claims are at one end. These include errors that effectively undermine the achievement of the client's primary objective for the representation, such as failing to file the complaint before the statute of limitations runs. At the other end of the spectrum are minor, harmless errors that do not prejudice the client's rights or interests. These include nonsubstantive typographical errors in a pleading or a contract or missing a deadline that causes nothing more than delay. Between the two ends of the spectrum are a range of errors that may or may not materially prejudice the client's interests." (footnote omitted; "Whether the lawyer must disclose an error to a client depends upon where the error falls on the spectrum and the circumstances at the time that the error is discovered."; "[I]t is clear that material errors that prejudice the client's rights or interests as well as errors that clearly give rise to a malpractice claim must always be reported to the client. Conversely, if the error is easily corrected or negligible and will not materially prejudice the client's rights or interests, the error does not have to be disclosed to the client."; "Errors that fall between the two extremes of the spectrum must be analyzed under the duty to keep the client reasonably informed about his legal matter. If the error will result in financial loss to the client, substantial delay in achieving the client's objectives for the representation, or material disadvantage to the client's legal position, the error must be disclosed to the client. Similarly, if disclosure of the error is necessary for the client to make an informed decision about the representation or for the lawyer to advise the client of significant changes in strategy, timing, or direction of the representation, the lawyer may not withhold information about the error. Rule 1.4. When a lawyer does not know whether disclosure is required, the lawyer should err on the side of disclosure or should seek the advice of outside counsel, the State Bar's ethics counsel, or the lawyer's malpractice carrier."; explaining that a lawyer making such a disclosure did not automatically have to withdraw from the representation; "Rule 1.7(b) allows a lawyer to proceed with a representation burdened by a conflict if the lawyer reasonably believes that she will be able to provide competent and diligent representation to the client and the client gives informed consent, confirmed in writing. If the lawyer reasonably concludes that she is still able to provide the client with competent and diligent representation -- that she can exercise independent professional judgment to advance the interests of the client and not solely her own interests -- the lawyer may seek the informed consent of the client to continue the representation."; "Of course, when an error is such that the client's objective can no longer be achieved, as when a claim can no longer be filed because the statute of limitations has passed, the lawyer must disclose the error to the client and terminate the representation."; further explaining that the lawyer did not have to confess to malpractice or provide details about how the client might proceed with their malpractice action; "[T]he lawyer is required to tell the client the operative facts about the error and to recommend that the client seek[] independent legal advice about the consequences of the error."; "Under this approach, the lawyer is not required to inform the client of the statute of limitations applicable to legal malpractice actions, nor is she required to give the client information about the lawyer's malpractice insurance carrier or information about how to file a claim with the carrier. Nevertheless, the lawyer should seek the advice of her malpractice insurance carrier prior to disclosing the error to the client, and should discuss with the carrier what information, if any, should be provided to the client about the lawyer's malpractice coverage or how to file a claim."; "The lawyer should not disclose to the client whether a claim for malpractice exists or provide legal advice about legal malpractice.").

- Texas LEO 593 (2/2010) (holding that a lawyer who has committed malpractice must advise the client, and must withdraw from the representation, but can settle the malpractice claim if the client has had the opportunity to seek independent counsel but has not done so; "Although Rule 1.06(c) provides that, if the client consents, a lawyer may represent a client in certain circumstances where representation would otherwise be prohibited, the Committee is of the opinion that, in the case of malpractice for which the consequences cannot be significantly mitigated through continued legal representation, under Rule 1.06 the lawyer-client relationship must end as to the matter in which the malpractice arose."; "[A]s promptly as reasonably possible the lawyer must terminate the lawyer-client relationship and inform the client that the malpractice has occurred and that the lawyer-client relationship has been terminated."; "Once the lawyer has candidly disclosed both the malpractice and the termination of the lawyer-client relationship to the client, Rule 1.08(g) requires that, if the lawyer wants to attempt to settle the client's malpractice claim, the lawyer must first advise in writing the now former client that independent representation of the client is appropriate with respect to settlement of the malpractice claim: 'A lawyer shall not . . . settle a claim for . . . liability [for malpractice] with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.'").

- Minnesota LEO 21 (10/2/09) (a lawyer "who knows that the lawyer's conduct could reasonably be the basis for a non-frivolous malpractice claim by a current client" must disclose the lawyer's conduct that may amount to malpractice; citing several other states' cases and opinions; "See, e.g., Tallon v. Comm. on Prof'l Standards, 447 N.Y.S. 2d 50, 51 (App. Div. 1982) ('An attorney has a professional duty to promptly notify his client of his failure to act and of the possible claim his client may thus have against him.'); Colo. B. Ass'n Ethics Comm., Formal Op. 113 (2005) ('When, by act or omission, a lawyer has made an error, and that error is likely to result in prejudice to a client's right or claim, the lawyer must promptly disclose the error to the client.'); Wis. St. B. Prof'l Ethics Comm., Formal Op. E-82-12 ('[A]n attorney is obligated to inform his or her client that an omission has occurred which may constitute malpractice and that the client may have a claim against him or her for such an omission.'); N.Y. St. B. Ass'n Comm. on Prof'l Ethics, Op. 734 (2000); 2000 WL 33347720 (Generally, an attorney 'has an obligation to report to the client that [he or she] has made a significant error or omission that may give rise to a possible malpractice claim.'); N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics, Op. 684 ('The Rules of Professional Conduct still require an attorney to notify the client that he or she may have a legal malpractice claim even if notification is against the attorney's own interest.')."; also explaining the factors the lawyer must consider in determining whether the lawyer may still represent the client; "Under Rule 1.7 the lawyer must withdraw from continued representation unless circumstances giving rise to an exception are present. . . . Assuming continued representation is not otherwise prohibited, to continue the representation the lawyer must reasonably believe he or she may continue to provide competent and diligent representation. . . . If so, the lawyer must obtain the client's 'informed consent,' confirmed in writing, to the continued representation. . . . Whenever the rules require a client to provide 'informed consent,' the lawyer is under a duty to promptly disclose to the client the circumstances giving rise to the need for informed consent. . . . In this circumstance, 'informed consent' requires that the lawyer communicate adequate information and explanation about the material risks of and reasonably available alternatives to the continued representation.").

- California LEO 2009-178 (2009) ("An attorney must promptly disclose to the client the facts giving rise to any legal malpractice claim against the attorney. When an attorney contemplates entering into a settlement agreement with a current client that would limit the attorney's liability to the client for the lawyer's professional malpractice, the attorney must consider whether it is necessary or appropriate to withdraw from the representation. If the attorney does not withdraw, the attorney must: (1) [c]omply with rule 3-400(B) by advising the client of the right to seek independent counsel regarding the settlement and giving the client an opportunity to do so; (2) [a]dvise the client that the lawyer is not representing or advising the client as to the settlement of the fee dispute or the legal malpractice claim; and (3) [f]ully disclose to the client the terms of the settlement agreement, in writing, including the possible effect of the provisions limiting the lawyer's liability to the client, unless the client is represented by independent counsel."; later confirming that "[a] member should not accept or continue representation of a client without providing written disclosure to the client where the member has or had financial or professional interests in the potential or actual malpractice claim involving the representation."; "Where the attorney's interest in securing an enforceable waiver of a client's legal malpractice claim against the attorney conflicts with the client's interests, the attorney must assure that his or her own financial interests do not interfere with the best interests of the client. . . . Accordingly, the lawyer negotiating such a settlement with a client must advise the client that the lawyer cannot represent the client in connection with that matter, whether or not the fee dispute also involves a potential or actual legal malpractice claim."; "A lawyer has an ethical obligation to keep a client informed of significant developments relating to the representation of the client. . . . Where the lawyer believes that, he or she has committed legal malpractice, the lawyer must promptly communicate the factual information pertaining to the client's potential malpractice claim against the lawyer to the client, because it is a 'significant development.'"; "While no published California authorities have specifically addressed whether an attorney's cash settlement of a fee dispute that includes a general release and a section 1542 waiver of actual or potential malpractice claims for past legal services falls within the prescriptions of this rule, it is the Committee's opinion that rule 3-300 should not apply.").New York LEO 734 (11/1/00) (holding that the Legal Aid Society "has an obligation to report to the client that it has made a significant error or omission [missing a filing deadline] that may give rise to a possible malpractice claim"; quoting from an earlier LEO in which the New York State Bar "held that a lawyer had a professional duty to notify the client promptly that the lawyer had committed a serious and irremediable error, <u>and</u> of the possible claim the client may have against the lawyer for damages" (emphasis added)).

Lawyers falling short of this duty might be professionally punished (especially if they keep representing their client).

- <u>In re Kieler</u>, 227 P.3d 961, 962, 965 (Kan. 2010) (suspending for one year a lawyer who had not advised the client of the lawyer's malpractice in missing the statute of limitations; "'The Respondent told Ms. Irby that the only way she could receive any compensation for her injuries sustained in that accident was to sue him for malpractice. He told her that it was "not a big deal," that he has insurance, and that is why he had insurance. The Respondent was insured by The Bar Plan.'" (internal citation omitted); "In this case, the Respondent violated KRPC 1.7 when he continued to represent Ms. Irby after

> her malpractice claim ripened, because the Respondent's representation of Ms. Irby was in conflict with his own interests. Though the Respondent admitted that Ms. Irby's malpractice claim against him created a conflict, he failed to cure the conflict by complying with KRPC 1.7(b). Accordingly, the Hearing Panel concludes that the Respondent violated KRPC 1.7.").

Given the hundreds (if not thousands) of judgment calls that lawyers make during an average representation, it might be very difficult to determine what sort of mistake rises to the level of such mandatory disclosure. For instance, it is difficult to imagine that a lawyer might tell the client that the lawyer could have done a better job of framing one question during a discovery deposition.

<u>Best Answer</u>

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

n 9/21

Effect of Clients' Claims: Continued Representation

Hypothetical 16

You have assisted a small businesswoman in substantially all of her business transactions for nearly 20 years. Although you have always considered your relationship with this client to have a "love-hate" element, you were shocked by the call you just received from her. She said that she intends to sue you for malpractice in an earlier transaction -- but she hopes that there are no "hard feelings" (she assumes that your carrier will ultimately bear all the financial costs). She also specifically asks whether you can continue to represent her in other transactions. At first you thought her call was a cruel joke, but when she explains that she is serious you begin to consider what to do.

If the client consents, may you continue representing the client in one matter while the client is suing you in another matter?

MAYBE

Analysis

A lawyer sued, accused, or even criticized by a client for some wrongdoing obviously faces a conflict of interest if the lawyer continues to represent the client. While bound by ethical and fiduciary duties to advance the client's interests, the lawyer obviously will be considering his or her own interests as well.

This type of conflict requires a careful analysis, and does not permit a "one size fits all" conclusion.

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

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

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

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

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

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

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

A lawyer's concern about her own possible liability represents a classic "rheostat" conflict. A client's sarcastic comment about a lawyer "screwing up" at a deposition almost surely would not create a conflict preventing the lawyer from continuing to represent the client. On the other hand, it might be difficult for a lawyer to continue representing a client (absent consent) if the client has repeatedly complained that the lawyer committed malpractice during the course of discovery.

An ABA Model Rules comment recognizes the possibility that the lawyer faces a conflict if the client questions the lawyer's conduct.

> [I]f the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.

ABA Model Rule 1.7 cmt. [10].

One legal ethics opinion held that lawyers must withdrawal from representation after disclosing its malpractice.

- Texas LEO 593 (2/2010) (holding that a lawyer who has committed malpractice must advise the client, and must withdraw from the representation, but can settle the malpractice claim if the client has had the opportunity to seek independent counsel but has not done so; "Although Rule 1.06(c) provides that, if the client consents, a lawyer may represent a client in certain circumstances where representation would otherwise be prohibited, the Committee is of the opinion that, in the case of malpractice for which the consequences cannot be significantly mitigated through continued legal representation, under Rule 1.06 the lawyer-client relationship must end as to the matter in which the malpractice arose."; "[A]s promptly as reasonably possible the lawyer must terminate the lawyer-client relationship and inform the client that the malpractice has occurred and that the lawyer-client relationship has been terminated."; "Once the lawyer has candidly disclosed both the malpractice and the termination of the lawyer-client relationship to the client, Rule 1.08(g) requires that, if the lawyer wants to attempt to settle the client's malpractice claim, the lawyer must first advise in writing the now former client that independent representation of the client is appropriate with respect to settlement of the malpractice claim: 'A lawyer shall not . . . settle a claim for . . . liability [for malpractice] with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.'").

In dealing with the abstract issue, several courts and bars have avoided a per se rule prohibiting such continued representation.

- California LEO 2009-178 (2009) ("An attorney must promptly disclose to the client the facts giving rise to any legal malpractice claim against the attorney. When an attorney contemplates entering into a settlement agreement with a current client that would limit the attorney's liability to the client for the lawyer's professional malpractice, the attorney must consider whether it is necessary or appropriate to withdraw from the representation. If the attorney does not withdraw, the attorney must: (1) [c]omply with rule 3-400(B) by advising the client of the right to seek independent counsel regarding the settlement and giving the client an opportunity to do so; (2) [a]dvise the client that the lawyer is not representing or advising the client as to the settlement of the fee dispute or the legal malpractice claim; and (3) [f]ully disclose to the client the terms of the settlement agreement, in writing, including the possible effect of the provisions limiting the lawyer's liability to the client, unless the client is represented by independent counsel."; later confirming that "[a] member should not accept or continue representation of a client without providing written disclosure to the client where the member has or had financial or professional interests in the potential or actual malpractice claim involving the representation."; "Where the attorney's interest in securing an enforceable waiver of a client's legal malpractice claim against the attorney conflicts with the client's interests, the attorney must assure that his or her own financial interests do not interfere with the best interests of the client. . . . Accordingly, the lawyer negotiating such a settlement with a client must advise the client that the lawyer cannot represent the client in connection with that matter, whether or not the fee dispute also involves a potential or actual legal malpractice claim."; "A lawyer has an ethical obligation to keep a client informed of significant developments relating to the representation of the client. . . . Where the lawyer believes that, he or she has committed legal malpractice, the lawyer must promptly communicate the factual information pertaining to the client's potential malpractice claim against the lawyer to the client, because it is a 'significant development.'"; "While no published California authorities have specifically addressed whether an attorney's cash settlement of a fee dispute that includes a general release and a section 1542 waiver of actual or potential malpractice claims for past legal services falls within the prescriptions of this rule, it is the Committee's opinion that rule 3-300 should not apply.").

- Minnesota LEO 21 (10/2/09) (a lawyer "who knows that the lawyer's conduct could reasonably be the basis for a non-frivolous malpractice claim by a current client" must disclose the lawyer's conduct that may amount to malpractice; citing several other states' cases and opinions; "<u>See, e.g.</u>, <u>Tallon</u>

v. Comm. on Prof'l Standards, 447 N.Y.S. 2d 50, 51 (App. Div. 1982) ('An attorney has a professional duty to promptly notify his client of his failure to act and of the possible claim his client may thus have against him.'); Colo. B. Ass'n Ethics Comm., Formal Op. 113 (2005) ('When, by act or omission, a lawyer has made an error, and that error is likely to result in prejudice to a client's right or claim, the lawyer must promptly disclose the error to the client.'); Wis. St. B. Prof'l Ethics Comm., Formal Op. E-82-12 ('[A]n attorney is obligated to inform his or her client that an omission has occurred which may constitute malpractice and that the client may have a claim against him or her for such an omission.'); N.Y. St. B. Ass'n Comm. on Prof'l Ethics, Op. 734 (2000); 2000 WL 33347720 (Generally, an attorney 'has an obligation to report to the client that [he or she] has made a significant error or omission that may give rise to a possible malpractice claim.'); N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics, Op. 684 ('The Rules of Professional Conduct still require an attorney to notify the client that he or she may have a legal malpractice claim even if notification is against the attorney's own interest.')."; also explaining the factors the lawyer must consider in determining whether the lawyer may still represent the client; "Under Rule 1.7 the lawyer must withdraw from continued representation unless circumstances giving rise to an exception are present. . . . Assuming continued representation is not otherwise prohibited, to continue the representation the lawyer must reasonably believe he or she may continue to provide competent and diligent representation. . . . If so, the lawyer must obtain the client's 'informed consent,' confirmed in writing, to the continued representation. . . . Whenever the rules require a client to provide 'informed consent,' the lawyer is under a duty to promptly disclose to the client the circumstances giving rise to the need for informed consent. . . . In this circumstance, 'informed consent' requires that the lawyer communicate adequate information and explanation about the material risks of and reasonably available alternatives to the continued representation.").

- Oregon LEO 2009-182 (10/2009) (analyzing the effect of a client's filing of a bar complaint against a lawyer representing the client in a matter set for trial one week later; holding that the lawyer was not obligated to withdraw, but "should consider whether the filing of a Bar complaint creates a conflict of interest under Oregon RPC 1.7, such that continued representation would potentially result in a violation of the Rules. If so, withdrawal would likely be required by Oregon RPC 1.16(a)(1)."; "Under Oregon RPC 1.7(a)(2), Lawyer has a conflict of interest if there is a 'significant risk' that Lawyer's representation will be 'materially limited' by a 'personal interest' of Lawyer. Under the facts presented, the potentially limiting interest would presumably be Lawyer's desire to avoid discipline by the Bar. It is also possible that Client's filing a Bar complaint could create such personal resentment that it would compromise Lawyer's ability to effectively represent Client. Regardless of the specific personal interest involved, <u>if it creates a substantial risk that Lawyer's representation would be materially limited, Lawyer may continue the</u>

representation only with Client's informed consent, confirmed in writing. Moreover, Lawyer may seek Client's consent only if Lawyer reasonably believes that competent and diligent representation can be provided to Client notwithstanding the conflict." (emphasis added); explaining that "[w]hile it is apparent that the filing of a disciplinary complaint could raise concerns on a case-by-case basis, it does not appear to create a per se conflict of interest." (emphasis added); "Although it has repeatedly rejected a per se approach, the Supreme Court has clearly suggested that at some point a potential malpractice claim might cause the interests of lawyer and client to diverge, thereby implicating Oregon RPC 1.7.").

- Los Angeles County LEO 521 (5/21/07) ("The Committee concludes: (1) a fee dispute does not require a lawyer or law firm to seek to withdraw; (2) a fee dispute, by itself, does not create an ethical conflict of interest; and (3) a fee dispute, where the lawyer does not have any lien rights, is not an adverse pecuniary interest in a client's property."; also holding that a lawyer would not be able to sue the client for fees unless the lawyer withdraws as counsel of record for the client).

In some circumstances, clients seek to have their lawyers continue the representation despite complaints about the lawyer.

Several bars have approved such continued representations.

- Connecticut LEO 2014-05 (6/18/14) (concluding that an immigration lawyer could keep representing the client, at the client's request, even after committing malpractice; "Two years later, at a final adjustment hearing, it was discovered that the handwritten 1-130 petition incorrectly reported that the previous 1-130 petition had been 'approved' when it should have been reported as having been 'revoked.' As a result, the Trial Counsel for the Department of Homeland Security ('DHS') had the 1-130 petition sent back for a review. The Immigration Court closed your client's file without prejudice to reopening it once the resubmitted 1-130 petition is approved or revoked."; "After learning of the mistake, you promptly met with your client in your office and explained to her, in her own language, the mistake you had made. You also provided her with a written letter explaining the error and the potential consequences of the mistake. The client signed the letter. You also advised her to speak to other attorneys to confirm your explanation. You apologized to the Trial Counsel for DHS twice and asked that there be no negative inference to your client. You have offered to refund your client's legal fees which amount to $1,000.00. Additionally, your client has paid approximately $2,500.00 in filing fees to USCIS, which you would like to reimburse. Your client wishes to continue with you as her lawyer."; "The first issue presented is whether your error or your firm's error creates a potential or actual conflict under the Rules of Professional Conduct. This scenario is often called a 'prior work' conflict."; "On the facts presented, we see no indication that your continued representation of the client presents such a risk or would affect your ability to properly represent your client. Any steps you take to advance your client's 1-130 petition will have the secondary effect of mitigating your firm's malpractice exposure. Further, your conduct does not reflect any action that could be construed as an attempt to mitigate your malpractice exposure at the expense of your client's interests. To the contrary, you have promptly and candidly admitted the mistake to both the client and Trial Counsel for DHS. You have taken steps to correct the mistake and asked that the mistake be attributed to you and not to your client. You have taken the additional step of providing your client with a written letter explaining the error and the potential consequences of the mistake. See Rule 1.4 of the Rules of Professional Conduct."; "We see no indication that your mistake has interfered with or will interfere with your professional judgment or that you will fail to pursue appropriate courses of action on your clients' behalf. Accordingly, the Committee is of the opinion that you may continue your representation of your clients. If, however, upon reflection, you assess that there is a significant risk that you would take actions to cause your client's 1-130 petition to be denied for reasons other than your mistake, thereby limiting your firm's malpractice exposure, there would be a clear conflict of interest under Rule 1.7(a)(2), requiring your withdrawal from representing the client."). B 6/15

- Delaware LEO 2008-3 (9/30/08) (explaining that a city attorney who had sued the City in an employment case may still represent the City, as long as the lawyer is not handling cases similar to his or her lawsuit against the City; "[I]f Attorney's duties include representing the City in age discrimination cases or other areas of labor law that raises issues that significantly overlap with the issues raised in his lawsuit, then there may be a 'significant risk that the representation of [the City] will be materially limited by . . . a personal interest of the lawyer.' The Committee, however, has not been informed that such circumstances exist here. Moreover, the City can and should take steps to ensure that such a set of circumstances does not develop in the future. Attorney is subordinate to more senior City lawyers. Those senior lawyers have the authority to delegate assignments to Attorney and should implement appropriate safeguards to avoid implicating Rule 1.7(a)(2). . . . Also, Attorney and the defendants in the Superior Court action are represented by outside counsel, which should help to ensure that both Attorney's and the defendant's confidences and strategy in the lawsuit are protected."; "[T]he Committee assumes that, as suggested, the City will take appropriate measures to minimize the risk of a conflict, such as avoiding the assignment to Attorney of cases and projects involving the same or similar factual or legal issues raised in his lawsuit.").

- Virginia LEO 1637(4/19/95) (as long as the client consents, a law firm may continue to represent it even though the client is suing the firm for unrelated legal malpractice; "[A]n informed consent is a product of an adequate explanation of the nature, extent and implications of a conflict of interest, including the possible effect on the exercise of the lawyer's independent professional judgment on behalf of the client."; the law firm must advise the client that one of its lawyers will cross-examine the client in the malpractice action; the firm may not reveal to its malpractice counsel any confidences or secrets it obtained from its client through a representation of the client in unrelated matters; although "[c]onsent may be oral or written," written consent would be best here; "Significantly, client consent is not contractually binding; it may be withdrawn at any time.").

In other circumstances, lawyers have sought to withdraw from a representation after clients complained about their services -- apparently over the clients' objections. In both criminal and civil settings, some courts have permitted such withdrawals.

- United States v. Blackledge, 751 F.3d 188, 191, 192, 194-95, 196, 198-99 (4th Cir. 2014) (vacating and remanding a criminal conviction, because the trial court erroneously refused to allow a criminal defendant's lawyer to withdraw; "On July 10, 2012, Attorney Allen filed a motion to withdraw as counsel on the ground that an internal conflict had arisen and she could 'no longer continue to ethically represent' Blackledge. . . . Speaking carefully to avoid violating client confidences or revealing trial strategies, Attorney Allen represented at a hearing on the motion that her internal ethical conflict arose from the fact that Blackledge requested to see certain items that she could not provide him. She added that Blackledge wished to proceed with new counsel and that she had located a panel attorney experienced in § 4248 hearings who could take over the matter immediately. Blackledge also stated at the motions hearing that Attorney Allen had failed to provide him certain documents he requested, and that he felt ignored by her, which made it very difficult for them to communicate."; "On July 23, 2012, Attorney Allen appealed the magistrate judge's ruling to the district court, and on July 30, 2012, she filed a second motion to withdraw. The second motion asserted that Blackledge had filed a state bar grievance against her, causing a conflict of interest where she could not defend against the bar complaint while also representing Blackledge." (emphasis added); "In this case, the district court did not meet its obligation to thoroughly inquire into the extent of the communications breakdown or the basis of the asserted conflict. Despite the representations from Attorney Allen and Blackledge on the morning of trial that they had not done any trial preparation or spoken about whether Blackledge would testify, the court did not ask when they had last seen each other or communicated about the case. . . . The court's failure to probe deeply into the basis of Attorney Allen's conflict seriously undermines its decision, and this factor weighs heavily against the court's ruling." (emphasis added); "Certainly, not every bar complaint against an attorney by her client will result in a conflict of interest, and we have previously expressed our unwillingness to 'invite [those] anxious to rid themselves of unwanted lawyers to queue up at the doors of bar disciplinary committees on the eve of trial.'. . . However, in this case, Blackledge threatened and ultimately submitted a seemingly non-frivolous grievance against Attorney Allen that forced her to choose between protecting her own reputation and arguing in her client's best interest that Blackledge should not be made to bear the consequence of her own errors in submitting the renewed motion to appoint Dr. Plaud (expert)." (emphasis added); "Attorney Allen also asserted an internal ethical conflict, and because the district court failed to conduct an adequate inquiry, it is unclear if this conflict was ever resolved prior to trial. Moreover, the district court made no inquiry whatsoever into the scope and nature of this conflict. As a result, we have no way of knowing whether Attorney Allen's internal ethical conflict was indeed so significant that it required her withdrawal as counsel. The fact that she told the magistrate judge that she would represent Blackledge zealously 'with great difficulty' if the motion were denied . . . is of little help, because, having been made aware of its existence, the court had a sua sponte obligation to examine the extent of this conflict. . . . '[A] trial court must inquire into a conflict of interest 'when it knows or reasonably should know that a particular conflict exists.') . . . Indeed, to the extent that Attorney Allen did opine that she could continue to represent Blackledge, this assertion cannot be isolated from her repeated protestations that she could not do so ethically." (emphasis in original); "In total, in proceedings that could result in lifelong incarceration for a person who has already served his full sentence, Blackledge was forced to be represented by a lawyer asserting multiple conflicts of interest with whom he had not prepared for trial because of their inability to communicate. We cannot conclude that the court's abuse of discretion in requiring Attorney Allen to continue as counsel was harmless. We therefore vacate the court's judgment as to the motions to withdraw and remand for the court to reconsider these motions after engaging in the appropriate inquiry regarding the extent of Attorney Allen's conflicts." (emphasis added)).

- MasTec N. Am., Inc. v. Consol. Edison, Inc., 2008 N.Y. Slip Op. 30565U, at 3, 3-4, 4 (N.Y. Sup. Ct. Feb. 1, 2008) (addressing a situation in which the law firm of Cozen O'Connor sought to withdraw as counsel for a client who had claimed that Cozen had committed malpractice; "While MasTec [client] itself cites these opinions, it represents that it is generally satisfied with Cozen's work and that it wishes to continue to be represented by Cozen. MasTec further contends that a conflict of interest will not develop if Cozen successfully prosecutes its remaining causes of action, in which event it will not have a claim for malpractice based on the loss of the lien foreclosure cause of action." (emphasis added); "This contention is without merit. As the ethics opinions persuasively reason, in the case of a potential irremediable malpractice claim 'not only [is] there an inherent conflict between the interest of the client and the lawyer's own interest, but, from an objective perspective, one could not be confident that the quality of the lawyer's work would be unaffected if the representation continued.'. . . Cozen also cogently points out that its continued representation of MasTec would place it in the anomalous position of having to demonstrate the merits of MasTec's claims, while at the same time anticipating a malpractice defense that would require it to establish that MasTec could not have prevailed on its claim."; "While the court thus finds that a conflict of interest exists, the parties have not addressed or submitted authority on the issue of whether the conflict is waivable under the circumstances of this case by MasTec, a sophisticated commercial entity. On this record, therefore, the court will not reach the issue of whether Cozen's withdrawal is mandatory. Nor need the court do so because permissive withdrawal is, in any event, proper.").

Best Answer

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

n 9/21

Agreements to Arbitrate Fee Disputes

Hypothetical 17

A number of disgruntled former clients have sued your firm in fee disputes, and as your firm's new managing partner you would like to reduce these distractions. You have been reading about the advantage of arbitrating fee disputes with clients, and you wonder if such retainer letter provisions might be worth pursuing.

May you include a provision in your standard retainer letter requiring clients to arbitrate any fee disputes?

YES

Analysis

The ethics rules contain a spectrum of substantive and disclosure requirements when lawyers enter into agreements with their clients.

- Lawyers must explain the arrangement to their clients
- Lawyers must explain the arrangement to their clients, "preferably in writing" (this is ABA Model Rule 1.5(b)'s burden for fee arrangements)
- Lawyers must "fully disclose [] and transmit [] in writing" the terms of the arrangement "in a manner that can be reasonably understood by the client" (this is ABA Model Rule 1.8(a)(1)'s requirement for the lawyer's business transaction with a client (among other requirements))
- Lawyers must describe the arrangement to their client "in a writing signed by the client" (this is ABA Model Rule 1.5(c)'s requirement; many states require this for all fee arrangements)
- Lawyers must obtain a client's "informed consent" to the arrangement (this is ABA Model Rule 1.8(f)(1)'s requirement for an arrangement under which a third party pays the lawyer)
- Lawyers must obtain the client's informed consent to the arrangement in writing
- Lawyers must obtain the client's informed consent "in a writing signed by the client" (this is ABA Model Rule 1.8(g)'s requirement for lawyers in an aggregate settlement situation)

- Lawyers must give the client an opportunity to seek independent legal advice

- Lawyers must explain in writing that the client has a reasonable opportunity to seek independent legal advice

- Lawyers must advise the client of the "desirability" of seeking such independent legal advice

- Lawyers must advise the client "in writing of the desirability of seeking and is given a reasonably opportunity to seek the advice of independent legal counsel" (this is ABA Model Rule 1.8(a)(2)'s requirement for a lawyer to enter into a business transaction with a client), and ABA Model Rule 1.8(h)(2)'s requirement if a lawyer settles a "claim or potential claim" for liability "with an unrepresented client or former client")

- Lawyers may not enter into the arrangement unless the client is independently represented in making the arrangement (this is ABA Model Rule 1.8(h)(1)'s requirement for an agreement prospectively limiting the lawyer's liability to a client for malpractice)

- Lawyers may not enter into the arrangement regardless of disclosure, consent, etc. (this is ABA Model Rule 1.8(c)'s prohibition on a lawyer's soliciting or accepting gifts from a client, ABA Model Rule 1.8(d)'s prohibition on a lawyer obtaining "literary or media rights" from a client in specified circumstances, and ABA Model Rule 1.8(j)'s prohibition on the lawyer's commencement of a sexual relationship with a client after the "client-lawyer relationship lawyer commenced")

As might be expected in a judicial system that encourages arbitration rather than litigation,[1] courts and bars look favorably on arbitration of lawyer-client fee disputes.

The ABA has issued a legal ethics opinion confirming that lawyers and clients can agree to arbitrate fee disputes.

- ABA LEO 425 (2/20/02) (lawyers and clients may agree to arbitrate fee and malpractice disputes, but: the client would have to be independently represented if the agreement limits the lawyer's possible liability (for instance, by precluding punitive damages that would be available in a lawsuit); the lawyer must explain "the possible adverse consequences as well as the benefits" of such an arrangement, such as the client's waiver of jury trial,

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[1] At least one state has <u>mandated</u> arbitration of all disputes between lawyers splitting fees. <u>Shimko v. Lobe</u>, 813 N.E.2d 669 (Ohio 2004) (upholding the constitutionality of an Ohio ethics rule that requires arbitration of fee disputes between lawyers).

broad discovery and appellate rights, the details of arbitration process and the possibility that the client may have to pay fees and costs of arbitration).

An ABA Comment about arbitrating fee disputes contains a strikingly inappropriate mixture of the words "should" and "must." Several ABA Model Rule Comments contain a confusing mixture of those two very different words. But the fee dispute resolution Comment is perhaps the worst.

- ABA Model Rule 1.5 cmt. [9] ("If a procedure has been established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar, the lawyer <u>must</u> comply with the procedure when it is mandatory, and, even when it is voluntary, the lawyer <u>should</u> conscientiously consider submitting to it. <u>Law may prescribe a procedure</u> for determining a lawyer's fee, for example, in representation of an executor or administrator, a class or person entitled to a reasonable fee as part of the measure of damages. The lawyer entitle to such a fee and a lawyer representing another party concerned with the fee <u>should comply with the prescribed procedure</u>." (emphases added)).

ABA Model Rule 1.5 cmt. [9] thus describes two possible contexts in which lawyers and clients may resolve fee disputes.

The first context is "a procedure . . . established for resolution of fee disputes, such as an arbitration or mediation procedure established by the bar." In that context, ABA Model Rule 1.5 cmt. [9] understandably explains that lawyers either "must" or "should" comply with the procedure – depending on whether it is mandatory or only suggested; (1) "the lawyer <u>must</u> comply with the procedure when it is mandatory"; (2) "even when it is voluntary, the lawyer <u>should</u> conscientiously consider submitting to it" (emphasis added).

The second context is where "[l]aw may <u>prescribe</u> a procedure for determining a lawyer's fee" (emphasis added). ABA Model Rule 1.5 cmt. [9] provides examples: "for example, in representation of an executor or administrator, a class or a person entitled to a reasonable fee as part of the measure of damages." ABA Model Rule 1.5 cmt. [9]

concludes with an inexplicable statement that "[t]he lawyer entitled to such a fee and a lawyer representing another party concerned with the fee should comply with the prescribed procedure" (emphasis added).

In other words, ABA Model Rule 1.5 cmt. [9] only suggests that lawyers "comply" with the legally-required "prescribed procedure". This would be alarming enough, but is even more surprising because two sentences earlier ABA Model Rule 1.5 cmt. [4] bluntly stated that "the lawyer must comply with the procedure ["established by the bar"] when it is mandatory" (emphases added).

The Restatement also confirms that lawyers and clients can arbitrate fee disputes. Interestingly, the Restatement provision discussing this possibility in an almost off-handed way contrasts sharply with the Restatement's hostility to arbitration of client claims against lawyers.

> In many jurisdictions, fee-arbitration procedures entitle any client to obtain arbitration; in others, both lawyers and client must consent. The procedures vary in the extent to which arbitration results are binding on one or both parties. Lawyers and clients might agree to arbitration under general arbitration statutes. An agreement to arbitrate should meet standards of fairness, particularly as regards designation of arbitrators. A client and lawyer may also resort to other forms of nonjudicial dispute resolution.

Restatement (Third) of Law Governing Lawyers § 42 cmt. b(iv) (2000).

Every bar seems to permit clients and lawyers to agree in advance to arbitrate fee disputes between them. The real issue is what steps must precede the agreement, and what disputes the agreement covers.

Lawyers assessing this situation must examine court rules as well as ethics rules and legal ethics opinions.

- Biotechpharma, LLC v. Ludwig & Robinson, PLLC, 98 A.3d 986, 988 & n.1 (D.C. 2014) (holding the D.C. rule allowed clients to arbitrate fee disputes, even if the retainer agreement did not contain such a provision; "Appellants -- BiotechPharma, LLC; Converting Biophile Laboratories, Inc.; and Dr. Raouf Albert Guirguis (collectively 'BTP') -- are former clients of appellee Ludwig & Robinson, PLLC ('L&R'), a law firm. L&R sued BTP to collect unpaid legal fees, and BTP moved to stay the litigation and compel arbitration. After the trial court denied the motion, BTP brought this interlocutory appeal, arguing mainly that District of Columbia Bar Rule XIII obligates L&R to arbitrate the fee dispute. We agree with BTP, reverse the trial court's order, and remand the case with instructions to compel arbitration." (footnote omitted); "'Although popularly known as 'D.C. Bar Rule XIII,' this is actually a rule of this court, adopted 'for the government of the Bar and the individual members thereof.' Preamble, Rules of the District of Columbia Court of Appeals Governing the Bar of the District of Columbia.'").

- Eichenberger v. Clark, 2015-Ohio-2718, at ¶ 14 (holding that Ohio did not require arbitration of fee disputes; "Our reading of Gov. Bar R. V(5)(G) and V(9)(G) is supported by reference to Prof. Cond. R. 1.5. As set forth above, Prof. Cond. R. 1.5(f) expressly mandates arbitration of fee disputes between lawyers not in the same firm. Prof. Cond. R. 1.5(f) does not, however, contain any language requiring fee disputes between a lawyer and his or her client to be arbitrated, if the client so requests. . . . Thus, while the Supreme Court requires arbitration of fee disputes between lawyers in different firms, it has not promulgated any rule requiring a lawyer to arbitrate a fee dispute with a client when the client so requests. Here, because the fee dispute is between Eichenberger and his former client, Clark, Eichenberger is not required to arbitrate the dispute.").

One of the important areas of difference between jurisdictions is whether the client must be separately represented in entering into such a binding arbitration provision covering fee disputes.

Some bars' legal ethics opinions do not require that the client be separately represented.[2]

Some bars' legal ethics opinions require that the client be advised of the opportunity to consult with independent counsel.[3]

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[2] Virginia LEO 1586 (4/11/94) (a retainer letter requiring arbitration of fee disputes does not amount to a per se violation of the Code as long as: there is "full and adequate disclosure as to all possible consequences" of the agreement; the client consents; and the arrangement is not "unconscionable, unfair, or inequitable when made"); Philadelphia LEO 91-5 (3/91) (holding that an agreement requiring arbitration of fee disputes would be upheld even if the client had not been separately represented in entering into it).

> Some bars' legal ethics opinions require that the client be separately represented.[4]

Another area of difference concerns the requirement of a written explanation of the arbitration provision, and a written consent.

> Some bars' legal ethics opinions require written disclosure and consent.[5]
>
> One bars' legal ethics opinion indicated that it would be "better" if the lawyer explains the arbitration provision in writing, and the client consents in writing.[6]

The final area of disagreement among states involves the degree and nature of disclosure required for the arbitration provision to be effective.

For instance, in New York County LEO 723 (7/17/97), the New York County Bar held that an arbitration provision must define the forum in which the arbitration would take place. The LEO also listed the types of disclosures required -- "[c]hief among

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3 North Carolina LEO 107 (4/12/91) (upholding an arbitration provision "assuming that the nature of the alternative dispute resolution procedures is fully disclosed to the client and the client is given full opportunity to consult independent counsel relative to the wisdom of foregoing other possible remedies in favor of alternative dispute resolution"); New York County LEO 723 (7/17/97) (upholding an arbitration provision covering fee disputes; explaining that "we respectfully disagree with the opinion of the District of Columbia bar . . . that an arbitration agreement is unethical unless the client first consults with independent counsel concerning the arrangement"; also disagreeing with the Maryland bar).

4 District of Columbia LEO 211 (5/15/90) ("a lawyer may not insist that a client enter into a fee agreement containing a clause mandating arbitration of fee and malpractice disputes unless the client is represented by other counsel. . . . In summary, this Committee has come to the conclusion that it is unrealistic to expect lawyers to provide enough information about arbitration to a prospective client, particularly on a first visit, so that the client can make an informed consent to a mandatory arbitration provision. It is equally unrealistic to conclude that limited disclosure coupled with the advice to seek independent legal counsel will cure the problem. How many clients either will see or can afford to see a second lawyer as a condition of entering into an agreement with the first? Therefore, we now conclude that Opinion 190 was incorrect in supposing that adequate disclosures concerning mandatory arbitration could be made to lay clients. Accordingly, mandatory arbitration agreements covering all disputes between lawyer and client are not permitted under either our prior Opinions or Rule 1.8(a) unless the client is in fact counselled by another attorney.").

5 District of Columbia LEO 218 (6/18/91) ("A retainer agreement providing for mandatory arbitration of fee disputes before the DC Bar Attorney-Client Fee Arbitration Board is not unethical provided the client is advised in writing of the availability of counselling by the staff of the ACAB and provided the client consents in writing to the mandatory arbitration.").

6 Connecticut LEO 97-5 (3/4/97) ("We therefore conclude that an engagement letter providing for mandatory arbitration of fee disputes is ethically permissible. In light of the significance of this provision, it may be better that the lawyer inform the client in writing and the client consents in writing to the mandatory arbitration.").

these differences is that an agreement to arbitrate amounts to a waiver of the right to a jury trial."

> The right to a jury trial is not the only material difference between litigation and arbitration. Other differences may include, but may not be limited to, the extent of discovery rights, the right to compel production of witnesses and documents, the availability of relief, the availability of appellate review on the merits, the fees and costs payable to the arbitrator, the availability of a public forum, and the like.

Id.

Other bars have also provided examples of the type of disclosures that are required or appropriate.

- Texas LEO 586 (10/2008) ("It is permissible under the Texas Disciplinary Rules of Professional Conduct to include in an engagement agreement with a client a provision, the terms of which would not be unfair to a typical client willing to agree to arbitration, requiring the binding arbitration of fee disputes and malpractice claims provided that (1) the client is aware of the significant advantages and disadvantages of arbitration and has sufficient information to permit the client to make an informed decision about whether to agree to the arbitration provision, and (2) the arbitration provision does not limit the lawyer's liability for malpractice."; "In situations involving clients who are individuals or small businesses, the lawyer should normally advise the client of the following possible advantages and disadvantages of arbitration as compared to a judicial resolution of disputes: (1) the cost and time savings frequently found in arbitration, (2) the waiver of significant rights, such as the right to a jury trial, (3) the possible reduced level of discovery, (4) the relaxed application of the rules of evidence, and (5) the loss of the right to a judicial appeal because arbitration decisions can be challenged only on very limited grounds. The lawyer should also consider the desirability of advising the client of the following additional matters, which may be important to some clients: (1) the privacy of the arbitration process compared to a public trial; (2) the method of selecting arbitrators; and (3) the obligation, if any, of the client to pay some or all of the fees and costs of arbitration, if those expenses could be substantial.").

- Virginia LEO 1707 (1/12/98) (although a "lawyer's fiduciary duties extend to preliminary consultation by a prospective client with a view to engagement," it is not per se improper for a client engagement agreement to provide for binding arbitration of legal malpractice claims as long as there is adequate disclosure and consent; like fee agreements, such initially-acceptable engagement agreement provisions might become improper given the "occurrence of unusual and extraordinary facts and circumstances not contemplated at the outset of the representation"; the Bar declines to require any specific disclosures or insist that the client actually consult another lawyer before entering into such an agreement (in Virginia LEO 638, the Bar seemed to require that the client must be advised to seek independent counsel regarding an arbitration provision); appropriate disclosures might include "waiver of trial by jury or by the court, discovery, evidentiary rules, arbitrator selection, scope of award, expense, appellate rights, finality of award, enforcement of award").

- Texas LEO 586 (10/2008) ("It is permissible under the Texas Disciplinary Rules of Professional Conduct to include in an engagement agreement with a client a provision, the terms of which would not be unfair to a typical client willing to agree to arbitration, requiring the binding arbitration of fee disputes and malpractice claims provided that (1) the client is aware of the significant advantages and disadvantages of arbitration and has sufficient information to permit the client to make an informed decision about whether to agree to the arbitration provision, and (2) the arbitration provision does not limit the lawyer's liability for malpractice."; "In situations involving clients who are individuals or small businesses, the lawyer should normally advise the client of the following possible advantages and disadvantages of arbitration as compared to a judicial resolution of disputes: (1) the cost and time savings frequently found in arbitration, (2) the waiver of significant rights, such as the right to a jury trial, (3) the possible reduced level of discovery, (4) the relaxed application of the rules of evidence, and (5) the loss of the right to a judicial appeal because arbitration decisions can be challenged only on very limited grounds. The lawyer should also consider the desirability of advising the client of the following additional matters, which may be important to some clients: (1) the privacy of the arbitration process compared to a public trial; (2) the method of selecting arbitrators; and (3) the obligation, if any, of the client to pay some or all of the fees and costs of arbitration, if those expenses could be substantial.").

Given the wide variation in how states approach agreements to arbitrate fee disputes, it is not surprising that courts take differing approaches to the arbitration agreements that come before them for review.

Some courts have upheld arbitration provisions.

- Schatz v. Allen Matkins Leck Gamble & Mallory LLP, 198 P.3d 1109 (Cal. 2009) (holding that lawyers can include arbitration clauses in retainer agreements that require binding arbitration of fee disputes between the lawyer and the client); Texas LEO 586 (10/2008) ("It is permissible under the Texas Disciplinary Rules of Professional Conduct to include in an engagement agreement with a client a provision, the terms of which would not be unfair to a typical client willing to agree to arbitration, requiring the binding arbitration of fee disputes and malpractice claims provided that (1) the client is aware of the significant advantages and disadvantages of arbitration and has sufficient information to permit the client to make an informed decision about whether to agree to the arbitration provision, and (2) the arbitration provision does not limit the lawyer's liability for malpractice."; "In situations involving clients who are individuals or small businesses, the lawyer should normally advise the client of the following possible advantages and disadvantages of arbitration as compared to a judicial resolution of disputes: (1) the cost and time savings frequently found in arbitration, (2) the waiver of significant rights, such as the right to a jury trial, (3) the possible reduced level of discovery, (4) the relaxed application of the rules of evidence, and (5) the loss of the right to a judicial appeal because arbitration decisions can be challenged only on very limited grounds. The lawyer should also consider the desirability of advising the client of the following additional matters, which may be important to some clients: (1) the privacy of the arbitration process compared to a public trial; (2) the method of selecting arbitrators; and (3) the obligation, if any, of the client to pay some or all of the fees and costs of arbitration, if those expenses could be substantial.").

- Ervin, Cohen & Jessup, LLP v. Kassel, 54 Cal. Rptr. 3d 685 (Cal. Ct. App. 2007) (as long as a client has waived the statutory right to engage in non-binding arbitration, the client can agree to binding arbitration of fee disputes with his lawyer).

- Henry v. Gonzalez, 18 S.W.3d 684 (Tex. App. 2000) (compelling arbitration; finding that determination of the attorney-client relationship did not invalidate the arbitration agreement).

Some courts find arbitration provisions unenforceable because they did not sufficiently describe the rights that the client was forfeiting.[7]

Some courts find that the lawyer has not followed the required procedure, and therefore could not insist on or enforce an arbitration provision.

- Woods v. Patterson Law Firm, P.C., 886 N.E.2d 1080 (Ill. App. Ct. 2008) (finding that a law firm had forfeited its right to arbitrate a malpractice claim brought by a former client by engaging in discovery during the client's legal malpractice lawsuit against the law firm).

Best Answer

The best answer to this hypothetical is **YES**. b 9/21

[7] See, e.g., Pre-Paid Legal Servs., Inc. v. Battle, 873 So. 2d 79 (Miss. 2004).

Agreements to Arbitrate Malpractice Disputes

Hypothetical 18

Several years ago, your firm began to insist that all clients sign retainer agreements containing a provision requiring arbitration of fee disputes. Now you wonder if that provision can be expanded to cover malpractice claims a client asserts against your firm.

May you include a provision in your standard retainer letter requiring clients to arbitrate malpractice disputes?

YES

Analysis

The ethics rules contain a spectrum of substantive and disclosure requirements when lawyers enter into agreements with their clients.

- Lawyers must explain the arrangement to their clients
- Lawyers must explain the arrangement to their clients, "preferably in writing" (this is ABA Model Rule 1.5(b)'s burden for fee arrangements)
- Lawyers must "fully disclose [] and transmit [] in writing" the terms of the arrangement "in a manner that can be reasonably understood by the client" (this is ABA Model Rule 1.8(a)(1)'s requirement for the lawyer's business transaction with a client (among other requirements))
- Lawyers must describe the arrangement to their client "in a writing signed by the client" (this is ABA Model Rule 1.5(c)'s requirement; many states require this for all fee arrangements)
- Lawyers must obtain a client's "informed consent" to the arrangement (this is ABA Model Rule 1.8(f)(1)'s requirement for an arrangement under which a third party pays the lawyer)
- Lawyers must obtain the client's informed consent to the arrangement in writing
- Lawyers must obtain the client's informed consent "in a writing signed by the client" (this is ABA Model Rule 1.8(g)'s requirement for lawyers in an aggregate settlement situation)

- Lawyers must give the client an opportunity to seek independent legal advice
- Lawyers must explain in writing that the client has a reasonable opportunity to seek independent legal advice
- Lawyers must advise the client of the "desirability" of seeking such independent legal advice
- Lawyers must advise the client "in writing of the desirability of seeking and is given a reasonably opportunity to seek the advice of independent legal counsel" (this is ABA Model Rule 1.8(a)(2)'s requirement for a lawyer to enter into a business transaction with a client), and ABA Model Rule 1.8(h)(2)'s requirement if a lawyer settles a "claim or potential claim" for liability "with an unrepresented client or former client")
- Lawyers may not enter into the arrangement unless the client is independently represented in making the arrangement (this is ABA Model Rule 1.8(h)(1)'s requirement for an agreement prospectively limiting the lawyer's liability to a client for malpractice)
- Lawyers may not enter into the arrangement regardless of disclosure, consent, etc. (this is ABA Model Rule 1.8(c)'s prohibition on a lawyer's soliciting or accepting gifts from a client, ABA Model Rule 1.8(d)'s prohibition on a lawyer obtaining "literary or media rights" from a client in specified circumstances, and ABA Model Rule 1.8(j)'s prohibition on the lawyer's commencement of a sexual relationship with a client after the "client-lawyer relationship lawyer commenced")

Mandatory arbitration provisions covering substantive malpractice claims raise essentially the same issue as provisions covering fee disputes -- although arguably clients forfeit more rights in the former type of provision.

Interestingly, the ABA dealt with both types of mandatory arbitration provisions in the same legal ethics opinion, and provided the same analysis.

- ABA LEO 425 (2/20/02) (lawyers and clients may agree to arbitrate fee and malpractice disputes, but: the client would have to be independently represented if the agreement limits the lawyer's possible liability (for instance, by precluding punitive damages that would be available in a lawsuit); the lawyer must explain "the possible adverse consequences as well as the benefits" of such an arrangement, such as the client's waiver of jury trial, broad discovery and appellate rights, the details of arbitration process and the possibility that the client may have to pay fees and costs of arbitration).

The Restatement (which absolutely prohibits any prospective limitation on a lawyer's liability for malpractice) permits such arbitration provisions.

> [A] lawyer and client may properly take certain measures that may have the effect of narrowing or otherwise affecting the lawyer's liability . . . A client and lawyer may agree in advance [subject to some restrictions] to arbitrate claims for legal malpractice, provided that the client receives proper [sic] of the scope and effect of the agreement, and if the relevant jurisdiction's law applicable to providers of professional services renders such agreements enforceable.

Restatement (Third) of Law Governing Lawyers § 54 cmt. b (2000).

Bars generally follow the same approach in addressing mandatory provisions governing malpractice as they do in mandatory arbitration provisions covering fee disputes.

- Texas LEO 586 (10/2008) ("It is permissible under the Texas Disciplinary Rules of Professional Conduct to include in an engagement agreement with a client a provision, the terms of which would not be unfair to a typical client willing to agree to arbitration, requiring the binding arbitration of fee disputes and malpractice claims provided that (1) the client is aware of the significant advantages and disadvantages of arbitration and has sufficient information to permit the client to make an informed decision about whether to agree to the arbitration provision, and (2) the arbitration provision does not limit the lawyer's liability for malpractice."; "In situations involving clients who are individuals or small businesses, the lawyer should normally advise the client of the following possible advantages and disadvantages of arbitration as compared to a judicial resolution of disputes: (1) the cost and time savings frequently found in arbitration, (2) the waiver of significant rights, such as the right to a jury trial, (3) the possible reduced level of discovery, (4) the relaxed application of the rules of evidence, and (5) the loss of the right to a judicial appeal because arbitration decisions can be challenged only on very limited grounds. The lawyer should also consider the desirability of advising the client of the following additional matters, which may be important to some clients: (1) the privacy of the arbitration process compared to a public trial; (2) the method of selecting arbitrators; and (3) the obligation, if any, of the client to pay some or all of the fees and costs of arbitration, if those expenses could be substantial.").

- Virginia LEO 1707 (1/12/98) (although a "lawyer's fiduciary duties extend to preliminary consultation by a prospective client with a view to engagement," it is not per se improper for a client engagement agreement to provide for binding arbitration of legal malpractice claims as long as there is adequate disclosure and consent; like fee agreements, such initially-acceptable engagement agreement provisions might become improper given the "occurrence of unusual and extraordinary facts and circumstances not contemplated at the outset of the representation"; the Bar declines to require any specific disclosures or insist that the client actually consult another lawyer before entering into such an agreement (in LEO 638, the Bar seemed to require that the client must be advised to seek independent counsel regarding an arbitration provision); appropriate disclosures might include "waiver of trial by jury or by the court, discovery, evidentiary rules, arbitrator selection, scope of award, expense, appellate rights, finality of award, enforcement of award").

- Virginia LEO 1550 (10/20/93) (a lawyer may not prospectively limit liability to a client, but may secure a release from the client for "specific completed acts" in exchange for consideration if the client consents after full disclosure, is "first advised to seek independent counsel as to whether to sign such an agreement" and if the transaction was not "unconscionable, unfair or inequitable when made"; the Bar reaffirmed the ethical propriety of arbitration provisions in retainer agreements covering any malpractice claims as long as the client consents after full disclosure and "is advised to seek independent counsel in regard to the advisability of such a provision").

- Virginia LEO 638 (12/3/84) (a retainer agreement may contain an arbitration provision covering malpractice claims as long as the client is fully informed of the provision's effect and is advised to seek independent legal advice).

As with arbitration provisions covering fee disputes, bars have disagreed about the enforceability of such provisions entered into by clients who were not separately represented.

Some courts enforce arbitration agreements – explicitly or implicitly finding that the agreements adequately explained the advantages and (especially) the disadvantages of an arbitration agreement covering malpractice disputes.

- Smith v. Lindemann, 710 F. App'x 101, 102-03, 103, 104, 104-05 (3d Cir. 2017) (discussing an arbitration of a divorce-related malpractice claim, based on federal law; "Smith's [Client] agreement with Calello [Lawyer] contains the following provision, which unambiguously requires arbitration of any quarrels between them: 'Arbitration of Differences Between the Client and the Law Firm. Should any difference[], disagreement, or dispute between you and the Law Firm arise as to its representation of you, or on account of any other matter, you agree to submit such disagreement in binding arbitration.'"; "It goes on to specify the applicable arbitration procedures and concludes by advising that '[s]igning of this Agreement will be deemed your consent to the methods of alternative dispute resolution set forth in this Section, and constitutes a waiver on your part and on the part of the Law Firm to have such disputes resolved by a court which might include having the matter determined by a jury.'" (alteration in original); "The arbitration provision before us is straightforward: '[A]ny difference[], disagreement, or dispute between [Smith and Calello] as to [his] representation of [her]' shall be submitted to 'binding arbitration.' J.A. 25. True, the New Jersey Supreme Court has held in a different context that '[t]he absence of <u>any</u> language in [an] arbitration provision that [a] plaintiff [i]s waiving her statutory right to seek relief in a court of law renders the provision unenforceable.' <u>Atalese v. U.S. Legal Servs. Grp., L.P.</u>, 219 N.J. 430, 99 A.3d 306, 309 (N.J. 2014) (emphasis in original). But the provision here makes plain that arbitration means giving up the right to have a dispute resolved by a judge and jury. J.A. 25 (agreement to arbitration constitutes a 'waiver . . . to have such disputes resolved by a court which might include having the matter determined by a jury.')." (alterations in original); "Despite her contention that she did not give informed consent to the arbitration provision, Smith does not argue that it is too narrow to cover malpractice claims. Although she contends Calello should have used the word 'malpractice' orally or in the agreement itself, she never claims not to have known malpractice claims would fall within the provision's definition of 'any difference[], disagreement, or dispute between [her] and [Calello] . . . as to [his] representation of [her.]' J.A. 46. Nor does she claim to have been surprised that her agreement to arbitrate meant giving up the right to go to court." (alterations in original)).

- <u>Short v. Grayson</u>, No. 16 C 2150, 2016 U.S. Dist. LEXIS 170664, at *6 (N.D. Ill. Dec. 9, 2016) (requiring a former client to arbitrate a malpractice claim against a Chicago law firm; "Short has not cited any other authority that an attorney retainer agreement violates public policy because it contains an arbitration clause. Indeed, district courts in this circuit and elsewhere have enforced arbitration clauses in attorney-client retainer agreements.").

- <u>Royston, Rayzor, Vickery, & Williams, LLP v. Lopez</u>, 467 S.W.2d 494, 497, 497-98 (Tex. 2015) (upholding an arbitration clause requiring clients to arbitrate claims of his former lawyer; "This interlocutory appeal involves the enforceability of an arbitration provision in an attorney-client employment contract. The provision specifies that the client and firm will arbitrate disputes that arise between them, except for claims made by the firm for recovery of its fees and expenses. After the underlying matter was settled, and the client sued the firm. The trial court denied the firm's motion to order the dispute to arbitration. On interlocutory appeal, the court of appeals affirmed on the basis that the arbitration provision is substantively unconscionable and unenforceable."; "We conclude that the client did not prove that either the arbitration provision is substantively unconscionable or any other defense to the arbitration provision. Accordingly, the judgment of the court of appeals is reversed and the cause is remanded to the trial court.").

- Sanford v. Bracewell & Guiliani, LLP, Civ. A. No. 13-1205, 2014 U.S. Dist. LEXIS 36547, at *21 n.7, *23-24, *27-28, *35-36, *40 (E.D. Pa. Mar. 20, 2014) (approving a law firm's retainer letter's arbitration clause; "Plaintiffs do not argue that the arbitration clause is substantively unconscionable."; "The arbitration clause at issue here does not unreasonably favor the Firm. It binds both parties equally, requiring 'any controversy, dispute or claim . . . arising out of or relating to' the representation to be arbitrated. While the arbitration agreement does state that each party shall bear their own costs and attorney's fees, it does not state that Sanford is required to file his claim within a five day window."; "The arbitration clause at issue here was embedded within a standardized take-it-or-leave-it fee agreement. However, there was no degree of economic compulsion motivating Mr. Sanford. He is sophisticated in business and was free to choose any law firm he wanted to pursue his claims against Smith."; "[S]ome state courts and ethics committees have imposed specific notice requirements on attorneys who wish to use an engagement agreement with an arbitration clause. These notice requirements are meant to equalize the bargaining power between the attorney and client. For example, the District of Columbia Bar Legal Ethics Committee has mandated that arbitration clauses in fee agreements will only be enforced if the client is represented by outside counsel before signing. Opinion No. 211 (1990). The Michigan Standing Committee on Professional and Judicial Ethics has created a slightly less onerous rule requiring attorneys to communicate in writing that their clients may obtain counsel to advise them on the clause. Opinion Number RI-196 (1994)."; ", "[I]t should be noted that the arbitration clause in the Bracewell & Guiliani fee letter did contain some language meant to put Mr. Sanford on notice of its scope and effect. It advised Mr. Sanford that he was waiving his right to a jury trial and would be bound by the confidential arbitration award. The Engagement Letter encouraged him to seek outside counsel or call attorney Halpern with questions. Additionally, the clause was not buried inside a lengthy engagement letter. The Letter was only four pages long. The arbitration clause was a four paragraph section labeled: 'Agreement Concerning Arbitration.' The terms were clear and easy to understand, covering 'any controversy, dispute or claim . . . arising out of or relating to the engagement described in th[e] Engagement Letter or any future engagement of B&G.'. . . Moreover, the Letter did not prospectively limit Bracewell."; "Mrs. Sanford's status as a client and her acceptance of the arbitration agreement are in issue and a jury trial on her claims is warranted.").

In contrast, some courts refuse to enforce such arbitration provisions.

- Lizzy McLellan, Ballard Spahr Lawyers Can't Arbitrate Based On Retainer Contract, The Legal Intelligencer, January 2, 2019 ("Lawyers from Lindquist & Vennum, which is now part of Philadelphia-based Ballard Spahr, may have to face a legal malpractice action in court after a Philadelphia judge found an arbitration clause in the firm's retainer agreement to be in violation of ethical requirements."; "The lawyers from Lindquist & Vennum 'failed to reasonably disclose the prospective limitations the firm was placing on its own liability for malpractice' in its retainer agreement with ex-client Mackin Medical, Philadelphia Court of Common Pleas Judge Ramy Djerassi wrote in an opinion filed Dec. 26."; "Mackin Medical was not given sufficient objective information required by Pennsylvania courts to understand that its former attorneys were prospectively limiting their own liability for malpractice without telling Mackin Medical that it had a right to consult independent counsel first,' Djerassi found."; "Ballard Spahr, which is also named as a defendant, acquired Minneapolis-based Lindquist & Vennum about a year ago.").

- Castillo v. Arrieta, 368 P.3d 1249, 1252, 1257, 1259 (N.M. Ct. App. 2016) (holding that a New Mexico lawyer could not enforce a retainer agreement arbitration clause; "An arbitration clause in a fee agreement between attorney and client implicates unique legal and ethical concerns that are presently being debated, with other jurisdictions taking varied approaches to enforceability. . . . For the reasons discussed in this Opinion, we hold that the plain text of this unusually broad arbitration provision reasonably applies to Plaintiff's malpractice claim, but that it is unenforceable if it was signed without Plaintiff's informed consent. We reverse the district court's decision compelling arbitration and reprimand for proceedings to determine the circumstances surrounding negotiation of the fee agreement."; "Here, the text of the clause itself is no help. It declares in a single sentence only that client and attorney agree to submit 'any dispute' to arbitration. We have already held that this is technically sufficient to apply to malpractice claims. However, it is not sufficient to inform the client 'of the material advantages and disadvantages of the proposed course of conduct.' . . . If Plaintiff truly was never warned that he 'was waiving [his] right to a trial by jury' if he sued his attorneys for malpractice, as he stated in his affidavit, then inclusion of such a broadly worded and unexplained material term was an overreach by his attorneys that will not be enforced in this Court."; "We remand for the district court to determine whether Defendants sufficiently disclosed the meaning and scope of the arbitration agreement to Plaintiff. On remand, the court should hold an evidentiary hearing on the issue. If Defendants did not inform Plaintiff that the agreement constituted a waiver of important rights, including the right to a jury trial, potentially the right to broad discovery, and the right to an appeal on the merits, then Defendants' motion to compel arbitration should be denied.").

- Gina Passarella, Judge Deems Reed Smith Arbitration Clause Unenforceable, The Legal Intelligencer, December 21, 2015 ("A mandatory arbitration clause in Reed Smith's client engagement letters is unenforceable because it was not specifically signed by the client and did not inform the client of the rights he was giving up, a Philadelphia judge has ruled in an issue of first impression in the state."; "Philadelphia Court of Common Pleas Judge John M. Younge rejected Reed Smith and partner Douglas Widin's additional argument that the arbitration clause should be enforced in this legal malpractice action because their client was a sophisticated businessman and attorney."; "Plaintiff Jerald S. Batoff sued Reed Smith and Widin over their work in negotiating a $20.5 million settlement with Batoff's insurance company after his Villanova mansion burned down in April 2021. Batoff has alleged Reed Smith advised him to enter the settlement without the involvement of the tenants who were living in the home at the time of the fire despite the fact that the lease agreement's lease-to-own provision required the tenants' involvement in such negotiations."; "Batoff now alleges he has more than $500,000 in damages from the legal fees he incurred in litigation with the tenants. He also faces millions in additional damages, Batoff alleges, because the settlement with the insurance company required Batoff indemnify the company if the tenants sued the insurer, which they did."; "In April, Younge denied without explanation Reed Smith's preliminary objections to Batoff's suit under the theory that the case was required to be sent to arbitration."; "In his December 18 opinion in response to Reed Smith's appeal of that ruling, Younge said the Pennsylvania Supreme Court has yet to weigh in on the issue of attorney-client arbitration agreements. But he said Pennsylvania Rule of Professional Conduct 1.8 allows such mandatory arbitration agreements if the client is 'fully informed of the scope and effect of the agreement.'"; "With no state case law to point to, Younge cited a recent Eastern District of Pennsylvania case, <u>Stanford v. Bracewell & Guilani</u>, which relied on a test outlined by the Louisiana Supreme Court in the case <u>Hodges v. Reasonover</u>, to determine whether an arbitration agreement fully informed the client of the rights he was giving up by agreeing to arbitration."; "The <u>Hodges</u> case said that clients signing arbitration clauses should be informed they are: waiving their right to a jury trial, waiving their right to an appeal, waiving broad discovery, could pay substantial upfront costs, that they could still make disciplinary complaint against the attorney and that they could speak with independent counsel before signing the agreement. The seventh <u>Hodges</u> factor stated clients should be fully informed of the types of claims that would have to be submitted to arbitration."; "'[T]he defendants were unable to establish that [Batoff] ever read the arbitration clause, or was even aware of its existence, because it was found in an addendum to the engagement letter that was neither signed nor initialed by [Batoff],' Younge said. 'Based on the language of the arbitration agreement, the defendants were also unable to establish that [Batoff] was informed of the ramifications and scope of arbitration.'"; "Younge said Reed Smith's arbitration clause did not provide any explanation of the rights Batoff was waiving. Younge said there was no mention of Batoff's waiving his right to a jury trial or his right to engage in full discovery or that he could face substantial costs.").

- <u>Atalese v. U.S. Legal Servs. Grp.</u>, 99 A.3d 306, 309 (N.J. 2014) (holding that an arbitration provision in a retainer agreement was unenforceable, because the lawyer had not adequately explained the provision; "Arbitration provisions are now commonplace in consumer contracts. Consumers can choose to pursue arbitration and waiver their right to sue in court, but should know that they are making that choice. An arbitration clause, like any contractual clause providing for the waiver of a constitutional or statutory right, must state its purpose clearly and unambiguously. In choosing arbitration, consumers must have a basic understanding that they are giving up their right to seek relief in a judicial forum."; "Here, plaintiff, Patricia Atalese, contracted with defendant, U.S. Legal Services Group, L.P. (USLSG), for debt-adjustment services. The contract contained an arbitration provision for the resolution of any dispute between the parties, but the provision made no mention that plaintiff waived her right to seek relief in court. Plaintiff brought a lawsuit against USLSG in the Special Civil Part alleging violations of two consumer-protection statutes."; "The trial court granted USLSG's motion to compel arbitration pursuant to the service contract. The Appellate Division affirmed, finding that 'lack of express reference to a waiver of the right to sue in court' did not bar enforcement of the arbitration clause."; "We now reverse. The absence of any language in the arbitration provision that plaintiff was waving her statutory right to seek relief in a court of law renders the provision unenforceable. An arbitration provision -- like any comparable contractual provision that provides for the surrendering of a constitutional or statutory right -- must be sufficiently clear to a reasonable consumer. The provision here does not pass that test. We therefore vacate the judgment of the Appellate Division and remand to the Special Civil Part for proceedings consistent with this opinion.").

- Feacher v. Hanley, Case No. 2:13-cv-92-EJF, 2014 U.S. Dist. LEXIS 4526, at *8-9, *10-11, *26-27 (D. Utah Jan. 13, 2014) (declining to enforce the following arbitration provision, after concluding that it was unconscionable; "Preferred Law, recognizing this rule [Utah R. Prof'l Conduct 1.8(h), cmt. [14]], put boilerplate language into the contract stating: 'BORROWER ACKNOWLEDGES THAT HE OR SHE HAS HAD ADEQUATE TIME TO SEEK INDEPENDENT COUNSEL AND IS NOW CURRENTLY REPRESENTED IN MAKING THIS AGREEMENT IN LIMITING PREFERRED LAW'S POTENTIAL MALPRACTICE AND OTHER LIABILITY TO BORROWER.' . . . Although the Contract requires the Feachers to acknowledge they had adequate time to seek independent counsel and had representation in making the agreement, the facts here show that the Feachers did not have separate counsel prior to signing the Contract and did not know of the provision. The Feachers had at most two days to review the Contract. Further, neither side claims anyone from Preferred Law or MRB ever mentioned the paragraph or made any inquiry about separate representation."; "No evidence suggests Prferred [sic] Law every explained that the Contract limited liability to the fee paid by the Feachers."; "[T]he Court finds the Contract both substantively and procedurally unconscionable. The Contract terms -- which specifically exclude the service the Feachers sought -- favor Preferred Law to an extent it unfairly oppressed, and no doubt surprised, the Feachers. Additionally, Defendants rushed the Feachers into signing the Contract without allowing them a reasonable opportunity to read and understand the Contract or obtain independent legal counsel. Even under Defendants' version of the facts -- where a Preferred Law employee e-mailed the Contract to the Feachers two days before their conversation with Mr. Kartchner -- the Feachers had an unreasonably short period of time in which to seek and obtain independent counsel, which would have enabled them to make an informed decision. Although the Feachers did not find themselves in as vulnerable a position as the plaintiff in Sosa [Sosa v. Paulos, 924 P.2d 357 (Utah 1996)], the threat of losing their home placed the Feachers in a vulnerable position. The Court also notes Defendants' use of deception in telling the Feachers the Contract represented their discussions with Defendants and contained a guarantee weighs heavily in favor of a finding of procedural unsconsionability [sic]." (emphasis added)).

Best Answer

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

b 9/21

Settlement of Client's Claims

Hypothetical 19

You recently botched a litigation matter for an elderly client. The client fired you, and now has to deal with her belief that you have committed malpractice. You would like to try to resolve the dispute before your former client talks to any other lawyers who might make your life even more miserable.

May you settle a malpractice claim by a former client who is not currently represented by another lawyer?

MAYBE

Analysis

The ethics rules contain a spectrum of substantive and disclosure requirements when lawyers enter into agreements with their clients.

- Lawyers must explain the arrangement to their clients
- Lawyers must explain the arrangement to their clients, "preferably in writing" (this is ABA Model Rule 1.5(b)'s burden for fee arrangements)
- Lawyers must "fully disclose [] and transmit [] in writing" the terms of the arrangement "in a manner that can be reasonably understood by the client" (this is ABA Model Rule 1.8(a)(1)'s requirement for the lawyer's business transaction with a client (among other requirements))
- Lawyers must describe the arrangement to their client "in a writing signed by the client" (this is ABA Model Rule 1.5(c)'s requirement; many states require this for all fee arrangements)
- Lawyers must obtain a client's "informed consent" to the arrangement (this is ABA Model Rule 1.8(f)(1)'s requirement for an arrangement under which a third party pays the lawyer)
- Lawyers must obtain the client's informed consent to the arrangement in writing
- Lawyers must obtain the client's informed consent "in a writing signed by the client" (this is ABA Model Rule 1.8(g)'s requirement for lawyers in an aggregate settlement situation)

- Lawyers must give the client an opportunity to seek independent legal advice
- Lawyers must explain in writing that the client has a reasonable opportunity to seek independent legal advice
- Lawyers must advise the client of the "desirability" of seeking such independent legal advice
- Lawyers must advise the client "in writing of the desirability of seeking and is given a reasonably opportunity to seek the advice of independent legal counsel" (this is ABA Model Rule 1.8(a)(2)'s requirement for a lawyer to enter into a business transaction with a client), and ABA Model Rule 1.8(h)(2)'s requirement if a lawyer settles a "claim or potential claim" for liability "with an unrepresented client or former client")
- Lawyers may not enter into the arrangement unless the client is independently represented in making the arrangement (this is ABA Model Rule 1.8(h)(1)'s requirement for an agreement prospectively limiting the lawyer's liability to a client for malpractice)
- Lawyers may not enter into the arrangement regardless of disclosure, consent, etc. (this is ABA Model Rule 1.8(c)'s prohibition on a lawyer's soliciting or accepting gifts from a client, ABA Model Rule 1.8(d)'s prohibition on a lawyer obtaining "literary or media rights" from a client in specified circumstances, and ABA Model Rule 1.8(j)'s prohibition on the lawyer's commencement of a sexual relationship with a client after the "client-lawyer relationship lawyer commenced")

Several courts and bars have addressed situations in which a lawyer wishes to settle a claim that the client could assert against the lawyer.

ABA Model Rules

Although ABA Model Rule 1.8(h)(1) requires that a client be separately represented in prospectively limiting liability to the lawyer, the Model Rules require slightly less protection for clients who are settling existing claims they can bring claims against their lawyers.

> A lawyer shall not . . . settle a claim or a potential claim for such liability with an unrepresented client or a former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

ABA Model Rule 1.8(h)(2) (emphasis added). Comment [15] explains the basis for the ABA's approach.

> Agreements settling a claim or a potential claim for malpractice are not prohibited by this Rule. Nevertheless, in view of the danger that a lawyer will take unfair advantage of an unrepresented client or former client, the lawyer must first advise such a person in writing of the appropriateness of independent representation in connection with such a settlement. In addition, the lawyer must give the client or former client a reasonable opportunity to find and consult independent counsel.

ABA Model Rule 1.8 cmt. [15] (emphasis added).

Restatement

Just as the Restatement flatly prohibits prospective limitations on a lawyer's malpractice liability to a client, it also takes a more restrictive view than the ABA Model Rules of a client's settlement of an existing claim.

The Restatement takes differing approaches to the enforceability of a malpractice settlement and a lawyer's vulnerability to an ethics charge.

First, the Restatement explains that a client can rescind a malpractice settlement agreement if the client was not independently represented when entering into it.

> The client or former client may rescind an agreement settling a claim by the client or former client against the person's lawyer if: (a) the client or former client was subjected to improper pressure by the lawyer in reaching the settlement; or (b) (i) the client or former client was not independently represented in negotiating the settlement, and (ii) the settlement was not fair and reasonable to the client or former client.

Restatement (Third) of Law Governing Lawyers § 54(3) (emphasis added).[1]

[1] In a comment, the Restatement explains that even an independently represented client can rescind a settlement agreement if the lawyer had imposed improper pressure "such as the lawyer's

A comment explains just how client-friendly this provision is.

> First, under Subsection (3) the settlement is not enforceable over the objection of the client or former client if it was the product of improper pressure, such as the lawyer's improper refusal to return documents or funds except upon release of the malpractice claim . . . . This is so even if the client was independently represented, because representation does not necessarily dispel improper pressure.
>
> Even absent improper pressure, such a settlement will not be enforced if the client or former client was not independently represented and, in addition, the settlement was not fair and reasonable to client or former client. Independent counsel includes a lawyer serving as inside legal counsel. The client or former client may, however, elect to enforce a settlement voidable under this Section.

Restatement (Third) of Law Governing Lawyers § 54 cmt. c (2000).

Second, the Restatement indicates that

> [f]or purposes of professional discipline, a lawyer may not . . . settle a claim for such liability with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.

Restatement (Third) of Law Governing Lawyers § 54(4)(b). A comment explains this provision.

> Second, and regardless of the enforceability of the agreement, under Subsection (4)(b) the lawyer is subject to disciplinary sanctions unless the client or former client was independently represented or the lawyer, before the settlement, informed the client or former client in writing that independent representation was appropriate in connection therewith.
>
> The rules stated in the Section apply because a client or former client may continue to rely on the good faith of the client's lawyer or former lawyer and thus surrender a valid claim for inadequate consideration. Also, many clients

improper refusal to return documents or funds except upon the release of the malpractice claim." Restatement (Third) of Law Governing Lawyers § 54 cmt. c.

> without independent representation cannot confront a legally knowledgeable adversary on an equal footing in a situation where their interests directly conflict. Lastly, lawyers should treat clients and former clients fairly and without deriving improper benefit from their knowledge of client confidences or from other advantage . . . .

Restatement (Third) of Law Governing Lawyers § 54 cmt. c (2000).

Thus, the Restatement provides a slight break to lawyers who hope to avoid ethics charges, but allows clients to back out of a malpractice settlement agreement which they entered into without a lawyer advising them.

States

States tend to take the more forgiving ABA Model Rule approach rather that the stricter Restatement approach.

- See, e.g., Texas LEO 593 (2/2010) (holding that a lawyer who has committed malpractice must advise the client, and must withdraw from the representation, but can settle the malpractice claim if the client has had the opportunity to seek independent counsel but has not done so; "Although Rule 1.06(c) provides that, if the client consents, a lawyer may represent a client in certain circumstances where representation would otherwise be prohibited, the Committee is of the opinion that, in the case of malpractice for which the consequences cannot be significantly mitigated through continued legal representation, under Rule 1.06 the lawyer-client relationship must end as to the matter in which the malpractice arose."; "[A]s promptly as reasonably possible the lawyer must terminate the lawyer-client relationship and inform the client that the malpractice has occurred and that the lawyer-client relationship has been terminated."; "Once the lawyer has candidly disclosed both the malpractice and the termination of the lawyer-client relationship to the client, Rule 1.08(g) requires that, if the lawyer wants to attempt to settle the client's malpractice claim, the lawyer must first advise in writing the now former client that independent representation of the client is appropriate with respect to settlement of the malpractice claim: 'A lawyer shall not . . . settle a claim for . . . liability [for malpractice] with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.'").

As might be expected, courts deal harshly with lawyers who violate these rules.

- In re Disciplinary Proceeding Against Greenlee, 143 P.3d 807, 811 (Wash. 2006) (suspending for six months a lawyer who arranged for his client to sign a release of a possible malpractice claim without complying with the Washington ethics rules' requirement that the client be advised in writing of the "'desirability of seeking'" advice from an independent lawyer).

- In re Carson, 991 P.2d 896 (Kan. 1990) (issuing a public censure of a lawyer who had settled a potential malpractice claim without the required written disclosure that the client should hire another lawyer to represent it).

A lawyer who has improperly settled a malpractice claim may be unable to discharge the settlement amount in bankruptcy.

- Selenberg v. Bates (In re Selenberg), 856 F.3d 393, 400 (5th Cir. 2017) (holding that a lawyer who had settled a malpractice case with a former client had not advised the client to obtain an independent lawyer in connection with a settlement, and therefore could not discharge the settlement amount in bankruptcy; "[W]e conclude that the bankruptcy court did not clearly err in finding that the parties effectively settled the malpractice claim. Moreover, the district court was correct in concluding that Selenberg had an ethical duty to advise Bates in writing of the desirability of seeking independent legal counsel before settling the malpractice claim. He did not do so. Thus, we hold that Selenberg violated Rule 1.8(h)(2) and thereby made a false representation under § 523(a)(2)(A).") N 7/21

Notably, lawyers settling claims or potential claims from their former clients may not include a provision in which the clients agree not to report the settling lawyers to bar disciplinary authorities.

Illinois deals with this issue in an explicit ethics rule.

> It is professional misconduct for a lawyer to . . . enter into an agreement with a client or former client limiting or purporting to limit the right of the client or former client to file or pursue any complaint before the Illinois Attorney Registration and Disciplinary Commission.

Illinois Rule 8.4(h).

This seems to be the rule nationwide.

- ABA/BNA Lawyers' Manual of Professional Conduct § 51:1110 ("It is generally agreed that settlement of a fee or malpractice dispute can never be conditioned on the client's consent not to file a grievance or report the misconduct to the appropriate discipline area authority."; citing cases from Colorado, New Jersey, New York, Oklahoma and Maryland, and legal ethics opinions from Arizona, District of Columbia and North Carolina).

- New Jersey LEO 721 (6/22/11) ("[A]n attorney may not seek or agree, as a condition of settlement of an underlying dispute, that the client not file an ethics grievance with regard to conduct of the attorney in the matter or withdraw a grievance already filed. Such an agreement is prejudicial to the administration of justice.").

- Utah LEO 16-02 (3/23/16) ("A lawyer may neither request nor agree to limit his or her duties to the administration of justice regarding filing or participating in a bar complaint."; "A lawyer may not request that a present or former client refrain from filing or participating in a bar complaint as a condition to settling disputes between the client and the lawyer."; "A lawyer may not participate in an agreement that limits the lawyer's liability for malpractice or prohibits the lawyer from accepting future clients except as permitted by rule or law.").

A lawyer may even face professional discipline for representing another lawyer in such a settlement.

- Ky. Bar Ass'n v. Unnamed Attorney, 414 S.W.2d 412, 414 (Ky. 2013) (privately reprimanding a lawyer who represented another lawyer and arranged for a settlement in which that lawyer's former client agreed to settle a complaint against that lawyer for overcharging on a probate matter and including within the settlement agreement the former client's promise not to cooperate with bar disciplinary authorities; "During the course of Unnamed Attorney's representation of a fellow attorney in a disciplinary matter, Unnamed Attorney negotiated a settlement between his client and the complaining party. The terms of the negotiated settlement have now resulted in charges of professional misconduct against Unnamed Attorney because the terms of the settlement agreement required the complaining party to refuse to cooperate voluntarily with the Kentucky Bar Association in any investigation into the matter." (footnote omitted); "The terms of the settlement required Unnamed Attorney's client to refund a $30,000 fee in return for Doe's withdrawal of her bar complaint. Specifically, paragraph 4 of the settlement agreement stated: 'Withdrawal of Bar Complaint. [Jane Doe] agrees to take all action legally necessary to immediately withdrawal [sic] of the Bar Complaint and agrees to the extent permitted by law, to resue to voluntarily assist or to voluntarily provide information to the KBA or anyone else, regarding the Bar Complaint unless directed to do so pursuant to subpoena, court order or other binding authority.'").

Best Answer

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

b 9/21

Clients Settling Claims Over Their Lawyers' Objection

Hypothetical 20

You have not been particularly successful as a plaintiff's lawyer, but about two years ago you hit the jackpot. Your neighbor's uncle hired you to represent him in an enormous fraud and breach of contract case against the company that had purchased his company when he retired. The case could not have been progressing any more smoothly. You nailed the defendant's chief executive officer in a deposition. A great damages expert estimates your client's damages at $30,000,000. The trial starts in about two months, and you expect to recover that amount and perhaps punitive damages.

Your client just called you this morning with horrible news – he has been diagnosed with Stage IV pancreatic cancer, and has been given only two months to live. He tells you that he does not want to spend the last two months of his life preparing for trial, and he insists that you drop the case.

May your client drop the case over your objection?

YES

Analysis

ABA Model Rule 1.2(a) governs the allocation of authority between clients and their lawyers.

> Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. <u>A lawyer shall abide by a client's decision whether to settle a matter</u>. 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.

ABA Model Rule 1.2(a) (emphasis added).

The first accompanying Comment reinforces clients' power to settle civil matters.

> Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. <u>The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client</u>. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

ABA Model Rule 1.2 cmt. [1] (emphasis added).

<u>Best Answer</u>

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

N 9/21

File Ownership if Clients Have Paid Their Lawyers

Hypothetical 21

You represented a local car dealer in all of her estate planning work until she fired you. The client fully paid all of your bills, but hinted that she might sue your firm for malpractice. Your former client has now demanded a copy of your entire file. Your partners are urging you to at least bill the former client for making a copy of the materials if you are obligated to send them to her.

(a) Must you give your former client the file?

YES PROBABLY

(b) May you bill the former client for copying the file?

YES

(c) May you retain a copy of the file over your former client's objections?

YES

Analysis

Lawyers can face two separate scenarios involving the files they create while representing clients. First, lawyers must determine what portions of their file they must give clients or former clients who have fully paid them. Second, lawyers who have not been fully paid must assess whether they can withhold all or part of the file until their clients pay them (relying on what is called a "retaining" lien).

Although not involving lawyer files, it is worth mentioning two other types of liens that lawyers might assert.

Lawyers representing clients who may recover a judgment might assert a lien over that judgment (this is commonly called a "charging" lien). Lawyer most frequently assert a "charging" lien in contingent fee cases, because those lawyers generally are not paid during the course of a representation. But lawyers representing clients under some alternative fee arrangement might assert a "charging" lien even if they have been paid an hourly rate through the representation (such as a lower-than-normal hourly rate, to be supplemented by a contingent fee payment upon recovery of a judgment).

The other type of lien involves something other than the file for a future judgment. For instance, lawyers might arrange for some security interest in the client's house or other asset -- and assert a lien over that asset if the client does not pay the underlying obligation. Those types of liens are generally governed by ABA Model Rule 1.8 or its state equivalent, which applies to business relationships between lawyers and their clients.

"Retaining" liens generate perhaps the most controversy, because they essentially involve the lawyers holding their files "hostage" until the clients pay them.

However, even lawyers whose clients have fully paid them must deal with file ownership issues.

And the stakes can be high. Lawyers may face profession discipline for not turning over files to which a former client is entitled.

- In re Thai, 987 A.2d 428, 430, 430-31(D.C. 2009) (suspending for sixty days a D.C. lawyer who was tardy in turning over a client's files to a former client; "The only issue on which the Board and Bar Counsel disagree is whether respondent failed to provide the file requested by his client in a timely manner resulting in a violation of Rule 1.16(d). The Hearing Committee concluded that respondent had violated the rule and Bar Counsel agreed. The Board, however, concluded that the delay in returning the client's file was not substantial enough to rise to the level of a violation of professional responsibility. We disagree."; "The pertinent part of Rule 1.16(d) requires lawyers who are terminating their representation of a client to 'make timely steps to the extent reasonably practicable to protect a client's interests' and includes 'surrendering papers and property to which the client is entitled' among the lawyer's duties. The Board appears to draw a distinction between this rule's requirement to 'take timely steps' and an earlier rule which required that the client receive materials 'promptly.' See DR-9-102 (B)(4). Regardless of whether this change actually alters the standard of conduct required by the rule, respondent's actions in this case were an obvious violation of both the letter and spirit of the rule.'"; "In concluding otherwise, the Board relies upon the fact that it took only five days for the client to receive his file after requesting it. On its face, the comparatively short delay appears in stark contrast to some of our prior cases where sanctions followed delays of months or years in responding to a client request. See, e.g., In re Arneja, 790 A.2d 552, 558 (D.C. 2002) (imposing sanctions for attorney's year-and-a-half delay in delivering client's file. The sanction was a suspension from the practice of law for one year.); In re Landesberg, 518 A.2d 96, 97, 102 (D.C. 1986) (imposing suspension on attorney for holding client file for two years after conceding he had no right to retain it. The sanction was a suspension from the practice of law for 60 days and restitution.); In re Russell, 424 A.2d 1087, 1088 (D.C. 1980) (imposing suspension of six months for delay of several years following client's request for file). In this case though, the five-day delay represented a significant proportion of the thirty days respondent's client had to appeal his deportation order."; "The conclusion that the delay was insignificant also overlooks the fact that, during those five days, respondent repeatedly denied requests for the file and actively obstructed the efforts of his former client and the successor attorney to obtain the file. We have previously stated that 'a client should not have to ask twice' for his file. In re Landesberg, 518 A.2d at 102. We have also said the client is owed an 'immediate return' of his file 'no matter how meager.' In re Russell, 424 A.2d at 1088; see also In re Hager, 812 A.2d 904 (D.C. 2002) (agreeing that Rule 1.16(d) 'unambiguously requires an attorney to surrender a client's file upon termination of the representation' and quoting In re Bernstein, 707 A.2d 371, 375 (D.C. 1998)). Under the circumstances here, it cannot be said that respondent took 'timely steps' to do anything but further hinder his former client from securing alternative representation in this pressing matter."; "Therefore we conclude that, in addition to the violations found by the Board, respondent violated his duty with respect to the termination of his representation under Rule 1.16(d).").

Lawyers' Duty to Maintain Client Files

ABA Model Rule 1.15 requires lawyers to safeguard the client's or a third person's property in the lawyer's possession. Although that rule generally focuses on money, it also extends to documents that clients give their lawyers.

General ABA rules governing diligence, communication, etc., implicitly recognize that lawyers will create files while representing clients. Some ABA Model Rules specifically require written communications with clients, such as those dealing with certain types of conflicts. Lawyers' general diligence duties presumably require lawyers to memorialize their work, which will involve file creation. And ABA Model Rule 1.16(d) recognizes this file creation in addressing lawyers' obligations upon the representation's end. This is discussed below.

The Restatement addresses the lawyer's obligation to safeguard property that the client has given the lawyer, or which the lawyer has created during the representation.

> (1) A lawyer must take reasonable steps to safeguard documents in the lawyer's possession relating to the representation of a client or former client.
>
> (2) On request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse.
>
> (3) Unless a client or former consents to non-delivery or substantial grounds exist for refusing to make delivery, a lawyer must deliver to the client or former client, at an appropriate time and in any event promptly after the representation ends, such originals and copies of other documents possessed by the lawyer relating to the representation as the client or former client reasonably needs.

Restatement (Third) of Law Governing Lawyers § 46(1), (2), (3). A comment provides a further explanation of this duty.

> A lawyer's duty to safeguard client documents does not end with the representation . . . . It continues while there is a reasonable likelihood that the client will need the documents, unless the client has adequate copies and originals, declines to receive such copies and originals from the lawyer, or consents to disposal of the documents.
>
> The lawyer need take only reasonable steps to preserve the documents. For example, a law firm is not required to preserve client documents indefinitely and may destroy documents that are outdated or no longer of consequence.

> Similarly, a lawyer who leaves a firm may leave with that firm the documents of clients the lawyer represented while with the firm, provided that the lawyer reasonably believes that the firm has appropriate safeguarding arrangements. So long as a lawyer has custody of documents, the lawyer must take reasonable steps in arrangements for storing, using, destroying, or transferring them. If the jurisdiction allows a lawyer's practice to be sold to another lawyer, the lawyer must comply with the rules governing the sale. If a firm dissolves, its members must take reasonable steps to safeguard documents continuing to require confidentiality, for example by entrusting them to a person or depository bound by appropriate restrictions.

Restatement (Third) of Law Governing Lawyers § 46 cmt. b.

Electronic Client Files

State bars generally permit lawyers to essentially retain all of their files in electronic form -- as long as that way of maintaining the files does not prevent lawyers from complying with all of the applicable ethics rules.

- N.Y. City LEO 2008-1 (7/2008) ("With respect to the electronic documents that the lawyer retains, the lawyer is not under an ethical obligation to organize those documents in any particular manner, or to store those documents in any particular storage medium, so long as the lawyer ensures that the manner of organization and storage does not (a) detract from the competence of the representation or (b) result in the loss of documents that the client may later need and may reasonably expect the lawyer to preserve. To those ends, electronic documents other than e-mails present less difficulty because they are frequently stored in document management systems in which they are typically coded with several identifying characteristics, making it easier to locate and assemble them later. E-mails raise more difficult organizational and storage issues. Some e-mail systems automatically delete e-mails after a period of time, so the lawyer must take affirmative steps to preserve those e-mails that the lawyer decides to save. In addition, e-mails generally are not coded, or otherwise organized, to facilitate their later retrieval. Thus, a practice with much to commend it is to organize saved e-mails to facilitate their later retrieval, for example, by coding them or saving them to dedicated electronic files. Otherwise, it may be exceedingly difficult and expensive for the lawyer to retrieve those e-mails, and, as discussed in the Opinion, the lawyer must charge the client for retrieval costs that could reasonably have been avoided. In New York, a client has a presumptive right to the lawyer's entire file in connection with a representation, subject to narrow exceptions. The lawyer may charge the client a reasonable fee, based on the lawyer's customary schedule, for gathering and producing electronic documents. That fee may reflect the reasonable costs of retrieving electronic documents from their storage media and reviewing those documents to determine the client's right of access. It is prudent for lawyer and client to discuss the retention, storage, and retrieval of electronic documents at the outset of the engagement and to consider memorializing their agreement in a retention letter.").

- Arizona LEO 07-02 (6/2007) ("In appropriate cases, a lawyer may keep current and closed client files as electronic images in an attempt to maintain a paperless law practice or to more economically store files. After digitizing paper documents, a lawyer may not, without client consent, destroy original paper documents that belong to or were obtained from the client. After digitizing paper documents, a lawyer may destroy copies of paper documents that were obtained from the client unless the lawyer has reason to know that the client wants the lawyer to retain them. A lawyer has the discretion to decide whether to maintain the balance of the file solely as electronic images and destroy the paper documents.").

- Florida LEO 06-1 (4/10/06) ("Lawyers may, but are not required to, store files electronically unless: a statute or rule requires retention of an original document, the original document is the property of the client, or destruction of a paper document adversely affects the client's interests. Files stored electronically must be readily reproducible and protected from inadvertent modification, degradation or destruction.").

- New Hampshire LEO 2005-06/3 (1/2006) ("Therefore, if a client requests a copy of her file, the firm has an obligation to provide all files pertinent to representation of that client, regardless of the burden that it might impose upon the firm to do so. . . . That burden can be managed, in any event, through computer word search functions or other means that are routinely used for discovery or other purposes. As in discovery-related matters, it is incumbent upon the firm to manage its electronic and other files in a way that will allow for release of a file to a client without releasing other information that might harm a third party.").

- North Carolina LEO 2002-5 (10/18/02) ("If a lawyer determines that an e-mail communication (whether in electronic format or hard copy) should be retained as a part of a client's file, at the time of the termination of the representation, the lawyer should provide the client with a copy of the retained e-mail communication, together with the other documents in the client's file, subject to the limitations set forth in CPR 3."; "Rule 1.16(d) requires the lawyer to take 'reasonably practicable' steps to protect the interests of the client upon termination. In light of the widespread availability of computers, this standard is met if Attorney provides Client with a computer disk containing the retained e-mail communications or otherwise transmits them to Client in an electronic format.").

- North Carolina RPC 234 (10/18/96) (holding that a lawyer can store clients files in electronic form; also noting that an earlier opinion required a lawyer to retain inactive client files for six years).

- New York LEO 680 (1/10/96) ("[A]ny lawyer who chooses to transfer existing paper records to computer images must insure that all required copies are in fact transferred before any paper records are disposed of; the lawyer who fails to do so acts at the peril of engaging in spoliation, and will be at risk to suffer the severe consequences of such conduct. DR 9-102(I) (failure to maintain and produce records as specified by disciplinary rules subjects lawyer to discipline)."; "Records required to be maintained by the Code in the form of 'copies' may be stored by reliable electronic means, as noted above, and records that are initially created by electronic means may be retained in that form, but other records that are specifically described by the Code must be retained in their original format.").

The increasing use of electronic files has generated its own issues. For instance, some bar have understandably concluded that lawyers do not need to retain hard copies of documents if those documents are available electronically.

- Arizona LEO 15-02 (6/2015) ("In general, a lawyer has an ethical obligation to provide, at the client's request upon termination of the representation, all documents reflecting work performed for the client. A lawyer's obligation to preserve documents reflecting work performed for the client does not, however, extend to electronic or other documents that are duplicative of other documents generated or received in the course of the representation, incidental to the representation, or not typically maintained by a working lawyer, unless the lawyer has reason to believe that, in all the circumstances, the client's interests require that these documents be preserved for eventual turning over to the client. To the extent Ops. 08-02 and 13-02, or earlier committee opinions, may be read to suggest otherwise, they are withdrawn."; "Where a client makes such a request, a lawyer does not act unethically by charging the client for additional copies of documents provided during the representation free of charge. Consistent with Comment 9 to ER 1.16, a lawyer may charge the client for additional copies provided the client has received a copy of the documents.").

Some bars have also wrestled with the length of time that a lawyer should keep a file after a matter has closed.

- Cruz v. Dollar Tree Stores, Inc., Case No. 07-04012-SC, 2012 U.S. Dist. LEXIS 68685, at *3, *6 (N.D. Cal. May 16, 2012) ("Rule 4-100(B)(3) requires an attorney to retain a complete record of all client funds and other properties coming into the possession of the attorney for at least five years after the conclusion of a litigation." (emphasis added); "Rule 4-100 deals primarily with preserving the identity of funds and other property held in trust for a client. While the scope of a client's property under Rule 4-100 may have been expanded to include attorney work product, . . . the Court is aware of no authority which has further broadened the rule so as to encompass the confidential information disclosed by an opposing party through discovery. Indeed, it strains credulity to suggest that another party's confidential materials become the property of a client when they are produced in discovery pursuant to a protective order. Further, reading Rule 4-100 so broadly would hamper the private resolution of discovery disputes. Parties might be unwilling to stipulate to protective orders or otherwise disclose confidential documents if they know that those documents could be retained by opposing counsel indefinitely." (emphasis added)).

- Illinois LEO 12-06 (1/2012) ("A lawyer must maintain records that identify the name and last known address of each client, and reflect whether the client's representation is active or concluded, for an indefinite period of time. A lawyer must keep complete records of trust account funds and other property of clients or third parties held by the lawyer and must preserve such records for at least seven years after termination of the representation. A lawyer must also maintain all financial records related to the lawyer's practice for not less than seven years. For other materials, if appropriate steps are taken to return or preserve actual client property or items with intrinsic value, then it is generally permissible for a legal services program to dispose of routine case file materials five years after case closing. Other considerations, such as administrative expense and the six-year Illinois statute of repose, suggest a general retention period of most lawyers of at least seven years. Any method of disposal must protect the confidentiality of client information." (emphases added); "There appears to be no consensus on the minimum period for retention of lawyer file materials no longer needed for a client's representation, but at least two other state bar opinions agree that five years after the conclusion of a matter is a reasonable option. See Arizona Opinion 08-02 (December 2008) and West Virginia 2002-01 (March 2002)."; "Given that the statute of repose for professional liability claims against lawyers, 735 ILCS 5/13-214.3(c), is six years, retaining files for some reasonable period beyond six years seems prudent. A general retention period of at least seven years after termination of the representation would comply with two of the Supreme Court's three record-keeping rules and keep a lawyer's file available in the event of a claim." (emphasis added)).

- Missouri LEO 127 (5/19/09) ("Rule 4-1.15(j) requires attorneys to maintain the file for a period of ten years, or for such other period as agreed upon with the client. However, no rule or previous opinion addresses the issue of whether the file may be maintained in electronic form." (emphasis added)).

- Arizona LEO 08-02 (12/2008) (holding that a lawyer's file belonged to the clients and not to the lawyer; indicating that a lawyer determining how long to maintain a client's files "should consider the general purposes of file retention stated above along with specific factors articulated in Op. 98-07: the client's foreseeable interests; the applicable statutes of limitations; the length of the client's sentence or probation in criminal cases; and the uses of the material in question to the former client"; noting an earlier Arizona opinion that recommended indefinite file retention for "'probate or estate matters, homicide cases, life sentence cases and lifetime probation case.'"; "File retention can be costly due to the volume of cases to be stored and the sheer quantity of documents comprising each individual file. In an effort to minimize file-storage costs, lawyers have asked whether they can purge client files of nonessential or irrelevant documents prior to storage. Because the client is entitled to the file in its entirety, and not just those portions that the lawyer deems to be essential or relevant, lawyers should not conduct such a purge without first consulting the client. The file is for the benefit of the client and any decisions about which documents to keep and which documents to purge should focus on the client's future need for the documents and the possibility of future litigation to protect the interests of the client, not the lawyer's possible future use for the documents."; noting that lawyers may intend to give the entire file to the client upon termination of the representation; holding that "lawyers should not purge files of documents prior to storage without notice to the client and permission from the client"; "In the absence of a file-retention policy, a lawyer must make reasonable efforts to notify the client prior to destroying the file. If the lawyer is unsuccessful, the lawyer must then determine whether applicable law requires preserving the file. <u>If the law does not require further preservation, the lawyer should safeguard the client file for a period of time equal to that under Arizona law for the abandonment of personal property.</u> . . . After the file may be regarded as abandoned, then the lawyer must carefully review the file to confirm that no procedural or statutory requirements obligate the lawyer to retain the file further, that there will be no further litigation, and that there is no longer any substantial purpose served in retaining the file. Given these obligations, creating and implementing a policy for the retention and destruction may actually decrease the amount of time a file must otherwise be preserved." (emphasis added)).

- Iowa LEO 08-02 (3/4/08) ("Unless the lawyer's insurance carrier requires a longer period of retention: (a) a lawyer's written file destruction policy should be <u>no shorter than six years</u> after the last legal service was rendered as evidence by date of the file closing letter; or (b) <u>in the event the lawyer does not have a written file destruction policy in place or it was not applicable to the matter in question, the file may be destroyed ten years</u> after the date the last legal service was rendered in compliance with the protocol described in paragraph 5." (footnote omitted) (emphases added); also advising lawyers to explain in their initial written fee arrangement how they will handle closed clients files.).

- Colorado LEO 104 (4/17/99) ("The Committee notes that there are certain circumstances in which the lawyer is required to maintain copies of certain documents for a period of time regardless of production to the client. See, e.g., C.R.C.P., Chapter 23.3, Rules Governing Contingent Fees, Rule 4(b) (retention of a copy of each contingent fee agreement for a period of six years); Colo. RPC 1.15(a), (complete records of [trust] account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation)." (emphases added); "Preservation of drafts of documents in the ordinary course of the attorney's business is not a matter addressed by this opinion. However, if a lawyer does retain such drafts, they generally are papers to which the client is entitled." (emphases added)).

- New York City LEO 1999-05 (1999) ("[W]e conclude that a retiring lawyer -- or one whose firm is dissolving -- may communicate with clients to arrange the return of original Wills to them or to obtain consent to dispose of those Wills. However, as to those clients who cannot be located, the lawyer's obligation to retain the Wills in safekeeping continues indefinitely or in accordance with law. The original Wills remaining in the lawyer's possession could be placed in storage or in the custody of a successor attorney (indexed and stored in a manner that will protect client secrets and confidences), unless it is appropriate to use available procedures for filing original Wills with a court for safekeeping.").

- North Carolina RPC 234 (10/18/96) (holding that a lawyer can store clients files in electronic form; also noting that an earlier opinion required a lawyer to retain inactive client files for six years).

Bars have explained that clients and lawyers can agree in a retainer letter how long the lawyer will retain the file.

- N.Y. City LEO 2010-1 (2010) ("Retainer agreements and engagement letters may authorize a lawyer at the conclusion of a matter or engagement to return all client documents to the client or to discard some or all such documents, subject to certain exceptions."; offering the following sample provision: "Once our engagement in this matter ends, we will send you a written notice advising you that this engagement has concluded. You may thereafter direct us to return, retain or discard some or all of the documents pertaining to the engagement. If you do not respond to the notice within (60) days, you agree and understand that any materials left with us after the engagement ends may be retained or destroyed at our discretion. Notwithstanding the foregoing, and unless you instruct us otherwise, we will return and/or preserve any original wills, deeds, contracts, promissory notes or other similar documents, and any documents we know or believe you will need to retain to enforce your rights or to bring or defend claims. You should understand that 'materials' include paper files as well as information in other mediums of storage including voicemail, email, printer files, copier files, facsimiles, dictation recordings, video files, and other formats. We reserve the right to make, at our expense, certain copies of all documents generated or received by us in the course of our representation. When you request copies of documents from us, copies that we generate will be made at your expense. We will maintain the confidentiality of all documents throughout this process."; "Our own files pertaining to the matter will be retained by the firm (as opposed to being sent to you) or destroyed. These firm files include, for example, firm administrative records, time and expense reports, personnel and staffing materials, and credit and account records. For various reasons, including the minimization of unnecessary storage expenses, we reserve the right to destroy or otherwise dispose of any documents or other materials retained by us within a reasonable time after the termination of the engagement.").

- Iowa LEO 08-02 (3/4/08) ("Unless the lawyer's insurance carrier requires a longer period of retention: (a) a lawyer's written file destruction policy should be <u>no shorter than six years</u> after the last legal service was rendered as evidence by date of the file closing letter; or (b) <u>in the event the lawyer does not have a written file destruction policy in place or it was not applicable to the matter in question, the file may be destroyed ten years</u> after the date the last legal service was rendered in compliance with the protocol described in paragraph 5." (footnote omitted) (emphases added); also advising lawyers to explain in their initial written fee arrangement how they will handle closed clients files).

(a) Ethics and property law considerations affect states' approach to clients' ownership of files generated by their lawyers.

It is important to recognize the distinction between a lawyer's <u>ethics</u> duty to turn over all or part of a file to a former client (either with or without the former client's request) and a lawyer's obligation to produce documents in response to a discovery request in a dispute between the lawyer and the former client. The normal discovery rules generally define the latter duty.

ABA Model Rules

In dealing with the ethics side of this issue, the ABA Model Rules takes a surprisingly neutral and state-specific approach.

> Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled . . . . The lawyer may retain papers relating to the client to the extent permitted by other law.

ABA Model Rule 1.16(d) (emphasis added).

Presumably, such "other law" includes the ABA Model Rule governing any property that clients give their lawyers for safekeeping. ABA Model Rule 1.15. Lawyers generally must relinquish those to clients when the representation ends (or even before then, if the client requests return of that property).

The more complicated issue involves documents that the lawyers created or collected while representing the client.

ABA LEO 471 (7/1/15)

In 2015, the ABA addressed fully paid lawyers' ethics obligations to provide portions of the lawyer's files to former clients. ABA LEO 471 (7/1/15).

The ABA largely rejected the majority "entire file" approach, under which lawyers must point to an exception when withholding any portion of their files requested by a client or former client. The ABA instead adopted the "end product," approach, although indicating lawyers may have a duty to surrender internal law firm documents, drafts, etc., if withholding those would prejudice former clients -- especially in the context of the lawyer's unfinished work.

Under ABA Model Rule 1.15, the lawyer must return documents received from the client -- because those documents constitute property that the client has given to the lawyer.

Under ABA Model Rule 1.16(d), lawyers must take "reasonably practicable" steps to protect former clients upon a representation's termination -- including "surrendering papers and property to which client is entitled." ABA LEO 471 (7/1/15). However, the rule does not describe which of the lawyer-created documents lawyers must surrender.

Most states follow the "entire file" approach, which:

> assumes that the client has an expansive general right to materials related to the representation and retains that right when the representation ends.

Id.

Under that standard, lawyers may withhold documents requested by clients or former clients only when a "specific exception applies."

> Commonly recognized exceptions to surrender include: materials that would violate a duty of non-disclosure to another person; materials containing a lawyer's assessment of the client; materials containing information, which if released, could endanger the health, safety, or welfare of the client or others; and documents reflecting only internal firm communications and assignments.

Id. (footnotes omitted).

A minority of states follow the "end-product approach," which requires a more limited surrender of files to former clients. Under this approach, lawyers must surrender:

> correspondence by the lawyer for the benefit of the client; investigative reports and other discovery for which the client has paid; and pleadings and other papers filed with a

> tribunal. The client is also entitled to copies of contracts, wills, corporate records, and other similar documents prepared by the lawyer for the client.

Id. (footnotes omitted). Lawyers may decline to surrender other documents.

> Administrative materials related to the representation, such as memoranda concerning potential conflicts of interest, the client's creditworthiness, time and expense records, or personnel matters, are not considered materials to which the client is entitled under the end-product approach. Additionally, the lawyer's personal notes, drafts of legal instruments or documents to be filed with a tribunal, other internal memoranda, and legal research are viewed as generated primarily for the lawyer's own purpose in working on a client's matter, and, therefore, need not be surrendered to the client under the end product approach.

Id. (footnotes omitted). Under this "end-product" approach, "[f]inal documents supersede earlier drafts." Id.

The ABA endorsed the minority "end-product" approach, which it had articulated in ABA Informal LEO 1376 (1977).

However, lawyers in some circumstances may be required to surrender documents other than "end-product" documents:

> For example, when the representation is terminated before the matter is concluded, protection of the client's interest may require the lawyer to provide the client with paper or property generated by the lawyer for the lawyer's own purpose.

Id. Although the determination of a matter before completion does not require lawyers to surrender all internal documents:

> at a minimum a lawyer's obligation under the Rules reasonably gives rise to an entitlement to those materials that would likely harm the client's interest if not provided.

Id.

In applying these general principles to a hypothetical client municipality which terminated a ten-year representation, the ABA explained that the terminated lawyers must surrender -- for completed matters:

> any materials provided to the lawyer by the municipality; legal documents filed with a tribunal -- or those completed, ready to be filed, but not yet filed; executed instruments like contracts; orders or other records of a tribunal; correspondence issued or received by the lawyer in connection with the representation of the municipality on relevant issues, including email and other electronic correspondence that has been retained according to the firm's document retention policy; discovery or evidentiary exhibits, including interrogatories and their answers, deposition transcripts, expert witness reports and witness statements, and exhibits; legal opinions issued at the request of the municipality; and third party assessments, evaluations, or records paid for by the municipality.

Id. (footnotes omitted). On the other hand, the lawyers in the hypothetical scenario do not have to surrender:

> [d]rafts or mark-ups of documents to be filed with a tribunal; drafts of legal instruments; internal legal memoranda and research materials; internal conflict checks; personal notes; hourly billing statements; firm assignments; notes regarding an ethics consultation; a general assessment of the municipality or the municipality's matter; and documents that might reveal the confidences of other clients.

Id.

For "a matter that is not completed," the lawyer may be obligated to provide former clients:

> materials the lawyer generated for internal law office use primarily for the lawyer's own purpose in working on a client's matter.

Id.

For instance, the lawyer's must surrender the following documents for uncompleted matters:

> (1) internal notes and memos that were generated primarily for the lawyer's own purpose in working on the municipality's [former client] matter, (2) for which no final product has emerged, and (3) the materials should be disclosed to avoid harming the municipality's interest, then the lawyer must also provide the municipality with these materials. For example, if in a continuing matter a filing deadline is imminent, and as part of working on the municipality's matter the lawyer has drafted documents to meet this filing deadline, but no final document has emerged, then the most recent draft and relevant supporting research should be provided to the municipality.

Id.

A lawyer's earlier supplying of documents during the representation "is not dispositive" of whether the lawyer must provide the materials again upon termination.

Id.

Similarly, the lawyer's earlier furnishing of document is not dispositive

> of who -- the lawyer or the client -- should pay for the time and cost of duplication of such materials upon termination of the representation.

Id.

In a footnote, the ABA encouraged lawyers "to explain in their retainer letters who is responsible for the costs of copying and under what circumstances." Id. n.35. Similarly, the ABA agreed with the reasoning of D.C. LEO 357 -- which explained that "'[l]awyers and clients may enter into reasonable agreements addressing how the client's files will be maintained, how copies will be provided to the client if requested, and who will bear what costs associated with providing the files in a particular form;

entering into such agreements is prudent and can help avoid misunderstandings.'" D.C. LEO 357 (10/2012).

Restatement

The Restatement deals with a lawyer's file in two sections -- articulating a general rule and also explaining a lawyer's right to retain the file under certain conditions.

As a general matter, the Restatement explains that:

> [o]n request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse.
>
> . . . Unless a client or former consents to non-delivery or substantial grounds exist for refusing to make delivery, a lawyer must deliver to the client or former client, at an appropriate time and in any event promptly after the representation ends, such originals and copies of other documents possessed by the lawyer relating to the representation as the client or former client reasonably needs.

Restatement (Third) of Law Governing Lawyers § 46(2), (3) (emphasis added).

Another Restatement provision discusses the client's right to the documents.

> As stated in Subsection (3), a client is entitled to retrieve documents in possession of a lawyer relating to representation of the client. That right extends to documents placed in the lawyer's possession as well as to documents produced by the lawyer, subject to the right to retain property under a valid lien . . . and to other justifiable grounds as discussed hereafter.
>
> A client is ordinarily entitled to inspect and copy at reasonable times any document relating to the representation in the possession of the client's lawyer . . . . A client's failure to assert the right to inspect and copy files during the representation does not bar later enforcement of

> that right, so long as the lawyer has properly not disposed of the documents . . . .

Restatement (Third) of Law Governing Lawyers § 46 cmt. c.

A comment describes the type of documents that a lawyer must furnish the client even without the client asking.

> Even without a client's request or the discovery order of a tribunal, a lawyer must voluntarily furnish originals or copies of such documents as a client reasonably needs in the circumstances. In complying with that standard, the lawyer should consider such matters as the client's expressed concerns, the client's possible needs, customary practice, the number of documents, the client's storage facilities, and whether the documents originally came from the client. The client should have an original of documents such as contracts, while a copy will suffice for such documents as legal memoranda and court opinions. Except under extraordinary circumstances -- for example, when a client retained a lawyer to recover and destroy a confidential letter -- a lawyer may keep copies of documents when furnished to a client.
>
> If not made before, delivery must be made promptly after the representation ends. The lawyer may withhold documents to induce the client to pay a bill only as stated in § 43. During the representation, the lawyer should deliver documents when the client needs or requests them. The lawyer need not deliver documents when the client agrees that the lawyer may keep them or where there is a genuine dispute about who is entitled to receive them . . . .

Restatement (Third) of Law Governing Lawyers § 46 cmt. d (2000).

Another comment describes three situations in which a lawyer may refuse to provide the client access to the file.

First,

> [a] lawyer may deny a client's request to retrieve, inspect, or copy documents when compliance would violate the lawyer's duty to another . . . . That would occur, for example, if a court's protective order had forbidden copying of a document obtained during discovery from another party, or if the lawyer

> reasonably believed that the client would use the document to commit a crime . . . . Justification would also exist if the document contained confidences of another client that the lawyer was required to protect.

Restatement (Third) of Law Governing Lawyers § 46 cmt. c (emphasis added).

Second,

> [u]nder conditions of extreme necessity, a lawyer may properly refuse for a client's own benefit to disclose documents to the client unless a tribunal has required disclosure. Thus, a lawyer who reasonably concludes that showing a psychiatric report to a mentally ill client is likely to cause serious harm may deny the client access to the report . . . . Ordinarily, however, what will be useful to the client is for the client to decide.

Id. (emphasis added).

Third,

> [a] lawyer may refuse to disclose to the client certain law-firm documents reasonably intended only for internal review, such as a memorandum discussing which lawyers in the firm should be assigned to a case, whether a lawyer must withdraw because of the client's misconduct, or the firm's possible malpractice liability to the client. The need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved. Even in such circumstances, however, a tribunal may properly order discovery of the document when discovery rules so provide. The lawyer's duty to inform the client . . . can require the lawyer to disclose matters discussed in a document even when the document itself need not be disclosed.

Id. (emphasis added).

The Restatement also addresses the lawyer's right to be paid for this effort.

> Because a lawyer's normal duties include collection and delivery of documents that came from the client or that the client should have, a lawyer paid by the hour should be compensated for time devoted to that task. Copying expenses may be separately billed when allowed under the

> principles stated in § 38(3)(a) and Comment e thereto. When the client seeks copies that the lawyer was not obliged to furnish in the absence of such a request, the lawyer may require the client to pay the copying costs.

Restatement (Third) of Law Governing Lawyers § 46 cmt. e (emphases added).

Separate Restatement provisions deal with the lawyer's obligation to return the client's or a non-client's property.

> (1) Except as provided in Subsection (2), a lawyer must promptly deliver, to the client or non-client so entitled, funds or other property in the lawyer's possession belonging to a client or non-client.
>
> (2) A lawyer may retain possession of funds or other property of a client or non-client if:
>
> (a) the client or non-client consents;
>
> (b) the lawyer's client is entitled to the property, the lawyer appropriately possesses the property for purposes of the representation, and the client has not asked for delivery of the property;
>
> (c) the lawyer has a valid lien on the property (see § 43);
>
> (d) there are substantial grounds for dispute as to the person entitled to the property; or
>
> (e) delivering the property to the client or non-client would violate a court order or other legal obligation of the lawyer.

Restatement (Third) of Law Governing Lawyers § 45. A comment explains the timing of this requirement.

> A lawyer's basic obligation under this Section is to deliver property of a client or non-client promptly to that client or person unless an exception stated in Subsection (2) applies. The obligation covers all kinds of property. For example, a lawyer who has received a deposit against future fee bills must return the unearned portion of the deposit when the representation ends . . . .

> How soon the delivery must occur depends on the circumstances . . . . When the owner asks for delivery of the property, the lawyer must comply with the request. If the lawyer knows that the owner has need to possess the property by a given time, the lawyer should if reasonably possible deliver it by that time. The lawyer ordinarily should not delay longer than necessary to record and transmit the funds . . . . A client entitled to proceeds of a judgment normally should not have to wait more than a few days to receive the property from the client's lawyer. When the representation ends, moreover, any delay in delivering the client's property can hamper the client's affairs . . . . On the other hand, during the representation a lawyer is not required, in the absence of client request, to deliver items that might turn out to be needed for the representation . . . .

Restatement (Third) of Law Governing Lawyers § 45 cmt. b.

The next Restatement provision deals with the client's consent to the lawyer's continued possession of the property.

> Clients and others often ask a lawyer to retain possession of property. No formal contract is required. Most clients would expect that during a representation the lawyer would keep property needed for further steps in the representation, unless the client indicates to the contrary. Thus, during the representation a lawyer need not return documents or court exhibits unless the client so requests. For treatment of documents after the representation ends, see § 46. In some circumstances, for example, when the client agrees that the lawyer will invest client funds, the arrangement constitutes a business transaction with the client subject to the requirements of § 126.

Restatement (Third) of Law Governing Lawyers § 45 cmt. c.

The Restatement deals with the lawyer's obligation if there is a dispute about the property.

> When it is unclear who is entitled to property in the lawyer's possession, the lawyer is not required to deliver the disputed property to either claimant; indeed, if the lawyer delivers the property to one claimant, the lawyer can later be held liable to the other. The lawyer should therefore safeguard the property until the disputants resolve it by contract or an

> appropriate procedure . . . . If a lawyer holds property belonging to one person and a second person has a contractual or similar claim against that person but does not claim to own the property or have a security interest on it, the lawyer is free to deliver the property to the person to whom it belongs. If a lawyer holds funds as an advance fee payment, the lawyer is not obliged to deliver those funds to the client when the client disputes the lawyer's good-faith claim that the sum withheld is due to the lawyer, but the lawyer may not transfer the disputed funds to the lawyer's personal account . . . .

Restatement (Third) of Law Governing Lawyers § 45 cmt. d. Not surprisingly, lawyers must comply with any court order dealing with the property.

> A court may order a lawyer to deposit property in court or in an interest-bearing account pending further court orders. A court might also require a lawyer to surrender an object to another party or allow its inspection at the lawyer's office, regardless of the wishes of the lawyer's client. Such a court order ordinarily binds a client's lawyer even if only the client is named in the order. A lawyer might also be constrained by a legal obligation not arising from a court order, for example a lien asserted by a third party. A lawyer is not required by any supposed duty to a client to deliver property to a claimant when doing so would cause the lawyer to violate a court order or other legal obligation.

Restatement (Third) of Law Governing Lawyers § 45 cmt. e.

Finally, the Restatement addresses the interesting situation in which a lawyer receives stolen property.

> The lawyer's duties of confidentiality do not prevent a lawyer from complying with the requirement of this Section to return promptly to its owner property that a client has stolen and placed in the lawyer's possession. The client's transfer of the property as such is ordinarily not a communication subject to the attorney-client privilege . . . . Although the lawyer's knowledge that the goods are stolen from a given person will usually derive from confidential client information . . . , a lawyer who knowingly retains stolen goods is helping the thief conceal them from their proper owner, which is a crime. The same would be true were the lawyer, once having taken possession of the goods, to return

> them to the thief. By asking the lawyer to possess stolen goods, moreover, the client has lost the protection of the attorney-client privilege for any accompanying communications . . . .
>
> Although the lawyer must return the goods, there is no requirement that the lawyer explain their provenance or name the thief. To do so voluntarily might well violate the lawyer's duties of confidentiality . . . , even though a tribunal might be able to require disclosure . . . . In representing the client in defending against a charge of crime, the lawyer may retain the goods long enough to test or inspect them in preparation for the client's defense, though this does not authorize keeping them secret until the trial. . . .
>
> Finally, if a genuine dispute exists as to ownership of the property, the lawyer need not deliver it . . . , but must then notify each person having a substantial claim of the lawyer's possession . . . so that the lawyer's possession does not conceal the property from its owner.

Restatement (Third) of Law Governing Lawyers § 45 cmt. f.

The general Restatement requirement that lawyers provide documents in their possession is subject to lawyers' right to:

> decline to deliver to a client or former client an original or copy of any document under circumstance permitted by § 43(1) [which deals with the lawyer's ability to retain document until the lawyer is paid].

Restatement (Third) of Law Governing Lawyers § 46(4). This right involves what is commonly called "retaining liens."

State Courts and Bars

The debate over a lawyer's obligation to provide the file to a former client involves several aspects.

First, states applying their Rule 1.15 generally require lawyers to return any documents or other items that the clients gave the lawyers in connection with the representation.

- Sacksteder v. Senney, 2014-Ohio-2678, at ¶¶ 10, 11, 12 (Ohio Ct. App. 2014) (analyzing a former clients' right to a lawyer's file under Ohio law; "A client has the right to any original paper or document that he gave the lawyer because these are the client's personal property. Here, there are no such papers or documents in the case files. According to the trial court, it is 'undisputed that none of the documents in defendants' possession include any original documents or papers which had been previously provided to defendants by plaintiffs.' Opinion and Judgment Entry, 4 (Aug. 2, 2013)."; "A client also has the right to any original paper or document that is reasonably necessary to the client's representation."; "As to any other original paper or document in the case files, Sacksteder fails to convince us that he either owns it or has the immediate right to possess it. We note that there is ongoing litigation and that the content of the case files could be in question. Also, we suspect that some of the documents in the case files were created, and are stored, electronically and therefore may have no physical form. An electronic document has no single original -- 'original' is any printed copy.").

If a lawyer cannot locate the client who has given the lawyer such documents, lawyers normally must try their best to locate the client. Lawyer who cannot successfully locate the client may have to apply their state's escheat statute.

- Alaska LEO 2015-2 (2015) ("Generally a lawyer does not have a responsibility to hold documents or property that a client has delivered unsolicited and that are not in connection with the representation, however the Ethics Committee recommends treating such items as abandoned property and following the guidelines set forth in Alaska Ethics Opinion 90-3."; "Even though the items may not be connected with the representation, and the lawyer may not have consented to hold anything -- in which case no true professional obligation arises -- the Ethics Committee recommends that, out of an abundance of caution and concern for the due process rights of the property owner, lawyers may follow the guidance set forth in Alaska Bar Association Ethics Opinion 90-3 (former rule DR 9-102(B)). This Opinion concerns the proper procedure when a lawyer cannot locate a former client for whom the lawyer is holding money in a trust account. The Ethics Committee concluded that the lawyer must exhaust reasonable efforts to locate the client, hold the funds for the requisite period of time, and then dispose of them as abandoned property pursuant to Alaska Statute 34.45.110-34.45.430. These statutes require periods of one to three years depending upon the type of property and the holder and this can impose a significant burden upon a lawyer who has not consented to hold the property and did not acquire the property for purposes of the representation, therefore the Committee recommends this only as precaution, but it is not required by any rule of professional responsibility.").

Second, states disagree about what portions of the file a lawyer must turn over to a former client. Case law and ethics opinions acknowledge and then choose between two approaches -- often called the "entire file" and the "end product" standards.

- TCV VI, L.P. v. TradingScreen Inc., C.A. No. 10164-VCL, 2018 Del. Ch. LEXIS 128, at *12, *12-13, *13, *13-14, *14-15, *15, *17 (Del. Ch. Apr. 23, 2018) (adopting the "entire file" approach to lawyers' obligation to provide documents to former clients; "The majority rule among other jurisdiction[s] is the 'entire file' approach. Many federal courts that have confronted the question in the absence of governing state law authority also have adopted the entire-file approach. The Restatement (Third) of the Law Governing Lawyers likewise embraces the entire-file approach." (footnotes omitted); "The entire-file approach is just what it sounds like. As described in the Restatement, this approach means that '[o]n request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse.' Commentary clarifies that 'a client is entitled to retrieve documents .in possession of a lawyer relating to representation of the client. That right extends to documents placed in the lawyer's possession as well as to documents produced by the lawyer.' The Restatement recognizes narrow exceptions for (i) situations 'when compliance would violate the lawyer's duty to another,' (ii) cases of 'extreme necessity,' such as where the disclosure 'is likely to cause serious harm' to the client, and (iii) 'certain law-firm documents reasonably intended for only internal review, such as a memorandum discussing which lawyers in the firm should be assigned to a case." (alteration in original) (footnotes omitted); "Courts adopting the entire-file approach have generally reasoned along two lines. First, they find that the approach best comports with the duty owed by a lawyer to his or her client. Second, they find that the approach is consistent with the client's property interest in his or her file." (footnote omitted); "A minority of jurisdictions follow the 'end product' approach. This approach distinguishes between the lawyer's external work product, which the client has a right to obtain, and the lawyer's internal work product, which the client does not have any right to receive. A lawyer's external work product includes documents that 'have been voluntarily and strategically exposed to public light by the attorney to further his client's interest,' such as 'pleadings and other papers which are filed with the court' and 'correspondence to the client, to the opposition and to witnesses, and correspondence which the attorney receives from the same.' The lawyer's internal work product includes those documents 'typically characterized by their informality [and] candor, and containing mental impressions, conclusions, opinions, or legal theories,' such as 'notes written by the attorney to himself prepatory to drafting other documents or as preparation for deposition or trial, or notes of interviews.'" (alteration in original) (footnote omitted); "Jurisdictions embracing the end-product approach cite a perceived 'tension between protecting the interests of the client and protecting the interests of the attorney in the work product he creates.' As these jurisdictions view the matter, 'the client is paying for the end result' and 'the lawyer's work product is the tool used by the lawyer to reach the end result.' They reason that a lawyer's internal documents 'reflect the candid, rough and blemished private thoughts of the lawyer' and that the lawyer's interest in them outweighs any value in their disclosure."(footnotes omitted); "In 2015, the Standing Committee on Ethics and Professional Responsibility of the American Bar Association (the 'ABA Committee') issued a formal opinion adopting a version of the end-product approach (the 'ABA Opinion')."; "In my view, the cases applying the entire-file approach are more persuasive and consistent with other aspects of Delaware law governing the attorney-client relationship."; "Morris Nichols did not produce its entire litigation file. Because this decision has adopted the entire-file approach, Morris Nichols shall produce its entire litigation file.").

- Jones v. Comm'r, 129 T.C. 146, 157 (T.C. 2007) (noting the debate among the states about ownership of a lawyer's file; finding it unnecessary to decide how Oklahoma would address the issue, because the material at issue did not amount to work product and therefore belonged to the client; "Because the materials are not work product, it is not necessary for us to determine in this case whether Oklahoma would follow the majority or minority view with regard to ownership of case files. We are aware of no court that has held that clients have no ownership interests in their respective case files. Rather, as we have summarized above, all jurisdictions that have considered explicitly the issue of ownership of case files have held that clients have superior property rights in at least those items in the case file that are not the attorney's self-created work product. Those courts that have served a property right to the attorney have done so only with regard to the attorney's personal notes, working drafts and papers, and internal memoranda. The materials in issue in this case fall outside of this work product exception. Thus, under either approach, the documents in issue in this case belong property to petitioner's client, McVeigh [Oklahoma City bomber], and not to petitioner.").

- District of Columbia LEO 333 (12/20/05) ("Upon the termination of representation, an attorney is required to surrender to a client, to the client's legal representative, or to a successor in interest the entire 'file' containing the papers and property to which the client is entitled. This includes copies of internal notes and memoranda reflecting the views, thoughts and strategies of the lawyer."; "The Committee has recognized that the surrender of all files to the client at the termination of a representation is the general rule and that the work-product exception applicable to liens for unpaid fees or expenses should be construed narrowly."; "Indeed, the Committee has explicitly recognized that the District of Columbia has rejected the 'end-product' approach of some jurisdictions -- where the client only owns the pleadings, contracts, and reports that reflect the final result of the attorney's work -- in favor of the majority, 'entire file' approach, 'which does not permit a lawyer to acquire a lien on any of the contents of the client file except that portion of work product within the file that has not been paid for.' D.C. Ethics Op. 283 n.3 (1988)." (footnote omitted) (emphasis added); "A minority of courts and state bar legal ethics authorities distinguish between the 'end product' of an attorney's services -- e.g., filed pleadings, final versions of documents prepared for the client's use, and correspondence with the client, opposing counsel and witnesses -- and the attorney's 'work product' leading to the creation of those end product documents, which remains the property of the attorney (see, e.g., Federal Land Bank v. Federal Intermediate Credit Bank, 127 F.R.D. 473, aff'd in part and rev'd in part on other grounds, 128 F.R.D. 182 (S.D. Miss. 1989); Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus, 824 S.W. 2d 92 (Mo. Ct. App.); Alabama State Bar, Formal Ethics Op. RO 86-02; Arizona State Bar Comm. on Rules of Prof'l Conduct, Op. No. 92-1; Illinois State Bar Assn., Op. No. 94-13; North Carolina State Bar Ethics Comm., RPC 178 (1994); Rhode Island Supreme Ct. Ethics Advisory Panel, Op. No. 92-88 (1993); Wisconsin Ethics Opinion E-82-7 (1998)).").

Most states follow the majority "entire file" rule, which requires lawyers to turn over essentially their entire substantive file, unless some exception justifies withholding the documents.

- Virginia Rule 1.16(e) ("All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and, therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client's new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Also upon termination, the client, upon request, must also be provided within a reasonable time copies of the following documents from the lawyer's file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); transcripts, pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer-client relationship. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation.").

- Arizona LEO 15-02 (06/2015) ("In general, a lawyer has an ethical obligation to provide, at the client's request upon termination of the representation, all documents reflecting work performed for the client. A lawyer's obligation to preserve documents reflecting work performed for the client does not, however, extend to electronic or other documents that are duplicative of other documents generated or received in the course of the representation, incidental to the representation, or not typically maintained by a working lawyer, unless the lawyer has reason to believe that, in all the circumstances, the client's interests require that these documents be preserved for eventual turning over to the client. To the extent Ops. 08-02 and 13-02, or earlier committee opinions, may be read to suggest otherwise, they are withdrawn."; "Where a client makes such a request, a lawyer does not act unethically by charging the client for additional copies of documents provided during the representation free of charge. Consistent with Comment 9 to ER 1.16, a lawyer may charge the client for additional copies provided the client has received a copy of the documents.").

- Arizona LEO 08-02 (12/2008) (holding that a lawyer's file belonged to the clients and not to the lawyer; indicating that a lawyer determining how long to maintain a client's files "should consider the general purposes of file retention stated above along with specific factors articulated in Op. 98-07: the client's foreseeable interests; the applicable statutes of limitations; the length of the client's sentence or probation in criminal cases; and the uses of the material in question to the former client"; noting an earlier Arizona opinion that recommended indefinite file retention for "'probate or estate matters, homicide cases, life sentence cases and lifetime probation case.'"; "File retention can be costly due to the volume of cases to be stored and the sheer quantity of documents comprising each individual file. In an effort to minimize file-storage costs, lawyers have asked whether they can purge client files of nonessential or irrelevant documents prior to storage. <u>Because the client is entitled to the file in its entirety, and not just those portions that the lawyer deems to be essential or relevant, lawyers should not conduct such a purge without first consulting the client</u>. The file is for the benefit of the client and any decisions about which documents to keep and which documents to purge should focus on the client's future need for the documents and the possibility of future litigation to protect the interests of the client, not the lawyer's possible future use for the documents." (emphasis added); noting that lawyers may intend to give the entire file to the client upon termination of the representation; holding that "lawyers should not purge files of documents prior to storage without notice to the client and permission from the client"; "In the absence of a file-retention policy, a lawyer must make reasonable efforts to notify the client prior to destroying the file. If the lawyer is unsuccessful, the lawyer must then determine whether applicable law requires preserving the file. If the law does not require further preservation, the lawyer should safeguard the client file for a period of time equal to that under Arizona law for the abandonment of personal property. . . . After the file may be regarded as abandoned, then the lawyer must carefully review the file to confirm that no procedural or statutory requirements obligate the lawyer to retain the file further, that there will be no further litigation, and that there is no longer any substantial purpose served in retaining the file. Given these obligations, creating and implementing a policy for the retention and destruction may actually decrease the amount of time a file must otherwise be preserved.").

- N.Y. City LEO 2008-1 (7/2008) ("With respect to the electronic documents that the lawyer retains, the lawyer is not under an ethical obligation to organize those documents in any particular manner, or to store those documents in any particular storage medium, so long as the lawyer ensures that the manner of organization and storage does not (a) detract from the competence of the representation or (b) result in the loss of documents that the client may later need and may reasonably expect the lawyer to preserve. To those ends, electronic documents other than e-mails present less difficulty because they are frequently stored in document management systems in which they are typically coded with several identifying characteristics, making it easier to locate and assemble them later. E-mails raise more difficult organizational and storage issues. Some e-mail systems automatically delete e-mails after a period of time, so the lawyer must take affirmative steps to preserve those e-mails that the lawyer decides to save. In addition, e-mails generally are not coded, or otherwise organized, to facilitate their later retrieval. Thus, a practice with much to commend it is to organize saved e-mails to facilitate their later retrieval, for example, by coding them or saving them to dedicated electronic files. Otherwise, it may be exceedingly difficult and expensive for the lawyer to retrieve those e-mails, and, as discussed in the Opinion, the lawyer must charge the client for retrieval costs that could reasonably have been avoided. In <u>New York, a client has a presumptive right to the lawyer's entire file in connection with a representation, subject to narrow exceptions</u>. The lawyer may charge the client a reasonable fee, based on the lawyer's customary schedule, for gathering and producing electronic documents. That fee may reflect the reasonable costs of retrieving electronic documents from their storage media and reviewing those documents to determine the client's right of access. It is prudent for lawyer and client to discuss the retention, storage, and retrieval of electronic documents at the outset of the engagement and to consider memorializing their agreement in a retention letter." (mphasis added)).

- California LEO 2007-174 (2007) ("An attorney is ethically obligated, upon termination of employment, promptly to release to a client, at the client's request: (1) an electronic version of e-mail correspondence, because such items come within a category subject to release; (2) an electronic version of the pleadings, because such items . . . come within a category subject to release; (3) an electronic version of discovery requests and responses, because such items are subject to release as reasonably necessary to the client's representation; (4) an electronic deposition and exhibit database, because such an item itself contains items that come within categories subject to release; and (5) an electronic version of transactional documents, because such items are subject to release as reasonably necessary to the client's representation. The attorney's ethical obligation to release any electronic items, however, does not require the attorney to create such items if they do not exist or to change the application (e.g., from Word (.doc) to WordPerfect (.wpd)) if they do exist. Prior to release, the attorney is ethically obligated to take reasonable steps to strip from each of these electronic items any metadata reflecting confidential information belonging to any other client.").

- Supreme Court Attorney Disciplinary Bd. v. Gottschalk, 729 N.W.2d 812, 819 (Iowa 2007) ("In general, there are two approaches for determining who owns the documents within a client's file -- the 'entire file' approach and the 'end product' approach. . . . The majority of jurisdictions that have addressed this issue conclude that a client owns his or her entire file, including attorney work product, subject to narrow exceptions. . . . We agree with the majority of jurisdictions and adopt the 'entire file' approach to this issue." (emphasis added)).

- Hiatt v. Clark, 194 S.W.3d 324, 329, 330 (Ky. 2006) (holding that a criminal defendant can obtain his lawyer's files; acknowledging that the files deserve work product protection, but holding that the lawyer could not withhold them from his client; "It is meant to protect an attorney, but not from his own former client, and it does not override questions of ownership."; "For the reasons set forth herein, we hold that a writ of mandamus is the most appropriate form of remedy available to Appellant and find that he is entitled to the entirety of his client file from Mr. Eardley [staff attorney for Fayette County Legal Aid who represented defendant], including work product materials, and therefore we hereby grant the relief sought.").

- New Hampshire LEO 2005-06/3 (1/2006) ("Therefore, if a client requests a copy of her file, the firm has an obligation to provide all files pertinent to representation of that client, regardless of the burden that it might impose upon the firm to do so. . . . That burden can be managed, in any event, through computer word search functions or other means that are routinely used for discovery or other purposes. As in discovery-related matters, it is incumbent upon the firm to manage its electronic and other files in a way that will allow for release of a file to a client without releasing other information that might harm a third party." (emphasis added)).

- District of Columbia LEO 333 (12/20/05) ("Upon the termination of representation, an attorney is required to surrender to a client, to the client's legal representative, or to a successor in interest the entire 'file' containing the papers and property to which the client is entitled. This includes copies of internal notes and memoranda reflecting the views, thoughts and strategies of the lawyer." (emphasis added); "The Committee has recognized that the surrender of all files to the client at the termination of a representation is the general rule and that the work-product exception applicable to liens for unpaid fees or expenses should be construed narrowly."; "Indeed, the Committee has explicitly recognized that the District of Columbia has rejected the 'end-product' approach of some jurisdictions -- where the client only owns the pleadings, contracts, and reports that reflect the final result of the attorney's work -- in favor of the majority, 'entire file' approach, 'which does not permit a lawyer to acquire a lien on any of the contents of the client file except that portion of work product within the file that has not been paid for.' D.C. Ethics Op. 283 n.3 (1988)."; "A minority of courts and state bar legal ethics authorities distinguish between the 'end product' of an attorney's services -- e.g., filed pleadings, final versions of documents prepared for the client's use, and correspondence with the client, opposing counsel and witnesses -- and the attorney's 'work product' leading to the creation of those end product documents, which remains the property of the attorney (see, e.g., Federal Land Bank v. Federal Intermediate Credit Bank, 127 F.R.D. 473, aff'd in part and rev'd in part on other grounds, 128 F.R.D. 182 (S.D. Miss. 1989); Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus, 824 S.W. 2d 92 (Mo. Ct. App.); Alabama State Bar, Formal Ethics Op. RO 86-02; Arizona State Bar Comm. on Rules of Prof'l Conduct, Op. No. 92-1; Illinois State Bar Assn., Op. No. 94-13; North Carolina State Bar Ethics Comm., RPC 178 (1994); Rhode Island Supreme Ct. Ethics Advisory Panel, Op. No. 92-88 (1993); Wisconsin Ethics Opinion E-82-7 (1998)).").

- Loeffler v. Lanser (In re ANR Advance Transp. Co.), 302 B.R. 607, 614 (E.D. Wis. 2003) (assessing different states' approach to ownership of a lawyer's file upon termination of the attorney-client relationship; contrasting the majority rule (permitting the client access to all of the files) and the minority, which indicates that the client is only entitled to "end product" documents; finding that the bankruptcy trustee was entitled to files in the possession of the lawyer; acknowledging that lawyers may assert work product protection, but refusing to allow a lawyer to withhold documents from the client's successor).

- Swift, Currie, McGhee & Hiers v. Henry, 581 S.E.2d 37, 39 (Ga. 2003) ("A minority of courts have ruled that a document belongs to the attorney who prepared it, unless the document is sought by the client in connection with a lawsuit against the attorney. . . . A majority of courts have ruled that a document created by an attorney belongs to the client who retained him." (emphasis added); adopting the majority view).

- North Carolina LEO 2002-5 (10/18/02) ("If a lawyer determines that an e-mail communication (whether in electronic format or hard copy) should be retained as a part of a client's file, at the time of the termination of the representation, the lawyer should provide the client with a copy of the retained e-mail communication, together with the other documents in the client's file, subject to the limitations set forth in CPR 3."; "Rule 1.16(d) requires the lawyer to take 'reasonably practicable' steps to protect the interests of the client upon termination. In light of the widespread availability of computers, this standard is met if Attorney provides Client with a computer disk containing the retained e-mail communications or otherwise transmits them to Client in an electronic format.").

- Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP, 689 N.E.2d 879, 881, 882 (N.Y. 1997) (requiring a client's former lawyer to turn over the files to the client as long as the client has paid the lawyer's fees; "A majority of courts and State legal ethics advisory bodies considering a client's access to the attorney's file in a represented matter, upon termination of the attorney-client relationship, where no claim for unpaid legal fees is outstanding, presumptively accord the client full access to the entire attorney's file on a represented matter with narrow exceptions."; "The American Law Institute, in its Restatement (Third) of the Law Governing Lawyers essentially embraced the majority position (see, Restatement [Third] of Law Governing Lawyers § 58 [Proposed Final Draft No. 1, 1996]). The draft Restatement provides that a former client is to be accorded access to 'inspect and copy any documents possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse' (id., § 58 [2] [emphasis supplied]). Even without a request, an attorney is obligated to deliver to the client, not later than promptly after representation ends, 'such originals and copies of other documents possessed by the lawyer relating to the representation as the . . .[former] client reasonably needs' (id., § 58 [3], comment d)."; "We conclude that the majority position, as adopted in the final draft of the American Law Institute Restatement (Third) of the Law Governing Lawyers, represents the sounder view. First, an expansive general right of the client to the contents of the attorney's file, upon termination of the attorney-client relationship, more closely conforms to the position taken by the courts of this State on the client's broad rights to the contents of the file when representation ceases on a matter still pending."; "Second, the minority position adopted by the courts below unrealistically and, in our view, unfairly places the burden on the client to demonstrate a need for specific work product documents in the attorney's file on the represented matter. Again, this case is illustrative that in a complex transaction where the file may be voluminous (commensurably increasing the likely usefulness of work product materials to advise the client concerning ongoing rights and obligations), the client's need for access to a particular paper cannot be demonstrated except in the most general terms, in the absence of prior disclosure of the content of the very document to which access is sought. The attorney in possession of the contents of the file is in a far better position to demonstrate that a particular document would furnish no useful purpose in serving the client's present needs for legal advice."; "Affording the client presumptive access to the attorney's entire file on the represented matter, subject to narrow exceptions, is also supported, although not necessarily dictated, by the lawyer's ethical obligations arising out of representation in a given matter.") (emphases added).

A minority of states follow the "end-product approach" -- under which lawyers may withhold from clients non-final documents such as drafts, legal memoranda, etc. As explained above, ABA LEO 471 (7/1/15) explicitly adopted this admittedly minority view.

- Citizens Dev. Corp. v. County of San Diego, Case No. 3:12-cv-0334-GPC-KSC, 2015 U.S. Dist. LEXIS 169001, at *18-19 (S.D. Cal. Dec. 17, 2015) (holding that a lawyer hired by an insurance company to represent its insured did not act improperly; explaining among other things that the law firm had not improperly withheld from the insurance company the litigation file the firm created while representing the insured and the insurance company; "At issue appears to be what is meant by the 'complete litigation file.' CDC's lead counsel appears to take the position that the 'complete litigation file' includes 'a full and complete copy of ALL communications between your respective firms and the insured's carriers,' as well as the participation of C&J in 'ALL future oral and/or written communications between your law firms and the insurance carriers.'. . . The Court finds that CDC overstates the meaning of 'complete litigation file.' First, CA Bar Guidance 2 contemplates that the litigation 'file' refers to physical or written records, including records of oral communications, but not the oral communications themselves. . . . It does not appear to contemplate that the insured should have the right to participate in all oral communications between the counsel and the insurer. Second, CA Bar Guidance 2 states that '[a]ny communication between the insurer and the retained attorney concerning the defense of insured's claim is a matter of common interest to both insured and insurer [to which] insured has a right.'. . . Thus, WS [law firm] is not required to turn over communications between itself and the insurer that are unrelated to the case." (emphasis added)).

- 625 Milwaukee, LLC v. Switch & Data Facilities Co., Case No. 06-C-0727, 2008 U.S. Dist. LEXIS 19943, at *4 n.2, *5 (E.D. Wis. Feb. 29, 2008) (analyzing implications of a joint representation by the law firms of Blank Rome and Quarles & Brady and a parent and its wholly owned subsidiary, which the parent sold to another company; noting that the change in the subsidiary's "ownership does not alter its existence"; explaining that the former subsidiary had now sued its former parent; "The parties agree that

Wisconsin law governs the issues of document ownership and attorney-client privilege inasmuch as this is a diversity case. <u>In Wisconsin, 'end product' documents such as filed pleadings, final versions of documents prepared for the client's use, and correspondence with the client or opposing counsel belong to the client</u>." (emphasis added); ultimately concluding that the two law firms jointly represented the parent and the wholly owned subsidiary in the sales transaction, and therefore had to produce pre-transaction documents and some post-transaction documents that referred to the law firm's service before the transaction.

- Pennsylvania LEO 2007-100 (2007) (holding that the client owns the files created by a lawyer while representing the client; explaining that the client might not be entitled to some internal documents; "Examples of items that might fall outside the scope of the formal 'file' are internal memoranda and notes generated primarily for a lawyer's own purposes in working on the client's problem. Particularly in the context of complex litigation involving numerous lawyers, it is nearly impossible to define on an a priori basis what must be part of the client's file." (footnote omitted); noting the debate between states following the "entire file" approach and the "limited file" approach; following the latter, but with a proviso: "A substantial subset of the 'entire file' group of jurisdictions allow other 'non-substantive' items, generally those associated with law practice management, to be excluded from the 'file' that belongs to the client. Under this approach, the client would not ordinarily be entitled to internal assignment documents, internal billing records, or purely private impressions of counsel."; noting that clients and lawyers can address file ownership in a retainer agreement, although "it is likely that any such agreement will undergo close scrutiny if a dispute arises between the client and the lawyer"; adopting the following guidelines: "A client is entitled to receive all materials in the lawyer's possession that relate to the representation and that have potential utility to the client and the protection of the client's interests. Items to which the client has a presumed right of access and possession include: (1) all filed or served briefs, pleadings, discovery requests and responses; (2) all transcripts of any type; (3) all affidavits and witness statements of any type; (4) all memoranda of law, case evaluations, or strategy memoranda; (5) all substantive correspondence of any type (including email), including correspondence with other parties or their counsel, all correspondence with the client, and correspondence with third parties; (6) all original documents with legal significance, such as wills, deeds and contracts; (7) all documents or other things delivered to the lawyer by or on behalf of the client; and (8) all invoices or statements sent to the client. The Committee's expectation is that the client would not normally need or want, and therefore would not typically be given, in response to a generalized request for access to or possession of the 'file', the following types of documents: (a) drafts of any of the items described above, unless they have some independent significance (such as draft chains relating to contract negotiations); (b) attorney notes from the lawyer's personal files, unless those notes have been placed by the attorney in the case file because they are significant to the representation; (c) copies of electronic mail messages, unless they have been placed by the attorney in the file because they are significant to the representation; (d) memoranda that relate to staffing or law office administration; (e) items that the lawyer is restricted from sharing with the client due to other legal obligations (such as 'restricted confidential' documents of a litigation adversary that are limited to counsel's eyes only). A client is entitled, however, to make a more specific request for items that are not generally put in the file, and the client is entitled to such items unless there are substantial grounds to decline the request. So long as the relevant considerations are fully discussed with the client, the lawyer and client may enter into a reasonable agreement that attempts to define the types or limit the scope of documents that will be retained in the client's file and defines the client's and lawyer's right to such contents, and the cost for providing access or possession.").

- Utah LEO 06-02 (6/2/06) ("An unexecuted legal instrument such as a trust or will, or an unfiled pleading, such as an extraordinary writ, is not part of the 'client's file' within the meaning of Rule 1.16(d). The lawyer is not required by Rule 1.16 to deliver these documents to the client at the termination of the representation."; "Comment 9 of Rule 1.16 states: 'It is impossible to set forth one all encompassing definition of what constitutes the client's file. However, the client file generally would include the following: all papers and property the client provides to the lawyer; litigation material such as pleadings, motions, discovery, and legal memoranda; all correspondence; depositions; expert opinions; business records; exhibits or potential evidence; and witness statements. The client file generally would not include the following: the lawyer's work product such as recorded mental impressions; research notes; legal theories; internal memoranda; and unfiled pleadings.'"; "[D]epriving the client of unexecuted legal instruments (such as agreements, trusts and wills) will not normally prejudice the client's interests. The same is true of withholding from the client unfiled legal pleadings. The client is entitled to the client's own papers and property and the 'client's file,' and the client may deliver these to new counsel for the purpose of preparing the legal instruments and the legal pleadings in accordance with the instructions of the client."; "Our interpretation of Comment 9 also is consistent with public policy on two fronts: (i) lawyers should not be exposed to liabilities arising from a requirement that the lawyer deliver to the client upon termination of the representation legal instruments that are neither executed nor filed as such instruments may be incomplete drafts or unchecked final documents not appropriate for execution of filing by the client or the client's new counsel; and (ii) the Utah Rules of Professional Conduct should not be interpreted in a manner to encourage and facilitate unscrupulous clients in defrauding lawyers by requesting the preparation of legal instruments, then terminating the attorney-client relationship after the legal instruments are prepared, for the purpose of obtaining the lawyer's services without payment.").

- Kansas LEO 92-5 (7/30/92) ("When counsel has been paid in full and discharged by client and no action is pending on the case file, we opine 'client's property' under MRPC 1.16(d) includes (1) documents brought to the attorney by the client or client's agents, (2) deposition or other discovery documents pertinent to the case for which client was billed and has paid for (expert witness opinions, etc.) and (3) pleadings and other court papers and such other documents as are necessary to under stand [sic] and interpret documents highlighted above. Such documents, being 'client property' must be returned unconditionally and additional photocopy fees as part of an unconditional return of such documents are inconsistent with MRPC 1.16(d). Other documents requested by client not amounting to this definition of 'client property' may be copied at a reasonable expense tot he [sic] client, such 'expense' to represent actual costs, not a profit. Work product, as defined elsewhere in case law, is not client property under this rule.").

Third, under either the "entire file" or the "end-product" approach, most states permit lawyers to withhold from their former clients purely administrative internal law firm documents.

- Arizona LEO 15-02 (6/2015) ("In general, a lawyer has an ethical obligation to provide, at the client's request upon termination of the representation, all documents reflecting work performed for the client. A lawyer's obligation to preserve documents reflecting work performed for the client does not, however, extend to electronic or other documents that are duplicative of other documents generated or received in the course of the representation, incidental to the representation, or not typically maintained by a working lawyer, unless the lawyer has reason to believe that, in all the circumstances, the client's interests require that these documents be preserved for eventual turning over to the client. To the extent Ops. 08-02 and 13-02, or earlier committee opinions, may be read to suggest otherwise, they are withdrawn."; "Where a client makes such a request, a lawyer does not act unethically by charging the client for additional copies of documents provided during the representation free of charge. Consistent with Comment 9 to ER 1.16, a lawyer may charge the client for additional copies provided the client has received a copy of the documents.").

- Ohio LEO 2010-2 (4/9/10) ("Internal office management memoranda such as personnel assignments or conflicts of interest checks will probably not be items reasonably necessary to a client's representation. But, a lawyer's notes regarding facts about the case will most likely be an item reasonably necessary to a client's representation. If a lawyer's note includes both items reasonably necessary to a client's representation and items not reasonably necessary, a lawyer may ethically redact from the note those items not reasonably necessary, or if more practical, a lawyer may prepare a note for the client that includes only the items reasonably necessary to the client's representation. Any expense, such as copying costs, incurred by a lawyer in turning over a client's file to a client upon request must be borne by the lawyer." (emphasis added); relying on a unique Ohio Rule 1.16(d): "'As part of the termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to protect a client's interest. The steps include giving due notice to the client, allowing reasonable time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules. Client papers and property shall be promptly delivered to the client. 'Client papers and property' may include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client's representation.'"; explaining that "[i]n Ohio there is no common law lien on a client's files in a contingent fee case. . . . And, in Ohio there is no statutory lien on the client files. The legality of a lien is a question of law outside this Board's advisory authority."; noting that "[i]n Ohio, lawyers have violated Prof. Cond. Rule 1.16(d) (and other rules) by refusing to turnover [sic] client files to the client." (emphases added)).

- Saroff v. Cohen, No. E2008-00612-COA-R3-CV, 2009 Tenn. App. LEXIS 84, at *19 (Tenn. Ct. App. Feb. 25, 2009) (holding that a lawyer did not have to make invoices available to the client; "We agree that the invoices are property of the law firm. . . . The invoices were accounts receivable records generated for the purpose of memorializing the cost to the client of legal services rendered and were maintained in the general course of business. The invoices did not become part of the client file simply because they were placed in the client's file. In addition, the invoices are not considered work product because they were not prepared for the benefit of Mr. Saroff; rather the invoices were generated for the benefit of Mr. Cohen and the firm to ensure payment of legal services rendered." (emphasis added)).

- Arizona LEO 04-01 (1/2004) ("While an attorney may withhold internal practice management memoranda that does not reflect work done on the client's behalf, the burden is on the attorney claiming the lien to identify with specificity any other documents or materials in the file which the attorney asserts are subject to the retaining lien, and which would not prejudice the client's interests, if withheld from the client.").

- Wisconsin LEO E-00-03 (2003) ("It has generally been recognized that each client file is the client's property even though that file is maintained by the lawyer in the lawyer's office. . . . However, certain papers maintained by the lawyer in client files may be the work product of the lawyer and need not be produced to the client on demand. Where this line of demarcation is drawn has never been precisely defined. The Professional Ethics Committee finds the following definition of which papers the lawyer is not required to produce at the client's demand to be sound and instructive. There are two primary areas in which the lawyer properly retains papers and documents that do not constitute papers and property to which the client is entitled. One includes documents used by the attorney to prepare initial documents for the client, in which a third party, for example, another client, has a right to nondisclosure. A lawyer has the right to withhold pleadings or other documents related to the lawyer's representation of other clients that the lawyer used as a model on which to draft documents for the current client. However, the product drafted by the lawyer may not be withheld. A second area involves those documents that would be considered personal attorney work product and not papers and property to which the client is entitled. Certain materials may be withheld such as, for example, internal memoranda concerning the client file, conflict checks, personnel assignments, and lawyers' notes reflecting personal impressions and comments relating to the business of representing the client. This information is personal attorney work product that is not needed to protect the client's interests, and does not constitute papers or property to which the client is entitled." (emphasis added); also explaining that lawyers may charge the client for the cost of copying files that the client requests, and can also charge for "staff and professional time necessarily incurred to search databases to identify files that contain documents that may fall within the client's request").

- Colorado LEO 104 (4/17/99) ("There are two primary areas in which the lawyer properly retains papers and documents which do not constitute papers and property to which the client is entitled. One includes documents, used by the attorney to prepare initial documents for the client, in which a third party, e.g., another client, has a right to non-disclosure. A lawyer has the right to withhold pleadings or other documents related to the lawyer's representation of other clients that the lawyer used as a model on which to draft documents for the present client. However, the product drafted by the lawyer may not be withheld."; "A second area involves those documents that would be considered personal attorney-work product, and not papers and property to which the client is entitled. Certain documents may be withheld: for example, internal memoranda concerning the client file, conflicts checks, personnel assignments, and lawyer notes reflecting personal impressions and comments relating to the business of representing the client. This information is personal attorney-work product that is not needed to protect the client's interests, and does not constitute papers and property to which the client is entitled."; "While there is some authority to the contrary, the majority of authority asserts that preliminary drafts, legal research, and legal research memoranda are not properly retained by the attorney as personal attorney-work product and must be surrendered. The Committee agrees with this view."; "Internal firm administration documents, such as conflicts checks and personnel assignments, properly are retained as personal attorney-work product. The lawyer may withhold certain firm documents that were intended for law office management or use. Production would not be needed to protect the client's interests in the matter."; "It is much more difficult to address personal lawyer notes, especially those notes containing personal impressions and comments. While recognizing that clear direction in this area depends on the specific facts encountered by a lawyer, the Committee reminds lawyers that the client's interests must be protected by the extent reasonably practicable. For example, if certain lawyer notes contain factual information, such as the content of client interviews, the information in those notes should be delivered to the client. In the event that certain personal impressions are intertwined with such factual information, those notes could be redacted or summarized to protect the interests of both the client and the lawyer."; "The Committee notes that there are certain circumstances in which the lawyer is required to maintain copies of certain documents for a period of time regardless of production to the client. See, e.g., C.R.C.P., Chapter 23.3, Rules Governing Contingent Fees, Rule 4(b) (retention of a copy of each contingent fee agreement for a period of six years); Colo. RPC 1.15(a)[] (complete records of [trust] account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation)."; "Preservation of drafts of documents in the ordinary course of the attorney's business is not a matter addressed by this opinion. However, if a lawyer does retain such drafts, they generally are papers to which the client is entitled.").

- California LEO 2007-174 (2007) ("An attorney is ethically obligated, upon termination of employment, promptly to release to a client, at the client's request: (1) an electronic version of e-mail correspondence, because such items come within a category subject to release; (2) an electronic version of the pleadings, because such items . . . come within a category subject to release; (3) an electronic version of discovery requests and responses, because such items are subject to release as reasonably necessary to the client's representation; (4) an electronic deposition and exhibit database, because such an item itself contains items that come within categories subject to release; and (5) an electronic version of transactional documents, because such items are subject to release as reasonably necessary to the client's representation. The attorney's ethical obligation to release any electronic items, however, does not require the attorney to create such items if they do not exist or to change the application (e.g., from Word (.doc) to WordPerfect (.wpd)) if they do exist. Prior to release, the attorney is ethically obligated to take reasonable steps to strip from each of these electronic items any metadata reflecting confidential information belonging to any other client.").

- Illinois LEO 94-13 (1/1995) (explaining what materials a lawyer must provide to a former client; "With respect to the sixth category, internal administrative materials, the Committee does not believe that a client is entitled to copies of or access to such materials under either Rule 1.4(a) or Rule 1.15(b). These materials are not relevant to the status of the client's matter and are usually prepared only for the lawyer's internal use. Nor are these materials property of the client that a lawyer must deliver upon request. Thus the failure of the lawyer to deliver or provide access to such materials will not prejudice the client."; "A lawyer may refuse to disclose to the client certain law firm documents reasonably intended only for internal review, such as a memorandum discussing which lawyers in the firm should be assigned to a case, whether a lawyer must withdraw because of the client's misconduct, or the firm's possible malpractice liability to the client. The need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved."; "With respect to the seventh category, which comprises the lawyer' notes and factual or legal research material, including the type of investigative materials involved in the present inquiry, the Committee is aware that various courts and ethics committees have taken differing positions on the nature of such materials. In the absence of controlling Illinois authority or a clear majority in the other states, the Committee concludes that the better rule is that these materials are the property of the lawyer. As such, the materials generally need not be delivered to the client."; "In summary, the Committee concludes under the facts presented that the lawyer may properly refuse to provide or disclose the lawyer's materials to the client because the materials in question are the lawyer's property and disclosure to the client could lead to harm to the client and his former wife. The Committee also notes that the lawyer could, in the exercise of the lawyer's professional judgment, release the materials to the client, but the lawyer is not required to do so by the Rules of Professional Conduct.").

- North Carolina RPC 178 (10/21/94) (holding that a lawyer must provide the lawyer's files to multiple clients, although the lawyer can withhold personal notes before providing a copy to the clients).

- North Carolina RPC 169 (1/14/94) (explaining North Carolina's unique provision allowing a lawyer to withhold the lawyer's "'personal notes'" when providing a file to a former client (citation omitted)).

Fourth, not surprisingly, lawyers normally may also withhold other clients' documents that have been placed in the file.

- California LEO 2007-174 (2007) ("An attorney is ethically obligated, upon termination of employment, promptly to release to a client, at the client's request: (1) an electronic version of e-mail correspondence, because such items come within a category subject to release; (2) an electronic version of the pleadings, because such items . . . come within a category subject to release; (3) an electronic version of discovery requests and responses, because such items are subject to release as reasonably necessary to the client's representation; (4) an electronic deposition and exhibit database, because such an item itself contains items that come within categories subject to release; and (5) an electronic version of transactional documents, because such items are subject to release as reasonably necessary to the client's representation. The attorney's ethical obligation to release any electronic items, however, does not require the attorney to create such items if they do not exist or to change the application (e.g., from Word (.doc) to WordPerfect (.wpd)) if they do exist.").

- Wisconsin LEO E-00-03 (2003) ("It has generally been recognized that each client file is the client's property even though that file is maintained by the lawyer in the lawyer's office. . . . However, certain papers maintained by the lawyer in client files may be the work product of the lawyer and need not be produced to the client on demand. Where this line of demarcation is drawn has never been precisely defined. The Professional Ethics Committee finds the following definition of which papers the lawyer is not required to produce at the client's demand to be sound and instructive. There are two primary areas in which the lawyer properly retains papers and documents that do not constitute papers and property to which the client is entitled. One includes documents used by the attorney to prepare initial documents for the client, in which a third party, for example, another client, has a right to nondisclosure. A lawyer has the right to withhold pleadings or other documents related to the lawyer's representation of other clients that the lawyer used as a model on which to draft documents for the current client. However, the product drafted by the lawyer may not be withheld. A second area involves those documents that would be considered personal attorney work product and not papers and property to which the client is entitled. <u>Certain materials may be withheld such as, for example, internal memoranda concerning the client file, conflict checks, personnel assignments, and lawyers' notes reflecting personal impressions and comments relating to the business of representing the client</u>. This information is personal attorney work product that is not needed to protect the client's interests, and does not constitute papers or property to which the client is entitled." (emphasis added); also explaining that lawyers may charge the client for the cost of copying files that the client requests, and can also charge for "staff and professional time necessarily incurred to search databases to identify files that contain documents that may fall within the client's request.").

- Colorado LEO 104 (4/17/99) ("There are two primary areas in which the lawyer properly retains papers and documents which do not constitute papers and property to which the client is entitled. One includes documents, used by the attorney to prepare initial documents for the client, in which a third party, <u>e.g.</u>, another client, has a right to non-disclosure. <u>A lawyer has the right to withhold pleadings or other documents related to the lawyer's representation of other clients that the lawyer used as a model on which to draft documents for the present client</u>. However, the product drafted by the lawyer may not be withheld." (emphases added); "A second area involves those documents that would be considered personal attorney-work product, and not papers and property to which the client is entitled. Certain documents may be withheld: for example, internal memoranda concerning the client file, conflicts checks, personnel assignments, and lawyer notes reflecting personal impressions and comments relating to the business of representing the client. This information is personal attorney-work product that is not needed to protect the client's interests, and does not constitute papers and property to which the client is entitled."; "While there is some authority to the contrary, the majority of authority asserts that preliminary drafts, legal research, and legal research memoranda are not properly retained by the attorney as personal attorney-work product and must be surrendered. The Committee agrees with this view."; "Internal firm administration documents, such as conflicts checks and personnel assignments, properly are retained as personal attorney-work product. The lawyer may withhold certain firm documents that were intended for law office management or use. Production would not be needed to protect the client's interests in the matter."; "It is much more difficult to address personal lawyer notes, especially those notes containing personal impressions and comments. While recognizing that clear direction in this area depends on the specific facts encountered by a lawyer, the Committee reminds lawyers that the client's interests must be protected by the extent reasonably practicable. For example, if certain lawyer notes contain factual information, such as the content of client interviews, the information in those notes should be delivered to the client. In the event that certain personal impressions are intertwined with such factual information, those notes could be redacted or summarized to protect the interests of both the client and the lawyer."; "The Committee notes that there are certain circumstances in which the lawyer is required to maintain copies of certain documents for a period of time regardless of production to the client. See, e.g., C.R.C.P., Chapter 23.3, Rules Governing Contingent Fees, Rule 4(b) (retention of a copy of each contingent fee agreement for a period of six years); Colo. RPC 1.15(a), (complete records of [trust] account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation)."; "Preservation of drafts of documents in the ordinary course of the attorney's business is not a matter addressed by this opinion. However, if a lawyer does retain such drafts, they generally are papers to which the client is entitled.") (emphasis added).

- Delaware LEO 1997-5 (11/25/97) ("In the Committee's view, the Inquiring Attorney's obligations to his former client under Rule 1.16(d) do not, under the circumstances presented, include surrendering information which Inquiring Attorney received pursuant to the Joint Defense Agreement. First, it does not appear that the information is 'papers and property to which the client is entitled.' The information was provided to the Inquiring Attorney by counsel for B pursuant to express limitations set forth in the Joint Defense Agreement. Moreover, to the extent that the information includes the Inquiring Attorney's impressions and work product, it is not property to which A is automatically entitled."; "Second, Rule 1.16(d) requires an attorney whose engagement is terminated to take steps that are 'reasonably practicable' to protect the former client's interest. In the Committee's view, it would be 'reasonably practicable' for the Inquiring Attorney to breach the Joint Defense Agreement by providing the information to a person who is outside the scope of the Agreement.

Doing so could be extremely prejudicial to B, who while not the client of the Inquiring Attorney, is still owed a duty of fairness. *See* Rule 3.4 (addressing fairness to opposing party in litigation setting) and Rule 4.4 (prohibiting a lawyer from using methods of obtaining evidence that would violate the rights of third parties including adverse parties in litigation). Indeed, if the Inquiring Attorney revealed the information to A's new attorney, the Inquiring Attorney would violate B's right under the Joint Defense Agreement."; "Third, A's new attorney presumably can gain access to the information by becoming a party to the Joint Defense Agreement. Thus, to the extent the new attorney needs the information, there appears to be a readily available way for him to get it without prejudicing B."; "Finally, the Committee does not believe that Inquiry Attorney's refusal to surrender the information constitutes a violation of Rule 1.9. The failure to turn over the information does not constitute using the information to the former client's disadvantage as contemplated by Rule 1.9.").

Fifth, some states allow lawyers to withhold other material.

- Ohio LEO 2010-2 (4/9/10) ("Whether a lawyer's notes of an interview with a current or former client are considered client papers to which the current or former client is entitled upon request pursuant to Prof. Cond. Rule 1.16(d) depends upon whether the notes are items reasonably necessary to the client's representation. This determination requires the exercise of a lawyer's professional judgment. When a client makes a file request to a lawyer, the lawyer's decision as to whether to relinquish the lawyer's notes will require examination of the lawyer's notes in the file to determine whether the notes are items reasonably necessary to the client's representation pursuant to Prof. Cond. Rule 1.16(d). A lawyer's notes to himself or herself regarding passing thoughts, ideas, impression[s], or questions will probably not be items reasonably necessary to a client's representation. Internal office management memoranda such as personnel assignments or conflicts of interest checks will probably not be items reasonably necessary to a client's representation. But, a lawyer's notes regarding facts about the case will most likely be an item reasonably necessary to a client's representation. If a lawyer's note includes both items reasonably necessary to a client's representation and items not reasonably necessary, a lawyer may ethically redact from the note those items not reasonably necessary, or if more practical, a lawyer may prepare a note for the client that includes only the items reasonably necessary to the client's representation. Any expense, such as copying costs, incurred by a lawyer in turning over a client's file to a client upon request must be borne by the lawyer."; relying on a unique Ohio Rule 1.16(d); "'As part of the termination of representation, a lawyer shall take steps, to the extent <u>reasonably</u> practicable, to protect a client's interest. The steps include giving due notice to the client, allowing <u>reasonable</u> time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

Client papers and property shall be promptly delivered to the client. "Client papers and property" may include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client's representation.'"; explaining that "[i]n Ohio there is no common law lien on a client's files in a contingent fee case. . . . And, in Ohio there is no statutory lien on the client files. The legality of a lien is a question of law outside this Board's advisory authority."; noting that "[i]n Ohio, lawyers have violated Prof. Cond. Rule 1.16(d) (and other rules) by refusing to turnover [sic] client files to the client.").

- San Diego County LEO 1984-3 (1984) ("Upon withdrawal, an attorney is obligated to deliver to the client all papers and property to which the client is entitled. Accordingly, the attorney must provide the client with the original of all pleadings, correspondence, deposition transcripts, and similar papers and property contained in the client's file. Even with a consensually created possessory lien over the client's file, an attorney may not withhold the file if to do so would prejudice the client. Should the attorney desire to retain copies of such papers or property, any expenses incurred in producing those copies must be borne by the attorney."; "However, pursuant to statutory and decisional law, the client is not 'entitled' to any papers or property which constitute or reflect an attorney's impressions, opinions, legal research or theories as defined by the 'absolute' work product privilege of the Code of Civil Procedure section 2016, subdivision (b). Although disclosure of the attorney's work product is not obligated, such disclosure is recommended as a matter of professional ethics and courtesy.").

(b) States differ in their approach to a lawyer's right to charge former clients for copying documents that lawyers surrender to those former clients.

The Restatement addresses a lawyer's right to charge the client for copying the file.

> Because a lawyer's normal duties include collection and delivery of documents that came from the client or that the client should have, a lawyer paid by the hour should be compensated for time devoted to that task. Copying expenses may be separately billed when allowed under the principles stated in § 38(3)(a) and Comment e thereto. When the client seeks copies that the lawyer was not obliged to furnish in the absence of such a request, the lawyer may require the client to pay the copying costs.

Restatement (Third) of Law Governing Lawyers § 46 cmt. e (emphasis added).

Courts also disagree about lawyers' ability to bill former clients for copies of documents the former clients' request.

Some bars have explained that a lawyer may charge the client for such copies.

- Arizona LEO 15-02 (06/2015) ("In general, a lawyer has an ethical obligation to provide, at the client's request upon termination of the representation, all documents reflecting work performed for the client. A lawyer's obligation to preserve documents reflecting work performed for the client does not, however, extend to electronic or other documents that are duplicative of other documents generated or received in the course of the representation, incidental to the representation, or not typically maintained by a working lawyer, unless the lawyer has reason to believe that, in all the circumstances, the client's interests require that these documents be preserved for eventual turning over to the client. To the extent Ops. 08-02 and 13-02, or earlier committee opinions, may be read to suggest otherwise, they are withdrawn."; "Where a client makes such a request, a lawyer does not act unethically by charging the client for additional copies of documents provided during the representation free of charge. Consistent with Comment 9 to ER 1.16, a lawyer may charge the client for additional copies provided the client has received a copy of the documents.").

- Illinois LEO 94-14 (1/1995) ("All original papers delivered to the lawyer by the client must be returned to the client. The lawyer may make copies of such material, if desired, at the lawyer's expense. With respect to other parts of the lawyer's file to which the client is entitled to access, including copies of documents that the client has already received, the originals may be retained by the lawyer and the client should be permitted to have copies at the client's expense. Consistent with Opinion No. 94-13, the Committee does not believe that a lawyer is required to act as a storage facility for clients, and therefore the lawyer is entitled to compensation for the reasonable expense involved in retrieving the files in question and providing copies of materials that the client has already received. The lawyer is also entitled to compensation for the reasonable expense of providing copies of any materials, such as routine administrative correspondence with third parties, that the client may not have received because the lawyer had no duty to provide the client with copies of such materials in the normal course of the representation, but to which the client is entitled to access upon reasonable request.").

- North Carolina RPC 227 (7/18/97) (holding that under North Carolina ethics rules a lawyer does not have to supply the lawyer's personal notes to a client who asks for a copy of the file).

- Illinois LEO 94-13 (1/1995) (addressing the obligation of a lawyer to provide files to a former client; holding that the lawyer must provide "reasonable access" to correspondence between the lawyer and the client, but does not have to "recreate or provide new copies of correspondence previously provided the client unless the client is willing to compensate the lawyer for the reasonable expense involved"; also holding that the "Committee does not believe that Rule 1.4(a) requires a lawyer to provide clients with copies of routine administrative correspondence with third parties, such as correspondence with court reporters or other service providers. A client is entitled under Rule 1.4(a) to reasonable access to copies of correspondence that the client has already received as well as copies of routine administrative correspondence with third parties. However, the lawyer is not required to provide copies of such materials unless the client is willing to compensate the lawyer for the reasonable expense involved."; adopting the same approach to pleadings that have been filed in court or with administrative agencies; also holding that the "client is entitled under Rule 1.4(a) to reasonable access to copies of the final version (as distinguished from the lawyer's drafts or working copies) of such documents in the lawyer's files, but the Committee believes that a lawyer is not required to furnish a client with additional copies unless the client is willing to compensate the lawyer for the reasonable expense involved"; explaining that clients are not entitled to copies of "internal administrative materials" even for the lawyer's internal use; "'A lawyer may refuse to disclose to the client certain law firm documents reasonably intended only for internal review, such as a memorandum discussing which lawyers in the firm should be assigned to a case, whether a lawyer must withdraw because of the client's misconduct, or the firm's possible malpractice liability to the client. The need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved.'" (quoting Restatement (Third) of Law Governing Lawyers § 58 cmt. d); "[T]he Committee concludes that the better rule is that these materials are the property of the lawyer. As such, the materials generally need not be delivered to the client"; reaching essentially the same conclusion about a lawyer's research materials).

- Kansas LEO 92-5 (7/30/92) ("When counsel has been paid in full and discharged by client and no action is pending on the case file, we opine 'client's property' under MRPC 1.16(d) includes (1) documents brought to the attorney by the client or client's agents, (2) deposition or other discovery documents pertinent to the case for which client was billed and has paid for (expert witness opinions, etc.) and (3) pleadings and other court papers and such other documents as are necessary to under stand [sic] and interpret documents highlighted above. Such documents, being 'client property' must be returned unconditionally and additional photocopy fees as part of an unconditional return of such documents are inconsistent with MRPC 1.16(d). Other documents requested by client not amounting to this definition of 'client property' may be copied at a reasonable expense tot he [sic] client, such 'expense' to represent actual costs, not a profit. Work product, as defined elsewhere in case law, is not client property under this rule.").

Other bars hold that lawyers must pay for such copies themselves.

- Ohio LEO 2010-2 (4/9/10) ("Any expense, such as copying costs, incurred by a lawyer in turning over a client's file to a client upon request must be borne by the lawyer."; relying on a unique Ohio Rule 1.16(d); "As part of the termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to protect a client's interest. The steps include giving due notice to the client, allowing reasonable time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules. Client papers and property shall be promptly delivered to the client. 'Client papers and property' may include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client's representation."; explaining that "[i]n Ohio there is no common law lien on a client's files in a contingent fee case. . . . And, in Ohio there is no statutory lien on the client files. The legality of a lien is a question of law outside this Board's advisory authority."; noting that "[i]n Ohio, lawyers have violated Prof. Cond. Rule 1.16(d) (and other rules) by refusing to turnover [sic] client files to the client.").

- Pennsylvania LEO 1996-157 (11/20/96) ("Consistent with the concept that the client is entitled to receive what he has paid for, it is my opinion that whatever documents you conclude are 'papers and property to which the client is entitled,' that those original documents are your client's property and should be provided. I do not believe it would be appropriate to provide a 'copy' of the file at the client's expense. To the extent you wish to retain any portion of the file, the associated duplicating expense should be treated by you as 'a cost of doing business' and should not be billed to the client.").

- San Diego County LEO 1984-3 (1984) ("Upon withdrawal, an attorney is obligated to deliver to the client all papers and property to which the client is entitled. Accordingly, the attorney must provide the client with the original of all pleadings, correspondence, deposition transcripts, and similar papers and property contained in the client's file. Even with a consensually created possessory lien over the client's file, an attorney may not withhold the file if to do so would prejudice the client. Should the attorney desire to retain copies of such papers or property, any expenses incurred in producing those copies must be borne by the attorney."; "However, pursuant to statutory and decisional law, the client is not 'entitled' to any papers or property which constitute or reflect an attorney's impressions, opinions, legal research or theories as defined by the 'absolute' work product privilege of the Code of Civil Procedure section 2016, subdivision (b). Although disclosure of the attorney's work product is not obligated, such disclosure is recommended as a matter of professional ethics and courtesy.").

(c) One bar has indicated that lawyers may retain a copy of the client's file at the lawyer's expense -- even over the client's objection.

- New York LEO 780 (12/8/04) (assessing a lawyer's right to retain a copy of the client's file after termination of the attorney-client relationship; "Although the Code does not explicitly address the issue of whether the lawyer has an interest in the file that would permit the lawyer to retain copies of file documents, there can be little doubt that the lawyer has such an interest."; "In summary, we agree with the several ethics opinions from other jurisdictions that a lawyer may retain copies of the file at the lawyer's expense. This general rule may be subject to exceptions that we are not required to elaborate on in this opinion, such as where the client has a legal right to prevent others from copying its documents and wishes for legitimate reasons to ensure that no copies of a particular document be available under any circumstances." (footnote omitted); also holding that "[a] lawyer may generally retain copies of documents in the client's file at the lawyer's own expense, even over the client's objection. As a condition of foregoing this right, a lawyer may seek to have the client release the lawyer from malpractice liability.").

This principle could become important if the lawyer suspects that the client has used the lawyer's services to engage in some wrongdoing, and wants to retain a copy in case anyone challenges the lawyer's actions.

Best Answer

The best answer to **(a)** is **PROBABLY YES**; the best answer to **(b)** is **YES**; the best answer to **(c)** is **YES**. N 9/21

File Ownership if Clients Have Not Paid Their Lawyers

Hypothetical 22

You represented a local car dealer in a landlord-tenant dispute until she fired you. You probably should have seen this coming, because she did not pay the retainer she agreed to pay -- and actually has never paid any of her bills. Amazingly, the car dealer now wants the file that you created while representing her.

Must you give your former client the file you generated while representing her?

YES (PROBABLY)

Analysis

States take different positions on a client's right to the file a lawyer generates while representing the client.

Lawyers can face two separate scenarios involving the files they create while representing clients. First, lawyers must determine what portions of their file they must give clients or former clients who have fully paid them. Second, lawyers who have not been fully paid must assess whether they can withhold all or part of the file until their clients pay them (relying on what is called a "retaining" lien).

Although not involving lawyer files, it is worth mentioning two other types of liens that lawyers might assert.

Lawyers representing clients who may recover a judgment might assert a lien over that judgment (this is commonly called a "charging" lien). Lawyer most frequently assert a "charging" lien in contingent fee cases, because those lawyers generally are not paid during the course of a representation. But lawyers representing clients under some alternative fee arrangement might assert a "charging" lien even if they have been paid an hourly rate through the representation (such as a lower-than-normal hourly rate, to be supplemented by a contingent fee payment upon recovery of a judgment).

The other type of lien involves something other than the file for a future judgment. For instance, lawyers might arrange for some security interest in the client's house or other asset -- and assert a lien over that asset if the client does not pay the underlying obligation. Those types of liens are generally governed by ABA Model Rule 1.8 or its state equivalent, which applies to business relationships between lawyers and their clients.

"Retaining" liens generate perhaps the most controversy in case law, because they essentially involve the lawyers holding their files "hostage" until the clients pay them.

ABA Model Rules

In dealing with the ethics side of this issue, the ABA Model Rules takes a surprisingly neutral and state-specific approach.

> Upon termination of representative, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled . . . . The lawyer may retain papers relating to the client to the extent permitted by other law.

ABA Model Rule 1.16(d) (emphasis added).

Restatement

The Restatement also deals with this issue -- in much more detail than the ABA Model Rules.

At the end of the lengthy Restatement sections discussing lawyers' obligation to turn over their files to clients who have fully paid them, the Restatement notes an exception if the clients have not fully paid their lawyers.

The general Restatement requirement that the lawyer provides documents in the lawyer's possession is subject to the lawyer's right to:

> decline to deliver to a client or former client an original or copy of any document under circumstance permitted by § 43(1) [which deals with the lawyer's ability to retain document until the lawyer is paid].

Restatement (Third) of Law Governing Lawyers § 46(4).

Another expansive Restatement section deals with such retaining liens.

> Except as provided in Subsection (2) or by statute or rule, a lawyer does not acquire a lien entitling the lawyer to retain the client's property in the lawyer's possession in order to secure payment of the lawyer's fees and disbursements. A lawyer may decline to deliver to a client or former client an original or copy of document prepared by the lawyer or at the lawyer's expense if the client or former client has not paid all fees and disbursements due for the lawyer's work in preparing the document and non-delivery would not unreasonably harm the client or former client.

Restatement (Third) of Law Governing Lawyers § 43(1).

Another Restatement section discusses a lawyer's general right to obtain a security interest in any property that the client owns or might acquire (not just a file).

> Unless otherwise provided by statute or rule, client and lawyer may agree that the lawyer shall have a security interest in property of the client recovered for the client through the lawyer's efforts, as follows: (a) the lawyer may contract in writing with the client for a lien on the proceeds of the representation to secure payment for the lawyer's services and disbursements in that matter; (b) the lien becomes binding on a third party when the party has notice of the lien; (c) the lien applies only to the amount of fees and disbursements claimed reasonably and in good faith for the lawyer's services performed in the representation; and

> (d) the lawyer may not unreasonably impede the speedy and inexpensive resolution of any dispute concerning those fees and disbursements or the lien.

Restatement (Third) of Law Governing Lawyers § 43(2).

Not surprisingly, the Restatement acknowledges tribunals' ability to deal with such liens.

> A tribunal where an action is pending may in its discretion adjudicate any fee or other dispute concerning a lien asserted by a lawyer on property of a party to the action, provide for custody of the property, release all or part of the property to the client or lawyer, and grant such other relief as justice may require.

Restatement (Third) of Law Governing Lawyers § 43(3).

A comment provides more explanation.

> Retaining liens are therefore not recognized under this Section except as authorized by statute or rule and to the extent provided under Subsection (4). Under this Section, lawyers may secure fee payment through a consensual charging lien on the proceeds of a representation . . . and through contractual security interests in other assets of the client . . . and other contractual arrangements such as a prepaid deposit. The lawyer may also withhold from the client documents prepared by the lawyer or at the lawyer's expense that have not been paid for . . . .

Restatement (Third) of Law Governing Lawyers § 43 cmt. b.

A comment provides an explanation.

> Under this Section a lawyer generally does not acquire a nonconsensual lien on property in the lawyer's possession or recovered by the client through the lawyer's efforts. The Section thus does not recognize retaining liens on the client's documents except as provided by statute or rule . . . , although a lawyer may retain possession of a document when the client has not paid the lawyer's fee for preparing the document . . . .
>
> Security interests in property of non-clients, for example a mortgage on the house of a client's relative, are not as such

> subject to this Section. However, the non-client might have a close relationship with the client, such as that of parent or spouse, and thus might be subject to similar pressures. Such security arrangements must meet the requirements of general law, which might treat such transactions as subject to obligations similar to those stated in this Section.

Restatement (Third) of Law Governing Lawyers § 43 cmt. a.

Another comment explains how a lawyer's "retaining" lien applies to the file.

> A lawyer ordinarily may not retain a client's property or documents against the client's wishes . . . . Nevertheless, under the decisional law of all but a few jurisdictions, a lawyer may refuse to return to a client all papers and other property of the client in the lawyer's possession until the lawyer's fee has been paid . . . . That law is not followed in the Section; instead it adopts the law in what is currently the minority of jurisdictions.
>
> While a broad retaining lien might protect the lawyer's legitimate interest in receiving compensation, drawbacks outweigh that advantage. The lawyer obtains payment by keeping from the client papers and property that the client entrusted to the lawyer in order to gain help. The use of the client's papers against the client is in tension with the fiduciary responsibilities of lawyers. A broad retaining lien could impose pressure on a client disproportionate to the size or validity of the lawyer's fee claim. The lawyer also can arrange other ways of securing the fee, such as payment in advance or a specific contract with the client providing security for the fee under Subsection (4). Because it is normally unpredictable at the start of a representation what client property will be in the lawyer's hands if a fee dispute arises, a retaining lien would give little advance assurance of payment. Thus, recognizing such a lien would not significantly help financially unreliable clients secure counsel. Moreover, the leverage of such a lien exacerbates the difficulties that clients often have in suing over fee charges . . . . Efforts in some jurisdictions to prevent abuse of retaining liens demonstrate their undesirability. Some authorities prohibit a lien on papers needed to defend against a criminal prosecution, for example. However[,] the very point of a retaining lien, if accepted at all, is to coerce payment by withholding papers the client needs.

Restatement (Third) of Law Governing Lawyers § 43 cmt. b.

The next comment deals with a lawyer's right to retain particular documents that the client has not specifically paid for.

> A client who fails to pay for the lawyer's work in preparing particular documents (or in having them prepared at the lawyer's expense, for example by a retained expert) ordinarily is not entitled to receive those documents. Whether a payment was due and whether it was for such a document depend on the contract between the client and the lawyer, as construed from the standpoint of a reasonable client . . . .
>
> A lawyer may not retain unpaid-for documents when doing so will unreasonably harm the client. During a representation, nonpayment of a fee might justify the lawyer in withdrawing . . . , but a lawyer who does not withdraw must continue to represent the client diligently . . . . A lawyer who has not been paid a fee due may normally retain those documents embodying the lawyer's work . . . . Even then, a tribunal is empowered to order production when the client has urgent need. A lawyer must record or deliver to a client for recording an executed operative document, such as a decree or deed, even though the client has not paid for it, when the operative effective of the document would be seriously compromised by the lawyers retention of it.

Restatement (Third) of Law Governing Lawyers § 43 cmt. c.

The Restatement provides two useful illustrations of how this principle works.

> Client retains Lawyer to prepare a series of memoranda for an agreed compensation of $100 per hour. Lawyer is to send bills every month. Client pays the first two bills and then stops paying. After five months, Client requests copies of all memoranda. Lawyer must deliver all memoranda prepared during the first two months, but need not deliver those thereafter prepared until Client makes the payments.

Restatement (Third) of Law Governing Lawyers § 43 cmt. c, illus. 1.

> The same facts as in Illustration 1, except that Client and Lawyer have agreed that Lawyer is to send bills every six months. After five months, Client requests copies of all the memoranda. Lawyer must deliver them all, because Client

> has not failed to pay any due bill. Had Client stated in advance that it would not pay the bill, the doctrine of anticipatory breach might allow Lawyer not to deliver.

Restatement (Third) of Law Governing Lawyers § 43 cmt. c, illus. 2.

State Courts and Bars

States have also dealt with a lawyer's right to withhold the file from a client who has not fully paid the lawyer.

This issue involves the propriety of viewing a lawyer's relationship with a client as essentially the same as the relationship between an auto mechanic and a customer. Auto mechanics normally can keep a customer's car until the customer pays the bill. Traditionally, lawyers have had the same power. However, the trend is clearly in the opposite direction.

Bars (and to a lesser extent, courts) take one of three basic approaches. First, some still follow the traditional "auto mechanic" approach, allowing lawyers to retain essentially all of the file until they are paid. Second, some have softened that traditional approach, and compel lawyers to turn over files if the clients would suffer in some way without the file. Third, some have essentially eliminated lawyers' retaining liens.

It makes sense to address this issue in historical order, because the trend is moving from the traditional approach to the elimination of retaining liens.

First, some courts and bars have articulated the traditional approach -- essentially allowing lawyers to retain a file until the client fully pays for them (all lawyers should check the current status of the pertinent state's approach -- given the trend against lawyers' assertion of retaining liens).

- Grimes v. Crockrom, 947 N.E.2d 452, 454-55 (Ind. Ct. App. 2011) (holding that a lawyer could assert a retaining lien even if the lawyer did not provide a detailed record of the lawyer's work to the client; "A common law retaining lien on records in the possession of an attorney arises on rendition of services by the attorney. . . . Crockrom does not direct us in any legal authority tying the validity of a retaining lien to the provision of an itemized bill to the client. Indeed, a retaining lien is complete and effective without notice to anyone. . . . And the reasonableness of a fee, as reflected by an attorney's lien, is irrelevant to the determination of whether the lien has been established. . . . We hold that Grimes has a valid retaining lien over the medical records.").

- Brickell Place Condo Ass'n v. Joseph H. Ganguzza & Assocs., P.A., 31 So. 3d 287, 289, 290 (Fla. Dist. Ct. App. 2010) (holding that a lawyer who had arranged to charge an condominium association a flat fee for collection and foreclosure matters was bound by the ethics rules governing contingent fees, because the law firm was not paid until collection; ultimately holding that the law firm could not refuse to turn over its files until the contingency had occurred; "[T]he law firm filed a retaining lien and refused to provide the Associations with a copy of their files unless the Associations paid the law firm for its services on the pending collection and foreclosure cases even though the delinquent unit owners had not brought their accounts current."; "The Associations, therefore, claimed that the law firm[] could only recover the reasonable value for its services, limited by the maximum contract fee, upon the successful occurrence of the contingency. Because the contingency upon which the services were based has not yet occurred (the collection of the delinquent unit owners' fees), the law firm is not yet entitled to be paid for its services and the retaining lien filed by the law firm cannot be legally or ethically maintained. We agree."; "It is well recognized, and the Associations do not dispute, that an attorney may file and maintain a retaining lien against a client or former client's legal files until the lawyer's fees have been paid or an adequate security for payment has been posted." (emphasis added); "American courts, with few exceptions, have held that in cases where the client, not the attorney, terminates the relationship, the client cannot compel his former attorney to deliver up papers or documents in the attorney's possession that are secured by a retaining lien. Wintter, 618 So. 2d at 377 [Wintter v. Fabber, 618 So. 2d 375 (Fla. Dist. Ct. App. 1993)]. The exceptions are where the client pays the fees due; the client furnishes adequate security for the payment which may be due or which is subsequently found to be due; there is a clear necessity in a criminal case and a defendant cannot post security; or a lawyer's misconduct caused his withdrawal. . . . An additional exception is in contingency fee cases where the contingency has not occurred."; "An attorney or law firm may not assert a retaining lien for fees allegedly owed in a contingent fee case unless and until the contingency has occurred. Because the contingency has not occurred, the law firm could not assert a retaining lien for fees it contends it is owed on collection matters that were still pending when it was discharged. If the law firm believes it is owed money for services it rendered in the collection of delinquent unit owner fees, it may file a charging lien and is entitled to the reasonable value of its services on the basis of quantum meruit, limited by the contract flat fee the parties agreed to." (emphases added)).

- Moore v. Ackerman, 876 N.Y.S.2d 831, 833, 834, 835, 837, 838 (N.Y. Sup. Ct. 2009) (addressing a successor counsel's motion to compel former to turn over files; recognizing a retaining lien, and allowing replaced counsel to charge a copying fee as a condition to releasing the file to replacement counsel; "'The three remedies of an attorney discharged without cause -- the retaining lien, the charging lien, and the plenary action in quantum meruit -- are not exclusive but cumulative.'" (citation omitted); "The authorities are uniform . . . that '[a] court has discretion "to secure the fees and to order the files to be returned to the client before the fees have been paid."'"; "Otherwise applicable law . . . does not clearly establish whether the outgoing attorney is entitled to be paid or reimbursed copying charges for reproducing the client's file before releasing the original to the incoming attorney."; "Neither the Disciplinary Rules nor the Rules of the Second Department make any exception to the retention requirements where the attorney withdraws from representation or is discharged."; "Payment of the reasonable cost of copying the file could be charged to the client as a condition to a release of the client's file to incoming counsel."; "Which is not to say that a charge of $.75 per page is reasonable.").

- Johnson v. Cherry, 256 F. App'x 1, 4-5, 5 (7th Cir. 2007) (unpublished opinion) (holding that a lawyer had not forfeited her right to a quantum meruit recovery, although the lawyer had asserted a retaining lien and failed to turn over the files to the client or her replacement lawyer; noting that the client had not pointed to any particular documents in the file that were necessary or unavailable from other sources; "But there is no actual evidence in the record before us that supports these assertions. Green [client's new lawyer] has never identified, for example, what documents he needed from the file in Clinite's [discharged lawyer] custody that were not available from other sources: e.g., from the public court file, from the court reporter(s) who recorded the depositions that were taken in this case, or from the defendants' attorneys. In that regard, Clinite made two noteworthy representations at the fees hearing below that have never been contradicted. First, Clinite stated that Johnson [client] and her counsel had obtained copies of all of the discovery from defendants' counsel, and that Johnson herself retained the original copies of any documentary evidence she had provided to Clinite."; concluding that there was no showing that the withheld documents "were essential to Green's ability to resolve the case on terms favorable to Johnson"; reversing and remanding directions to award the discharged lawyer "fees in the amount of $3,333 and costs in the amount of $786.93").

Although courts and bars taking this traditional approach might provide some comfort to lawyers who want to withhold the file, those lawyers must also bear in mind the possible liability issues. A client claiming some prejudice due to the lawyer's withholding the file might file a malpractice claim against the lawyer, or file a malpractice counterclaim if the lawyer sues the former client for payment of the lawyer's bills. Withholding of the file might not violate the ethics rules, but it could support a malpractice claim or counterclaim, and at the least affect the "atmospherics" of the dispute over the lawyer's fees. In fact, those other issues normally "trump" the ethics consideration, and prompt lawyers to turn over the file even if the ethics rules do not require it.

Second, some courts and bars have moved away from the traditional "auto mechanic" approach to a retaining lien.

These courts and bars sometimes articulate standards under which the client can obtain the file without paying the lawyer. These standards represent a spectrum of prejudice the client must claim (or prove) before the lawyer becomes ethically obligated to turn over the file even if the client has not paid the lawyers.

Such courts and bars have articulated the following standards.

Substantial Prejudice[1]

- Pennsylvania LEO 1996-157 (11/20/96) ("There is a recognized exception to asserting a lien if the retention of the file would cause 'substantial prejudice' to your client. Under these circumstances, the requirement of Rule 1.16(d) would take precedence and you would be required to surrender the file to your client. 'Substantial prejudice' as contemplated by Opinion No. 94-35 means that prejudice to the client that is not permitted by the Rules. Rules 1.15(b) and 1.16(d) (first sentence); On the other hand, if retention of the file

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[1] This is the Restatement standard. Restatement (Third) of Law Governing Lawyers § 43 cmt. c ("A lawyer may not retain unpaid-for documents when doing so will unreasonably harm the client. During a representation, nonpayment of a fee might justify the lawyer in withdrawing . . . , but a lawyer who does not withdraw must continue to represent the client diligently . . . . A lawyer who has not been paid a fee due may normally retain those documents embodying the lawyer's work . . . . Even then, a tribunal is empowered to order production when the client has urgent need. A lawyer must record or deliver to a client for recording an executed operative document, such as a decree or deed, even though the client has not paid for it, when the operative effect of the document would be seriously compromised by the lawyer's retention of it.") (emphasis added).

would merely result in 'prejudice' as that term is defined in Opinion No. 94-35, which would be prejudice which is tolerated by the Rules, the file would not have to be surrendered. Whether retaining a file would result in mere 'prejudice' or 'substantial prejudice' must be determined on a case by case basis." (emphasis added); "I should caution that there appears to be a trend in the law to favor a client's access to his file over an attorney's lien in certain circumstances. . . . Therefore, where a right to a retaining lien is arguable, and there is a doubt as to whether withholding the file would cause 'substantial prejudice' to a client, any doubt should be resolved in favor of relinquishment and the lawyer should consider returning the file without asserting a lien and subsequently bringing a civil action for recovery of the costs."; "However, the lawyer need not deliver his internal memos and notes which had been generated primarily for his own purposes in working on the client's problem."; "Consistent with the concept that the client is entitled to receive what he has paid for, it is my opinion that whatever documents you conclude are 'papers and property to which the client is entitled,' that those original documents are your client's property and should be provided. I do not believe it would be appropriate to provide a 'copy' of the file at the client's expense. To the extent you wish to retain any portion of the file, the associated duplicating expense should be treated by you as 'a cost of doing business' and should not be billed to the client.").

- Pennsylvania LEO 94-35 (5/12/94) ("Except as provided herein, the Committee concludes that where the client has not paid for services rendered, the lawyer may retain papers and other things of the client relating to the unpaid services. No law prohibits the retention of such papers and things. Except as provided herein, it is the opinion of the Committee that a client is not entitled to papers and things in a pending matter where all fees have not been paid to the lawyer. The exception to the rule is that where retention of such papers and things would cause substantial prejudice to the client, then the lawyer must return the papers and things to the client. The Committee further concludes that where the lawyer has retained papers or other property for the convenience of the client and where the client has paid for the services relating to those papers or property, then the lawyer is obligated to return such property to the client promptly upon demand. For example, where a lawyer prepares a will and is paid for that service and, subsequently, a dispute arises regarding another matter, the lawyer cannot withhold the will from the client. The client is entitled to papers and property for which he or she has paid and such papers and property must be surrendered promptly to the client. In contingency matters, the lien may not be asserted until after the happening of the contingency. If the contingency has not occurred, then the attorney may not assert the lien and must return to the client anything in the lawyer's possession that is the property of the client. Additionally, in contingency matters, if retention of certain things that are not necessarily property of the client, such as exhibits or evidence, would cause substantial prejudice to the client (as in the case where a matter is ready to go to trial or where a facet of the litigation requires the use of those things), then the lawyer must make such things available to the client. In certain circumstances, where a lawyer's right to a lien is arguable, a lawyer should not withhold client papers or other property, even though the lawyer, arguably, has a right to retain such property. Rule 1.16(d) makes it clear that, where withholding such property would cause substantial prejudice [sic] the client, then the lawyer may not assert a lien against that property and papers. In these circumstances, it is recommended that even where fees are owed to a lawyer, the lawyer consider returning to clients papers and other property and subsequently to bring suit for the recovery of such fees. The lawyer may contemplate the possibility of such an action in a retainer letter. Actions on a contract or in quantum meruit against the former client to recover the value of the services should be considered as an alternative to assertion of the lien."); Minnesota LEO 13 (6/15/89) ("A lawyer may not condition the return of client files, papers and property on payment of copying costs. Nor may the lawyer condition return of client files, papers or property upon payment of the lawyer's fee. . . . A lawyer may withhold documents not constituting client files, papers and property until the outstanding fee is paid unless the client's interests will be substantially prejudiced without the documents. Such circumstances shall include, but not necessarily be limited to, expiration of a statute of limitations or some other litigation imposed deadline. A lawyer who withholds documents not constituting client files, papers or property for nonpayment of fees may not assert a claim against the client for the fees incurred in preparing or creating the withheld document(s).").

Prejudice

- Arizona LEO 04-01 (1/2004) ("The inquiring attorney's assertion of a retaining lien on the entire file is improper. Because the inquiring attorney's asserted retaining lien does not extend to materials given to inquiring attorney for use at trial, it is unethical to assert a lien as to such materials. As to the remaining items in the file against which the inquiring attorney desires to assert a lien, the inquiring attorney bears the burden of establishing that his lien attaches to identified items in the file based on a particularized inquiry into the circumstances, and the requirements of Arizona law. No lien can attach to documents when the attachment would prejudice the client's rights. The limited facts provided by the inquiring attorney do not establish that he is entitled to a lien on the documents in the file. Therefore, he should assert no lien on the documents, and should promptly return or provide to the client the documents on which he has no lien claim. Not only do the plain terms of ER 1.16 compel the documents' return upon the client's request, so do the requirements of ER 1.15(d), which states '[A] lawyer shall promptly deliver to the client or third person any . . . other property that the client . . . is entitled to receive and, upon request by the client . . . , shall promptly render a full accounting regarding such property." (emphasis added)).

- San Diego County LEO 1984-3 (1984) ("Upon withdrawal, an attorney is obligated to deliver to the client all papers and property to which the client is entitled. Accordingly, the attorney must provide the client with the original of all pleadings, correspondence, deposition transcripts, and similar papers and property contained in the client's file. Even with a consensually created possessory lien over the client's file, <u>an attorney may not withhold the file if to do so would prejudice the client</u>. Should the attorney desire to retain copies of such papers or property, any expenses incurred in producing those copies must be borne by the attorney." (emphasis added); "However, pursuant to statutory and decisional law, the client is not 'entitled' to any papers or property which constitute or reflect an attorney's impressions, opinions, legal research or theories as defined by the 'absolute' work product privilege of the Code of Civil Procedure section 2016, subdivision (b). Although disclosure of the attorney's work product is not obligated, such disclosure is recommended as a matter of professional ethics and courtesy.").

<u>Harm</u>

- Mississippi LEO 144 (3/11/88) ("The right of a lawyer to withhold or retain a client's file to secure payment of the fee is a matter of law. However, ethically, <u>a lawyer may not retain a client's file in a pending matter if it would harm the client or the client's cause</u>. The ownership of specific items in a client's file is a matter of law. However, ethically, the lawyer should turn over to a client all papers and property of the client which were delivered to the lawyer, the end product of the lawyer's work, and any investigative reports paid for by the client. The lawyer is under no ethical obligations to turn over his work product to the client." (emphasis added); "This committee concludes that the better-reasoned opinions generally recognize that to the extent the client has a right to his file, then his file consists of the papers and property delivered by him to the lawyer, the pleadings or other end product developed by the lawyer, the correspondence engaged in by the lawyer for the benefit of the client, and the investigative reports which have been paid for by the client. . . . However, the lawyer's work product is generally not considered the property of the client, and the lawyer has no ethical obligation to deliver his work product.").

Some courts and bars address the same issue, but from a different direction. Rather than requiring clients to prove the harm they will suffer if deprived of the file, these courts and bars explain that clients must prove how much they need those files.

Such bars and courts have articulated the following standards:

Pressing Necessity

- Conde & Cohen, P.L. v. Grandview Palace Condo. Ass'n, 201 So 3d 64, 65 (Fla. Dist. Ct. App. 2015) ("It is well established that in this state any attorney has a right to a retaining lien on all of the client's property in the attorney's possession, whether related to only one specific matter, until the attorney is paid."; "In this case, no determination has been made as to the validity of any of the law firm's retainer agreements; no determination has been made as to the validity as to the law firm's retaining liens; and no determination has been made as to whether the law firm has been paid. Certainly, absent such determination, no order compelling the law firm to hand over its files may be entered without the requisite showing of pressing necessity and the posting of adequate security. Anything less amounts to a departure from the essential requirements of the law which will cause irreparable harm by nullifying the law firm's retaining liens.").

Essential Need

- Alaska LEO 2004-1 (1/15/04) ("In summary, an expert or investigator's report is part of the client's file. . . . A lawyer may not withhold such reports to serve the lawyer's own interest in getting paid or reimbursed for the cost of the report if it will prejudice the client. Whether or not the client has paid for the report, the client's interests must be paramount. The lawyer's right to reimbursement for the expert's fee must give way to the client's needs if the material is essential to the client's case." (footnote omitted).

Third, at the other extreme, some states explicitly indicate that lawyers must relinquish all or a portion of the file even if the client has not paid them.

- Virginia Rule 1.16(e) (requiring Virginia lawyers to turn over certain portions of their file to clients "whether or not the client has paid the fees and costs owed the lawyer").

- Martin Bricketto, New Jersey Advisory Panel Backs Ban On Attorney Retaining Liens, Law360, Nov. 26, 2012 ("A New Jersey Supreme Court advisory committee has recommended prohibiting attorneys from clinging to client files and other property to collect on unpaid legal bills, despite arguments from the state bar association that the practice remains a legitimate avenue for pursuing payment."; "The Advisory Committee of Professional Ethics was charged with weighing the pros and cons of the common law retaining lien. As part of that process, the panel sought the participation of the New Jersey State Bar Association (NJSBA), which said the liens should continue to be an option for attorneys as long as clients' rights are protected."; "However, in a report made available on November 19, the committee found that the lien is most effective when it hurts clients."; "'A qualification that the lien should not be asserted when it causes prejudice to clients renders the lien ineffective as a method to obtain payment,' the committee said, recommending that the state Supreme Court amend the Rules of Professional Conduct to ban the practice."; "The committee said lawyers with "any sense of professionalism" rarely assert a common law retaining lien when a client urgently needs the file."; "'Assertion of the lien at a time when it is effective -- when the inconvenience to the client in being denied access to his or her property is most intense -- is unduly destructive of the lawyer-client relationship and impacts the public confidence in the bar and the judicial system,' the committee said."; "A lawyer, often when he or she has withdrawn or been terminated from a case, can use the lien to keep a client's file or other property if the client refuses to pay up, the report said. However, a court can order a client's former attorney to turn over such papers if retaining them prejudices the client in continuing to pursue a legal claim or defense, according to the report."; "The Restatement of the Law has been advocating doing away with the common law lien, and some scholars have found that retaining liens can raise concerns such as potential overreaching and breach of fiduciary duty, the report said."; "According to the committee, declining use of the lien in recent years arguably reflects evolving public policy in the state to protect clients, the less powerful party in an attorney-client relationship."; "The state Supreme Court will ultimately decide the fate of the common law retaining lien, and comments are now being accepted on the advisory committee's report and recommendation. Any such feedback is due by January 31.").

- Mary Pat Gallagher, New Jersey Erects Ethical Bar to Common-Law Liens on Client Files, N.J. L.J., Mar. 26, 2013 ("As of April 1, lawyers no longer will be able to hold onto client files and papers to collect fees. An amendment to Rule of Professional Conduct (RPC) 1.16(d), effective that date, states flatly, 'No lawyer shall assert the common law retaining lien.'").

- Brussow v. Utah State Bar, 286 P.3d 1246, 1249, 1252, 1253, 1354 (Utah 2012) (relying on an explicit Utah ethics rule in holding that a Utah lawyer cannot retain a client's file under a retaining lien; "Mr. Brussow [lawyer] acknowledged that he had received requests for Ms. Langley's [client] file from Ms. Langley and her new attorney, but he argued that he was entitled to retain the file because Ms. Langley had failed to pay the fees for the deposition transcripts. He also argued that he had functionally provided the file to Ms. Langley by sending her copies of his work as he performed it. Finally, he claimed that retaining the file did not cause any harm to Ms. Langley."; "[T]he comments [to Utah Rule 1.16] state that '[t]he Utah rule differs from the ABA Model Rule in requiring that papers and property considered to be part of the client's file be returned to the client notwithstanding any other laws or fees or expenses owing to the lawyer.'"; "[T]he plain language of rule 1.16(d) does not allow attorneys to assert a lien on a client files to secure payments from a client."; "[A]lthough Mr. Brussow may have sent Ms. Langley copies of his work as he performed it, her client file likely contained more than the documents that he drafted, such as documents submitted by the opposing party in the proceeding, discovery materials, depositions, or witness statements. Further, Ms. Langley testified at the hearing before the Screening Panel that she and her new lawyer had to 'try to catch up on what was going on without the file by getting copies of the court records.' This testimony indicates that Ms. Langley did not have the information that she needed from her client to move forward with her case. Thus, regardless of whether Mr. Brussow sent Ms. Langley copies of his work as he performed it, rule 1.16(d) required him to provide her file to her upon her request.").

Under this approach, lawyers essentially must treat their files as if they have been fully paid. This is not to say that they must automatically turn over all of their files. Even if they are fully paid, lawyers must determine what files the ethics rules require them to turn over to their clients or former clients. Most bars take what is called the "entire file" approach, which generally requires lawyers to turn over drafts of documents, etc. A minority of some bars use what is commonly called the "end-product" approach, under which they must give clients only the final version of documents, etc. Under either approach, lawyers generally may withhold purely internal administrative documents relating to staffing, etc.

Under any of these standards, other issues can arise. For instance, bars take different positions on whether certain types of documents are immune to otherwise permissible retaining liens.

- <u>In re Attorney G.</u>, 302 P.3d 248, 252-53 (Colo. 2013) (holding that a lawyer could not assert an attorney lien over a client's passport; "[A] United States passport is a sui generis type of federal property that does not fall within a client's 'papers' on which a retaining lien may be asserted under section 12-5-120.").

Bars also disagree about whether clients can charge their clients for copies of documents that the lawyers must turn over to the clients.

- New York City LEO 2008-1 (07/2008) ("In ABCNY Formal Op. 1986-4, we addressed a lawyer's obligations to retain paper documents relating to a representation. We now conclude that the guidelines articulated in ABCNY

Formal Op. 1986-4 should also apply to a lawyer's obligations to retain e-mails and other electronic documents. With respect to the electronic documents that the lawyer retains, the lawyer is not under an ethical obligation to organize those documents in any particular manner, or to store those documents in any particular storage medium, so long as the lawyer ensures that the manner of organization and storage does not (a) detract from the competence of the representation or (b) result in the loss of documents that the client may later need and may reasonably expect the lawyer to preserve. To those ends, electronic documents other than e-mails present less difficulty because they are frequently stored in document management systems in which they are typically coded with several identifying characteristics, making it easier to locate and assemble them later. E-mails raise more difficult organizational and storage issues. Some e-mail systems automatically delete e-mails after a period of time, so the lawyer must take affirmative steps to preserve those e-mails that the lawyer decides to save. In addition, e-mails generally are not coded, or otherwise organized, to facilitate their later retrieval. Thus, a practice with much to commend it is to organize saved e-mails to facilitate their later retrieval, for example, by coding them or saving them to dedicated electronic files. Otherwise, it may be exceedingly difficult and expensive for the lawyer to retrieve those e-mails, and as discussed in this Opinion, the lawyer must not charge the client for retrieval costs that could reasonably have been avoided."; "In New York, a client has a presumptive right to the lawyer's entire file in connection with a representation, subject to narrow exceptions. The lawyer may charge the client a reasonable fee, based on the lawyer's customary schedule, for gathering and producing electronic documents. That fee may reflect the reasonable costs of retrieving electronic documents from their storage media and reviewing those documents to determine the client's right of access. It is prudent for lawyer and client to discuss the retention, storage, and retrieval of electronic documents at the outset of the engagement and to consider memorializing their agreement in a retention letter.").

Best Answer

The best answer to this hypothetical is **PROBABLY YES**. N 9/21

Duty to Protect Former Clients

Hypothetical 23

You know you have ethics and fiduciary duties to current clients, but three recent incidents have involved your possible duties to former clients.

(a) Must you advise your former client (whom you represented until just six weeks ago) about a new IRS ruling that dramatically affects your former client's estate tax planning?

NO

(b) Must you advise a former client that its electronic files your firm possesses have been compromised by a cyberattack?

MAYBE

(c) Must you respond to a document subpoena your law firm just received for a former client's documents – if your former client refuses to pay for the time you will spend objecting to the subpoena and producing any responsive documents under a court order?

YES (PROBABLY)

(d) Must you separate out the privileged documents before producing your firm's files to your former client's adversary?

NO (PROBABLY)

Analysis

This situation involves both ethical and fiduciary duties.

The ABA Model Rule explicitly describe duties that lawyers owe to their former clients.

First, under ABA Model Rule 1.9(a), lawyers may not represent another client

> in the same or a substantially related matter in which that [other client's] interests are materially adverse to the

> interest of the former client, unless the former client gives informed consent, confirmed in writing.

ABA Model Rule 1.9(a).

Second, ABA Model Rule 1.9(b) applies essentially the same principle to a lawyer's representation adverse to a former client of the lawyer's former law firm if that lawyer had acquired material information.

Third, under ABA Model Rule 1.9(c)(2) a lawyer shall not

> reveal information relating to the representation [of a former client] except as these Rules would permit or require with respect to a client.

ABA Model Rule 1.9(c)(2). Thus, former clients deserve the same confidentiality duty as current clients.

Fourth, under ABA Model Rule 1.9(c)(1), a lawyer may not

> use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known."

ABA Model Rule 1.9(c)(1).

Other than those specific duties, the ABA Model Rules do not recognize lawyers' duties to their former clients.

The Restatement provides a more detailed analysis of a lawyer's duty to former clients.

In addition to the obvious duties to preserve the client's confidences, etc., and avoid taking advantage of the earlier representation, the Restatement contains at least a minimal duty of communication.

Thus, the Restatement requires lawyers to:

> (a) observe obligations to a former client such as those dealing with client confidences . . . , conflicts of interest . . . , client property and documents . . . , and fee collection . . . ; (b) take no action on behalf of a former client without new authorization and give reasonable notice, to those who might otherwise be misled, that the lawyer lacks authority to act for the client; (c) take reasonable steps to convey to the former client any material communication the lawyer receives relating to the matter involved in the representation; and (d) take no unfair advantage of a former client by abusing knowledge or trust acquired by means of the representation.

<u>Restatement (Third) of Law Governing Lawyers</u> § 33(2) (2000).

In 2018, the ABA explicitly indicated that lawyers have no duty to disclose to a former client any malpractice that occurred during the representation.

- ABA LEO 481(4/17/18) ("The Model Rules require a lawyer to inform a current client if the lawyer believes that he or she may have materially erred in the client's representation. Recognizing that errors occur along a continuum, an error is material if a disinterested lawyer would conclude that it is (a) reasonably likely to harm or prejudice a client; or (b) of such a nature that it would reasonably cause a client to consider terminating the representation even in the absence of harm or prejudice. The lawyer must so inform the client promptly under the circumstances. Whether notification is prompt is a case- and fact-specific inquiry." "<u>No similar duty of disclosure exists under the Model Rules where the lawyer discovers after the termination of the attorney-client relationship that the lawyer made a material error in the former client's representation.</u>" "Good business and risk management reasons may exist for lawyers to inform former clients of their material errors when they can do so in time to avoid or mitigate any potential harm or prejudice to the former client." An attorney-client relationship ends when: the engagement letter specifies such a time; the lawyer or the client explicitly end the relationship; "when overt acts inconsistent with the continuation of the attorney-client relationship indicate that the relationship has ended"; or "when it would be objectively unreasonably to continue to bind the parties to each other." An "episodic" client might be a continuing client in the absence of any ongoing matter if the client periodically engaged the lawyer, and the client "reasonably expects that the professional relationship will span any [such] intervals and that the lawyer will be available when the client next needs representation.") (emphasis added).

Just six months later, the ABA took the same position about lawyers' knowledge that a data breach or cyberattack has exposed a former client's confidential information

– explicitly declining to extend such a disclosure duty to former clients in the absence of an ethics rule.

- ABA LEO 483 (10/17/18) (addressing a "data event where material client confidential information is misappropriated, destroyed, or otherwise compromised, or where a lawyer's ability to perform legal services for which the lawyer is hired is significantly impaired") lawyers: (1) must comply with their competence duty, including monitoring for databreaches (making "reasonable efforts," because not immediately detecting a databreach may not constitute an ethics violation); (2) "act reasonably and promptly to stop the breach and mitigate damage resulting from the breach" (and "should consider proactively developing an incident response plan"); (3) make "reasonable attempts to determine whether electronic files were accessed, and if so, which ones"; (4) comply with their confidentiality duty (although lawyers' competence in preserving client confidences "is not a strict liability standard and does not require the lawyer to be invulnerable or impenetrable"), including considering any implied authorization to disclose client confidences to law enforcement to the reasonably necessary to assist in "ending" the breach or recovering stolen information," in light of considerations such as the disclosure's harm to the client); (5) <u>advise current clients about such databreach or cyberattack</u> (whether or not client data deserves protection under Rule 1.15 – which remains an "open question"); (6) in responding to a databreach or cyberattack involving former clients' data, consider "reach[ing] agreement with clients before conclusion, or at the termination, of the relationship about how to handle the client's electronic information that is in the lawyer's possession" (<u>noting that "the Committee is unwilling to require notice [of a databreach or cyberattack] to a former client as a matter of legal ethics in the absence of a black letter provision requiring such notice</u>"); (7) consider their obligation to notify clients depending on the type of breach (for instance, lawyers need not alert their clients of a ransomware attack if "no information relating to the representation of a client was inaccessible for any material amount of time, or was not accessed by or disclosed to unauthorized persons"; (8) must comply with state and federal law if "personally identifiable information or others is compromised as a result of a data breach. (emphasis added)

Interestingly, a Maine legal ethics opinion explicitly rejected this ABA approach, and imposed such a disclosure duty on a client's former lawyer.

- Maine LEO 220 (4/11/19) (generally adopting the articulation of lawyers' duties upon discovering a data breach cyberattack adopted by ABA LEO 483 (10/17/18) with one exception; "While the Commission agrees with the analysis contained in ABA Form Opinion No. 483 concerning notification of a current client, <u>the Commission departs from the ABA with respect to a former</u>

client. The ABA reviewed Model Rules 1.9 and 1.16 and concluded that notice to a former client is not required. However, Maine's Rule 1.9 provides that 'a lawyer who has formerly represented a client shall not thereafter: (2) reveal confidences or secrets of a former client except as these rules would permit or require with respect to a client.' The duty of confidentiality survives the termination of the client-lawyer relationship. M.R. Prof. Conduct 1.6 cmt. (18). Indeed, trust is the 'hallmark of the client-lawyer relationship,' id., cmt. (2), whether for a current or a former client. The Commission concludes that a former client is entitled to no less protection and candor than a current client in the case of compromised secrets and confidences. A former client must be timely notified regarding a cyberattack or data breach that has, or may have, exposed the client's confidences or secrets.") (emphases added).

Several years earlier, the ABA tried to "thread the needle" in describing lawyers' duty when responding to a subpoena or a former client's client confidential or privileged communications or documents. The ABA required lawyers to disclose such a subpoena to former clients, and surmised that lawyers "may be required to challenge the initial demand" even if a former client refuses to pay the lawyer any fees for the required work.

- ABA LEO 473 (2/17/16) (lawyers receiving a subpoena or other compulsory process calling for the disclosure of client confidential or privileged communications or documents: (1) must notify or make reasonable steps to notify current or former clients of the subpoena; (2) must consult with available clients about whether to challenge the demand or appeal (but may withdraw if such an appeal is beyond the retention scope or is a new matter the lawyer does not wish to handle); (3) must consult with available clients about fees if the original retainer letter does not require clients' payments in that situation -- although lawyers "may be required to challenge the initial demand" even without a fee agreement; (4) "should" resist disclosure on behalf of unavailable clients, but may comply with a court order overruling any objections (in that situation, lawyers may seek to withdraw or file a later quantum meruit action for fees); (5) need not appeal on behalf of unavailable clients a court order requiring disclosure; (6) must in all circumstances only disclose client confidential or privileged information or communications "to the extent reasonably necessary" (which may require lawyers to seek protective orders or other arrangements.) (emphases added).

Only a few courts have dealt with this scenario.

- See, e.g., Sage Realty Corp. v. Proskauer, Rose, Goetz & Mendelsohn, LLP, 743 N.Y.S.2d 72 (N.Y. App. Div. 2002) (requiring a client's former law firm to continue looking for a file generated during its representation of the client, but which could not immediately be located; allowing the firm to charge the client for the cost of providing the missing files).

Best Answer

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

N 9/21