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ETHICS IN LITIGATION

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Lawyers' Communications about Cases: Basic Principles

Hypothetical 1

You occasionally have lunch with your favorite law school professor, and enjoy a vigorous "give and take" on abstract legal issues that you never face in your everyday practice. Yesterday you spent the entire lunch discussing whether lawyers lose their First Amendment rights when they join the profession.

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

(A) YES

Analysis

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

ABA Model Rules

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

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

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

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

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

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

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

ABA Model Rule 3.6(b).

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

> There are, on the other hand, certain subjects that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter, or any other proceeding that could result in incarceration. These subjects relate to:
>
> > (1) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;
> >
> > (2) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission, or statement given by a defendant or suspect or that person's refusal or failure to make a statement;
> >
> > (3) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be presented;
> >
> > (4) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

> (5) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or
>
> (6) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

ABA Model Rule 3.6 cmt. [5].

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

Restatement

The Restatement articulates the same basic prohibition.

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

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

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

> Restrictions on the out-of-court speech of advocates seek to balance three interests. First, the public and the media have an interest in access to facts and opinions about litigation because litigation has important public dimensions. Second, litigants may have an interest in placing a legal dispute before the public or in countering adverse publicity about the matter, and their lawyers may feel a corresponding duty to further the client's goals through contact with the media. Third, the public and opposing parties have an

> interest in ensuring that the process of adjudication will not be distorted by statements carried in the media, particularly in criminal cases. The free-expression rights of advocates, because of their role in the ongoing litigation, are not as extensive as those of either nonlawyers or lawyers not serving as advocates in the proceeding.

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

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

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

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

State Approaches

Every state has adopted some limitation on lawyers' public communications. As in so many other areas, states often adopt their own variation on the ABA Model Rules approach. A few examples suffice to show the great variation among the states' positions.

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

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

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

Virginia also applies a different standard.

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

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

Courts' Gag Orders

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

- United States v. McGregor, 838 F. Supp. 2d 1256, 1267 (M.D. Ala. 2012) (declining to enter a gag order, but reminding the lawyers of their ethical duty not to make certain public statements; "The court declined to grant the government's proposed gag order because it was not the least restrictive alternative and it would not have been fully effective in curbing trial publicity. Instead, the court adopted a middle-ground approach: instructing the attorneys to follow the guidelines embodied in Alabama Rule of Professional Conduct 3.6. The court emphasized that comments about a witness's

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

credibility would be disfavored and presumptively prejudicial."; "A gag order is a prior restraint on speech. As such, the court engaged in a rigorous First Amendment inquiry. Because the government's proposed gag order targeted only the attorneys and not the defendants or the media, the court had to determine whether extrajudicial comments created a substantial likelihood of material prejudice to the proceedings. Furthermore, a gag order had to be narrowly tailored and could only be granted if less burdensome alternatives were ineffective."; "The court declined to impose the government's proposed gag order. The court, however, attempted to strike a balance between defense counsel's First Amendment rights and the government's interest in a fair trial."; "Accordingly, rather than granting the government's motion for a gag order . . . , the court employed the less restrictive alternative of requiring the attorneys and their trial teams to comply with Alabama Rule of Professional Conduct 3.6. The court found that the Rule 3.6 alternative worked well.").

Courts' Other Restrictions

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

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

- United States v. Fieger, Case No. 07-CR-20414, 2008 U.S. Dist LEXIS 18473, at *10-11 (E.D. Mich. Mar. 11, 2008) (addressing Fieger's advertisements which, among other things, compared the Bush Administration to the Nazi party; noting that the advertisements began to appear before Fieger's criminal trial on alleged campaign contribution violations involving his support for Democratic primary candidate John Edwards;"The Court finds these two commercials are unequivocally directed at polluting the potential jury venire in the instant case in favor of Defendant Fieger and against the Government. As Magistrate Judge Majzoub correctly found, the issue of selective prosecution is one of law not fact, and therefore, arguing such a theory to the potential jury pool through commercials, creates the danger of those jurors coming to the courthouse with prejudice against the Government.")

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

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

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

- Steiner v. Superior Court, 164 Cal. Rptr. 3d 155, 157, 165 (Cal. Ct. App. 2013) (holding that a court could not order a lawyer handling the case before the court to remove references on his website; "An attorney's Web site advertised her success in two cases raising issues similar to those she was about to try here. The trial court admonished the jury not to 'Google' the attorneys or to read any articles about the case or anyone involved in it. Concerned that a juror might ignore these admonitions, the court ordered the attorney to remove for duration of trial two pages from her website discussing the similar cases. We conclude this was an unlawful prior restraint on the attorney's free speech rights under the First Amendment. Whether analyzed under the strict scrutiny standard or the lesser standard for commercial speech, the order was more extensive than necessary to advance the

competing public interest in assuring a fair trial. Juror admonitions and instructions, such as those given here, were the presumptively adequate means of addressing the threat of jury contamination in this case."; "The trial court properly admonished the jurors not to Google the attorneys and also instructed them not to conduct independent research. We accept that jurors will obey such admonitions. . . . It is a belief necessary to maintain some balance with the greater mandate that speech shall be free and unfettered. If a juror ignored these admonitions, the court had tools at its disposal to address the issue. It did not, however, have authority to impose, as a prophylactic measure, an order requiring Farrise [lawyer] to remove pages from her law firm website to ensure they would be inaccessible to a disobedient juror. Notwithstanding the good faith efforts of a concerned jurist, the order went too far.").

Best Answer

The best answer to this hypothetical is **(A) YES**.

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

Lawyers' Communications about Cases: Defining the Limits

Hypothetical 2

Your state's chief justice just appointed you to a commission reviewing your state's ethics rules provision dealing with lawyers' public communications. You wrestle with some basic issues as you prepare for the commission's first meeting.

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

(B) NO

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

(B) NO

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

(B) NO

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

(A) YES

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

(A) YES

Analysis

(a) The ABA Model Rules apply the prohibition to a lawyer who "is participating or has participated in the investigation or litigation of a matter." ABA Model Rule 3.6(a). Although the term "investigation" extends the prohibition beyond ongoing

litigation, the rule clearly focuses on lawyers engaged in litigation, or the preparation for litigation.

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

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

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

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

ABA Model Rule 3.6 cmt. [6].

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

- In re Gilsdorf, No. 2012PR00006, Hearing Board of Ill. Attorney Registration & Disciplinary Comm'n (June 4, 2013) ("This matter arises out of the Administrator's two-count Complaint, filed on February 6, 2012, as amended by the Administrator's motions on April 5, 2012, and September 28, 2012. The charges of misconduct arose out of the Respondent knowingly posting on an Internet site, and showing to others, a DVD video he received from the state's attorney while representing a criminal defendant. The video showed the undercover drug transaction between Respondent's client and a

confidential police source. The Respondent entitled the video 'Cops and Task Force Planting Drugs,' which was false. By posting the video while his client's criminal case was pending, Respondent intended to persuade residents of the county that the police or other government officials acted improperly in the prosecution of his client. The Hearing Board found that the Respondent engaged in the misconduct charged in both counts. Specifically, he revealed information relating to the representation of a client without the informed consent of his client and without the disclosure being impliedly authorized in order to carry out the representation; failed to reasonably consult with the client about the means by which the client's objectives are to be accomplished; made extrajudicial statements that the lawyer reasonably knows will be disseminated by means of public communication and would pose a serious and imminent threat to the fairness of an adjudicative proceeding; engaged in conduct prejudicial to the administration of justice; and engaged in conduct which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute. The Hearing Board recommended that Respondent be suspended from the practice of law for a period of five (5) months.").

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

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

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

- PCG Trading, LLC v. Seyfarth Shaw, LLP, 951 N.E.2d 315, 320, 321 (Mass. 2011) (finding that a lawyer from Bickel & Brewer had not violated Mass. Rule 3.6 by publicly commenting on a malpractice case that Bickel & Brewer was pursuing against Seyfarth Shaw; concluding that the Bickel & Brewer's public statements essentially tracked the complaint; "A review of the record establishes that Brewer's remark quoted in the National Law Journal falls well within these two exceptions. Brewer's statement that Seyfarth Shaw, 'in an attempt to relieve itself of its responsibility to . . . Converge [defunct company whose assets were bought by plaintiff],' filed court papers 'that not only misstated the facts, but stated the facts in a way' that supported Costigan's [former Converge employee who had won a judgement against it] notion of PCG's successor liability, in large measure tracks directly the allegations of PCG's complaint."; "To the extent the complaint itself does not allege that

Seyfarth Shaw's motion to withdraw 'misstated' facts, the public court filings in the Norfolk County action do reflect the misstatement to which Brewer referred. Those court filings are matters of 'public record.'" (citation omitted); rejecting Seyfarth Shaw's efforts to prevent a Bickel & Brewer lawyer from being admitted pro hac vice).

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

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

Several years earlier, the Iowa Supreme Court dealt with a civil defense lawyer's letter to the editor about a case brought against an insurance agency that the lawyer represented. Iowa Supreme Court Bd. of Prof'l Ethics v. Visser, 629 N.W.2d 376 (Iowa 2001). The letter initially summarized his client's defense, criticized the lawsuit and indicated that he and his client expected the client would be exonerated "from the claims of this unhappy and confused former employee." Id. at 379. The State Disciplinary Board recommended a public reprimand, but the Iowa Supreme Court

found no violation, based in large part on the absence of any evidence that the letter to the editor would cause prejudice.

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

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

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

- Ryan Davis, Samsung Attorney Defends Release Of Banned Apple Trial Evidence, Law360, Aug. 1, 2012 ("Quinn Emanuel managing partner John Quinn on Wednesday defended his decision as Samsung Electronics Company Ltd's attorney to publicly release evidence that had been excluded from the company's patent trial with Apple Inc., telling the judge irritated by the move that the release was protected by the First Amendment."; "As the trial got underway Tuesday, United States District Judge Lucy Koh refused to

allow evidence that Samsung says proves it could not have copied the design for the iPhone, as Apple alleges it did, because it had a similar phone in the works before the Apple device was released. Later in the day, Samsung sent the evidence to media outlets and issued a statement complaining about its exclusion."; "The statement angered Judge Koh, who demanded in court that Quinn, of Quinn Emanuel Urquhart & Sullivan LLP, explain who drafted and authorized it."; "In a declaration filed Wednesday, Quinn said that he authorized the release and maintained that he had done nothing wrong, since all the evidence was available in publicly filed court documents. Moreover, statements to the press by attorneys are protected free speech, he said."; "In an order on Sunday, Judge Koh excluded both pieces of evidence, ruling that their disclosure was untimely. In court on Tuesday, Quinn implored the judge to reconsider, arguing that the exclusion threatened the integrity of the trial."; "'In 36 years, I've never begged the court. I'm begging the court now,' he said."; "Judge Koh refused to admit the evidence, telling Quinn, 'Please don't make me sanction you. I want you to sit down, please.'"; "Later in the day, Samsung sent the excluded evidence to media outlets, along with a statement arguing that Judge Koh's decision to keep it out means that Samsung would 'not allowed to tell the jury the full story.'"; "'The excluded evidence would have established beyond doubt that Samsung did not copy the iPhone design. Fundamental fairness requires that the jury decide the case based on all the evidence,' the statement said."; "Apple's attorneys immediately complained to Judge Koh that Samsung's release could influence the jurors. The judge told Samsung's attorneys in court that she wanted to know who authorized the release."; referring to the Declaration of John B. Quinn, which stated as follows: "Samsung's brief statement and transmission of public materials in response to press inquiries was not motivated by or designed to influence jurors. The members of the jury had already been selected at the time of the statement and the transmission of these public exhibits, and had been specifically instructed not to ready any form of media relating to this case. The information provided therefore was not intended to, nor could it, 'have a substantial likelihood of material prejudicing an adjudicative proceeding.' See Cal. R. Prof. Res. 5-120(A)"; "[E]ven courts that have chosen to restrict the parties' communications with the public have recognized that '[a]fter the jury is selected in this case, any serious and imminent threat to the administration of justice is limited' because 'there is an "almost invariable assumption of the law that jurors will follow their instructions."'").

The court ultimately declined to sanction Quinn.

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

ABA Model Rule 3.6 cmt. [1] explains that some restrictions are justified, "particularly where trial by jury is involved." ABA Model Rule 3.6 cmt. [6] acknowledges

that "[c]riminal jury trials will be most sensitive to extrajudicial speech. . . . Non-jury hearings and arbitration proceedings may be even less affected."

The Restatement also provides some guidance.

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

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

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

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

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

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

ABA Model Rule 3.6(c).

Comment [7] explains this exception.

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

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

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

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

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

Best Answer

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

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

Ex Parte Communications with a Corporate Adversary's Employees

Hypothetical 3

You represent a plaintiff injured when she was hit by a truck. The trucking company lawyer has been "running you ragged" in an effort to force a favorable settlement. You are trying to think of ways that you can gather evidence without the cost of depositions.

Without the trucking company lawyer's consent, may you interview:

(a) The trucking company's chairman?

(B) NO

(b) The trucking company's vice chairman, who has had nothing to do with this case and who would not be involved in any settlement?

MAYBE

(c) The supervisor of the truck driver who hit your client (and whose statements would be admissible as "statements against interest")?

(A) YES (PROBABLY)

(d) A truck driver who has worked for the trucking company for the same number of years as the driver who hit your client (to explore the type of training she received)?

(A) YES (PROBABLY)

(e) The trucking company's mechanic, who checked out the truck the day before the accident?

MAYBE

(f) The truck driver who hit your client?

(B) NO

Analysis

Introduction

Of all the ex parte contact issues, the permissible scope of ex parte contacts with employees of a corporate adversary has the most practical consequences, and (unfortunately) the most subtle differences from state to state.

The ABA Model Rules address this issue in a comment.

> In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

ABA Model Rule 4.2 cmt. [7].

Significantly, the Ethics 2000 changes deleted an additional category of corporate employees that had formerly been off-limits:

> or whose statement may constitute an admission on the part of the organization.

Thus, the ABA Ethics 2000 changes liberalized the Rule, expanding the number of corporate employees who are fair game for ex parte contacts.

The Restatement defines a "represented nonclient" who is off-limits to ex parte contacts as follows:

> [A] current employee or other agent of an organization represented by a lawyer:
>
> (a) if the employee or other agent supervises, directs, or regularly consults with the lawyer concerning the matter or if the agent has power to compromise or settle the matter;

> (b) if the acts or omissions of the employee or other agent may be imputed to the organization for purposes of civil or criminal liability in the matter; or
>
> (c) if a statement of the employee or other agent, under applicable rules of evidence, would have the effect of binding the organization with respect to proof of the matter.

Restatement (Third) of Law Governing Lawyers § 100(2) (2000). The first two categories match ABA Model Rule 4.2 cmt. [7], but the third category is quite different.

Elsewhere, the Restatement explains that

> [m]odern evidence rules make certain statements of an employee or agent admissible notwithstanding the hearsay rule, but allow the organization to impeach or contradict such statements. Employees or agents are not included within Subsection (2)(c) solely on the basis that their statements are admissible evidence. A contrary rule would essentially mean that most employees and agents with relevant information would be within the anti-contact rule, contrary to the policies described in Comment b.

Restatement (Third) of Law Governing Lawyers § 100 cmt. e (2000). Thus, the Restatement takes the same position as the ABA Ethics 2000 change.

In a 2009 article, Professors Hazard and Irwin explained the confusion about permissible ex parte communications with employees of a corporate adversary. After a lengthy discussion, they proposed to add a Comment to Rule 4.2 to explain the standard.

> In the context of organizational representation, the prohibition on communications applies where the lawyer knows or reasonably should know that a constituent is in a position within the organization to be classified as a represented person. This means that the lawyer has actual knowledge of the constituent's position or that a lawyer of reasonable prudence and competence would have actual knowledge in the same circumstances. See Rule 1.0(j).

Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Toward a Revised 4.2 No-Contact Rule, 60 Hastings L.J. 797, 840 (Mar. 2009).

In 2002, the Nevada Supreme Court issued an opinion which provided an excellent summary of the principles involved in this issue, the competing approaches and the advantages and disadvantages of those approaches. Palmer v. Pioneer Inn Assocs., Ltd., 59 P.3d 1237 (Nev. 2002).

The Nevada Supreme Court listed various interests furthered by restricting contacts between the corporation's adversary and corporate employees.

- "[P]rotecting the attorney-client relationship from interference." Id. at 1242.
- "[P]rotecting represented parties from overreaching by opposing lawyers." Id.
- "[P]rotecting against the inadvertent disclosure of privileged information." Id.
- "[B]alancing on one hand an organization's need to act through agents and employees, and protecting those employees from overreaching and the organization from the inadvertent disclosure of privileged information." Id.

The Nevada Supreme Court also listed the interests that would justify some ex parte contacts between a plaintiff's lawyer and corporate employees.

- "[T]he lack of any such protection afforded an individual, whose friends, relatives, acquaintances and co-workers may generally all be contacted freely." Id.
- "[P]ermitting more equitable and affordable access to information pertinent to a legal dispute." Id.
- "[P]romoting the court system's efficiency by allowing investigation before litigation and informal information-gathering during litigation." Id.
- "[P]ermitting a plaintiff's attorney sufficient opportunity to adequately investigate a claim before filing a complaint in accordance with Rule 11." Id.
- "[E]nhancing the court's truth-finding role by permitting contact with potential witnesses in a manner that allows them to speak freely." Id.

The Nevada Supreme Court described the pros and cons of six possible tests.

First, the "blanket test" prohibits all ex parte contacts with employees of a corporate adversary.

The blanket test has the advantages of clarity, and offering the most protection to the organization. However, the blanket test limits or eliminates counsel's opportunity to "properly investigate a potential claim before a complaint is filed," and also forces all discovery to be taken through expensive depositions. Id. at 1243.

Second, the "party-opponent admission test" prohibits ex parte contacts with

> any employee whose statement might be admissible as a party-opponent admission under FRE 801(d)(2)(D) and its state counterparts.

Id.

Under this approach, an employee's statement "is not hearsay, and thus is freely admissible against the employer, if it concerns a matter within the scope of the employee's employment, and is made during the employee's period of employment." Id. The party-opponent admission test has the advantage of protecting the organization "from potentially harmful admissions made by its employees to opposing counsel, without the organization's counsel's presence." Id. The organization's interest in avoiding such a situation is "particularly strong because such admissions are generally recognized as a very persuasive form of evidence." Id.

The party-opponent admission test has a disadvantage of "essentially cover[ing] all or almost all employees, since any employee could make statements concerning a matter within the scope of his or her employment, and thus could potentially be included within the Rule." Id. This means that the test can "effectively serve as a blanket test." Id.

Third, the "managing-speaking agent test" prohibits ex parte contacts with

> those employees who have "speaking" authority for the organization, that is, those with legal authority to bind the organization.

Id. at 1245 (footnote omitted).

Identifying such off-limits employees must be "determined on a case-by-case basis according to the particular employee's position and duties and the jurisdiction's agency and evidence law." Id. The managing-speaking agent test has the advantage of balancing the competing policies of "protecting the organizational client from overreaching . . . and the adverse attorney's need for information in the organization's exclusive possession that may be too expensive or impractical to obtain through formal discovery." Id. The managing-speaking agent test has the disadvantage of "lack of predictability." Id.

Fourth, the "control group test" prohibits ex parte contacts with

> only those top management level employees who have responsibility for making final decisions, and those employees whose advisory roles to top management indicate that a decision would not normally be made without those employees' advice or opinion.

Id.

The control group test has the advantage of reducing discovery costs by increasing the number of fair-game employees. The control group test has the disadvantage of being narrower than the attorney-client privilege rule expressed in Upjohn. It also lacks predictability, because it is not easy to tell who is within the "control group." Id.

Fifth, the "case-by-case balancing test" looks at each case and determines which ex parte contacts would be appropriate. According to the Nevada Supreme Court, "this

test has been applied only when a lawyer seeks prospective guidance from a court." Id. at 1246.

Sixth, the "New York test" prohibits ex parte communications with

> corporate employees whose acts or omissions in the matter under inquiry are binding on a corporation (in effect, the corporation's "alter egos") or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel.

Id. This is the approach adopted by the Restatement, and is also called the "alter ego test." This approach "would clearly permit direct access to employees who were merely witnesses to an event for which the corporate employer is sued." Id. The advantages of the New York test are its balancing of protection of the organization and the need for informal investigation. Its disadvantages are its unpredictability, and the possibility that it provides too much protection for the organization.

The Nevada Supreme Court ultimately selected the "Managing-Speaking Agent Test." The court explained that this approach does not prohibit ex parte contacts with "employees whose conduct could be imputed to the organization based simply on the doctrine of respondeat superior." Id. at 1248. The off-limits employees under this test are only those whose statements can "bind" the corporation in a "legal evidentiary sense." Id. An employee is not deemed off-limits "simply because his or her statement may be admissible as a party-opponent admission." Id.

States take varying approaches to this common situation. For instance, some jurisdictions include their approach in the black-letter rule.

> For purposes of this Rule, the term "party" or "person" includes any person or organization, including an employee of an organization, who has the authority to bind a party organization as to the representation to which the communication relates.

D.C. Rule 4.2(c). In a comment, D.C. Rule 4.2(c) explains that "the Rule does not prohibit a lawyer from communicating with employees of an organization who have the authority to bind the organization with respect to the matters underlying the representation if they do not also have authority to make binding decisions regarding the representation itself." D.C. Rule 4.2 cmt. [4].

Some states include their approach in a comment to their ethics rules.

> In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons in the organization's "control group" as defined in Upjohn v. United States, 449 U.S. 383 (1981) or persons who may be regarded as the "alter ego" of the organization. The "control group" test prohibits ex parte communications with any employee of an organization who, because of their status or position, have the authority to bind the corporation. Such employees may only be contacted with the consent of the organization's counsel, through formal discovery or as authorized by law. An officer or director of an organization is likely a member of that organization's "control group." The prohibition does not apply to former employees or agents of the organization, and an attorney may communicate ex parte with such former employee or agent even if he or she was a member of the organization's "control group." If an agent or employee of the organization is represented in the matter by separate counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.

Virginia Rule 4.2 cmt. [7].

Most states follow the basic ABA Model Rule and Restatement approach -- considering "off-limits" corporate employees with managerial responsibility or involvement in the pertinent incident.

- North Carolina LEO 2005-5 (7/21/06) ("Even when a lawyer knows an organization is represented in a particular matter, Rule 4.2(a) does not restrict access to all employees of the represented organization. See[,] e.g., 97 FEO 2 and 99 FEO 10 (delineating which employees of a represented organization are protected under Rule 4.2). Counsel for an organization, be it a corporation or government agency, may not unilaterally claim to represent all

of the organization's employees on current or future matters as a strategic maneuver. See 'Communications with Person Represented by Counsel,' Practice Guide, Lawyers' Manual on Professional Conduct 71:301 (2004) (list of cases and authorities rejecting counsel's right to assert blanket representation of organization's constituents). The rule's protections extend only to those employees who should be considered the lawyer's clients either because of the authority they have within the organization or their degree of involvement or participation in the legal representation of the matter.").

- North Carolina LEO 99-10 (7/21/00) ("[A] government lawyer working on a fraud investigation may instruct an investigator to interview employees of the target organization provided the investigator does not interview an employee who participates in the legal representation of the organization or an officer or manager of the organization who has the authority to speak for and bind the organization."; inexplicably holding that the government fraud investigator could conduct ex parte interviews of corporate employees whose acts apparently might be imputed to the corporation; explaining the factual context of the question: "[t]he fraud investigator wants to interview the current house managers and aides, without notice and outside the presence of Attorney C, to ask them whether they falsified records, whether they saw others falsify records, and whether they or others were ordered by supervisors to falsify records. The investigator will take the following steps before each such interview: (1) identify himself, (2) state that he is investigating possible criminal violations, (3) not interview any employee who participated substantially in the legal representation of Corporation, and (4) not elicit privileged communications between Corporation and Attorney C."; answering the following question affirmatively: "May Attorney A direct the investigator to proceed with informal interviews of the house managers and aides without the consent of Attorney C?").

- North Carolina LEO 97-2 (1/16/98) (finding that a lawyer for an employee may not communicate ex parte with an adjuster for an insurance workers' compensation insurance carrier; "Although an adjuster for an insurance company may not be considered a 'manager' or 'management personnel' for the company, the adjuster does have managerial responsibility for the claims that she investigates. The adjuster is also privy to privileged communications with the legal counsel for the company and is generally involved in substantive conversations with the organization's lawyer regarding the representation of the organization. To safeguard the client-lawyer relationship from interference by adverse counsel and to reduce the likelihood that privileged information will be disclosed, Rule 4.2(a) protects from direct communications by opposing counsel not only employees who are clearly high-level management officials but also any employee who, like the adjuster in this inquiry, has participated substantially in the legal representation of the organization in a particular matter. Such participation includes substantive and/or privileged communications with the organization's lawyer as to the

> strategy and objectives of the representation, the management of the case, and other matters pertinent to the representation.").

However, the ABA Model Rules' dramatic changes in its approach (essentially rendering "fair game" for ex parte communications large numbers of corporate employees) and variations among states' ethics rules have generated considerable confusion in many states.

Examining federal and state courts' decisions in just two states -- Illinois and Virginia -- shows how confusing all of this can be. In some ways, this confusion plays to the advantage of corporations' lawyers, because it certainly might deter ex parte communications by lawyers representing the corporation's adversaries.

Illinois

Illinois seems to have a mismatch between its federal courts and its state courts. (As explained below, the Illinois Bar issued an opinion that provides at least some consistency.)

In Weibrecht v. Southern Illinois Transfer, Inc., 241 F.3d 875 (7th Cir. 2001), the Seventh Circuit upheld the Southern District of Illinois's adoption of the ABA approach. The Seventh Circuit acknowledged that an earlier Illinois court decision applied Illinois Rule 4.2

> only to those members of a corporate defendant's "control group" who have "the responsibility of making final decisions and those employees whose advisory roles to top management are such that a decision would not normally be made without those persons' advice."

Id. at 881-82 (quoting Fair Auto. Repair, Inc. v. Car-X Serv. Sys., Inc., 471 N.E.2d 554, 560 (Ill. App. Ct. 1984)).

The Seventh Circuit half-heartedly explained that federal courts were free to take a different approach than Illinois courts in applying the same Illinois rule.

> Nonetheless, the district court considered the Fair Automotive test in its order denying Shane's Rule 60(b) motion and concluded that, because Fair Automotive was decided under a prior version of the Illinois Rules, it is not clear that the Illinois courts would still apply the control group test. In any event, the district court was construing its own local rule, and even though in this case the district court has incorporated Illinois's rules by reference, nothing compelled the district court to adopt the same interpretation of those rules that has been adopted by an intermediate Illinois court. (We see no indication in the materials accompanying the professional conduct rules of the Southern District of Illinois that the district court intended to bind itself to follow the Illinois Supreme Court's interpretations of the Illinois rules, much less to follow decisions from other Illinois courts.) The district court was within its discretion in choosing to follow the ABA test rather than the control group test, and we will not disturb that decision.

Id. at 882.

Illinois federal court decisions issued since Weibrecht follow the same approach -- ignoring the Illinois state court interpretation of Rule 4.2 in favor of the ABA version. Hill v. Shell Oil Co., 209 F. Supp. 2d 876, 878-79 (N.D. Ill. 2002) (finding that managers at a gas station were within the "off-limits" category of Rule 4.2; "In determining whether Rule 4.2 covers non-managerial employees, courts have recognized the tension between a party's need to conduct low-cost informal discovery, and an opposing party's need to protect employees from making ill-considered statements or admissions . . . . The conduct of station attendants is at the heart of this litigation, and it is being offered as an example of the alleged discrimination of the defendants. As a result, the employees fall under the second category of Rule 4.2: employees whose acts or omissions in the matter at issue can be imputed to the

organization."); Mundt v. U.S. Postal Serv., No. 00 C 6177, 2001 U.S. Dist. LEXIS 17622, at *12 (N.D. Ill. Oct. 25, 2001) ("In Weibrecht, the Seventh Circuit upheld the District Court's adoption of a three-part test, set out in the American Bar Association's official commentary to the Model Rules of Professional Conduct, to determine whether an employee is to be considered represented. See ABA Model Rules of Professional Conduct Rule 4.2 cmt. 4 (1995). Under that test, a defendant's employee is regarded as being represented by the defendant's lawyer if any of three conditions are met: (1) the employee has 'managerial responsibility' in the defendant's organization, (2) the employee's acts or omissions can be imputed to the organization for purposes of liability, or (3) the employee's statements constitute an admission.").

To make matters even more complicated, the ABA has changed its Model Rule 4.2 since the Seventh Circuit issued this opinion. One is left to wonder whether an Illinois federal court would follow the old ABA approach or the new ABA approach.

In at least one respect, the Illinois Bar provided some clarification. In Illinois LEO 09-01, the Illinois Bar rejected its earlier "control group" analysis and adopted the ABA Model Rule approach. Illinois LEO 09-01 (1/2009) (rejecting earlier Illinois law which placed off-limits ex parte communications by a corporation's adversary only those within the corporate "control group"; instead adopting the ABA Model Rule 4.2 standard; "A lawyer may communicate with a current constituent of a represented organization about the subject-matter of the representation without the consent of the organization's counsel only when the constituent does not (i) supervise, direct or regularly consult with the organization's lawyer concerning the matter; (ii) have authority to obligate the organization with respect to the matter; or (iii) have acts or omissions in connection with

the matter that may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with former constituents about the matter of the representation. If the constituent has his or her own counsel, however, that counsel must consent to the communication."; also explaining that "a lawyer who is allowed to communicate with a constituent may not invade the privileges of the Represented Organization"; holding that former employee could be contacted ex parte).

However, this still leaves a mismatch between the federal and the state courts. As explained above, the Illinois federal courts' adoption of the ABA Model Rule approach included the prohibition on ex parte contacts with a corporate employee whose statements would be admissible against the corporation.

The Illinois Bar's current approach does not include that prohibition, but instead adopts the post-2000 ABA Model Rule approach -- which renders those employees fair game for ex parte contacts.

Virginia

Virginia has had trouble reconciling its Bar's approach with its federal courts' approach.

The Virginia ethics rules contain a unique comment describing folks who are off-limits to ex parte communications with representatives of a corporate adversary.

> In the case of organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons in the organization's "control group" as defined in Upjohn v. United States, 449 U.S. 383 (1981) or persons who may be regarded as the "alter ego" of the organization. The "control group" test prohibits ex parte communications with any employee of an organization who, because of their status or position, have

> the authority to bind the corporation. Such employees may only be contacted with the consent of the organization's counsel, through formal discovery or as authorized by law. An officer or director of an organization is likely a member of that organization's "control group." The prohibition does not apply to former employees or agents of the organization, and an attorney may communicate ex parte with such former employee or agent even if he or she was a member of the organization's "control group." If an agent or employee of the organization is represented in the matter by separate counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.

Virginia Rule 4.2 cmt. [7].

The "control group" reference seems fairly clear -- because it piggybacks on the Upjohn United States Supreme Court case. However, the comment does not describe who "may be regarded as the 'alter ego' of the organization." That term usually comes up in cases involving plaintiffs' efforts to pierce the corporate veil and hold others responsible for a corporation's liabilities.

Neither the "control group" nor "alter ego" phrase would seem to include some corporate employees or other representatives who should clearly be off-limits -- defined in ABA Model Rule 4.2 cmt. [7] as those "whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." In essence, that exclusion includes the bus company employee who ran over a plaintiff's client. The bus driver clearly is not in the bus company "control group." In traditional corporate terms, the bus driver clearly is not the "alter ego" of the bus company. Thus, the Virginia Bar and Virginia courts have had to deal with this obvious hole in the Virginia rules' definition of those immune from ex parte communications by the corporation's adversary.

On a number of occasions, the Virginia Bar held that a lawyer may contact the employee of a corporate adversary unless the employee could "commit the corporation to specific courses of action" or could be characterized as the corporation's "alter ego." See, e.g., Virginia LEO 801 (5/27/86); Virginia LEO 795 (5/27/86); Virginia LEO 530 (11/23/83); Virginia LEO 507 (3/30/83); Virginia LEO 459 (7/21/82); Virginia LEO 347 (12/4/79). The Virginia Bar has even referred to the pre-Upjohn "control group" test. See, e.g., Virginia LEO 801 (5/27/86); Virginia LEO 795 (5/27/86).

Although the Virginia Bar has not explained exactly where the line should be drawn, it has provided some hints. For instance, in Virginia LEO 507 (3/30/83), the Virginia Bar held that a lawyer could not contact his corporate opponent's "regional manager." Accord Virginia LEO 459 (7/21/82) (store managers deemed off-limits).

On the other hand, in one Legal Ethics Opinion the Virginia Bar indicated that lawyers initiating such ex parte contacts must disclose their adversarial role, and then try "to ascertain whether that employee feels that his employment or his situation requires that he first communicate with counsel for the corporate entity." Virginia LEO 905 (3/17/89). A lawyer concluding that the employee "feels" this way must presumably end the communication.

Virginia court decisions are hopelessly confused. Four cases decided in a little over ten months in the mid-1990s would leave any practitioner perplexed.

In Queensberry v. Norfolk & Western Railway, 157 F.R.D. 21 (E.D. Va. 1993), the Eastern District of Virginia dealt with a railroad's motion to prohibit plaintiff (an injured railroad worker proceeding under the Federal Employers' Liability Act ("FELA")) from conducting ex parte communications with the railroad's employees. The court

acknowledged that its local rule adopted as the applicable ethics standards the then-current Virginia Code of Professional Responsibility. The court quoted Virginia Code of Prof'l Responsibility DR 7-103(A), and then noted that its language was "identical" to what was then the ABA Model Code of Prof'l Responsibility DR 7-104(A)(1). For some reason, the court did not rely on the Virginia Code comment describing who is fair game and off-limits within an organization, but instead relied on ABA LEO 359 (3/22/91). The ABA approach has always been different from Virginia's approach.

Focusing on what was then the ABA prohibition on ex parte contacts with those "whose statement may constitute an admission on the part of the organization" -- a prohibition that has never appeared in the Virginia Code or the Virginia Rules -- the court then turned to Federal Rule of Evidence 801(d)(2) in concluding that "'virtually any employee may conceivably make admissions binding on his or her employer.'" Queensberry, 157 F.R.D. at 23. Thus, the court granted the railroad's motion, and prohibited the plaintiff from conducting ex parte interviews of railroad workers.

Just a few months later, the Roanoke (Virginia) Circuit Court dealt with an identical request by the same railroad to prohibit a plaintiff from conducting ex parte interviews of railroad employees. Schmidt v. Norfolk & W. Ry., 32 Va. Cir. 326 (Va. Cir. Ct. 1994). The state court explained that "while I have the greatest respect for the district judge who decided Queensberry, I conclude that he was incorrect in his interpretation of the application of Virginia's Disciplinary Rules in this situation and therefore do not follow his guidance on the point." Id. at 328.

> Though there is no Virginia appellate decision on point, the standing committee on Legal Ethics of the Virginia State Bar "has consistently opined that it is not impermissible for an attorney to directly contact and communicate with

> employees of an adverse party provided that the employees are not members of the corporation's control[] group and are not able to commit the organization or corporation to specific courses of action that would lead one to believe the employee is the corporation's alter ego. See, e.g., Legal Ethics Opinion Nos. 347, 530, 795; Upjohn Co. v. U.S., 449 U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)." Legal Ethics Opinion No. 1504, December 14, 1992.
>
> While the Virginia State Bar's "control group" test may not be the one followed in the majority of jurisdictions, the overwhelming weight of authority rejects the Railway Company's argument that the Disciplinary Rules prohibit contact with any employee of the corporate defendant. See, e.g., Niesig v. Team I, et al., 76 N.Y.2d 363, 558 N.E.2d 1030, 559 N.Y.S.2d 493 (1990), a persuasive opinion by the current chief judge of New York's highest court.
>
> The railway company relies for support of its interpretation of DR 7-103(A)(1) on a memorandum opinion of another trial judge. Queensberry v. Norfolk and Western Railway Company, 157 F.R.D. 21 (E.D. Va. 1993). The plaintiff argues, and I agree, that in deciding that case, the federal district judge was justifiably concerned with the effect, under the Federal Rules of Evidence, of any admission that even the lowest-level employee might make. As the plaintiff notes, such a concern does not exist in Virginia's state courts, where the Federal Rules do not apply. Thus, the plaintiff suggests, Queensberry should be distinguished from the case at bar.

Id. at 327-28. The court therefore denied the railroad's motion.

A few months after that, another Eastern District of Virginia judge addressed an identical request by the same railroad. Tucker v. Norfolk & W. Ry., 849 F. Supp. 1096 (E.D. Va. 1994). The court followed what it called the "thoughtful" opinion in Queensberry in granting the railroad's request. Id. at 1099. Interestingly, the court indicated that "both parties in this action agree" that the ex parte prohibition applies only "after a lawsuit is filed." Id. at 1098. This is an incorrect statement of the law in every state. The court therefore allowed the plaintiff to re-interview employees his lawyer had

spoken with before litigation began, although they would not be able to obtain any "new information" from them. Id. at 1101.

Several months later, the Winchester, Virginia Circuit Court addressed this issue in connection with a hospital's motion to prevent plaintiff from engaging in ex parte communications with the hospital's nurses about a malpractice case. Dupont v. Winchester Med. Ctr., Inc., 34 Va. Cir. 105 (Va. Cir. Ct. 1994). The state court judge cited the Virginia Rule, but quoted from the ABA comment -- as well as noting the Queensberry and Tucker cases. The court found that the hospital's nurses were not the "alter ego" of the hospital, but that they would be off-limits under either the Virginia precedent or the ABA approach.

> However, the nurses' negligent acts may make the Medical Center vicariously liable in that the nurses may "act on behalf of the corporation or make decisions on behalf of the corporation in the particular area which is the subject matter of the litigation." LEO 905, which will control the destiny of the Medical Center vis a vis its potential liability to the Plaintiff. This LEO 905 language, which LEO 1504 characterizes as "dispositive," is substantially similar to that of the official comment to ABA Model Rule 4.2, and is in fact a functional analysis based upon either the employee's relationship to the corporation ("make decisions on behalf"), which is the traditional control group analysis, or the employees's participation in the events giving rise to the cause of action ("act on behalf of the corporation"), which is closely akin to the substance of the official comment to ABA Rule 4.2.

Id. at 108. As the court explained,

> [w]here the employees are actual players in the alleged negligent act or where they have the authority to make decisions to bind the corporation, then they are acting as the corporation with regard to those acts and are in essence its alter ego. A corporation may have many heads and even more hands, and any one or more of the heads and hands may bind the corporation. There is no reason why a corporation or other organization, which must act through

> surrogates, should be afforded less protection under the rules of discovery than a natural person. Therefore, the better rule to be applied in the context of permissible discovery and ex parte contacts would be that of the official comment to ABA Model Rule 4.2 and LEO 905. Accordingly, the plaintiff may not contact The Medical Center's nurses who were, or may be, directly involved in the sponge issue in this case outside the discovery process. However, to the extent that employees of the Medical Center are not persons "whose act or omission in connection with that matter [in litigation] may be imputed to the organization for purposes of civil . . . liability or whose statement may constitute an admission on the part of the organization," those corporate employees may be contacted ex parte by the Plaintiff.

Id. at 108-09. The court entered an order prohibiting the plaintiff from ex parte contacts with

> the nurses who attended to the physician and who may have negligently placed the sponges. However, to the extent that there are other nurses or employees who are not involved in the sponge placement process of this particular plaintiff, then the plaintiff is free to talk to such nurses outside the discovery process so long as traditional rules of patient confidentiality and the principles discussed in this order are not transgressed.

Id. at 109-10.

A federal court decision in Virginia on this topic also followed the ABA approach rather than the Virginia approach. In Lewis v. CSX Transportation, Inc., 202 F.R.D. 464 (W.D. Va. 2001), the court addressed CSX's motion to enjoin a plaintiff's lawyer from conducting ex parte interviews of CSX employees. The court relied on the Tucker and Queensberry approach. The court acknowledged that the Western District of Virginia Local Rules adopt the Virginia ethics rules, but noted that the court can "'look to federal law in order to interpret and apply those rules.'" Id. at 466 (quoting McCallum v. CSX Transp., Inc., 149 F.R.D. 104, 108 (M.D.N.C. 1993)). The court also cited Federal Rule of Evidence 801 -- noting that an employee's statement can amount to an admission.

Of course, all of these cases were decided under the old ABA approach, which placed off-limits corporate employees whose statements were admissible as admissions against their corporate employer's interest. In fact, that was the explicit provision on which all three federal district court decisions rested. Now that the ABA has changed its approach, and rendered those corporate employees fair game for ex parte contacts, there is simply no telling what the federal courts would do in Virginia.

In 2005, a Virginia state court decision dealing with this topic followed the Virginia rules. Pruett v. Virginia Health Servs., Inc., 69 Va. Cir. 80, 85 (Va. Cir. Ct. 2005) (permitting plaintiff's lawyer to initiate ex parte communications with a defendant nursing home's current employees, except for current "control group" employees and current non "control group" employees who provide resident care; permitting ex parte contacts even with those nursing home employees, as long as the communications "do not relate to the acts or omissions alleged to have caused injury, damage or death to plaintiff's decedent"; also permitting ex parte contacts with former nursing home "control group" and non "control group" employees).

The most recent Virginia state court to deal with this topic extensively analyzed both the "control group" and "alter ego" definition in Virginia Rule 4.2 cmt. [7]. In Yukon Pocahontas Coal Co. v. Consolidation Coal Co., 72 Va. Cir. 75 (Va. Cir. Ct. 2006), defendant's lawyer communicated briefly with several limited partners of plaintiffs' limited liability partnerships. The court concluded that the limited partners were not members of the plaintiffs' "control group," because "[b]y definition, a limited partner cannot bind or act on behalf of" plaintiffs. Id. at 91.

However, the court held that the limited partners were somehow "alter egos" of the plaintiffs, because the plaintiffs' partnership agreements allowed them to "make decisions on behalf of [plaintiffs] in the particular area which is a subject matter in the underlying litigation" -- voting on the general partner's proposed partnership agreement amendments dealing with his power to act on plaintiffs' behalf (which the court described as the issue being litigated). Id. at 92. The court pointed to several old Virginia legal ethics opinions, which defined as "alter egos" of a corporation those agents who can commit the organization because of their authority or some other law providing that power. The court also pointed to the Pruett case, in which another circuit court found off-limits to ex parte communications floor nurses who obviously were not in the nursing home's "control group," but who allowed the nursing home to carry on its business through their "'hands on' interaction." Id. (quoting Pruett v. Virginia Health Servs., Inc. at 84-85).

This strange definition of "alter ego" does not come from any standard corporate law jurisprudence. Instead, it appears to be a judicial effort to plug the hole left in Virginia Model Rule 4.2 cmt. [7], which does not include the obvious prohibition on ex parte contacts with those (as characterized in ABA Model Rule 4.2 cmt. [7]) "whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." However, this definition of "alter ego" does not exactly match with the ABA Model Rule definition of those off-limits lower level employees. It makes sense to prevent ex parte contacts with non-control group corporate employees whose "act or omission" might put the corporation at risk, but

these Virginia courts' definition of "alter ego" employees goes beyond that group and apparently includes witnesses whose acts or omissions would not have that effect.

The most recent Virginia federal court opinion takes the same inexplicable approach as an earlier federal court decision.

- Smith v. United Salt Corp., Case No. 1:08cv00053, 2009 U.S. Dist. LEXIS 82685, at *9-10, *9, *11 (W.D. Va. Sept. 9, 2009) (analyzing a corporate defendant's effort to enjoin lawyers for a sexual harassment and discrimination plaintiff from ex parte contacts with company employees; declining to apply the holding in Lewis v. CSX Transp., Inc., 202 F.R.D. 464 (W.D. Va. 2001) because that case involved ex parte contact with "the very employees who used and maintained the piece of equipment at issue," which meant that their statements would "be an admission of liability imputable to the employer"; inexplicably analyzing the issue as the Lewis court had done, in light of the standard found in an earlier version of ABA Rule 4.2 (which prohibited ex parte communications with persons "'whose statement[s] may constitute an admission on the part of the corporate party'"); ultimately declining to enjoin ex parte contacts by the plaintiff's lawyer with employees "whose statements could not be used to impute liability upon the employee," but prohibiting "ex parte contact in this context with any supervisory or managerial employee").

All in all, Virginia case law presents a confusing and contradictory amalgam of current and obsolete Virginia and ABA principles.

Best Answer

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

n 12/11

Ex Parte Communications with a Corporate Adversary's In-House Lawyer

Hypothetical 4

You represent the defendant in a large patent infringement case. The plaintiff company hired a bombastic trial lawyer to handle its lawsuit against your client. The other side's Assistant General Counsel for Litigation is a law school classmate with whom you have been on friendly terms for years. You think there might be some merit in calling your friend in an effort to resolve the case.

(a) Without the outside lawyer's consent, may you call the other side's in-house lawyer -- if she has been listed as "counsel of record" on the pleadings?

(A) YES (PROBABLY)

(b) Without the outside lawyer's consent, may you call the other side's in-house lawyer -- if she has not been listed as "counsel of record" on the pleadings?

MAYBE

Analysis

The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

ABA Model Rule 4.2.[1]

This hypothetical addresses the "[i]n representing a client" phrase.

[1] The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.").

Introduction

It is difficult enough in a case of individual lawyers to properly characterize them as "clients" or as "lawyers" for purposes of analyzing Rule 4.2, but trying to assess the role of in-house lawyers complicates the analysis even more.

The ABA Model Rules and Comments are silent on the issue of in-house lawyers. However, the ABA issued a legal ethics opinion generally permitting ex parte contacts with the corporate adversary's in-house lawyers.

- ABA LEO 443 (8/5/06) (explaining that Rule 4.2 is designed to protect a person "against possible overreaching by adverse lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information regarding the representation"; concludes that the protections of Rule 4.2 "are not needed when the constituent of an organization is a lawyer employee of that organization who is acting as a lawyer for that organization," so "inside counsel ordinarily are available for contact by counsel for the opposing party"; noting that adverse counsel can freely contact an in-house lawyer unless the in-house lawyer is "part of a constituent group of the organization as described in Comment [7] of Rule 4.2 as, for example, when the lawyer participated in giving business advice or in making decisions which gave rise to the issues which are in dispute" or the in-house lawyer "is in fact a party in the matter and represented by the same counsel as the organization"; acknowledging that "in a rare case adverse counsel is asked not to communicate about a matter with inside counsel"; not analyzing the circumstance in which an in-house lawyer is "simultaneously serving as counsel for an organization in a matter while also being a party to, or having their own independent counsel in, that matter").

The Restatement similarly explains that

> [i]nside legal counsel for a corporation is not generally within Subsection (2) [those off limits to ex parte communications], and contact with such counsel is generally not limited by § 99.

Restatement (Third) of Law Governing Lawyers § 100 cmt. c (2000).

Both the ABA legal ethics opinions and the Restatement deal with ex parte communication to an in-house lawyer.

Most states follow the same approach as the ABA and the Restatement take.

- Wisconsin LEO E-07-01 (7/1/07) ("A lawyer does not violate SCR 20:4.2 by contacting in-house counsel for an organization that is represented by outside counsel in a matter. The retention of outside counsel does not normally transform counsel for an organization into a represented constituent and contact with a lawyer does not raise the same policy concerns as contact with a lay person.").

- Virginia LEO 1820 (1/27/06) (holding that an in-house lawyer "is not a party to the dispute but instead is counsel for a party").

- District of Columbia LEO 331 (10/2005) (concluding that "[i]n general, a lawyer may communicate with in-house counsel of a represented entity about the subject of the representation without obtaining the prior consent of the entity's other counsel"; explaining that "if the in-house counsel is represented personally in a matter, Rule 4.2 would not permit a lawyer to communicate with that in-house counsel regarding that matter, without the consent of the in-house counsel's personal lawyer").

Other states disagree.

- Rhode Island LEO 94-81 (2/9/95) (indicating that a lawyer may not communicate a settlement offer to in-house counsel with a copy to outside counsel, unless outside counsel consents).

- North Carolina LEO 128 (4/16/93) (explaining that "a lawyer may not communicate with an adverse corporate party's house counsel, who appears in the case as a corporate manager, without the consent of the corporation's independent counsel").

The ABA legal ethics opinions and the Restatement do not address communications by an in-house lawyer who is not otherwise clearly designated as a lawyer representing the corporation in litigation or some transactional matter. Because clients can always speak to clients, characterizing an in-house lawyer as a "client" rather than a lawyer presumably frees such in-house lawyers to communicate directly with a represented adversary of the corporation -- without the adversary's lawyer's consent. This seems inappropriate at best (although presumably corporate employees

with a law degree may engage in such ex parte communications as long as they are not "representing" their corporation in a legal capacity).

In any event, at least one bar has forbidden such communications by in-house lawyers.

- Illinois LEO 04-02 (4/2005) (holding that a company's general counsel may not initiate ex parte contacts permitted by Rule 4.2).

Of course, lawyers and their clients must consider other issues as well. For instance, in-house lawyers hoping to avoid the ex parte prohibition rules by characterizing themselves as clients rather than as lawyers might jeopardize their ability to have communications protected by the attorney-client privilege.

(a) Although the answer might differ from state to state, it seems likely that ex parte contacts would be appropriate with an in-house lawyer who has signed on as "counsel of record" on the pleadings -- because that lawyer should appropriately be seen as representing the corporation.

(b) This scenario presents a more difficult analysis, because the in-house lawyer has not signed on as the corporation's representative in the lawsuit. Therefore, the answer to this hypothetical would depend on the state's approach.

Although the pertinent ABA legal ethics opinion and the Restatement would permit such ex parte communications, lawyers would be wise to check the applicable state's approach.

Best Answer

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

n 12/11

Request to Avoid Ex Parte Communications

Hypothetical 5

You are the only in-house lawyer at a consulting firm with several hundred employees. A former employee just sued your company for racial discrimination, and you suspect that her lawyer will begin calling some of your company's current and former employees to gather evidence. You would like to take whatever steps you can to protect your company from these interviews.

(a) May you send a memorandum to all current employees "directing" them not to talk with the plaintiff's lawyer if she calls them?

(B) NO (PROBABLY)

(b) May you send a memorandum to all current employees "requesting" them not to talk with the plaintiff's lawyer if she calls them?

(A) YES

(c) May you send a memorandum to all former employees "requesting" them not to talk with the plaintiff's lawyer if she calls them?

MAYBE

(d) May you advise employees that they are not required to talk to the plaintiff's lawyer if the lawyer calls them?

(A) YES (PROBABLY)

Analysis

Introduction

The ABA permits some defensive measures as an exception to the general prohibition on lawyers providing any advice to unrepresented persons.

> A lawyer shall not . . . request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

> (1) the person is a relative or an employee or other agent of a client; and
>
> (2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

ABA Model Rule 3.4(f) (emphases added).

The Rule seems self-evident, although the ABA added a small comment.

> Paragraph (f) permits a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client. See also Rule 4.2.

ABA Model Rule 3.4 cmt. [4] (emphasis added). The ABA has not reconciled its use of the term "request" in the black-letter rule and its use of the term "advise" in the comment. The former seems weaker than the latter, and the distinction might make a real difference in the effect that the lawyer's communication has on the client employee/agent. An employee receiving an ex parte contact from an adversary might think that she can ignore her employer's lawyer's "request" to refrain from talking to the adversary's lawyer, but might feel bound if the employer's lawyer has "advised" her not to give information to the adversary's lawyer.

The Restatement addresses this issue as part of its ex parte contact provision. The Restatement uses the "request" standard, and even specifically warns that lawyers may run afoul of other rules if they "direct" their client employees/agents not to speak with an adversary's lawyer. The Restatement also answers a question that the ABA Model Rules leave open -- whether lawyers' requests that their client employees/agents not give information to the adversary limit in any way the adversary's lawyers from trying to obtain such information. The Restatement indicates that it does not.

> A principal or the principal's lawyer may inform employees or agents of their right not to speak with opposing counsel and may request them not to do so (see § 116(4) & Comment e thereto). In certain circumstances, a direction to do so could constitute an obstruction of justice or a violation of other law. However, even when lawful, such an instruction is a matter of intra-organizational policy and not a limitation against a lawyer for another party who is seeking evidence. Thus, even if an employer, by general policy or specific directive, lawfully instructs all employees not to cooperate with another party's lawyer, that does not enlarge the scope of the anti-contact rule applicable to that lawyer.

Restatement (Third) of Law Governing Lawyers § 100 cmt. f (2000) (emphases added).

Most states take this approach.

- See, e.g., New York City LEO 2009-5 (2009) ("In civil litigation, a lawyer may ask unrepresented witnesses to refrain from voluntarily providing information to other parties to the dispute. A lawyer may not, however, advise an unrepresented witness to evade a subpoena or cause the witness to become unavailable. A lawyer also may not tamper with the witness (e.g., bribe or intimidate a witness to obtain favorable testimony for the lawyer's client). And while lawyers generally are prohibited from rendering legal advice to unrepresented parties, they may inform unrepresented witnesses that they have no obligation to voluntarily communicate with others regarding a matter in dispute and may suggest retention of counsel." (emphasis added); "The Committee concludes that a lawyer may ask an unrepresented witness to refrain from providing information voluntarily to other parties. We are persuaded in part by the absence of any explicit rule to the contrary in the Code, and the absence of any specific prohibition in the new Rules, even though the New York State Bar Association recommended Proposed Rule 3.4(f), which specifically would have prohibited such conduct. We do not know why the Appellate Divisions declined to adopt Proposed Rule 3.4(f), but we view the omission as a factor reinforcing our conclusion that it would be inappropriate to imply a restriction nowhere found on the face of the Rule, as approved."; "Nor do we believe that the administration of justice would be prejudiced by a lawyer's request that a non-party witness refrain from communicating voluntarily with the lawyer's adversary. Even when a witness complies with such a request, the adverse party still may subpoena the witness to compel testimony or production of documents. And, a lawyer, of course, is prohibited from assisting a witness in evading a subpoena. Thus, an adverse party may compel the unrepresented witness to provide information through available discovery procedures even if that witness refuses to voluntarily speak with that party's lawyer."; "[T]his rule does not prohibit a lawyer from advising an unrepresented witness that she has no obligation to speak voluntarily with the lawyer's adversary."; "The Rules also

do not prohibit a lawyer from asking an unrepresented witness to notify her in the event the witness is contacted by the lawyer's adversary. So long as the lawyer does not suggest that the witness must comply with this request, we believe it does not unduly pressure the witness, especially when accompanied by the suggestion that the witness consider retaining her own counsel.").

Lawyers going beyond this fairly narrow range of permitted activity risk court sanctions or bar discipline.

- Castaneda v. Burger King Corp., No. C 08-4262 WHA (JL), 2009 U.S. Dist. LEXIS 69592, at *21-22, *22-23, *23 (N.D. Cal. July 31, 2009) (finding that defense lawyers could engage in ex parte communications with class members before class certification; "Plaintiffs should provide Defendants with contact information for the putative class members, as required by Rule 26, as part of their initial disclosures, since the putative class members are potential witnesses. Both parties are permitted to take pre-certification discovery, including discovery from prospective class members. Plaintiffs' counsel have also allegedly advised putative class members not to talk to Defendants' counsel. If true, this would be a violation of pertinent codes of professional conduct."; "Plaintiffs' counsel have no right to be present at any contact between Defendants' counsel and putative class members. It is Plaintiff's burden to show abusive or deceptive conduct to justify the court's cutting off contact, and they fail to do so. This is not an employment case, where the Defendant may threaten or imply a threat to the job of a plaintiff who cooperates with Plaintiffs' counsel or refuses to cooperate with Defendants' counsel. This is an ADA access case, not an employment case; Defendants have no power over these prospective plaintiffs."; "Defendant counsel must identify themselves and advise contacts that they need not speak with them if they do not want to do so. Defendants are admonished not to inquire into the substance of communications between putative plaintiffs and class counsel.").

- Cleary Gottlieb Steen & Hamilton LLP v. Kensington Int'l Ltd., 284 F. App'x 826 (2d Cir. 2008) (unpublished opinion) (affirming a district court's order reprimanding the law firm of Cleary Gottlieb and ordering Cleary Gottlieb to pay $165,000 as a sanction for one of Cleary Gottlieb's lawyer's (a member of the law firm's executive committee based in Paris) efforts to persuade a potentially damaging witness from providing testimony against Cleary's client in the Congo; [in the district court opinion, Kensington Int'l Ltd. v. Republic of Congo, No. 03 Civ. 4578 (LAP), 2007 U.S. Dist. LEXIS 63115, at *8 (S.D.N.Y. Aug. 23, 2007), the court noted that the Cleary Gottlieb lawyer advised the witness that he would be taking a great risk by appearing at a deposition without a lawyer, but that Cleary Gottlieb could not represent him at the deposition, and that the Cleary Gottlieb lawyer had told the witness that he should not testify "'out of patriotism'" (citation omitted); the district court noted

that the witness testified that the Cleary Gottlieb lawyer "'told me as such not to go'" to the deposition, 2007 U.S. Dist. LEXIS 63115, at *8 (citation omitted); the district court also ordered that the formal reprimand "should be circulated to all attorneys at Cleary," 2007 U.S. Dist. LEXIS 63115, at *34]).

- In re Jensen, 191 P.3d 1118, 1128 (Kan. 2008) (analyzing a situation in which a father's lawyer contacted the client's former wife's new husband's employer to ask about the new husband's income; ultimately concluding that the lawyer violated Kansas's Rule 3.4(a) and 8.4(a) by advising the new husband's employer that he did not have to appear in court, although the employer was under a subpoena to appear in court; also finding that the lawyer's statement that the employer did not have to appear in court violated Rule 4.1(a); rejecting a Bar panel's conclusion that the lawyer also violated Rule 4.3 by not explaining to the new husband's employer what role is was playing; explaining that the Bar had not established that "it was highly probable that Jensen [husband's lawyer] should have known of" the witness's confusion; ultimately issuing a public censure of the lawyer).

(a) The ABA and state ethics rules only allow a lawyer to "request" that current client employees not provide information to the corporation's adversaries. The Restatement explains that "[i]n certain circumstances, a direction to do so could constitute an obstruction of justice or a violation of other law. " Restatement (Third) of Law Governing Lawyers § 100 cmt. f (2000) (emphasis added).

(b) The ABA, the Restatement and state ethics rules allow company lawyers to take this step. Another option is for the company's lawyers to advise company employees that they are free to meet with lawyers for the company's adversary, but that the company lawyers would like to attend such meetings.

(c) The ABA and Restatement provisions allow such "requests" only to current company employees and agents. To the extent that a former employee does not count as a company agent, presumably a lawyer could not request former employees to refrain from providing information to the company's adversary. Some states explicitly allow company lawyers to make similar requests to "former" employees or agents. Virginia Rule 3.4(h)(2).

(d) Lawyers may find themselves facing another ethics rule if they do more than "request" that an employee or former employee not voluntarily provide facts to an adversary. For instance, lawyers advising an employee or former employee that they do not have to speak with the adversary's lawyer almost surely are giving legal advice to an unrepresented person.

The ABA Model Rules provide that

> The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

ABA Model Rule 4.3. A comment provides further guidance.

> The Rule distinguishes between situations involving unrepresented persons whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice, apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented person, as well as the setting in which the behavior and comments occur.

ABA Model Rule 4.3 cmt. [2].

Lawyers should be very careful to document the type of direction they give to any current or former employee who might misunderstand the "request," or turn on the company and its lawyer. To the extent that the witness incorrectly remembers that he or she was "told" by the company's lawyer not to provide information, the lawyer might face court or bar scrutiny.

Best Answer

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

n 12/11

Threatening Criminal Charges

Hypothetical 6

You represent a worker fired by a local engraving company. Your client claims that the company fired her because she complained about other employees dumping chemicals down a nearby storm sewer. The dumping would violate various criminal laws. You filed a lawsuit against the company for back wages.

May you threaten to report the company's unlawful dumping unless it settles the civil case your client has brought against it?

(A) YES (PROBABLY)

Analysis

Introduction

This issue provides a fascinating insight into the national and state bars' approach to ethics -- and provides another excellent example of why lawyers cannot follow their "moral instinct" or "smell test" when making ethics decisions.

The old ABA Model Code contained a fairly straight-forward prohibition. The ABA Model Rules dropped its prohibition on such actions nearly thirty years ago, but Virginia and many other states have retained it.

> A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

ABA Model Code of Prof'l Responsibility DR 7-105(A) (1980).

When the ABA adopted its Model Rules in 1983, it deliberately dropped this provision.

The ABA explained its reasoning in a LEO issued about ten years later.

> The deliberate omission of DR 7-105(A)'s language or any counterpart from the Model Rules rested on the drafters' position that "extortionate, fraudulent, or otherwise abusive

> threats were covered by other, more general prohibitions in the Model Rules and thus that there was no need to outlaw such threats specifically." C. W. Wolfram, Modern Legal Ethics (1986) § 13.5.5, at 718, citing Model Rule 8.4 legal background note (Proposed Final Draft, May 30, 1981), (last paragraph). Model Rules that both provide an explanation of why the omitted provision DR 7-105(A) was deemed unnecessary and set the limits on legitimate use of threats of prosecution are Rules 8.4, 4.4, 4.1 and 3.1.

ABA LEO 363 (7/6/92) (footnote omitted).

In defending its decision, the ABA first dealt with the possibility that such threats could amount to extortion. ABA LEO 363 provides that

> [i]t is beyond the scope of the Committee's jurisdiction to define extortionate conduct, but we note that the Model Penal Code does not criminalize threats of prosecution where the "property obtained by threat of accusation, exposure, lawsuit or other invocation of official action was *honestly claimed as restitution for harm done in the circumstances to which such accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful services*." Model Penal Code, sec. 223.4 (emphasis added); see also sec. 223.2(3) (threats are not criminally punishable if they are based on a claim of right, or if there is an honest belief that the charges are well founded.) As to the crime of compounding, we also note that the Model Penal Code, § 242.5, in defining that crime, provides that:
>
> A person commits a misdemeanor if he accepts any pecuniary benefit in consideration of refraining from reporting to law enforcement authorities the commission of any offense or information relating to an offense. It is an affirmative defense to prosecution under this Section that the pecuniary benefit did not exceed an amount which the actor believed to be due as restitution or indemnification *for harm caused by the offense*.

Id. (emphases added; emphases in original indicated by italics). See Model Penal Code § 223.4 ("Theft by Extortion") ("It is an affirmative defense to prosecution based on paragraphs (2), (3) or (4) that the property obtained by threat of accusation, exposure,

lawsuit or other invocation of official action was honestly claimed as restitution or indemnification for harm done in the circumstances to which such accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful services."); Model Penal Code § 242.5 ("Compounding") ("A person commits a misdemeanor if he accepts or agrees to accept any pecuniary benefit in consideration of refraining from reporting to law enforcement authorities the commission or suspected commission of any offense or information relating to an offense. It is an affirmative defense to prosecution under this Section that the pecuniary benefit did not exceed an amount which the actor believed to be due as restitution or indemnification for harm caused by the offense.").

The ABA concluded as follows:

> The Committee concludes, for reasons to be explained, that the Model Rules do not prohibit a lawyer from using the possibility of presenting criminal charges against the opposing party in a civil matter to gain relief for her client, provided that the criminal matter is related to the civil claim, the lawyer has a well founded belief that both the civil claim and the possible criminal charges are warranted by the law and the facts, and the lawyer does not attempt to exert or suggest improper influence over the criminal process. It follows also that the Model Rules do not prohibit a lawyer from agreeing, or having the lawyer's client agree, in return for satisfaction of the client's civil claim for relief, to refrain from pursuing criminal charges against the opposing party as part of a settlement agreement, so long as such agreement is not itself in violation of law.

ABA LEO 363 (7/6/92).

The ABA also explained that wrongful threats of criminal prosecution could amount to violations of other ABA Model Rules, such as:

> Rule 8.4(d) and (e) provide that it is professional misconduct for a lawyer to engage in conduct prejudicial to

> the administration of justice and to state or imply an ability improperly to influence a government official or agency.
>
> Rule 4.4 (Respect for Rights of Third Persons) prohibits a lawyer from using means that "have no substantial purpose other than to embarrass, delay, or burden a third person. . . ." A lawyer who uses even a well-founded threat of criminal charges merely to harass a third person violates Rule 4.4. See also Hazard & Hodes, supra, § 4.4:104.
>
> Rule 4.1 (Truthfulness in Statements to Others) imposes a duty on lawyers to be truthful when dealing with others on a client's behalf. A lawyer who threatens criminal prosecution, without any actual intent to so proceed, violates Rule 4.1.
>
> Finally, Rule 3.1 (Meritorious Claims and Contentions) prohibits an advocate from asserting frivolous claims. A lawyer who threatens criminal prosecution that is not well founded in fact and in law, or threatens such prosecution in furtherance of a civil claim that is not well founded, violates Rule 3.1.

ABA LEO 363 (7/6/92).

The Restatement also deliberately excluded this prohibition -- dealing with the issue in an obscure comment to the rule governing statements to a non-client.

> Beyond the law of misrepresentation, other civil or criminal law may constrain a lawyer's statements, for example, the criminal law of extortion. In some jurisdictions, lawyer codes prohibit a lawyer negotiating a civil claim from referring to the prospect of filing criminal charges against the opposing party.

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

Even as of 1992, the ABA explained that a number of states had chosen to continue the prohibition on such threats even after they shifted to a Model Rules format. The ABA listed the following states as having made this decision: Illinois; Texas; Connecticut; Maine; D.C.; and North Carolina. The ABA also noted that the following

states continued to follow the basic rule, but by way of legal ethics opinion rather than black-letter rule or comment: New Jersey and Wisconsin.

The ABA/BNA Lawyers' Manual on Professional Conduct § 71:601 provides a list (current as of 2003) of those states which have continued the prohibition in their rules, expanded the prohibition to include disciplinary charges, and adopted the prohibition by way of legal ethics opinion rather than by rule.

Some states follow the ABA approach.

- Delaware LEO 1995-2 (12/22/95) ("Attorney may use the threat of presenting criminal charges against Opposing Party in order to gain relief for Client in her civil claim without violating the applicable ethical standards if the criminal matter is related to Client's civil claim; Attorney has a well founded belief that both the civil claim and the criminal charges are warranted by Delaware law and the facts; Attorney is not attempting to exert or suggest improper influence over the criminal process; and Attorney and/or Client actually intend to proceed with presenting the charges if the civil claim is not satisfied. In addition, Attorney may agree to, or have Client agree to, refrain from reporting criminal charges in return for satisfaction of Client's civil claim."; explaining the meaning of extortion; "We note that extortion is defined as compelling or inducing another person to deliver property by means of instilling in him a fear that the threatener will 'accuse anyone of a crime or cause criminal charges to be instituted against him.' 11 Del C. §846(4). It is an affirmative defense to this crime, however, if the attorney believes the threatened criminal charge is true and his or her only purpose is to induce the opposing party to make good the wrong. 11 Dec. C. §847(b). Accordingly, where threatened criminal charges relate to a client's civil matter and an attorney seeks to recover from the opposing party no more than the amount the attorney believes the client is entitled to, an attorney will likely not violate 11 Del. C. §846 by threatening criminal prosecution."; "Finally, in reaching its conclusion, the Committee notes that the New Jersey Committee on Professional Ethics has reached a contrary conclusion. N.J. Comm. on Prof. Ethics, Op. 595 (1986) (ABA/BNA Law. Manual on Prof. Conduct 901:5804). The New Jersey Committee concluded that the omission of DR 7-105(A) from the New Jersey Rules on Professional Conduct was not deliberate because there is no record that its omission was affirmatively intended by the committee that recommended the New Jersey Model Rules and the New Jersey Supreme Court's explanatory comments do not refer to DR 7-105(A)'s non-adoption or explain the reasons therefore. Moreover, the New Jersey Committee concluded that the rule set forth in former DR 7-105(A) derives not from any formal cannon or code of ethics, but from generally accepted standards of professional conduct long

enforced by the New Jersey Supreme Court. ABA Formal Op. 92-363 expressly rejects the New Jersey Committee's opinion and an 'incorrect' interpretation of the Model Rules. Id. at 7.").

Because the ABA has dropped the prohibition, states deciding to retain it must determine where in their rules they will insert the prohibition. Of course, states do not have this problem when adopting a variation of an ABA Model Rule -- because they use the same rule number, but include a different substance. With the prohibition on threatening criminal prosecution, there is no ABA Model Rule to use as a guide.

This makes it very difficult for practitioners to determine if a particular state continues to prohibit such conduct.

- At least one state includes the provision in its Rule 1.2 (entitled "Scope of Representation and Allocation of Authority Between Client and Lawyer"). Ohio Rule 1.2(e).

- Some states include the provision in their Rule 3.4 (entitled "Fairness to Opposing Party and Counsel"): Connecticut Rule 3.4(7); Florida Rule 4-3.4(g); Georgia Rule 3.4(h); New York Rule 3.4(e); Virginia Rule 3.4(i).

- Some states include the provision in their Rule 4.4 (entitled "Respect for Rights of Third Persons"): Tennessee Rule 4.4(a)(2).

- Some states include the provision in their Rule 8.4 (entitled "Misconduct"). D.C. Rule 8.4(g); Illinois Rule 8.4(g).

- Those states having unique numbering also must find a place to put a prohibition that they wish to retain: California Rule 3.10; Texas Rule 4.04(b).

Some states follow essentially the same approach, but use legal ethics opinions rather than rules.

- North Carolina LEO 2009-5 (1/22/09) ("[A] lawyer may serve the opposing party with discovery requests that require the party to reveal her citizenship status, but the lawyer may not report the status to ICE unless required to do so by federal or state law."; "It is unlikely that Lawyer's impetus to report Mother to ICE is motivated by any purpose other than those prohibited under these principles. The Ethics Committee has already determined that a lawyer may not threaten to report an opposing party or a witness to immigration to gain an advantage in civil settlement negotiations. 2005 FEO 3. Similarly,

Lawyer may not report Mother's illegal status to ICE in order to gain an advantage in the underlying medical malpractice action.").

- North Carolina LEO 98-19 (4/23/99) ("Although the rule prohibiting threats of criminal prosecution to gain an advantage in a civil matter was omitted from the Revised Rules of Professional Conduct, a lawyer representing a client with a civil claim that also constitutes a crime should adhere to the following guidelines: (1) a threat to present criminal charges or the presentation of criminal charges may only be made if the lawyer reasonably believes that both the civil claim and the criminal charges are well-grounded in fact and warranted by law and the client's objective is not wrongful; (2) the proposed settlement of the civil claim may not exceed the amount to which the victim may be entitled under applicable law; (3) the lawyer may not imply an ability to influence the district attorney, the judge, or the criminal justice system improperly; and (4) the lawyer may not imply that the lawyer has the ability to interfere with the due administration of justice and the criminal proceedings or that the client will enter into any agreement to falsify evidence.").

- West Virginia LEO 2000-01 (5/12/00) (finding that threatening criminal prosecution can be improper if the threatening party seeks more than restitution).

The answer to this hypothetical obviously depends on the applicable jurisdiction's ethics rules. To make matters even more complicated, it may be necessary to analyze a lawyer's home state ethics rules' choice of law provision to determine whether the lawyer has engaged in misconduct.

Interestingly, one bar has taken what could be seen as a counterintuitive (or overly risky) approach -- finding ethically permissible a lawyer's participation in a civil settlement that includes a non-reporting provision in which the civil plaintiff agrees not to report wrongful conduct to the law enforcement authorities.

- North Carolina LEO 2008-15 (1/23/09) ("Provided the agreement does not constitute the criminal offense of compounding a crime, is not otherwise illegal, and does not contemplate the fabrication, concealment, or destruction of evidence (including witness testimony), a lawyer may participate in a settlement agreement of a civil claim that includes a provision that the plaintiff will not report the defendant's conduct to law enforcement authorities.").

Many states would probably take a different approach, and prohibit such an arrangement.

Best Answer

The best answer to this hypothetical is **(A) PROBABLY YES**.

Ghostwriting Pleadings

Hypothetical 7

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

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

MAYBE

Analysis

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

ABA Approach

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

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

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

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

Id. (emphases added).

In 2007, the ABA totally reversed itself.

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

ABA LEO 446 (5/5/07).

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

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

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

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

Id. (footnotes omitted).

Bars' Approach

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

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

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

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

- Virginia LEO 1127 (11/21/88) ("Under DR:7-105(A) and recent indications from the courts that attorneys who draft pleadings for <u>pro se</u> clients will be called upon by the court, any disregard by either the attorney or the <u>pro se</u> litigant of the court's requirement that the drafter of the pleadings be revealed would be violative of that disciplinary rule. Such failure to disclose would be violative of DR:7-102(A)(3), which requires that a lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal. Under certain circumstances, such failure to disclose that the attorney provided active or substantial assistance, including the drafting of pleadings, may be a misrepresentation to the court and to opposing counsel and therefore violative of DR:1-102(A)(4). In a similar fact situation, the Association of the Bar of the City of New York opined that a lawyer drafting pleadings and providing <u>other substantial assistance</u> to a <u>pro se</u> litigant must obtain the client's assurance that the client will disclose that assistance to the court and adverse counsel. Failure to secure that commitment from the client or failure of the client to carry it out would require the attorney to discontinue providing assistance." (emphasis added)).

- New York LEO 613 (9/24/90) ("Accordingly, we see nothing unethical in the arrangement proposed by our inquirer. Indeed, we note that our inquirer's proposed conduct, which involves disclosure to opposing counsel and the court by cover letter, fully meets the most restrictive ethics opinion described above. We <u>believe that the preparation of a pleading, even a simple one, for a pro se litigant constitutes 'active and substantial' aid requiring disclosure of the lawyer's participation</u> and thus are in accord with N.Y. City 1987-2. We depart from the City Bar opinion only to the extent of requiring disclosure of the lawyer's name; in our opinion, the endorsement on the pleading 'Prepared by Counsel' is insufficient to fulfill the purposes of the disclosure requirement. We see nothing ethically improper in the provision of advice and counsel, including the preparation of pleadings, to <u>pro se</u> litigants if the Code of Professional Responsibility is otherwise complied with. Full and

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

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

- Delaware LEO 1994-2 (5/6/94) ("The legal services organization may properly limit its involvement to advice and preparation of documents. However, if the organization provides significant assistance to a litigant, this fact must be disclosed. Accordingly, if the organization prepares pleadings or other documents (other than assisting the litigant in the preparation of an initial pleading) on behalf of a litigant who will subsequently be proceeding pro se, or if the organization provides legal advice and assistance to the litigant on an on-going basis during the course of the litigation, the extent of the organization's participation in the matter should be disclosed by means of a letter to opposing counsel and the court."; "[W]e agree that it is improper for an attorney to fail to disclose the fact he or she has provided significant assistance to a litigant, particularly if the assistance is on-going. By 'significant assistance,' we mean representation that goes further than merely helping a litigant to fill out an initial pleading, and/or providing initial general advice and information. If *an attorney drafts court papers (other than an initial pleading) on the client's behalf, we agree with the New York State Bar Association ethics committee in concluding that disclosure of this assistance by means of a letter to the court and opposing counsel, indicating the limited*

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

- Virginia LEO 1592 (9/14/94) ("Under DR 7-105(A), and indications from the courts that attorneys who draft pleadings for pro se clients would be deemed by the court to be counsel of record for the [pro se] client, any disregard by either Attorney A or Defendant Motorist of a court's requirement that the drafter of pleadings be revealed would be violative of that disciplinary rule. Such failure to disclose would also be violative of DR 7-102(A)(3). Further, such failure to disclose Attorney A's substantial assistance, including the drafting of pleadings and motions, may also be a misrepresentation to the court and to opposing counsel and, therefore, violative of DR 1-102(A)(4).").

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

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

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

pleading pro se," because the existence of an attorney-client relationship depends on the lawyer's actions rather than a mere title).

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

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

- Maine LEO 89 (8/31/88) ("Since the lawyer's representation of the client was limited to preparation of the complaint, the lawyer was not required to sign the complaint or otherwise enter his appearance in court as counsel for the plaintiff, and the plaintiff was entitled to sign the complaint and proceed pro se. At the same time, however, the Commission notes that a lawyer who agrees to represent a client in a limited role such as this remains responsible to the client for assuring that the complaint is adequate and does not violate the requirements of Rule 11 of Maine Rules of Civil Procedure." (emphasis added)).

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

- Los Angeles County LEO 502 (11/4/99) ("An attorney may limit the scope of representation of a litigation client to consultation, preparation of pleadings to be filed by the client in pro per, and participation in settlement negotiations so long as the limited scope of representation is fully explained and the client consents to it. The attorney has a duty to alert the client to legal problems which are reasonably apparent, even though they fall outside the scope of retention, and to inform the client that the limitations on the representation create the possible need to obtain additional advice, including advice on issues collateral to the representation. These principles apply whether the

attorney is representing the client on an hourly, contingency, fixed or no fee basis. Generally, where the client chooses to appear in propria persona and where there is no court rule to the contrary, the attorney has no obligation to disclose the limited scope of representation to the court in which the matter is pending. If an attorney, who is not 'of record' in litigation, is authorized by his client to participate in settlement negotiations, opposing counsel may reasonably request confirmation of the attorney's authority before negotiating with the attorney. Normally, an attorney has authority to determine procedural and tactical matters while the client alone has authority to decide matters that affect the client's substantive rights. An attorney does not, without specific authorization, possess the authority to bind his client to a compromise or settlement of a claim." (emphasis added)).

- Tennessee LEO 2007-F-153 (3/23/07) ("[A]n attorney in Tennessee may not engage in extensive undisclosed participation in litigation in [sic] behalf of a pro se litigant as doing so permits and enables the false appearance of being without substantial professional assistance. This prohibition does not extend to providing undisclosed assistance to a truly pro se litigant. Thus, an attorney may prepare a leading pleading including, but not limited to, a complaint, or demand for arbitration, request for reconsideration or other document required to toll a statute of limitations, administrative deadline or other proscriptive rule, so long as the attorney does not continue undisclosed assistance of the pro se litigant. The attorney should be allowed, in such circumstances, to elect to have the attorney's assistance disclosed or remain undisclosed. To require disclosure for such limited, although important, assistance would tend to discourage the assistance of litigants for the protection of the litigants' legal rights. Such limited assistance is not deemed to be in violation of RPC 8.4(c)." (emphasis added)).

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

required disclosure situations is present, and the limited assistance is simply an effort by an attorney to aid someone who is financially unable to secure an attorney, but is not part of an organized program, disclosure is not required.").

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

- Virginia LEO 1874 (7/28/14) (Lawyers assisting members of a pre-paid legal services plan do not have to disclose their role in preparing pleadings that will be filed by pro se litigants, because "absent a court rule or law to the contrary, there is no ethical obligation to notify the court of the lawyer's assistance to the pro se litigant." After reviewing ABA and other states' legal ethics opinions, "[t]he Committee concludes that there is not a provision in the Rules of Professional Conduct that prohibits undisclosed assistance to a pro se litigant as long as the lawyer does not do so in a manner that violates a rule of conduct that otherwise would apply to the lawyer's conduct." Lawyers should nevertheless familiarize themselves with courts' policies about ghostwriting "lawyers are now on notice, because of Laremont-Lopez [Laremont-Lopez v. Southeastern Tidewater Opportunity Center, 968 F. Supp. 1075, 1077-78 (E.D. Va. 1997)] and other federal court cases, that 'ghostwriting' may be forbidden in some courts, and should take heed, even if such conduct does not violate any specific standing rule of court." [overruling inconsistent portions of LEOs 1127, 1592, 1761 and 1803]).

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

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

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

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

> [a]ny pleadings or other papers prepared by an attorney for a pro se litigant and filed with the court must indicate "Prepared with the Assistance of Counsel." An attorney who drafts pleadings or other filings for a party triggers an attorney-client relationship with that party even if the attorney does not represent the party as attorney of record.

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

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

Id.

Court Approach

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

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

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

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

- Laremont-Lopez v. Southeastern Tidewater Opportunity Project, 968 F. Supp. 1075, 1077-78, 1078, 1079-80, 1080 (E.D. Va. 1997) ("The Court believes that the practice of lawyers ghost-writing legal documents to be filed with the Court by litigants who state they are proceeding pro se is inconsistent with the intent of certain procedural, ethical, and substantive rules of the Court. While there is no specific rule that prohibits ghost-writing, the Court believes that this practice (1) unfairly exploits the Fourth Circuit's mandate that the pleadings of pro se parties be held to a less stringent standard than pleadings drafted by lawyers."; "When . . . complaints drafted by attorneys are filed bearing the signature of a plaintiff outwardly proceeding pro se, the indulgence extended to the pro se party has the perverse effect of skewing the playing field rather than leveling it. The pro se plaintiff enjoys the benefit of the legal counsel while also being subjected to the less stringent standard reserved for those proceeding without the benefit of counsel. This situation places the opposing party at an unfair disadvantage, interferes with the efficient administration of justice, and constitutes a misrepresentation of the Court."; "The Court FINDS that the practice of ghost-writing legal documents to be filed with the Court by litigants

designated as proceeding pro se is inconsistent with the procedural, ethical and substantive rules of this Court. While the Court believes that the Attorneys should have known that this practice was improper, there is no specific rule which deals with such ghost-writing. Therefore, the Court FINDS that there is insufficient evidence to find that the Attorneys knowingly and intentionally violated its Rules. In the absence of such intentional wrongdoing, the Court FINDS that disciplinary proceedings and contempt sanctions are unwarranted."; "This Opinion and Order sets forth this Court's unqualified FINDING that the practices described herein are in violation of its Rules and will not be tolerated in this Court.").

- Ricotta v. California, 4 F. Supp. 2d 961, 986-87, 987 (S.D. Cal. 1998) ("The threshold issue that this Court must address is what amount of aid constitutes ghost-writing. Ms. Kelly contends that she acted as a 'law-clerk' and provided a draft of sections of the memorandum and assisted Plaintiff in research. Implicit in the three opinions addressing the issue of ghost-writing, is the observation that an attorney must play a substantial role in the litigation."; "In light of these opinions, in addition to this Court's basic common sense, it is this Court's opinion that a licensed attorney does not violate procedural, substantive, and professional rules of a federal court by lending some assistance to friends, family members, and others with whom he or she may want to share specialized knowledge. Otherwise, virtually every attorney licensed to practice would be eligible for contempt proceedings. Attorneys cross the line, however, when they gather and anonymously present legal arguments, with the actual or constructive knowledge that the work will be presented in some similar form in a motion before the Court. With such participation the attorney guides the course of litigation while standing in the shadows of the Courthousedoor [sic]. This conclusion is further supported by the ABA Informal Opinion of 1978 that 'extensive undisclosed participation by a lawyer . . . that permits the litigant falsely to appear as being without substantial professional assistance is improper."; In the instant case it appears to the Court that Ms. Kelly was involved in drafting seventy-five to one hundred percent of Plaintiff's legal arguments in his oppositions to the Defendants' motions to dismiss. The Court believes that this assistance is more than informal advice to a friend or family member and amounts to unprofessional conduct."; "However, even though Ms. Kelly's behavior was improper this Court is not comfortable with the conclusion that holding her and/or Plaintiff in contempt is appropriate. The courts in Johnson and Laremont explained that because there were no specific rules dealing with ghost-writing, and given that it was only recently addressed by various courts and bar associations, there was insufficient evidence to find intentional wrongdoing that warranted contempt sanctions."; declining to hold the lawyer for the plaintiff in contempt of court).

- In re Meriam, 250 B.R. 724, 733, 734 (D. Colo. 2000) ("While it is true that neither Fed. R. Bank[r]. P. 9011, nor its counterpart Fed. R. Civ. P. 11, specifically address the situation where an attorney prepares pleadings for a

party who will otherwise appear unrepresented in the litigation, many courts in this district, and elsewhere, disapprove of the practice known as ghostwriting. . . . These opinions highlight the duties of attorneys, as officers of the court, to be candid and honest with the tribunal before which they appear. When an attorney has the client sign a pleading that the attorney prepared, the attorney creates the impression that the client drafted the pleading. This violates both Rule 11 and the duty of honesty and candor to the court. In addition, the situation 'places the opposite party at an unfair disadvantage' and "interferes with the efficient administration of justice. . . . According to these decisions, ghostwriting is sanctionable under Rule 11 and as contempt of court."; "The failure of an attorney to sign a petition he or she prepares potentially misleads the Court, the trustee and creditors, and distorts the bankruptcy process. From a superficial perspective, there is no apparent justification for excusing an attorney who prepares a petition from signing it when a petition preparer is required to do so. But regardless of whether it is an attorney or petition preparer who prepares the petition, if such person does not sign it the Court, trustee and creditors do not know who is responsible for its contents. Should the Court hold a debtor responsible for the petition's accuracy and sufficiency if it was prepared by an attorney? Can such debtor assert that the contents of the petition result from advice of counsel in defense of a motion to dismiss or a challenge to discharge for false oath?" (footnotes omitted); nevertheless declining to reduce the lawyer's fees, and inviting the lawyer to sign a corrected pleading).

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

- Duran v. Carris, 238 F.3d 1268, 1271-72, 1273 (10th Cir. 2001) ("Mr. Snow's actions in providing substantial legal assistance to Mr. Duran without entering an appearance in this case not only affords Mr. Duran the benefits of this court's liberal construction of pro se pleadings, . . . but also inappropriately shields Mr. Snow from responsibility and accountability for his actions and counsel."; "We recognize that, as of yet, we have not defined what kind of legal advice given by an attorney amounts to 'substantial' assistance that must be disclosed to the court. Today, we provide some guidance on the matter. We hold that the participation by an attorney in drafting an appellate brief is per se substantial, and must be acknowledged by signature. In fact,

we agree with the New York City Bar's ethics opinion that 'an attorney must refuse to provide ghostwriting assistance unless the client specifically commits herself to disclosing the attorney's assistance to the court upon filing.' . . . We caution, however, that the mere assistance of drafting, especially before a trial court, will not totally obviate some kind of lenient treatment due a substantially pro se litigant. . . . We hold today, however, that any ghostwriting of an otherwise pro se brief must be acknowledged by the signature of the attorney involved." (footnote omitted); admonishing the lawyer; concluding that "this circuit [does not] allow ghostwritten briefs," and "this behavior will not be tolerated by this court, and future violations of this admonition would result in the possible imposition of sanctions").

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

- In re Mungo, 305 B.R. 762, 767, 768, 768-69, 769, 770, 771 (Bankr. D. S.C. 2003) ("Ghost-writing is best described as when a member of the bar represents a pro se litigant informally or otherwise, and prepares pleadings, motions, or briefs for the pro se litigant which the assisting lawyer does not sign, and thus escapes the professional, ethical, and substantive obligations imposed on members of the bar."; "Policy issues lead this Court to prohibit ghostwriting of pleadings and motions for litigants that appear pro se and to establish measures to discourage ghostwriting."; "[G]hostwriting must be prohibited in this Court because it is a deliberate evasion of a bar member's obligations, pursuant to Local Rule 9010-1(d) and Fed R. Civ. P. Rule 11."; "[T]he Court will, in its discretion, require pro se litigants to disclose the identity of any attorneys who have ghost written pleadings and motions for them. Furthermore, upon finding that an attorney has ghost written pleadings for a pro se litigant, this Court will require that offending attorney to sign the pleading or motion so that the same ethical, professional, and substantive rules and standards regulating other attorneys, who properly sign pleadings, are applicable to the ghost-writing attorney."; "[F]ederal courts generally interpret pro se documents liberally and afford greater latitude as a matter of judicial discretion. Allowing a pro se litigant to receive such latitude in addition to assistance from an attorney would disadvantage the non-offending party."; "[T]herefore, upon a finding of ghost-writing, the Court will not provide the wide latitude that is normally afforded to legitimate pro se litigants."; "[T]his Court prohibits attorneys from ghost-writing pleadings and motions for litigants that appear pro se because such an act is a misrepresentation that violates an attorney's duty and professional responsibility to provide the utmost candor toward the Court."; "The act of ghost-writing violates SCRPC Rule 3.3(a)(2) and SCRPC Rule 8.4(d) because assisting a litigant to appear pro se when in truth an attorney is authoring pleadings and necessarily managing the course of litigation while

cloaked in anonymity is plainly deceitful, dishonest, and far below the level of disclosure and candor this Court expects from members of the bar."; publicly admonishing the lawyer for "the unethical act of ghost-writing pleadings for a client").

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

- Johnson v. City of Joliet, No. 04 C 6426, 2007 U.S. Dist. LEXIS 10111, at *5-6, *6, *8 (N.D. Ill. Feb. 13, 2007) ("As an initial matter, before addressing Johnson's motions, the court needs to address a serious concern with Johnson's pleadings. Johnson represents that she is acting pro se, yet given the arguments she raises and the language and style of her written submissions, it is obvious to both the court and defense counsel that someone with legal knowledge has been providing substantial assistance and drafting her pleadings and legal memoranda. We suspect that Johnson is working with an unidentified attorney, although it is possible that a layperson with legal knowledge is assisting her. Regardless, neither scenario is acceptable."; "If, as we suspect, a licensed attorney has been ghostwriting Johnson's pleadings, this presents a serious matter of unprofessional conduct. Such conduct would circumvent the requirements of Rule 11 which 'obligates members of the bar to sign all documents submitted to the court, to personally represent that there are grounds to support the assertions made in each filing.". . . Moreover, federal courts generally give pro se litigants greater latitude than litigants who are represented by counsel. . . . It would be patently unfair for Johnson to benefit from the less-stringent standard applied to pro se litigants if, in fact, she is receiving substantial behind-the-scenes assistance from counsel."; "Here, there is no doubt that Johnson has been receiving substantial assistance in drafting her pleadings and legal memoranda. (When asked at her deposition to disclose who was helping her, Johnson reportedly declined to answer and (improperly) invoked the Fifth Amendment). This improper conduct cannot continue. We therefore order Johnson to disclose to the court in writing the identity, profession and address of the person who has been assisting her by February 20, 2007.").

- Delso v. Trustees for Ret. Plan for Hourly Employees of Merck & Co., Civ. A. No. 04-3009 (AET), 2007 U.S. Dist. LEXIS 16643, at *37, *40-42, *42-43, *53 (D.N.J. Mar. 5, 2007) ("Defendant asserts that Shapiro should be barred from 'informally assisting' or 'ghostwriting' for Delso in this matter. The permissibility of ghostwriting is a matter of first impression in this District. In fact, there are relatively few reported cases throughout the Federal Courts that touch on the issue of attorney ghostwriting for pro se litigants. Moreover, a nationwide discussion regarding unbundled legal services, including ghostwriting, has only burgeoned within the past decade."; "Courts generally

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

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

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

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

Many states' experience reflects this continuing mismatch. For instance, as indicated above, several older Virginia legal ethics opinions prohibited ghostwriting. Similarly, several Virginia federal courts condemned ghostwriting.

Seven years after the ABA reversed course, in 2007 the Virginia Bar indicated that certain lawyers could engage in ghostwriting if they do not violate applicable court rules.

- Virginia LEO 1874 (7/28/14) (Lawyers assisting members of a pre-paid legal services plan do not have to disclose their role in preparing pleadings that will be filed by pro se litigants, because "absent a court rule or law to the contrary, there is no ethical obligation to notify the court of the lawyer's assistance to the pro se litigant." After reviewing ABA and other states' legal ethics opinions, "[t]he Committee concludes that there is not a provision in the Rules of Professional Conduct that prohibits undisclosed assistance to a pro se litigant as long as the lawyer does not do so in a manner that violates a rule of conduct that otherwise would apply to the lawyer's conduct." Lawyers should nevertheless familiarize themselves with courts' policies about ghostwriting "lawyers are now on notice, because of Laremont-Lopez [Laremont-Lopez v. Southeastern Tidewater Opportunity Center, 968 F. Supp. 1075, 1077-78 (E.D. Va. 1997)] and other federal court cases, that 'ghostwriting' may be forbidden in some courts, and should take heed, even if such conduct does not violate any specific standing rule of court." [overruling inconsistent portions of LEOs 1127, 1592, 1761 and 1803]).

However, as with the national experience, Virginia courts continue to condemn ghostwriting -- even doubling down on their sanctions. In 2014, the Western District of Virginia Bankruptcy Court held that lawyers may not ghostwrite, specifically warning Virginia lawyers not to rely on the then month-old Virginia legal ethics opinion allowing certain ghostwriting under the ethics rules.

- In re Tucker, 516 B.R. 340 n.3 (Bankr. W.D. Va. 2014) ("The Court accepts the Debtor's testimony that she received no undisclosed assistance on the Motion. However, given the nature of the Motion and the manner in which it was drafted, it raised the suspicion of having been 'ghost-written.' The Virginia State Bar recently released Legal Ethics Opinion 1874 ('LEO 1874') on the subject of 'ghost-writing' for pro se litigants, finding it to not be objectionable in certain circumstances. To the extent that the practicing bar

may intend to rely on LEO 1874 in the future to 'ghost-write' in this Court, all counsel should be aware that this Court takes a different view. This Court agrees with those courts that find, at a minimum, the practice of ghost-writing transgresses counsel's duty of candor to the Court and such practice is expressly disavowed. See, e.g., Chaplin v. DuPont Advance Fiber Sys., 303 F. Supp. 2d 766, 773 (E.D. Va. 2004) ('[T]he practice of ghost-writing will not be tolerated in this Court.'); In re Mungo, 305 B.R. 762, 767-70 (Bankr. D.S.C. 2003).").

In 2015, the Eastern District of Virginia adopted an explicit Local Rule designed to smoke out ghostwriting.

- Eastern District of Virginia Local Rule 83.1 (M) (as of 12/1/18) ("(1) Any attorney who prepares any document that is to be filed in this Court by a person who is known by the attorney, or who is reasonably expected by the attorney, to be proceeding pro se, shall be considered to have entered an appearance in the proceeding in which such document is filed and shall be subject to all rules that govern attorneys who have formally appeared in the proceeding."; "(2) All litigants who are proceeding pro se shall certify in writing and under penalty of perjury that a document(s) filed with the Court has not been prepared by, or with the aid of, an attorney or shall identify any attorney who has prepared, or assisted in preparing, the document."; "Each document filed with the court by a pro se litigant shall bear the following certification: . . . that . . . No attorney has prepared, or assisted in the preparation of this document" or [identifying the lawyer who] "[p]repared, or assisted in the preparation of, this document." (emphasis omitted)).

Thus, Virginia lawyers looking just at ethics opinions might feel free to assist a purportedly pro se litigant in ghostwriting pleadings. But such lawyers could run afoul of courts' continuing (and even increasing) condemnation of the practice.

Best Answer

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

Filing Claims Subject to an Affirmative Defense

Hypothetical 8

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

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

(A) YES (PROBABLY)

Analysis

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

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

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

> The affirmative defense has its origin in the common law plea of confession and avoidance. At the risk of stating the obvious, it is a matter not within the elements of plaintiff's

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

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

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

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

Bar Analysis

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

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

not always clear whether the passage of time affects the right or merely the remedy." (emphasis added)).

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

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

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

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

> We conclude that it is generally <u>not a violation of either of these rules to file a time-barred lawsuit, so long as this does not violate the law of the relevant jurisdiction. The running of the period provided for enforcement of a civil claim creates an affirmative defense which must be asserted by the opposing party</u>, and is not a bar to a court's jurisdiction over the matter. A time-barred claim may still be enforced by a court, and will be if the opposing party raises no objection. And, opposing counsel may fail to raise a limitations defense for any number of reasons, ranging from incompetence to a considered decision to forego the defense in order to have vindication on the merits or to assert some counterclaim. In such circumstances, a failure by plaintiff's counsel to call attention to the expiration of the limitations period cannot be characterized either as the filing of a frivolous claim in violation of Rule 3.1, or a failure of candor toward the tribunal in violation of Rule 3.3. As long as the lawyer makes

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

Id. (emphases added; footnotes omitted).

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

- Pennsylvania LEO 96-80 (6/24/96) ("Adopting the reasoning of ABA Formal Opinion 94-387, it would be ethically permissible for you to file a claim on behalf of a client which you know or believe to be barred by the statute of limitations 'unless the rules of the jurisdiction preclude it.' It is not entirely clear what the ABA Committee means by the 'rules of the jurisdiction', although that phrase appears to encompass primarily jurisdictional 'defects' in the action which would be grounds for dismissal without regard to any actions taken by the opposing party.").

- North Carolina LEO 2003-13 (1/16/04) ("The question is whether filing a time-barred claim is 'frivolous' under Rule 3.1 of the Rules of Professional Conduct. . . . Filing suit after the limitations period has expired does not affect the validity of the claim, nor does it divest a court from having jurisdiction to hear the matters raised therein. ABA Formal Opinion 94-387, 1001:235, 237 (1994). Instead, the statute of limitations is merely an affirmative defense to an otherwise enforceable claim. Id. The defendant must plead the statute of limitations in his answer or it is waived. Northampton County Drainage Dist. No. 1 v. Bailey, 92 N.C. App. 68, 373 S.E.2d 560 (1988), rev'd in part and aff'd in part, 326 N.C. 742, 392 S.E.2d 352 (1990). In addition, the expiration of the limitations period does not prevent a plaintiff from continuing to negotiate settlement with an opposing party who is unaware of the limitations period. ABA Formal Opinion 94-387 at 236-237. Because a time-barred claim can be enforced by a court if the defense raises no objection, filing suit under these circumstances would not violate the prohibition against an attorney advancing a frivolous claim under Rule 3.1.").

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

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

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

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

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

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

Id. (footnotes omitted).

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

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

Case Law

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

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

In 1991, the Fourth Circuit issued an opinion that has come to typify judicial criticism of plaintiffs filing a complaint in the face of an obvious dispositive affirmative defense. In Brubaker v. City of Richmond, 943 F.2d 1363 (4th Cir. 1991), plaintiffs filed a defamation action after Virginia's one-year limitation period had expired. To be sure, plaintiffs did not drop their claim after defendants raised the statute of limitations issue. The court explained that "[i]t was not until the district judge later questioned [plaintiff]

specifically about the defamation count that [plaintiff] conceded that the statute of limitations is one year on a defamation count." Id. at 1384.

The court harshly condemned plaintiff.

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

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

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

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

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

> Theoretically, opposing counsel may fail to assert the statute of limitations defense because of incompetence, for example, or because counsel has successfully urged that the client forego the defense on moral or social grounds. Furthermore, a defendant might waive the defense because he wants to achieve vindication in a public forum, or to reassert the allegedly defamatory remarks. . . .
>
> . . . .
>
> In the Brubaker case, however, the Fourth Circuit rejected this line of reasoning, characterizing L's litigating strategy as "a cat and mouse game" in which she would catch the opposition unawares if she could, but would otherwise quickly dismiss the suit in an attempt to avoid sanctions. This approach seems wrong, for it requires the plaintiff's attorney to anticipate defendant's every move. . . . The whole point of an adversarial system is that parties are entitled to harvest whatever windfalls they can from the miscues or odd judgments of their opponents.

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

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

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

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

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

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

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

Id. at 710 (emphasis added).

The Court first explained that

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

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

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

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

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

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

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

> We agree that sanctions are appropriate in this case, not because plaintiffs failed to inquire into the facts of their claims, but because they failed to act reasonably given the results of their inquiries. In their pleadings, plaintiffs did occasionally question the existence or facial validity of the

> releases; however, they pleaded in the alternative that the releases were void. Thus, plaintiffs appear to have been aware of the releases, and the issue is whether they were justified in ignoring them. The argument that the releases were void was later held frivolous by the district court.
>
> Part of a reasonable attorney's prefiling investigation must include determining whether any obvious affirmative defenses bar the case. . . . An attorney need not forbear to file her action if she has a colorable argument as to why an otherwise applicable affirmative defense is inapplicable in a given situation. For instance, an otherwise time-barred claim may be filed, with no mention of the statute of limitations if the attorney has a nonfrivolous argument that the limitation was tolled for part of the period. The attorney's argument must be nonfrivolous, however; she runs the risk of sanctions if her only response to an affirmative defense is unreasonable.

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

Several years later, the Eleventh Circuit took essentially the same approach in Souran v. Travelers Insurance Co.:

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

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

One article also suggested this type of middle ground.

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

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

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

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

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

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

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

Best Answer

The best answer to this **HYPOTHETICAL** is **(A) PROBABLY YES**.

Enforcing Settlement Agreements: General Rule

Hypothetical 9

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

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

(B) NO

Analysis

This hypothetical comes from a Washington, D.C., case (discussed below), and highlights the states' various approaches to lawyers' authority to settle litigation. The issue involves a mix of statutory law, common law agency principles, and ethics rules.[4]

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

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

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

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

First, some courts follow traditional agency principles in finding that a lawyer can bind her client to a settlement if the lawyer acts with apparent authority. See, e.g., Motley v. Williams, 647 S.E.2d 244, 247 (S.C. Ct. App. 2007) ("'Acts of an attorney are directly attributable to and binding upon the client. Absent fraud or mistake, where attorneys of record for a party agree to settle a case, the party cannot later repudiate the agreement.' Shelton [Shelton v. Bressant, 439 S.E.2d 833 (S.C. 1993)] at 184, 439 S.E.2d at 834 (quoting Arnold v. Yarborough, 281 S.C. 570, 572. 316 S.E.2d 416, 417 (Ct. App. 1984)). This court has held: '[E]mployment of an attorney in a particular suit implies his client's assent that he may do everything which the court may approve in the progress of the cause. Upon this distinction in a large measure rest the certainty, verity, and finality of every judgment of a court. Litigants must necessarily be held bound by the acts of their attorneys in the conduct of a cause in court, in the absence, of course, of fraud.' Arnold at 572, 316 S.E. at 417 (quoting Ex parte Jones, 47 S.C. 393, 397, 25 S.E. 285, 286 (1896))." (emphasis added); enforcing the settlement).

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

For instance, the Second Circuit has acknowledged that "the decision to settle a case rests with the client," and that "a client does not automatically bestow the authority to settle a case on retained counsel." Pereira v. Sonia Holdings, Ltd. (In re Artha

Mgmt., Inc.), 91 F.3d 326, 329 (2d Cir.1996). The Second Circuit nevertheless recognized a presumption that a lawyer has a client's authority to settle a case.

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

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

Many other courts have taken this approach.

- XL Ins. Am., Inc. v. BJ's Wholesale Club, Inc., 86 Vir. Cir. 476, 481, 482 (Va. Cir. Ct. 2013) (finding that a lawyer had "apparent authority" to bind a client to a settlement; "Viewing the record in light of the relevant case law, it is the Court's ruling that Mr. Nyce possessed apparent authority to bind BJ's as to both the settlement agreement and the SIR [Self-Insured Retention]. Nothing at the mediation took place to put XL on notice that Mr. Nyce lacked authority to settle the matter or bind BJ's as to the SIR. BJ's sent two attorneys, Messrs. Nyce and Kelly, to attend mediation in their representative capacities. Both attorneys participated actively in the mediation. Like in Singer [Singer Sewing Machine Co. v. Ferrell, 144 Va. 395 (1926)], Mr. Nyce left the negotiating table to confer with his client via telephone. Both attorneys for BJ's advised Mr. Cortese that $3,000,000 was a good settlement amount. Upon conclusion of the mediation, Mr. Nyce drafted and signed the documents memorializing the settlement agreement, then prepared the final documents ultimately removing this case from Norfolk Circuit docket."; "Mr. Nyce testified at deposition that he 'made it clear to Judge Shadrick, Cortese, everybody else, that [he] was [attending the mediation], but [he] did not have the authority to [. . .] agree to fund [the] BJ's SIR . . .' Mr. Nyce's testimony to this effect was not corroborated. Importantly, co-counsel for BJ's, Mr. Kelly, did not testify to hearing such a disclaimer. Rather, the record indicates that counsel for BJ's acted in such a way as to create the reasonable belief that they possessed authority to bind

BJ's as to the settlement agreement and $500,000 SIR."; "The facts here are closer to Singer than they are to Walson. In Walson, the attorney in question ended negotiations with an explicit disclaimer of authority with respect to a particular issue. Notwithstanding this disclaimer, he appeared the following day and executed a settlement agreement against his client's wishes. Moreover, the attorney in that case repeatedly sent to his client for endorsement draft settlement agreements, indicating that his client's signature, rather than his own, would be required to bind the parties to settlement. Neither of these facts are presented by the record."; "Here, Mr. Nyce consulted with his client during the mediation on several occasions, returning each time to continue the process. At no point did he indicate that BJ's was unwilling to settle, nor did negotiations break down following one of these consultations. Rather, each time he returned to the table, negotiations continued, ultimately resulting in an agreement signed by Mr. Nyce. All of his actions created the reasonable belief that he possessed the authority to bind BJ's to the agreement and SIR.").

- Messer v. Huntington Anesthesia Grp., Inc., 664 S.E.2d 751, 759, 760 (W. Va. 2008) ("When an attorney-client relationship exists, apparent authority of the attorney to represent his client is presumed."; finding that the party challenging the settlement had not overcome the "strong presumption" that the settlement should be enforced).

- Collick v. United States, 552 F. Supp. 2d 349, 353 (E.D.N.Y. 2008) ("[A] party challenging an attorney's settlement authority bears the burden of showing that the attorney lacked authority to settle."; refusing to enforce the settlement agreement).

- Joseph v. Worldwide Flight Servs., Inc., 480 F. Supp. 2d 646, 653 (E.D.N.Y. 2007) ("A client who seeks to set aside a settlement entered into by his attorney 'bears the burden of proving by affirmative evidence that the attorney lacked authority.' . . . Thus, in order to set aside the settlement agreement and stipulation of discontinuance, Joseph must show with 'clear evidence,' . . . that Ronai entered into the settlement and stipulation without his consent or approval. This burden of proof is 'not insubstantial.'" (citation omitted); recommending that the court enforce a settlement agreement).

- Am. Prairie Constr. Co. v. Tri-State Fin., LLC, 529 F. Supp. 2d 1061, 1076-77 (D.S.D. 2007) ("'While an attorney's authority to settle must be expressly conferred, the existence of the attorney of record's authority to settle in open court is presumed unless rebutted by affirmative evidence that authority is lacking." . . . Clients are held accountable for acts and omissions of their attorneys. . . . The rules for determining whether settlement authority has been given by the client to the attorney are the same as those which govern other principal-agent relationships. . . . The party who denies that the attorney was authorized to enter into the settlement has a heavy burden to prove that authorization was not given. . . . Also, a client's failure to object

timely to his or her attorney's action taken without the client's consent may be deemed to be acquiesced by the client."; remanding to the bankruptcy court for an analysis of the settlement agreement's enforceability).

- Infante v. Bridgestone/Firestone, Inc., 6 F. Supp. 2d 608, 610 (E.D. Tex. 1998) ("An attorney retained for litigation is presumed to possess express authority to enter into a settlement agreement on behalf of the client. . . . The client bears the burden of rebutting this presumption with clear evidence that the attorney lacked settlement authority."; finding that the client had not overcome that presumption; granting defendants' motion to enforce a settlement agreement).

- Sorensen v. Consol. Rail Corp., 992 F. Supp. 146, 149 (N.D.N.Y. 1998) (acknowledging that "[o]nly the principal can act to bestow apparent authority upon an agent," and thus an "agent cannot unilaterally obtain this authority"; nevertheless recognizing that "[w]hen the attorney of record enters into a settlement agreement, there is a presumption that the attorney had authority to do so. . . . The party seeking to prove a lack of settlement authority 'bears the burden of proving by affirmative evidence that the attorney lacked authority.'" (citations omitted); finding that the client had not carried its burden of overcoming the presumption granting defendant's motion to enforce an oral settlement agreement).

- HNV Cent. Riverfront Corp. v. United States, 32 Fed. Cl. 547, 549-50 (Fed. Cl. 1995) ("It is well established that 'an attorney retained for litigation purposes is presumed to possess express authority to enter into a settlement agreement on behalf of the client, and the client bears the burden of rebutting this presumption with affirmative proof that the attorney lacked settlement authority." Amin v. Merit Systems Protection Bd., 951 F.2d 1247, 1254 (Fed. Cir. 1991) (emphasis added). Thus unless HNV rebuts this presumption with affirmative proof, HNV's attorney is presumed to have had the express authority to settle this case by dismissing it with prejudice. HNV, however, has provided no such proof. In fact, HNV has failed to respond to this motion."; granting defendant's motion to enforce a settlement agreement).

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

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

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

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

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

Id.

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

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

> Turning to the merits, the controlling legal principles are quite settled. The authority of an attorney to represent a client in litigation is separate from and does not involve the authority to compromise or settle the lawsuit. An attorney who represents a client in litigation has no authority to compromise, consent to a judgment against the client, or give up or waive any right of the client. Rather, the attorney must receive the client's express authorization to do so. . . .
>
> Where a settlement is made out of court and is not made a part of the judgment, the client will not be bound by the agreement without proof of express authority. This authority will not be presumed and the burden of proof rests on the party alleging authority to show that fact. . . . Further, in such a case, opposing counsel is put on notice to ascertain the attorney's authority. If opposing counsel fails to make inquiry or to demand proof of the attorney's authority, opposing counsel deals with the attorney at his or her peril.

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

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

> Plaintiff's argument is that retention of an attorney with express authority to negotiate a settlement, which defendant's attorney had in this case, combined with an extensive history of negotiations, implies the power to reach a binding agreement. While this Court has never addressed

> this precise question, other courts have concluded that an attorney does not have implied authority to reach a binding agreement under these circumstances.

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

> We think that these decisions are specialized applications of the general rule, supported by the weight of the authority, that an attorney has no authority to compromise or settle his client's claim without his client's permission . . . [A]n important distinction must be drawn between an attorney's authority to conduct negotiations and his authority to bind his client to a settlement agreement without express permission. The latter is within the ambit of the subject matter of litigation, which remains at all times within the control of the client, and cannot be implied from authority to conduct negotiations. Accordingly, we hold that retention of an attorney to represent one's interest in a dispute, with instructions to conduct settlement negotiations, without more, does not confer implied authority to reach an agreement binding on a client.
>
> Plaintiff's argument that our holding will undercut the policy in favor of settlement agreements is unpersuasive. First, the incentives for all parties to settle litigation are not affected by our holding today. While our holding will restrict the enforceability of unauthorized agreements against clients, it does not follow that settlement will be discouraged. Rather, the primary effect of this decision will be to "encourage attorneys negotiating settlements to confirm their, or their opponent's, actual extent of authority to bind their respective clients." . . . More importantly, the client's control over settlement decisions is preserved.

Id. at 1120 (emphases added).

Several states take this approach.

- Wells Fargo Bank, N.A. v. Green, Civ. A. No. 3:10-CV-67, 2011 U.S. Dist. LEXIS 23113, at *2, *4 (W.D. Va. Mar. 7, 2011) ("Under Virginia law, 'it is well settled that a compromise made by an attorney without authority . . . will not be enforced to the client's injury . . . .' Walson v. Walson, 37 Va. App. 208, 556 S.E.2d 53, 56 (Va. Ct. App. 2001) (quoting Singer Sewing Machine Co. v. Ferrell, 144 Va. 395, 132 S.E. 312, 315 (Va. 1926). The attorney's authority to settle a case may be actual or apparent. See Dawson v. Hotchkiss, 160 Va. 577, 169 S.E. 564, 566 (Va. 1933). As Plaintiff's counsel has represented that he lacked actual authority to enter the alleged

agreement, and there is no evidence to the contrary, the court will only consider whether counsel had apparent authority."; "[T]here is no evidence before the court that Plaintiff made any verbal or nonverbal representation that Plaintiff[']s counsel had authority to enter a settlement agreement. Under Virginia law, it is not sufficient that Plaintiff[']s counsel was an attorney, retained by Plaintiff, and authorized to negotiate."; declining to enforce the settlement).

- Alper v. Wiley, 81 Va. Cir. 212, 213 (Va. Cir. Ct. 2010) ("Long standing precedent in Virginia makes clear that an attorney, simply by reason of his or her employment, does not have the authority to compromise his or her client's claim. . . . Generally, the scope of the agent's authority in dealings with third parties is that authority which the principal has held the agent out as possessing or which the principal is estopped to deny. . . . Evidence of apparent authority of an attorney to bind the client to a settlement agreement must find support in the record."; "The authority of the attorney to bind his client cannot be proved by his or her declarations, acts, or conduct alone."; declining to enforce the settlement).

- Andrews v. Andrews, 80 Va. Cir. 279, 282 (Va. Cir. Ct. 2010) ("An attorney may not bind his client[] to a settlement absent the client's express authority. . . . This has long been a proposition of settled law with which sophisticated commercial parties such as Insurance companies should be well familiar[.] It is clear from the evidence here that the plaintiff did not authorize Conrad to enter into the settlements claimed, was unaware that he had taken the actions he took, and received none of the funds tendered by the defendants to him. In short the evidence is wholly devoid of any showing that Conrad [lawyer] acted within the terms of his actual authority or any implied authority."; "A client may, as principal, imbue his attorney with apparent authority to settle a claim."; "It is essential, in determining the scope of any apparent authority, to look at the actions of the client, however, for it is clear that the attorney can never [b]e the architect of his own mandate. . . . The apparent authority must be the product of a belief that is 'traceable to the principal's manifestations.' Restatement (Third) of Agency §2.03 (2006). Manifestation by the principal is the *sine qua non* to any creation of apparent authority."; "A decision to settle a claim is the client's alone. . . . And while rationing a lawyer may vest [him] with apparent authority to do all acts reasonably calculated to advance the client's interests, it may never be the sole source for a finding of apparent authority to compromise them."; declining to enforce the settlement).

- Walson v. Walson, 556 S.E.2d 53, 55, 57 (Va. Ct. App. 2001) (rejecting a trial court's finding that a wife had given her lawyer apparent authority to settle a case, despite the undisputed fact that the lawyer repeatedly spoke by telephone to his client (the wife) during the settlement negotiation, and told the husband's lawyer "that wife had agreed" to the proposed settlement; "Through her conduct, wife plainly held Byrd [lawyer] out as possessing the

authority to conduct settlement negotiations on her behalf. She permitted him to attend the two negotiation meetings and to relay her offers and counteroffers to husband and Schell [opposing lawyer], as well as her rejections and acceptance of husband's offers and counteroffers. However, nothing in the record indicates that wife held out Byrd as possessing the authority to execute the final property settlement agreement on her behalf."; declining to enforce the settlement).

- Magallanes v. Ill. Bell Tel. Co., 535 F.3d 582, 584, 585 (7th Cir. 2008) ("Under Illinois law, an attorney has no authority to settle a claim of the client absent the client's express authorization to do so. . . . An attorney's authority to agree to an out-of-court settlement will not be presumed, and the burden of proof rests on the party alleging authority to show that fact."; finding for the second time that a trial court had abused its discretion in enforcing a settlement, and remanding for reinstatement of the case; explaining that "lest there be any lingering doubt as to our intent, this case must proceed to decision on the merits").

- Price v. Bowen, 945 A.2d 367, 368 (Vt. 2008) ("[The Vermont Supreme Court] ha[s] long recognized 'the general rule, supported by the weight of the authority, that an attorney has no authority to . . . settle his client's claim without his client's permission.' . . . A 'settlement is valid only if defendant was found to have granted express authority to settle on those terms.'" (citation omitted); remanding for a hearing "as to the authority of defendant's attorney to enter the disputed settlement").

- Kulchawik v. Durabla Mfg. Co., 864 N.E.2d 744, 749 (Ill. App. Ct. 2007) ("An attorney who represents a client in litigation has no authority to settle a claim of the client absent the client's express authorization to do so. . . . Where a settlement is made out of court and not made part of the judgment, the client will not be bound by the agreement without proof of express authority. . . . The party alleging authority has the burden of proving that fact. . . . The plaintiffs point to no evidence that Moser [defendant's president] expressly authorized Meyer to settle the lawsuits on behalf of Durabla. Meyer had been retained by Durabla's insurance company."; enforcing a settlement agreement).

- BP Prods. N. Am., Inc. v. Oakridge at Winegard, Inc., 469 F. Supp. 2d 1128, 1134-35 (M.D. Fla. 2007) ("In Florida, the party seeking to enforce the settlement agreement must establish that counsel for the opposing party was given the clear and unequivocal authority to settle the case by his or her client. See, e.g., Spiegel [Spiegel v. Holmes, 834 So. 2d 295 (Fla. Ct. app. 2002)], 834 So. 2d at 297 (citing Jorgensen v. Grand Union Co., 490 So.2d 214 (Fla. 4th DCA 1986)). 'An unauthorized compromise, executed by an attorney, unless subsequently ratified by his client, is of no effect and may be repudiated or ignored and treated as a nullity by the client.' Vantage Broadcasting Co. v. WINT Radio, Inc., 476 So. 2d 796 (Fla. 1st DCA 1985).

> In Murchison v. Grand Cypress Hotel Corporation, [13 F.3d 1483 (11th Cir. 1994)], the Circuit Court considered the following facts in deciding whether a client had given his attorney clear authority to settle the case: 1) whether the client knew his lawyer was in the process of negotiating a settlement; 2) whether and how many times the client met or spoke with his attorney while settlement negotiations were ongoing; 3) whether the client was present in the courtroom when the settlement was announced in open court; 4) whether the client immediately objected to the settlement; and 5) whether the client was an educated man who could understand the terms of the settlement agreement. See Murchison, 13 F.3d at 1485-86." (footnote omitted); enforcing the settlement).

Some states have even adopted statutes specifically indicating that only clients have the power to settle cases, and declining to honor settlements entered into by lawyers without "special authority in writing" from the client. Cook v. Surety Life Ins. Co., 903 P.2d 708, 714 & 717, 715 (Haw. Ct. App. 1995) ("Thus, we hold, that ordinarily, an attorney must have the written authority of the client to settle in order to settle a matter on behalf of a client."; vacating the trial court's enforcement of a settlement).

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

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

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

> Although the client may not have actually authorized the attorney to enter into a settlement agreement, the third party must be allowed to enforce the agreement against the client

> if the third party reasonably interprets the client's manifestations as bestowing the authority to settle on the attorney. The wariness expressed by some courts is based on the desire to protect a client within the attorney-client relationship but the result ignores fairness to the third party. There is no reason to rob an innocent third party of the entire doctrine of apparent authority as a matter of law when the attorney for a client enters into a settlement agreement with the third party. As with all other agency settings, the client principal selects the attorney agent, and fairness demands that courts view the principal as more responsible than the reasonable third party when the agent errs. The third party who has reasonably interpreted the client's manifestations as an indication that the attorney has authority to settle is indeed the innocent, and deserves the protection of the apparent authority doctrine.
>
> Any desire by courts to protect the client from the wrongdoing attorney cannot be furthered at the expense of the third party. The client has other, more appropriate protections. Not only can a wronged client sue his attorney for malpractice, but the client can pursue professional discipline for the attorney, an avenue of recourse unavailable in most other agency settings.

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

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

For instance, a Colorado appellate court explained that

> [a]n attorney does not have the authority to compromise and settle the claim of a client without his or her knowledge and consent. . . . Thus, generally, a client is not bound by a settlement agreement made by an attorney when the lawyer has not been granted either express or implied authority. . . .
>
> However, because there is at least one other party involved in a settlement (who, in the absence of further action or proceedings on the claim against it, is entitled to

> rely on the fact that the case has been resolved), when a client discovers that an attorney has "settled" his claim without authority, the client must either timely repudiate the settlement and proceed with the lawsuit or ratify the settlement as an acceptable bargain.

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

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

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

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

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

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

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

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

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

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

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

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

Id. at 1309-10.

. . .

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

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

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

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

The court answered the certified question in the negative.

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

> settlement conference and permitting the attorney to negotiate on the client's behalf -- were insufficient to permit a reasonable belief by the District that Harrison [plaintiff's lawyer] had been delegated authority to conclude the settlement. Some additional manifestation by Makins was necessary to establish that she had given her attorney final settlement authority, a power that goes beyond the authority an attorney is generally understood to have.

Id. at 595-96.

Best Answer

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

Disclosing Unpublished Case Law

Hypothetical 10

One of your newest lawyers has proven to be a very skilled legal researcher, and can find decisions that more traditional research might not have uncovered. However, her thorough research has generated some ethics issues for you.

Must you advise the trial court of the following decisions:

(a) A decision by one of your state's appellate courts that is directly adverse to your statutory interpretation argument, but which that court labeled as "not for publication"?

(A) YES (PROBABLY)

(b) A decision by one of your state's appellate courts that is directly adverse to your statutory interpretation argument, but which that court labeled as "not to be used for citation"?

(B) NO (PROBABLY)

Analysis

(a)-(b) The story of unpublished opinions involves both substantive law and ethics -- with an interesting twist of evolving technology.

The ABA Model Rules do not deal with the lawyer's duty to disclose case law that has not been published, or that the court has indicated should not be cited (although the ABA issued a legal ethics opinion dealing with that issue -- discussed below).

The Restatement contains a comment dealing with this issue.

> Case-law precedent includes an unpublished memorandum opinion, . . . an unpublished report filed by a magistrate, . . . and an adverse federal habeas corpus ruling . . . . The duty to disclose such unpublished materials may be of great practical significance, because they are less likely to be discovered by the tribunal itself. . . . Such a requirement should not apply when the unpublished decision

> has no force as precedent. Nor should it apply, of course, in jurisdictions prohibiting citation of certain decisions of lower courts. Typical would be the rule found in some states prohibiting citation of intermediate-appellate-court decisions not approved for official publication.

Restatement (Third) of Law Governing Lawyers §111 Reporter's Note cmt. d (2000) (emphases added).

The history of this issue reflects an interesting evolution. One recent article described federal courts' changing attitudes.

> Although some federal circuits, in the 1940s, considered issuing unpublished opinions as a means to manage its [sic] burgeoning caseload, the federal courts of appeals continued to publish virtually every case decision well into the early 1960s. In 1964, however, because of the rapidly growing number of published opinions and the reluctance of federal courts to issue unpublished decisions, the Judicial Conference of the United States resolved that judges should publish "only those opinions which are of general precedential value and that opinions authorized to be published be succinct." In the early 1970s, after the federal circuits failed to respond to this original resolution and many circuits had continued to publish most of their opinions, the Judicial Conference mandated that each circuit adopt a "publication plan" for managing its caseload. Furthermore, in 1973, the Advisory Council on Appellate Justice urged the federal circuits to issue specific criteria for determining which opinions to publish. The Advisory Council hoped that limiting publication would preserve judicial resources and reduce costs by increasing the efficiency of judges.

Andrew T. Solomon, Making Unpublished Opinions Precedential: A Recipe for Ethical Problems & Legal Malpractice?, 26 Miss. C. L. Rev. 185, 189-90 (2006/2007) (emphases added; footnotes omitted).

Another article pointed out the ironic timing of the Judicial Conference's recommendation.

> In 1973, just one year after the Judicial Conference recommended adoption of circuit publication plans, Lexis began offering electronic access to its legal research database; Westlaw followed suit soon after in 1975.

J. Lyn Entrikin Goering, Legal Fiction of the "Unpublished" Kind: The Surreal Paradox of No-Citation Rules and the Ethical Duty of Candor, 1 Seton Hall Cir. Rev. 27, 39 (2005).

One commentator explained the dramatic effect that these rules had on circuit courts' opinions.

> Into the early 1980s, federal courts of appeals were publishing nearly 90% of their opinions. However, by the mid-1980s, the publication rates for federal court of appeals decisions changed dramatically. By 1985, almost 60% of all federal court of appeals decisions were unpublished. Today [2007], more than 80% of all federal court of appeals decisions are unpublished.

Andrew T. Solomon, Making Unpublished Opinions Precedential: A Recipe for Ethical Problems & Legal Malpractice?, 26 Miss. C. L. Rev. 185, 192-93 (2006/2007) (emphases added; footnotes omitted).

As federal and state courts increasingly issued unpublished opinions, the ABA found it necessary to explain that

> [i]t is ethically improper for a lawyer to cite to a court an unpublished opinion of that court or of another court where the forum court has a specific rule prohibiting any reference in briefs to an opinion that has been marked, by the issuing court, "not for publication."

ABA LEO 386R (8/6/94; revised 10/15/95). The ABA noted that as of that time (1994) several states (including Indiana, Kansas, Wisconsin, and Arkansas) prohibited lawyers from citing unpublished cases. In closing, the ABA explained that -- not

surprisingly -- lawyers' ethics duties had to mirror the tribunal's rules about unpublished cases.

> [T]here is no violation if a lawyer cites an unpublished opinion from another jurisdiction in a jurisdiction that does not have such a ban, even if the opinion itself has been stamped by the issuing court "Not for Publication," so long as the lawyer informs the court to which the opinion is cited that that limitation has been placed on the opinion by the issuing court. Court rules prohibiting the citation of unpublished opinions, like other procedural rules, may be presumed, absent explicit indication to the contrary, to be intended to govern proceedings in the jurisdiction where they are issued, and not those in other jurisdictions. Thus, the Committee does not believe that a lawyer's citing such and opinion in a jurisdiction other than the one in which it was issued would violate Rule 3.4(c).

Id.

By the mid-1990s, authors began to question courts' approach, given the evolving technology that allowed lawyers to easily find case law.

> These historic rationales for the limited publication/no-citation plans warrant re-examination in light of current technology. Increased access to both published and unpublished legal opinions through the computer brings to the forefront new concerns while relegating some old concerns to the past. Further, as technology alters the available body of law, it exacerbates some of the practical problems with current limited publication/no-citation plans.

Kirt Shuldberg, Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals, 85 Cal. L. Rev. 541, 551 (1997). The author noted that as of that time (1997) "allowing citation to unpublished opinions has gained popularity. Six circuits currently allow citations, up from only two circuits in 1994." Id. at 569.

In 2000, the Eighth Circuit found unconstitutional a court rule that did not allow courts to rely on unpublished opinions. Anastasoff v. United States, 223 F.3d 898 (8th Cir.), vacated as moot, 235 F.3d 1054 (8th 2000) (en banc).

The ABA joined this debate shortly after Anastasoff. In August 2001, the American Bar Association adopted a resolution urging the federal courts of appeals uniformly to:

> (1) Take all necessary steps to make their unpublished decisions available through print or electronic publications, publicly accessible media sites, CD-ROMs, and/or Internet Websites; and
>
> (2) Permit citation to relevant unpublished opinions.

See Letter from Robert D. Evans, Director, ABA Govtl. Affairs Office, to Howard Coble, Chairman, Subcomm. on Courts, Internet & Intellectual Prop., U.S. House of Representatives (July 12, 2002).

The Anastasoff opinion began a dramatic movement in the federal courts against issuing unpublished opinions that lawyers could not later cite.

A 2003 article reported on this shift. Stephen R. Barnett, Developments and Practice Notes: No-Citation Rules Under Siege: A Battlefield Report and Analysis, 5 J. App. Prac. & Process 473 (Fall 2003). As that article reported, within a few years, nine federal circuits began to allow citation of unpublished opinions. Of those nine federal circuits, six circuits allowed unpublished opinions to be cited for their "persuasive" value, two circuits adopted hybrid rules under which some unpublished opinions were binding precedent and some unpublished opinions were persuasive precedent, and one circuit did not specify the precedential weight to be given to unpublished opinions. Of course, this also meant that four federal circuits still absolutely prohibited citation of unpublished opinions.

The 2003 article also listed all of the many state variations, including:

- States that did not issue unpublished opinions or did not prohibit citation of unpublished opinions (Connecticut, Mississippi, New York, and North Dakota).
- States allowing citation of unpublished opinions as "precedent" (Delaware, Ohio, Texas, Utah, and West Virginia).
- States allowing citation for "persuasive value" (Alaska, Iowa, Kansas, Michigan, New Mexico, Tennessee, Vermont, Wyoming, Virginia, Minnesota, New Jersey, and Georgia).
- States (25 as of that time) prohibiting citation of any unpublished opinion.
- States too close to call (Hawaii, Illinois, Maine, Oklahoma, and Oregon).

Id. at 481-85. The article even noted that there was disagreement among authors about how to categorize the states' approach.

As the crescendo of criticism built, authors continued to explain why the rules limiting publication and citation of decisions made less and less sense.

> No-citation rules artificially impose fictional status on unpublished opinions, contrary to the overarching ethical duty, shared by attorneys and judges alike, to protect the integrity of the American judicial system. To pretend that no-citation rules can be reconciled with norms of professional conduct and rules of ethics is to defend a surreal netherworld that imposes an outmoded and unjustified double bind on the federal bar.

J. Lyn Entrikin Goering, Legal Fiction of the "Unpublished" Kind: The Surreal Paradox of No-Citation Rules and the Ethical Duty of Candor, 1 Seton Hall Cir. Rev. 27, 34 (2005) (footnotes omitted).

This article also explained the dilemma (including the ethical dilemma) facing lawyers in these jurisdictions.

> No-citation rules put attorneys in a double bind: If appellate counsel conscientiously abides by the duty of candor to the tribunal, the attorney risks the imposition of sanctions by that very court for citing opinions designated as "unpublished," in violation of the rules of the court and the

> ethical rules requiring attorneys to follow them. On the other hand, if appellate counsel abides by local rules that prohibit or disfavor the citation of "unpublished" opinions, the attorney risks the imposition of sanctions for violating the ethical duty of candor, the requirements of Fed. R. Civ. P. 11, the obligations on appellate counsel set forth in Fed. R. App. P. 46, and the duty to competently represent the client.

Id. at 79 (footnote omitted).

The constant drumbeat of criticism eventually changed the Judicial Conference's approach.

> The controversy ultimately induced the Judicial Conference in 2005 to propose Federal Rule of Appellate Procedure 32.1, which was recently adopted by the Supreme Court. The rule allows lawyers to cite unpublished opinions issued on or after January 1, 2007 in federal courts nationwide. If unaltered by Congress, the rule will take effect beginning in 2007.

Dione C. Greene, The Federal Courts of Appeals, Unpublished Decisions, and the "No-Citation Rule", 81 Ind. L.J. 1503, 1503-04 (Fall 2005) (footnotes omitted).

New Federal Rule of Appellate Procedure 32.1 had some effect, but did not end the debate.

One article described the continuing issue.

> From 2000 to 2008, more than 81% of all opinions issued by the federal appellate courts were unpublished. See Judicial Business of the United States Courts: Annual Report of the Director, tbl. S-3 (2000-2008). During that period, the Fourth Circuit had the highest percentage of unpublished opinions (92%), and more than 85% of the decisions in the Third, Fifth, Ninth and Eleventh circuits were unpublished. Even the circuits with the lowest percentages during that period -- the First, Seventh and District of Columbia circuits -- issued 54% of their opinions as unpublished. Id. . . . Unpublished decisions are much more accessible today -- on Westlaw, Lexis and West's Federal Appendix -- than they were years ago. Still, given the federal circuits' treatment of unpublished decisions as having limited or no precedential value, practitioners who receive a

> significant but unpublished appellate decision may wish to ask the court to reconsider and issue a published opinion. The federal circuit rules on moving for publication vary. The Fourth, Eighth and Eleventh circuits allow only parties to petition for publication, while the District of Columbia, First, Seventh and Ninth Circuits allow anyone to petition. Two states, California and Arizona, have an extraordinary practice of allowing their state supreme courts, on their own motion, to 'depublish' intermediate appellate court decisions. In California, anyone can petition the state Supreme Court to depublish any appellate court opinion. See California R. Ct. 8.1125; Arizona R. Civ. App. P. 28(f).

Aaron S. Bayer, Unpublished Appellate Decisions Are Still Commonplace, The National Law Journal, Aug. 24, 2009.

State courts have also continued to debate whether their courts can issue unpublished decisions, or decisions that lawyers cannot cite.

For instance, on January 6, 2009, the Wisconsin Supreme Court changed its rules (effective July 1, 2009) to allow lawyers to cite some but not all unpublished opinions.

> [A]n unpublished opinion issued on or after July 1, 2009, that is authored by a member of a three-judge panel or by a single judge under s. 752.31(2) may be cited for its persuasive value. A per curiam opinion, memorandum opinion, summary disposition order, or other order is not authored opinion for purposes of this subsection. Because an unpublished opinion cited for its persuasive value is not precedent, it is not binding on any court of this state. A court need not distinguish or otherwise discuss an unpublished opinion and a party has no duty to research or cite it.

Wis. Stat. § 809.23(3)(b) (effective July 1, 2009); In re Amendment of Wis. Stat. § 809.23, Sup. Ct. Order No. 08-02 (Wis. Jan. 6, 2009). The accompanying Judicial Council Note provided an explanation.

> Section (3) was revised to reflect that unpublished Wisconsin appellate opinions are increasingly available in electronic form. This change also conforms to the practice in

> numerous other jurisdictions, and is compatible with, though more limited than, Fed. R. App. P. 32.1, which abolished any restriction on the citation of unpublished federal court opinions, judgments, orders, and dispositions issued on or after January 1, 2007. The revision to Section (3) does not alter the non-precedential nature of unpublished Wisconsin appellate opinions.

Id. Judicial Council Note, 2008. Interestingly, the court indicated that it

> will convene a committee that will identify data to be gathered and measured regarding the citation of unpublished opinions and explain how the data should be evaluated. Prior to the effective date of this rule amendment, the committee and CCAP staff will identify methods to measure the impact of the rule amendment and establish a process to compile the data and make effective use of the court's data keeping system. The data shall be presented to the court in the fall of 2011.

Id.

One of the Wisconsin Supreme Court justices dissented -- noting that "[t]his court has faced three previous petitions to amend the current citation rule" and that "[n]o sufficient problem has been identified to warrant the change." In re Amendment of Wis. Stat. § 809.23, Sup. Ct. Order No. 08-02 (Wis. Jan. 6, 2009) (Bradley, J., dissenting). The dissenting justice indicated that she "continue[d] to believe that the potential increased cost and time outweigh any benefits gained." Id.

One recent article explained the remaining issue facing lawyers litigating in courts that no longer prohibit citation of unpublished opinions.

> For federal circuits with unpublished opinions issued after January 1, 2007, and for all other jurisdictions which have banned no-citation rules, attorneys may now cite to unpublished opinions. But does this mean that attorneys must cite to unpublished opinions if those opinions are directly adverse?
>
> Although unclear, the word "authority" in the Model Rule leads to the conclusion that whether an attorney must

> disclose an adverse unpublished opinion depends upon how the jurisdiction treats unpublished opinions and, more particularly, whether it treats the unpublished opinion as precedent, or rather, as "authority." Furthermore, the comment to the Model Rule 3.3 states that the duty to disclose only relates to "directly adverse authority in the controlling jurisdiction." Therefore, unless the unpublished opinion is adverse controlling authority, the attorney would not be obligated to cite it. An attorney's obligation to cite to an unpublished opinion adverse to her client's opinion does not rest upon the rationale that the other side may not have equal access to unpublished opinion, as some commentators have argued.

Shenoa L. Payne, The Ethical Conundrums of Unpublished Opinions, 44 Willamette L. Rev. 723, 757 (Summer 2008) (emphases added). Although this article erroneously concluded that the disclosure obligation applied to controlling authority (as opposed to authority from the controlling jurisdiction), it accurately described lawyers' continuing difficulty in assessing their ethics obligations.

Recent decisions have also highlighted the confusing state of the ethics rules governing lawyers in states that continue to limit citation of published opinions.

> Subsection (a)(3) speaks to a different issue, because it requires a lawyer to disclose court opinions and decisions that constitute "legal authority in the controlling jurisdiction," even if that authority is directly contrary to the interest of the client being represented by the attorney. The obligation to disclose case law, however, is limited somewhat by the impact of Rule 1:36-3, which provides that "[n]o unpublished opinion shall constitute precedent or be binding upon any court." Even that limitation, however, is not unbounded, as an attorney who undertakes to rely on unpublished opinions that support his or her position must, in compliance with the duty of candor, also disclose contrary unpublished decisions known to the attorney as well. Nevertheless, this Rule continues to define the demarcation line between opinions considered to be "binding" authority and other opinions, even though the latter, in many cases, are now readily available through the internet or through media outlets in printed format.

Brundage v. Estate of Carambio, 951 A.2d 947, 956-57 (N.J. 2008) (emphasis added). In that case, the court also noted that New Jersey courts "have recognized that the decision of one trial court is not binding on another." Id. at 957. Relying both on this principle and on an earlier decision's status as "unpublished," the court concluded that a lawyer litigating a case before the court did not have a duty to bring the earlier decision to the court's attention.

> [I]f we were to conclude that an attorney has an affirmative duty to advise his adversary or the court of every unpublished adverse ruling against him, we would create a system in which a single adverse ruling would be the death knell to the losing advocate's practice. And it would be so even if the first adverse ruling eventually were overturned by the appellate panel or by this Court. Such a system would result in a virtual quagmire of attorneys being unable to represent the legitimate interests of their clients in any meaningful sense. It would not, in the end, advance the cause of justice because the first decision on any issue is not necessarily the correct one; the first court to speak is just as likely to be incorrect in novel or unusual matters of first impression as it is to be correct.

Id. at 968.

In 2011, the Northern District of California addressed the constitutionality of a rule prohibiting citations to unpublished cases.

- Lifschitz v. George, No. C 10-2107 SI, 2011 U.S. Dist. LEXIS 8505, at *2 (N.D. Cal. Jan. 28, 2011) (finding that the U.S. Constitution did not prohibit a rule prohibiting lawyers from citing unpublished California court opinions; noting that under the California rule lawyers are "'only permitted to cite or mention opinions of California state courts that have been designated as 'certified for publication' or ordered officially published ('published' cases), and are forbidden from citing or even mentioning any other cases to the California state or any other courts.'" (internal citation omitted); upholding the provision).

California lawyers' ethics requirements presumably parallel the substantive law governing citations of such opinions.

Best Answer

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