PROFESSIONALISM FOR THE ETHICAL LAWYER

Hypotheticals and Analyses*

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

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Hypothetical 1

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

Do the ethics rules prohibit discourteous behavior?

NO (EXCEPT AT THE EXTREME)

Analysis

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

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

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

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

Applicable Ethics Rules

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

For instance, under ABA Model Rule 4.4(a),

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

ABA Model Rule 4.4(a) (emphasis added). The ABA Model Rules Preamble similarly explains that

> [a] lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.

ABA Model Rules Preamble [5] (emphasis added).

The ethics rules thus set a very low minimum standard of conduct. They do not condemn all actions that "embarrass, delay, or burden" third persons. Instead, the ethics rules only prohibit actions that "have no substantial purpose" other than to prejudice third persons in that way. Not surprisingly, not many actions fall below this line. Even the dimmest of lawyers can normally find some other arguable reason to have undertaken an unprofessional act.

Best Answer

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

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Duty to Supervise Lawyers and Nonlawyers

Hypothetical 2

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

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

YES

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

YES

Analysis

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

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

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

ABA Model Rule 5.1(a).

Thus, lawyers who manage other lawyers must take reasonable steps to put in place "measures" that provide at least reasonable assurance that lawyers in the firm comply with the ethics rules. Comment [2] to that rule mentions such "internal policies

and procedures" as those designed to identify conflicts, assure that filing and other deadlines are met, provide for proper trust account processes, etc. ABA Model Rule 5.1 cmt. [2]. Comment [3] explains that the measures lawyers may take to comply with this managerial responsibility can vary according to the size of the law firm.

> In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. . . . Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members, and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

ABA Model Rule 5.1 cmt. [3].

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

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

ABA Model Rule 5.1(b).

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

> With respect to a nonlawyer employed or retained by or associated with a lawyer:
>
> (a) a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the

> firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer; and
>
> (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.

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

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

> A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
>
> (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner or has managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ABA Model Rule 5.1(c).

Not surprisingly, the same basic rules apply to a supervising lawyer's responsibility for a nonlawyer's ethics breach.

> [A] lawyer shall be responsible for conduct of such a person [nonlawyer employed or retained by or associated with a lawyer] that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
>
> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

> (2) the lawyer is a partner or has managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ABA Model Rule 5.3(c).

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

Best Answer

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

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Responsibility of Subordinate Lawyers

Hypothetical 3

You just finished your first week of work at a new law firm, and you already have some qualms. In particular, the partner who supervises your work seems to be a bit "shady." You begin to wonder what responsibility you might have if your supervisor asks you to do something that makes you feel ethically uncomfortable.

May you be held responsible for conduct you undertake at your supervising partner's direction?

YES

Analysis

The ethics rules try to draw a fine line between automatically punishing subordinate lawyers for following a supervisor's direction and recognizing an "I was just following orders" defense.

ABA Model Rule 5.2(a) explains that lawyers must follow all of the ethics rules "notwithstanding that the lawyer acted at the direction of another person." On the other hand, ABA Model Rule 5.2(b) indicates that

> [a] subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

ABA Model Rule 5.2(b).

The comments reflect the same tension. Comment [1] notes (gratuitously, in a way) that subordinated lawyers might not have the type of actual knowledge of wrongdoing that must underlie most ethics breaches. As an example, that comment explains that a subordinate lawyer filing a frivolous pleading "would not be guilty of a

professional violation unless the subordinate knew of the document's frivolous character." ABA Model Rule 5.2 cmt. [1].

Comment [2] explains that supervising lawyers normally direct subordinate's actions -- to assure a "consistent course of action or position." If an ethics question arises, both the supervising and subordinate lawyer are responsible for any misconduct if the ethics question "can reasonably be answered only one way." On the other hand, a subordinate lawyer may safely defer to the supervising lawyer's direction "if the question is reasonably arguable." As an example, this comment explains that a supervisor's "reasonable resolution" of a conflicts question "should protect the subordinate professionally if the resolution is subsequently challenged." ABA Model Rule 5.2 cmt. [2].

This delicate balancing normally insulates subordinate lawyers from professional punishment if they defer to their supervisors. On the other hand, the balance makes it more difficult for subordinate lawyers to challenge unprofessional (as opposed to unethical) conduct.

Best Answer

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

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Avoiding Discrimination and Bigotry

Hypothetical 4

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

What should you do?

REMIND THE SENIOR PARTNER THAT SUCH JOKES ARE INAPPROPRIATE IN TODAY'S WORLD AND MAY VIOLATE THE ETHICS RULES

Analysis

On August 9, 2016, the ABA House of Delegates overwhelmingly approved changes to ABA Model Rule 8.4, intended to prohibit certain discrimination. It will be interesting to see how any states adopting this new rule implement its crystal-clear per se prohibition.[1]

Previous ABA Model Rule Comment

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

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

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

[1] Many states are now analyzing the new ABA Model Rule and whether they should adopt it or a similar rule. Some states have explicitly prohibited only illegal or unlawful practices. That presumably is narrower than the ABA's flat prohibition, and incorporates outside statutory, regulatory and common law concepts into the ethics analysis.

This former ABA Model Rule Comment was fairly limited. First, it applied only to a lawyers' conduct "in the course of representing a client." Other ABA Model Rule prohibitions begin with the same or similar phrase, such as the prohibition on false statements of material fact (ABA Model Rule 4.1), or the prohibition on ex parte communications with represented persons (ABA Model Rule 4.2). This limiting language contrasts with the introductory phrase of ABA Model Rule 8.4: "It is professional misconduct for a lawyer to . . . ." Those prohibitions apply whenever the lawyer acts in any context, professionally or personally. Second, the former ABA Model Rule Comment prohibited only "knowing" misconduct. Third, the former ABA Model Rule Comment did not prohibit discrimination. It prohibited "bias or prejudice," if such conduct was "based upon" the stated attributes. The ABA Model Rules did not define those two terms, but presumably, they describe improper (and perhaps even unlawful) conduct that is a subset of discrimination. If the terms were meant to describe the more generic conduct of "discrimination," the ABA could have used that one word rather than the two words. Fourth, the former ABA Model Rule Comment prohibited the misconduct only when it was "prejudicial to the administration of justice." That vague standard paralleled the black letter ABA Model Rule 8.4(d)'s prohibition on any "conduct that is prejudicial to the administration of justice." In fact, the general language of ABA Model Rule 8.4(d) thus already prohibited the specific conduct described in former ABA Model Rule 8.4 cmt. [3].

ABA Model Rule 8.4(g)

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

> It is professional misconduct for a lawyer to: engage in conduct that the lawyer knows or reasonably should know is

> harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.

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

The new black letter rule provision expands the scope of the previous Comment. First, the rule applies to lawyers' conduct "related to the practice of law." This is far broader than conduct lawyers undertake "in the course of representing a client." But it is still narrower than other ABA Model Rule 8.4 provisions, which apply to all of lawyers' professional and private conduct. Second, the rule applies when a lawyer "knows or reasonably should know" that she is engaged in the articulated misconduct. This contrast with the previous Comment's "knowing" standard. Third, the rule prohibits "discrimination" -- in contrast to the old Comment's "bias or prejudice." As explained below, inclusion of this prohibition on any and all "discrimination" is the most interesting new addition. Fourth, the rule prohibits the described conduct whether or not it is "prejudicial to the administration of justice."

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

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

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

ABA Model Rule 8.4(g) is also notable for a word that is missing from the black letter rule. The language could have the word "unlawfully" in describing the prohibited

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

The new ABA Model Rule is supplemented by two comments.

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

> Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

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

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

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

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

ABA Model Rule 8.4 Comment [4]

ABA Model Rule 8.4(g)'s flat prohibition covers any discrimination on the basis of race, sex, or any of the other listed attributes.

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

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

ABA Model Rule 8.4 cmt. [4].

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

First, as the ABA Model Rules themselves explain,

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

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

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

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

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

Reach of ABA Model Rule 8.4(g)

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

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

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

Impact of ABA Model Rule 8.4(g)

Ironically, at the same meeting that the ABA House of Delegates adopted the ABA Model Rule 8.4 changes, it adopted a Resolution urging (among other things) "the use of diverse merit selection panels" in connection with federal judge magistrate selection. ABA House of Delegates Resolution 102, Aug. 8-9, 2016. The Resolution also indicated that "[s]itting federal judges can assist the cause of diversity by ensuring that their interns and law clerks represent diverse backgrounds." Id. In its Conclusion,

the Resolution lauds what it called "[p]ipeline recruitment," which includes "targeting minority students" to encourage them to consider judicial careers. However, the Resolution concluded that "[i]t is also essential to have a diverse merit selection panel." Id.

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

The ABA's bizarre approach to ABA Model Rule 8.4(g) was on full display in the October 2017 ABA Journal. In that ABA Journal, noted Stanford Law School Professor Deborah Rhode essentially acknowledged that new ABA Model Rule 8.4(g) cannot (or at least will not) be used for disciplinary purposes.

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

> lawsuits if the conduct is egregious and the damages are substantial.

David L. Hudson, Jr., Constitutional Conflict: States split on Model Rule limiting harassing conduct, 103 A.B.A.J. 25, 26, Oct. 2017 (emphases added).[2] So even one of the country's leading ethics authorities concluded that ABA Model Rule 8.4(g) merely "provides a useful symbolic statement and educational function." That is not the ABA Model Rules' purpose, and adopting disciplinary rules merely for symbolic or educational purposes carries frightening implications.

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

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

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

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

As with the awkwardly timed ABA Resolution urging courts to use race as a factor in selecting magistrate judges, and hiring law clerks, the law school admissions process presumably does not involve "conduct related to the practice of law." But if it did, would Yale's and Harvard's deans run afoul of ABA Model Rule 8.4(g)? Of course they would. In both Grutter and Fisher, the United States Supreme Court did not deny that those admissions processes involved race discrimination. To the contrary, the United States Supreme Court acknowledged that the processes involved race discrimination -- but found it constitutional in those specific contexts. So Yale's and

Harvard's use of race as a "plus" might be "lawful" discrimination – but ABA Model Rule 8.4(g) prohibits all discrimination.

Conclusion

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

B 12/16; B 11/17

Offering Candid Advice

Hypothetical 5

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

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

YES

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

YES

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

YES

Analysis

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

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

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

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

> related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

ABA Model Rule 2.1 cmt. [5] (emphasis added).

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

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

ABA Model Rule 2.1 cmt. [1] (emphasis added).

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

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

ABA Model Rule 2.1 cmt. [2] (emphasis added).

Best Answer

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

b 12/10

Advising Clients of the Benefits of Courtesy

Hypothetical 6

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

What should you do?

EXPLAIN TO YOUR CLIENT THE BENEFITS OF COURTESY

Analysis

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

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

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[1] Although the ethics rules do not require that lawyers act with civility or courtesy, several comments highlight lawyers' freedom to act professionally. Among other things, lawyers can explicitly limit the scope of a representation to exclude actions "that the lawyer regards as repugnant or imprudent." ABA Model Rule 1.2 cmt. [6]. Another comment explains that lawyers' "duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect." ABA Model Rule 1.3 cmt. [1]. In keeping with the same theme, lawyers can withdraw from a representation if the client "insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." ABA Model Rule 1.16(b)(4).

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

Best Answer

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

b 12/10

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

Hypothetical 7

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

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

YES

Analysis

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

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

- First, lawyers establishing an attorney-client relationship can limit the scope of the representation so it "exclude[s] specific means that might otherwise be used to accomplish the client's objective" -- such as "actions . . . that the lawyer regards as repugnant or imprudent" (lawyers can either make their services available only under this condition, or agree with the client to such a limit). ABA Model Rule 1.2 cmt. [6].

- Second, during the course of the representation clients generally set the objectives, but "normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters." ABA Model

Rule 1.2 cmt. [2]. Thus, lawyers "may have authority to exercise professional discretion in determining the means by which a matter should be pursued." ABA Model Rule 1.3 cmt. [1].

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

- Fourth, although a lawyer "shall act with reasonable diligence and promptness in representing a client" (ABA Model Rule 1.3), "[t]he lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect." ABA Model Rule 1.3 cmt. [1] (emphasis added).

- Fifth, a lawyer may withdraw from representing a client (even if there is "material adverse effect on the interests of the client" (ABA Model Rule 1.16(b)(1))) if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." ABA Model Rule 1.16(b)(4) (emphasis added).

This hypothetical focuses on the fifth situation.

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

> A lawyer shall act with reasonable diligence and promptness in representing a client.

ABA Model Rule 1.3. Thus, lawyers act primarily as their clients' advocates.

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

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

ABA Model Rule 1.16(a)(1). Thus, lawyers must withdraw from a representation in an extreme situation involving unethical or illegal conduct.

Second, the ethics rules also permit withdrawal in several circumstances that might apply to a lawyer representing a client urging inappropriate conduct. Under ABA

Model Rule 1.16(b)(1), lawyers may withdraw from a representation at any time if "withdrawal can be accomplished without material adverse effect on the interests of the client." Although the ABA Model Rules do not fully explore the meaning of that phrase, lawyers generally can withdraw at the very beginning of a representation without any looming deadlines, during a lull in activity, etc. Of course, withdrawal from a court case also requires judicial permission. Lawyers might rely on this permissible withdrawal provision if they find themselves representing a client pushing them to act inappropriately.

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

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

> the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

ABA Model Rule 1.16(b)(4).

A comment provides some explanation of this principle.

> A lawyer may withdraw from representation in some circumstances. The lawyer has the option to withdraw if it can be accomplished without material adverse effect on the client's interests. . . . The lawyer may also withdraw where the client insists on taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

ABA Model Rule 1.16 cmt. [7] (emphasis added).

A lawyer may also withdraw if the client "refuses to abide by the terms of an agreement relating to the representation, such as an agreement . . . limiting the objectives of the representation." ABA Model Rule 1.16 cmt. [8]. A lawyer might point to this provision in withdrawing upon a client's refusal to abide by a limitation that excludes "actions that . . . the lawyer regards as repugnant or imprudent." ABA Model Rule 1.2 cmt. [6].

Best Answer

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

b 12/10

Returning Phone Calls and E-Mails

Hypothetical 8

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

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

YES

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

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

Analysis

At the extreme, a failure to communicate could run afoul of the ethics rules' prohibition on taking an action that has "no substantial purpose other than to embarrass, delay or burden a third person." ABA Model Rule 4.4(a).[1]

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

[1] Although the ethics rules do not require that lawyers act with civility or courtesy, several comments highlight lawyers' freedom to act professionally. Among other things, lawyers can explicitly limit the scope of a representation to exclude actions "that the lawyer regards as repugnant or imprudent." ABA Model Rule 1.2 cmt. [6]. Another comment explains that lawyers' "duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect." ABA Model Rule 1.3 cmt. [1]. In keeping with the same theme, lawyers can withdraw from a representation if the client "insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." ABA Model Rule 1.16(b)(4).

There obviously will be occasions when lawyers cannot return communications by the end of each day, but that should always be the goal. Even having an assistant return a call or e-mail with an explanation of the delay shows respect for the person communicating.

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

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

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

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

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

Best Answer

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

b 12/10

Avoiding Nasty Communications

Hypothetical 9

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

What should you do?

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

Analysis

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

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

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

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

Best Answer

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

b 12/10

Treating Nonlawyer Staff with Respect

Hypothetical 10

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

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

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

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

PRIVATELY ADVISE YOUR NEW COLLEAGUE NEVER TO ACT LIKE THAT AGAIN

Analysis

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

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

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

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

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

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

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

In all situations, you should avoid reciprocating.

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

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

Best Answer

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

b 12/10

Serving the Community

Hypothetical 11

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

Should you accept the principal's invitation?

YES

Analysis

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

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

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

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

The ethics rules address pro bono work.

> Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer should aspire to render at least (50) hours of pro bono publico legal services per year.

ABA Model Rule 6.1. The remainder of ABA Model Rule 6.1 provides guidance to lawyers interested in fulfilling this aspirational standard.

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

Best Answer

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

b 12/10

Accepting Court Appointments

Hypothetical 12

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

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

NO

Analysis

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

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

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

ABA Model Rule 6.2 (emphasis added).

As in so many other areas, the ethics rules set a very low minimum standard. Under ABA Model Rule 6.2, lawyers should turn down court appointments only if the

client or the client's cause is "so repugnant" as to fundamentally prevent an adequate representation. Not many clients or causes will fall below that minimum.

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

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

ABA Model Rule 1.2(b). See ABA Model Rule 1.2 cmt. [5].

Interestingly, the ethics rules also recognize that lawyers might face a conflict of interest in this setting. A lawyer's "personal interest" might materially limit the lawyer's representation of a client. ABA Model Rule 1.7(a)(2). However, an individual lawyer's disqualification under that provision is not imputed to the entire firm if the lawyer's personal interest "does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm." ABA Model Rule 1.10(a)(1). A comment to that rule explains this issue.

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

ABA Model Rule 1.10 cmt. [3].

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

Best Answer

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

b 12/10

Timing of Filing Pleadings

Hypothetical 13

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

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

MAYBE

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

NO (PROBABLY)

Analysis

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

In addition to the ethics rules encouraging professionalism,[1] several other rules empower lawyers to act professionally. These provisions should encourage lawyers to decide for themselves when to file pleadings, or resist a client's push to file the pleading in a way that the lawyer believes is inappropriate.

---

[1] Although the ethics rules do not require that lawyers act with civility or courtesy, several comments highlight lawyers' freedom to act professionally. Among other things, lawyers can explicitly limit the scope of a representation to exclude actions "that the lawyer regards as repugnant or imprudent." ABA Model Rule 1.2 cmt. [6]. Another comment explains that lawyers' "duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect." ABA Model Rule 1.3 cmt. [1]. In keeping with the same theme, lawyers can withdraw from a representation if the client "insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." ABA Model Rule 1.16(b)(4).

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

- First, lawyers establishing an attorney-client relationship can limit the scope of the representation so it "exclude[s] specific means that might otherwise be used to accomplish the client's objective" -- such as "actions . . . that the lawyer regards as repugnant or imprudent" (lawyers can either make their services available only under this condition, or agree with the client to such a limit). ABA Model Rule 1.2 cmt. [6].

- Second, during the course of the representation clients generally set the objectives, but "normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters." ABA Model Rule 1.2 cmt. [2]. Thus, lawyers "may have authority to exercise professional discretion in determining the means by which a matter should be pursued." ABA Model Rule 1.3 cmt. [1].

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

- Fourth, although a lawyer "shall act with reasonable diligence and promptness in representing a client" (ABA Model Rule 1.3), "[t]he lawyer's duty to act with reasonable diligence <u>does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect</u>." ABA Model Rule 1.3 cmt. [1] (emphasis added).

- Fifth, a lawyer may withdraw from representing a client (even if there is "material adverse effect on the interests of the client" (ABA Model Rule 1.16(b)(1))) if "the client insists upon taking action that the lawyer considers <u>repugnant or with which the lawyer has a fundamental disagreement</u>." ABA Model Rule 1.16(b)(1) & (4) (emphasis added).

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

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

Such action might be inappropriate if the lawyer filing the motion knows that the adversary's lawyer is sick, out of town, in trial, etc. Absent such circumstances, there probably is nothing wrong with taking advantage of the complex local rules to reduce the amount of time the adversary has to prepare a response.

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

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

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

Best Answer

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

b 12/10

Scheduling Hearings, Depositions, Etc.

Hypothetical 14

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

What should you do?

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

Analysis

Unless a court rule or order requires cooperation in setting deposition dates, a lawyer does not fall below the ethical standards by simply picking a date that works for her.

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

Lawyers dealing with an adversary's lawyer who is not constructively engaging in such scheduling issues might have to notice the deposition without input from the other

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lawyer. In such circumstances, the lawyer should offer to move the deposition if necessary (and if consistent with the lawyer's duty of diligence to her own client).

Lawyers should notify the other side immediately of any schedule changes. As a matter of courtesy, lawyers should also be punctual in attending depositions and other meetings.

Best Answer

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

b 12/10

Responding to Requests for Extensions

Hypothetical 15

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

What should you do?

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

Analysis

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

In some situations, lawyers should readily agree to their client's position -- if granting the extension would materially harm the client.

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

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

- First, lawyers establishing an attorney-client relationship can limit the scope of the representation so it "exclude[s] specific means that might otherwise be used to accomplish the client's objective" -- such as "actions . . . that the lawyer regards as repugnant or imprudent" (lawyers can either make their services available only under this condition, or agree with the client to such a limit). ABA Model Rule 1.2 cmt. [6].

- Second, during the course of the representation clients generally set the objectives, but "normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters." ABA Model Rule 1.2 cmt. [2]. Thus, lawyers "may have authority to exercise professional discretion in determining the means by which a matter should be pursued." ABA Model Rule 1.3 cmt. [1].

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

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- Fifth, a lawyer may withdraw from representing a client (even if there is "material adverse effect on the interests of the client" (ABA Model Rule 1.16(b)(1))) if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." ABA Model Rule 1.16(b)(1) & (4) (emphasis added).

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

ABA Model Rule 1.3 cmt. [3] provides further guidance.

> Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. A lawyer's duty to act with

> reasonable promptness, however, does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.

ABA Model Rule 1.3 cmt. [3] (emphasis added). This limitation should provide comfort to lawyers knowing that they must represent their clients diligently, but also wishing to act professionally when they do so.

If the client insists on declining the request for an extension, you will have to decide how vigorously to oppose the other side's motion for extension. Lawyers appearing in court must always advocate diligently for their clients, but might be tempted to indicate through body language that the client insists that the lawyer resist the request. Of course, lawyers must avoid harming their clients by overdoing this.

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

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

Best Answer

The best answer to this hypothetical is **SEEK YOUR CLIENT'S CONSENT FOR THE EXTENSION, IF IT WOULD NOT MATERIALLY HARM YOUR CLIENT**. b 12/10

Permissible Admissions

Hypothetical 16

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

May you ethically admit facts that cannot be reasonably denied?

YES

Analysis

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

Under Comment 5 of ABA Model Rule 1.6,

> a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter.

ABA Model Rule 1.6 cmt. [5].

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

Best Answer

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

b 12/10

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

Hypothetical 17

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

What should you do?

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

Analysis

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

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

A comment to the rule governing tribunals explains that the prohibition on "engag[ing] in conduct intended to disrupt the tribunal" (ABA Model Rule 3.5(d)) applies "to any proceeding of a tribunal, including a deposition." ABA Model Rule 3.5 cmt. [5].[1]

[1] Interestingly, that comment refers to ABA Model Rule 1.0(m), but the definition of "Tribunal" does not mention depositions. Presumably the extension of tribunal-based rules to depositions relies on court rules that take that approach.

Even if discourteous deposition conduct does not violate the minimum standard in the ethics rules, it almost always falls short of professionalism standards.[2]

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

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

Best Answer

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

b 12/10

[2] Although the ethics rules do not require that lawyers act with civility or courtesy, several comments highlight lawyers' freedom to act professionally. Among other things, lawyers can explicitly limit the scope of a representation to exclude actions "that the lawyer regards as repugnant or imprudent." ABA Model Rule 1.2 cmt. [6]. Another comment explains that lawyers' "duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect." ABA Model Rule 1.3 cmt. [1]. In keeping with the same theme, lawyers can withdraw from a representation if the client "insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." ABA Model Rule 1.16(b)(4).

Avoiding Actions that Needlessly Embarrass an Adversary or Third Party

Hypothetical 18

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

What should you do?

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

Analysis

The ethics rules would prohibit the videotaping if it would "have no substantial purpose other than to embarrass, delay, or burden" the deponent. ABA Model Rule 4.4(a).

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

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

- First, lawyers establishing an attorney-client relationship can limit the scope of the representation so it "exclude[s] specific means that might otherwise be used to accomplish the client's objective" -- such as "actions . . . that the lawyer regards as repugnant or imprudent" (lawyers can either make their

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

- Second, during the course of the representation clients generally set the objectives, but "normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters." ABA Model Rule 1.2 cmt. [2]. Thus, lawyers "may have authority to exercise professional discretion in determining the means by which a matter should be pursued." ABA Model Rule 1.3 cmt. [1].

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

- Fourth, although a lawyer "shall act with reasonable diligence and promptness in representing a client" (ABA Model Rule 1.3), "[t]he lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect." ABA Model Rule 1.3 cmt. [1] (emphasis added).

- Fifth, a lawyer may withdraw from representing a client (even if there is "material adverse effect on the interests of the client" (ABA Model Rule 1.16(b)(1))) if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." ABA Model Rule 1.16(b)(1) & (4) (emphasis added).

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

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

Best Answer

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

b 12/10

Dealing with the Court and its Personnel

Hypothetical 19

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

What should you do?

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

Analysis

As a matter of ethics, lawyers fall short of their required conduct when dealing with tribunals only if they "engage in conduct intended to disrupt the tribunal." ABA Model Rule 3.5(d).

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

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

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

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

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

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

Best Answer

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

b 12/10

Advising Clients to Act Courteously with the Court and its Personnel

Hypothetical 20

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

What should you do?

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

Analysis

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

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

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

[1] Although the ethics rules do not require that lawyers act with civility or courtesy, several comments highlight lawyers' freedom to act professionally. Among other things, lawyers can explicitly

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

Best Answer

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

b 12/10

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limit the scope of a representation to exclude actions "that the lawyer regards as repugnant or imprudent." ABA Model Rule 1.2 cmt. [6]. Another comment explains that lawyers' "duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect." ABA Model Rule 1.3 cmt. [1]. In keeping with the same theme, lawyers can withdraw from a representation if the client "insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." ABA Model Rule 1.16(b)(4).

Offering Evidence a Lawyer Reasonably Believes to be False

Hypothetical 21

You have been representing a very aggressive client in litigation that is nearly ready for trial. As you explain your trial outline to the client, she asks why you are not planning to call a witness whose testimony she thinks assists her case. When you explain to your client that you believe that the witness is being less than truthful, your client sternly insists that you call and rely on the witness. Your client knows enough to cite the various ethics provisions requiring you to diligently represent her.

If your client insists, must you present evidence that you reasonably believe is false?

NO

Analysis

Perhaps surprisingly (to nonlawyers and even to some lawyers), the ethics rules allow lawyers to present evidence that they reasonably believe is false -- but do not require them to do so at the client's direction.

To be sure, ABA Model Rule 3.3(a)(3) prohibits lawyers from "knowingly" offering "evidence that the lawyer knows to be false." A comment to that rule explains that the prohibition depends on the lawyer's knowledge of falsity.

> The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

ABA Model Rule 3.3 cmt. [8] (emphasis added).

However, the same ethics rule explains that

> [a] lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

ABA Model Rule 3.3(a)(3) (emphasis added). A comment describes this provision.

> Although paragraph (a)(3) only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false. Offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate. Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify. See also Comment [7].

ABA Model Rule 3.3 cmt. [9].

Thus, lawyers may refuse to offer evidence that they reasonably believe is false, without falling short of their duty to diligently represent their client.

Best Answer

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

b 12/10

Limitation to Non-Litigation Matters

Hypothetical 22

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

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

YES

Analysis

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

> A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstance and the client gives informed consent.

ABA Model Rule 1.2(c).

ABA Model Rule 1.2 cmt. [6] provides an explanation of this permissible limitation.

> The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

ABA Model Rule 1.2 cmt. [6] (emphases added).

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

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

- First, lawyers establishing an attorney-client relationship can limit the scope of the representation so it "exclude[s] specific means that might otherwise be used to accomplish the client's objective" -- such as "actions . . . that the lawyer regards as repugnant or imprudent" (lawyers can either make their services available only under this condition, or agree with the client to such a limit). ABA Model Rule 1.2 cmt. [6].

- Second, during the course of the representation clients generally set the objectives, but "normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters." ABA Model Rule 1.2 cmt. [2]. Thus, lawyers "may have authority to exercise professional discretion in determining the means by which a matter should be pursued." ABA Model Rule 1.3 cmt. [1].

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

- Fourth, although a lawyer "shall act with reasonable diligence and promptness in representing a client" (ABA Model Rule 1.3), "[t]he lawyer's duty to act with reasonable diligence <u>does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect</u>." ABA Model Rule 1.3 cmt. [1] (emphasis added).

- Fifth, a lawyer may withdraw from representing a client (even if there is "material adverse effect on the interests of the client" (ABA Model Rule 1.16(b)(1))) if "the client insists upon taking action that the lawyer considers <u>repugnant or with which the lawyer has a fundamental disagreement</u>." ABA Model Rule 1.16(b)(1) & (4) (emphasis added).

Lawyers sensing that their clients might want them to engage in unprofessional conduct might well rely on their ability to limit the representation under the first situation.

Best Answer

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

b 12/10

Collaborative Lawyering

Hypothetical 23

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

May you enter into the arrangement your client has proposed?

YES

Analysis

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

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

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

law" and "collaborative law" arrangements. The former arrangement essentially amounts to an agreement among clients to mediate or arbitrate disputes.

However, a collaborative law arrangement takes a dramatically different view than the traditional approach.

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

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

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

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

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

Best Answer

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

b 12/10

No Need to Press for Every Advantage

Hypothetical 24

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

Are you required to seek every advantage for your client?

NO

Analysis

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

- First, lawyers establishing an attorney-client relationship can limit the scope of the representation so it "exclude[s] specific means that might otherwise be used to accomplish the client's objective" -- such as "actions . . . that the lawyer regards as repugnant or imprudent" (lawyers can either make their services available only under this condition, or agree with the client to such a limit). ABA Model Rule 1.2 cmt. [6].

- Second, during the course of the representation clients generally set the objectives, but "normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters." ABA Model Rule 1.2 cmt. [2]. Thus, lawyers "may have authority to exercise professional discretion in determining the means by which a matter should be pursued." ABA Model Rule 1.3 cmt. [1].

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

- Fourth, although a lawyer "shall act with reasonable diligence and promptness in representing a client" (ABA Model Rule 1.3), "[t]he lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect." ABA Model Rule 1.3 cmt. [1] (emphasis added).

- Fifth, a lawyer may withdraw from representing a client (even if there is "material adverse effect on the interests of the client" (ABA Model Rule 1.16(b)(1))) if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." ABA Model Rule 1.16(b)(1) & (4) (emphasis added).

This hypothetical deals with the third situation.

Best Answer

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

b 12/10

Requesting that Clients Forego Inappropriate Actions

Hypothetical 25

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

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

YES

Analysis

The ethics rules contain several provisions recognizing lawyers' ability to forego inappropriate actions. It normally would make sense for lawyers to request that their client avoid giving direction to the lawyer to take such inappropriate actions (or withdraw such direction).

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

- First, lawyers establishing an attorney-client relationship can limit the scope of the representation so it "exclude[s] specific means that might otherwise be used to accomplish the client's objective" -- such as "actions . . . that the lawyer regards as repugnant or imprudent" (lawyers can either make their services available only under this condition, or agree with the client to such a limit). ABA Model Rule 1.2 cmt. [6].

- Second, during the course of the representation clients generally set the objectives, but "normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters." ABA Model

Rule 1.2 cmt. [2]. Thus, lawyers "may have authority to exercise professional discretion in determining the means by which a matter should be pursued." ABA Model Rule 1.3 cmt. [1].

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- Fifth, a lawyer may withdraw from representing a client (even if there is "material adverse effect on the interests of the client" (ABA Model Rule 1.16(b)(1))) if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." ABA Model Rule 1.16(b)(1) & (4) (emphasis added).

This hypothetical deals with the second and fourth situations.

Lawyers should be ready to rely on the ethics rules' provision allowing lawyers to forego inappropriate actions.

Best Answer

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

b 12/10

No Need to Always Follow the Client's Direction

Hypothetical 26

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

May you refuse to follow a client's direction?

YES

Analysis

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

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

- First, lawyers establishing an attorney-client relationship can limit the scope of the representation so it "exclude[s] specific means that might otherwise be used to accomplish the client's objective" -- such as "actions . . . that the lawyer regards as repugnant or imprudent" (lawyers can either make their services available only under this condition, or agree with the client to such a limit). ABA Model Rule 1.2 cmt. [6].

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- Fifth, a lawyer may withdraw from representing a client (even if there is "material adverse effect on the interests of the client" (ABA Model Rule 1.16(b)(1))) if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." ABA Model Rule 1.16(b)(1) & (4) (emphasis added).

This hypothetical deals with the fourth and fifth situations.

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

Best Answer

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

b 12/10

Dealing with a Discourteous Opponent

Hypothetical 27

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

What should you do?

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

Analysis

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

Reciprocating discourteous conduct ultimately does not serve your client, and in most situations will make you feel worse about yourself and about your role as a lawyer.[1]

Some lawyers have devised clever ways to personally engage discourteous lawyers. For instance, McGuireWoods partner Sid Kanazawa (who practices in that firm's Los Angeles office) relies on an interesting tactic. Sid invites a troublesome

[1] Although the ethics rules do not require that lawyers act with civility or courtesy, several comments highlight lawyers' freedom to act professionally. Among other things, lawyers can explicitly limit the scope of a representation to exclude actions "that the lawyer regards as repugnant or imprudent." ABA Model Rule 1.2 cmt. [6]. Another comment explains that lawyers' "duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect." ABA Model Rule 1.3 cmt. [1]. In keeping with the same theme, lawyers can withdraw from a representation if the client "insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." ABA Model Rule 1.16(b)(4).

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

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

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

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

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

Best Answer

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

b 12/10

Scheduling Meetings

Hypothetical 28

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

What should you do?

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

Analysis

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

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

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

- First, lawyers establishing an attorney-client relationship can limit the scope of the representation so it "exclude[s] specific means that might otherwise be used to accomplish the client's objective" -- such as "actions . . . that the lawyer regards as repugnant or imprudent" (lawyers can either make their services available only under this condition, or agree with the client to such a limit). ABA Model Rule 1.2 cmt. [6].

- Second, during the course of the representation clients generally set the objectives, but "normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters." ABA Model Rule 1.2 cmt. [2]. Thus, lawyers "may have authority to exercise professional discretion in determining the means by which a matter should be pursued." ABA Model Rule 1.3 cmt. [1].

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- Fifth, a lawyer may withdraw from representing a client (even if there is "material adverse effect on the interests of the client" (ABA Model Rule 1.16(b)(1))) if "the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement." ABA Model Rule 1.16(b)(1) & (4) (emphasis added).

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

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

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

Whenever lawyers schedule meetings, they should arrive on time.

Best Answer

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

b 12/10

Reacting to the Adversary's Drafting Errors in Transactional Documents

Hypothetical 29

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

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

YES

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

NO (PROBABLY)

Analysis

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

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

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

The more recent Ethical Guidelines for Settlement Negotiations similarly indicates that lawyers "should identify changes from draft to draft or otherwise bring them explicitly to the other counsel's attention." ABA, Ethical Guidelines for Settlement Negotiations 57 (Aug. 2002). The Guidelines explain that "[i]t would be unprofessional,

if not unethical, knowingly to exploit a drafting error or similar error concerning the contents of the settlement agreement." Id.

Other authorities agree. See, e.g., Patrick Emery Longan, Ethics in Settlement Negotiations: Foreword, 52 Mercer L. Rev. 807, 814-15 (2000-2001) ("the lawyer has the duty to correct the mistakes" if the lawyer notices typographical or calculation errors in a settlement agreement).

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

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

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

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

In ABA Informal Op. 1518 (2/9/86), the ABA "conclude[d] that the error is appropriate for correction between the lawyers without client consultation." The ABA indicated that a lawyer's obligation under ABA Model Rule 1.4 to keep the client adequately informed does not require disclosure of a typographical error, because the client does not need to make an "informed decision" in connection with the matter. As the ABA explained it, "the decision on the contract has already been made by the client." Id. The ABA also pointed to a comment to ABA Model Rule 1.2 (now Comment [2]) indicating that lawyers generally have responsibility for "technical" matters involving the representation.

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

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

Best Answer

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

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Inadvertent Transmission of Communications

Hypothetical 30

During a long conference call with executives of your corporate client about contentious negotiations, you were monitoring e-mail message traffic. When an e-mail appeared from the lawyer representing the adversary, you alerted the folks on the phone that you had just received an e-mail from "the other side." Everyone on the call waits for you to see what the e-mail says. However, you very quickly realize that the other lawyer sent the e-mail to you by accident -- it uses her client's name in the body of the e-mail and also attaches a document entitled "Negotiation Strategy." When you describe the situation to those on the conference call, they all insist that you open up the attached "Negotiation Strategy" document and read it to them. When you balk at doing so, the in-house lawyer on the call reminds you of your duty of loyalty and diligence.

Must you read the inadvertently transmitted communication?

NO

Analysis

This issue has vexed the ABA, state bars and state courts for many years. In the early 1990s, the ABA started a trend in favor of requiring the return of such documents, but then shifted course in 2002.

For purposes of professionalism, the key is the ABA's creation of a "safe harbor" generally allowing lawyers to forego reading such inadvertently transmitted communications.

ABA Approach

In 1992, the ABA issued a surprisingly strong opinion directing lawyers to return obviously privileged or confidential documents inadvertently sent to them outside the document production context.

In ABA LEO 368, the ABA indicated that

> as a matter of ethical conduct contemplated by the precepts underlying the Model Rules, [the lawyer] (a) should not examine the [privileged] materials once the inadvertence is discovered, (b) should notify the sending lawyer of their receipt and (c) should abide by the sending lawyer's instructions as to their disposition.

ABA LEO 368 (11/10/92).

As explained below, many bars and courts took the ABA's lead in imposing some duty on lawyers receiving obviously privileged or confidential documents to return them forthwith.

However, ten years later the ABA retreated from this position. As a result of the Ethics 2000 Task Force Recommendations (adopted in 2002), ABA Model Rule 4.4(b) now indicates that

> [a] lawyer who receives a document relating to the representation of the lawyer's client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

ABA Model Rule 4.4(b) (emphasis added).

Comment [2] to this ABA Model Rule reveals that in its current form the ABA's approach is both broader and narrower than the ABA had earlier announced in its Legal Ethics Opinions.

ABA Model Rule 4.4(b) is broader because it applies to documents "that were mistakenly sent or produced by opposing parties or their lawyers," thus clearly covering document productions. ABA Model Rule 4.4 cmt. [2] (emphasis added).

The rule is narrower than the earlier legal ethics opinion because it explains that

> [i]f a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is

> required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person.

ABA Model Rule 4.4 cmt. [2].

In its new form, the ABA approach defers to case law on the issue of whether a lawyer must return such documents, but provides a professional "safe harbor" for those who do.

> Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document is a matter of professional judgment ordinarily reserved to the lawyer.

ABA Model Rule 4.4 cmt. [3] (emphasis added).

Thus, the ABA backed off its strict return requirement and now defers to legal principles stated by other bars or courts.

As a result of these changes in the ABA Model Rules, the ABA recently took the very unusual step of withdrawing the earlier ABA LEO that created the "return unread" doctrine.[1]

[1] ABA LEO 437 (10/1/05) (citing February 2002 ABA Model Rules changes; withdrawing ABA LEO 368; holding that ABA Model Rule 4.4(b) governs the conduct of lawyers who receive inadvertently transmitted privileged communications from a third party; noting that Model Rule 4.4(b) "only obligates the receiving lawyer to notify the sender of the inadvertent transmission promptly. The rule does not require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the sending lawyer.").

Restatement

The Restatement would allow use of inadvertently transmitted privileged information under certain circumstances. Unlike the ABA Model Rules, the Restatement apparently does not contain the sort of "safe harbor" provision found in the ABA Model Rules.

> If the disclosure operates to end legal protection for the information, the lawyer may use it for the benefit of the lawyer's own client and may be required to do so if that would advance the client's lawful objectives . . . . That would follow, for example, when an opposing lawyer failed to object to privileged or immune testimony . . . . The same legal result may follow when divulgence occurs inadvertently outside of court . . . . The receiving lawyer may be required to consult with that lawyer's client . . . about whether to take advantage of the lapse. If the person whose information was disclosed is entitled to have it suppressed or excluded . . . , the receiving lawyer must either return the information or hold it for disposition after appropriate notification to the opposing person or that person's counsel. A court may suppress material after an inadvertent disclosure that did not amount to a waiver of the attorney-client privilege . . . . Where deceitful or illegal means were used to obtain the information, the receiving lawyer and that lawyer's client may be liable, among other remedies, for damages for harm caused or for injunctive relief against use or disclosure. The receiving lawyer must take steps to return such confidential client information and to keep it confidential from the lawyer's own client in the interim. Similarly, if the receiving lawyer is aware that disclosure is being made in breach of trust by a lawyer or other agent of the opposing person, the receiving lawyer must not accept the information. An offending lawyer may be disqualified from further representation in a matter to which the information is relevant if the lawyer's own client would otherwise gain a substantial advantage . . . . A tribunal may also order suppression or exclusion of such information.

Restatement (Third) of Law Governing Lawyers § 60 cmt. m (2000) (emphasis added).

State Bar Opinions

States began to adopt, adopt variations of, or reject the ABA Model Rule version of Rule 4.4(b).

States are moving at varying speeds, and (not surprisingly) taking varying approaches.

First, some states have simply adopted the ABA version. See, e.g., Florida Rule 4-4.4(b).[2]

Second, some states have adopted a variation of the ABA Model Rule that decreases lawyers' responsibility upon receipt of an inadvertently transmitted communication or document. For instance, as of January 1, 2010, Illinois adopted a version of Rule 4.4(b) that only requires the receiving lawyer to notify the sending lawyer if the lawyer "knows" of the inadvertence -- explicitly deleting the "or reasonably should know" standard found in the ABA Model Rule 4.4(b).[3]

Third, some states have adopted the ABA Model Rule approach, but warn lawyers that case law might create a higher duty. For instance, the New York state

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[2] Interestingly, despite adopting the ABA "simply notify the sender" approach, Florida has also prohibited a receiving lawyer from searching for metadata in an electronic document received from a third party (which at best could be characterized as having been "inadvertently" included with the visible parts of such a document). Florida LEO 06-2 (9/15/06).

[3] Illinois Rule 4.4(b) ("A lawyer who receives a document relating to the representation of the lawyer's client and knows that the document was inadvertently sent shall promptly notify the sender.").

Interestingly, Illinois formerly prohibited lawyers from reading and using inadvertently transmitted communication once the lawyer realized the inadvertence. Illinois LEO 98-04 (1/1999). Thus, Illinois moved from a variation of the "return unread" approach passed the ABA "simply notify the sender" approach to a much more harsh approach -- which requires the receiving lawyer to notify the sender of the receipt only if the receiving lawyer actually "knows" of the inadvertent nature of the communication.

Somewhat ironically, despite the Illinois Bar's move in that direction, one Illinois federal court pointed to the new Illinois rule's simply "notify the sender" approach in prohibiting lawyers receiving inadvertently produced documents in litigation from using the documents -- explaining that "[r]equiring the receiving lawyer to notify the sending lawyer is clearly at odds with any purported duty on the part of the receiving lawyer to use the information for the benefit of his or her client." Coburn Group, LLC v. Whitecap Advisors LLC, 640 F. Supp. 2d 1032, 1043 (N.D. Ill. 2009).

courts adopted the ABA version of Rule 4.4(b), but the New York State Bar adopted comments with such an explicit warning.[4]

Fourth, some jurisdictions have explicitly retained a higher duty for the receiving lawyer. For instance, Washington, D.C. Rule 4.4(b) uses only a "knows" and not a "knows or reasonably should know" standard -- but require receiving lawyers who know of the inadvertence to stop reading the document. D.C. Rule 4.4(b) ("A lawyer who receives a writing relating to the representation of a client and knows, before examining the writing, that it has been inadvertently sent, shall not examine the writing, but shall notify the sending party and abide by the instructions of the sending party regarding the return or destruction of the writing.").[5]

Fifth, some states have not adopted any variation of ABA Model Rule 4.4(b), and continue to address the issues through legal ethics opinions. See, e.g., Virginia LEO 1702 (11/24/97) (adopting the reasoning of ABA LEO 368; explaining that once the lawyer recognizes a document as confidential, the lawyer "has an ethical duty to notify opposing counsel, to honor opposing counsel's instructions about disposition of the document, and not to use the document in contravention of opposing counsel's instructions"); Virginia LEO 1786 n.7 (12/10/04) (acknowledging that the ABA has

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[4] New York Rule 4.4 cmt. [2] (2009) "Although this Rule does not require that the lawyer refrain from reading or continuing to read the document, a lawyer who reads or continues to read a document that contains privileged or confidential information may be subject to court-imposed sanctions, including disqualification and evidence-preclusion."); New York Rule 4.4 cmt. [3] (2009) ("[T]his Rule does not subject a lawyer to professional discipline for reading and using that information." Nevertheless, substantive law or procedural rules may require a lawyer to refrain from reading an inadvertently sent document, or to return the document to the reader, or both.").

[5] A comment to that rule provides more explanation. D.C. Rule 4.4 cmt. [2] ("Consistent with Opinion 256, paragraph (b) requires the receiving lawyer to comply with the sending party's instruction about disposition of the writing in this circumstances [sic], and also prohibits the receiving lawyer from reading or using the material. ABA Model Rule 4.4 requires the receiving lawyer only to notify the sender in order to permit the sender to take protective measures, but Paragraph (b) of the D.C. Rule 4.4 requires the receiving lawyer to do more.").

changed its Model Rules to replace a "return unread" policy with a notice requirement, but reiterating Virginia's approach articulated in Virginia LEO 1702).

Courts' Approach

Court decisions have also reached differing conclusions. Some courts have allowed lawyers to take advantage of their adversary's mistake in transmitting privileged or confidential documents. These courts normally do not even mention the ethics issues, but instead focus on attorney-client privilege or work product waiver issues.

Other decisions indicate that lawyers who fail to notify the adversary or return inadvertently transmitted privileged documents risk disqualification or sanctions.

- Rico v. Mitsubishi Motors Corp., 171 P.3d 1092, 1096, 1097, 1099, 1099-1100, 1100-01 (Cal. 2007) (upholding the disqualification of a plaintiff's lawyer who somehow came into possession of and then used notes created by defendant's lawyer to impeach defendant's expert; noting that defendant's lawyer claimed that plaintiff's lawyer took the notes from his briefcase while alone in a conference room, while the plaintiff's lawyer claimed that he received them from the court reporter -- although she had no recollection of that and generally would not have provided the notes to one of the lawyers; agreeing with the trial court that the notes were "absolutely privileged by the work product rule" because they amounted to "an attorney's written notes about a witness's statements"; "When a witness's statement and the attorney's impressions are inextricably intertwined, the work product doctrine provides that absolute protection is afforded to all of the attorney's notes."; explaining that "[t]he document is not a transcript of the August 28, 2002 strategy session, nor is it a verbatim record of the experts' own statements. It contains Rowley's summaries of points from the strategy session, made at Yukevich's direction. Yukevich also edited the document in order to add his own thoughts and comments, further inextricably intertwining his personal impressions with the summary."; not dealing with the attorney-client privilege protection; rejecting the argument that the notes amounted to an expert's report; "Although the notes were written in dialogue format and contain information attributed to Mitsubishi's experts, the document does not qualify as an expert's report, writing, declaration, or testimony. The notes reflect the paralegal's summary along with counsel's thoughts and impressions about the case. The document was absolutely protected work product because it contained the ideas of Yukevich and his legal team about the case."; adopting a rule prohibiting a lawyer from examining materials "where it is reasonably apparent that the materials were provided or made available through

inadvertence"; acknowledging that the defense lawyer's notes were not "clearly flagged as confidential," but concluding that the absence of such a label was not dispositive; noting that the plaintiff's lawyer "admitted that after a minute or two of review he realized the notes related to the case and that Yukevich did not intend to reveal them"; ultimately adopting an objective rather than a subjective standard on this issue; also rejecting plaintiff's lawyer's argument that he could use the work product protected notes because they showed that the defense expert had lied; agreeing with the lower court and holding that "'once the court determines that the writing is absolutely privileged, the inquiry ends. Courts do not make exceptions based on the content of the writing.' Thus, 'regardless of its potential impeachment value, Yukevich's personal notes should never have been subject to opposing counsel's scrutiny and use.'"; also rejecting plaintiff's argument that the crime fraud exception applied, because the statutory crime fraud exception applies only in a law enforcement action and otherwise does not trump the work product doctrine).

- Conley, Lott, Nichols Mach. Co. v. Brooks, 948 S.W.2d 345, 349 (Tex. App. 1997) (although a lawyer's failure to return a purloined privileged document would not automatically result in disqualification, "what he did after he obtained the documents must also be considered"; disqualifying the lawyer in this case because his retention and use of the knowingly privileged documents amounted to "conduct [that] fell short of the standard that an attorney who receives unsolicited confidential information must follow").

- American Express v. Accu-Weather, Inc., Nos. 91 Civ. 6485 (RWS), 92 Civ. 705 (RWS), 1996 WL 346388 (S.D.N.Y. June 25, 1996) (imposing sanctions on a lawyer for what the court considered the unethical act of opening a Federal Express package and reviewing a privileged document after receiving a telephone call and letter advising that the sender had inadvertently included a privileged document in the package and asking that the package not be opened).

Conclusion

Thus, lawyers seeking guidance on the issue of inadvertently transmitted communications must check the applicable ethics rules, any legal ethics opinions analyzing those rules (remembering that some of the old legal ethics opinions might now be inoperative), and any case law applying the ethics rules, other state statutes, or any governing common law principles that supplement or even trump the ethics rules. Lawyers should remember that many judges have their own view of ethics and

professionalism -- and might well consider lawyers seeking to diligently represent their clients in reviewing inadvertently transmitted communications as stepping over the line and thus acting improperly.

Given the uncertainty about the receiving lawyer's obligation, lawyers might well point to the "safe harbor" provision in declining a client's direction to read inadvertently transmitted communications.

Best Answer

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

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