McGuireWoods LLP
Fall Annual Ethics Program

LITIGATION ETHICS: PART V (COURTS)

Hypotheticals and Analyses*

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* These analyses are based on the ABA Model Rules, although they also discuss various states' ethics rules. No state has adopted the ABA Model Rules in total, and every state has a different set of ethics rules. Before making any decisions, you should check your state's ethics rules.

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Hypothetical 1

As your firm's ethics "guru," you receive numerous calls every day from your partners who are trying cases. This morning you received two similar calls from partners who need your immediate input.

One of your partners represents an individual plaintiff in a lease case about to be tried. Your partner called you this morning to say that the defendant appears not to have discovered her client's earlier criminal conviction for fraud and perjury. Your partner wonders about her obligations at the upcoming trial.

(a) Must your partner disclose her client's criminal conviction for fraud and perjury?

NO (PROBABLY)

Another partner called you from the courthouse during a break in an ex parte TRO hearing. That partner's client had earlier been found liable for engaging in fraudulent mortgage transactions -- which would be material in the matter. Your partner needs to know immediately whether to disclose that earlier judgment.

(b) Must your partner disclose the earlier judgment entered against your client?

YES

Analysis

Lawyers' duties to disclose unfavorable facts vary depending on the type of proceeding -- in a dichotomy that highlights the essential nature of the adversarial system.

(a) In a typical adversarial proceeding, the ethics rules prohibit a lawyer's false statement of fact, or silence in the face of someone else's false statement of material fact.

> A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of

> material fact or law previously made to the tribunal by the lawyer.

ABA Model Rule 3.3(a)(1) (emphasis added).

A comment provides some additional explanation.

> This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

ABA Model Rule 3.3 cmt. [2] (emphasis added).

Interestingly, before the ABA's Ethics 2000 changes (adopted in February, 2002), the prohibition only precluded lawyers' false statements of "material" facts.

Of course, lawyers must also remember the two more general rules prohibiting misstatements or deceptive silence. Under ABA Model Rule 4.1,

> [i]n the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
>
> (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Taking even a broader approach (not limited to acting "in the course of representing a client"), Rule 8.4 indicates that it is "professional misconduct" for a lawyer to

> engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . [o]r engage in conduct that is prejudicial to the administration of justice.

ABA Model Rule 8.4(c), (d).

Other rules involving arguably deceptive trial conduct tend to focus on lawyers' presentations of evidence rather than lawyers' own statements to the court. See, e.g., ABA Model Rule 3.3(a)(3) (prohibiting lawyers from knowingly offering evidence that the lawyer "knows to be false").

Although some situations involve the courtroom setting, many cases discussing lawyers' false statements arise in the deposition setting. Not surprisingly, courts consider statements at a deposition to be "to a tribunal" for purposes of the ethics rules -- both because every state's rules of civil procedure essentially analogize the deposition setting to a trial setting, and because deposition testimony frequently will be read in court at a later trial.

The more difficult situations involve a lawyer's silence rather than affirmative misstatements.

In the normal adversarial proceeding, lawyers have very little obligation to disclose unfavorable facts. The very nature of the adversarial proceeding requires each side to use available discovery to uncover helpful facts, then present them to the court or the fact finder. It is usually inconceivable that a court would require a lawyer to voluntarily alert the other side to facts that might assist its case.

Still, some courts have sanctioned lawyers for remaining silent.

- In re Alcorn, 41 P.3d 600, 603, 609 (Ariz. 2002) (assessing a situation in which a plaintiff's lawyer pursuing a malpractice case against a hospital and a doctor faced a difficult situation after the hospital obtained summary

judgment; condemning the lawyer's secret arrangement with the doctor that the plaintiff would proceed against the doctor (who agreed not to object to any cross-examination by the plaintiff's lawyer), but under which the plaintiff would voluntarily dismiss his claim against the doctor at the close of the plaintiffs' case; noting that "[t]he purpose of the agreement, as we understand it, was to 'educate' the trial judge as to the Hospital's culpability so he could use this background in deciding whether to reconsider his grant of summary judgment to the Hospital"; noting that the plaintiff's trial against the doctor took ten days over a two- or three-week period; calling the trial a "charade" that was "patently illegitimate"; suspending the lawyer from the practice of law for six months).

- Gum v. Dudley, 505 S.E.2d 391, 402-03 (W. Va. 1997) (assessing a situation in which a defendant's lawyer did not disclose a secret settlement agreement with another party, and remained silent when a lawyer for another party advised the court that none of the parties had entered into any settlement agreements; "First, Mr. Janelle's silence without doubt invoked a material misrepresentation. The question propounded by the circuit court, during the hearing, was whether or not any of the parties had entered into a settlement agreement. Counsel for the Dudleys responded that no settlement agreement existed between the defendants. Unbeknownst to the Dudleys' counsel, a settlement agreement between defendants Baker and Ayr had occurred. Mr. Janelle was fully aware of the fact, but remained silent. This silence created a misrepresentation. The misrepresentation was axiomatically material, insofar as a hearing was held based upon Mrs. Gum's specific motion to determine if any of the defendants had entered into a settlement agreement. Therefore, Mr. Janelle's silence invoked the material representation that no settlement agreement existed between any of the defendants. Second, the record is clear that the trial court believed as true the misrepresentation by Mr. Janelle. Third, Mr. Janelle intended for his misrepresentation to be acted upon. That is, he wanted the trial court to proceed with the jury trial. Fourth, the trial court acted upon the misrepresentation by proceeding with the trial without any further inquiry into the settlement. Finally, Mr. Janelle's misrepresentation damaged the judicial process."; remanding for imposition of sanctions against the lawyer).

- National Airlines Inc. v. Shea, 292 S.E.2d 308, 310-11 (Va. 1982) (assessing a situation in which a plaintiff's lawyer did not advise the court that the defendant airline's lawyer thought that the case was being held in abeyance; explaining that the plaintiff's lawyer did not respond to the defendant's lawyer expressing this understanding, did not advise the court of the understanding, and instead obtained a default judgment and levied on the airline's property; holding that the plaintiff's lawyer "had a duty to be above-board with the court and fair with opposing counsel"; also noting that the plaintiff's lawyer "failed to call the court's attention to the applicability of the Warsaw Convention,

> which he knew to be adverse to his clients' position"; setting aside the default judgment "on the ground of fraud upon the court").

It can be difficult to point to any provision in the ethics rules requiring disclosure in many situations like this -- although in some contexts a court could justifiably find some implicit misrepresentation that the lawyer should have corrected.

In most situations involving court sanctioning of lawyers for their silence, the courts rely on their inherent power to oversee proceedings. These courts apparently rely on their role in assuring justice and seeking the truth. Some might think that such judicial actions risk changing the judicial role from a neutral umpire to a more active participant in the adversarial process, but lawyers who ignore this possible judicial reaction do so at their own risk.

(b) Interestingly, the ethics rules are quite different in ex parte proceedings.

> In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

ABA Model Rule 3.3(d). A comment to ABA Model Rule 3.3 explains the basis for this important difference.

> Ordinarily, an advocate has the limited responsibility of presenting one side of the matters that a tribunal should consider in reaching a decision; the conflicting position is expected to be presented by the opposing party. <u>However, in any ex parte proceeding, such as an application for a temporary restraining order, there is no balance of presentation by opposing advocates</u>. The object of an ex parte proceeding is nevertheless to yield a substantially just result. The judge has an affirmative responsibility to accord the absent party just consideration. <u>The lawyer for the represented party has the correlative duty to make disclosures of material facts known to the lawyer and that</u>

> the lawyer reasonably believes are necessary to an informed decision.

ABA Model Rule 3.3 cmt. [14] (emphases added). Thus, lawyers appearing ex parte must advise the court of all material facts -- even harmful facts. This dramatic difference from the situation in an adversarial proceeding highlights the basic nature of the adversarial system.

The Restatement takes the same approach.

> In representing a client in a matter before a tribunal, a lawyer applying for ex parte relief or appearing in another proceeding in which similar special requirements of candor apply must . . . disclose all material and relevant facts known to the lawyer that will enable the tribunal to reach an informed decision.

Restatement (Third) of Law Governing Lawyers § 112(2) (2000). A comment mirrors the ABA's explanation.

> An ex parte proceeding is an exception to the customary methods of bilateral presentation in the adversary system. A potential for abuse is inherent in applying to a tribunal in absence of an adversary. That potential is partially redressed by special obligations on a lawyer presenting a matter ex parte.
>
> Subsection (1) prohibits ex parte presentation of evidence the advocate believes is false. Subsection (2) is affirmative, requiring disclosure of all material and relevant facts known to the lawyer that will enable the tribunal to make an informed decision. Relevance is determined by an objective standard.
>
> To the extent the rule of this Section requires a lawyer to disclose confidential client information, disclosure is required by law within the meaning of § 62. On the other hand, the rule of this Section does not require the disclosure of privileged evidence.

Restatement (Third) of Law Governing Lawyers § 112 cmt. b (2000).

Not surprisingly, court decisions take the same approach. In re Mullins, 649 N.E.2d 1024, 1026 (Ind. 1995) (reprimanding a lawyer for not "sufficiently or fully advising [the court in an ex parte proceeding] of all relevant aspects of the pending parallel proceeding" in another court); Time Warner Entm't Co. v. [Does], 876 F. Supp. 407, 415 (E.D.N.Y. 1994) ("In an ex parte proceeding, in which the adversary system lacks its usual safeguards, the duties on the moving party must be correspondingly greater.").

In some situations, bars have had to determine if they should treat a proceeding as an adversarial proceeding or as an ex parte proceeding.

For instance, in North Carolina LEO 98-1 (1/15/99), a lawyer represented a claimant seeking Social Security disability benefits. The bar explained the setting in which the lawyer would be operating.

> Social Security hearings before an ALJ are considered non-adversarial because no one represents the Social Security Administration at the hearing. However, prior to the hearing, the Social Security Administration develops a written record which is before the ALJ at the time of the hearing. In addition, the ALJ has the authority to perform an independent investigation of the client's claim.

The North Carolina Bar explained that before the hearing, the claimant's treating physician sent the claimant's lawyer a letter indicating that the physician "believes that the claimant is not disabled." Id.

Interestingly, the North Carolina Bar apparently assumed that a lawyer would not have to disclose this material fact in an adversarial proceeding (hence the debate about whether the administrative hearing should be treated as an adversarial or as an ex parte proceeding). The North Carolina Bar explained that

> [a]lthough it is a hallmark of good lawyering for an advocate to disclose adverse evidence and explain to the court why it should not be given weight, generally an advocate is not required to present facts adverse to his or her client.

Id.

The North Carolina Bar concluded that the administrative hearing should be considered as an adversarial proceeding -- which meant that the lawyer did not have to submit the treating physician's adverse letter to the administrative law judge at the hearing.

> [A] Social Security disability hearing should be distinguished from an ex parte proceeding such as an application for a temporary restraining order in which the judge must rely entirely upon the advocate for one party to present the facts. In a disability hearing, there is a "balance of presentation" because the Social Security Administration has an opportunity to develop the written record that is before the ALJ at the time of hearing. Moreover, the ALJ has the authority to make his or her own investigation of the facts. When there are no "deficiencies of the adversary system," the burden of presenting the case against a finding of disability should not be put on the lawyer for the claimant.

Id. This is an interesting result. Although the legal ethics opinion is not crystal-clear, it would seem that a lawyer pursuing disability benefits after receiving a doctor's letter indicating that the client is not disabled risks violating the general prohibition on lawyers advancing frivolous claims. ABA Model Rule 3.1. Even if maintaining silence about the doctor's letter does not run afoul of that ethics provision, it would seem almost inevitable that the lawyer would somehow explicitly or implicitly make deceptive comments to the court while seeking disability benefits for a client that the lawyer now knows is not disabled.

Best Answer

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

Prosecutors' Duty to Disclose Unfavorable Facts

Hypothetical 2

You joined a law firm right after graduation from law school, while your roommate became a government prosecutor. Over the years, you have met periodically for lunch to discuss your careers. Yesterday you debated lawyers' possible duties to disclose unfavorable facts that the other side might not have uncovered. You tell your friend that you just dealt with this situation in a recent trial, and concluded that you did not have to disclose unfavorable facts. Your prosecutor friend insists that as a matter of ethics she must do so, and that her duty even continues after a criminal trial ends.

(a) As a matter of ethics, must prosecutors disclose unfavorable facts?

YES

(b) If so, does the prosecutor's duty last beyond the end of a trial and appeal?

YES (PROBABLY)

Analysis

Prosecutors face a very different ethical landscape than civil lawyers engaged in litigation.

(a) Every state acknowledges that prosecutors must "do justice" rather than just try to win cases.

A 2008 addition to the ABA Model Rules provides a detailed explanation of this difference (which all states have not yet adopted, but which every state undoubtedly would affirm).

> A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons. The extent of mandated remedial action is a matter

> of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard to those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.

ABA Model Rule 3.8 cmt. [1] (emphasis added). The Restatement takes the same basic approach. Restatement (Third) of Law Governing Lawyers § 97 cmt. h (2000).

(b) In 2008, the ABA adopted an entirely new rule that extends this duty beyond the end of a criminal trial and its appeal.

> When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:
>
> > (1) promptly disclose that evidence to an appropriate court or authority, and
> >
> > (2) if the conviction was obtained in the prosecutor's jurisdiction,
> >
> > > (i) promptly disclose that evidence to the defendant unless a court authorizes delay, and (ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
>
> . . . When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.

ABA Model Rule 3.8(g), (h). This recent change highlights the very different ethics rules governing prosecutors and civil lawyers.

Not every state has followed this approach. For instance, in 2010 the Ohio Supreme Court explicitly rejected the argument that a prosecutor's ethics duty of disclosure exceeded any statutory requirement to disclose facts to criminal defendants.

> We decline to construe DR 7-103(B) as requiring a greater scope of disclosure than Brady [Brady v. Maryland, 373 U.S. 83 (1963)] and Crim.R. 16 require. Relator's broad interpretation of DR 7-103(B) would threaten prosecutors with professional discipline for failing to disclose evidence even when the applicable law does not require disclosure. This would in effect expand the scope of discovery currently required of prosecutors in criminal cases.

Disciplinary Counsel v. Kellogg-Martin, 923 N.E.2d 125, 130 (Ohio 2010).[1]

Best Answer

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

[1] Disciplinary Counsel v. Kellogg-Martin, 923 N.E.2d 125, 129, 130 (Ohio 2010) (dismissing a complaint against a former chief assistant prosecuting attorney in an Ohio county, charged with failing to disclose to a criminal defendant possibly exculpatory information; noting that the state disciplinary board had recommended a twelve-month suspension (with six months stayed) of the prosecutor; explaining that the prosecutor had not disclosed (to a criminal defendant charged with raping a child under thirteen) evidence indicating that the victim gave contradictory statements about her age at the time of the alleged rape; addressing the issue of whether the Ohio ethics rules require prosecutors to disclose evidence "'that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment'" -- which was then in the old ABA Model Code format (citation omitted); ultimately rejecting the concept that the ethics rules required more than the law required; "We decline to construe DR 7-103(B) as requiring a greater scope of disclosure than Brady [Brady v. Maryland, 373 U.S. 83 (1963)] and Crim.R. 16 require. Relator's broad interpretation of DR 7-103(B) would threaten prosecutors with professional discipline for failing to disclose evidence even when the applicable law does not require disclosure. This would in effect expand the scope of discovery currently required of prosecutors in criminal cases.").

Disclosing Directly Adverse Law: General Rules

Hypothetical 3

You are defending a bank in a lawsuit going to trial next month. One of your newest colleagues checks on a daily basis court decisions dealing with the issues involved in your litigation. Your colleague just reported on several new decisions, and you wonder whether you must bring them to the trial court's attention in your case.

Must you advise the trial court of the following decisions:

(a) A decision by your state's supreme court directly adverse to the statutory interpretation argument you are advancing on behalf of your bank client?

YES

(b) A decision by another trial court elsewhere in your state, which does not control your trial court's decision, but which is directly adverse to your statutory interpretation argument?

YES (PROBABLY)

(c) Unfavorable dicta in a decision from your state's supreme court?

NO (PROBABLY)

(d) A decision from a neighboring state's appellate court involving exactly the same facts as your case, and which is directly adverse to your statutory interpretation argument?

NO (PROBABLY)

Analysis

Introduction

As in so many other areas, determining a lawyer's duty to advise tribunals of adverse authority involves two competing principles: (1) a lawyer's duty to act as a diligent advocate for the client, forcing the adversary's lawyer to find any holes,

weaknesses, contrary arguments, or adverse case law that would support the adversary's case; and (2) the institutional integrity of the judicial process, and the desire to avoid courts' adoption of erroneous legal principles.

Not surprisingly, this issue has vexed bars and courts trying to balance these principles. Furthermore, their approach has varied over time.

This issue involves more than ethics rules violations. Courts have pointed to a variety of sanctions for lawyers who violate the courts' interpretation of their disclosure obligation.[1]

ABA Approach

The ABA's approach to this issue shows an evolving increase and later reduction in lawyers' disclosure duties to the tribunal.

The original 1908 Canons contained a fairly narrow duty of candor to tribunals. In essence, the old Canon simply required lawyers not to lie about case law.

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[1] Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346 (Fed. Cir. 2003) (affirming a Rule 11 sanction against a lawyer who violated the disclosure obligation); Tyler v. State, 47 P.3d 1095 (Alaska Ct. App. 2001) (denying a petition for rehearing of a rule fining lawyer for violating the rule); In re Thonert, 733 N.E.2d 932 (Ind. 2000) (issuing a public reprimand against a lawyer who violated a disclosure obligation); United States v. Crumpton, 23 F. Supp. 2d 1218, 1219 (D. Colo. 1998) (finding that a lawyer violated the Colorado ethics rules requiring such disclosure; "I find that it was inappropriate for Crumpton's counsel to file her motion and not mention contrary legal authority that was decided by a Judge of this Court when the existence of such authority was readily available to counsel. Counsel in legal proceedings before this Court are officers of the court and must always be honest, forthright and candid in all of their dealings with the Court. To do otherwise, demeans the court as an institution and undermines the unrelenting goal of this Court to administer justice."); Dilallo v. Riding Safely, Inc., 687 So. 2d 353, 355 (Fla. Dist. Ct. App. 1997) (reversing summary judgment granted by the trial court in favor of the lawyer who had not disclosed adverse authority, and remanding); Massey v. Prince George's County, 907 F. Supp. 138, 143 (S.D. Md. 1995) (issuing a show cause order against a lawyer who violated the disclosure obligation; "[T]he Court will direct defense counsel to show cause to the Court in writing within thirty (30) days why citation to the Kopf case was omitted from his Motion for Summary Judgment, oral argument, and indeed from any pleading or communication to date."); Dorso Trailer Sales, Inc. v. Am. Body & Trailer, Inc., 464 N.W.2d 551 (Minn. Ct. App. 1990) (vacating a judgment in favor of the lawyer who had violated his disclosure obligation, and remanding), aff'd in part and rev'd in part on other grounds, 482 N.W.2d 771 (Minn. 1992); Jorgenson v. County of Volusia, 846 F.2d 1350 (11th Cir. 1988) (upholding Rule 11 sanctions).

> The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.
>
> It is not candid or fair for the lawyer knowingly to misquote the contents of a paper, the testimony of a witness, the language or the argument of opposing counsel, or the language of a decision or a textbook; or with knowledge of its invalidity, to cite as authority a decision that has been overruled, or a statute that has been repealed; or in argument to assert as a fact that which has not been proved, or in those jurisdictions where a side has the opening and closing arguments to mislead his opponent by concealing or withholding positions in his opening argument upon which his side then intends to rely.

ABA Canons of Professional Ethics Canon 22 (1908) (emphases added). This provision essentially precluded affirmative misrepresentations of law to the tribunal.

Twenty-seven years later, the ABA issued ABA LEO 146. Citing the lawyer's role as "officer of the court" and "his duty to aid the court in the due administration of justice," the ABA interpreted Canon 22 as requiring affirmative disclosure of "adverse" court decisions.

> Is it the duty of a lawyer appearing in a pending case to advise the court of decisions adverse to his client's contentions that are known to him and unknown to his adversary?
>
> . . . .
>
> We are of the opinion that this Canon requires the lawyer to disclose such decisions to the court. He may, of course, after doing so, challenge the soundness of the decisions or present reasons which he believes would warrant the court in not following them in the pending case.

ABA LEO 146 (7/17/35) (emphasis added). The ABA did not explain the reach of this duty, but certainly did not limit the disclosure obligation to controlling case law or even to controlling jurisdictions.

The ABA visited the issue again fourteen years later. In ABA LEO 280, the ABA noted that a lawyer had asked the ABA "to reconsider and clarify the [Ethics] Committee's Opinion 146." The ABA expanded a lawyer's duty of disclosure beyond its earlier discussion. To be sure, the ABA began with a general statement of lawyers' duties to diligently represent their clients.

> The lawyer, though an officer of the court and charged with the duty of "candor and fairness," is not an umpire, but an advocate. He is under no duty to refrain from making every proper argument in support of any legal point because he is not convinced of its inherent soundness. Nor is he under any obligation to suggest arguments against his position.

ABA LEO 280 (6/18/49). However, the ABA then dramatically expanded the somewhat vague disclosure obligation it had first adopted in LEO 146.

> We would not confine the Opinion [LEO 146] to "controlling authorities," -- i.e., those decisive of the pending case -- but, in accordance with the tests hereafter suggested, would apply it to a decision directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case.
>
> Of course, if the court should ask if there are any adverse decisions, the lawyer should make such frank disclosure as the questions seems [sic] to warrant. Close cases can obviously be suggested, particularly in the case of decisions from other states where there is no local case in point . . . . A case of doubt should obviously be resolved in favor of the disclosure, or by a statement disclaiming the discussion of all conflicting decisions.

> Canon 22 should be interpreted sensibly, to preclude the obvious impropriety at which the Canon is aimed. In a case involving a right angle collision or a vested or contingent remainder, there would seem to be no necessity whatever of citing even all of the relevant decisions in the jurisdiction, much less from other states or by inferior courts. Where the question is a new or novel one, such as the constitutionality or construction of a statute, on which there is a dearth of authority, the lawyer's duty may be broader. The test in every case should be: Is the decision which opposing counsel has overlooked one which the court should clearly consider in deciding the case? Would a reasonable judge properly feel that a lawyer who advanced, as the law, a proposition adverse to the undisclosed decision, was lacking in candor and fairness to him? Might the judge consider himself misled by an implied representation that the lawyer knew of no adverse authority?

Id. (emphases added). Thus, the ABA expanded lawyers' disclosure obligation to include any cases (even those from other states) that the court "should clearly consider in deciding the case."

The ABA Model Code of Professional Responsibility DR:7-106(B)(1)[2] (adopted in 1969) and the later ABA Model Rules of Professional Conduct (adopted in 1983) contain a much more limited disclosure duty.

> A lawyer shall not knowingly: . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

ABA Model Rule 3.3(a)(2) (emphases added).

Comment [4] of the Model Rules provides a fuller explanation.

[2] ABA Model Code of Prof'l Responsibility DR 7-106(B)(1) (1980) ("In presenting a matter to a tribunal, a lawyer shall disclose: (1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel." (footnote omitted)).

> Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.

ABA Model Rule 3.3 cmt. [4] (emphases added).

The ABA explained some of its evolving approach in a legal ethics opinion decided shortly after the ABA adopted the Model Rules. In ABA Informal Op. 1505, the ABA dealt with a plaintiff's lawyer who had successfully defeated defendant's motion to dismiss a case based on a "recently enacted statute."

> [D]uring the pendency of the case, an appellate court in another part of the state, not supervisory of the trial court, handed down a decision interpreting the exact statute at issue in the motions to dismiss. The appellate decision, which controls the trial court until its own appellate court passes on the precise question involved, can be interpreted two ways, one of which is directly contrary to the holding of the trial court in denying the motions to dismiss.

ABA Informal Op. 1505 (3/5/84) (emphasis added). The plaintiff's lawyer explained that the issue was not then before the court, but "may well be revived because the prior ruling was not a final, appealable order." He asked the ABA whether he had to advise the trial court at that time, or whether he could "await the conclusion of the appeals process in the other case and the revival of the precise issue by the defendants" in his case.

The ABA indicated that the plaintiff's lawyer must "promptly" advise the court of the other decision.

> [T]he recent case is clearly "legal authority in the controlling jurisdiction" and, indeed, is even controlling of the trial court until such time as its own appellate court speaks to the issue. Under one interpretation of the decision, it is clearly "directly adverse to the position of the client." And it involves the "construction of a statute on which there is a dearth of authority."
>
> . . . .
>
> While there conceivably might be circumstances in which a lawyer might be justified in not drawing the court's attention to the new authority until a later time in the proceedings, here no delay can be sanctioned. The issue is potentially dispositive of the entire litigation. His duty as an officer of the court to assist in the efficient and fair administration of justice compels plaintiff's lawyer to make the disclosure immediately.

Id. (emphasis added). Thus, the ABA noted that ABA Model Rule 3.3(a)(3) required the plaintiff's lawyer to promptly disclose such a decision from the "controlling jurisdiction."

Restatement Approach

The Restatement takes essentially the same approach as the ABA Model Rules take, but with more explanation.

> In representing a client in a matter before a tribunal, a lawyer may not knowingly: . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position asserted by the client and not disclosed by opposing counsel.

Restatement (Third) of Law Governing Lawyers § 111(2) (2000).

The Restatement explains what the term "directly adverse" means in this context.

> A lawyer need not cite all relevant and adverse legal authority; citation of principal or representative "directly adverse" legal authorities suffices. In determining what authority is "directly adverse," a lawyer must follow the jurisprudence of the court before which the legal argument is being made. In most jurisdictions, such legal authority

> includes all decisions with holdings directly on point, but it does not include dicta.

Restatement (Third) of Law Governing Lawyers § 111 cmt. c (2000) (emphasis added).

Another comment explains that the duty covers statutes and regulations, as well as case law.

> "Legal authority" includes case-law precedents as well as statues, ordinances, and administrative regulations.

Id. cmt. d. The same comment discusses what the term "controlling jurisdiction" means.

> Legal authority is within the "controlling jurisdiction" according to the established hierarchy of legal authority in the federal system. In a matter governed by state law, it is the relevant state law as indicated by the established hierarchy of law within that state, taking into account, if applicable, conflict-of-laws rules. Ordinarily, it does not include decisions of courts of coordinate jurisdiction. In a federal district court, for example, a decision of another district court or of the court of appeals from another circuit would not ordinarily be considered authority from the controlling jurisdiction by the sitting tribunal. However, in those jurisdictions in which a decision of a court of coordinate jurisdiction is controlling, such a decision is subject to the rule of the Section.

Id. (emphasis added). The Reporter's Note contains even a more specific definition of the decisional law falling under the obligation.

> Case-law precedent includes an unpublished memorandum opinion, . . . an unpublished report filed by a magistrate, . . . and an adverse federal habeas corpus ruling . . . . The duty to disclose such unpublished materials may be of great practical significance, because they are less likely to be discovered by the tribunal itself. . . . Such a requirement should not apply when the unpublished decision has no force as precedent. Nor should it apply, of course, in jurisdictions prohibiting citation of certain decisions of lower courts. Typical would be the rule found in some states prohibiting citation of intermediate-appellate-court decisions not approved for official publication.

Id. Reporter's Note cmt. d (emphases added). A comment also explains the timing of a lawyer's obligation.

> The duty under Subsection (2) does not arise if opposing counsel has already disclosed the authority to the tribunal. If opposing counsel will have an opportunity to assert the adverse authority, as in a reply memorandum or brief, but fails to do so, Subsection (2) requires the lawyer to draw the tribunal's attention to the omitted authority before the matter is submitted for decision.

Id. cmt. c.

Unfortunately, the Restatement's two illustrations do not provide much useful guidance. Illustration (1) involves a lawyer arguing to the court that the state law did not give an adversary a cause of action, even though the lawyer knew that a state law did just that. Illustration (2) involves a lawyer representing to a court that the lawyer had cited "all relevant decisions in point" -- despite knowing of another decision adverse to the lawyer's position. Id. cmt. c, illus. 1 & 2. Thus, those two illustrations involve lawyers affirmatively misrepresenting the state of the law when communicating to a tribunal. The illustrations do not explore the much more difficult situation -- involving a lawyer's failure to mention unhelpful case law, but not affirmatively telling the court that there is no contrary decisional law.

Finally, a comment describes the various remedies available to courts hearing cases in which a lawyer falls short of this duty.

> Professional discipline . . . may be imposed for violating the rule of this Section. A lawyer may also be susceptible to procedural sanctions . . . , such as striking the offending brief, revoking the lawyer's right to appear before the tribunal, or vacating a judgment based on misunderstanding of the law. Failure to comply with this Section may constitute evidence relevant to a charge of abuse of process.

Id. cmt. e.

State Ethics Rules

Most states follow the ABA Model Rules approach. However, at least one state (Virginia) applies a wildly different standard.

> A lawyer shall not knowingly . . . fail to disclose to the tribunal controlling legal authority in the subject jurisdiction known to the lawyer to be adverse to the position of the client and not disclosed by opposing counsel.

Virginia Rule 3.3(a)(3) (emphasis added). As explained above, the ABA Model Rules require the disclosure of case law from the "controlling jurisdiction," not just "controlling" case law.

Case Law

Courts analyzing lawyers' obligations to disclose adverse law have provided some guidance on a number of issues.

Although all courts apparently agree that a lawyer's disclosure duty extends beyond just those cases that control the decision before the court, some courts take a remarkably broad approach. Several federal courts have continued to follow the old ABA approach -- essentially requiring lawyers to disclose to tribunals any adverse decisions that a reasonable lawyer would think the court would want to consider.

In Smith v. Scripto-Tokai Corp., 170 F. Supp. 2d 533 (W.D. Pa. 2001), vacated by uncontested joint motion, No. 2:99-cv-01707-RJC, 2002 U.S. Dist. LEXIS 11870 (W.D. Pa. June 14, 2002), the court explained the purpose of the disclosure obligation.

> The Rule serves two purposes. First, courts must rely on counsel to supply the correct legal arguments to prevent erroneous decisions in litigated cases. . . . Second,

> revealing adverse precedent does not damage the lawyer-client relationship because the law does not "belong" to a client, as privileged factual information does. . . . Counsel remains free to argue that the case is distinguishable or wrongly decided.

Id. at 539 (emphasis added). The court then explained the difference between ABA LEO 280 (6/18/49) and the approach taken by the Pennsylvania Bar Association in April, 2000. The court rejected the Pennsylvania Bar's approach in favor of the fifty-two-year-old ABA approach.

> The ABA explained that this Opinion [ABA LEO 280 (6/18/1949)] Opinion was not confined to authorities that were decisive of the pending case (i.e., binding precedent), but also applied to any "decision directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case.". . . We note that the Pennsylvania Bar Association's Pennsylvania Ethics Handbook § 7.3h1 (April 2000 ed.), opines that for a case to be "controlling," the opinion must be written by a court superior to the court hearing the matter, although it otherwise adopts the test set forth in the ABA Formal Opinion.
>
> Because both the Pennsylvania and ABA standards are premised upon what "would reasonably be considered important by the judge," we briefly explain why we prefer the ABA's interpretation. The reason for disclosing binding precedent is obvious: we are required to apply the law as interpreted by higher courts. Although counsel might legitimately argue that he was not required to disclose persuasive precedent such as Hittle under Pennsylvania's interpretation of Rule 3.3, informing the court of case law that is directly on-point is also highly desirable.
>
> . . . .
>
> In sum, the court is aware of the limitations on the duty of disclosure as interpreted by the Pennsylvania Bar Association. However, at least as applied to cases such as the one before the court, it would seem that the ABA position is by far the better reasoned one. Certainly, ABA Formal

> Opinion 280 comports more closely with this judge's expectation of candor to the tribunal.

Id. at 539-40 (emphases added). Thus, the Western District of Pennsylvania's decision required lawyers to disclose far more than the current ABA Model Rules or the Pennsylvania ethics rules (as interpreted the previous year by Pennsylvania lawyers).

An earlier federal district court decision implicitly took the same approach -- criticizing a lawyer for not disclosing a decision issued by another state's court. In Rural Water System #1 v. City of Sioux Center, 967 F. Supp. 1483 (N.D. Iowa 1997), aff'd in part and rev'd in part on other grounds, 202 F.3d 1035 (8th Cir.), cert. denied, 531 U.S. 820 (2000), the court indicated that a lawyer should have advised the court of a Sixth Circuit case ("Scioto Water") -- but also the lower court decision in that case, and a Colorado Supreme Court Case.

> It is hardly the issue that the rules of professional conduct require only the disclosure of controlling authority, see, e.g., C.P.R. DR 7-106(B)(1), which the decision of a court of appeals in another circuit certainly is not. In this court's view, the rules of professional conduct establish the "floor" or "minimum" standards for professional conduct, not the "ceiling"; basic notions of professionalism demand something higher. Although the decision of the Sixth Circuit Court of Appeals is obviously not controlling on this federal district court in the Eighth Circuit, RWS # 1's counsel's omission of the Scioto Water decision from RWS # 1's opening briefs smacks of concealment of obviously relevant and strongly persuasive authority simply because it is contrary to RWS # 1's position. RWS # 1's counsel did not hesitate to cite a decision of the Colorado Supreme Court on comparable issues, although that decision is factually distinguishable, probably because that decision appears to support RWS # 1's position. This selective citation of authorities, when so few decisions are dead on point, is not good faith advocacy, or even legitimate "hard ball." At best, it constitutes failure to confront and distinguish or discredit contrary authority, and, at worst, constitutes an attempt to

> hide from the court and opposing counsel a decision that is adverse to RWS # 1's position simply because it is adverse.
>
> . . . This court does not believe that it is appropriate to disregard a decision of a federal circuit court of appeals simply because one of the litigants involved in the case in which the decision was rendered disagrees with that decision. Rather, non-controlling decisions should be considered on the strength of their reasoning and analysis, which is the manner in which this court will consider the decisions of the Sixth Circuit Court of Appeals and the U.S. District Court for the Southern District of Ohio in Scioto Water and the Colorado Supreme Court in City of Grand Junction v. Ute Water Conservancy Dist., 900 P.2d 81 (Colo. 1995) (en banc). RWS # 1's counsel should have brought the Scioto Water decision to this court's attention for consideration on that basis. Failure to cite obscure authority that is on point through ignorance is one thing; failure to cite authority that is on point and known to counsel, even if not controlling, is quite another.

Id. at 1498 n.2 (emphases added). Thus, the Northern District of Iowa expected the lawyer to point out Colorado case law.

The court rejected what it called the lawyer's "rather self-serving assertion" that he did not have to cite one of the cases because a party in that case had filed a petition for certiorari with the United States Supreme Court. Id. The court's opinion also reveals (if one reads between the lines) that the lawyer seems to have been taken aback by the court's question at oral argument about the missing cases.

> At oral arguments, counsel for RWS # 1 acknowledged that he should have cited the Scioto Water decision in RWS # 1's opening brief, and explained that his principal reason for not doing so was that he was disappointed and surprised by the result in that case. While the court is sympathetic with counsel's disappointment, such disappointment should not have prevented counsel from citing relevant authority. Counsel was given the opportunity at oral arguments in this case to explain his differences with the Sixth Circuit Court of Appeals and the U.S. District Court

> for the Southern District of Ohio In Scioto Water, and he ably did so. However, the point remains that counsel could, and this court believes should, have seized the opportunity to argue the defects counsel perceives in these decisions by including those decisions in RWS # 1's opening brief.

Id. Despite this criticism, the court seems not to have sanctioned the lawyer -- acknowledging that the lawyer's "omission, as a practical matter is slight." Id.

Other courts have not been quite as blunt as this, but clearly expect lawyers to disclose decisions that the ABA Model Rules and the Restatement approach would not obligate the lawyers to disclose to the court. See, e.g., State v. Somerlot, 544 S.E.2d 52, 54 n.2 (W. Va. 2000) (explaining that it was "disturbed" that a litigant's lawyer had not included a United States Supreme Court decision in his briefing, without explaining whether the decision was directly adverse to the lawyer's position).

(a) Both the ABA Model Rules and the case law require disclosure of directly controlling adverse authority.

(b) Some lawyers confuse the meaning of the term "controlling" in ABA Model Rule 3.3(a)(2).

A lawyer's disclosure duty includes more than "controlling" decisional or other law. ABA Model Rule 3.3(a)(2) requires disclosure of "legal authority in the controlling jurisdiction" (emphasis added). Thus, the term "controlling" applies to the jurisdiction, not to the decisional or other law. This means that any directly adverse law issued by a court or adopted by the legislature, promulgated by an agency, etc. must be disclosed -- if it comes from the controlling jurisdiction. Tyler v. State, 47 P.3d 1095, 1111 (Alaska Ct. App. 2001) ("'Directly adverse' authority encompass[es] more than 'controlling' authority.").

Presumably, the "controlling jurisdiction" could be another state, if the forum's choice of law principles would look to that other state for the controlling law.

(c) Although ABA Model Rule 3.3(a)(2) does not define the term "legal authority," the Restatement indicates that

> [i]n most jurisdictions, such legal authority includes all decisions with holdings directly on point, but it does not include dicta.

Restatement (Third) of Law Governing Lawyers §111 cmt. c (2000) (emphasis added).

However, as with other issues involving the duty of disclosure, some courts require far more than the ethics rules require.

For instance, the Federal Circuit affirmed the United States Court of International Trade's reprimand of a Department of Justice lawyer for "misquoting and failing to quote fully from two judicial opinions." Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346, 1347 (Fed. Cir. 2003). In that case, the DOJ lawyer had omitted several sentences from decisions she quoted. The Federal Circuit found that the lawyer's omission provided a misleading view of the decisions. In addition,

> she failed to state "emphasis added" for the quoted material in bold face, although she had so stated about the bold face portions of the quotation from McAllister in the text. This difference would lead a reader to assume that the emphasis in Justice Thomas' dissent was provided by him, not by her.

Id. at 1349. Thus, the DOJ lawyer had included "emphasis added" following her quotation from one case, but had not done so following her quotation from a dissent by Supreme Court Justice Clarence Thomas.

The Federal Circuit also rejected the DOJ lawyer's argument that an early United States Supreme Court statement was dictum and therefore not covered by her

disclosure obligation -- noting that a 1960 Second Circuit case and Justice Thomas's dissent "believed that the statement was sufficiently important to quote it . . . and to cite it." Id. at 1356.

(d) On its face, ABA Model Rule 3.3(a)(2) does not require disclosure of directly adverse law from another state -- unless that state supplies the controlling law in the case.

However, as explained in the Introduction, some courts ignore the ABA Model Rules and the Restatement, and instead essentially revert to the 1949 ABA legal ethics opinion that required lawyers to disclose law "which would reasonably be considered important by the judge sitting on the case." ABA LEO 280 (6/18/49).

Best Answer

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

Disclosure Obligation: Knowledge Standard

Hypothetical 4

You thought you understood your obligation to disclose unfavorable case law from the "controlling jurisdiction," but now you have several more questions as you begin to brief legal matters in a large case.

Can you be sanctioned for not disclosing directly adverse case law of which you were not aware when you filed a brief, but which you could have found by conducting some simple research?

NO (PROBABLY)

Analysis

ABA Model Rule 3.3(a)(2) prohibits only a failure to disclose adverse legal authority "known to the lawyer" (emphasis added). Similarly, the Restatement indicates that a lawyer "may not knowingly" fail to disclose directly adverse authority. Restatement (Third) of Law Governing Lawyers § 111(2) (2000) (emphasis added).

However, at least one court has applied what amounts to a negligence standard.

In Dilallo v. Riding Safely, Inc., 687 So. 2d 353 (Fla. Dist. Ct. App. 1997), a Florida state court seemed to ignore the "knowing" element of the ethics rule.

> Appellee's counsel conceded to this court that he had not checked the effective date of the statute when arguing for summary judgment. We note that the Rules of Professional Conduct of the Florida Bar require candor toward the tribunal, and a duty of competence. Rule 4-1.1 and Rule 4-3.3(3) imply a duty to know and disclose to the court adverse legal authority. We construe these rules to also require an attorney to provide full information to the trial court such that the court has all necessary information to determine the issue presented to it.

Id. at 355 (emphasis added) (reversing the trial court's grant of summary judgment in favor of the lawyer who had not disclosed the statute's effective date, and remanding).

Best Answer

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

Disclosing Unpublished Case Law

Hypothetical 5

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

Must you advise the trial court of the following decisions:

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

YES (PROBABLY)

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

NO (PROBABLY)

Analysis

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

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

The Restatement contains a comment dealing with this issue.

> Case-law precedent includes an unpublished memorandum opinion, . . . an unpublished report filed by a magistrate, . . . and an adverse federal habeas corpus ruling . . . . The duty to disclose such unpublished materials may be of great practical significance, because they are less likely to be discovered by the tribunal itself. . . . Such a

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id.

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

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

Kirt Shuldberg, Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals, 85 Cal. L. Rev. 541, 551 (1997). The author noted that as of that

time (1997) "allowing citation to unpublished opinions has gained popularity. Six circuits currently allow citations, up from only two circuits in 1994." Id. at 569.

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

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

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

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

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

A 2003 article reported on this shift. Stephen R. Barnett, Developments and Practice Notes: No-Citation Rules Under Siege: A Battlefield Report and Analysis, 5 J. App. Prac. & Process 473 (Fall 2003). As that article reported, within a few years, nine federal circuits began to allow citation of unpublished opinions. Of those nine federal circuits, six circuits allowed unpublished opinions to be cited for their "persuasive" value,

two circuits adopted hybrid rules under which some unpublished opinions were binding precedent and some unpublished opinions were persuasive precedent, and one circuit did not specify the precedential weight to be given to unpublished opinions. Of course, this also meant that four federal circuits still absolutely prohibited citation of unpublished opinions.

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

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

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

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

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

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

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

> No-citation rules put attorneys in a double bind: If appellate counsel conscientiously abides by the duty of candor to the tribunal, the attorney risks the imposition of sanctions by that very court for citing opinions designated as "unpublished," in violation of the rules of the court and the ethical rules requiring attorneys to follow them. On the other hand, if appellate counsel abides by local rules that prohibit or disfavor the citation of "unpublished" opinions, the attorney risks the imposition of sanctions for violating the ethical duty of candor, the requirements of Fed. R. Civ. P. 11, the obligations on appellate counsel set forth in Fed. R. App. P. 46, and the duty to competently represent the client.

Id. at 79 (footnote omitted).

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

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

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

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

One article described the continuing issue.

> From 2000 to 2008, more than 81% of all opinions issued by the federal appellate courts were unpublished. See Judicial Business of the United States Courts: Annual Report of the Director, tbl. S-3 (2000-2008). During that period, the Fourth Circuit had the highest percentage of unpublished opinions (92%), and more than 85% of the decisions in the Third, Fifth, Ninth and Eleventh circuits were unpublished. Even the circuits with the lowest percentages during that period -- the First, Seventh and District of Columbia circuits -- issued 54% of their opinions as unpublished. Id. . . . Unpublished decisions are much more accessible today -- on Westlaw, Lexis and West's Federal Appendix -- than they were years ago. Still, given the federal circuits' treatment of unpublished decisions as having limited or no precedential value, practitioners who receive a significant but unpublished appellate decision may wish to ask the court to reconsider and issue a published opinion. The federal circuit rules on moving for publication vary. The Fourth, Eighth and Eleventh circuits allow only parties to petition for publication, while the District of Columbia, First, Seventh and Ninth Circuits allow anyone to petition. Two states, California and Arizona, have an extraordinary practice of allowing their state supreme courts, on their own motion, to 'depublish' intermediate appellate court decisions. In California, anyone can petition the state Supreme Court to depublish any appellate court opinion. See California R. Ct. 8.1125; Arizona R. Civ. App. P. 28(f).

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

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

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

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

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

> Section (3) was revised to reflect that unpublished Wisconsin appellate opinions are increasingly available in electronic form. This change also conforms to the practice in numerous other jurisdictions, and is compatible with, though more limited than, Fed. R. App. P. 32.1, which abolished any restriction on the citation of unpublished federal court opinions, judgments, orders, and dispositions issued on or after January 1, 2007. The revision to Section (3) does not alter the non-precedential nature of unpublished Wisconsin appellate opinions.

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

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

Id.

One of the Wisconsin Supreme Court justices dissented -- noting that "[t]his court has faced three previous petitions to amend the current citation rule" and that "[n]o

sufficient problem has been identified to warrant the change." In re Amendment of Wis. Stat. § 809.23, Sup. Ct. Order No. 08-02 (Wis. Jan. 6, 2009) (Bradley, J., dissenting). The dissenting justice indicated that she "continue[d] to believe that the potential increased cost and time outweigh any benefits gained." Id.

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

> For federal circuits with unpublished opinions issued after January 1, 2007, and for all other jurisdictions which have banned no-citation rules, attorneys may now cite to unpublished opinions. But does this mean that attorneys must cite to unpublished opinions if those opinions are directly adverse?
>
> Although unclear, the word "authority" in the Model Rule leads to the conclusion that whether an attorney must disclose an adverse unpublished opinion depends upon how the jurisdiction treats unpublished opinions and, more particularly, whether it treats the unpublished opinion as precedent, or rather, as "authority." Furthermore, the comment to the Model Rule 3.3 states that the duty to disclose only relates to "directly adverse authority in the controlling jurisdiction." Therefore, unless the unpublished opinion is adverse controlling authority, the attorney would not be obligated to cite it. An attorney's obligation to cite to an unpublished opinion adverse to her client's opinion does not rest upon the rationale that the other side may not have equal access to unpublished opinion, as some commentators have argued.

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

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

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

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

> [I]f we were to conclude that an attorney has an affirmative duty to advise his adversary or the court of every unpublished adverse ruling against him, we would create a system in which a single adverse ruling would be the death knell to the losing advocate's practice. And it would be so even if the first adverse ruling eventually were overturned by the appellate panel or by this Court. Such a system would result in a virtual quagmire of attorneys being unable to represent the legitimate interests of their clients in any meaningful sense. It would not, in the end, advance the

> cause of justice because the first decision on any issue is not necessarily the correct one; the first court to speak is just as likely to be incorrect in novel or unusual matters of first impression as it is to be correct.

Id. at 968.

Best Answer

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

Disclosing Statutory Law and Affirmative Defenses

Hypothetical 6

You represent a defendant retailer which has been sued by a customer after an incident in which your client's guards briefly restrained the customer. The litigation has been ugly from the beginning, and you have filed a counterclaim against the plaintiff customer alleging various claims.

The plaintiff's inexperienced lawyer has apparently missed several pertinent state statutes, and you are deciding what to do as you prepare for trial.

(a) If the plaintiff does not do so, must you disclose to the court a state statute prohibiting one of the counterclaim theories you have asserted?

YES

(b) If the plaintiff does not do so, must you disclose the statute of limitations that might bar (but which would not extinguish) one of the counterclaims you have asserted?

NO (PROBABLY)

Analysis

This analysis begins with ABA Model Rule 3.3.

> A lawyer shall not knowingly: . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.

ABA Model Rule 3.3(a)(2) (emphases added).

The Restatement explicitly indicates that

> "[l]egal authority" includes case-law precedents as well as statues, ordinances, and administrative regulations.

Restatement (Third) of Law Governing Lawyers §111 cmt. d (2000) (emphasis added).

Thus, the term "legal authority" apparently includes statutory law as well as case law.

See, e.g., Dorso Trailer Sales, Inc. v. Am. Body & Trailer, Inc., 464 N.W.2d 551 (Minn. Ct. App. 1990), aff'd in part and rev'd in part on other grounds, 482 N.W.2d 771 (Minn. 1992); National Airlines Inc. v. Shea, 292 S.E.2d 308, 310-11 (Va. 1982) (assessing a situation in which a plaintiff's lawyer did not advise the court that the defendant airline's lawyer thought that the case was being held in abeyance; explaining that the plaintiff's lawyer did not respond to the defendant's lawyer expressing this understanding, did not advise the court of the understanding, and instead obtained a default judgment and levied on the airline's property; holding that the plaintiff's lawyer "had a duty to be above-board with the court and fair with opposing counsel"; also noting that the plaintiff's lawyer "failed to call the court's attention to the applicability of the Warsaw Convention, which he knew to be adverse to his clients' position"; setting aside the default judgment "on the ground of fraud upon the court").

(a) The disclosure obligation under ABA Model Rule 3.3(a)(2) requires disclosure of statutory law prohibiting assertion of a claim. In fact, the very assertion of the claim itself probably violates ABA Model Rule 3.1 -- which prohibits assertion of claims that are not well grounded in fact or law.

(b) It is unclear how the ethics rules would treat a litigant's failure to disclose a statute (such as a statute of limitations) that provides the adversary an affirmative defense.

Although a statute of limitations would seem to be "legal authority" that is "directly adverse to the position of the client," the ABA and every other bar have indicated that lawyers may ethically file time-barred claims. See, e.g., ABA LEO 387 (9/26/94) ("We conclude that it is generally not a violation . . . to file a time-barred lawsuit, so long as

this does not violate the law of the relevant jurisdiction. The running of the period provided for enforcement of the civil claim creates an affirmative defense which must be asserted by the opposing party . . . . [W]e do not believe it is unethical for a lawyer to file suit to a time-barred claim."); Oregon LEO 2005-21 (8/05); North Carolina LEO 2003-13 (1/16/04); Pennsylvania LEO 96-80 (6/24/96). Although several courts have disagreed with this analysis, as a matter of ethics it seems clear that lawyers may file a knowingly time-barred claim.

It is difficult to imagine that a lawyer may ethically file a time-barred claim, but then be ethically obligated to disclose the statute of limitations to the court.

Best Answer

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

Timing of Disclosure Obligation

Hypothetical 7

The other side in a big case just filed its initial pleading in favor of a summary judgment motion. Amazingly, the other side missed an important case from your state's supreme court that directly supports its position (and therefore is directly adverse to your position). Under the briefing schedule, the other side will have two weeks to file a reply to your brief in opposition to its summary judgment motion.

Must you disclose the unfavorable supreme court decision in your brief (rather than wait to see if the other side includes it in its reply brief)?

MAYBE

Analysis

This hypothetical deals with the timing of a lawyer's duty of disclosure.

ABA Model Rule 3.3(a)(2) does not explicitly deal with the timing of a lawyer's disclosure obligation. However, the Rule itself speaks about a lawyer's duty to disclose if the directly adverse law was "not . . . disclosed by the opposing party" -- which sounds as if the lawyer can wait to see what the opposing counsel does. Comment [4] uses the same tense.

A Restatement comment more clearly indicates that a lawyer can wait to see if the adversary notes the unfavorable authority.

> The duty under Subsection (2) does not arise if opposing counsel has already disclosed the authority to the tribunal. If opposing counsel will have an opportunity to assert the adverse authority, as in a reply memorandum or brief, but fails to do so, Subsection (2) requires the lawyer to draw the tribunal's attention to the omitted authority before the matter is submitted for decision.

Restatement (Third) of Law Governing Lawyers §111 cmt. c (2000) (emphasis added).

However, some courts require lawyers to make the disclosure in their initial pleading. For instance, the Eleventh Circuit found that lawyers representing a lounge known as "Porky's" had violated Rule 11 by failing to cite a recent Florida Supreme Court case. The Eleventh Circuit explained that a lawyer's duty to disclose case law was not affected by the adversary's later citation to the law.

> The appellants are not redeemed by the fact that opposing counsel subsequently cited the controlling precedent. The appellants had a duty to refrain from affirmatively misleading the court as to the state of the law. They were not relieved of this duty by the possibility that opposing counsel might find and cite the controlling precedent, particularly where, as here, a temporary restraining order might have been issued ex parte.

Jorgenson v. County of Volusia, 846 F.2d 1350, 1352 (11th Cir. 1988) (upholding Rule 11 sanctions). Under this strict interpretation, lawyers can be sanctioned for failing to disclose law even if the court ultimately has the pertinent law before it (because the adversary raises it later).

Best Answer

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

Ex Parte Communications with the Court

Hypothetical 8

You remember from law school that both lawyers' and judges' ethics rules generally prohibit a lawyer's ex parte communications with a judge. However, a recent case has raised several more complicated questions.

(a) May you speak with a judge who initiates an ex parte communication about the merits of a pending case?

NO

(b) May you communication ex parte with a judge about scheduling issues?

MAYBE

(c) If you speak ex parte with a judge about scheduling issues, must the judge (rather than you) advise the other parties about the communication?

MAYBE

Analysis

As might be expected, both lawyers' and judges' ethics rules govern ex parte communications between them.

Lawyers' Ethics Rules

The ABA's approach to ex parte communications has changed over the years.

The old ABA Code prohibited only ex parte communications "as to the merits of the cause."[1]

[1] ABA Model Code of Prof'l Responsibility DR 7-110 (B) (1980) ("In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except: (1) -In the course of official proceedings in the cause. (2) -In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer. (3) -Orally upon adequate notice to opposing

The ABA Model Rules take a broader approach, indicating that lawyers may not

> communicate ex parte with such a person [including judges and other officials] during the proceeding unless authorized to do so by law or court order.

ABA Model Rule 3.5(b) (2008). See ABA Model Rule 3.5 cmt. [2].[2]

The Restatement takes the same basic approach.

> A lawyer may not knowingly communicate ex parte with a judicial officer before whom a proceeding is pending concerning the matter, except as authorized by law.

Restatement (Third) of Law Governing Lawyers § 113(1) (2000).

Most states follow this approach,[3] but some states have more subtle rules.[4]

Of course, the absolute prohibition cannot really mean what it says, prohibiting (for instance) a lawyer from saying "Good Morning, Your Honor" if the lawyer sees the judge in the parking lot. Still, the elimination of the language dealing with "merits of the cause" undoubtedly expands the communications prohibited by the general bar on ex parte communications. For instance, the new formulation prohibits communications about scheduling or administrative matters.

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counsel or to the adverse party if he is not represented by a lawyer. (4) -As otherwise authorized by law, or by Section A(4) under Canon 3 of the Code of Judicial Conduct.").

[2] See, e.g., North Carolina LEO 2001-15 (4/19/02) ("a lawyer may not communicate ex parte with a judge in reliance upon the communication being 'permitted by law' unless there is a statute or case law specifically and clearly authorizing such communications or proper notice is given to the adverse party or counsel").

[3] See, e.g., North Carolina LEO 98-12 (7/16/98) (explaining the prohibition on ex parte contacts with a court).

[4] See, e.g., Virginia Rule 3.5(e) ("In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except: (1) in the course of official proceedings in the cause; (2) in writing if the lawyer promptly delivers a copy of the writing to opposing counsel or to the adverse party who is not represented by a lawyer; (3) orally upon adequate notice to opposing counsel or to the adverse party who is not represented by a lawyer; or (4) as otherwise authorized by law.").

Judges' Ethics Rules

The ABA Model Code of Judicial Conduct avoids the per se rule found in the ABA Model Rules, and instead adopts a more subtle approach.

> A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending[] or impending matter,[] except as follows:
>
> > (1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:
> >
> > > (a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and
> > >
> > > (b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

ABA Model Code of Judicial Conduct, Rule 2.9(A) (2007). The ethics code governing federal judges takes the same basic approach.[5]

[5] Code of Conduct for United States Judges, Canon 3A(4) (2009) ("A judge should accord to every person who has a legal interest in a proceeding, and that person's lawyer, the full right to be heard according to law. Except as set out below, a judge should not initiate, permit, or consider ex parte communications or consider other communications concerning a pending or impending matter that are made outside the presence of the parties or their lawyers. If a judge receives an unauthorized ex parte communication bearing on the substance of a matter, the judge should promptly notify the parties of the subject matter of the communication and allow the parties an opportunity to respond, if requested. A judge may: (a) initiate, permit, or consider ex parte communications as authorized by law; (b) when circumstances require it, permit ex parte communication for scheduling, administrative, or emergency purposes, but only if the ex parte communication does not address substantive matters and the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; (c) obtain the written advice of a disinterested expert on the law, but only after giving advance notice to the parties of the person to be consulted and the subject matter of the advice and affording the parties reasonable opportunity to object and respond to the notice and to the advice received; or (d) with the consent of the parties, confer separately with the parties and their counsel in an effort to mediate or settle pending matters." (emphasis added)).

Thus, the ABA Model Code of Judicial Conduct specifically excludes from the prohibition ex parte communications about logistics (or emergency matters), as long as a judge quickly notifies all the parties of the communication.

The law recognizes a few very narrow exceptions -- such as a TRO situation.[6]

Bars have also explained the requirement that lawyers copy the adversary on any communication with the court -- making the communication not an ex parte communication.[7]

(a) Neither judges nor lawyers may engage in ex parte communications except under the narrow circumstances approved in the rules.

If the judge initiates such a communication, the lawyer must respectfully terminate it.[8]

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[6] See, e.g., Pennsylvania LEO 96-153 (11/12/96) (pointing to a state civil procedure rule providing "for the issuance of preliminary or special injunctions to prevent the removal, disposition or alienation of personal property" in justifying a lawyer's ex parte communication to the judge seeking an order to seal a safe deposit box in a divorce dispute; "it is my opinion that a petition for a temporary restraining order freezing the safe deposit box is authorized by law and may be decided outside of an adversarial setting. Once the order is granted, the proceedings are then converted into an adversarial form").

[7] See, e.g., North Carolina LEO 2003-17 (1/16/04) ("an attorney may only provide a judge with additional authority post-hearing if the communication is permitted by the rules of the tribunal and a copy of the writing is furnished simultaneously to opposing counsel"); Pennsylvania LEO 98-15 (1/99) ("Absent extraordinary circumstances, such notice will be inadequate unless it is contemporaneous with the communication to the judge, i.e. at a minimum by the same method of communication so that the other side will have notice at the same time or before the judge does. In addition, if the communicating lawyer suspects or knows that the other side's lawyer may not be immediately available to receive and respond to the notice, then the communicating lawyer should either find the other side's lawyer or delay the communication until the other lawyer is available. Does copying opposing counsel on a letter to a judge remove the objection that it is an ex parte communication? It does, provided the letter is received by opposing counsel at the same time or before it is received by the judge."); North Carolina LEO 97-5 (1/16/98) ("a lawyer must give the opposing counsel a copy of a proposed order simultaneously with the lawyer's submission of the proposed order to a judge in an ex parte communication").

[8] See, e.g., Illinois LEO 94-7 (9/1994) ("It is improper for a lawyer to engage in or to respond to ex parte communications from a judge concerning the drafting of an order or judgment without giving prompt notice to opposing counsel."); Michigan LEO RI-195 (3/7/94) ("A lawyer may not draft findings of fact and conclusions of law in a matter when contacted ex parte by the presiding judge to do so. If the lawyer cannot persuade the judge to correct the ex parte contact, the lawyer may have a duty to report the judge's conduct to the Judicial Tenure Commission.").

(b) As explained above, some judicial codes allow judges and lawyers to communicate ex parte about scheduling issues, as long as the communications meet the requirements of those ethics rules (which normally include disclosure by the judge to all of the parties).[9]

(c) The ABA Model Judicial Code requires that a judge engaging in permissible ex parte communications promptly notify all the other parties, and give them a chance to respond. ABA Model Code of Judicial Conduct, Rule 2.9(A)(1) (2007).

The ethics code for federal judges is not as clear. That code requires judges to notify all the parties of any unauthorized ex parte communication from a party "bearing on the substance of a matter." Code of Conduct for United States Judges, Canon 3A(4) (2009). The same section permits ex parte communications for "scheduling, administrative, or emergency purposes" -- but does not explicitly require either the judge or the lawyer engaging in such communications to notify all the parties. Thus, that code apparently does not require the same level of notification as the ABA Model Code of Judicial Conduct.

As always, there are interesting side issues. For instance, the ABA Model Judicial Code requires a judge to "promptly" advise all parties if the judge inadvertently receives an unauthorized ex parte communication.[10] The Philadelphia Bar has

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[9] Pennsylvania LEO 98-15 (1/1999) (indicating that "asking a judge's secretary a non-case specific procedural question would be permissible, because it is not an ex parte communication with a judge, juror, prospective juror or other official").

[10] ABA Model Code of Judicial Conduct, Rule 2.9(B) (2007) ("If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.").

explained that a lawyer does not have a duty to provide a copy to other parties of an impermissible ex parte communication by the client to the court.[11]

Best Answer

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

[11] Philadelphia LEO 98-12 (6/1998) (explaining a lawyer's duty upon learning that the client had communicated about the merits of her case to the judge; finding that the lawyer seeking the opinion also intended to withdraw as counsel for the client; holding that "[y]our obligation at this point is to contact your client immediately, explain the potential adverse consequences of her conduct, and advise her not to make any more ex parte contacts with the judge. You are not required to disclose the client's letter and its enclosures to opposing counsel, and indeed your obligation to maintain your client's confidences under Rule 1.6 would prevent you from doing so."; also explaining that "[y]our final concern is correcting the misrepresentations contained in your client's letter to the court, where she misquoted you and misrepresented the circumstances of how she became your client. Since you may not communicate ex parte with the judge, you must consider whether airing the misrepresentations in the letter may harm your client and provide an opportunity for opposing counsel to obtain confidential attorney-client information. Rule 1.6 requires that you protect this confidential information, and Rule 1.7 does not allow you to place your interests, in clearing your reputation before the Court, ahead of your client's interests.").

Courtroom Behavior

Hypothetical 9

You are representing your brother-in-law in an assault case, even though you normally do not handle criminal matters. You and your brother-in-law believe that the "victim" made up the entire story, and you are looking for ways to establish that fact.

May you bring one of your neighbors (rather than your brother-in-law) to trial to sit with you, and hope that the "victim" identifies the neighbor as the man who assaulted her?

NO

Analysis

Amazingly, for over twenty years, lawyers have tried essentially the same tactic -- arranging for a nonclient to sit with the lawyer at the counsel table in the hope that witnesses will mistakenly identify the person sitting with the lawyer as the person who committed a crime, engaged in some other conduct at issue in the proceeding, etc.

Perhaps this tactic works in some courts, but the decisions addressing this strategy universally condemn the lawyers' trick -- and usually sanction the lawyer.

- In re Gross, 759 N.E.2d 288 (Mass. 2001) (suspending a lawyer for eighteen months).

- People v. Simac, 641 N.E.2d 416, 421-22, 422 (Ill. 1994) (finding the lawyer in criminal contempt and fining him $100; noting that no party moved to exclude witnesses, but also explaining that the lawyer did not correct the court's misidentification of the person sitting with the lawyer; "We find that appellant's conduct clearly reveals that his intent was not merely to test the State's identification testimony. Rather, we find that appellant intended to cause a misidentification, thereby misleading not only the State and its witness but also the court itself. Appellant commissioned a clerical employee from his office to sit with him at the defendant's customary place at the counsel's table. Appellant's employee resembled the defendant in important identification characteristics. Moreover, both the substitute and the defendant wore glasses and were similarly dressed. Under these circumstances, we find that appellant calculated to cause a

misidentification. . . . [A]ppellant responded in the negative to the clerk's direct inquiry as to whether his defendant would be sworn. Appellant responded negatively even though, at the same time, he obviously anticipated that the substitute would eventually testify as a witness concerning the misidentification. Clearly, appellant was aware that the only inference the court could draw from the totality of these circumstances was that the person sitting next to appellant at counsel's table was the defendant and that the defendant was not going to testify at trial. Most revealing of appellant's intent to deceive, however, was appellant's failure to correct the court and the record upon the court's erroneous statement for the record that the witness had identified the defendant. As this point, as an officer of the court, appellant had a responsibility to the court and the integrity of the proceedings to correct the court and the record. When the court made the erroneous statement for the record, appellant clearly knew that the court was laboring wider a misconception as to the identity of the defendant, yet he took no action to correct the court's mistaken impression. If appellant had not calculated to cause such a misconception, he would have taken some action to clarify the defendant's identity."; "Appellant could have easily achieved this purpose without resorting to deceptive and misleading practices. Many alternative methods are available to an attorney to test identification testimony. These available alternatives include conducting an in-court lineup, having defendant sit in the gallery without placing a substitute at counsel's table, or placing more than one person at counsel's table. It is readily apparent, therefore, that appellant could have achieved his goal as an advocate without misleading or deceiving the court, the State, and the witness and thereby remained within the bounds of his responsibilities as an officer of the court.").

- United States v. Thoreen, 653 F.2d 1332, 1342 n.7 (9th Cir. 1981) (holding the lawyer in criminal contempt; "Judge Tanner found Thoreen in criminal contempt for the substitution because it was imposed on the court and counsel without permission or prior knowledge, the claimed identification issue did not exist; it disrupted the trial; it deceived the court and frustrated its responsibility to administer justice; and it violated a court custom."; explaining that "If identification is at issue, an attorney could test a witness's credibility by notifying the court and counsel that it is and by seeking the court's permission to (1) seat two or more persons at counsel table without identifying the defendant . . . ; (2) have no one at counsel table; (3) hold an in-court lineup.").

- Miskovsky v. State, 586 P.2d 1104, 1108 (Okla. Crim. App. 1978) (finding the lawyer in "direct contempt" and imposing a $100 fine; "His actions indicated a disrespectful attitude for the judicial process, in that he felt it necessary to resort to deception and misrepresentation to protect his client's interests.").

Although courts sometimes condemn the entire tactic as inherently deceitful, they usually can point to the lawyer's specific misdeeds. For instance, one party or the other usually moves for witnesses to be excluded from the courtroom -- which presumably would require the imposter to leave the courtroom. In other situations, the court's introductory statement to the jury mistakenly identifies the person sitting next to the lawyer as the lawyer's client -- which the lawyer does not correct.

Best Answer

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

Deposition Behavior

Hypothetical 10

You are involved in litigation in which one of your former legal assistants will be an adverse deposition and trial witness. You suspect that the legal assistant might be tempted to lie about key matters. In an effort to assure her honesty, you conspicuously place nine blank audio cassette tapes in front of the legal assistant on the table before you depose her. You suggestively label the audio tapes and refer to them during your questioning -- implying that you had recorded conversations with the legal assistant that could impeach and personally embarrass her. You also intermittently caution the legal assistant to answer truthfully or risk perjuring herself.

Does your tactic violate the ethics rules?

MAYBE

Analysis

This hypothetical comes from Cincinnati Bar Ass'n v. Statzer, 800 N.E.2d 1117 (Ohio 2003).

The Cincinnati Bar Association had charged attorney Joni Statzer with three counts of misconduct. The first count accused Statzer of attempting to induce her former legal assistant to execute a false affidavit. The second count accused Statzer of failing to report a former associate who had similarly sought to induce the same legal assistant to provide false testimony. The bar dismissed these two counts, after determining "that the testimony of the legal assistant, a central witness on these counts, lacked credibility." Id. at 1119.

The third count dealt with Statzer's deposition of her former legal assistant. The Ohio Supreme Court described the situation as follows:

> During the proceeding, which was attended by respondent's [lawyer accused of wrongdoing] and relator's [legal assistant]

> legal counsel, respondent conspicuously placed nine audio cassette tapes in front of her former legal assistant. By suggestively labeling the tapes and referring to them during questioning, respondent implied that she had recorded conversations with the legal assistant that could impeach and personally embarrass the legal assistant. Respondent also intermittently cautioned the legal assistant to answer truthfully or risk perjuring herself.

Id. at 1119-20. The Ohio Supreme Court found that Statzer's tactic violated the ethics rules.

> Respondent's suggestive display of the cassettes was intended to mislead the legal assistant. The tapes were actually blank or held information unrelated to the legal assistant, and consequently, respondent did not offer the tapes as evidence during or after the deposition. The panel found that respondent had thereby violated DR 1-102(A)(4), which prohibits a lawyer from engaging in conduct involving fraud, deceit, dishonesty, or misrepresentation, and DR 7-106(C)(1), which prohibits a lawyer appearing in a professional capacity before a tribunal from alluding to any matter that will not be supported by admissible evidence.

Id. at 1120 (emphases added). The Ohio Supreme Court noted that Statzer

> argues that wide latitude was imperative during that proceeding to draw honest testimony from a theretofore untrustworthy witness and that use of the audio cassette tapes was merely a tactic intended to achieve this legitimate end.

Id. at 1122. The Ohio Supreme Court rejected Statzer's argument.

> We recognize that the discovery process, particularly the pursuit of information through deposition, cannot be overly restricted if it is to remain effective. We must draw the line, however, when an attorney engages in subterfuge that intimidates a witness. While respondent's primary purpose during the legal assistant's deposition may have been to elicit the truth, her tactic also tricked the legal assistant into thinking that the revelation of embarrassing confidences was at stake.

> Throughout these proceedings, respondent has asserted that her "bluff" worked. Regardless, the success of her tactic is not at issue, and respondent can not [sic], with any degree of certainty, assert that her witness would not have testified truthfully in the absence of her subterfuge. Further, while such deception may induce truthful testimony, it is just as likely to elicit lies if a witness believes that lies will offer security from the false threat. Respondent's deceitful tactic intimidated her witness by creating the false impression that respondent possessed compromising personal information that she could offer as evidence. For these reasons, we agree that respondent violated DR 1-102(A)(4) and 7-106(C)(1).

Id. at 1122-23 (emphases added).

Interestingly, the court did not note in this section of its opinion that the Cincinnati Bar had earlier dismissed its first two counts against Statzer because the legal assistant who was "a central witness on these counts, lacked credibility." Id. at 1119. The Ohio Supreme Court ordered that Statzer be suspended from the practice of law for six months - although staying the sanction "on the condition that she engage in no further misconduct." Id. at 1123.

Not every court would be this harsh, but the Ohio Supreme Court's punishment of Statzer highlights the risk that lawyers face when they engage in what seems to be aggressive but permissible tactics when dealing with witnesses who might be tempted to shade the truth.

Best Answer

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

Judges' Disqualification Based on Personal Relationships with Litigants

Hypothetical 11

Over the years, you have found that one of the most enjoyable aspects of practicing law is the wide circle of friends with whom you enjoy spending leisure time. You have just been offered a judgeship, and you wonder to what extent judges can continue to socialize with litigants.

If you become a judge, may you:

(a) Attend a church picnic with the defendant in a car accident case you are hearing?

YES

(b) Play golf with the plaintiff in a commercial litigation matter, whom you have known for twenty-five years?

YES

(c) Go hunting with a government official (such as the country's Vice President) who has been sued in his official (rather than personal) capacity in a case that will come before your court?

YES

Analysis

(a)-(b) Courts and bars by definition cannot establish per se rules governing situations in which a judge's friend appears as a litigant.

Every judicial code tries to balance: (1) the desirability of judges' involvement in their communities; and (2) the need to assure both the reality and perception of judges' evenhandedness and independence. Judges cannot lead a monastic life, but must

never appear to favor their friends, engage in discriminatory behavior or use their prestige to gain some improper benefit.

Like its predecessor, the ABA Model Judicial Code explains the benefits of judicial involvement in community affairs.

> Participation in both law-related and other extrajudicial activities helps integrate judges into their communities, and furthers public understanding of and respect for courts and the judicial system.

ABA Model Code of Judicial Conduct, Rule 3.1 cmt. [2] (2007). For this reason, the ABA Model Judicial Code does not just allow judges to participate in community matters -- it encourages such involvement.

> To the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects. In addition, judges are permitted and encouraged to engage in education, religious, charitable, fraternal or civic extrajudicial activities not conducted for profit, even when the activities do not involve the law.

ABA Model Code of Judicial Conduct, Rule 3.1 cmt. [1] (2007). Accord Code of Conduct for United States Judges, Canon 4 (2009).[1]

[1] Code of Conduct for United States Judges, Canon 4 Commentary (2009) ("Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives. As a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice. To the extent that the judge's time permits and impartiality is not compromised, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the law. Subject to the same limitations, judges may also engage in a wide range of non-law-related activities.").

Given the official encouragement of involvement in community matters, judges obviously will develop personal relationships with members of the community. Of course, judges also bring with them to the bench any previous personal relationships.

Therefore, judges' ability to hear cases involving friends who are litigants must be judged under the most general principle.

> A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality[] might reasonably be questioned.

ABA Model Code of Judicial Conduct, Rule 2.11(A)(1) (2007). The judicial code governing federal judges takes the same basic approach.

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.

Code of Conduct for United States Judges, Canon 3C(1) (2009).

Every judicial ethics code has essentially the same provision. Judges themselves must determine if they can hear a case in which one of their friends is involved. Most judges would decline to hear a case in which their best, life-long friend has been accused of murder, but undoubtedly would hear a case in which a casual acquaintance from an earlier bar association involvement appears as a defendant before the judge in a minor matter.

Most attempts to disqualify judges based on such relationships fail.

(c) This question is based on an incident involving Justice Scalia -- who faced criticism for having traveled with Vice President Cheney on a hunting trip to Texas despite the pendency before the Supreme Court of a case in which Vice President Cheney was being sued in his official capacity.

Although the judicial codes do not apply to Supreme Court justices, Justice Scalia issued a lengthy explanation of why he was not prohibited from participating in a decision about whether to grant certiorari in that case. In denying the Sierra Club's motion to recuse, Justice Scalia handled the issue with his typical bluntness.

> There are, I am sure, those who believe that my friendship with persons in the current administration might cause me to favor the Government in cases brought against it. That is not the issue here. Nor is the issue whether personal friendship with the Vice President might cause me to favor the Government in cases in which he is named. None of those suspicions regarding my impartiality (erroneous suspicions, I hasten to protest) bears upon recusal here. The question, simply put, is whether someone who thought I could decide this case impartially despite my friendship with the Vice President would reasonably believe that I cannot decide it impartially because I went hunting with that friend and accepted an invitation to fly there with him on a Government plane. If it is reasonable to think that a Supreme Court Justice can be bought so cheap, the Nation is in deeper trouble than I had imagined.

Cheney v. United States Dist. Court, 541 U.S. 913, 928-29 (2004).

Best Answer

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

Judges' Disqualification Based on Personal Relationships with Lawyers

Hypothetical 12

Having just been appointed as a local judge, you need to make some decisions about cases which have been assigned to you.

(a) May you hear a case in which one of the litigant's lawyers is your best friend?

MAYBE

(b) May you hear a case in which one of the litigant's lawyers is your son-in-law?

NO (WITHOUT CONSENT)

(c) May you hear a case in which one of the litigant's lawyers is your brother-in-law?

MAYBE

(d) May you hear a case in which one of the litigant's lawyers practices at a firm where your son-in-law is a partner?

NO (PROBABLY) (WITHOUT CONSENT)

(e) May you hear a case in which one of the litigant's lawyers practices at a firm where your son-in-law is an associate?

MAYBE

Analysis

Because in nearly every situation judges are drawn from the legal community in which they have practiced, they frequently handle matters in which current or former professional colleagues and friends represent litigants.

As with a judge's personal relationships with litigants, the bottom-line rule requires a judge to recuse himself or herself "in any proceeding in which the judge's impartiality[] might reasonably be questioned." ABA Model Code of Judicial Conduct, Rule 2.11(A)(1) (2007). Accord Code of Conduct for United States Judges, Canon 3(C)(1) (2009).

(a) Depending on the length and intensity of the friendship (and the nature of the case), a judge's personal friendship with a lawyer might require the judge's recusal. In most situations, such a personal friendship would not require the judge's recusal.[1]

Another option is for the judge to disclose the friendship, and essentially give any litigant a "veto power" over the judge's participation. The ABA Model Judicial Code provision describing this process does not find it effective if the judge's "bias or prejudice" rises to the level actually requiring recusal. ABA Model Code of Judicial Conduct, Rule 2.11(C) (2007). Accord Code of Conduct for United States Judges, Canon 3D (2009). However, a judge struggling with determining if he or she must recuse himself could trigger this process to be extra careful.

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[1] See, e.g., People v. Chavous, No. 240340, 2004 Mich. App. LEXIS 1149, at *2-3 (Mich. Ct. App. May 6, 2004) (unpublished opinion) (refusing to overturn a verdict against a criminal defendant, who had been unsuccessful in seeking to disqualify the judge -- a childhood friend of the prosecutor; "In the present case, the trial judge disclosed that he knew the prosecutor as a child because they lived in the same neighborhood. However, the last communication between the two had occurred in 1996. Prior to 1996, they had not seen each other since college. The trial judge stated that he was comfortable handling the case, and there was no need to recuse. Although the prosecutor apprised defense counsel of the prior relationship months earlier, defendant sought disqualification just before the commencement of trial. At the request of his client, defense counsel moved to disqualify the trial judge. Both the trial court and the chief judge denied the motion. Following de novo review of the record, we cannot conclude that the trial court's decision was an abuse of discretion. Wells, supra. [People v. Wells, 605 N.W.2d 374, 379 (Mich. Ct. App. 1999)] Defendant failed to meet her burden of establishing bias or prejudice with blanket assertions unsupported by citations to the record. Id. Defendant's only argument is that the rulings against her objections may show bias, but this Court has specifically stated that repeated rulings against a litigant do not require disqualification of a judge.").

(b) A specific federal statute governs a judge's disqualification if a close family member acts as a lawyer in a matter before the judge.

> He shall also disqualify himself in the following circumstances: . . . He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: . . . Is acting as a lawyer in the proceeding.

28 U.S.C. § 455(b)(5)(ii).

Similarly, the ABA Model Judicial Code provides that judges should disqualify themselves if a "lawyer in the proceeding" has a certain defined relationship with the judge.

> A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality[] might reasonably be questioned, including but not limited to the following circumstances: . . . The judge knows[] that the judge, the judge's spouse or domestic partner,[] or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is: . . . acting as a lawyer in the proceeding; [or] . . . a person who has more than a de minimis interest that could be substantially affected by the proceeding.

ABA Model Code of Judicial Conduct, Rule 2.11(A)(2)(b), (c) (2007) (emphasis added).

The Code of Conduct for United States Judges contains a similar rule.

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which: . . . the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such a person is: . . . acting as a lawyer in the proceeding; [or] . . . known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.

Code of Conduct for United States Judges, Canon 3C(1)(d)(ii), (iii) (2009) (emphasis added).

If the judge's relationship to a lawyer appearing before the judge does not rise to the level of actual "bias or prejudice," a judge disqualifying herself under these provisions may initiate a procedure under which the parties can agree to let her continue as the judge.

> A judge subject to disqualification under this Rule, other than for bias or prejudice under paragraph (A)(1), may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, outside the presence of the judge and court personnel, whether to waive disqualification. If, following the disclosure, the parties and lawyers agree, without participation by the judge or court personnel, that the judge should not be disqualified, the judge may participate in the proceeding. The agreement shall be incorporated into the record of the proceeding.

ABA Model Code of Judicial Conduct, Rule 2.11(C) (2007). The judicial code governing federal judges has a similar provision.

> Instead of withdrawing from the proceeding, a judge disqualified by Canon 3C(1) may, except in the circumstances specifically set out in subsections (a) through (e), disclose on the record the basis of disqualification. The judge may participate in the proceeding if, after that disclosure, the parties and their lawyers have an opportunity to confer outside the presence of the judge, all agree in writing or on the record that the judge should not be disqualified, and the judge is then willing to participate. The agreement should be incorporated in the record of the proceeding.

Code of Conduct for United States Judges, Canon 3D (2009).

Thus, judges must disqualify themselves if a close relative appears as a lawyer before the judge, but absent actual "bias or prejudice" the judge may remain in the case if all of the parties consent to that arrangement (using the prescribed procedure).

(c) The issue here is whether a brother-in-law is a "person within the third degree of relationship" to the judge or the judge's spouse. The ABA Model Judicial Code defines that relationship.

> "Third degree of relationship" includes the following persons: great-grandparent, grandparent, parent, uncle, aunt, brother, sister, child, grandchild, great-grandchild, nephew, and niece.

ABA Model Code of Judicial Conduct, Terminology (2007).

Of course, judges may choose to disqualify themselves in either situation, or may disclose the relationship on the record and follow the process for seeking all of the parties' and their lawyers' consent to the judge hearing the matter.

(d) A comment to the ABA Model Judicial Code explains that judges need <u>not</u> automatically disqualify themselves just because a litigant appearing before the judge is represented by a lawyer who practices in the same firm as one of the judge's close relatives.

> <u>The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not itself disqualify the judge.</u> If, however, the judge's impartiality might reasonably be questioned under paragraph (A), or the relative is known by the judge to have an interest in the law firm that could be substantially affected by the proceeding under paragraph (A)(2)(c), the judge's disqualification is required.

ABA Model Code of Judicial Conduct, Rule 2.11 cmt. [4] (2007) (emphasis added).

The Code of Conduct for United States Judges contains a similar comment.

> <u>The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge.</u> However, if "the judge's impartiality might reasonably be questioned" under Canon 3C(1), or the relative is known by the judge to have an

> interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1)(d)(iii), the judge's disqualification is required.

Code of Conduct for United States Judges, Canon 3C(1)(d)(ii) Commentary (2009) (emphasis added).

Thus, judicial codes take a much more subtle approach to judges handling matters in which one of the litigant's lawyers practices law with the judge's close relative.

A federal statute requires a judge to

> disqualify himself in the following circumstances: . . . He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person: . . . Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.

28 U.S.C. § 455(b)(5)(iii) (emphasis added).

The ABA Model Judicial Code provides that

> [a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality[] might reasonably be questioned, including but not limited to the following circumstances: . . . The judge knows[] that the judge, the judge's spouse or domestic partner,[] or a person within the third degree of relationship[] to either of them, or the spouse or domestic partner of such a person is: . . . acting as a lawyer in the proceeding; [or] . . . a person who has more than a de minimis interest that could be substantially affected by the proceeding.

ABA Model Code of Judicial Conduct, Rule 2.11(A)(2)(b) & (c) (2007) (emphasis added). Thus, the ABA Model Judicial Code applies the standard only if the person has "more than a de minimis[] interest" -- which contrasts with the federal statute's application of the standard if the judge's relative has any interest.

The Code of Conduct for United States judges contains a similar rule.

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances in which: . . . the judge or the judge's spouse, or a person related to either within the third degree of relationship, or the spouse of such a person is: . . . acting as a lawyer in the proceeding; [or] . . . known by the judge to have an interest that could be substantially affected by the outcome of the proceeding.

Code of Conduct for United States Judges, Canon 3C(1)(d)(ii) & (iii) (2009) (emphasis added).

These prohibitions apply if the judge's relative has a financial interest (of the specified level -- either any interest or a de minimis interest) that could be "substantially affected by the proceeding." Thus, none of the judicial codes require the judge's relative to have a "substantial" financial interest. Rather, the rules apply if the relative has a financial interest that could be "substantially" affected by the matter before the judge.

If the lawyer's close relative is a partner in a firm representing a litigant before the judge, there is at least a strong chance that the judge's relative has "an interest that could be substantially affected by the outcome of the proceeding" (the statutory standard) or "has more than a de minimis interest that could be substantially affected by the proceeding" (the ABA Model Judicial Code standard).

Thus, some courts take a per se approach.

> A federal judge must disqualify himself from consideration of a case if a person within the third degree of relationship "[i]s acting as a lawyer in the proceeding(.)" . . . Further, a judge must recuse if such a family member "[i]s known by the judge to have an interest that could be substantially affected by the outcome of the

> proceeding." . . . That a relative within the proscribed proximity stands to benefit financially as a partner in a participating firm - even if the relative is not himself involved - is sufficient to require recusal. . . . In this case, petitioner Price is the nephew of Chief Judge U.W. Clemon of the Northern District of Alabama, and is a full partner in LMPP. There is thus no dispute that, under Sections 455(b)(5)(ii) and 455(b)(5)(iii), Judge Clemon may not hear cases in which Price or LMPP is acting as a lawyer or a firm in which he is a full partner is a participant.

In re BellSouth Corp., 334 F.3d 941, 943-44 (11th Cir. 2003) (emphasis added). This per se approach does not appear in the judicial ethics rules -- which reject such an absolute rule.

States' judicial ethics advisory committees take varying positions. Those adopting an unforgiving attitude have indicated that judges must disqualify themselves if:

- A lawyer from a law firm employing the judge's daughter appears before the judge.[2]
- A lawyer from a law firm employing the judge's relative appears before the judge.[3]

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[2] Fla. Judicial Ethics Advisory Comm. Op. 2006-26 (10/31/06) ("JEAC Opinion 98-20 is dispositive of this inquiry. In that opinion, this Committee held that even though the judge's daughter would not personally be the attorney of record in the case before the judge, the judge should recuse himself from presiding over cases in which the law firm where his daughter is employed is the law firm of record, unless all parties agree to a remittal of disqualification pursuant to Canon 3F. . . . The Committee pointed out that Canon 3E(1)(d)(ii), . . . Florida Code of Judicial Conduct, requires a judge's disqualification if the judge's child is the attorney of record. Canon 3E(1)(d)(iii) also requires a judge's disqualification if a person within the third degree of relationship to the judge 'is known by the judge to have a more than de minimis interest that could be substantially affected by the proceeding.' The Committee held in JEAC Opinion 98-20 that a judge's child has more than a de minimis economic interest that could be substantially affected by the proceeding when the judge's child is associated with the law firm appearing before the judge.").

[3] Id.; Fla. Judicial Ethics Advisory Comm. Op. 2003-18 (10/31/03) (analyzing the following situation: "Whether a judge is obligated to disclose and disqualify himself or herself when the law firm employing the judge's niece as a legal intern appears before the judge."; responding as follows: "Whether a judge is obligated to disclose and disqualify himself or herself when a law firm appears before the judge that has employed the judge's brother as an expert witness in a different matter not pending before the judge.";

- A lawyer from a law firm employing the judge's wife appears before the judge.[4]

Committees taking a more liberal approach have required disclosure to the parties (but not automatic disqualification) if:

- A lawyer from a law firm employing the judge's relative appears before the judge.[5]

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pointing to an earlier opinion which "stated that a judge should not sit on any case involving the law firm in which one of the judge's nephews was a partner, and another nephew was an associate").

[4] North Carolina LEO 1 (10/21/05) (analyzing the following situation: "Assume that Attorney A has no involvement in a matter coming before Judge B, her husband. The matter involves fees for Law Firm either because it is a collection case on behalf of Law Firm or because there is a claim for attorney's fees associated with the underlying claim (e.g., custody or child support in district court; Rule 11 in Superior Court). May members of Law Firm appear before Judge B without disclosing Attorney A's relationship?"; answering in the negative: "If Attorney A stands to benefit directly from a favorable outcome, then Judge B, Attorney A's husband, would also benefit financially. Under these circumstances, Law Firm may seek first to have the matter heard by someone other than Judge B if possible. If it is not possible, disclosure should be made to opposing counsel so that he has the opportunity to move for recusal. Law Firm should disclose Attorney A's relationship, even where Attorney A would not directly benefit financially from the outcome. See Opinion #2, above. In addition, Judge B may independently determine that he must recuse himself under the Code of Judicial Conduct because his impartiality may be reasonably questioned under the circumstances."; finding that the lawyer in question could appear before other judges in the same judicial district).

[5] Fla. Judicial Ethics Advisory Comm. Op. 2007-16 (10/8/07) (holding that a judge has to disclose to litigants that the judge's son-in-law was employed by a litigant's law firm as a law clerk, but would not be automatically disqualified from handling the case; "Issues of disqualification, arising out of the employment of a judge's relative by a law firm, have been the subject of numerous opinions by this Committee. In the distant past, this Committee opined that disqualification was not required when the judge's son was employed by a law firm as summer help in a non-legal capacity or when the judge's son-in-law was a law clerk."; "The more recent trend of opinions has required disqualification in almost all cases in which a relative of the [judge's] spouse is employed by a law firm. The recent opinions are a clear departure from the above referenced opinions. For example, this Committee's most recent opinion recommended disqualification when the judge's spouse is employed by a law firm as a paralegal. Fla. JEAC Op. 07-14. Other examples are JEAC Opinion 82-17 that required disqualification when the judge's son, who was not yet a member of the Florida Bar, was working with a law firm; JEAC Opinion 92-8 that required disqualification in cases involving a law firm in which the wife works (without specifying the nature of the employment); and Florida JEAC Opinion 03-18 that required disqualification in cases involving a law firm employing the judge's niece, a second year law student, as a summer intern. The facts of JEAC Opinion 03-18 are very similar to the current inquiry, and if this Committee followed the rationale of that opinion, disqualification would be required."; "This Committee is now of the opinion that the trend toward bright line requiring disqualification in all cases involving the employment of a judge's relative by a law firm may be misplaced."; "Even though disqualification is not required under the facts of this inquiry, the Judge should disclose to the parties the relationship that the son-in-law has with the law firm."); North Carolina LEO 1 (10/21/05) (assessing the following situation: "Law Firm hires Attorney A, who is married to District Court Judge B. Attorney A is also the daughter of Senior Resident Superior Court Judge C. Judges B and C are in the same judicial district and the lawyers in Law Firm regularly appear before judges in this district, including Judges B and C."; holding as follows: "While Attorney A

- A lawyer from a law firm employing the judge's cousins appears before the judge.[6]

- A lawyer appears before the judge from a United States Attorney's office that employs the judge's child.[7]

As explained above, a judge considering that she is not required to disqualify herself under the "bias and prejudice" standard can handle the issue by disclosing the relationship and letting the litigants and their lawyers decide whether to insist that the judge step aside. ABA Model Code of Judicial Conduct, Rule 2.11(C) (2007); Code of Conduct for United States Judges, Canon 3D (2009).

(e) If the judge's close relative is an associate in a law firm representing a litigant before the judge, it seems less likely that the relative would have an interest that meets the disqualifying standards mentioned above.

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may not personally appear before Judges B and C without consent from all parties involved in the matter, a member of Attorney A's firm is not disqualified. See CPR 225 (lawyer permitted to appear before judge who is his brother with consent from all parties to the matter). A previous ethics opinion held that the personal disqualification of a lawyer from practicing before a family member ordinarily is not imputed to the other members of the lawyer's firm. CPRs 226 and 367. Nonetheless, a judge may determine independently that he must recuse himself if his impartiality may be reasonably questioned by reason of financial interests or some other special circumstances. Canon III D of the Code of Judicial Conduct; see also 97 Formal Ethics Opinion 1."); Comm. on Codes of Conduct [for United States Judges] Advisory Op. 58 (7/10/98) (analyzing to what extent a judge's relative has an "interest" that could be substantially affected by a proceedings outcome; "The Committee concludes that an equity partner in a law firm generally has 'an interest that could be substantially affected by the outcome of the proceeding' in all cases where the law firm represents a party before the court.").

[6] Fla. Judicial Ethics Advisory Comm. Op. 2004-06 (2/6/04) (responding affirmatively to the question "[w]hether a judge is required to announce or otherwise notify the parties when a lawyer from law firms employing the judge's two first cousins appears before the judge."; "Two years is a reasonable period of time for a judge to disqualify himself or herself from hearing any cases handled by the judge's former law firm, so long as at the end of two years there are no financial ties between the judge and former law firm including, but not limited to, outstanding fees, buyout, or ownership of real estate.").

[7] Comm. on Codes of Conduct [for United States Judges], Advisory Op. 38 (7/10/98) ("The last question is raised here, specifically, 'Can the judge's impartiality reasonably be questioned because the judge's child is an assistant United States attorney?' It does not seem reasonable to do so in view of the unique nature and obligations of the United States attorney's office, which does not represent clients, as do private law firms, but rather, the public interest."; "In view of this basic distinction, it would seem unreasonable to question the judge's impartiality merely because the judge's child happened to be an assistant United States attorney.").

Best Answer

The best answer to **(a)** is **MAYBE**; the best answer to **(b)** is **NO (WITHOUT CONSENT)**; the best answer to **(c)** is **MAYBE**; the best answer to **(d)** is **PROBABLY NO (WITHOUT CONSENT)**; the best answer to **(e)** is **MAYBE**.

Judges' Disqualification Based on Previous Partnership or Employment Relationship with Lawyers

Hypothetical 13

You joined a large law firm right out of law school, and practiced there for about 20 years before becoming a judge. You knew some of the lawyers at the firm very well during your tenure there, but as in any large firm there are some lawyers you hardly knew at all (and many you never met).

May you hear a case if a lawyer at your former firm represents one of the litigants?

MAYBE

Analysis

Interestingly, nothing in the ABA Model Judicial Code (or its state equivalents) requires judges to recuse themselves if a litigant before the judge has hired the law firm in which the judge previously served as a partner or as an associate.

The bottom line is that judges must recuse themselves "in any proceeding in which the judge's impartiality[] might reasonably be questioned." ABA Model Code of Judicial Conduct, Rule 2.11(A)(1) (2007). Accord Code of Conduct for United States Judges, Canon 3C(1) (2009).

Any possible grounds for disqualification falling short of this standard (which cannot be cured with the litigants' consent) allows the judge to remain in the case if the litigants and their lawyers consent after a full disclosure. ABA Model Code of Judicial Conduct, Rule 2.11(C) (2007); Code of Conduct for United States Judges, Canon 3D (2009).

The lack of any specific rules governing this situation means that judges have essentially three options:

- Disqualify themselves because they either themselves do not believe that they can act impartially, or because they believe a reasonable person would doubt that impartiality.

- Disclose their prior relationship with the firm, and continue hearing the case if all litigants and their lawyers consent.

- Decide not to make the disclosure, because it does not rise to the level requiring such disclosure.

This analysis might also be affected by what is called the "rule of necessity" -- in which a judge may continue to hear a case even if the judge would otherwise be disqualified, if no other judge can hear the case.

Even in the absence of actual necessity, many judges select one of the options in light of the availability of other judges. For instance, a judge in a small rural location might choose to hear cases in which one of his or her former partners is a lawyer (either with or without disclosure), because the judge does not want to burden other judges, who have to hear cases that the judge decides not to hear. On the other hand, a judge in a large urban setting might automatically disqualify himself or herself from handling cases in which a litigant is represented by a former colleague -- knowing that the case can easily be assigned to one of the many other judges in the courthouse.

Not surprisingly, judges also consider the lapse of time since they practiced in the firm representing one of the litigants. A judge might disqualify himself or herself for a certain period of time after leaving the firm, but at some point might consider either disclosure or eventual nondisclosure as the judge's relationship with the firm recedes into the past.

Somewhat surprisingly, some judges take almost a per se attitude toward this situation, disqualifying themselves if any lawyer from their old firm appears on behalf of

a litigant. In some situations, the judges have applied what amounts to the other side of the coin -- preventing a lawyer from appearing before them if that appearance would prompt the judge's disqualification.

- Order at 2, 2-3, 3, 4, 4-5, Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp., No. 00-1218 (Fed. Cir. Nov. 28, 2001) (not citable as precedent pursuant to Fed. Cir. R. 47.6) (addressing a situation in which ex-solicitor general Seth Waxman and his new firm of Wilmer Cutler appeared as counsel for appellant DeKalb Genetics after that company had summary judgment entered against it; holding that Wilmer Cutler "surely knew that upon the filing of its entry of appearance, two members of the [federal circuit] panel would be called upon to determine" whether Wilmer Cutler's appearance "counsels their disqualification from further proceedings in this case" (emphasis added); explaining that one member of the panel departed from Wilmer Cutler in 1990 and at that time severed all financial connections with Wilmer Cutler, while another member of the panel "more recently retained a financial interest in the firm"; noting that the Second Circuit was "similarly disrupted" in an early case involving similar facts; concluding that "[w]e see no reason not to follow the rule that in these circumstances, the judges stay and the new lawyers go"; acknowledging that "[t]his court, of course, cannot know precisely why Mr. Waxman's skills have been sought by Appellant"; "If he is desired only for strategic advice, no entry of appearance would have been required, and we would have been saved the need to examine our duties under the Canons. Mr. Waxman's entry however leaves open substantive participation by Wilmer, Cutler & Pickering in the remainder of the appeal here, and it is that situation which compels our invocation of the rule that protects the integrity of our appellate process."; sua sponte ordering Mr. Waxman and Wilmer Cutler to withdraw their entry of appearance).

- In re Federal Communications Comm'n, 208 F.3d 137, 139, 139-40, 139 n.1 (2d Cir. 2000) (addressing a situation in which Gibson, Dunn entered an appearance for its client NextWave in preparation for a petition for rehearing, thereby triggering the recusal of one of the judges who signed the order that NextWave sought to overturn; noting that "[i]t cannot have escaped the notice of the Gibson, Dunn firm and its several partners that one of the members of this Court's panel, Judge Robert Sack, was a member of that firm from 1986 until 1998. It was therefore obvious that Gibson, Dunn's appearance, if accepted by this Court, would draw into question Judge Sack's ability or willingness to remain on the panel, regardless of whether counsel focused on the relevant texts." (emphasis added); ultimately rejecting the appearance of Gibson, Dunn; "Once the members of a panel assigned to hear an appeal become known or knowable, counsel thereafter retained to appear in that matter should consider whether appearing might

> cause the recusal of a member of the panel. We make no finding as to good faith or intent by the estimable lawyers of Gibson, Dunn. It is clear, however, that tactical abuse becomes possible if a lawyer's appearance can influence the recusal of a judge known to be on a panel. Litigants might retain new counsel for rehearing for the very purpose of disqualifying a judge who ruled against them. As between a judge already assigned to a panel, and a lawyer who thereafter appears in circumstances where the appearance might cause an assigned judge to be recused, the lawyer will go and the judge will stay. . . . So the failure of counsel to consider in advance the known or knowable risk of a judge's recusal may result in the rejection of the appearance by that lawyer or firm."; ironically, noting that "On March 2, 2000, a motion was made by Global Crossing Ltd. and Liberty Media Corporation for leave to file a brief amicus curiae in support of NextWave's position. The motion, which has yet to be adjudicated, was filed by Simpson Thacher & Bartlett. A second member of the panel is a former partner of that firm; and a current partner of that firm is the son of the third member of this panel.").

Although no provision of any judicial code requires such a strict approach, these cases highlight the ability of judges to essentially decide for themselves how to handle the presence of lawyers who are former colleagues.

Best Answer

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

Judges' Disqualification Based on a Litigant's Lawyer's or Law Firm's Representation of the Judge in Unrelated Matters

Hypothetical 14

You have served on the bench for just a few weeks, but glancing ahead at your docket has raised some issues that require your attention.

(a) May you hear a case in which one of the litigant's lawyers is simultaneously preparing your personal estate plan?

NO (ABSENT DISCLOSURE AND CONSENT)

(b) May you hear a case in which one of the litigant's lawyers is representing you in your official capacity (responding to a petition for writ of mandamus filed in another case)?

MAYBE

(c) May you hear a case in which one of the litigant's lawyers is in a law firm preparing your estate plan (the litigant's lawyer has nothing to do with that work for you)?

MAYBE

(d) May you hear a case in which one of the litigant's lawyers is representing your spouse in a small dispute involving the florist shop that your spouse operates?

NO (PROBABLY) (ABSENT DISCLOSURE AND CONSENT)

(e) May you hear a case in which one of the litigant's lawyers represented you in your divorce (which was final ten years ago)?

MAYBE

Analysis

As in all issues involving a judge's possible bias, the bottom line is that the judge must disqualify himself or herself "in any proceeding in which his [or her] impartiality

might reasonably be questioned." 28 U.S.C. § 455(a). The ABA Model Judicial Code[1] and the judicial code governing federal judges[2] take the same approach.

If the possible impartiality does not rise to that high level, judges can disclose the possible grounds for disqualification to the litigants and their lawyers, and continue to hear the case if the litigants and their lawyers consent under the prescribed procedure. ABA Model Code of Judicial Conduct, Rule 2.11(C) (2007); Code of Conduct for United States Judges, Canon 3D (2009).

Interestingly, there is no specific provision in the statute or any judicial code dealing with the situation in which a litigant's lawyer (or law firm) currently or previously represented the judge or another person in a matter involving the judge.

(a) Despite the absence of any specific judicial ethics rule requiring it, many judicial ethics advisory committees and courts have stated the general rule that judges must disqualify themselves if one of the parties in a case before the judge is representing that judge in an unrelated matter.

- Berry v. Berry, 765 So. 2d 855, 857, 857-58, 858 (Fla. Dist. Ct. App. 2000) (granting a petition for writ of prohibition, and disqualifying a trial judge from handling a divorce case because the judge hired the lawyer representing the husband in the divorce case to represent the judge in his own divorce; explaining that "the trial judge should have immediately entered the order disqualifying himself"; "Whatever the reason, after such a lengthy delay, it is unlikely the trial judge would be able to draft its own comprehensive and detailed judgment without further exercising his discretion. As a result, the reduction of the judge's oral ruling to writing was no longer ministerial and the exception could not apply. Moreover, such a scenario involves the unusual situation where the husband's attorney was submitting a proposed judgment on behalf of one dissolution client (the husband) to another dissolution client

[1] ABA Model Code of Judicial Conduct, Rule 2.11(A)(1) (2007) ("[a] judge shall disqualify himself or herself in any proceeding in which the judge's impartiality[] might reasonably be questioned").

[2] Code of Conduct for United States Judges, Canon 3C(1) (2009) ("A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.").

(the judge) for approval. This is unacceptable."); "The instant case was pending and issues including attorney's fees remained unresolved. The trial judge had an affirmative duty to disqualify himself or, at the very least, to make a disclosure to the parties regarding his attorney/client relationship with the husband's attorney. The trial took place on December 10, 1999. At that time, there was no attorney/client relationship between the judge and the husband's attorney. When the trial judge established his own attorney/client relationship with the husband's attorney in February of 2000, the trial judge had an obligation to disclose the relationship immediately upon its creation. Taking the allegations in the wife's motion to disqualify as true, no disclosure was made.").

- Utah Judicial Ethics Informal Advisory Op. 00-4 (7/5/00) (holding that a judge must recuse if a lawyer representing her before a Judicial Inquiry Commission appears before her, even though the Judicial Inquiry Commission proceedings are confidential; also holding that the recusal obligation continues for six months after the representation ends; "The reason for requiring disqualification for an additional period is that a person could reasonably question a judge's impartiality while the case is still fresh in memory. There is no standard or basis upon which to calculate a reasonable time. The period of time should simply be sufficient to allow any reasonable inferences of partiality to subside. While it might be tempting to create different time lines based on the many different outcomes that can result from a Judicial Conduct Commission proceeding (keeping in mind the public or private nature of the result), it is more predictable and workable for a single time line to be established. The Committee believes that six months is a reasonable time. A judge must therefore enter disqualification in proceedings involving an attorney who represents a judge before the Judicial Conduct Commission and the requirement of disqualification continues for six months after the representation has ended.").

- Florida Judicial Ethics Op. 99-13 (4/27/99) (holding that a judge "must automatically recuse herself" ("even if the parties do not request recusal") when the judge is currently represented by a lawyer appearing before the judge, or any lawyer from that firm).

- Alabama Judicial Ethics Advisory Op. 98-704 (7/31/98) (holding that a judge must recuse himself if a lawyer appearing before the judge represents one of the judge's co-defendants in an unrelated case, the judge's opponent in an unrelated case, the judge's spouse in an unrelated case, or the judge himself in a fiduciary or official role).

- In re Cooks, 694 So. 2d 892 (La. 1997) (disciplining a judge because (among other things), the judge had not recused herself based on her "close personal relationships" with the attorney and party in a case in her court).

- Washington Judicial Ethics Op. 97-06 (5/12/97) (addressing the following situation: "Should a judge recuse in a case in which the lawyer representing the judge in a private matter appears before the judge? If the judge is the recipient of legal services from an attorney sponsored by an organization like the American Civil Liberties Union or provided through an insurance company must the judge recuse when that attorney appears before the judge?"; finding that the judge must disclose the representation, and might be able to remit the disqualification; "Under CJC Canon 3(D)(1), a judge should disqualify him or herself from hearing a case when the judge's impartiality might reasonably be questioned. In Opinion 95-12, the Committee stated that, where an attorney is currently representing a judge in a personal capacity, the judge should disqualify because that circumstance is one in which his or her impartiality might reasonably be questioned. This response does not change regardless of whether the judge receives legal services in a personal capacity from an attorney sponsored by an organization, provided through an insurance company or retained by the judge personally."; explaining that the bar had insufficient facts to determine if disclosure and recusal would be sufficient).

- Atkinson Dredging Co. v. Henning, 631 So. 2d 1129 (Fla. Dist. Ct. App. 1994) (granting a writ of prohibition where judge refused to recuse herself; disqualifying a trial judge because she and her husband were being represented in a separate unrelated action by one of the lawyers appearing before the judge).

- Alabama Judicial Ethics Advisory Op. 82-168 (12/21/82) (holding that a judge must disqualify himself "from hearing any proceeding in which the attorney for one of the parties performs legal work for the judge in an unrelated matter."; not holding out the possibility of disclosure and remittal).

Only a few courts and state bars do not require judges to disqualify themselves in this setting.

- Lueg v. Lueg, 976 S.W.2d 308, 311 (Tex. App. 2009) (finding recusal was unnecessary in a situation in which a trial judge allowed a fellow judge to decide whether the trial judge should recuse himself because he was being simultaneously represented by a lawyer representing the husband in a divorce case pending before the trial judge; affirming other judge's ruling that disqualification was unnecessary; holding that in the case before the court "we view the attorney-client relationship between Flores [judge] and Evins [lawyer representing the judge in an "ongoing civil lawsuit"] as a prima facie basis for recusal of the judge"; also noting that Texas generally follows the fact-specific analysis; "Under Justice Enoch's [judge issuing a 1995 opinion dealing with recusal motions] standard, nevertheless, the relevant perception

of impartiality must be based on all the facts. In the context of an attorney-client relationship, there are an infinite number of circumstances that affect the determination of whether a judge's impartiality 'might reasonably be questioned.' These run the continuum from near-certainty of partiality to no reasonable questioning of impartiality. Questions relevant to the analysis might include: Did the attorney represent the judge only as the nominal party in a mandamus proceeding? Is the lawyer representing the judge as a defendant in an action involving his office along with other public officeholders? Is the judge one of a large class of plaintiffs in a class action? Is the lawsuit which affects the judge's financial or personal well-being at issue? How close a relationship exists in truth rather than merely in theory between the judge and the lawyer? What is the attendant publicity that might affect the public's perception of impartiality?"; "The record before Judge Mancias [judge conducting the hearing on the disqualification motion and deciding that Judge Flores did not have to recuse himself] gave virtually no insight into the nature of Flores's representation of Evins. We thus have an insufficient basis for reaching the conclusion that recusal was mandated.").

- Bank of Tex., N.A. v. Mexia, 135 S.W.3d 356, 361 (Tex. App. 2004) (rejecting the argument that a trial judge should have recused himself because he was currently being represented in an unrelated matter by a lawyer representing a guardian in a case before the judge; "The Trustee contends that the former judge in this case was 'interested' because counsel for the Guardian represented the former judge in his personal capacity in another suit. However, there is no evidence that any matter regarding the other suit, other than the attorney-client relationship, is related to this case. There is no evidence the former judge had a direct pecuniary or property interest in the subject matter of this litigation. Therefore, we cannot agree that relationship constitutes an interest 'which rests upon a direct pecuniary or personal interest in the result of the case presented to the judge.'" (citation omitted)), review denied, No. 04-0553, 2004 Tex. LEXIS 1308 (Tex. Dec. 3, 2004).

- In re Cargill, Inc., 66 F.3d 1256 (1st Cir. 1995) (denying mandamus seeking recusal of a judge; noting that the judge had disclosed to all of the parties that he was represented in a home purchase by a lawyer representing the plaintiff in the case before the judge, and that none of the parties demanded that the judge recuse himself; noting that defendant Cargill had complained about the judge's role only after losing a motion to dismiss).

- Michigan LEO JI-43 (10/3/91) (analyzing the recusal obligations of a judge sitting on the Michigan Court of Appeals; "Absent actual bias or another clear reason, a Court of Appeals judge, sued in one case need not mandatorily recuse from another unrelated case where the lawyer for the judge or for the judge's opponent is engaged."; explaining that "when suit of a substantial

nature, not spurious nor used as a tactic to induce disqualification, is filed against a judge, the judge, even absent actual prejudice against a lawyer or party, should seriously consider recusal, even when not mandatory. This may extend to cases other than the one in which the judge is actually a party, and should last as long as the judge's personal cause is at risk in the hands of the lawyer for any party."; "Thus, with regard to current litigation in which the judge is a party: (1) Absent actual bias or another clear reason, a Court of Appeals judge sued in one case is not per se disqualified from hearing another unrelated case where the lawyer for the judge or for the judge's opponent is engaged[;] (2) The Court of Appeals judge should consider voluntary recusal to avoid an untoward appearance while the judge's own case is pending; if the judge decides the possible attribution of bias or prejudice is too attenuated to warrant recusal, the judge should advise all parties and their counsel of the relationship and seriously consider any subsequent request for recusal[;] (3) While the judge's own case is pending, a Court of Appeals judge should recuse from appellate review of unrelated cases from the trial judge presiding in the appellate judge's own case[;] (4) The judge's own case should have a finite life, and the ensuing disqualifications should be conterminous with it."; explaining that the judge might take the same approach whenever a lawyer from the judge's lawyer's law firm appears).

Courts and judicial advisory committees which do not mandate automatic disqualification require judges to disclose the relationship.

- Kentucky Judicial Ethics Op. JE-103 (10/3/03) (holding that a judge must automatically disqualify himself if a lawyer then representing the judge's adversary in an unrelated matter appears before the judge, although the judge may follow the remittal procedure; also holding that the judge must disclose but does not need to automatically recuse himself if another lawyer in the firm appears before the judge; holding that a judge must follow that same procedure if a lawyer representing one of the judge's co-defendants in the unrelated case appears before the judge).

- Younce v. Pac. Gulf Marine, Inc., 827 So. 2d 1144, 1146 (La. 2002) (holding that a trial judge should have recused himself from a case in which the plaintiff's lawyer was currently representing the judge in another matter; noting that "[t]he disclosure requirement is mandatory," and that the judge had not made the required disclosure; reversing the trial court's failure to recuse himself).

- Nevada Judicial Ethics Op. JE99-007 (1/12/00) (addressing the following situation: "All the district judges in a judicial district have been sued in the Supreme Court by the county clerk in a complaint for usurpation of office

under NRS 35.050 including an application of writ of prohibition. Each of the district judges have been individually named as defendants in their official, public capacity. The complaint does not seek a monetary award from the defendant judges and the judges have no pecuniary interest in the litigation. The attorney general's office has designated two deputy attorneys to provide representation of the judges pursuant to NRS 41.0339."; explaining that the normal recusal rules apply even when a judge is sued in an official capacity; "While the judges have been sued in their official capacity and they have no pecuniary interest in this litigation, the clerk of the court has alleged that the district judges and their predecessors engaged in conduct to usurp her power as an elected official which conduct is unlawful under Nevada's laws and constitution. In order to defend the judges, the designated attorneys general will undoubtedly be required to meet with the judges to review the allegations of the complaint and plan defense strategy in a lawsuit that appears to have the potential to raise strong feelings on both sides. With this background, even though the judges have been named in their official capacity, the Committee believes there is a potential that an opposing party may have reason to question the impartiality of the district judges when facing the two lawyers for the district judges."; "[T]he judges of the judicial district are required to disqualify themselves in any proceeding in which these attorneys appear until this lawsuit is finally resolved. However, a judge disqualified may disclose on the record the basis of this disqualification and ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive this disqualification."; limiting this result to the "specific attorneys representing the judges," and therefore not requiring this process when other lawyers from the attorney general's office appear before the judge; "There may be some possibility that a judge's impartiality would be questioned when a deputy attorney general not involved in the county clerk litigation appears in district court. However, this possibility is remote and even if present, recusal is avoided because necessity requires attorneys general unrelated to this case to represent the interests of the public and the state of Nevada in the courts of the district throughout the pendency of the instant litigation. It would not be practicable to transfer every case in a given judicial district to another judge to cure this problem. 'The rule of necessity thus operates as an exception to the requirement of impartiality, prescribed by the demands of reality.' Judicial Conduct and Ethics, Shaman, Lubet and Alfini (Second Ed. 1995 at Section 4.03 and 4.18).").

- West Virginia Judicial Ethics Advisory Op. (3/16/99) ("If a judicial officer uses a local attorney to assist him/her in adopting a child, then the judicial officer must disclose this relationship in all cases in which the attorney appears before him/her. Moreover, the judicial officer should recuse himself/herself in all cases when asked to do so after the relationship has been disclosed. The above opinion applies even when the judicial officer has not actually

- Illinois Judicial Ethics Op. 95-2 (3/7/95) ("The appearance before a judge of a lawyer who represents the judge involves a situation where the judge's impartiality might reasonably be questioned. Consequently, the judge is disqualified from hearing any matters involving the lawyer unless, following the judge's disclosure of his or her relationship with the lawyer, the parties agree in writing to waive the disqualification pursuant to Illinois Supreme Court Rule 63D."; taking a fact-intensive approach in determining how long the disclosure and recusal obligation lasts after the representation ends; "It might be easy to select the three-year or seven-year standard and argue that such a period would serve as a 'safe harbor' for any judge who has previously been in a lawyer-client relationship with a lawyer representing a litigant, but to do so would be a disservice. One can analogize different types of representation to these differing standards. For example, representation of the judge on a ticket for exceeding the speed limit or at a closing on the purchase of a home may well be de minimis such that the lawyer could appear from the judge immediately following termination of the representation. In contrast, the lawyer representing the judge in the judge's dissolution of marriage involves a more extensive lawyer-client relationship where the three-year standard might be appropriate. The Committee could identify no specific examples [where] the fact that the lawyer represented a judge might justify disqualification for seven years as any possible question as to the judge's impartiality relates under that provision to the litigant and not to the lawyer representing the litigant. To do so may make it unreasonably difficult for a judge to obtain legal representation."; explaining that the judge should disclose any earlier representation, and follow the procedures for possible remittal of the disqualification.).

- Washington Judicial Ethics Op. 89-13 (6/15/89) ("[A] court commissioner may not hear any matters which are not agreed (whether the same be actively contested or any posture of default) in which the attorney who represents the commissioner in a lawsuit in the commissioner's personal capacity is involved or the opposing counsel in the lawsuit is involved. This restriction shall apply while the lawsuit is pending or for a reasonable period of time after its termination. The type of lawsuit is not relevant to the issue of disqualification. The court commissioner may hear matters in which the attorney is associated with either the commissioner's attorney or opposing counsel if 1) the commissioner discloses on the record the relationship to the commissioner's attorney or opposing counsel, 2) that attorney is not associated in any way with the commissioner's lawsuit and the commissioner's attorney or opposing counsel have not been involved in the matter before the commissioner, and 3) offers to recuse. The commissioner

may enter all agreed orders brought by the commissioner's attorney, opposing counsel, or any of their associates.").

In some settings, the "rule of necessity" requires a judge's continued service despite such a relationship with one of the party's lawyers. The "rule of necessity" arises when the otherwise disqualified judge is the only one who can hear a case.

- Nevada Judicial Ethics Op. JE99-007 (1/12/00) (addressing the following situation: "All the district judges in a judicial district have been sued in the Supreme Court by the county clerk in a complaint for usurpation of office under NRS 35.050 including an application of writ of prohibition. Each of the district judges have been individually named as defendants in their official, public capacity. The complaint does not seek a monetary award from the defendant judges and the judges have no pecuniary interest in the litigation. The attorney general's office has designated two deputy attorneys to provide representation of the judges pursuant to NRS 41.0339."; explaining that the normal recusal rules apply even when a judge is sued in an official capacity; "While the judges have been sued in their official capacity and they have no pecuniary interest in this litigation, the clerk of the court has alleged that the district judges and their predecessors engaged in conduct to usurp her power as an elected official which conduct is unlawful under Nevada's laws and constitution. In order to defend the judges, the designated attorneys general will undoubtedly be required to meet with the judges to review the allegations of the complaint and plan defense strategy in a lawsuit that appears to have the potential to raise strong feelings on both sides. With this background, even though the judges have been named in their official capacity, the Committee believes there is a potential that an opposing party may have reason to question the impartiality of the district judges when facing the two lawyers for the district judges."; "[T]he judges of the judicial district are required to disqualify themselves in any proceeding in which these attorneys appear until this lawsuit is finally resolved. However, a judge disqualified may disclose on the record the basis of this disqualification and ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive this disqualification."; limiting this result to the "specific attorneys representing the judges," and therefore not requiring this process when other lawyers from the attorney general's office appear before the judge; "There may be some possibility that a judge's impartiality would be questioned when a deputy attorney general not involved in the county clerk litigation appears in district court. However, this possibility is remote and even if present, recusal is avoided because necessity requires attorneys general unrelated to this case to represent the interests of the public and the state of Nevada in the courts of the district throughout the pendency of the instant litigation. It would not be practicable to transfer every case in a given

judicial district to another judge to cure this problem. 'The rule of necessity thus operates as an exception to the requirement of impartiality, prescribed by the demands of reality.' Judicial Conduct and Ethics, Shaman, Lubet and Alfini (Second Ed. 1995 at Section 4.03 and 4.18).").

- Alabama Judicial Ethics Advisory Op. 95-581 (11/13/95) ("The Judicial Inquiry Commission has considered your request for an advisory opinion as to whether a judge is disqualified under the Canons of Judicial Ethics from hearing cases in which a party is represented by a lawyer who also represents a class of which the judge is a member in unrelated litigation. Two Alabama judges, as named class representatives, brought the class action suit against the State Comptroller seeking a declaratory judgment with respect to the state statutes which provide that counties may supplement state expenditures for salaries of judges within their county. The suit alleges on behalf of the class that said statutes and local enactments are unconstitutional and are in violation of the Alabama and Federal Constitutions."; "It is the opinion of the Commission that due to the Rule of Necessity, the judge is not disqualified from sitting in such proceedings.").

A few authorities (including the ABA) have dealt with a lawyer's dilemma if a judge/client refuses to comply with the recusal or disclosure request.

- Michigan LEO R-20 (7/25/08) (analyzing the admittedly "extremely rare" situation in which a judge would refuse to disclose a lawyer's representation of the judge, and refuse to offer to disqualify himself or herself based on that representation; explaining that a lawyer in that awkward situation "may make a direct contact with the judge to urge the judge to raise the issue of disqualification" -- recognizing the prohibition on ex parte communications with a judge, but concluding that such a communication would pertain to the "independent matter" of the judge's disqualification, and "not to the client matter itself"; further explaining that a lawyer who failed in an effort to convince the judge to disqualify himself or herself would have to "withdraw from the representation that would cause the judge to violate [the] Judicial Code" (and thereby causing the lawyer to assist the judge in a violation of the Judicial Code); not explicitly explaining whether the lawyer should withdraw from the representation of the judge or of the other client whose matter is before the judge, but apparently requiring withdrawal from representing the judge).

- ABA LEO 449 (8/9/07) (explaining that: a lawyer considering whether to represent a judge who is simultaneously presiding over a matter involving a client may proceed "only if the lawyer reasonably believes that he will be able to provide competent and diligent representation to each affected client, and each affected client gives informed consent, confirmed in writing"; a judge

considering whether to retain a lawyer who might appear before the judge must recuse himself if the representation would create a "personal bias or prejudice concerning a party or a party's lawyer" (this is a non-waivable ground for disqualification under the new judicial code); a judge represented by a lawyer appearing before him and who determines that he does not have such a personal bias or prejudice may continue presiding if the judge discloses on the record the lawyer's representation of the judge on an unrelated matter, and if the parties and their lawyers consider "out of the presence of the judge and court personnel" whether to weigh the disqualification, and unanimously agree that the judge may continue presiding; a lawyer's silence in the face of a judge's failure to comply with this process himself violates the prohibition on assisting a judge in an ethics violation; a lawyer's reminder to the judge of his duty does not violate the ex parte contact prohibition; if the judge still does not make the required disclosure after such a reminder, the lawyer representing the judge in an unrelated matter may not disclose the representation (which is protected by the ethics duty of confidentiality, although not by the attorney-client privilege); even if otherwise permissible, such a disclosure would not comply with the process mandated by the judicial code; similarly, "the judge's misconduct cannot be cured by reliance on the fact that all parties to the matter already might be aware of the lawyer's representation of the judge in another matter"; if the lawyer discovers that one of his firm's clients is appearing before a judge that the lawyer is representing, "the Committee believes that, at least presumptively, the representation begun later in time is the one from which withdrawal would be required"; the lawyer might also have to withdraw from representing the client, either because the judge might "develop a bias" against the lawyer or his partner, or because the lawyer cannot obtain his other client's consent to the continuation of the representation despite the judge's possible bias (because the lawyer cannot disclose his or his partner's representation of the judge); the lawyer may not report the judge (his client) to the judicial disciplinary authority, because Rule 1.6 trumps the duty to report a judge's misconduct; neither the lawyer nor judicial ethics rules "prescribe specific time periods" that a lawyer "ought not to appear before the judge on behalf of a client" if the lawyer had previously represented the judge; that issue depends on "whether a reasonable person would believe, in light of the time that had elapsed, that the judge's fairness and impartiality could still be questioned"; in making that determination, the lawyer should assess the nature of his representation of the judge (whether it was consequential as a judicial disciplinary proceeding or as inconsequential as a real estate transaction), the size of the fee, whether the representation was isolated or one of a series of matters "and whether the representation was in a matter that was highly confidential or highly publicized"; lawyers considering representing judges might ask the judge to sign an engagement letter pledging to follow the judicial code process, or an engagement letter with "an advance waiver of confidentiality").

(b) Authorities disagree about whether the general rule varies according to the judge's capacity in the litigation in which she is represented by a lawyer who also represents a litigant before the judge.

Some courts and judicial ethics advisory committees apply the same standard if the lawyer in question is representing (or has represented) the judge in her official rather than personal capacity.

- Nevada Judicial Ethics Op. JE99-007 (1/12/00) (addressing the following situation: "All the district judges in a judicial district have been sued in the Supreme Court by the county clerk in a complaint for usurpation of office under NRS 35.050 including an application of writ of prohibition. Each of the district judges have been individually named as defendants in their official, public capacity. The complaint does not seek a monetary award from the defendant judges and the judges have no pecuniary interest in the litigation. The attorney general's office has designated two deputy attorneys to provide representation of the judges pursuant to NRS 41.0339."; explaining that the normal recusal rules apply even when a judge is sued in an official capacity; "While the judges have been sued in their official capacity and they have no pecuniary interest in this litigation, the clerk of the court has alleged that the district judges and their predecessors engaged in conduct to usurp her power as an elected official which conduct is unlawful under Nevada's laws and constitution. In order to defend the judges, the designated attorneys general will undoubtedly be required to meet with the judges to review the allegations of the complaint and plan defense strategy in a lawsuit that appears to have the potential to raise strong feelings on both sides. With this background, even though the judges have been named in their official capacity, the Committee believes there is a potential that an opposing party may have reason to question the impartiality of the district judges when facing the two lawyers for the district judges."; "[T]he judges of the judicial district are required to disqualify themselves in any proceeding in which these attorneys appear until this lawsuit is finally resolved. However, a judge disqualified may disclose on the record the basis of this disqualification and ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive this disqualification."; limiting this result to the "specific attorneys representing the judges," and therefore not requiring this process when other lawyers from the attorney general's office appear before the judge; "There may be some possibility that a judge's impartiality would be questioned when a deputy attorney general not involved in the county clerk litigation appears in district court. However, this possibility is remote and even if present, recusal is avoided because necessity requires attorneys

general unrelated to this case to represent the interests of the public and the state of Nevada in the courts of the district throughout the pendency of the instant litigation. It would not be practicable to transfer every case in a given judicial district to another judge to cure this problem. 'The rule of necessity thus operates as an exception to the requirement of impartiality, prescribed by the demands of reality.' Judicial Conduct and Ethics, Shaman, Lubet and Alfini (Second Ed. 1995 at Section 4.03 and 4.18).").

- Alabama Judicial Ethics Advisory Op. 98-704 (7/31/98) (holding that a judge must recuse himself if a lawyer appearing before the judge represents one of the judge's co-defendants in an unrelated case, the judge's opponent in an unrelated case, the judge's spouse in an unrelated case, or the judge himself in a fiduciary or official role).

- Alabama Judicial Ethics Advisory Op. 96-616 (9/9/96) (holding that a judge must recuse himself when a lawyer appearing before the judge is currently representing the judge in the judge's official capacity; finding that in "extraordinary circumstances" the recusal will be required when another lawyer from the same firm appears before the judge; also explaining that in "extraordinary circumstances" the recusal obligation will continue after the representation ends; "[T]he Commission confirms that a judge is disqualified from hearing cases in which a party is represented by an attorney who represents the judge in unrelated litigation and that such disqualification includes cases where the judge has been sued in his or her official capacity in the unrelated litigation. . . . Ordinarily, such disqualification only applies to the particular attorney who represents the judge and not to other members of that attorney's firm, and such disqualification ceases when the litigation concludes or the representation otherwise ceases. However, since the disqualification arises under the general provision in Canon 3C(1) where disqualification is required because the judge's 'impartiality might reasonably be questioned,' extraordinary circumstances occasionally exist in which disqualification extends either to other members of the attorney's firm or for a period after representation ceases.").

- In re Disqualification of Badger, 47 Ohio St. 3d 604, 604 (Ohio 1989) (ordering the disqualification of a trial judge from hearing a matter in which one of the parties was represented by a lawyer who was simultaneously representing the judge in his official capacity; noting that the judge "had no involvement in the selection of the attorney who represents him," but that a visiting judge should hear the matter).

- Alabama Judicial Ethics Advisory Op. 88-337 (8/2/88) (addressing a situation in which a judge named as a defendant in his official capacity is represented by a defense lawyer; "[I]t is the opinion of the Commission that pending the resolution of the federal litigation the judge is disqualified from sitting in any

proceeding in which either of the judge's attorneys or the plaintiffs' attorneys represents a party. This disqualification does not extend to proceedings where other members of the firms of the disqualifying attorneys represents a party.").

- ABA Informal Ethics Op. 13-31 (6/25/75) (addressing the following situation: "[Y]our firm has been requested by the appropriate court administrator to represent various members of the judiciary of your Commonwealth in actions brought against them under various federal statutes, including, presumably, Title 42, United States Code, Section 1983, and possibly under similar state legislation. Such representation would be on a continuing basis for a modest but compensatory fee paid from public funds, and is necessitated by reason of a recent ruling of the attorney general of the Commonwealth declining to follow the practice of his predecessors of providing defense of such members of the judiciary through his office."; pointing to the "appearance of impropriety" standard in concluding that "in many instances it would be preferable for your firm not to appear before a judge who is then being represented by you in these circumstances. Of course, it would be advisable, if possible, to effect an advance agreement with the court administrator establishing a procedure to avoid any conflicting representation.").

Several other authorities consider the judge's role (as a client) as one of the factors in analyzing the need for disqualification or disclosure.

- Lueg v. Lueg, 976 S.W.2d 308, 311 (Tex. App. 2009) (finding recusal was unnecessary in a situation in which a trial judge allowed a fellow judge to decide whether the trial judge should recuse himself because he was being simultaneously represented by a lawyer representing the husband in a divorce case pending before the trial judge; affirming other judge's ruling that disqualification was unnecessary; holding that in the case before the court "we view the attorney-client relationship between Flores [judge] and Evins [lawyer representing the judge in an "ongoing civil lawsuit"] as a prima facie basis for recusal of the judge"; also noting that Texas generally follow the fact-specific analysis; "Under Justice Enoch's [judge issuing a 1995 opinion dealing with recusal motions] standard, nevertheless, the relevant perception of impartiality must be based on all the facts. In the context of an attorney-client relationship, there are an infinite number of circumstances that affect the determination of whether a judge's impartiality 'might reasonably be questioned.' These run the continuum from near-certainty of partiality to no reasonable questioning of impartiality. Questions relevant to the analysis might include: Did the attorney represent the judge only as the nominal party in a mandamus proceeding? Is the lawyer representing the judge as a defendant in an action involving his office along with other public

officeholders? Is the judge one of a large class of plaintiffs in a class action? Is the lawsuit which affects the judge's financial or personal well-being at issue? How close a relationship exists in truth rather than merely in theory between the judge and the lawyer? What is the attendant publicity that might affect the public's perception of impartiality?"; "The record before Judge Mancias [judge conducting the hearing on the disqualification motion and deciding that Judge Flores did not have to recuse himself] gave virtually no insight into the nature of Flores's representation of Evins. We thus have an insufficient basis for reaching the conclusion that recusal was mandated.").

- Powell v. Anderson, 660 N.W.2d 107, 118 (Minn. 2003) (vacating an order that denied disqualification on a trial judge from hearing a case in which one of the lawyers appearing before the judge was simultaneously representing a trust of which the judge was trustee; pointing to four factors that require a judge's recusal: "First, the reviewing court should consider the extent of the attorney-client relationship. If the relationship consisted of a single, short episode, or even a series of sporadic contacts, disqualification is less likely than if it consisted of a long-term, continuous course of representation. Similarly, representation that had been concluded prior to the instant case is less likely to lead to disqualification than representation that is concurrent with the case."; "Second, the reviewing court should examine the nature of the representation. A direct relationship, where the judge is represented personally, is more indicative of a reasonable question regarding the judge's impartiality than a relationship that only involves the judge in some institutional or technical role. Further, the more serious the matter for the judge, the greater the impact of the representation on the judge's impartiality." (footnote omitted); "Third, the reviewing court should consider the frequency, volume and quality of contacts between the judge and the attorney or law firm. The more frequent and substantial these contacts, the more likely the relationship is to create a reasonable question as to impartiality. Likewise, the closer the contacts come to the subject of the case before the judge, the greater the impact on impartiality."; "Fourth, the reviewing court should take into account any special circumstances that might either enhance or limit (1) the importance of the attorney or firm to the judge and/or (2) the appearance of impropriety to the public."; holding that the judge should have disqualified himself from hearing the case).

- Arizona Judicial Ethics Advisory Op. 02-05 (9/12/02) (analyzing an assistant state attorney general's representation of a judge who has been sued in the judge's judicial role; explaining that there is no per se rule describing how long the judge must recuse himself after the representation ends; "Once the litigation against the judge concludes, he or she should assess whether ongoing disqualification in cases involving the same assistant attorney general is necessary. Relevant considerations include the nature and extent of the prior litigation, whether the judge was personally involved in the matter

as it progressed, and whether he or she shared any confidential information with the assistant attorney general that might give that attorney an advantage when appearing before him or her in the future. Barring such circumstances, however, disqualification would not ordinarily be required once the litigation has ended."; distinguishing the situation from a judge being represented by a lawyer in a private matter; "It is beyond the scope of this opinion to address a judge's duties when his or her personal lawyer is at issue. Different considerations apply in that context because the appearance of bias is more pronounced. Moreover, the relationship will typically be one in which the judge affirmatively selected and retained the lawyer.").

- Tennant v. Marion Health Care Found., Inc., 459 S.E.2d 374 (W. Va. 1995) (addressing a situation in which the judge learned that he was being represented in his official capacity by a lawyer representing a defendant in a case before him; explaining that the judge recused at that time, that a new judge granted plaintiff a new trial; reversing the order granting a new trial, and reinstating the first trial verdict).

- Michigan LEO JI-102 (6/6/95) ("If a lawyer appearing before an administrative hearing officer has previously represented the adjudicator or a member of the judge's household on legal matters, the adjudicator and the lawyer must disclose the prior representation to all other parties and their counsel."; explaining that "[i]f the judge's representation is in an official capacity, disqualification is not per se required"; holding that "[i]n the current inquiry, the former representation of the spouse involved the spouse's personal employment situation. The administrative hearing officer was not involved in that matter as a party, witness, beneficiary of the relief sought, or otherwise. The spouse's representation has been complete for more than a year. It is not known whether the spouse's representation was concluded before the pending matter was undertaken. Under these circumstances, the administrative hearing officer and the lawyer have a duty to disclose the prior representation to opposing parties and their counsel. Whether the judge should recuse is a question determined on the merits of any motion for disqualification which may be filed pursuant to MCR 2.003(C).").

- Washington Judicial Ethics Op. 95-12 (3/10/95) (addressing a situation in which a deputy prosecuting attorney represents a judicial officer in a civil matter in which the judicial officer has been sued in his official capacity; "[T]he judicial officer, who is being sued because of his or her personal involvement or conduct and not merely because the judicial officer is a member of a particular court, may not preside over cases in which the deputy prosecuting attorney handling the judicial officer's case participates, during the pendency of the judicial officer's case. The disqualification, however, does not run to the other members of the prosecutor's office who appear on

either civil or criminal cases unless there are independent circumstances which merit disqualification.").

- New York Judicial Ethics Advisory Op. 94-23 (3/10/94) ("Individual members of a board of judges need not recuse themselves from matters in which members of a law firm representing the board appear. However, if the law firm were to represent the board members individually, then those judges must recuse themselves from matters in which the firm appears. Where a law firm represents a judge as part of a class of judges, and that judge is not named individually in the suit, the judge need not recuse himself or herself from matters in which members of the firm appear.").

(c) Courts and judicial ethics advisory committees disagree about whether judges who would have to disqualify themselves if their lawyer appeared as counsel of record for a party must take the same step if one of the lawyer's partners appears as counsel of record for a party.

Some authorities require judges to take the same step when any lawyer in the firm appears.

- Florida Judicial Ethics Op. 2005-15 (10/19/05) (analyzing the following issue: "Whether a sitting circuit judge who has hired a lawyer to represent him in a civil action against the county, where the judge is the only judge assigned to the probate and guardianship division, needs to file a notice of disqualification in all cases handled by the law firm."; explaining that "[t]he inquiring judge should enter recusal in all cases involving the lawyer and the lawyer's firm").

- Kentucky Judicial Ethics Op. JE-103 (10/3/03) (holding that a judge must automatically disqualify himself if a lawyer then representing the judge's adversary in an unrelated matter appears before the judge, although the judge may follow the remittal procedure; also holding that the judge must disclose but does not need to automatically recuse himself if another lawyer in the firm appears before the judge; holding that a judge must follow that same procedure if a lawyer representing one of the judge's co-defendants in the unrelated case appears before the judge).

- New York Judicial Ethics Op. 91-10 (1/24/91) ("A judge asks about the propriety of hearing cases involving a law firm which is currently representing the judge, through the judge's insurance company, in an automobile accident lawsuit."; "Section 100.3(c) of the Rules of the Chief Administrator requires

that a judge disqualify himself or herself in any proceeding in which the judge's partiality might be questioned. Here, the judge should not handle any cases in which either the law firm, or a member of that firm representing the judge, appears."; "In Opinion 88-153 (Vol. III), this Committee found that a judge should continue to disqualify himself or herself in any matters in which the judge's present or former personal attorney appears for a period of time, considering all the relevant factors. A copy of that opinion is enclosed. If the judge chooses not to disqualify himself or herself, the judge must reveal the prior relationship with the attorney, and should seriously consider disqualification if any party objects.").

- Washington Judicial Ethics Op. 89-13 (6/15/89) ("[A] court commissioner may not hear any matters which are not agreed (whether the same be actively contested or any posture of default) in which the attorney who represents the commissioner in a lawsuit in the commissioner's personal capacity is involved or the opposing counsel in the lawsuit is involved. This restriction shall apply while the lawsuit is pending or for a reasonable period of time after its termination. The type of lawsuit is not relevant to the issue of disqualification. The court commissioner may hear matters in which the attorney is associated with either the commissioner's attorney or opposing counsel if 1) the commissioner discloses on the record the relationship to the commissioner's attorney or opposing counsel, 2) that attorney is not associated in any way with the commissioner's lawsuit and the commissioner's attorney or opposing counsel have not been involved in the matter before the commissioner, and 3) offers to recuse. The commissioner may enter all agreed orders brought by the commissioner's attorney, opposing counsel, or any of their associates.").

Some authorities take exactly the opposite position.

- North Carolina LEO 2005-1 (10/21/05) ("While Attorney A may not personally appear before Judges B and C without consent from all parties involved in the matter, a member of Attorney A's firm is not disqualified. See CPR 225 (lawyer permitted to appear before judge who is his brother with consent from all parties to the matter). A previous ethics opinion held that the personal disqualification of a lawyer from practicing before a family member ordinarily is not imputed to the other members of the lawyer's firm. CPRs 226 and 367. Nonetheless, a judge may determine independently that he must recuse himself if his impartiality may be reasonably questioned by reason of financial interests or some other special circumstances."; holding that the lawyer may not (absent disclosure) work on the case without entering an appearance in the matter; explaining that the lawyer may appear before other judges in the same judicial district without disclosure).

- Utah Judicial Ethics Informal Advisory Op. 00-4 (7/5/00) (holding that a judge must recuse if a lawyer representing her before a judicial inquiry commission appears before her, even though the judicial inquiry commission proceedings are confidential; also holding that the recusal obligation continues for six months after the representation ends; holding that the recusal obligation did not apply to other lawyers in the law firm once the representation ended).

- Arizona Judicial Ethics Advisory Op. 92-11 (9/9/92) (finding that the judge did not have to disqualify himself if he was being represented in a personal matter by a lawyer picked by the insurance company, when another lawyer in that 30-lawyer firm appeared before the judge; "Where the attorney appearing before the judge and the attorney representing the judge are one in [sic] the same and the judge's relationship with the attorney is direct, substantial, and longstanding, a reasonable person could call into question the impartiality of the judge. For example, a judge should not preside over a matter in which his own long-term personal counsel is representing a party. See Mo. Op. 104 (1984), which recommended disqualification when the attorney was used by the judge for ongoing personal legal business such as income tax preparation."; "The facts of the present matter are very different, however. The judge's lawyer is not the lawyer appearing before the judge. They are from the same firm, which is a firm of more than thirty lawyers and in which the judge's lawyer is an associate and the other lawyer a partner. The automobile collision case is entirely unrelated to the case pending before the judge. The judge's insurer selected his lawyer. The judge had no prior attorney-client relationship with that lawyer and contemplates none upon conclusion of the matter."; "Some jurisdictions take a more restrictive view. New York prohibits judges from hearing cases presented by lawyers from the same firm as any lawyer the judge has ever retained, regardless of the directness, duration and substantiality of the relationship. N.Y. Op. 511 (1979)."; commending the judge for having made the disclosure and offering to recuse).

- Alabama Judicial Ethics Advisory Op. 88-337 (8/2/88) (addressing a situation in which a judge named as a defendant in his official capacity is represented by a defense lawyer; "[I]t is the opinion of the Commission that pending the resolution of the federal litigation the judge is disqualified from sitting in any proceeding in which either of the judge's attorneys or the plaintiffs' attorneys represents a party. This disqualification does not extend to proceedings where other members of the firms of the disqualifying attorneys represents a party.").

- Duke v. Pfizer, Inc., 668 F. Supp. 1031, 1034, 1035, 1036 (E.D. Mich. 1987) (denying plaintiff's motion for a new trial for failure of judge to recuse himself; noting that two years earlier the judge had been represented by a lawyer at the Dickinson, Wright firm when the judge had been criticized by a bar

association headed up by another Dickinson, Wright lawyer; "As to that matter, the facts are these. In August of 1984, I gave an interview, which was highly publicized, to a Detroit Free Press reporter. As a result of the interview, the Wolverine Bar Association, whose president at that time was George Ashford, a partner in the firm of Dickinson, Wright, filed a complaint against me with the Circuit Council of the United States Court of Appeals for the Sixth Circuit. Joseph Marshall and Beth DunCombe of the Dickinson, Wright firm were also active, along with George Ashford, in filing the complaint."; "Thomas Kienbaum (then President of the Detroit Bar Association) and John O'Meara, also partners in the Dickinson, Wright firm, volunteered to represent me before the Circuit Council. They explained to me that they felt they had an obligation, as members of the Bar, to assist me because they believed I had been unfairly accused in the Wolverine Bar Association's complaint. I accepted their offer."; "The case was argued before the Circuit Council in December of 1984, and in March of 1985 the Circuit Council dismissed the complaint of the Wolverine Bar Association. Dickinson, Wright was not involved, as a firm, on either side of that matter. The lawyers named acted in their individual capacities."; "I exercise my discretion and I find that there is no appearance of partiality to a reasonable person knowing the following facts: first, that individual members of the Dickinson, Wright firm were on both sides of the complaint filed against me in 1984; and second, that there was a greater than two-year period of repose between the representation of me by Messrs. Kienbaum and O'Meara and the initiation of this case. I am aware of no case that requires a judge to stand aside a priori under similar facts."; "Here, the complaint against me was dismissed by the Circuit Council on March 11, 1985 and this case was assigned to me on March 27, 1987 -- more than two years later. There is no good reason for requiring a longer period of repose for a lawyer who once represented a judge, or proceeded against him, than for a law clerk who worked with a judge more than two years prior to appearing before that judge.").

Some authorities recognize imputation in the private setting, but not in the government setting -- so that judges may hear cases in which a party is represented by another government lawyer from the same office as the lawyer who represents the judge (normally in an official capacity).

- Arizona Judicial Ethics Advisory Op. 02-05 (9/12/02) (analyzing an assistant state attorney general's representation of a judge who has been sued in judge's role; explaining that the recusal issue arises only when the assistant attorney general representing the judge appears before the judge; "The appearance of partiality is significantly diminished when it is another member

of the Attorney General's Office that appears before the judge. The Attorney General employs hundreds of attorneys. Absent actual bias, it is not necessary that the judge disqualify in all cases involving that office during the pendency of the representation. Other jurisdictions recognize this same distinction, requiring disqualification only when it is the judge's own lawyer who appears. See, e.g., N.Y. Ops. 90-197 and 98-14; Wash. Op. 95-12; Nev. Op. 99-007. Nor does the committee deem it necessary for the judge to disclose the fact that he is being represented by the Attorney General's Office in every case in which a member of that office appears.").

- New York Judicial Ethics Op. 97-135 (12/11/97) ("A judge who is a full-time County Court Judge and Surrogate inquires whether a part-time member of the Public Defender's Office, who represents the judge before the State Commission on Judicial Conduct, may ever appear before the judge."; "Although other members of the Public Defender's office may appear before the inquiring judge, it would be inappropriate to permit an attorney representing the judge to appear before him or her. In matters subsequent to the conclusion of the representation of the judge by the attorney, the judge should disclose the relationship to all parties in cases in which the attorney appears and the judge should recuse himself/herself if there is any objection by the attorney's adversary, in order to avoid any appearance of impropriety arising from a situation in which the judge's impartiality might reasonably be questioned.").

- Washington Judicial Ethics Op. 95-12 (3/10/95) (addressing a situation in which a deputy prosecuting attorney represents a judicial officer in a civil matter in which the judicial officer has been sued in his official capacity; "[T]he judicial officer, who is being sued because of his or her personal involvement or conduct and not merely because the judicial officer is a member of a particular court, may not preside over cases in which the deputy prosecuting attorney handling the judicial officer's case participates, during the pendency of the judicial officer's case. The disqualification, however, does not run to the other members of the prosecutor's office who appear on either civil or criminal cases unless there are independent circumstances which merit disqualification.").

- New York Judicial Ethics Op. 98-14 (1/29/88) ("A judge who is being represented by the Attorney General of New York in a Federal District Court action must recuse in cases in which the attorney(s) handling that matter appear before the judge, but need not recuse in cases where the representation is by other assistant attorneys general."; "[T]here is no necessity for recusal in matters in which the appearance is by a member of the Attorney General's staff who had no involvement in the representation of the judge in the Federal Court action. Representation by the office of the Attorney General is not to be analogized to that of representation of a judge

> in a personal matter by a law firm, where disqualification might be required whenever any member of the firm appears. . . . The representation of a judge by the Attorney General in the circumstances stated, is required by law . . . and it cannot be said that there is a unity of interest among Assistant Attorneys General throughout the State as there presumably is among members of a private law firm, so as the require disqualification.").

One bar explained that the imputation normally is not imputed, but imputed the disqualification when two of four lawyers in the firm represented the judge.[3] Another bar explained that the imputation is imputed only in extraordinary circumstances.[4]

(d) Courts and judicial ethics advisory committees disagree about a judge's disqualification obligation if a lawyer appearing before the judge represents (in an unrelated matter) someone <u>other</u> than the judge.

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[3] Alabama Judicial Ethics Advisory Op. 92-443 (4/24/92) (analyzing the following situation: "The Judicial Inquiry Commission is conducting an investigation into allegations of unethical conduct which have been made against you. As part of that investigation, you appeared before the Commission and were represented by Attorney A who is one partner of a law firm composed of four members. Your question is whether you must recuse yourself in any case in which that attorney or any member of that law firm represents a party in a case over which you preside."; "It is the opinion of this Commission that under the particular facts presented by your present situation you are disqualified in any case in which either Attorney A or any member of the law firm of which he is a member represents a party."; "Ordinarily, a judge's disqualification regarding one member of a law firm does not extend to other members of the firm."; explaining that in this case "both Attorney A and Attorney B, two of the firm's four members, are intimately connected with the Commission's investigation of your alleged unethical conduct. Both of these attorneys represent you on the basis of your personal and not your official conduct."; "Your disqualification may not be remitted under the provisions of Canon 3D. Your disqualification to preside over any case in which a party is represented by any member of the law firm will cease upon the official resolution of the pending charges of unethical conduct.").

[4] Alabama Judicial Ethics Advisory Op. 96-616 (9/9/96) (holding that a judge must recuse when a lawyer appearing before the judge is currently representing the judge in the judge's official capacity; finding that in "extraordinary circumstances" the recusal will be required when another lawyer from the same firm appears before the judge; also explaining that in "extraordinary circumstances" the recusal obligation will continue after the representation ends; "[T]he Commission confirms that a judge is disqualified from hearing cases in which a party is represented by an attorney who represents the judge in unrelated litigation and that such disqualification includes cases where the judge has been sued in his or her official capacity in the unrelated litigation. . . . Ordinarily, such disqualification only applies to the particular attorney who represents the judge and not to other members of that attorney's firm, and such disqualification ceases when the litigation concludes or the representation otherwise ceases. However, since the disqualification arises under the general provision in Canon 3C(1) where disqualification is required because the judge's 'impartiality might reasonably be questioned,' extraordinary circumstances occasionally exist in which disqualification extends either to other members of the attorney's firm or for a period after representation ceases.").

Such committees and courts have indicated that judges must disqualify themselves (or at least make the required disclosure) if a lawyer representing a party before the judge also represents the judge's:

- Spouse.[5]
- Adult child.[6]

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[5] Fla. Judicial Ethics Advisory Comm. Op. 2001-17 (11/29/01) (holding that a judge must disclose (for "a reasonable period of time") that a law firm was representing a party before the judge which had previously represented the judge's spouse in a legal malpractice action; "[D]isclosure of the spouse's former relationship with a law firm which now represents one of the parties is mandatory if the judge believes the information is relevant to the question of disqualification, and disqualification is required if the judge's impartiality might reasonably be questioned. The determination of whether the judge's impartiality might reasonably be questioned depends upon the nature and extent of the relationship between the spouse and the attorney, whether the attorney was personally involved with the spouse, the monetary or personal significance of the case to the spouse, and the passage of time since the representation."; noting that "[d]isclosure does not necessarily require disqualification"); Alabama Judicial Ethics Advisory Op. 98-704 (7/31/98) (holding that a judge must recuse himself if a lawyer appearing before the judge represents one of the judge's co-defendants in an unrelated case, the judge's opponent in an unrelated case, the judge's spouse in an unrelated case, or the judge himself in a fiduciary or official role); Michigan LEO JI-102 (6/6/95) ("If a lawyer appearing before an administrative hearing officer has previously represented the adjudicator or a member of the judge's household on legal matters, the adjudicator and the lawyer must disclose the prior representation to all other parties and their counsel."; explaining that "[i]f the judge's representation is in an official capacity, disqualification is not per se required."; holding that "[i]n the current inquiry, the former representation of the spouse involved the spouse's personal employment situation. The administrative hearing officer was not involved in that matter as a party, witness, beneficiary of the relief sought, or otherwise. The spouse's representation has been complete for more than a year. It is not known whether the spouse's representation was concluded before the pending matter was undertaken. Under these circumstances, the administrative hearing officer and the lawyer have a duty to disclose the prior representation to opposing parties and their counsel. Whether the judge should recuse is a question determined on the merits of any motion for disqualification which may be filed pursuant to MCR 2.003(C).").

[6] New York LEO 673 (3/16/95) ("A lawyer may appear before a town justice when the lawyer represents a relative of another town justice in an unrelated action in another court unless there is some other reason that the town justice's impartiality may reasonably be questioned."; "A lawyer may appear before a town justice after having represented the town justice's adult child in an unrelated matter in which the town justice had no involvement."; avoiding any per se rules, and noting the factor that would determine the judge's disclosure and recusal obligation; "'First, if the prior representation of the judge was a character where the judge's personal integrity was at issue or involved a highly emotional situation, such as a bitterly contested matrimonial matter, we believe that the judge should in all cases disqualify himself, irrespective of consent, for several years. Thereafter, the judge should disqualify himself unless the parties remit the disqualification under Canon 3D.'" (citation omitted); "'Second, if the representation was (a) of a routine and economic character, such as buying or selling a home or drawing a routine will, (b) in the course of official duties (and in the nature of a defense of the court rather than of the judge) or (c) provided by an insurer with respect to a fully insured claim, we believe that it is not necessary either for the judge to disqualify himself or for remittal under Canon 3D to be obtained, provided no special circumstances are present. The prior representation, however, should be disclosed.'" (citation omitted);

- Member of the judge's household.[7]
- An estate of which the judge is executor.[8]
- Co-defendant in a case.[9]

"'Third, in cases falling between these two situations, where there are not other special circumstances, and in cases otherwise falling into paragraph (2) above where the representation was in repeated instances, then, for a period of several years, the judge should disqualify himself unless the parties enunciated in paragraph (2) above would apply, and the prior representation must be disclosed.'"(citation omitted); "'It is impossible to fix a specific number of years to the period of disqualification. The length of the period will depend upon whether an objective, disinterested observer would question the judge's impartiality. That, in turn, will depend upon the circumstances surrounding the original representation, the frequently of the lawyer's representation of the judge, and the relationship of the judge and the lawyer since the time of representation.'" (citation omitted); explaining that there is a significant distinction when the lawyer represents the judge's relative rather than the judge herself; "In the present inquiry, the lawyer represents a relative of the judge rather than the judge. . . . This distinction is significant. There can be no presumption of any personal relationship between the judge and the lawyer. The lawyer has had no duty to vigorously represent the judge's interests. . . . While some personal interest in the relative's welfare can be presumed, the judge's interest is likely to be significantly attenuated as compared to that of the relative. Further, since the prior representation is now over, the judge is in no position to confer any benefit upon the relative through favorable treatment of the lawyer. . . . Even owing a debt of gratitude is not enough, alone, to disqualify the judge."; however, explaining that "[t]he existence of a family connection anywhere in the case could reasonably affect an observer's calculation of the judge's impartiality. Therefore, the Committee recommends that a judge assess the prior representation of a relative on the same basis as if the judge himself had been represented by the lawyer, and apply the guidelines set forth in N.Y. State 574. These general principles should be tempered to recognize that the judge's relative, rather than the judge, was the client. This fact, in most instances, would justify a response by the judge that is less than what would be required under N.Y. State 574 if the judge were the represented party. There will be situations, however, that the judge should treat the same as if he or she were represented by the attorney, such as when the judge is directly involved in the matter."; explaining that in the situation before the bar the lawyer was representing the judge's adult child in a matrimonial matter expected to result in an uncontested divorce -- so that "while disclosure should be made for some period of time, disqualification would not appear necessary").

[7] Michigan LEO JI-102 (6/6/95) ("If a lawyer appearing before an administrative hearing officer has previously represented the adjudicator or a member of the judge's household on legal matters, the adjudicator and the lawyer must disclose the prior representation to all other parties and their counsel."; explaining that "[i]f the judge's representation is in an official capacity, disqualification is not per se required."; holding that "[i]n the current inquiry, the former representation of the spouse involved the spouse's personal employment situation. The administrative hearing officer was not involved in that matter as a party, witness, beneficiary of the relief sought, or otherwise. The spouse's representation has been complete for more than a year. It is not known whether the spouse's representation was concluded before the pending matter was undertaken. Under these circumstances, the administrative hearing officer and the lawyer have a duty to disclose the prior representation to opposing parties and their counsel. Whether the judge should recuse is a question determined on the merits of any motion for disqualification which may be filed pursuant to MCR 2.003(C).").

[8] Alabama Judicial Ethics Advisory Op. 87-313 (9/29/87) (holding that a judge must recuse herself if a lawyer appearing before the judge represents the estate of which the judge is serving as an executor).

[9] Kentucky Judicial Ethics Op. JE-103 (10/3/03) (holding that a judge must automatically disqualify himself if a lawyer then representing the judge's adversary in an unrelated matter appears before the

- Opponent in a case.[10]

One bar indicated that a judge would have to disqualify himself if a lawyer appearing before the judge was a witness for or against the judge in a judicial misconduct proceeding.

- New York LEO 602 (10/26/89) ("Lawyer may not appear before judge when member of lawyer's firm is witness in Commission on Judicial Conduct proceeding brought against that judge, absent disclosure and remittal; irrelevant whether testimony will be favorable to judge; judge has primary obligation of recusal; failing recusal or remittal, lawyer must seek to withdraw; to extent permitted by law, opposing counsel and clients having matters before judge must be informed."; "Our analysis of the judge's obligation of recusal must begin by asking whether an appearance by the lawyer witness -- as distinguished from one of his partners or associates -- should require the judge to recuse himself. As long as proceedings before the Commission continue, the lawyer witness may have significant power over the judge's reputation and career. Regardless of whether the witness' testimony will support the judge's position in those proceedings, the witness will be perceived to have some power to influence its outcome. We believe that this power can reasonably raise a question concerning the judge's impartiality. Accordingly, the judge 'should disqualify himself' from matters in which the

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judge, although the judge may follow the remittal procedure; also holding that the judge must disclose but does not need to automatically recuse himself if another lawyer in the firm appears before the judge; holding that a judge must follow that same procedure if a lawyer representing one of the judge's co-defendants in the unrelated case appears before the judge); Alabama Judicial Ethics Advisory Op. 98-704 (7/31/98) (holding that a judge must recuse himself if a lawyer appearing before the judge represents one of the judge's co-defendants in an unrelated case, the judge's opponent in an unrelated case, the judge's spouse in an unrelated case, or the judge himself in a fiduciary or official role); State v. Salazar, 898 P.2d 982, 986, 987 (Ariz. Ct. App. 1995) (addressing a situation in which a criminal defendant was represented by a lawyer who simultaneously represented the judge's former secretary in a lawsuit against the judge; reversing the conviction on the grounds that the judge should have recused himself from the criminal trial; "Various courts also have held that trial judges were disqualified from presiding over litigation in which a party was represented by a lawyer who was then representing the judge in another matter . . . ."; "Although we do not conclude that the judge was actually biased against defendant or defense counsel, that is immaterial. The judge should have been disqualified based on the appearance of partiality.").

[10] Kentucky Judicial Ethics Op. JE-103 (10/3/03) (holding that a judge must automatically disqualify himself if a lawyer then representing the judge's adversary in an unrelated matter appears before the judge, although the judge may follow the remittal procedure; also holding that the judge must disclose but does not need to automatically recuse himself if another lawyer in the firm appears before the judge; holding that a judge must follow that same procedure if a lawyer representing one of the judge's co-defendants in the unrelated case appears before the judge); Alabama Judicial Ethics Advisory Op. 98-704 (7/31/98) (holding that a judge must recuse himself if a lawyer appearing before the judge represents one of the judge's co-defendants in an unrelated case, the judge's opponent in an unrelated case, the judge's spouse in an unrelated case, or the judge himself in a fiduciary or official role).

witness is appearing as counsel." (citation omitted); "Because we believe that the judge should not preside over cases in which the witness appears and it is reasonable to assume that other lawyers in the witness' firm share the witness' knowledge, we find that the judge should also recuse himself from presiding over cases in which the witness' partners and associates appear.").

In contrast, courts and judicial ethics advisory committees have declined to disqualify judges from handling cases in which a lawyer for one of the parties was representing:

- A relative of another judge on the same court.[11]

[11] New York LEO 673 (3/16/95) ("A lawyer may appear before a town justice when the lawyer represents a relative of another town justice in an unrelated action in another court unless there is some other reason that the town justice's impartiality may reasonably be questioned."; "A lawyer may appear before a town justice after having represented the town justice's adult child in an unrelated matter in which the town justice had no involvement."; avoiding any per se rules, and noting the factor that would determine the judge's disclosure and recusal obligation; "'First, if the prior representation of the judge was a character where the judge's personal integrity was at issue or involved a highly emotional situation, such as a bitterly contested matrimonial matter, we believe that the judge should in all cases disqualify himself, irrespective of consent, for several years. Thereafter, the judge should disqualify himself unless the parties remit the disqualification under Canon 3D.'" (citation omitted); "'Second, if the representation was (a) of a routine and economic character, such as buying or selling a home or drawing a routine will, (b) in the course of official duties (and in the nature of a defense of the court rather than of the judge) or (c) provided by an insurer with respect to a fully insured claim, we believe that it is not necessary either for the judge to disqualify himself or for remittal under Canon 3D to be obtained, provided no special circumstances are present. The prior representation, however, should be disclosed.'" (citation omitted); "'Third, in cases falling between these two situations, where there are not other special circumstances, and in cases otherwise falling into paragraph (2) above where the representation was in repeated instances, then, for a period of several years, the judge should disqualify himself unless the parties enunciated in paragraph (2) above would apply, and the prior representation must be disclosed.'"(citation omitted); "'It is impossible to fix a specific number of years to the period of disqualification. The length of the period will depend upon whether an objective, disinterested observer would question the judge's impartiality. That, in turn, will depend upon the circumstances surrounding the original representation, the frequently of the lawyer's representation of the judge, and the relationship of the judge and the lawyer since the time of representation.'" (citation omitted); explaining that there is a significant distinction when the lawyer represents the judge's relative rather than the judge herself; "In the present inquiry, the lawyer represents a relative of the judge rather than the judge. . . . This distinction is significant. There can be no presumption of any personal relationship between the judge and the lawyer. The lawyer has had no duty to vigorously represent the judge's interests. . . . While some personal interest in the relative's welfare can be presumed, the judge's interest is likely to be significantly attenuated as compared to that of the relative. Further, since the prior representation is now over, the judge is in no position to confer any benefit upon the relative through favorable treatment of the lawyer. . . . Even owing a debt of gratitude is not enough, alone, to disqualify the judge."; however, explaining that "[t]he existence of a family connection anywhere in the case could reasonably affect an observer's calculation of the judge's impartiality. Therefore, the Committee recommends that a judge assess the prior representation of a relative on the same basis as if the judge himself had been represented by the lawyer, and apply the guidelines set forth in N.Y. State 574. These general principles should be tempered to recognize that the

- Amicus in a matter before the judge.[12]

(e) Judicial ethics advisory committees and courts have debated the duration of a judge's disclosure or disqualification obligation.

First, some authorities explain that the disclosure or disqualification obligation ends when the lawyer stops representing the judge in the unrelated matter.

- Ex parte Cotton, 638 So. 2d 870, 872-73 (Ala. 1994) (finding that a judge did not have to recuse when he had been previously represented in a settled case by one of the lawyers appearing before the judge; "[A]lthough Judge Nation was represented in the earlier case by one of the attorneys involved in the present case, that earlier case has been settled. It is not a pending case, as was the case that gave rise to the advisory opinion issued by the Judicial Inquiry Commission."; denying a writ of mandamus requiring the judge's recusal).

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judge's relative, rather than the judge, was the client. This fact, in most instances, would justify a response by the judge that is less than what would be required under N.Y. State 574 if the judge were the represented party. There will be situations, however, that the judge should treat the same as if he or she were represented by the attorney, such as when the judge is directly involved in the matter."; explaining that in the situation before the bar the lawyer was representing the judge's adult child in a matrimonial matter expected to result in an uncontested divorce -- so that "while disclosure should be made for some period of time, disqualification would not appear necessary.").

[12] Ainsworth v. Combined Ins. Co. of Am., 744 P.2d 1003, 1023, 1023 n.19 (Nev. 1989) (finding that a Nevada Supreme Court justice did not have to recuse himself when a lawyer then representing the justice in an unrelated matter signed an amicus brief in the case; "Combined asserts that a 'substantial and pervasive appearance of impropriety' exists in this case because Laura FitzSimmons, the attorney who signed the amicus brief on behalf of the NTLA, simultaneously represented former Chief Justice Gunderson in another unrelated matter. Combined contends that vacatur and reargument are warranted because the former Chief Justice should have disclosed this attorney-client relationship or recused himself from participating in this appeal."; "We are persuaded by the responsive affidavits of FitzSimmons and other members of the NTLA amicus curiae committee that FitzSimmons' involvement in Ainsworth was extremely limited and cannot reasonably support any inference of impropriety. For example, the affidavits establish that FitzSimmons did not author the amicus brief, but merely signed it, at the request of the chairman of the NTLA amicus curiae committee, because she was the only Northern Nevada member of the committee available who could not do so in time to insure that the brief was promptly filed with the clerk of this court in Carson City."; "We also note that FitzSimmons' representation of former Chief Justice Gunderson in the above referenced unrelated matter concluded in April of 1987, after the NTLA brief was filed in this case, but before this case was orally argued, and well before the opinion was filed."; "Combined has cited no authorities establishing that an attorney's appearance on behalf of an amicus curiae constitutes representation of a 'litigant.' In our view, it cannot be reasonably contended that the NTLA appeared in this matter as a 'litigant.' Rather, the NTLA was merely allowed to file a brief in this appeal as a 'friend of the court.' Nor can it be reasonably inferred, under the facts cited above, that FitzSimmons' act of signing the NTLA brief and attending a portion of the oral argument amounted to representation of a 'litigant' sufficient to create a disqualifying appearance of impropriety.").

- Alabama Judicial Ethics Advisory Op. 92-443 (4/24/92) (analyzing the following situation: "The Judicial Inquiry Commission is conducting an investigation into allegations of unethical conduct which have been made against you. As part of that investigation, you appeared before the Commission and were represented by Attorney A who is one partner of a law firm composed of four members. Your question is whether you must recuse yourself in any case in which that attorney or any member of that law firm represents a party in a case over which you preside."; "It is the opinion of this Commission that under the particular facts presented by your present situation you are disqualified in any case in which either Attorney A or any member of the law firm of which he is a member represents a party."; "Ordinarily, a judge's disqualification regarding one member of a law firm does not extend to other members of the firm."; explaining that in this case "both Attorney A and Attorney B, two of the firm's four members, are intimately connected with the Commission's investigation of your alleged unethical conduct. Both of these attorneys represent you on the basis of your personal and not your official conduct."; "Your disqualification may not be remitted under the provisions of Canon 3D. Your disqualification to preside over any case in which a party is represented by any member of the law firm will cease upon the official resolution of the pending charges of unethical conduct.").

- Michigan LEO JI-43 (10/3/91) (analyzing the recusal obligations of a judge sitting on the Michigan Court of Appeals; "Absent actual bias or another clear reason, a Court of Appeals judge, sued in one case need not mandatorily recuse from another unrelated case where the lawyer for the judge or for the judge's opponent is engaged."; explaining that "when suit of a substantial nature, not spurious nor used as a tactic to induce disqualification, is filed against a judge, the judge, even absent actual prejudice against a lawyer or party, should seriously consider recusal, even when not mandatory. This may extend to cases other than the one in which the judge is actually a party, and should last as long as the judge's personal cause is at risk in the hands of the lawyer for any party."; "Thus, with regard to current litigation in which the judge is a party: (1) Absent actual bias or another clear reason, a Court of Appeals judge sued in one case is not per se disqualified from hearing another unrelated case where the lawyer for the judge or for the judge's opponent is engaged[;] (2) The Court of Appeals judge should consider voluntary recusal to avoid an untoward appearance while the judge's own case is pending; if the judge decides the possible attribution of bias or prejudice is too attenuated to warrant recusal, the judge should advise all parties and their counsel of the relationship and seriously consider any subsequent request for recusal[;] (3) While the judge's own case is pending, a Court of Appeals judge should recuse from appellate review of unrelated cases from the trial judge presiding in the appellate judge's own case[;] (4) The judge's own case should have a finite life, and the ensuing

disqualifications should be conterminous with it."; explaining that the judge might take the same approach whenever a lawyer from the judge's lawyer's law firm appears).

- South Carolina Judicial Ethics Advisory Op. 2-1990 (1/20/90) ("A judge was represented in a civil matter, two years ago, by an attorney who regularly appears in the judge's court. The matter was settled and no other relationship exists between the lawyer and the judge. A lawyer has raised the issue of the propriety of the judge sitting on cases in which his former lawyer represents one litigant."; "There is no conflict of interest or impropriety in a judge presiding over a trial in which one of the attorneys represented him in past litigation, provided that litigation is over, that their relationship was strictly an arms length lawyer-client relationship and there is no debt or financial obligation still outstanding."; "A past representation on a strictly business basis without ongoing financial involvement should not disqualify either the judge or the attorney from future participation in a court trial before the judge."; "The judge in this instance has no financial or other interest in the ongoing litigation conducted by his former lawyer and there is no reason to suspect his impartiality simply from the fact of past representation."; "Even though there is no conflict of interest in this factual situation, if a defendant or lawyer raises the issue of past representation, the judge should make a disclosure on the record and rule on the motion to recuse himself as his conscience dictates.").

Other authorities have explained that:

- The disqualification "normally" ends when the representation ends.[13]
- The disqualification ends and the representation ends, absent "extraordinary circumstances."[14]

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[13] Arizona Judicial Ethics Advisory Op. 02-05 (9/12/02) (analyzing an assistant state attorney general's representation of a judge who has been sued in the judge's judicial role; explaining that there is no per se rule describing how long the judge must recuse himself after the representation ends; "Once the litigation against the judge concludes, he or she should assess whether ongoing disqualification in cases involving the same assistant attorney general is necessary. Relevant considerations include the nature and extent of the prior litigation, whether the judge was personally involved in the matter as it progressed, and whether he or she shared any confidential information with the assistant attorney general that might give that attorney an advantage when appearing before him or her in the future. Barring such circumstances, however, disqualification would not ordinarily be required once the litigation has ended."; distinguishing the situation from a judge being represented by a lawyer in a private matter; "It is beyond the scope of this opinion to address a judge's duties when his or her personal lawyer is at issue. Different considerations apply in that context because the appearance of bias is more pronounced. Moreover, the relationship will typically be one in which the judge affirmatively selected and retained the lawyer.").

[14] Alabama Judicial Ethics Advisory Op. 96-616 (9/9/96) (holding that a judge must recuse when a lawyer appearing before the judge is currently representing the judge in the judge's official capacity;

- The end of the representation is a factor in the disqualification analysis.[15]
- The disqualification is imputed to others in the law firm while the representation is ongoing, but the imputation stops when the representation ends.[16]

Second, some courts set a definite time for a judge's disclosure/disqualification obligation to end after the representation ends. A Utah legal ethics opinion explained the benefit of a definite time.

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finding that in "extraordinary circumstances" the recusal will be required when another lawyer from the same firm appears before the judge; also explaining that in "extraordinary circumstances" the recusal obligation will continue after the representation ends; "[T]he Commission confirms that a judge is disqualified from hearing cases in which a party is represented by an attorney who represents the judge in unrelated litigation and that such disqualification includes cases where the judge has been sued in his or her official capacity in the unrelated litigation. . . . Ordinarily, such disqualification only applies to the particular attorney who represents the judge and not to other members of that attorney's firm, and such disqualification ceases when the litigation concludes or the representation otherwise ceases. However, since the disqualification arises under the general provision in Canon 3C(1) where disqualification is required because the judge's 'impartiality might reasonably be questioned,' extraordinary circumstances occasionally exist in which disqualification extends either to other members of the attorney's firm or for a period after representation ceases.").

[15] Powell v. Anderson, 660 N.W.2d 107, 118 (Minn. 2003) (vacating an order that denied disqualification of a trial judge from hearing a case in which one of the lawyers appearing before the judge was simultaneously representing a trust of which the judge was trustee; pointing to four factors that require a judge's recusal: "First, the reviewing court should consider the extent of the attorney-client relationship. If the relationship consisted of a single, short episode, or even a series of sporadic contacts, disqualification is less likely than if it consisted of a long-term, continuous course of representation. Similarly, representation that had been concluded prior to the instant case is less likely to lead to disqualification than representation that is concurrent with the case."; "Second, the reviewing court should examine the nature of the representation. A direct relationship, where the judge is represented personally, is more indicative of a reasonable question regarding the judge's impartiality than a relationship that only involves the judge in some institutional or technical role. Further, the more serious the matter for the judge, the greater the impact of the representation on the judge's impartiality." (footnote omitted); "Third, the reviewing court should consider the frequency, volume and quality of contacts between the judge and the attorney or law firm. The more frequent and substantial these contacts, the more likely the relationship is to create a reasonable question as to impartiality. Likewise, the closer the contacts come to the subject of the case before the judge, the greater the impact on impartiality."; "Fourth, the reviewing court should take into account any special circumstances that might either enhance or limit (1) the importance of the attorney or firm to the judge and/or (2) the appearance of impropriety to the public."; holding that the judge should have disqualified himself from hearing the case).

[16] Utah Judicial Ethics Informal Advisory Op. 00-4 (7/5/00) (holding that a judge must recuse if a lawyer representing her before a judicial inquiry commission appears before her, even though the judicial inquiry commission proceedings are confidential; also holding that the recusal obligation continues for six months after the representation ends; holding that the recusal obligation did not apply to other lawyers in the law firm once the representation ended).

> The reason for requiring disqualification for an additional period is that a person could reasonably question a judge's impartiality while the case is still fresh in memory. There is no standard or basis upon which to calculate a reasonable time. The period of time should simply be sufficient to allow any reasonable inferences of partiality to subside. While it might be tempting to create different time lines based on the many different outcomes that can result from a Judicial Conduct Commission proceeding (keeping in mind the public or private nature of the result), it is more predictable and workable for a single time line to be established. The Committee believes that six months is a reasonable time. A judge must therefore enter disqualification in proceedings involving an attorney who represents a judge before the Judicial Conduct Commission and the requirement of disqualification continues for six months after the representation has ended.

Utah Judicial Ethics Informal Advisory Op. 00-4 (7/5/00). Courts have picked the following arbitrary times for the termination of a judge's disclosure or disqualification obligation after the lawyer stops representing the judge in an unrelated matter.

- Six months after the representation ends.[17]
- Two years after the representation ends.[18]

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[17] Utah Judicial Ethics Informal Advisory Op. 00-4 (7/5/00) (holding that a judge must recuse if a lawyer representing her before a Judicial Inquiry Commission appears before her, even though the Judicial Inquiry Commission proceedings are confidential; also holding that the recusal obligation continues for six months after the representation ends; "The reason for requiring disqualification for an additional period is that a person could reasonably question a judge's impartiality while the case is still fresh in memory. There is no standard or basis upon which to calculate a reasonable time. The period of time should simply be sufficient to allow any reasonable inferences of partiality to subside. While it might be tempting to create different time lines based on the many different outcomes that can result from a Judicial Conduct Commission proceeding (keeping in mind the public or private nature of the result), it is more predictable and workable for a single time line to be established. The Committee believes that six months is a reasonable time. A judge must therefore enter disqualification in proceedings involving an attorney who represents a judge before the Judicial Conduct Commission and the requirement of disqualification continues for six months after the representation has ended.").

[18] New York Judicial Ethics Op. 94-33 (4/28/94) (holding that a part-time judge being represented by a law firm in an adoption proceeding should recuse himself "for the duration of the representation of the judge by the law firm and for a period of two years thereafter."; further explaining that after the two year period, "the judge may preside, depending on the evaluation" of various factors); New York Judicial Ethics Op. 92-54 (6/18/92) ("A part-time judge asks whether the judge should preside where the town attorney appears, when the town attorney and his partner have represented the judge in the past before the

- Two years after the representation ends (for purposes of determining the disqualification obligation), although the disclosure obligation continues after that.[19]

Third, judicial ethics advisory committees and courts have found in particular cases that a judge no longer had a disclosure or disqualification obligation after a certain period of time (based on the particular facts, rather than on some arbitrary deadline).

- One year after the representation ended.[20]
- One year after the representation of the judge's spouse ended (although the lawyer would have to disclose that representation).[21]

Judicial Court Commission and in private legal matters."; "When lawyers who previously have represented judges in personal legal matters appear, the Committee has advised that if the legal representation was within the previous two years, the judge must recuse himself or herself (Opinion 92-31). If the representation was more than two years ago, the judge may preside if the judge feels that he or she can be impartial. The judge should consider all relevant factors to determine if disqualification is the proper course, including the nature of the instant proceeding, the nature of the prior representation by the attorney, and its frequency and duration, the length of time since the last representation, the amount of work done for the judge by the attorney and the amount of the fee, whether the representation was routine or technical or involved the morality of the judge's conduct, whether there exists a social relationship between the judge and the judge's former attorney, and whether there are any special circumstances creating a likely appearance of impropriety. (Joint Opinion 88-120, 88-125)."; "If the judge does not disqualify himself or herself, based on the particular facts, then the judge must reveal the prior relationship with the attorney on the record to the parties. If any party objects, the judge should seriously consider disqualifying himself or herself, and should do so.").

[19] New York Judicial Ethics Advisory Op. 97-90 (9/11/97) ("A Family Court judge who is represented by an attorney in an adoption proceeding (1) should not preside over any matters in which the attorney participates during the period of the attorney's representation of the judge; (2) should recuse himself/herself, subject to remittal, for the two years following the completion of the attorney's representation; and (3) after two years have elapsed, there should be disclosure and if a party objects, the judge should seriously consider disqualifying himself/herself and should do so unless the judge concludes that the objection is frivolous, in bad faith, or wholly without merit.").

[20] Florida Judicial Ethics Op. 95-16 (5/1/95) (explaining that a judge need not disclose the past representation of the judge by a lawyer now appearing before the judge; "Your question is: since one year has passed since the 'termination' of the representation of the attorney that handled lawsuits wherein you were named defendant and that settled within policy limits, is it proper for you to hear cases involving the former attorney or his law firm."; "Our Committee's response only addresses the ethical implications and not the legal requirements for recusals. However, due to the limited nature of the representation and the passage of one year, a majority of the Committee agree that you may hear cases involving the former lawyer or his law firm and that you do not need to disclose the representation or recuse yourself in cases with the attorney or his firm.").

- Two years after the representation ended.[22]
- Four years after the representation ended.[23]

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[21] Michigan LEO JI-102 (6/6/95) ("If a lawyer appearing before an administrative hearing officer has previously represented the adjudicator or a member of the judge's household on legal matters, the adjudicator and the lawyer must disclose the prior representation to all other parties and their counsel."; explaining that "[i]f the judge's representation is in an official capacity, disqualification is not per se required."; holding that "[i]n the current inquiry, the former representation of the spouse involved the spouse's personal employment situation. The administrative hearing officer was not involved in that matter as a party, witness, beneficiary of the relief sought, or otherwise. The spouse's representation has been complete for more than a year. It is not known whether the spouse's representation was concluded before the pending matter was undertaken. Under these circumstances, the administrative hearing officer and the lawyer have a duty to disclose the prior representation to opposing parties and their counsel. Whether the judge should recuse is a question determined on the merits of any motion for disqualification which may be filed pursuant to MCR 2.003(C).").

[22] New York Judicial Ethics Op. 94-33 (4/28/94) (holding that a part-time judge being represented by a law firm in an adoption proceeding should recuse himself "for the duration of the representation of the judge by the law firm and for a period of two years thereafter"; further explaining that after the two year period, "the judge may preside, depending on the evaluation" of various factors); Duke v. Pfizer, Inc., 668 F. Supp. 1031, 1034, 1035, 1036 (E.D. Mich. 1987) (denying plaintiff's motion for a new trial for failure of judge to recuse himself; noting that two years earlier the judge had been represented by a lawyer at the Dickinson, Wright firm when the judge had been criticized by a bar association headed up by another Dickinson, Wright lawyer; "As to that matter, the facts are these. In August of 1984, I gave an interview, which was highly publicized, to a Detroit Free Press reporter. As a result of the interview, the Wolverine Bar Association, whose president at that time was George Ashford, a partner in the firm of Dickinson, Wright, filed a complaint against me with the Circuit Council of the United States Court of Appeals for the Sixth Circuit. Joseph Marshall and Beth DunCombe of the Dickinson, Wright firm were also active, along with George Ashford, in filing the complaint."; "Thomas Kienbaum (then President of the Detroit Bar Association) and John O'Meara, also partners in the Dickinson, Wright firm, volunteered to represent me before the Circuit Council. They explained to me that they felt they had an obligation, as members of the Bar, to assist me because they believed I had been unfairly accused in the Wolverine Bar Association's complaint. I accepted their offer."; "The case was argued before the Circuit Council in December of 1984, and in March of 1985 the Circuit Council dismissed the complaint of the Wolverine Bar Association. Dickinson, Wright was not involved, as a firm, on either side of that matter. The lawyers named acted in their individual capacities."; "I exercise my discretion and I find that there is no appearance of partiality to a reasonable person knowing the following facts: first, that individual members of the Dickinson, Wright firm were on both sides of the complaint filed against me in 1984; and second, that there was a greater than two-year period of repose between the representation of me by Messrs. Kienbaum and O'Meara and the initiation of this case. I am aware of no case that requires a judge to stand aside a priori under similar facts."; "Here, the complaint against me was dismissed by the Circuit Council on March 11, 1985 and this case was assigned to me on March 27, 1987 -- more than two years later. There is no good reason for requiring a longer period of repose for a lawyer who once represented a judge, or proceeded against him, than for a law clerk who worked with a judge more than two years prior to appearing before that judge.").

[23] Illinois LEO 98-17 (11/10/98) (addressing the recusal effect of a lawyer from the judge's former firm appearing before the judge, and the lawyer's representation of the judge himself in various real estate closings; "Judge does not have a duty to disqualify or disclose when, (1) relationship with lawyer's firm ended thirty-three years ago; (2) lawyer's representation of judge in two routine real estate closings took place four and nine years ago."; holding that the duration of any recusal obligation depended on the type of representation; "It might be easy to select the three-year or seven-year standard and argue that such a period would serve as a 'safe harbor' for any judge who has previously been in a lawyer-client relationship

- Eight years after the representation ended.[24]
- Ten years after the representation ended.[25]
- Eleven years after the representation ended.[26]
- Thirty-three years after the representation ended.[27]

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with a lawyer representing a litigant, but to do so would be a disservice. One can analogize different types of representation to these differing standards. For example, representation of the judge on a ticket for exceeding the speed limit or at a closing on the purchase of a home may well be de minimis such that the lawyer could appear before the judge immediately following termination of the representation. In contrast, the lawyer representing the judge in the judge's dissolution of marriage involves a more extensive lawyer-client relationship where the three-year standard might be appropriate.").

[24] Florida Judicial Ethics Op. 95-15 (5/1/95) (holding that a judge does not need to disclose the representation eight years earlier of the judge in the child custody case by a lawyer now appearing before the judge).

[25] Young v. Young, 971 S.W.2d 386, 390 (Tenn. Ct. App. 1997) (affirming a judge's decision not to recuse himself from the divorce case because one of the lawyers represented the judge in his own divorce ten years earlier; citing an earlier Tennessee judicial ethics opinion; "In Judicial Ethics Opinion No. 94-2, the Committee addressed the issue of whether a judge should recuse himself from a particular case where the judge had been represented by an attorney of one of the parties in an uncontested divorce action ten years earlier. In holding that the judge did not have a duty to recuse himself, the Committee stated: 'Certainly the passage of ten years after an uncontested divorce, with the further representation during that time, completely obviates the need for recusal.'"; "'Absent any factors other than the single episode of representation in an uncontested divorce ten years ago, the judge's impartiality could not be unreasonably questioned under canon 3C. Similarly, the "appearance of impropriety" of canon 2 also must be measured by a standard of reasonableness; a decade-old representation of the judge by a particular lawyer should not create in the mind of a reasonable person the appearance of impropriety when that lawyer appears before the judge.'" (quoting Tennessee Judicial Ethics Comm., Op. 94-2 (1994))).

[26] Florida Judicial Ethics Advisory Comm. Op. 2004-1 (1/16/04) (holding that a judge must disqualify himself/herself for a "reasonable period of time" "when an attorney or any member of the attorney's law firm appears before the judge and the judge has a close social relationship with the attorney, the attorney served as the judge's campaign treasurer and will serve in the same capacity in 2004, and the attorney represented the judge in a personal injury lawsuit eleven (11) years ago"; noting that "Fla. JEAC Op. 86-09 dealt squarely with an attorney who had recently represented a judge in a personal injury action that had concluded. The Committee stated that the judge was not prohibited from hearing cases which involved the attorney who had recently represented the judge and his or her family. However, the Committee did state that the judge should allow several months to lapse before he resumed the handling of such cases. Similarly, the Committee in Fla. JEAC Op. 93-19 stated that the judge did not need to disclose that a large local law firm had represented him or her a year prior regarding the sale of one home and the purchase of another home. In an opinion involving an attorney who had represented the judge concerning the custody of his or her son, the Committee, in Fla. JEAC Op. 95-15, stated that the judge did not need to disclose that representation, even in light of the fact that the judge anticipated that the attorney will appear before him or her in family court.").

[27] Illinois LEO 98-17 (11/10/98) (addressing the recusal effect of a lawyer from the judge's former firm appearing before the judge, and the lawyer's representation of the judge himself in various real estate closings; "Judge does not have a duty to disqualify or disclose when, (1) relationship with lawyer's firm

Other authorities have explained that sufficient amount of time had passed since the representation ended, but without describing the amount of time.[28]

Fourth, some authorities discussing the issue in the abstract (rather than addressing a particular situation) have provided fairly ambiguous standards. Thus, courts have used the following to describe the duration of a judge's disclosure or disqualification obligation after the representation ends:

- "Period of time."[29]

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ended thirty-three years ago; (2) lawyer's representation of judge in two routine real estate closings took place four and nine years ago."; holding that the duration of any recusal obligation depended on the type of representation; "It might be easy to select the three-year or seven-year standard and argue that such a period would serve as a 'safe harbor' for any judge who has previously been in a lawyer-client relationship with a lawyer representing a litigant, but to do so would be a disservice. One can analogize different types of representation to these differing standards. For example, representation of the judge on a ticket for exceeding the speed limit or at a closing on the purchase of a home may well be de minimis such that the lawyer could appear before the judge immediately following termination of the representation. In contrast, the lawyer representing the judge in the judge's dissolution of marriage involves a more extensive lawyer-client relationship where the three-year standard might be appropriate.").

[28] Marcotte v. Gloekner, 679 So. 2d 1225 (Fla. Dist. Ct. App. 1996) (holding that a judge should have recused herself when the plaintiff in a case sought recusal, because the judge had been previously represented by the lawyer representing the defendant in a case before the judge; not explaining when the representation ended); Sonner v. State, 930 P.2d 707 (Nev. 1996) (declining to disqualify a judge who in the past had been represented by the prosecutor (when the prosecutor was in private practice); noting that the representation had ended several years earlier); Murphy v. Murphy, 461 S.E.2d 39, 42 (S.C. 1995) (holding that a judge does not need to recuse in a divorce case, although the wife's lawyer had previously represented the judge in an unspecified matter; "Mr. Murphy next contends that the presiding judge should have recused himself in this matter because he was represented by counsel for Mrs. Murphy in a prior legal matte. We disagree."; "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned. . . . If there is no evidence of judicial prejudice, a judge's failure to disqualify himself will be affirmed."; "The record contains substantial evidence supporting the judge's factual finding. Furthermore, our search of the record reflects no judicial bias or prejudice. We therefore conclude that Mr. Murphy has not established error in the judge's denial of the motion for recusal.").

[29] New York Judicial Ethics Op. 91-10 (1/24/91) ("A judge asks about the propriety of hearing cases involving a law firm which is currently representing the judge, through the judge's insurance company, in an automobile accident lawsuit."; "Section 100.3(c) of the Rules of the Chief Administrator requires that a judge disqualify himself or herself in any proceeding in which the judge's partiality might be questioned. Here, the judge should not handle any cases in which either the law firm, or a member of that firm representing the judge, appears."; "In Opinion 88-153 (Vol. III), this Committee found that a judge should continue to disqualify himself or herself in any matters in which the judge's present or former personal attorney appears for a period of time, considering all the relevant factors. A copy of that opinion is enclosed. If the judge chooses not to disqualify himself or herself, the judge must reveal the prior relationship with the attorney, and should seriously consider disqualification if any party objects.").

- "Several years."[30]
- "Reasonable" period of time.[31]

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[30] New York LEO 673 (3/16/95) ("A lawyer may appear before a town justice when the lawyer represents a relative of another town justice in an unrelated action in another court unless there is some other reason that the town justice's impartiality may reasonably be questioned."; "A lawyer may appear before a town justice after having represented the town justice's adult child in an unrelated matter in which the town justice had no involvement."; avoiding any per se rules, and noting the factor that would determine the judge's disclosure and recusal obligation; "'First, if the prior representation of the judge was a character where the judge's personal integrity was at issue or involved a highly emotional situation, such as a bitterly contested matrimonial matter, we believe that the judge should in all cases disqualify himself, irrespective of consent, for several years. Thereafter, the judge should disqualify himself unless the parties remit the disqualification under Canon 3D.'" (citation omitted); "'Second, if the representation was (a) of a routine and economic character, such as buying or selling a home or drawing a routine will, (b) in the course of official duties (and in the nature of a defense of the court rather than of the judge) or (c) provided by an insurer with respect to a fully insured claim, we believe that it is not necessary either for the judge to disqualify himself or for remittal under Canon 3D to be obtained, provided no special circumstances are present. The prior representation, however, should be disclosed.'" (citation omitted); "'Third, in cases falling between these two situations, where there are not other special circumstances, and in cases otherwise falling into paragraph (2) above where the representation was in repeated instances, then, for a period of several years, the judge should disqualify himself unless the parties enunciated in paragraph (2) above would apply, and the prior representation must be disclosed.'"(citation omitted); "'It is impossible to fix a specific number of years to the period of disqualification. The length of the period will depend upon whether an objective, disinterested observer would question the judge's impartiality. That, in turn, will depend upon the circumstances surrounding the original representation, the frequently of the lawyer's representation of the judge, and the relationship of the judge and the lawyer since the time of representation.'" (citation omitted); explaining that there is a significant distinction when the lawyer represents the judge's relative rather than the judge herself; "In the present inquiry, the lawyer represents a relative of the judge rather than the judge. . . . This distinction is significant. There can be no presumption of any personal relationship between the judge and the lawyer. The lawyer has had no duty to vigorously represent the judge's interests. . . . While some personal interest in the relative's welfare can be presumed, the judge's interest is likely to be significantly attenuated as compared to that of the relative. Further, since the prior representation is now over, the judge is in no position to confer any benefit upon the relative through favorable treatment of the lawyer. . . . Even owing a debt of gratitude is not enough, alone, to disqualify the judge."; however, explaining that "[t]he existence of a family connection anywhere in the case could reasonably affect an observer's calculation of the judge's impartiality. Therefore, the Committee recommends that a judge assess the prior representation of a relative on the same basis as if the judge himself had been represented by the lawyer, and apply the guidelines set forth in N.Y. State 574. These general principles should be tempered to recognize that the judge's relative, rather than the judge, was the client. This fact, in most instances, would justify a response by the judge that is less than what would be required under N.Y. State 574 if the judge were the represented party. There will be situations, however, that the judge should treat the same as if he or she were represented by the attorney, such as when the judge is directly involved in the matter."; explaining that in the situation before the bar the lawyer was representing the judge's adult child in a matrimonial matter expected to result in an uncontested divorce -- so that "while disclosure should be made for some period of time, disqualification would not appear necessary").

[31] Florida Judicial Ethics Advisory Comm. Op. 2004-1 (1/16/04) (holding that a judge must disqualify himself/herself for a "reasonable period of time" "when an attorney or any member of the attorney's law firm appears before the judge and the judge has a close social relationship with the attorney, the attorney served as the judge's campaign treasurer and will serve in the same capacity in 2004, and the attorney represented the judge in a personal injury lawsuit eleven (11) years ago"; noting that "Fla. JEAC Op. 86-

Courts have discussed the following factors as affecting the duration of the disclosure or disqualification obligation.

- The type of matter in which the lawyer represented the judge.[32]

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09 dealt squarely with an attorney who had recently represented a judge in a personal injury action that had concluded. The Committee stated that the judge was not prohibited from hearing cases which involved the attorney who had recently represented the judge and his or her family. However, the Committee did state that the judge should allow several months to lapse before he resumed the handling of such cases. Similarly, the Committee in Fla. JEAC Op. 93-19 stated that the judge did not need to disclose that a large local law firm had represented him or her a year prior regarding the sale of one home and the purchase of another home. In an opinion involving an attorney who had represented the judge concerning the custody of his or her son, the Committee, in Fla. JEAC Op. 95-15, stated that the judge did not need to disclose that representation, even in light of the fact that the judge anticipated that the attorney will appear before him or her in family court."); Fla. Judicial Ethics Advisory Comm. Op. 2001-17 (11/29/01) (holding that a judge must disclose (for "a reasonable period of time") that a law firm was representing a party before the judge which had previously represented the judge's spouse in a legal malpractice action; "[D]isclosure of the spouse's former relationship with a law firm which now represents one of the parties is mandatory if the judge believes the information is relevant to the question of disqualification, and disqualification is required if the judge's impartiality might reasonably be questioned. The determination of whether the judge's impartiality might reasonably be questioned depends upon the nature and extent of the relationship between the spouse and the attorney, whether the attorney was personally involved with the spouse, the monetary or personal significance of the case to the spouse, and the passage of time since the representation."; noting that "[d]isclosure does not necessarily require disqualification"); Arkansas Judicial Ethics Op. 92-03 (6/5/92) ("We conclude that Canon 3C(1) requires that you recuse from all cases in which any one of these five attorneys participate at least for so long as the litigation involving you pends, and for a reasonable time thereafter."; "As to how long after your litigation terminates should you disqualify is a question that only time can answer; and undoubtedly you will be in the better position to judge this period. As I remember, almost 100% of the lawyers in Arkansas thought that Judge G.R. Smith recused from Rose Law Firm cases for much too long a period."; "We do not feel that your disqualification can be waived."); Washington Judicial Ethics Op. 89-13 (6/15/89) ("[A] court commissioner may not hear any matters which are not agreed (whether the same be actively contested or any posture of default) in which the attorney who represents the commissioner in a lawsuit in the commissioner's personal capacity is involved or the opposing counsel in the lawsuit is involved. This restriction shall apply while the lawsuit is pending or for a reasonable period of time after its termination. The type of lawsuit is not relevant to the issue of disqualification. The court commissioner may hear matters in which the attorney is associated with either the commissioner's attorney or opposing counsel if 1) the commissioner discloses on the record the relationship to the commissioner's attorney or opposing counsel, 2) that attorney is not associated in any way with the commissioner's lawsuit and the commissioner's attorney or opposing counsel have not been involved in the matter before the commissioner, and 3) offers to recuse. The commissioner may enter all agreed orders brought by the commissioner's attorney, opposing counsel, or any of their associates.").

[32] Powell v. Anderson, 660 N.W.2d 107, 118 (Minn. 2003) (vacating an order that denied disqualification on a trial judge from hearing a case in which one of the lawyers appearing before the judge was simultaneously representing a trust of which the judge was trustee; pointing to four factors that require a judge's recusal: "First, the reviewing court should consider the extent of the attorney-client relationship. If the relationship consisted of a single, short episode, or even a series of sporadic contacts, disqualification is less likely than if it consisted of a long-term, continuous course of representation. Similarly, representation that had been concluded prior to the instant case is less likely to lead to disqualification than representation that is concurrent with the case."; "Second, the reviewing court should

examine the nature of the representation. A direct relationship, where the judge is represented personally, is more indicative of a reasonable question regarding the judge's impartiality than a relationship that only involves the judge in some institutional or technical role. Further, the more serious the matter for the judge, the greater the impact of the representation on the judge's impartiality." (footnote omitted); "Third, the reviewing court should consider the frequency, volume and quality of contacts between the judge and the attorney or law firm. The more frequent and substantial these contacts, the more likely the relationship is to create a reasonable question as to impartiality. Likewise, the closer the contacts come to the subject of the case before the judge, the greater the impact on impartiality."; "Fourth, the reviewing court should take into account any special circumstances that might either enhance or limit (1) the importance of the attorney or firm to the judge and/or (2) the appearance of impropriety to the public."; holding that the judge should have disqualified himself from hearing the case); Illinois LEO 98-17 (11/10/98) (addressing the recusal effect of a lawyer from the judge's former firm appearing before the judge, and the lawyer's representation of the judge himself in various real estate closings; "Judge does not have a duty to disqualify or disclose when, (1) relationship with lawyer's firm ended thirty-three years ago; (2) lawyer's representation of judge in two routine real estate closings took place four and nine years ago."; holding that the duration of any recusal obligation depended on the type of representation; "It might be easy to select the three-year or seven-year standard and argue that such a period would serve as a 'safe harbor' for any judge who has previously been in a lawyer-client relationship with a lawyer representing a litigant, but to do so would be a disservice. One can analogize different types of representation to these differing standards. For example, representation of the judge on a ticket for exceeding the speed limit or at a closing on the purchase of a home may well be de minimis such that the lawyer could appear before the judge immediately following termination of the representation. In contrast, the lawyer representing the judge in the judge's dissolution of marriage involves a more extensive lawyer-client relationship where the three-year standard might be appropriate."); Florida Judicial Ethics Op. 93-19 (4/1/93) ("You ask for what period of time must you continue to disclose that a large local law firm represented you a year ago in the sale of one home and the purchase of another home."; "All eight participating Committee members believe you do not need to continue to disclose the above considering the limited circumstances you have provided the Committee. By analogy, several Committee members state there is a custom that judges do not hear for one years cases involving former law partners or associates. However, if you maintain strong social ties with the law firm that represented you, disclosure should continue. Also, it is the nature and extent of the legal representation that is critical. One test is whether an objective, disinterested person knowing all the circumstances would reasonably question your impartiality because of the past relationship."; "Three members state that representation in connection with the purchase and sale of a home is fairly perfunctory and doesn't lead to extended and intimate legal relationships. However, they state if the legal representation was for litigation or in a contested divorce and the representation extended for a period of time, they would feel differently about the need to disclose."; "Two judges state there is no particular significance to one year but the need to disclose depends on the circumstances of each cases."); Florida Judicial Ethics Op. 93-17 (4/1/93) ("You ask must a judge who has been represented by an attorney three years ago in a now closed case, announce in every case in which that attorney appears before you the prior representation and relationship. Further, you ask would it be different if the representation was five or ten years ago. Also, you ask whether you must recuse yourself upon request of opposing counsel. Five of the eight participating Committee members agree that disclosure should be unnecessary depending on the nature and the extent of the relationship between you and the attorney. If you maintain strong social ties with the attorney or the prior representation was in a 'high profile' case or one of great personal or monetary significance to you or your former lawyer, disclosure would be appropriate or necessary. They agree the question must be answered on a case by case basis. Three Committee members state the decision to disclose is not necessarily based on time. It is a question of whether the court's impartiality might reasonably by [sic] questioned. The test is whether an objective, disinterested person knowing all the circumstances would reasonably question your impartiality.").

- Any continuing "strong social ties" with a lawyer.[33]
- The fact that the judge would hire the lawyer again if the need arose.[34]
- Whether the lawyer had represented the judge in a single matter or multiple matters.[35]

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[33] Florida Judicial Ethics Op. 93-17 (4/1/93) ("You ask must a judge who has been represented by an attorney three years ago in a now closed case, announce in every case in which that attorney appears before you the prior representation and relationship. Further, you ask would it be different if the representation was five or ten years ago. Also, you ask whether you must recuse yourself upon request of opposing counsel. Five of the eight participating Committee members agree that disclosure should be unnecessary depending on the nature and the extent of the relationship between you and the attorney. If you maintain strong social ties with the attorney or the prior representation was in a 'high profile' case or one of great personal or monetary significance to you or your former lawyer, disclosure would be appropriate or necessary. They agree the question must be answered on a case by case basis. Three Committee members state the decision to disclose is not necessarily based on time. It is a question of whether the court's impartiality might reasonably by [sic] questioned. The test is whether an objective, disinterested person knowing all the circumstances would reasonably question your impartiality."); see also Florida Judicial Ethics Advisory Comm. Op. 2004-1 (1/16/04) (holding that a judge must disqualify himself/herself for a "reasonable period of time" "when an attorney or any member of the attorney's law firm appears before the judge and the judge has a close social relationship with the attorney, the attorney served as the judge's campaign treasurer and will serve in the same capacity in 2004, and the attorney represented the judge in a personal injury lawsuit eleven (11) years ago"; noting that "Fla. JEAC Op. 86-09 dealt squarely with an attorney who had recently represented a judge in a personal injury action that had concluded. The Committee stated that the judge was not prohibited from hearing cases which involved the attorney who had recently represented the judge and his or her family. However, the Committee did state that the judge should allow several months to lapse before he resumed the handling of such cases. Similarly, the Committee in Fla. JEAC Op. 93-19 stated that the judge did not need to disclose that a large local law firm had represented him or her a year prior regarding the sale of one home and the purchase of another home. In an opinion involving an attorney who had represented the judge concerning the custody of his or her son, the Committee, in Fla. JEAC Op. 95-15, stated that the judge did not need to disclose that representation, even in light of the fact that the judge anticipated that the attorney will appear before him or her in family court.").

[34] New York Judicial Ethics Op. 93-09 (1/28/93) ("The inquiring judge states that during the period before the father's retirement the judge and members of the judge's immediate family hired that firm to represent them in their legal matters, the last occasion being approximately six years ago. The judge further advises that the judge probably would hire the same firm to represent the judge in the future in the event the judge should require legal representation."; explaining that the judge's policy was to disclose the earlier representation; "Although, the judge or his family were last represented last by the father's former firm six years ago, it is unclear from the inquiry whether the judge still considers the firm to be the judge's lawyers. If the judge does consider the firm to be the judge's lawyers, the judge should continue to invoke recusal as when the father was a member of the firm. On the other hand, if the judge no longer considers the firm to be the judge's lawyers, the judge should proceed as indicated hereafter."; "Concerning any former member or members of the judge's father's firm, if he or she, as a member of that firm, personally represented the judge in the past, the judge likewise must disclose the representation.").

[35] Powell v. Anderson, 660 N.W.2d 107, 118 (Minn. 2003) (vacating an order that denied disqualification on a trial judge from hearing a case in which one of the lawyers appearing before the judge was simultaneously representing a trust of which the judge was trustee; pointing to four factors that require a judge's recusal: "First, the reviewing court should consider the extent of the attorney-client relationship. If the relationship consisted of a single, short episode, or even a series of sporadic contacts,

- Whether the representation was ongoing.[36]

Best Answer

The best answer to **(a)** is **NO (ABSENT DISCLOSURE AND CONSENT)**; the best answer to **(b)** is **MAYBE**; the best answer to **(c)** is **MAYBE**; the best answer to **(d)** is **PROBABLY NO (ABSENT DISCLOSURE AND CONSENT)**; the best answer to **(e)** is **MAYBE**.

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disqualification is less likely than if it consisted of a long-term, continuous course of representation. Similarly, representation that had been concluded prior to the instant case is less likely to lead to disqualification than representation that is concurrent with the case."; "Second, the reviewing court should examine the nature of the representation. A direct relationship, where the judge is represented personally, is more indicative of a reasonable question regarding the judge's impartiality than a relationship that only involves the judge in some institutional or technical role. Further, the more serious the matter for the judge, the greater the impact of the representation on the judge's impartiality." (footnote omitted); "Third, the reviewing court should consider the frequency, volume and quality of contacts between the judge and the attorney or law firm. The more frequent and substantial these contacts, the more likely the relationship is to create a reasonable question as to impartiality. Likewise, the closer the contacts come to the subject of the case before the judge, the greater the impact on impartiality."; "Fourth, the reviewing court should take into account any special circumstances that might either enhance or limit (1) the importance of the attorney or firm to the judge and/or (2) the appearance of impropriety to the public."; holding that the judge should have disqualified himself from hearing the case).

[36] Id.

Manipulating the Choice of Judges: Docket Assignment

Hypothetical 15

You practice in a state judicial district served by three judges -- two of whom are very conservative and one of whom is very liberal. Over the years, you and every other local lawyer has recognized the advantage that employment and personal injury plaintiffs have when drawing the liberal judge. Not surprisingly, you have considered various steps to increase the odds that your plaintiff's cases are assigned to the liberal judge. Your local court's docket control clerk assigns cases on a rotating basis.

May you take the following steps in an effort to increase the chances of drawing the liberal judge:

(a) Wait until you know that both conservative judges are out of town before filing a motion (such as a motion seeking a TRO) that requires immediate judicial attention?

YES (PROBABLY)

(b) Have one of your associates wait at the clerk's office until it looks as if the next case filed will be assigned to the liberal judge, at which time your associate will file your client's case?

MAYBE

(c) File three essentially identical cases for your client, and then dismiss the two cases assigned to the conservative judges?

NO

Analysis

Every court follows its own practice of assigning cases. Lawyers attempting to diligently represent their clients naturally look for a way to increase the odds of drawing a judge who is more inclined to favor the client's arguments.

As with all other ethics issues, the question here is how aggressively a lawyer can seek such a "good" draw -- without "gaming" the docket-assignment system in a way that the ethics rules prohibit or (especially) the court thinks inappropriate.

(a) It does not appear as if any lawyer has been punished for timing the filing of an action to maximize the chances of drawing a judge that the lawyer believes might be more favorable to his or her client's position.

(b) There seems to be no reported decisions in which a lawyer has faced punishment for a tactic such as this. However, courts might think that this crosses the line into impermissible judge-shopping. Of course, the more judges to which the case might be assigned, the less likely this type of tactic is to succeed.

(c) This hypothetical comes from the case of In re Fieger, No. 97-1359, 1999 U.S. App. LEXIS 22435 (6th Cir. Sept. 10, 1999) (not for publication).

In that case, the well-known Michigan lawyer Geoffrey Fieger (representing Dr. Jack Kevorkian)

> signed and caused to be filed thirteen complaints for declaratory and injunctive relief in federal district court, all challenging the constitutionality of the same provisions of Michigan common law. Dr. Jack Kevorkian was the plaintiff on all thirteen complaints, nine of which were brought against the Oakland County prosecutor, three against Wayne County prosecutor, and one against the Macomb County prosecutor.

Id. at *2. Significantly, Fieger did not accurately complete the civil docket cover sheet, which required him to advise the court if the cases were related to any other cases (an affirmative answer to which would have resulted in all of the cases going to the same judge).

After the cases were assigned to judges, Fieger voluntarily dismissed twelve of the lawsuits, leaving only one of the cases pending. The Sixth Circuit opinion indicates that "[i]n press interviews, Fieger stated that he dismissed the cases so he could select the judge." Id. at *3.

The Eastern District of Michigan chief judge appointed a three-judge panel to examine Fieger's conduct. The panel eventually accepted a proposal under which Fieger apologized to the court and agreed to pay over $8,000 in costs. The panel also referred the matter to the Michigan Bar for possible discipline. Fieger later filed motions complaining about the panel's use of the term "reprimands" in its order -- arguing that the term incorrectly implied that he had been adjudicated and found guilty of misconduct.

The Sixth Circuit rejected Fieger's challenge. Among other things, the court found Fieger's conduct improper.

> [W]e note that Fieger's actions fully warranted the imposition of sanctions. He circumvented the random assignment rule, specifically tried to control the assignment of judges to his cases, and boasted publicly that he had done so. These actions violated the rules, as well as his duties as an officer of the court.

Id. at *7.

Most courts would probably take the same approach to such a tactic, although Fieger's public boasting of his manipulation certainly made it easier for the court in that case to find an improper motive.

Best Answer

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

Manipulating the Choice of Judges: Triggering Recusal

Hypothetical 16

One of your largest clients just hired you to defend a series of employment discrimination cases filed by several plaintiffs in Northern District of Alabama federal court. Your client also wants you to defend cases that your client expects other plaintiffs will file in the coming years. In previous employment cases, your client has been extremely unlucky before one Northern District of Alabama judge, and has asked you about possible ways to avoid that judge.

May you take the following actions -- if you are motivated by the desire to avoid having the unsympathetic Northern District of Alabama judge hear cases against your client:

(a) Move for a change of venue to the Southern District of Alabama (if there are legal grounds for doing so)?

YES

(b) Retain as additional local counsel the judge's son?

NO (PROBABLY)

(c) In preparing for a case that you plan to file against an employee in six months, retain as local counsel the judge's son to appear as counsel of record when you file the complaint?

MAYBE

(d) Retain as additional local counsel a law firm in which the judge's eldest daughter works?

MAYBE

(e) Retain as additional local counsel the law firm at which the judge previously worked?

MAYBE

Analysis

Lawyers' attempts to manipulate the selection of judges can implicate both lawyers' and judges' ethics rules, as well as courts' power to police their own dockets and avoid unfair litigation tactics.

To a certain degree, lawyers may freely attempt to "forum shop." For instance, plaintiffs who could file a case in one of several courts undoubtedly will assess what judge they might draw in different jurisdictions. There is nothing wrong with a plaintiff filing a lawsuit in a jurisdiction where a sympathetic judge might handle the case.

Lawyers may also retain co-counsel or local counsel in an effort to influence judges. There is certainly nothing wrong with retaining as co-counsel a lawyer who has had great success before a certain judge, who seems to have the judge's respect, who clerked several years ago for the judge, etc. In fact, it could be argued that lawyers diligently representing their clients have a duty to search out lawyers as co-counsel or local counsel who are likely to have a positive influence with the judge.

On the other hand, courts have been extremely harsh on lawyers who have attempted to "knock out" judges by taking advantage of the judicial ethics rules requiring judges to disqualify themselves (often called "recusal") in certain circumstances.

(a) No lawyer seems to have been punished for seeking a change in venue in an effort to arrange for a more sympathetic judge.

Perhaps the issue never comes up, because most lawyers are smart enough not to reveal their true motive. However, even a lawyer acknowledging that intent probably would not face any punishment for filing an arguably meritorious venue motion.

In Wolters Kluwer Financial Services, Inc. v. Scivantage, 564 F.3d 110 (2d Cir.), cert. denied, 130 S. Ct. 625 (2009), the Second Circuit dealt with an analogous situation -- in which a litigant voluntarily dismissed a case to pursue litigation in another court. The Second Circuit upheld sanctions against a former Dorsey & Whitney lawyer for several inappropriate actions. However, the court then dealt with another action taken by the Dorsey lawyer, which the district court had sanctioned.

> The district court found that Dorsey's main purpose in filing a Rule 41 voluntary dismissal of the Wolters litigation was to judge-shop in order to conceal from its client "deficiencies in counsel's advocacy" that had been noted by the district judge in New York. The district court reasoned that this sort of judge-shopping was an improper purpose and was accordingly sanctionable.

Id. at 114. The Second Circuit reversed this sanction -- explaining that a plaintiff may freely dismiss an action under Rule 41.

> It follows that Dorsey was entitled to file a valid Rule 41 notice of voluntary dismissal for any reason, and the fact that it did so to flee the jurisdiction or the judge does not make the filing sanctionable. Accordingly, because the district court made no finding that Dorsey acted in bad faith in voluntarily dismissing the case under Rule 41, and because Dorsey was entitled by law to dismiss the case, the district court's sanction against Dorsey for filing the voluntary dismissal must be reversed.

Id. at 115.

(b) A federal statute,[1] the ABA Model Code of Judicial Conduct,[2] the Code of Conduct for United States Judges[3] and every state counterpart requires disqualification

[1] 28 U.S.C. § 455(b)(5)(ii).

[2] ABA Model Code of Judicial Conduct, Rule 2.11(A)(2)(b), (c) (2007).

[3] Code of Conduct for United States Judges, Canon 3C(1)(d)(ii), (iii) (2009).

if a judge's close family member appears as a lawyer before the judge. In some situations, the judge can remain on the case after disclosure to and consent by the litigants and their lawyers.[4]

Given this strict standard, it should come as no surprise that clever lawyers have tried to "knock off" judges by hiring the judge's close relative as co-counsel.

A number of courts have dealt with lawyers' efforts to trigger a judge's recusal.

In Grievance Adm'r v. Fried, 570 N.W.2d 262 (Mich. 1997), the court dealt with similar cases before the Monroe Circuit Court, in which three judges served. Two of the judges "had a reputation within the local legal community of being tough sentencing judges, while [the third judge] had the reputation of being somewhat more lenient." Id. at 263. One of the tough sentencing judges had a first cousin who practiced in the area, and the other tough sentencing judge had a brother-in-law who practiced in the area. The Michigan Bar alleged that these two lawyers improperly accepted retainers specifically for the purpose of disqualifying the judges who were relatives. In some cases, they received $1,000 retainer payments when appearing.

The Michigan grievance commission somehow obtained statements from clients indicating that the lawyers freely admitted that this was their practice. In one criminal case, one of the tough-sentencing judges was assigned to handle the matter. His relative entered an appearance, which caused his recusal. When the case was re-assigned to the other tough sentencing judge, his relative entered an appearance -- causing the case to be assigned to the more lenient judge.

[4] ABA Model Code of Judicial Conduct, Rule 2.11(C) (2007); Code of Conduct for United States Judges, Canon 3D (2009).

The Michigan Supreme Court agreed with the lawyer disciplinary board that lawyers may freely undertake some action in an effort to "forum shop," but that these lawyers' actions crossed the line.

> The ADB correctly observes that there are a variety of permissible steps that have a degree of similarity to the charged conduct. For instance, a lawyer may file a motion for change of venue that recites legal grounds, but is motivated by a desire to move the case to a jurisdiction where the lawyer believes success is more likely. A lawyer may accept employment and be brought into a case because the client (or an attorney already involved in the case) believes the lawyer has a record of success in appearances against an opposing lawyer, or before a particular judge. . . . In the instant case, the Grievance Administrator charges that the respondents were selling, not their professional services, but their familial relationships.

Id. at 267. The Michigan Supreme Court found that the lawyers' conduct was "prejudicial to the administration of justice." Id.

> The alleged conduct is contrary to justice, ethics, honesty, and good morals. It is wrong. . . .
>
> . . . .
>
> It is unethical conduct for a lawyer to tamper with the court system or to arrange disqualifications, selling the lawyer's family relationship rather than professional services. A lawyer who joins a case as co-counsel, and whose principal activity on the case is to provide the recusal, is certainly subject to the discipline.
>
> On the other hand, the rules do not prohibit a lawyer from taking a case that might lead to a recusal. Mr. Golden and Mr. Rostash are not precluded from practicing law in the Monroe Circuit Court. The Grievance Administrator alleges that there are sixty-six cases in which the respondents acted improperly to gain recusals. To the extent that these are cases in which Mr. Golden or Mr. Rostash appeared as lawyers and were substantially involved in the representation

> of the client, then the recusal was an unavoidable result of the rules established to avoid conflicts of interest.
>
> An appearance filed principally to obtain the recusal (or de minimis activity as co-counsel to a lawyer who is handling the case, with the co-counsel designation serving with principally to obtain the recusal) is a ground for discipline. . . .

Id. at 267-68. The Michigan Supreme Court remanded to the disciplinary authorities.

Interestingly, one circuit court (the Eleventh Circuit) has twice dealt with such efforts involving Northern District of Alabama Judge U.W. Clemon. These incidents involved the rule involving a judge's relative appearing as a lawyer in the proceeding himself or herself, as well as the rule involving the relative's firm appearing in the proceeding (discussed more fully below).

Issues involving Judge Clemon arose as early as 1995. At that time, Judge Clemon's nephew was working at the Constangy, Brooks law firm.

As explained in the later case of Robinson v. Boeing Co., 79 F.3d 1053, 1056 (11th Cir. 1996), Judge Acker of the Northern District of Alabama was handling a case that a plaintiff had brought against BellSouth. Judge Acker ordered the clerk to provide a list of all cases filed in the Northern District of Alabama between January 1, 1993 and June 2, 1995, in which the case was originally assigned to Judge Clemon, but thereafter any lawyer from Costangy, Brooks appeared for the defendant -- thus triggering Judge Clemon's recusal.

As explained above, the ethics rules do not require judges to recuse themselves merely because a litigant had hired a law firm which employs the judge's close relative.

The court nevertheless assumed that a defendant's retention of Costangy, Brooks would automatically cause Judge Clemon's recusal.

Judge Acker explained in his order that the BellSouth case was the first such case assigned to him in those circumstances, but that the clerk reported that lawsuits filed against the following corporate defendants faced exactly the same fate (original assignment to Judge Clemon, later appearance of Constangy, Brooks, recusal of Judge Clemon, and reassignment to another judge): AmSouth Bank, University of Alabama, Wal-Mart Inc., Parker Hannafin Corp., Southern Company Services, Inc., Southern Natural Gas, ALFA Mutual Insurance Co., Blue Cross and Blue Shield, Baptist Medical Center, Jim Walter Resources, Inc., Liberty National Life Insurance Co., Krystal Co., Compass Bancshares, Inc., etc.

Judge Acker reached the following conclusion:

> The court has no way of knowing what the incidence of Constangy, Brook and Smith's being retained by defendants would have been if the above-named cases had been originally assigned to judges other than Judge Clemon, but an intelligent guess is that the incidence would have been less. What, if anything, this court should do about the matter will be for the entire court and not for one judge. Meanwhile, the defendant in this case is represented by competent counsel and shall file its answer (which may include a motion to dismiss) . . . .

Id. at 1056-57. Unfortunately, it is unclear what step Judge Acker took after conducting this analysis. The order does not explicitly exclude Costangy, Brooks from representing BellSouth.

The issue of Judge Clemon came up again just a few years later. An employment plaintiff sued Boeing and the case was assigned to Judge Clemon. About

fifteen months later, Boeing sought to associate lawyers from Constangy, Brooks as "additional trial counsel cognizant of the fact that Judge Clemon's nephew was associated with the firm and granting defendant's motion would most certainly lead to Judge Clemon's recusal." Id. at 1054.

Not surprisingly, Boeing argued that it wanted to hire Constangy Brooks because of "the additional attorneys' knowledge of employment-related matters and the vast resources of the firm." Id. Another district judge heard Boeing's motion, and denied Boeing's effort to add Constangy Brooks. That judge did not find that Boeing was attempting to manipulate the system, but noted the possibility of abuse.

> "If the issue is truly not one of 'judge shopping' the denial of the motion will not adversely affect the defendant. There is no shortage of law firms available to replace the Lanier-Ford law firm. The fact that a case has been pending a considerable period of time lends itself to potential abuse after there has been an opportunity for considering rulings, discussions, etc. of a trial judge. No matter how extensive the discovery may be, the true motive will be elusive, non-objective and not likely truly ascertainable. The discovery issues, especially those involving attorney-client privilege, are complex, and further discovery would not likely result in a confession or 'smoking gun.' When there has been a passage of fifteen months, the problem is exacerbated. When there has been such a passage of time, the burden to establish the right to join a disqualifying firm is greater. The court concludes that the motion should be denied."

Id. at 1055 (emphasis added). The Eleventh Circuit affirmed that denial of Boeing's motion to retain Judge Clemon's nephew's firm.

The Eleventh Circuit concluded that "[t]his potential for manipulation or impropriety may be considered, without making specific findings, a difficulty the deciding judge reflected upon in his opinion." Id. at 1056.

The Eleventh Circuit addressed matters involving Judge Clemon again seven years later. In re BellSouth Corp., 334 F.3d 941 (11th Cir. 2003), the Eleventh Circuit denied a petition for writ of mandamus filed by BellSouth, which was attempting to overturn a district court's order disqualifying Judge Clemon's nephew and the law firm in which he was then a partner (Lehr Middlebrooks Price & Proctor) from representing BellSouth.

The Eleventh Circuit first provided the background of the judicial ethics rules that applied.

> A federal judge must disqualify himself from consideration of a case if a person within the third degree of relationship "[i]s acting as a lawyer in the proceeding(.)" . . . Further, a judge must recuse if such a family member "[i]s known by the judge to have an interest that could be substantially affected by the outcome of the proceeding." . . . That a relative within the proscribed proximity stands to benefit financially as a partner in a participating firm - even if the relative is not himself involved - is sufficient to require recusal. . . . In this case, petitioner Price is the nephew of Chief Judge U.W. Clemon of the Northern District of Alabama, and is a full partner in LMPP. There is thus no dispute that, under Sections 455(b)(5)(ii) and 455(b)(5)(iii), Judge Clemon may not hear cases in which Price or LMPP is acting as a lawyer or a firm in which he is a full partner is a participant.

Id. at 943-44 (emphasis added). This per se approach does not appear in the judicial ethics rules -- which reject such an absolute rule.

The Eleventh Circuit acknowledged that "[i]t has long been a matter of concern that parties in the Northern District of Alabama might be taking strategic advantage of the recusal statute to, in effect, 'judge-shop.'" Id. at 944. The court explained that after the early decisions, the Northern District of Alabama adopted a "Standing Order"

essentially creating a presumption that any party adding a lawyer in a case before Judge Clemon was acting improperly, if the addition of that lawyer would result in Judge Clemon's recusal.

> ". . . There shall be a strong, but rebuttable, presumption that the reason for such a proposed addition or substitution of counsel is to cause recusal or disqualification of the assigned judge . . . ."

Id. at 945 (quoting from Standing Order).

In the case before the court this time, the Eleventh Circuit noted that Judge Clemon's nephew filed a stand-alone appearance as counsel of record eleven days after the plaintiff filed a class-action employment discrimination case against BellSouth. The case had been assigned to Judge Clemon, but another judge heard the disqualification motion. That judge disqualified the Judge Clemon's nephew and his law firm.

The Eleventh Circuit acknowledged that the Standing Order did not technically apply to the case before it, because BellSouth did not add Judge Clemon's nephew as additional counsel, but rather retained the nephew from the beginning. However, the Eleventh Circuit noted that the district court had been "suspicious" about BellSouth's retention of Judge Clemon's nephew, and had conducted some research.

> The court then discussed BellSouth's history of retaining Price [Judge Clemon's nephew] as counsel. Based on a computer analysis by court staff, Price was retained in only four of the 204 cases in which BellSouth was sued in the Northern District of Alabama since 1991. Although the 204 cases were divided among 19 different judges, three of the four Price cases were initially referred to Judge Clemon, forcing his recusal. The court found the fourth case to be of dubious value, since the appearance was entered only after the Jenkins controversy developed, suggesting it may have

> been contrived. Applying the presumption in light of the foregoing evidence, the district court found that the reason for the selection of Price as counsel was to cause the recusal of the assigned judge.

Id. at 947. The Eleventh Circuit ultimately agreed that the Standing Order did not apply, but nevertheless denied BellSouth's petition for writ of mandamus. Ironically, BellSouth had already been represented for over a year by the Constangy firm -- the law firm where Judge Clemon's nephew previously worked.

Well-respected Judge Tjoflat filed a lengthy dissent (even though he had been one of three judges who issued the per curiam decision in the earlier Robinson v. Boeing Co. case (discussed above)). He thought that Judge Clemon should automatically have disqualified himself as soon as his nephew filed his notice of appearance. Judge Tjoflat noted that Judge Clemon's nephew had appeared from the beginning of the case, so the situation did not involve BellSouth later choosing the nephew "as counsel to force the district court and the respondents to start from scratch with a new judge after expending significant resources." Id. at 976 (Tjoflat, J., dissenting). Judge Tjoflat worried about the process that the majority would require.

> If the majority is correct that the recusal statute authorizes the disqualification of counsel hired to force recusal of the first judge, this will require an evidentiary hearing before a second judge every time the first judge's third-degree relative is retained as counsel and the opposing party would like the proceedings to remain before the first judge. Under the majority's scheme, a party who wants the first judge to stay on the case because of a type of bias not covered by the recusal statute - e.g., ideological bias - will always move to disqualify the relative once he appears as counsel in the case, even if the relative is retained for legitimate reasons long before the complaint is ever filed. In every such case, the motion to disqualify will force an evidentiary hearing before a second judge to determine the

> party's motivation for hiring the judge's relative, this hearing will be necessary even if the motion to disqualify the relative is baseless because the first judge is conflicted and thus cannot rule that the motion is baseless.

Id. at 977 (Tjoflat, J., dissenting). Judge Tjoflat predicted that this would result in a lengthy and inappropriate evidentiary process.

> Following an evidentiary hearing in which the moving party demonstrates that the first judge is likely to be biased in his favor and the relative was hired to avoid this bias, and it appears that the moving party only wants the case returned to the first judge so that he can capitalize on the judge's bias in favor of his position, there would be, at the very least, a reasonable basis to question the first judge's impartiality under Section 455(a), if the case were reassigned to him.

Id. at 978 (Tjoflat, J., dissenting). Judge Tjoflat concluded that "[a]voiding this ugly scenario is why Congress opted to eliminate a hearing on a party's motive for hiring the judge's relative in the first place." Id. at 978 (Tjoflat, J., dissenting).

Interestingly, about as many pages of judicial analysis have been devoted to Judge Clemon's situation as to all other judges combined.

Still, a few other courts have dealt with similar recusal issues.

- Valley v. Phillips County Election Comm'n, 183 S.W.3d 557, 560 (Ark. 2004) (addressing a situation in which three days after learning that his case had been assigned to a particular judge, the plaintiff hired the partner of the judge's political opponent; concluding that "Valley retained [the lawyer] to force recusal" -- and disqualifying the lawyer).

- United States v. Jones, 102 F. Supp. 2d 1083, 1086 (E.D. Ark. 2000) (addressing a situation in which lawyer Luther Sutter filed an entry of appearance for criminal defendant Jones, thus triggering recusal of the judge handling the criminal matter; noting that "[b[y order filed on June 1st in the case of Harris v. Lester, 4:99cv00320 GH, the Court filed an order of recusal due to family members of the Court and family members of the plaintiff's attorney, Sutter, having recently participated in religious and church activities. By memo dated June 2nd, Sutter was added to the Court's recusal list. On June 7th, Sutter personally visited with several of this Court's staff

> members and received clarification that the recusal would be in all the cases where he was attorney of record and would apply to him personally and not other members of the firm. The attachments to the June 19th motion for accommodation clearly show that Sutter was aware when he entered his appearance here that the undersigned was the judge assigned to this case."; refusing to allow Sutter's appearance on behalf of Jones).

At least one bar has taken the same approach.

- Michigan LEO JI-44 (11/1/91) ("A lawyer may not associate as co-counsel with a lawyer in another firm, or offer or accept a referral from a lawyer, when one of the reasons for associating with or referring to the particular lawyer is to instigate a judicial recusal.").

(c) Courts obviously have an easier time analyzing (and possibly finding an improper motive in) a litigant's retention of a lawyer whose hiring triggers a judge's recusal after the judge has begun to handle the case. In some of the situations discussed above, the cases have been pending for some time.

For instance, in In re BellSouth Corp., 334 F.3d 941 (11th Cir. 2003), the Eleventh Circuit noted that

> [c]ourts in the district have been asked to apply the Standing Order several times in cases assigned to Judge Clemon in which Price (Judge Clemon's nephew) appeared. In two cases brought to our attention, courts declined to invoke the presumption of wrongful intent, because Price and LMPP [Price's law firm] had appeared from the outset rather than as substitute or additional counsel.

Id. at 945. In the case before the court, Judge Clemon's nephew entered an appearance just eleven days after the plaintiff filed the complaint against BellSouth -- although the case apparently had been assigned to Judge Clemon before that time.

One of the interesting questions is how (or even whether) the court can assess a client's motives in retaining lawyers.

In Grievance Adm'r v. Fried, 570 N.W.2d 262 (Mich. 1997), the Michigan disciplinary authority somehow obtained access to privileged communication between the clients and the lawyers -- and thus could point to several admissions that the lawyers were purely motivated by their desire to recuse their relatives from acting as judges.

In one of the Eleventh Circuit cases (In re BellSouth Corp., 334 F.3d 941 (11th Cir. 2003)) and in the Eastern District of Arkansas case discussed above, the courts had entered orders dealing with the situation. The order involving Judge Clemon created a rebuttable presumption that retaining the judge's nephew or the nephew's law firm was improper. The Eastern District of Arkansas order memorialized the judge's intent to recuse himself if any litigant hired a family/church friend.

In the matters involving Judge Clemon, the district court examined statistics to demonstrate some improper motive by corporate defendants obviously anxious to avoid their cases being heard by Judge Clemon.

Absent some evidence that a lawyer has retained co-counsel primarily to disqualify a judge sometime in the future, it is difficult to see how the lawyer could be punished for his or her selection of co-counsel.

(d) A comment to the ABA Model Judicial Code,[5] the Code of Conduct for United States Judges,[6] and state counterparts explains that a judge does not have to disqualify himself or herself just because a litigant appearing before the judge is represented by a lawyer who practices in the firm with one of the judge's relatives.

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5 ABA Model Code of Judicial Conduct, Rule 2.11 cmt. [4] (2007).

6 Code of Conduct for United States Judges, Canon 3C(1)(d)(ii) & (iii) (2009).

Instead, the issue is whether the relative has any interest or any "de minimis[] interest"[7] that could be "substantially affected by the outcome of the proceeding."[8] Courts and bars take different positions on this issue, but it is more likely that a judge would be disqualified if one of the judge's close relatives was a partner (rather than an associate) in the law firm representing one of the litigants before the judge.

As explained elsewhere, judges wondering whether they must disqualify themselves in a setting like that might choose to disclose the relationship, and follow the process for seeking litigants' and lawyers' consent to stay in the case.[9]

Many courts and bars have condemned efforts to seek a judge's disqualification by hiring a law firm that employs one of the judge's relatives. Several cases dealing with Northern District of Alabama Judge U.W. Clemon (discussed above) seemed not to differentiate much between situations in which Judge Clemon's nephew appeared personally, and situations in which colleagues from his law firm appeared. It would be easy to understand this reaction if the judge had already announced that the judge would recuse himself or herself if any colleague of the judge's relative appeared as a lawyer before the judge (or if there was a track record of the judge doing so). In that situation, the judge would essentially have turned the fairly subtle analysis of the relative's "interest" in the firm into a per se rule -- which other litigants and their lawyers would be tempted to use in manipulating the judge selection.

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7 ABA Model Code of Judicial Conduct, Rule 2.11(A)(2)(b) & (c) (2007).

8 28 U.S.C. § 455(b)(5)(ii); Code of Conduct for United States Judges, Canon 3C(1)(d)(ii) & (iii) (2009).

9 ABA Model Code of Judicial Conduct, Rule 2.11(C) (2007); Code of Conduct for United States Judges, Canon 3D (2009).

(e) Nothing in the ABA Model Judicial Code or in any of its state equivalents requires judges to recuse themselves if a litigant before the judge has hired the law firm in which the judge previously served as a partner or as an associate. Instead, judges use their own judgment about that situation, either: (1) automatically disqualifying themselves (for at least a certain period of time); (2) making the required disclosure and seeking the litigants' and lawyers' consent to continue handling the case under the prescribed process; or (3) not disclosing the affiliation at all (often after a lapse of time following the judge's departure from the firm).

Given the lack of any certain rules about the effect of this situation, it is somewhat surprising that several courts in high-profile cases found that litigants had acted improperly in hiring law firms at which the judges hearing the case had previously worked.

- Order at 2, 2-3, 3, 4, 4-5, Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp., No. 00-1218 (Fed. Cir. Nov. 28, 2001) (not citable as precedent pursuant to Fed. Cir. R. 47.6) (addressing a situation in which ex-solicitor general Seth Waxman and his new firm of Wilmer Cutler appeared as counsel for appellant DeKalb Genetics after that company had summary judgment entered against it; holding that Wilmer Cutler "surely knew that upon the filing of its entry of appearance, two members of the [federal circuit] panel would be called upon to determine" whether Wilmer Cutler's appearance "counsels their disqualification from further proceedings in this case" (emphasis added); explaining that one member of the panel departed from Wilmer Cutler in 1990 and at that time severed all financial connections with Wilmer Cutler, while another member of the panel "more recently retained a financial interest in the firm"; noting that the Second Circuit was "similarly disrupted" in an early case involving similar facts; concluding that "[w]e see no reason not to follow the rule that in these circumstances, the judges stay and the new lawyers go"; acknowledging that "[t]his court, of course, cannot know precisely why Mr. Waxman's skills have been sought by Appellant"; "If he is desired only for strategic advice, no entry of appearance would have been required, and we would have been saved the need to examine our duties under the Canons. Mr. Waxman's entry however leaves open substantive participation by Wilmer, Cutler & Pickering in the remainder

of the appeal here, and it is that situation which compels our invocation of the rule that protects the integrity of our appellate process."; sua sponte ordering Mr. Waxman and Wilmer Cutler to withdraw their entry of appearance).

- In re Federal Communications Comm'n, 208 F.3d 137, 139, 139-40, 139 n.1 (2d Cir. 2000) (addressing a situation in which Gibson, Dunn entered an appearance for its client NextWave in preparation for a petition for rehearing, thereby triggering the recusal of one of the judges who signed the order that NextWave sought to overturn; noting that "[i]t cannot have escaped the notice of the Gibson, Dunn firm and its several partners that one of the members of this Court's panel, Judge Robert Sack, was a member of that firm from 1986 until 1998. It was therefore obvious that Gibson, Dunn's appearance, if accepted by this Court, would draw into question Judge Sack's ability or willingness to remain on the panel, regardless of whether counsel focused on the relevant texts." (emphasis added); ultimately rejecting the appearance of Gibson, Dunn; "Once the members of a panel assigned to hear an appeal become known or knowable, counsel thereafter retained to appear in that matter should consider whether appearing might cause the recusal of a member of the panel. We make no finding as to good faith or intent by the estimable lawyers of Gibson, Dunn. It is clear, however, that tactical abuse becomes possible if a lawyer's appearance can influence the recusal of a judge known to be on a panel. Litigants might retain new counsel for rehearing for the very purpose of disqualifying a judge who ruled against them. As between a judge already assigned to a panel, and a lawyer who thereafter appears in circumstances where the appearance might cause an assigned judge to be recused, the lawyer will go and the judge will stay. . . . So the failure of counsel to consider in advance the known or knowable risk of a judge's recusal may result in the rejection of the appearance by that lawyer or firm."; ironically, noting that "On March 2, 2000, a motion was made by Global Crossing Ltd. and Liberty Media Corporation for leave to file a brief amicus curiae in support of NextWave's position. The motion, which has yet to be adjudicated, was filed by Simpson Thacher & Bartlett. A second member of the panel is a former partner of that firm; and a current partner of that firm is the son of the third member of this panel.").

The judicial codes certainly do not require such a harsh approach, but courts perceiving some attempt to manipulate the system understandably resist such efforts.

Best Answer

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

Judicial Bias

Hypothetical 17

You just started hearing a criminal trial of a defendant charged with breaking into an elderly women's house and strangling her to death. This scenario brings back strong memories, because your mother was the victim of a nearly identical crime about ten years ago.

(a) Must you disclose this fact to the prosecution and the defense?

MAYBE

(b) Must you recuse yourself if requested by either the prosecutor or the defense lawyer?

MAYBE

(c) From what you have already heard about this defendant from both his lawyer and the prosecutor in various pretrial hearings, the defendant seems to be a real hot head -- must you recuse yourself if in the course of the trial the defendant brags about the crime, says that he knows your mother died in exactly the same way, and then makes an obscene gesture toward you in the courtroom?

NO

Analysis

General Standards

Judges' recusal is governed both by statute and by judicial code.

For instance, a federal statute requires any federal judge to "disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455.

The ABA Model Judicial Code similarly explains that

> A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality[] might reasonably be questioned.

ABA Model Code of Judicial Conduct, Rule 2.11(A)(1) (2007).

The judicial code governing federal judges takes the same basic approach.

> A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned.

Code of Conduct for United States Judges, Canon 3C(1) (2009). A comment to that code provides some explanation.

> An appearance of impropriety occurs when reasonable minds, with knowledge of all the relevant circumstances disclosed by a reasonable inquiry, would conclude that the judge's honesty, integrity, impartiality, temperament, or fitness to serve as a judge is impaired. Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. This prohibition applies to both professional and personal conduct. A judge must expect to be the subject of constant public scrutiny and accept freely and willingly restrictions that might be viewed as burdensome by the ordinary citizen. Because it is not practicable to list all prohibited acts, the prohibition is necessarily cast in general terms that extend to conduct by judges that is harmful although not specially mentioned in the Code. Actual improprieties under this standard include violations of law, court rules, or other specific provisions of this Code.

Code of Conduct for United States Judges, Canon 2A Commentary (2009).

When the ABA revisited the judicial code several years ago, an enormous national debate focused on whether to drop the "appearance of impropriety" standard from the ethics code for judges. The ABA finally decided to leave the standard in its judicial code.

> A judge shall act at all times in a manner that promotes public confidence in the independence,[] integrity,[] and impartiality[] of the judiciary, and shall avoid impropriety and the appearance of impropriety.

ABA Model Code of Judicial Conduct, Rule 1.2 (2007). A comment explains what the term means.

> Actual improprieties include violations of law, court rules or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.

ABA Model Code of Judicial Conduct, Rule 1.2 cmt. [5] (2007).

Not surprisingly, the ABA Model Code of Judicial Conduct emphasizes that judges must analyze their own involvement even if no party files a motion seeking their disqualification.[1]

Interestingly, the ABA Model Judicial Code contains a separate provision warning judges not to disqualify themselves too quickly.

> A judge shall hear and decide matters assigned to the judge, except when disqualification is required by Rule 2.11 or other law.

ABA Model Code of Judicial Conduct, Rule 2.7 (2007). A comment explains this concept.

> Judges must be available to decide the matters that come before the court. Although there are times when disqualification is necessary to protect the rights of litigants and preserve public confidence in the independence,

[1] ABA Model Code of Judicial Conduct, Rule 2.11 cmt. [2] (2007) ("A judge's obligation not to hear or decide matters in which disqualification is required applies regardless of whether a motion to disqualify is filed.").

> integrity, and impartiality of the judiciary, judges must be available to decide matters that come before the courts. Unwarranted disqualification may bring public disfavor to the court and to the judge personally. The dignity of the court, the judge's respect for fulfillment of judicial duties, and a proper concern for the burdens that may be imposed upon the judge's colleagues require that a judge not use disqualification to avoid cases that present difficult, controversial, or unpopular issues.

ABA Model Code of Judicial Conduct, Rule 2.7 cmt. [1] (2007)[2] (emphases added).

Like all other judicial codes, the ABA Model Judicial Code also recognizes what is called a "rule of necessity" -- requiring judges to hear a case if no other judge could step in.[3]

Alleged Bias Caused by Evidence in the Case

Most courts recognizing a judge's apparent bias against a party do not require disqualification if the bias comes from what the judge has heard in the courtroom.[4]

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[2] Although lawyers must diligently represent their clients in seeking a judge's disqualification in the right circumstances, they can pay a price if they target a judge but miss. See, e.g., Ginsberg v. Evergreen Security, Ltd. (In re Evergreen Security, Ltd.), 570 F.3d 1257 (11th Cir. 2009) (suspending for five years a Crowell & Moring partner from appearing in bankruptcy court, for improperly pursuing disqualification of a bankruptcy judge).

[3] ABA Model Code of Judicial Conduct, Rule 2.11 cmt. [3] (2007) ("The rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In matters that require immediate action, the judge must disclose on the record the basis for possible disqualification and make reasonable efforts to transfer the matter to another judge as soon as practicable.").

[4] See, e.g., United States v. Pearson, 203 F.3d 1243, 1278 (10th Cir.) ("[T]his case comports with the Supreme Court's continuing recognition in Liteky [v. United States, 510 U.S. 540 (1994)] that comments made by a judge based on information learned during the course of the proceedings normally do not necessitate recusal on the grounds of bias. Of course, even when angry, a judge must be fair and take care not to cross the line separating righteous criticism from injudicious damnation. We are satisfied that the line has not been crossed here, and that the district judge's rulings, based on information he learned during the course of the proceedings, did not display a deep-seated antagonism that would make fair judgment impossible and require us to vacate and direct a new trial or resentencing."), cert. denied, 530 U.S. 1268 (2000); Hays v. Craven, 963 P.2d 1198, 1200 (Idaho Ct. App. 1998) ("In order for a judge to be disqualified under this rule, the alleged bias or prejudice 'must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.'" (citation omitted)).

It is extremely rare for a court to disqualify a trial judge for comments the trial judge makes in court or in an opinion. One recent case involved D.C. district Judge Royce Lamberth. The D.C. Circuit[5] pointed to the following statement in one of Judge Lamberth's opinions in concluding "reluctantly, that this is one of those rare cases in which reassignment is necessary" because of "a judge's animosity toward a party." Cobell v. Kempthorne, 455 F.3d 317, 335 (D.C. Cir.2006), cert. denied, 549 U.S. 1317 (2007).

> "The entire record in this case tells the dreary story of Interior's degenerate tenure as Trustee-Delegate for the Indian trust -- a story shot through with bureaucratic blunders, flubs, goofs and foul-ups, and peppered with scandals, deception, dirty tricks and outright villainy -- the end of which is nowhere in sight. . . . The puerile reference is not lost on the Court, but Interior's misguided attempt at levity in the context of litigation an issue of immense importance to 500,000 members of a historically oppressed people is disgraceful. . . . This Court has played host to countless pleadings from clinically insane litigants and prison inmates but has rarely seen such a disrespectful tenor in the court filing."

Id. at 327-28 (citation omitted; emphases added).

> "While it is undeniable that Interior has failed as a Trustee-Delegate, it is nevertheless difficult to conjure plausible hypotheses to explain Interior's default. Perhaps Interior's past and present leaders have been evil people, deriving their pleasure from inflicting harm on society's most vulnerable. Interior may be consistently populated with apathetic people who just cannot muster the necessary energy or emotion to avoid complicity in the Department's grossly negligent administration of the Indian trust. Or maybe Interior's officials are cowardly people who dodge their responsibilities out of a childish fear of the magnitude of effort involved in reforming a degenerative system. Perhaps Interior as an institution is so badly broken that even the

[5] Cobell v. Kempthorne, 455 F.3d 317 (D.C. Cir. 2006), cert. denied, 549 U.S. 1317 (2007).

> most well-intentioned initiatives are polluted and warped by the processes of implementation. The government as a whole may be inherently incapable of serving as an adequate fiduciary because of some structural flaw. Perhaps the Indians were doomed the moment the first European set foot on American soil. Who can say? It may be that the opacity of the cause renders the Indian trust problem insoluble."

Id. at 328-29 (footnote omitted; emphases added). The court remanded the case to the district court's chief judge "with instructions to reassign the case."[6] For obvious reasons, this sort of disqualification only occurs in the most extreme cases.

Bias Caused by Stock Ownership

Most courts have adopted their own standards for judges' disqualification if the judge owns stock in one of the parties.[7] However, an occasional decision still deals with a related issue.

For instance, in United States v. Wolff, 263 F. App'x 612 (9th Cir. 2008) (unpublished opinion), the Ninth Circuit reversed 18 convictions of a defendant in a corporate fraud scheme. The defendant was CEO and chairman of a company that dealt with AOL. The fraud involved the defendant's company's dealings with AOL, although AOL was not itself involved in the case. Defendant Wolff had sought to disqualify the judge handling the case, because he acknowledged that he owned AOL stock. A colleague in the Central District of California had heard the motion to disqualify, and denied it.

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6 Id. at 335.

7 Comm. on Codes of Conduct [for United States Judges], Advisory Op. No. 57 (7/10/98) ("It is the opinion of the Committee that the owner of stock in a parent corporation has a direct legal or equitable interest in a controlled subsidiary, and where a judge knows that a party is controlled by a corporation in which the judge owns stock, the judge should disqualify in the proceeding.").

However, the Ninth Circuit disagreed with that decision -- and reversed the criminal conviction because the judge had continued to preside after his colleague denied the defendant's disqualification motion. The Ninth Circuit noted the following facts: several AOL employees were unindicted co-conspirators; the allegedly fraudulent deals involved an AOL senior executive; four AOL officials testified at the trial; many witnesses testified about the defendant's dealings with AOL; the U.S. government filed a criminal complaint against AOL that was stayed pending the criminal trial; the SEC charged AOL's successor with fraud in connection with the same transactions; several private plaintiffs filed actions against AOL based on the transactions. The Ninth Circuit found that these facts meant that the judge's ownership of AOL stock should have resulted in his disqualification.

> There is no dispute that Judge Anderson's ownership of AOL stock constitutes the requisite "financial interest[";] the only question is whether it is an interest "in the subject matter in controversy." Based on the unique facts that are before us, we conclude that the judge did have a financial interest in the subject matter in controversy under section 455(b)(4). Accordingly, Judge Walter erred in denying Wolff's disqualification motion.
>
> . . . .
>
> Based on our review of the record, we conclude that Judge Anderson's ownership of AOL stock constituted a "financial interest in the subject matter in controversy," in violation of 28 U.S.C. § 455(b)(4). We therefore conclude that Judge Walter abused his discretion by denying Wolff's motion to disqualify Judge Anderson.

Id. at 615-16.

On the other hand, some judges clearly go too far. For instance, the Fourth Circuit reversed an Eastern District of Virginia judge who had declined to hear a case

involving a power company, because as a power company customer the judge might ultimately receive a fairly minor refund.

> We are inclined to agree with the district court that $70 to $100 cash in hand is not de minimis. But when the possibility of recovering that amount is spread over the next 40 years, is dependent upon VEPCO winning the lawsuit and the full amount claimed, collecting the judgment, and the Virginia State Corporation Commission requiring VEPCO to return increased fuel costs to its customers, we doubt that anyone other than Jimmy the Greek would offer anything for the judge's chance. A reasonable man would doubtless prefer a $2 ticket at Churchill Downs on the first Saturday in May. We hold the judge's "any other interest" in VEPCO's speculative recovery was de minimis and his finding to the contrary clearly erroneous.

Virginia Elec. & Power Co. v. Sun Shipbuilding & Dry Dock Co. (In re Virginia Elec. & Power Co.), 539 F.2d 357, 368 (4th Cir. 1976).

In some situations, judges deal with their own possible interests in a somewhat mysterious way. For instance, in Muchnik v. Thomson Corp. (In re Literary Works in Elec. Databases Litig.), 509 F.3d 136 (2d Cir. 2007), two judges on the Second Circuit explained why they did not recuse themselves. As they explained it, they realized one day before an important argument that "there was a high probability that [the judges] held copyrights in works, such as law review articles and speeches, reproduced on defendants' databases" (which was the subject matter of the case). Id. at 139. The judges publically stated at the hearing that they would "forego any financial interest in the settlement that we could possibly have now or in the future." Id.

Within the next several days, the judges sought advice from the Committee on Codes of Conduct of the Judicial Conference of the United States, which advised the judges not to continue serving on the Second Circuit panel. Several weeks later, the

judges informed this Committee "of the added fact that the case had been assigned to us after the claims period had expired" -- which meant that "we would have been ineligible to participate in any recovery." Id. at 140. Three days later, the Committee's chair "informed us that this fact did not alter the Committee's opinion that recusal should occur." Id. The judges nevertheless decided to remain in the case -- despite having been told twice by the Committee hearing such matters that they should disqualify themselves.

(a)-(b) Courts usually reject disqualification motions based on some bias supposedly resulting from the judge's personal experience.

For instance, courts have held that:

- A judge who is an adoptive mother could hear a case about the disclosure of adoption records.[8]
- A judge whose father had been killed by a black man could hear a case involving a black criminal defendant.[9]
- A judge who had been the victim of harassment and stalking could hear a case involving alleged stalking.[10]
- A judge who had been sexually abused as a child could hear a sexual abuse case.[11]

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[8] In re Margaret Susan P., 733 A.2d 38 (Vt. 1999).

[9] State v. Shabazz, 719 A.2d 440 (Conn. 1998), cert. denied, 525 U.S. 1179 (1999).

[10] Commonwealth v. Urrutia, 653 A.2d 706 (Pa. Super. Ct. 1995), appeal denied, 661 A.2d 873 (1995).

[11] State v. Mann, 512 N.W.2d 528 (Iowa 1994). A federal district court later granted a writ of habeas corpus based on the judge's failure to recuse himself (Mann v. Thalacker, No. 3:95-cv-03008-DEO (N.D. Iowa Sept. 10, 1999)), but the Eighth Circuit reversed – rejecting the defendant's argument that he never would have waived a jury and let the judge decide his sexual abuse case if he had known that the judge himself had been sexually abused as a teenager. Mann v. Thalacker, 246 F.3d 1092 (8th Cir.), cert. denied, 543 1018 (2001).

In a more somewhat surprising case, the Virginia Court of Appeals held that a judge did not have to automatically disqualify himself from hearing a criminal case against a defendant who several years earlier had stolen the judge's car.[12]

(c) Interestingly, judges need not disqualify themselves in situations that on first blush would seem to require recusal.

Several courts and bar have indicated that judges need not disqualify themselves if a party appearing before the judge:

- Files a lawsuit against the judge.[13]

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[12] Broady v. Commonwealth, 429 S.E.2d 468, 471, 472 (Va. Ct. App. 1993) (reversing and remanding a criminal conviction for robbery and burglary, because of possible racially-motivated peremptory strikes; noting that the criminal defendant had not raised on appeal the possible obligation of the trial judge to recuse himself; "We consider the recusal issue because it may arise again upon retrial. Appellant made a motion prior to the commencement of the case requesting that the trial judge recuse himself as the appellant had previously been convicted of grand larceny of the judge's motor vehicle."; noting that the judge had "no personal recollection of the individual that had been convicted of larceny of his vehicle," that he had not participated in the earlier criminal proceeding as either a judge or witness, that the matter before the judge was to be decided by a jury, that he as judge would be dealing with the law, and that "[t]he fact that he as the victim of a prior act would not, in his opinion, prevent him from acting fairly and impartially"; explaining that "we point out that the judge's role in a jury trial should be given little weight in determining whether the judge should recuse himself. Many of the legal issues in a trial involve mixed questions of law and fact and require the judge to be the fact finder on certain issues. Further, many critical rulings in a case are left to the sound discretion of the trial judge, not the least of which is whether to impose or suspend the jury's recommended sentence. Therefore, the fact that the case is to be tried by a jury should be accorded little, if any, weight in determining whether the judge should recuse himself. Also, on remand, the trial judge should give consideration to the Canons of Judicial Conduct, Canons III (c)(1), which provides: '[a] judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.'"; not reaching any conclusion about what the judge should do on remand).

[13] United States v. Walls, Case No. 92-CR-80236-DT, 2006 U.S. Dist. LEXIS 27381, at *5-6 (E.D. Mich. May 9, 2006) (denying a motion to recuse filed by a criminal defendant who had filed a lawsuit against a judge; "Defendant also argues that this court should disqualify itself because Defendant has recently filed a lawsuit against the undersigned judge. (5/1/06 Aff. at 3.) While under 28 U.S.C. § 455(b)(5)(i), the court would be required to disqualify itself if it were a party to this proceeding, there is no such requirement when the court is a party in a separate proceeding involving the same defendant. United States v. Grismore, 564 F.2d 929, 933 (10th Cir. 1977) ('A judge is not disqualified merely because a litigant sues or threatens to sue him.'); Scarrella v. Midwest Federal Sav. and Loan, 536 F.2d 1207, 1209 (8th Cir. 1976) (holding that judges were not disqualified merely because they were parties in a separate action involving one of the litigants). . . . As discussed above, Defendant has failed to allege any facts which demonstrate 'reliance upon an extrajudicial source . . .' Liteky, 510 U.S. 540 at 555, 127 L. Ed. 2d 474 [(2nd Cir. 1943)]. Nor are the defendant's averments the 'rare[] circumstance[]' variety that

- Files an ethics charge against the judge.[14]
- Asserts other charges against the judge.[15]

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might 'evidence the degree of favoritism or antagonism required . . . when no extrajudicial source is involved.' Id.").

[14] United States v. Talley, Case No. 3:06cr448-01/RV, 2007 U.S. Dist. LEXIS 54597, at *4, *5 (N.D. Fla. July 27, 2007) (a non-motion to recuse filed by a defendant who had "recently filed a charge of judicial misconduct against me, as well as a separate lawsuit seeking damages from this court in the amount of $78,600,000.00."; "I am now the third judge in this court assigned to the defendant's case. It appears that his defense tactic is to file judicial complaints and/or lawsuits against the presiding judge (or, indeed, anyone affiliated with the case), attempt to seek that judge's recusal, and then continue the same foolish routine until he exhausts the supply of judges. The law, however, does not permit such 'judge-shopping,' and this tactic will not be tolerated."); Smartt v. United States, 267 F. Supp. 2d 1173, 1177 (M.D. Fla. 2003) (denying a motion to recuse by a defendant who had filed an ethics charge against a sitting judge; "It has long been established that a party cannot force a judge to recuse himself by engaging in personal attacks on the judge. Otherwise, 'every man could evade the punishment due to his offense, by first pouring a torrent of abuse upon his judges, and then asserting that they act from passion.' Standing Committee v. Yagman, 55 F.3d 1430, 1443-44 (9th Cir. 1995). See also United States v. Wolfson, 558 F.2d 59, 62 (2d Cir. 1977) (defendant's unfounded charges of misconduct against judge did not require disqualification because defendant's remarks established only the defendant's feelings towards the judge, and not the reverse)."; "Further, a judge has as strong a duty to sit when there is no legitimate reason to recuse as he does to recuse when the law and facts require.").

[15] Brown v. Alabama, 740 F. Supp. 819, 820-21, 821, 822, 822-23, 823 (N.D. Ala. 1990) (denying a motion to recuse filed by an individual defendant in a race and sex discrimination case filed against the state of Alabama and a number of individuals; explaining that one of the individual defendants served as the Alabama Commissioner of Revenue, and had in that role filed a tax lien against the judge twelve years earlier; noting that the judge paid the full amount of the lien six days after receiving the lien notice; "A reasonable person, accepting these facts as true, would infer no bias or prejudice against the tax official by the taxpayer-judge. Such reasonable person would conclude that the judge, upon receiving notice of the lien, conceded its correctness and promptly paid the taxes. That reasonable person would infer that had the judge harbored any resentment of or hostility towards the tax official, he would have put the tax official to his proof -- as he had a perfect legal right to do so. . . . Instead, the judge voluntarily paid the tax before the final establishment of the legal obligation to do so -- evincing an obvious desire to put the entire matter behind him."; "A precious few, if any, citizens rejoice in the prospect of paying taxes. But only an unreasonable taxpayer would take offense at the tax collector who simply performs his/her job in any evenhanded manner. More importantly, only an unreasonable tax collector would fear any bias or prejudice at the hands of a judge to whom he had sent a valid uncontested tax lien twelve years earlier, and from whom he had heard nothing since the lien was satisfied."; "The Beshears affidavit speaks to other matters. . . . It says that prior to 1982, this judge was habitually late in filing his tax returns; that these late filings resulted in additional interest and penalties; and that his tax returns have been subject to numerous field audits and adjustments. Beshears does not allege any personal involvement with any of these alleged problems. Thus, his affidavit is legally insufficient insofar as these matters are concerned, for it is settled law that the bias alleged in a § 144 affidavit must be personal bias against the affiant or in favor of an adverse party."; also noting that "[t]he Beshears affidavit was not filed under seal. It is now a matter of public record."; "This judge has been unable to verify the existence of any court order authorizing the release of his income tax returns and records to defendant Beshears and/or his attorney. . . . If no such order exists, then a crime may have been committed by defendant Beshears and possibly others, for this judge has not consented to the release of his tax records and their use in this proceeding."; "Before disposing of the disqualification issue in its entirety, the Court must know whether Beshears or his attorney obtained the requisite court order prior to making public the otherwise

- Threatens the judge.[16]
- Assaults the judge in court.[17]

Although one might think that a judge could not impartially hear a case involving a party in such a situation, rewarding the party for such misbehavior by requiring disqualification would clearly encourage other parties to engage in similar misconduct.

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confidential tax information. Upon being so advised, the Court will determine whether disqualification is warranted."; "By 4:30 P.M. on Friday, June 29, 1990, Counsel for Beshears shall file with the Court a certified copy of any court order authorizing the release by said defendant of this judge's tax returns and other tax information. Should counsel fail to file such document, the Court will assume that none exists and proceed to pass on the ultimate issue of whether disqualification is warranted based on a possible violation of the judge's right of privacy by a party to this proceeding.").

[16] State v. Prater, 583 So. 2d 520, 527 (La. Ct. App. 1991) (affirming a conviction of a criminal defendant who had apparently sent threatening letters to the judge (based on handwriting analysis); "Immediately prior to sentencing, counsel for defendant orally moved for the trial judge to recuse himself from sentencing defendant. This oral motion for recusal was based upon the threats defendant apparently made against the judge making it improper for the court to impose sentence. The trial judge denied the motion stating he had no personal animosity towards defendant and defendant had not demonstrated any prejudice on the judge's part. Further, the trial judge stated that defendant could not 'disarm' him because defendant wrote him some letters.").

[17] State v. Bilal, 893 P.2d 674, 675 (Wash. Ct. App. 1995) (upholding a lower court's ruling that a trial judge could sentence a criminal defendant after a jury verdict finding the defendant guilty of rape, even though the criminal defendant "assaulted the trial judge as he sat on the bench" after the verdict was read); People v. Hall, 499 N.E.2d 1335, 1339 (Ill. 1986) (affirming a conviction and death sentence for a convicted murderer; explaining that the criminal defendant had hit the judge "on the head with his fist" and had attacked his public defender lawyer with a chair; "The actions of the defendant in striking his attorney and the trial judge were certainly outrageous and called for extraordinary detachment on their part. Despite the gravest of provocations the attorney and the judge, as we have observed, carried out their responsibilities with professional competence and, considering the circumstances, even grace. We cannot presume a failure of impartiality of a trial judge even under extreme provocation. Judges are called upon to preside over the trial of onerous causes and persons. By definition, however, a trial judge is required to ignore provocations and pressures, whether public or from individuals. The record shows that the trial judge's conduct here was entirely proper. He correctly noted that the administration of justice requires the courage to insure that justice is fairly and impartially administered. The judge could easily have stepped aside without criticism and had the cause tried by another judge, even though it was predictable that a claim of double jeopardy might subsequently be raised. To hold that the law requires a substitution of judges under circumstances similar or comparable to those here would invite misconduct toward judges and lawyers, and a practice would develop that the grosser the misconduct the better the chances to avoid trial with an undesired judge or lawyer."), rev'd in part on other grounds sub nom. Hall v. Washington, 106 F.3d 742 (7th Cir. 1997).

Best Answer

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

Judges' Personal Investigations

Hypothetical 18

You have served for two years as a trial court judge, and realistically hope to soon receive an appointment to an appellate court. You are now in the middle of a newsworthy trial, and questions have arisen that require your immediate attention.

(a) In the trial, there is some dispute about when the defendant spoke with a court clerk about a filing deadline. May you call the clerk to find out when the defendant spoke to her?

NO

(b) You suspect that the defendant could not have spoken to the court clerk on the date he claims, because he earlier stated that he would be out of the country during that time. May you check the defendant's social networking website to see where he was on that date?

NO

(c) The trial also involves a young adult's reaction to a stressful incident. May you read and rely on articles about how young adults react under stress (which have not been admitted into evidence)?

NO

(d) If you are appointed to the appellate court, may you read and rely on such articles?

YES (PROBABLY)

Analysis

The ABA Model Judicial Code severely restricts judges' personal factual investigations.

> A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

ABA Model Code of Judicial Conduct, Rule 2.9(C) (2007). Not surprisingly, this prohibition explicitly extends to electronic sources (such as the Internet). ABA Model Code of Judicial Conduct, Rule 2.9 cmt. [6] (2007) ("The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.").

The ABA Model Judicial Code even finds it necessary to include a limited permission for judges to consult with court staff and officials. ABA Model Code of Judicial Conduct, Rule 2.9(A)(3) (2007) ("A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.").

In appellate courts, the line between factual investigation and background reading seems to blur.

(a) If the date of the communication between a litigant and the court is an important point in a case, judges must refrain from conducting their own investigation of the communication -- which appears to fall outside the permissive contact discussed above.

(b) Judges should not undertake such personal factual investigations. The ABA Model Code of Judicial Conduct's explicit reference to electronic sources of information provide clear guidance to judges tempted to use the Internet or some other easy source of factual information.

(c) The issue here is whether such reading amounts to an investigation of fact, or the sort of background self-education that judges may undertake. It would be better for judges to err on the side of avoiding such focused research in connection with a particular case.

(d) Although there is no reason to think that the ABA Model Code of Judicial Conduct applies any differently to appellate judges than it does to trial judges, appellate courts routinely examine such extraneous material that has not been tested through cross-examination.

To be sure, there is an important difference between a judge conducting her own research and the judge relying on material presented by one of the parties to an appeal (or an amicus). Still, it is interesting to consider the role of material presented on appeal that has not survived the crucible of cross-examination at trial.

Many academic writers urge courts to accept such extrajudicial sources of information, as a way to advance basic social justice. For instance, in her article Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs, 34 U.S.F. L. Rev. 197 (2000), Temple University School of Law Professor Ellie Margolis defended use of such materials.

> As long as appellate courts decide cases and write opinions that rely upon non-legal materials, lawyers should learn to use these materials effectively. . . . Lawyers are missing a golden opportunity for advocacy by allowing judges alone to research non-legal materials and draw their own connections, often unsupported, between the legal arguments presented and the factual information thought to be supportive of the judge's conclusion. It is particularly important for lawyers to do this when making policy arguments, for which non-legal information may often provide the best support. For all of these reasons, lawyers

> not only can, but should use non-legal information in support of arguments in appellate briefs.
>
> . . . .
>
> . . . In cases which require the formulation of a new legal rule, policy-based reasoning is extremely important, and the appellate lawyer should present policy arguments as effectively as possible to the court. Non-legal materials can often be the best, and sometimes the only support for these policy arguments. Indeed, non-legal materials serve a unique function in supporting policy arguments that is different from other uses of legislative facts. Because of this, the appellate court is the appropriate forum to use them.

Id. at 202-03 & 210-11 (emphases added; footnotes omitted).

Most commentators point to the case of Muller v. Oregon, 208 U.S. 412 (1908) as initiating this process of judicial reliance on extrajudicial sources. In that case, the Supreme Court upheld the constitutionality of an Oregon law limiting to ten hours the amount of time that women may work in certain establishments.

The state of Oregon was represented in that case by Louis Brandeis, who filed what became known as a "Brandeis Brief" in support of the Oregon statute. Brandeis's brief consisted of a two-sentence introduction, a few transition sentences, a one-sentence conclusion, and 113 pages of statutory citations and (primarily) social science study reports and academic treatises about how women cannot tolerate long work hours. For example, the Brandeis Brief contained the following passages:

> Long hours of labor are dangerous for women primarily because of their special physical organization. In structure and function women are differentiated from men. Besides these anatomical and physiological differences, physicians are agreed that women are fundamentally weaker than men in all that makes for endurance: in muscular strength, in nervous energy, in the powers of persistent attention and application.

Brandeis Brief at 18 (emphasis added), available at http://www.law.louisville.edu/library/collections/brandeis/sites/www.law.louisville.edu.library.collections.brandeis/files/brief3.pdf.

The various social science study reports quoted in the Brandeis Brief have some remarkable conclusions and language.

> "You see men have undoubtedly a greater degree of physical capacity than women have. Men are capable of greater effort in various ways than women."[1]
>
> . . .
>
> "Woman is badly constructed for the purposes of standing eight or ten hours upon her feet."[2]
>
> . . .
>
> "It has been declared a matter of public concern that no group of its women workers should be allowed to unfit themselves by excessive hours of work, by standing, or other physical strain, for the burden of motherhood, which each of them should be able to assume."[3]
>
> . . .
>
> "'The children of such mothers -- according to the unanimous testimony of nurses, physicians, and others who were interrogated on this important subject -- are mostly pale and weakly; when these in turn, as usually happens, must enter upon factory work immediately upon leaving school, to

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[1] Brandies Brief at 19 (quoting Report of Committee on Early Closing of Shops Bill, British House of Lords, 1901) (emphasis added), available at http://www.law.louisville.edu/library/collections/brandeis/sites/www.law.louisville.edu.library.collections.brandeis/files/brief3.pdf.

[2] Id. (quoting Report of the Maine Bureau of Industrial and Labor Statistics, 1888).

[3] Id. at 49-50 (quoting Legislative Control of Women's Work, by S.P. Breckinridge, Journal of Political Economy, p. 107, vol. XIV, 1906) (emphases added), available at http://www.law.louisville.edu/library/collections/brandeis/sites/www.law.louisville.edu.library.collections.brandeis/files/brief5.pdf.

> contribute to the support of the family, it is impossible for a sound, sturdy, enduring race to develop.'"[4]

Based on all of this social science, the Brandeis Brief ends with the following conclusion:

> We submit that in view of the facts above set forth and of legislative action extending over a period of more than sixty years in the leading countries of Europe, and in twenty of our States, it cannot be said that the Legislature of Oregon had no reasonable ground for believing that the public health, safety, or welfare did not require a legal limitation on women's work in manufacturing and mechanical establishments and laundries to ten hours in one day.

Brandeis Brief at 113 (emphasis added), available at http://www.law.louisville.edu/library/collections/brandeis/sites/www.law.louisville.edu.library.collections.brandeis/files/brief11.pdf.

Incidentally, an article published approximately 100 years after Brandeis filed his brief pointed out that Brandeis's dramatic conclusion stated exactly the opposite of what he intended to argue. Clyde Spillenger, Revenge of the Triple Negative: A Note on the Brandeis Brief in Muller v. Oregon, 22 Const. Comment. 5 (Spring 2005).

In its decision upholding Oregon's statute, the United States Supreme Court explicitly relied on Brandeis's Brief -- emphasizing women's physical weakness and their importance in bearing and raising children. Emphasizing "the difference between the sexes," the Supreme Court quoted from one of the sources that Brandeis had included in his brief.

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[4] Id. at 58 (quoting The Working Hours of Female Factory Hands. From Reports of the Factory Inspectors, Collated by the Imperial Home Office, p. 113, Berlin, 1905 (emphasis added), available at http://www.law.louisville.edu/library/collections/brandeis/sites/www.law.louisville.edu.library.collections.brandeis/files/brief5.pdf.

> "The reasons for the reduction of the working day to ten hours -- (a) the physical organization of women, (b) her maternal functions, (c) the rearing and education of the children, (d) the maintenance of the home -- are all so important and so far reaching that the need for such reduction need hardly be discussed."

Muller v. Oregon, 208 U.S. at 419 n.1. The court took "judicial cognizance of all matters of general knowledge" -- including the following:

> That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.
>
> Still again, history discloses the fact that woman has always been dependent upon man.
>
> . . .
>
> [S]he is not an equal competitor with her brother.
>
> . . .
>
> It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him.
>
> . . .
>
> [S]he is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions -- having in view not merely her own health, but the well-being of the race -- justify legislation to protect her from the greed as well as the passion of man.
>
> . . .

> The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her.

Id. at 421, 422, 422-23 (emphases added).

The United States Supreme Court continues to debate reliance on such extrajudicial sources.

In Roper v. Simmons, 543 U.S. 551 (2005), for instance, the Supreme Court found unconstitutional states' execution of anyone under 18 years old, however horrible their crime. Justice Kennedy's majority relied heavily on social science sources (presented for the first time to the court, and therefore not subjected to cross-examination) indicating that people under 18 are not fully capable of making rational decisions, and therefore should never be subject to execution.

Justice Scalia's dissent severely criticized the majority's reliance on such studies.

> Today's opinion provides a perfect example of why judges are ill equipped to make the type of legislative judgments the Court insists on making here. To support its opinion that States should be prohibited from imposing the death penalty on anyone who committed murder before age 18, the Court looks to scientific and sociological studies, picking and choosing those that support its position. It never explains why those particular studies are methodologically sound; none was ever entered into evidence or tested in an adversarial proceeding.

Id. at 616-17 (emphasis added) (Scalia, J., dissenting). Justice Scalia said that by selecting favorable extrajudicial and untested social science articles means that "all the

Court has done today, to borrow from another context, is to look over the heads of the crowd and pick out its friends." Id. (emphasis added).

Justice Scalia provided a concrete example.

> We need not look far to find studies contradicting the Court's conclusions. As petitioner points out, the American Psychological Association (APA), which claims in this case that scientific evidence shows persons under 18 lack the ability to take moral responsibility for their decisions, has previously taken precisely the opposite position before this very Court. In its brief in [another case], the APA found a "rich body of research" showing that juveniles are mature enough to decide whether to obtain an abortion without parental involvement. . . . The APA brief, citing psychology treatises and studies too numerous to list here, asserted: "[B]y middle adolescence (age 14-15) young people develop abilities similar to adults in reasoning about moral dilemmas, understanding social rules and laws, [and] reasoning about interpersonal relationships and interpersonal problems."

Id. at 617-18 (emphases added; citation omitted) (Scalia, J., dissenting).

The Supreme Court (and other appellate courts) nevertheless continues to rely on extrajudicial sources that have never been subjected to cross-examination.

Best Answer

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

Settlement Role

Hypothetical 19

You represent the defendant in contentious litigation. You think that the judge's participation in settlement discussions might result in a favorable settlement for your client.

Can the presiding judge participate in settlement negotiations, such as caucused mediations?

YES

Analysis

Not surprisingly, the ABA Model Code of Judicial Conduct permits judges to encourage settlement, but warns against any coercion.[1] The judicial ethics code governing federal judges takes the same basic approach.[2]

The ABA Model Judicial Code also permits judges to more directly involve themselves in settlement discussions, with the parties' consent. ABA Model Code of Judicial Conduct, Rule 2.9(A)(4) (2007) ("A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to settle matters pending before the judge.").

However, the ABA Model Judicial Code warns judges that such involvement might ultimately require their disqualification.

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[1] ABA Model Code of Judicial Conduct, Rule 2.6(B) (2007) ("A judge may encourage parties to a proceeding and their lawyers to settle matters in dispute but shall not act in a manner that coerces any party into settlement.").

[2] Code of Conduct for United States Judges, Canon 3A(4) Commentary (2009) ("A judge may encourage and seek to facilitate settlement but should not act in a manner that coerces any party into surrendering the right to have the controversy resolved by the courts.").

> Judges must be mindful of the effect settlement discussions can have, not only on their objectivity and impartiality, but also on the appearance of their objectivity and impartiality. Despite a judge's best efforts, there may be instances when information obtained during settlement discussions could influence a judge's decision making during trial, and, in such instances, the judge should consider whether disqualification may be appropriate.

ABA Model Code of Judicial Conduct, Rule 2.6 cmt. [3] (2007).

Thus, the judicial codes do not prohibit per se a judge's involvement in settlement discussions, but also provide no assurance that the judge may continue hearing the case should settlement talks fail.

Courts, bars, and mediation guidelines have also debated a parallel issue -- whether a judge/mediator's preparation of a settlement agreement after a successful mediation would violate the general principle prohibiting judges from practicing law. The issue is whether such an action makes the judge a mere "scrivener" (a role not prohibited by the judicial codes) or instead involves the judge practicing law (which generally is forbidden except in the case of the judge's family-owned company).

Courts and bars disagree about that issue. The Maryland Bar noted the debate in the context of a lawyer/mediator. The Bar ultimately concluding that the mediator "cannot represent both parties in the dispute," and therefore could not draft a settlement agreement for the parties -- although he or she could prepare "a document that memorializes the understanding that was reached by the parties."

> The gist of the issue involves the question of whether an attorney-mediator can draft a settlement agreement for unrepresented parties in resolution of a dispute the mediator has been asked to resolve. The short answer to that question is that an attorney-mediator may not draft a settlement agreement on behalf of unrepresented parties to

> the mediation. . . . It is common for mediators to assist the parties in preparing a term sheet or a memorandum of understanding to set forth the essential terms of the mediated resolution of the dispute. This activity is undertaken as a mediator, not as the lawyer for either party. We see no problem with a lawyer-mediator engaging in this task. . . . When the task changes from memorializing the understanding to drafting legally binding documents, the mediator's role as scrivener changes to legal practitioner. . . . This issue is not one without difference of opinion. Other states that have considered the issue under the Model Rules reached conflicting conclusions. Utah, North Carolina, Virginia and New Hampshire, all reached the same conclusion that we do. New York, Connecticut and Massachusetts reach the opposite conclusion. We believe the Utah Committee's analysis to be best under Maryland law.

Maryland LEO 2007-19 (11/5/07).[3] The same principle would probably apply to judges.

Best Answer

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

[3] Maryland LEO 2007-19 (11/5/07) ("The gist of the issue involves the question of whether an attorney-mediator can draft a settlement agreement for unrepresented parties in resolution of a dispute the mediator has been asked to resolve. The short answer to that question is that an attorney-mediator may not draft a settlement agreement on behalf of unrepresented parties to the mediation."; "It is common for mediators to assist the parties in preparing a term sheet or a memorandum of understanding to set forth the essential terms of the mediated resolution of the dispute. This activity is undertaken as a mediator, not as the lawyer for either party. We see no problem with a lawyer-mediator engaging in this task."; "When the task changes from memorializing the understanding to drafting legally binding documents, the mediator's role as scrivener changes to legal practitioner."; "This issue is not one without difference of opinion. Other states that have considered the issue under the Model Rules reached conflicting conclusions. Utah, North Carolina, Virginia and New Hampshire, all reached the same conclusion that we do. New York, Connecticut and Massachusetts reach the opposite conclusion. We believe the Utah Committee's analysis to be best under Maryland law." (footnotes omitted); ultimately concluding that the mediator "cannot represent both parties in the dispute" and therefore could not draft a settlement agreement for the parties as opposed to "a document that memorializes the understanding that was reached by the parties").

Judges Dealing with Other Governmental Entities

Hypothetical 20

After many years on the bench, you have earned a well-deserved reputation for wisdom and evenhandedness. This has resulted in several invitations to interact with other branches of the government.

(a) May you testify in favor of increased funding for your state's special juvenile court?

YES

(b) May you serve on a commission appointed by your state's governor studying changes in your state's drug laws?

NO (PROBABLY)

Analysis

The ABA Model Code of Judicial Conduct restricts judges' involvement with the other branches of government, perhaps reflecting basic constitutional principles.

First,

> [a] judge shall not accept appointment to a governmental committee, board, commission, or other governmental position, unless it is one that concerns the law, the legal system, or the administration of justice.

ABA Model Code of Judicial Conduct, Rule 3.4 (2007).

Second, the ABA Model Judicial Code restricts judges' appearances at public hearings or even private consultations with other branches of government.

> A judge shall not appear voluntarily at a public hearing before, or otherwise consult with, an executive or a legislative body or official, except:
>
> > (A) in connection with matters concerning the law, the legal system, or the administration of justice;

> (B) in connection with matters about which the judge acquired knowledge or expertise in the course of the judge's judicial duties; or
>
> (C) when the judge is acting pro se in a matter involving the judge's legal or economic interests, or when the judge is acting in a fiduciary[] capacity.

ABA Model Code of Judicial Conduct, Rule 3.2 (2007).

The judicial code governing federal judges takes the same basic approach -- but starting with permissible actions and then listing impermissible actions.

> A judge may consult with or appear at a public hearing before an executive or legislative body or official:
>
> (a) on matters concerning the law, the legal system, or administration of justice;
>
> (b) to the extent that it would generally be perceived that a judge's judicial experience provides special expertise in the area; or
>
> (c) when the judge is acting pro se in a matter involving the judge or the judge's interest.

Code of Conduct for United States Judges, Canon 4A(2) (2009).

Some states take a more liberal approach. See, e.g., North Carolina Judicial Standards Comm'n Formal Advisory Op. 2007-1 (2/9/07) ("The Judicial Standards Commission approved the request for the judge to participate as a member of the interview committee/board as part of a panel to interview candidates for the position of city chief of police."; "[S]hould the new city chief of police appear as a substantive witness in a hearing or as a party to an action in a matter before the judge, it is advised that the judge disclose the information that he participated as a member of the interview committee/board that interviewed candidates for the city chief of police.").

(a) Every judicial code would permit this type of testimony or lobbying, because it involves the "legal system" and the "administration of justice."

(b) Most judicial codes would probably prohibit a judge's involvement in such a commission, because it involves substantive law more than the administration of justice. However, as explained above, some states take a more liberal approach.

Best Answer

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

Prohibition on Judges Practicing Law

Hypothetical 21

Before you went on the bench, you played a very active role in your law school's alumni group, including acting as its informal "general counsel." You also provided legal advice to a family-owned corporation primarily managed by your sister.

(a) Now that you are a judge, can you continue to act as the alumni group's lawyer?

NO

(b) Now that you are a judge, may you continue to provide legal advice to your sister's company?

YES

Analysis

The ABA Model Code of Judicial Conduct prohibits judges from practicing law, except for providing limited legal services to a member of a judge's family (which does not include appearances in court).[1]

> A judge shall not practice law. A judge may act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family,[] but is prohibited from serving as the family member's lawyer in any forum.

ABA Model Code of Judicial Conduct, Rule 3.10 (2007). The judicial code governing federal judges takes the same basic approach.

[1] The ABA Model Judicial Code applies essentially the same principle to a judge's other business activities. ABA Model Code of Judicial Conduct, Rule 3.11(B) (2007) ("A judge shall not serve as an officer, director, manager, general partner, advisor, or employee of any business entity except that a judge may manage or participate in: (1) a business closely held by the judge or members of the judge's family; or (2) a business entity primarily engaged in investment of the financial resources of the judge or members of the judge's family.").

> A judge should not practice law and should not serve as a family member's lawyer in any forum. A judge may, however, act pro se and may, without compensation, give legal advice to and draft or review documents for a member of the judge's family.

Code of Conduct for United States Judges, Canon 4A(5) (2009).

Several courts, bars, and model mediator standards have debated whether this prohibition on judges practicing law prevents a judge/mediator from drafting settlement agreements. The debate involves whether to characterize that activity as acting as a lawyer, or merely as a "scrivener."

(a) A judge normally cannot provide legal services to anyone but the judge's family.

Interestingly, the Virginia Judicial Ethics Advisory Committee explicitly allowed a judge to serve as the Army Judge Advocate General (although warning that providing certain types of legal assistance might violate Canon 2's "appearance of impropriety" standard). Virginia Judicial Ethics Advisory Committee 03-4 (11/21/03, amended 5/21/04).

(b) As indicated above, judicial codes permit such limited activity.

Best Answer

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

Involvement in Fundraising

Hypothetical 22

You have been very active in your law school's alumni organization, and hope to continue some involvement with that group after your upcoming installation as a judge.

May you engage in the following activities after you become a judge:

(a) Serve as president of the law school alumni association?

YES

(b) Serve as the head of the alumni organization's fundraising group?

YES

(c) Send a letter to law school alumni seeking contributions to the alumni fund?

NO

(d) Speak at a holiday dinner at which money will be raised for the law school alumni fund?

NO

(e) Attend a summer picnic at which money will be raised for the law school alumni fund?

YES

Analysis

Introduction

Any analysis of a judge's interaction with others should start with two basic principles that create an awkward tension.

First, every jurisdiction's judicial ethics code encourages judges to involve themselves in their community. For instance, Rule 3.1 of the ABA Model Code of Judicial Conduct indicates that "[a] judge may engage in extrajudicial activities, except as prohibited by law[] or this Code." Two comments explain the benefits of this interaction.

> To the extent that time permits, and judicial independence and impartiality are not compromised, judges are encouraged to engage in appropriate extrajudicial activities. Judges are uniquely qualified to engage in extrajudicial activities that concern the law, the legal system, and the administration of justice, such as by speaking, writing, teaching, or participating in scholarly research projects. In addition, judges are permitted and encouraged to engage in educational, religious, charitable, fraternal or civic extrajudicial activities not conducted for profit, even when the activities do not involve the law. See Rule 3.7.

ABA Model Code of Judicial Conduct, Rule 3.1 cmt. [1] (2007) (emphases added).

> Participation in both law-related and other extrajudicial activities helps integrate judges into their communities, and furthers public understanding of and respect for courts and the judicial system.

Id. cmt. [2].

The judicial code governing federal judges makes essentially the same point.

> Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the society in which the judge lives. As a judicial officer and a person specially learned in the law, a judge is in a unique position to contribute to the law, the legal system, and the administration of justice, including revising substantive and procedural law and improving criminal and juvenile justice. To the extent that the judge's time permits and impartiality is not compromised, the judge is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicated to the law. Subject to the same limitations, judges

> may also engage in a wide range of non-law-related activities.

Code of Conduct for United States Judges, Canon 4 Commentary (2009).

Thus, that code explains that "[a] judge may serve on the board of a private or public law school . . . but may not serve on a state board responsible for operating a public university." Comm. on Codes of Conduct [for United States Judges], Advisory Op. 93 (10/27/98).

Thus, judicial codes encourage judges' participation in community affairs, for a number of reasons.

Second, judges must avoid violating a deliberately vague standard based on the "appearance of impropriety." Significantly, the ABA dropped the "appearance of impropriety" standard decades ago from the ABA Model Rules governing lawyers' conduct. Most (if not all) states have followed suit. Commentators routinely condemned that standard as too vague to have any meaning, thus preventing lawyers from knowing what they can and cannot do, and allowing disciplinary authorities to punish lawyers indiscriminately for conduct that they could not have known was wrong.

When the ABA revisited the judicial code several years ago, an enormous national debate focused on whether to drop the "appearance of impropriety" standard from the ethics code for judges. The ABA finally decided to leave the standard in its judicial code.

> A judge shall act at all times in a manner that promotes public confidence in the independence,[] integrity,[] and impartiality[] of the judiciary, and shall avoid impropriety and the appearance of impropriety.

ABA Model Code of Judicial Conduct, Rule 1.2 (2007). A comment explains what the term means.

> Actual improprieties include violations of law, court rules or provisions of this Code. The test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge violated this Code or engaged in other conduct that reflects adversely on the judge's honesty, impartiality, temperament, or fitness to serve as a judge.

ABA Model Code of Judicial Conduct, Rule 1.2 cmt. [5] (2007).

In addition to these general statements about all judicial conduct, the specific rule encouraging judges' interaction with the community contains a similarly vague statement.

> A judge may engage in extrajudicial activities, except as prohibited by law[] or this Code. However, when engaging in extrajudicial activities, a judge shall not: . . . participate in activities that would appear to a reasonable person to undermine the judge's independence,[] integrity,[] or impartiality.

ABA Model Code of Judicial Conduct, Rule 3.1(C) (2007).

Thus, the judicial codes contain somewhat contradictory basic principles -- encouraging judges to become involved in their communities, but warning them not to engage in conduct that falls short of some undefined and essentially indefinable "appearance of impropriety" standard. Not surprisingly, trying to reconcile these two basic approaches has proven very difficult.

(a)-(b) Judges attempting to analyze what role they can play in fundraising for community groups will face this tension.

Judicial codes generally allow judges to play leadership roles in organizations that raise money. For instance, the ABA Model Code of Judicial Conduct allows judges to assist nonprofit "educational, religious, charitable, fraternal or civil organizations" in "planning related to fund-raising" and in "participating in the management and investment of the organization's or entity's funds." ABA Model Code of Judicial Conduct, Rule 3.7(A) (2007).

Similarly, the judicial code governing federal judges allows judges to "assist nonprofit law-related, civic, charitable, educational, religious, or social organizations in planning fund-raising activities and may be listed as an officer, director or trustee."[1]

(c) Determining what personal role a judge can play in fundraising involves a much more subtle analysis.

A nonprofit organization generally can show the judge (including his or her title) on the letterhead on a fundraising letter.

> Identification of a judge's position in educational, religious, charitable, fraternal, or civic organizations on letterhead used for fund-raising or membership solicitation does not violate this Rule. The letterhead may list the judge's title or judicial office if comparable designations are used for other persons.

[1] Code of Conduct for United States Judges, Canon 4C (2009) ("A judge may assist nonprofit law-related, civic, charitable, educational, religious, or social organizations in planning fund-raising activities and may be listed as an officer, director, or trustee. A judge may solicit funds for such an organization from judges over whom the judge does not exercise supervisory or appellate authority and from members of the judge's family. Otherwise, a judge should not personally participate in fund-raising activities, solicit funds for any organization, or use or permit the use of the prestige of judicial office for that purpose. A judge should not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism.").

ABA Model Code of Judicial Conduct, Rule 3.7 cmt. [4] (2007); Code of Conduct for United States Judges, Canon 4C (2009). An ABA legal ethics opinion explains this principle.[2]

In contrast judges generally cannot personally engage in any fundraising. See, e.g., Code of Conduct for United States Judges, Canon 4C (2009) ("[A] judge should not personally participate in fund-raising activities, solicit funds for any organization, or use or permit the use of the prestige of judicial office for that purpose. A judge should not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism.").

State judicial ethics advisory committee opinions generally follow this approach. See, e.g., Florida Judicial Ethics Advisory Comm. Op. 2000-06 (2/11/00) ("T]he Committee concludes that the judge may not author a letter soliciting membership or $350 in lieu of services because the Code of Judicial Conduct prohibits a judge from soliciting memberships and fund-raising.").

Interestingly, the ABA Model Judicial Code states this position in the positive, but allows only limited fundraising activities. That code indicates that lawyers may solicit contributions -- but "only from members of the judge's family,[] or from judges over

[2] ABA LEO 452 (10/17/08) (judges may participate in fundraising activities on behalf of "therapeutic" or "problem-solving" courts, but must comply with all of the Model Judicial Code's limitations on fundraising and other activities; for instance, judges may not sign solicitation letters, but may appear on the letterhead of a not-for-profit organization (presumably including letterhead used in fundraising letters); although judges would not automatically have to disqualify themselves from matters in which one of the lawyers contributed to such an organization, the judge would have to consider such disqualification (taking into account "both the size and the importance of contributions known by the judge to have been made by lawyers or parties who come before her"); judges may endorse such organizations "only when it is clear that no political or business profit-making interest is involved").

whom the judge does not exercise supervisory or appellate authority." ABA Model Code of Judicial Conduct, Rule 3.7(A)(2) (2007).

Although not every state goes this far, the ABA Model Judicial Code also allows judges to solicit membership in and contributions for organizations "if the organization or entity is concerned with the law, the legal system, or the administration of justice." ABA Model Code of Judicial Conduct, Rule 3.7(A)(3) (2007).

Thus, judges may not personally solicit funds for any nonprofit unrelated to the law, except for their own families and other judges not under their supervision.

(d) Judges generally may not speak at fundraising events for outside organizations.

For instance, the ABA Model Judicial Code explains that judges may participate in the activities of nonprofit organizations, including

> appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such an organization or entity, but if the event serves a fund-raising purpose, the judge may participate only if the event concerns the law, the legal system, or the administration of justice.

ABA Model Code of Judicial Conduct, Rule 3.7(A)(4) (2007) (emphasis added); Code of Conduct for United States Judges, Canon 4C ("[A] judge should not personally participate in fund-raising activities, solicit funds for any organization, or use or permit the use of the prestige of judicial office for that purpose. A judge should not personally participate in membership solicitation if the solicitation might reasonably be perceived as coercive or is essentially a fund-raising mechanism.").

The judicial codes also generally prohibit judges from speaking or appearing as "guests of honor" at such fundraising events. See, e.g., ABA Model Code of Judicial Conduct, Rule 3.7(A) (2007) ("Subject to the requirements of Rule 3.1, a judge may participate in activities . . . including but not limited to the following activities: . . . (4) appearing or speaking at, receiving an award or other recognition at, being featured on the program of, and permitting his or her title to be used in connection with an event of such an organization or entity, but if the event serves a fund-raising purpose, the judge may participate only if the event concerns the law, the legal system, or the administration of justice." (emphasis added)). Code of Conduct for United States Judges, Canon 4C Commentary (2009) ("A judge may attend fund-raising events of law-related and other organizations although the judge may not be a speaker, a guest of honor, or featured on the program of such an event." (emphasis added)).

(e) It can be even more difficult to determine the permissibility of a judge's involvement in fundraising events that do not directly involve the judge bluntly asking for money.

> Mere attendance at an event, whether or not the event serves a fund-raising purpose, does not constitute a violation of paragraph (A)(4). It is also generally permissible for a judge to serve as an usher or a food server or preparer, or to perform similar functions, at fund-raising events sponsored by educational, religious, charitable, fraternal, or civic organizations. Such activities are not solicitation and do not present an element of coercion or abuse the prestige of judicial office.

ABA Model Code of Judicial Conduct, Rule 3.7 cmt. [3] (2007); Code of Conduct for United States Judges, Canon 4C Commentary (2009) ("A judge may attend fund-raising

events of law-related and other organizations although the judge may not be a speaker, a guest of honor, or featured on the program of such an event.").

Not surprisingly, state judicial ethics advisory committees must draw very subtle lines in distinguishing between permissible and impermissible activities. In 2005, the Florida Bar discussed these issues.

> The Committee has said that a judge cannot be a model in a charity fashion show, Fla. JEAC Op. 88-31, or even participate in such an event "by announcing the winning tickets and describing the items won." Fla. JEAC Op. 98-32. We have also said that a judge cannot solicit the donation of coats and gloves to be distributed by the Salvation Army, Fla. JEAC Op. 92-38, ring a bell at a Salvation Army kettle (although disguised as a holiday character), Fla. JEAC Op. 04-36, or play in an exhibition basketball game intended to raise money for scholarships. Fla. JEAC Op. 88-05. . . .
>
> On the other hand, the Committee has found no ethical prohibition against participating in a Habitat for Humanity build, Fla. JEAC Op. 96-27, or helping referee and checking press credentials at a fund-raising sports event, Fla. JEAC Op. 89-19, where the public was given no indication that the judges involved held judicial office. Fla. JEAC Op. 75-11. A judge may help plan fund-raising activities for educational, charitable or civic organizations, Fla. JEAC Op. 04-36, decorate a hall where a fund-raising event is to be held, donate items to be auctioned for charity, and help value such items. Fla. JEAC Op. 01-09. In general, a judge may help with fund-raising activities for an educational, charitable or civic organization, so long as the prestige of judicial office is not used to advance the organization's interests.
>
> . . . .
>
> . . . A judge can help prepare food, but ought not, we then said, take money directly from the public. We continue to believe that a judge would do well to aspire to participate in community activities as something other than a cashier, and that a judge working at a concession stand should not identify herself or himself as such. On the other hand, we

> are no longer prepared to say that a judge who is flipping hamburgers or putting mustard on hot dogs cannot fill in for a co-volunteer who must step away from the cashier's duties momentarily. In this connection, we believe there is an important distinction between selling -- at a reasonable price -- widely sold items, and soliciting charitable contributions.

Florida Judicial Ethics Advisory Comm. Op. 2005-07 (3/14/05).

These subtle distinctions reflect the tension between judicial codes' encouragement of judges' involvement in the community and avoidance of any actions that create a reasonable "appearance of impropriety."

Best Answer

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

Involvement in Religious Activities

Hypothetical 23

After your installation as a judge last month, you have been studying your state's judicial ethics advisory committee opinions to make sure that you comply with all of the ethics rules. You have always been very active in your church, and you wonder about the permissibility of certain actions now that you are a judge.

May you engage in the following activities as a judge:

(a) Participate as a "lay reader" of a religious text during the service?

YES (PROBABLY)

(b) Present the sermon at the service in which your church encourages its members to pledge 10 percent of their income to the church for the next year?

NO (PROBABLY)

(c) Act as an usher during the service, which involves silently passing a collection plate during the service?

YES (PROBABLY)

Analysis

Analyzing judges' permissible religious activities highlights the dramatic tension between: (1) judicial codes' encouragement of judges' involvement in the community; and (2) the prohibition on judges implicitly intimidating members of the public by engaging in conduct which has the "appearance of impropriety."

Not surprisingly, judges may not take a job as a paid pastor while also serving as a judge.[1] Similarly, judges may not use their titles when participating in any church activities.[2]

On the other hand, the ABA Model Code of Judicial Conduct allows judges to serve as leaders in organizations that raise money, and even plan fundraisers behind the scene. See, e.g., ABA Model Code of Judicial Conduct, Rule 3.7(A) (2007); accord Code of Conduct for United States Judges, Canon 4C (2009). Thus, judges clearly may accept leadership positions in churches.

- Virginia Judicial Conduct Canon 4(C)(3) ("a judge may serve as an officer, director, trustee or non legal advisor of . . . [a religious] organization not conducted for profit, subject to the following limitations and the other requirements of this Code").

- Maryland Judicial Ethics Comm. Op. 1980-10 (11/25/80) (explaining that as a vestryman the judge "participates in discussions and votes on decisions with respect to raising money for the church but takes no part in any solicitations for funds"; explaining that the rules prohibit a judge's "direct or indirect solicitation of contributions"; allowing "purely internal discussions and decisions within the confines of the governing board" related to finances, "provided, of course, that the judge's name is not used, directly or indirectly, in the solicitation of the funds or the promotion of the project").

- Illinois Judicial Ethics Comm. Op. 96-4 (3/6/96) (explaining that a judge "may be president of a church, temple or mosque but may not solicit funds for the church, temple or mosque").

- Kansas Judicial Ethics Advisory Panel Op. JE-77 (7/11/97) (explaining that a judge may serve as an elder of a church although in that role the judge will assist in preparing and agreeing upon the church's budget, and presenting the budget to the congregation; warning that the judge serving as an elder may not "make public requests for contribution from the pulpit, and to write letters to individual members of the congregation, soliciting financial

[1] See, e.g., Kansas Judicial Ethics Advisory Comm. Op. JE-25 (9/16/88) (judges cannot also take a job as a paid pastor for a church).

[2] See, e.g., Virginia Judicial Conduct Canon 4(C)(3)(b)(iv) (judges "shall not use or permit the use of the prestige of judicial office for fund raising or membership solicitation").

contributions and exhorting the members to meet their pledges or other financial obligations to the church").

- But see Maryland Judicial Ethics Comm. Op. 1975-10 (10/21/75) (explaining that it would be "preferable" for a judge not to become the treasurer of a church).

Although the ABA Model Judicial Code permits judges to solicit membership only for those organizations "concerned with the law, the legal system, or the administration of justice," ABA Model Code of Judicial Conduct, Rule 3.7(A) (2007), at least one judicial code allows judges to solicit membership in a broader range of contexts.

- Virginia Judicial Conduct Canon 4(C)(3)(b)(iii) ("a judge may not personally participate in membership solicitation [in religious and other organizations] if the solicitation might reasonably be perceived as coercive or, except as permitted in Section 4C(3)(b)(i), if the membership solicitation is essentially a fund raising mechanism").

- Virginia Judicial Conduct Canon 4(C) Commentary ("a judge may solicit other persons for membership in the [religious or other] organizations described above if neither those persons nor persons with whom they are affiliated are likely ever to appear before the court on which the judge serves").

Most state judicial ethics advisory committees that have examined the issue permit judges to silently participate in church fundraising.

- Arizona Judicial Ethics Advisory Comm. Op. 96-13 (11/8/96) (judges who are members of a church congregation may help with the collection as long as the judge "makes no verbal requests for donations," and passes a collection plate "without words of solicitation").

- New York City Advisory Comm. on Judicial Ethics Joint Op. 89-83, 89-84 (9/12/89) (judges who are members of a congregation can help pass a collection plate as long as they do not "participate in the actual solicitation"; the opinion indicates that the collection follows "a solicitation of funds made prior to the collection by a clergyman or member of the congregation").

In discussing church events as fundraisers, one judicial ethics advisory committee has prohibited a judge from speaking at a fundraiser that did not involve a religious service.[3]

Only a handful of states have dealt with the core question -- may a judge participate as a speaker in a religious service that involves the collection of money. Two states have allowed judges to participate in religious services.

- Illinois Judicial Ethics Comm. Op. 01-06 (5/1/01) (a judge may speak at a church service; pointing to the judge's request for opinion, which indicated that there was no "fundraising" at the service; not addressing a collection that is part of the regular liturgy).

- Arizona Judicial Ethics Advisory Comm. Op. 93-01 (2/12/93) (a judge can play a "prominent role" in a religious service (giving examples of a judge acting as "cantor, lector, speaker or lay official"); indicating that the judge would not solicit funds during the service; not dealing with a collection that is part of the regular liturgy).

(a) Most judicial codes would permit such activity, although the content of the reading might affect the analysis. For instance, a judge probably could not engage in such a reading if it involved condemnation of homosexual activity, encouragement of violence against some religious group, etc.

(b) This type of involvement in a fundraising effort presumably would violate every state's judicial code.

(c) The handful of judicial ethics committee opinions dealing with this issue have permitted such conduct, although theoretically it involves fundraising.

[3] Arkansas Judicial Ethics Advisory Comm. Op. 94-03 (3/8/94) (finding that a banquet held at a hotel designed to raise money for a church scholarship fund constituted a fundraiser; explaining that "a judge must not be a speaker or guest of honor at an organization's fund raising event, but mere attendance at such an event is permissible if otherwise consistent with this Code"; noting that a judge would be violating the Code "by speaking at a fund raising even [sic], permitting his/her name to be used in connection therewith, or actively soliciting the funds sought for the designed purpose(s)").

Best Answer

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

Acceptance of Gifts

Hypothetical 24

You will soon be installed as a judge, and wonder about the propriety of accepting gifts from various people and groups.

Once you become a judge, may you:

(a) Accept an expensive stereo for your office, which will be given to you at a dinner hosted by your former law firm?

MAYBE

(b) Accept travel expenses and a free room for you and your husband at a CLE program to be held in Bermuda, and paid for by a local defense lawyer group?

YES

(c) Accept an honorarium from a plaintiffs' lawyer group for a talk on the administration of justice?

YES

(d) Agree to a congratulatory announcement in the statewide bar magazine by your former firm?

NO (PROBABLY)

Analysis

The judicial codes' analysis of the permissibility of judges accepting gifts highlights the tension between the provision encouraging judges to participate in their community, and the provision prohibiting conduct that might create an "appearance of impropriety."

The judicial code provisions dealing with the judge's involvement in fundraising reflect the worry about judges intimidating those who might appear before them, while the provisions dealing with judges' acceptance of gifts reflects the worry that the public might think judges can be influenced by money or other benefits given by those who might appear before the judge. This concern could arise from a judge's acceptance of a gift, or the acceptance of a fee for speaking to a group, etc.

In dealing with gifts, the ABA Model Judicial Code allows judges to accept minor gifts without reporting them.

> (A) A judge shall not accept any gifts, loans, bequests, benefits, or other things of value, if acceptance is prohibited by law[] or would appear to a reasonable person to undermine the judge's independence,[] integrity,[] or impartiality.[]
>
> (B) Unless otherwise prohibited by law, or by paragraph (A), a judge may accept the following without publicly reporting such acceptance:
>
> > (1) items with little intrinsic value, such as plaques, certificates, trophies, and greeting cards;
> >
> > (2) gifts, loans, bequests, benefits, or other things of value from friends, relatives, or other persons, including lawyers, whose appearance or interest in a proceeding pending[] or impending[] before the judge would in any event require disqualification of the judge under Rule 2.11;
> >
> > (3) ordinary social hospitality.

ABA Model Code of Judicial Conduct, Rule 3.13 (2007). In contrast, judges must report other more substantial gifts.

> Unless otherwise prohibited by law or by paragraph (A), a judge may accept the following items, and must report such acceptance to the extent required by Rule 3.15:

> (1) gifts incident to a public testimonial;
>
> (2) invitations to the judge and the judge's spouse, domestic partner, or guest to attend without charge:
>
> > (a) an event associated with a bar-related function or other activity relating to the law, the legal system, or the administration of justice; or
> >
> > (b) an event associated with any of the judge's educational, religious, charitable, fraternal or civic activities permitted by this Code, if the same invitation is offered to nonjudges who are engaged in similar ways in the activity as is the judge; and
>
> (3) gifts, loans, bequests, benefits, or other things of value, if the source is a party or other person, including a lawyer, who has come or is likely to come before the judge, or whose interests have come or are likely to come before the judge.

ABA Model Code of Judicial Conduct, Rule 3.13(C) (2007).

Not surprisingly, case law and judicial ethics advisory committee opinions present a spectrum of reactions.

For instance, the Florida Supreme Court upheld a six-month suspension for a lawyer who attempted to give cash to a judge.[1]

In contrast, judicial ethics advisory opinions permit lawyers to engage in normal social niceties involving minimal amounts of money.

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[1] Florida Bar v. Saxon, 379 So. 2d 1281, 1282 (Fla. 1980) ("On or about June 17, 1971, the Respondent represented certain criminal defendants at a preliminary hearing before Judge Peter R. Palermo of the United States District court for the Southern District of Florida. (Admission C.). At that hearing, Judge Palermo dismissed the charges against two of Mr. Saxon's clients. (Admission D.)"; "On June 18, 1971, before noon, Mr. Saxon came by Judge Palermo's office in the Post Office Building. Judge Palermo maintains an open-door policy. Saxon walked into Judge Palermo's office and placed an indeterminate number of $ 100 bills (but more than one), all rolled up, in Judge Palermo's shirt pocket. Judge Palermo immediately returned the cash and asked Mr. Saxon. 'What gives?' At this point, Judge Palermo's secretary walked in. Mr. Saxon then took a small Government memo paid [sic] from the desk of Judge Palermo and wrote 'They are clean' and displayed the pad to Judge Palermo. Judge Palermo's secretary left the room.").

- South Carolina Bar Ethics Advisory Op. 97-40 (1997) (allowing lawyers to organize and participate in a baby shower for a local judge expecting a child; "Under certain circumstances, a lawyer may participate in a social event honoring a friend who is a judge, including the giving of a gift to a judge so long as participation in the event or the giving of the gift are not intended to, nor appear to be intended to, influence the judge.").

- Rhode Island Ethics Advisory Panel Op. 91-41 (7/18/91) (permitting a lawyer to send flowers to a hospitalized judge; "The Panel is of the opinion that the act of sending flowers to a judge under these circumstances is a normal courtesy involving an object of minimal or no monetary value which would not create an appearance of impropriety to a reasonable, objective observer.").

Unfortunately, most situations fall in between these extremes.

- Comm. on Codes of Conduct [for United States Judges], Advisory Op. No. 98 (3/17/00) (addressing the permissibility of a newly-invested judge to accept gifts; "In no event do the foregoing provisions permit a judge to solicit gifts on the occasion of an investiture or otherwise. Applicable statutory provisions and the Judicial Conference gift regulations both prohibit the solicitation of gifts. As with any gift, judges should be aware that financial reporting provisions may require the disclosure of certain information. Judges should take care to observe applicable requirements. . . . One common benefit offered to new judges is an offer by a private entity either to sponsor or to contribute to a reception in honor of the judge's investiture. Whether a judge may properly accept such an offer depends in part on the identity of the proposed donor and its relationship to the judge. If the donor or sponsor is a former law firm, corporate employer, business client, or colleagues, the gift regulations recognize that such an offer may properly be accepted as a gift from a friend on a special occasion, if the gift is fairly commensurate with the occasion and the relationship. It may also be accepted as a gift incident to a public testimonial. In addition, to the extent the judge plans to recuse for a period of time following appointment from cases in which the former employer, client, or colleagues appear, the judge will not be taking any official action affecting the donors and no appearance of impropriety should be created."; "Likewise, receptions sponsored by bar associations generally do not present ethical concerns. They may properly be considered gifts incident to public testimonials, which may be accepted under the gift regulations. Also, as we have noted previously, '[w]hen hospitality is extended by lawyer organizations, the risk of an appearance of impropriety is markedly reduced, compared to hospitality conferred by a particular law firm or lawyer.'"; "It is also common for judges to receive tangible gifts and mementoes in connection with their appointment and investiture. Judges may properly accept such gifts, consistent with the provisions outlined above. The Code of Conduct and the gift regulations

recognize the propriety of accepting appropriate gifts, from friends, relatives and colleagues, to mark this special occasion and serve as a form of public testimonial. Examples of gifts the Committee has found to be appropriate include: a judicial robe given by former law partners; a clock given by a bar association; a chair given by former state judicial colleagues; and a gavel and $500 monetary gift from a former client."; "Acceptance of a gift offered in connection with a judge's investiture may necessitate the judge's recusal from matters involving the donor. In many instance, the donors are likely to be persons whose appearance in a case would in any event necessitate the judge's recusal, at least for some period of time. These include former law partners, close friends, and former clients. When the gift is given by a group and the cost is shared proportionately, recusal may not be required if the amount of each individual contribution is relatively small. A judge's determination whether to recuse, and for how long, should be guided by the standards set forth in Canon 3C(1) of the Code of Conduct.").

- Kentucky Ethics Op. KBA E-351 (7/1992) ("A lawyer may not provide loans or gifts to a judge before whom the lawyer practices. A lawyer may extend 'ordinary social hospitality' to a judge before whom the lawyer practices."; quoting several Reporter's Notes to the Code of Judicial Conduct: "The 'social hospitality' issue proved to be difficult. Should a judge be precluded from going to a party given by a lawyer because the food and drink is a gift or favor? Such questions could be continued in gradations of gifts ranging from a cigar to a month's visit at a mountain cabin. The committee opted for a standard of 'ordinary social hospitality.' The judge should not be excluded from all social relationships with lawyers or persons who likely [sic] to be litigants in (the judge's) court. The scope of permissible hospitality will vary somewhat from place to place, depending on local customs and practices. The committee felt that there are common sense limits and that the standard is understandable and defensible; for example, the offer to a judge [of] a month at the mountain cabin of a lawyer friend who practices in the judge's court is clearly not ordinary social hospitality, and acceptance is prohibited. Persons who think that the 'ordinary social hospitality' test sets too relaxed a standard should keep in mind that the 'impropriety and appearance of impropriety.' . . . provisions of Canon 2 are applicable to all of a judge's activities. . . ." [sic]).

- Hawaii Office of Disciplinary Counsel Formal Op. No. 24 (5/22/79) ("It is improper for an attorney or a law firm to give gifts or lend anything of even nominal value to a judge, official, or employee of a tribunal. . . . Without limiting the foregoing, this prohibition expressly applies to Christmas or other holiday gifts or loans by attorneys and law firms."; "This opinion does not prohibit an individual lawyer from making a gift or a loan to a judge, official, or employee of a tribunal if there is a bona fide, appropriate social relationship justifying such a loan or gift and if such a loan or gift is not otherwise in

> violation of the Hawaii Rules of Professional Conduct or the Code of Judicial Conduct.").

Thus, states frequently wrestle with drawing the line between a permissible "social nicety" and a more extensive gift that violates the admittedly vague "appearance of impropriety" standard.

(a) Depending on how expensive the stereo system is, this could be seen as either a permissible gift, or as an impermissible gift that violates the "appearance of impropriety" standard.

(b) Most states permit such reimbursement, although state (and federal) courts increasingly require reporting of such travel expense reimbursements.

Of course, a judge would also have to asses the group paying for the trip and inviting the judge to speak. The more specific the advocacy group, the more likely the judicial codes are to prohibit both the reimbursement and the speech itself. For instance, speaking to a defense law group would probably be permissible, but speaking to a group dedicated to shutting down abortion clinics would clearly be improper.

(c) As long as a judge complies with any reporting requirement this type of honorarium presumably would be acceptable.

(d) Such a congratulatory announcement could be seen as a gift to the judge, and it could also be seen as the judge impermissibly lending the prestige of office to favor the former firm.

This question comes from Florida Supreme Court Judicial Ethics Advisory Committee Opinion 2006-10 (4/24/06). The Committee dealt with the following two issues:

> Whether the inquiring judge may assent to a congratulatory announcement in the Florida Bar News by his/her former law firm pertaining to the inquiring judge's recent appointment to the bench. . . . Whether the inquiring judge may assent to mailing by his/her former law firm a congratulatory announcement to clients of the law firm pertaining to the inquiring judge's recent appointment to the bench.

Id. The Committee answered both questions in the negative -- explaining that

> Canon 2B of the Code of Judicial Conduct states in part that "a judge shall not lend the prestige of judicial office to advance the private interests of the judge or others; nor shall a judge convey or permit others to convey the impression that they are in a special position to influence the judge." By permitting the announcement, the inquiring judge would be lending the prestige of his/her ascension to the bench to advance the private interests of the former law firm. In addition, sending the announcement to the law firm's clients would give the appearance that the former law firm holds a special position of influence over the judge.

Id.

Best Answer

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

Involvement with Discriminatory Organizations

Hypothetical 25

Now that you have become a judge, you have tried to be extra careful in avoiding any appearance of prejudice or bias. However, several recent invitations have left you agonizing over what you can do.

May you accept an invitation to:

(a) Join an honorary society that does not admit minorities?

NO

(b) Join an organization that does not allow women to hold certain positions in the organization?

MAYBE

(c) Attend a weekly lecture series at a country club which limits its membership to Protestants?

MAYBE

(d) Attend a wedding reception for your niece, to be held at a local private club which excludes minorities?

YES

Analysis

Not surprisingly, judges must avoid any prejudice or discrimination "by words or conduct" in performing their judicial duties.

> A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, or engage in harassment, including but not limited to bias, prejudice, or harassment based upon race, sex, gender, religion, national origin, ethnicity, disability, age, sexual orientation, marital status, socioeconomic status, or political affiliation, and shall

> not permit court staff, court officials, or others subject to the judge's direction and control to do so.

ABA Model Code of Judicial Conduct, Rule 2.3(B) (2007).

This simple prohibition creates a number of subtle issues when applied to a judge's membership or involvement in arguably discriminatory organizations.

The ABA Model Judicial Code prohibits lawyers from holding membership in organizations that practice "invidious discrimination."

> A judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.

ABA Model Code of Judicial Conduct, Rule 3.6(A) (2007); Code of Conduct for United States Judges, Canon 2C (2009) ("A judge should not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion, or national origin.").

This flat prohibition raises a number of ancillary issues.

First, how do you define "invidious discrimination"? The ABA Model Judicial Code explains that "[a]n organization is generally said to discriminate invidiously if it arbitrarily excludes from membership on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation persons who would otherwise be eligible for admission." ABA Model Code of Judicial Conduct, Rule 3.6 cmt. [2] (2007).

The ABA Model Judicial Code warns that "[t]he answer cannot be determined from a mere examination of an organization's current membership rolls, but rather, depends upon how the organization selects members, as well as other relevant factors, such as whether the organization is dedicated to the preservation of religious, ethnic, or

cultural values of legitimate common interest to its members, or whether it is an intimate, purely private organization whose membership limitations could not constitutionally be prohibited." Id.

Second, does the prohibition on such membership include membership in churches or other organizations which might restrict the participation of women, etc.? As indicated above, the ABA Model Judicial Code examines such factors as whether the organization "is dedicated to the preservation of religious, ethic, or cultural values." Id. To make the point even clearer, the ABA Model Judicial Code explicitly indicates that "[a] judge's membership in a religious organization as a lawful exercise of the freedom of religion is not a violation of this Rule," and also notes that the rule "does not apply to national or state military service." ABA Model Code of Judicial Conduct, Rule 3.6 cmts. [4], [5] (2007).[1] Thus, judicial ethics codes generally permit judges' participation in traditional religious, military, or other groups that restrict participation by some members.

Third, what should a judge do upon learning of a group's discriminatory practices (or when a judge belongs to such an organization upon becoming a judge)? The ABA Model Judicial Code explains that

[1] Accord Code of Conduct for United States Judges, Canon 2C Commentary (2009) ("Membership of a judge in an organization that practices invidious discrimination gives rise to perceptions that the judge's impartiality is impaired. Canon 2C refers to the current practices of the organization. Whether an organization practices invidious discrimination is often a complex question to which judges should be sensitive. The answer cannot be determined from a mere examination of an organization's current membership rolls but rather depends on how the organization selects members and other relevant factors, such as that the organization is dedicated to the preservation of religious, ethnic or cultural values of legitimate common interest to its members, or that it is in fact and effect an intimate, purely private organization whose membership limitations could not be constitutionally prohibited. See New York State Club Ass'n, Inc. v. City of New York, 487 U.S. 1, 108 S. Ct. 2225, 101 L. Ed. 2d 1 (1988).").

> When a judge learns that an organization to which the judge belongs engages in invidious discrimination, the judge must resign immediately from the organization.

ABA Model Code of Judicial Conduct, Rule 3.6 cmt. [3] (2007).

The judicial code governing federal judges takes a totally different approach.

> When a judge determines that an organization to which the judge belongs engages in invidious discrimination that would preclude membership under Canon 2C or under Canons 2 and 2A, the judge is permitted, in lieu of resigning, to make immediate and continuous efforts to have the organization discontinue its invidiously discriminatory practices. If the organization fails to discontinue its invidiously discriminatory practices as promptly as possible (and in all events within two years of the judge's first learning of the practices), the judge should resign immediately from the organization.

Code of Conduct for United States Judges, Canon 2C Commentary (2009). Thus, the ABA Model Code of Judicial Conduct requires immediate resignation, while the judicial code governing federal judges allows a more gradual approach.

Fourth, may a judge attend events or meetings at facilities of a discriminatory organization? The ABA Model Judicial Code explains that

> [a] judge's attendance at an event in a facility of an organization that the judge is not permitted to join is not a violation of this Rule when the judge's attendance is an isolated event that could not reasonably be perceived as an endorsement of the organization's practices.

ABA Model Code of Judicial Conduct, Rule 3.6(B) (2007). The judicial code governing federal judges takes a somewhat more subtle approach -- prohibiting the judge from setting up a meeting at such an organization, but allowing use that is not regular.

> [I]t would be a violation of Canons 2 and 2A for a judge to arrange a meeting at a club that the judge knows practices invidious discrimination on the basis of race, sex, religion, or

> national origin in its membership or other policies, or for the judge to use such a club regularly.

Code of Conduct for United States Judges, Canon 2C Commentary (2009).

(a) All judicial codes would prohibit judges from joining an organization that invidiously discriminates against minorities.

(b) Judges might be able to join organizations that do not allow women to hold certain positions, but probably would have to point to one of the exemptions for religious or other organizations to justify such an action.

(c) Weekly attendance at a country club probably would be seen as a "regular" attendance, but the religious nature of the organization might allow judges to rely on the exemption mentioned above.

(d) Most judicial codes would allow judges to attend such an event, as long as the judge did not arrange for the event and does not regularly attend such events at the discriminatory organization.

Best Answer

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

Judges' Communications about Their Cases

Hypothetical 26

You have been defending a large software company for several years in a government antitrust action. The judge handling the case has repeatedly granted interviews about the case and even the issues being litigated before him. You are not sure what to do about this, but you first want to know if the judge is running afoul of the judicial ethics code.

May judges make public comment on cases that they are handling?

NO

Analysis

The prohibition on judges publicly talking about their cases represents one of the bedrock principles of every judicial ethics code.

For instance, the ABA Model Code of Judicial Conduct indicates that

> [a] judge shall not make any public comment that might reasonably be expected to affect the outcome or impair the fairness of a matter pending[] or impending[] in any court, or make any nonpublic comment that might substantially interfere with a fair trial or hearing.

ABA Model Code of Judicial Conduct, Rule 2.10(A) (2007).

Thus, there are two levels of prohibition. Judges: (1) may not make public statements that might affect a case's outcome; and (2) may not make nonpublic statements that might "substantially interfere" with a case. This difference makes sense. Judges have somewhat more leeway in making what amount to private comments. Judges would face discipline for private comments only if a state's judicial disciplinary authority can prove that such comments might "substantially interfere" with a proceeding.

Not surprisingly, the judge must assure that court personnel subject to the judge's control follow the same rule. Id. Rule 2.10(C).

Of course, the prohibition does not preclude a judge's official statements, or a discussion of process.

> Notwithstanding the restrictions in paragraph (A), a judge may make public statements in the course of official duties, may explain court procedures, and may comment on any proceeding in which the judge is a litigant in a personal capacity.

Id. Rule 2.10(D). Judges clearly can speak publicly when they are doing their job. Judges can also talk about process rather than substance.

The ABA Model Code of Judicial Conduct commentary provides some additional guidance. The ABA Model Code of Judicial Conduct states flatly that

> restrictions on judicial speech are essential to the maintenance of the independence, integrity, and impartiality of the judiciary.

ABA Model Code of Judicial Conduct, Rule 2.10 cmt. [1] (2007).

The ABA Model Code of Judicial Conduct also defines "pending" and "impending" for purposes of this prohibition.

> [An] [i]mpending matter is a matter that is imminent or expected to occur in the future. . . .
>
> . . . .
>
> [A] [p]ending matter is a matter that has commenced. A matter continues to be pending through any appellate process until final disposition.

Id. Terminology.

Interestingly, the new Code of Conduct for United States Judges includes a provision that is both narrower and broader than the ABA Model Code of Judicial Conduct.

First, unlike the ABA Model Code of Judicial Conduct (which restricts both judges' public and private statements), the Code of Conduct for United States Judges only restricts a judge's public comments.

> A judge should not make public comment on the merits of a matter pending or impending in any court. A judge should require similar restraint by court personnel subject to the judge's direction and control. The prohibition on public comment on the merits does not extend to public statements made in the course of the judge's official duties, to explanations of court procedures, or to scholarly presentations made for purposes of legal education.

Code of Conduct for United States Judges, Canon 3A(6) (2009). A comment provides some additional guidance.

> The admonition against public comment about the merits of a pending or impending matter continues until the appellate process is complete. If the public comment involves a case from the judge's own court, the judge should take particular care so that the comment does not denigrate public confidence in the judiciary's integrity and impartiality, which would violate Canon 2A. A judge may comment publicly on proceedings in which the judge is a litigant in a personal capacity, but not on mandamus proceedings when the judge is a litigant in an official capacity (but the judge may respond in accordance with Fed. R. App. P. 21(b)).

Id. Canon 3A(6) Commentary.

Second, unlike the ABA Model Code of Judicial Conduct (which prohibits public and private comments only if they might have an adverse impact on some proceeding), the Code of Conduct for United States Judges prohibits all such public comments, even

if they would not "reasonably be expected to affect the outcome or impair the fairness" of a matter (which is the ABA Model Code of Judicial Conduct standard).

In taking this approach, the Code of Conduct for United States Judges parallels provisions in some state judicial codes. For instance, the Virginia Code of Judicial Conduct Canon 3 indicates that

> [a] judge shall abstain from public comment about a pending or impending proceeding in any court, and should direct similar abstention on the part of court personnel subject to his direction and control.

Virginia Code of Judicial Conduct Canon 3B(9). Thus, unlike the ABA approach, Virginia does not allow any statement, even statements that might not "reasonably be expected to affect [a case's] outcome or impair [its] fairness." ABA Model Code of Judicial Conduct, Rule 2.10(A) (2007). Interestingly, despite this broader rule, the Virginia Code of Judicial Conduct does not contain the justification for the restriction.

Numerous judges have run afoul of this prohibition. In some situations, the judge's public statements represent just one of several types of misconduct justifying some sanctions against the judge.

- Office of Disciplinary Counsel v. Ferreri, 710 N.E.2d 1107 (Ohio 1999) (suspending a judge from the practice of law for 18 months after he granted several interviews and made false statements about his cases, although staying the suspension for the last 12 months and ordering the remaining 6-month suspension from the bench without pay).

- Broadman v. Commission on Judicial Performance, 959 P.2d 715 (Cal. 1998) (censuring a judge for various misconduct, including making public statements).

- In re Conard, 944 S.W.2d 191 (Mo. 1997) (suspending a judge for 30 days without pay, after the judge publicly feuded with a local police chief and reneged on a promise not to file criminal contempt charges against the police

chief, and also made public statements about a case before the judge), cert. denied, 525 U.S. 1070 (1999).

- In re Conduct of Schenck, 870 P.2d 185 (Or.) (suspending a judge from office without pay for 45 days, after the judge feuded with a lawyer litigating a case before him, and sent a letter to the local bar association criticizing the lawyer), cert. denied, 513 U.S. 871 (1994).

- In re Sheffield, 465 So. 2d 350 (Ala. 1984) (suspending a judge for 2 months without pay after the judge spoke with a newspaper about a letter the newspaper received from a citizen witness in a case before the judge).

Perhaps not surprisingly, most of these cases involve state judges. However, one of the most famous recent incidents involved a federal judge hearing a critically important case.

In United States v. Microsoft Corp., 253 F.3d 34 (D.C. Cir.), cert. denied, 534 U.S. 952 (2001), the D.C. Circuit (sitting en banc) addressed Microsoft's appeal of Judge Thomas Penfield Jackson's finding (after a 76-day bench trial) that Microsoft violated antitrust laws, and should be subjected to severe sanctions (including divestiture). In a per curiam opinion, the D.C. Circuit affirmed in part and reversed in part Judge Jackson's 's findings that Microsoft violated the antitrust laws. The court vacated Judge Jackson's remedies, and remanded.

The D.C. Circuit also removed Judge Jackson from the case, and remanded to another district court judge. The court first listed the applicable rule and statutes.

> Canon 3A(6) of the Code of Conduct for United States Judges requires federal judges to "avoid public comment on the merits of [] pending or impending" cases. Canon 2 tells judges to "avoid impropriety and the appearance of impropriety in all activities," on the bench and off. Canon 3A(4) forbids judges to initiate or consider ex parte communications on the merits of pending or impending proceedings. Section 455(a) of the Judicial Code requires

> judges to recuse themselves when their "impartiality might reasonably be questioned." 28 U.S.C. § 455(9a).

Id. at 107. The court found that Judge Jackson violated all of these ethics precepts. It also held that his violations were "deliberate, repeated, egregious and flagrant." Id.

The D.C. Circuit noted that Judge Jackson began to speak about the case immediately after entering final judgment. Id. The judge made speeches and gave several public interviews. The court also cited various published accounts indicating that Judge Jackson gave several secret interviews to reporters beginning after the parties finished putting on their evidence, but two months before his final ruling. According to one of the articles, the judge "insisted that the fact and content of the interviews remain secret until he issued the Final Judgment." Id. at 108.

The D.C. Circuit acknowledged that the articles were not admitted into evidence and may constitute hearsay. However, the D.C. Circuit noted that the plaintiffs did not dispute the accuracy of the articles or Judge Jackson's quotations. Acknowledging the unusual situation in which it found itself, the D.C. Circuit decided to hear Microsoft's disqualification motion despite the odd state of the record, and despite the court's usual practice of hearing cases for the first time on appeal (Microsoft had not moved for Judge Jackson's disqualification below, because the articles did not appear until after he had entered his final judgment). The court "assume[d] the truth of the press accounts," but "reach[ed] no judgment on whether the details of the interviews were accurately recounted." Id. at 109.

The D.C. Circuit quoted several articles containing statements attributed to Judge Jackson.

> He also provided numerous after-the-fact credibility assessments. He told reporters that Bill Gates' "testimony is inherently without credibility" and "if you can't believe this guy, who else can you believe?"

Id.

> As for the company's other witnesses, the Judge is reported as saying that there "were times when I became impatient with Microsoft witnesses who were giving speeches." "They were telling me things I just flatly could not credit.". . . In an interview given the day he entered the break-up order, he summed things up: "Falsus in uno, falsus in omnibus": "Untrue in one thing, untrue in everything." "I don't subscribe to that as absolutely true. But it does lead one to suspicion. It's a universal human experience. If someone lies to you once, how much else can you credit as the truth?" . . . .

Id. at 109-10.

> The Judge told a college audience that "Bill Gates is an ingenious engineer, but I don't think he is that adept at business ethics. He has not yet come to realise [sic] things he did (when Microsoft was smaller) he should not have done when he became a monopoly."

Id. at 110.

> Characterizing Gates' and his company's "crime" as hubris, the Judge stated that "if I were able to propose a remedy of my devising, I'd require Mr. Gates to write a book report" on Napoleon Bonaparte, "because I think [Gates] has a Napoleonic concept of himself and his company, an arrogance that derives from power and unalloyed success, with no leavening hard experience, no reverses."

Id.

> The District Judge likened Microsoft's writing of incriminating documents to drug traffickers who "never figure out that they shouldn't be saying certain things on the phone."

Id.

> He invoked the drug trafficker analogy again to denounce Microsoft's protestations of innocence, this time with a

> reference to the notorious Newton Street Crew that terrorized parts of Washington, D.C. Reporter Auletta wrote in The New Yorker that the Judge "went as far as to compare the company's declaration of innocence to the protestations of gangland killers. He was referring to five gang members in a racketeering drug-dealing, and murder trial that he had presided over four years earlier. In that case, the three victims had had their heads bound with duct tape before they were riddled with bullets from semi-automatic weapons. 'On the day of the sentencing, the gang members maintained that they had done nothing wrong, saying that the whole case was a conspiracy by the white power structure to destroy them,' Jackson recalled. 'I am now under no illusions that miscreants will realize that other parts of society will view them that way.'"

Id.

> The District Judge also secretly divulged to reporters his views on the remedy for Microsoft's antitrust violations. On the question whether Microsoft was entitled to any process at the remedy stage, the Judge told reporters in May 2000 that he was "not aware of any case authority that says I have to give them any due process at all. The case is over. They lost." . . . Another reporter has the Judge asking "were the Japanese allowed to propose terms of their surrender?". . . .

Id. at 111.

> The Judge recited a "North Carolina mule trainer" story to explain his change in thinking from "if it ain't broken, don't try to fix it" and "I just don't think that [restructuring the company] is something I want to try to do on my own" to ordering Microsoft broken in two: "He had a trained mule who could do all kinds of wonderful tricks. One day somebody asked him: 'How do you do it? How do you train the mule to do all these amazing things?' 'Well,' he answered, 'I'll show you.' He took a 2-by-4 and whopped him upside the head. The mule was reeling and fell to his knees, and the trainer said: 'You just have to get his attention.'" . . . The Judge added: "I hope I've got Microsoft's attention."

Id.

The D.C. Circuit issued a harsh conclusion.

> The Microsoft case was "pending" during every one of the District Judge's meetings with reporters; the case is "pending" now; and even after our decision issues, it will remain pending for some time. The District Judge breached his ethical duty under Canon 3A(6) each time he spoke to a reporter about the merits of the case. Although the reporters interviewed him in private, his comments were public. Court was not in session and his discussion of the case took place outside the presence of the parties. He provided his views not to court personnel assisting him in the case, but to members of the public. And these were not just any members of the public. Because he was talking to reporters, the Judge knew his comments would eventually receive widespread dissemination.
>
> It is clear that the District Judge was not discussing purely procedural matters, which are a permissible subject of public comment under one of the Canon's three narrowly drawn exceptions. He disclosed his views on the factual and legal matters at the heart of the case. His opinions about the credibility of witnesses, the validity of legal theories, the culpability of the defendant, the choice of remedy, and so forth all dealt with the merits of the action. It is no excuse that the Judge may have intended to "educate" the public about the case or to rebut "public misperceptions" purportedly caused by the parties.

Id. at 112.

The D.C. Circuit cited several historic sources for the basic principle, which requires judges to avoid public communications about cases they are handling.

> Judge Learned Hand spoke of "this America of ours where the passion for publicity is a disease, and where swarms of foolish, tawdry moths dash with rapture into its consuming fire. . . ." Judges are obligated to resist this passion. Indulging it compromises what Edmund Burke justly regarded as the "cold neutrality of an impartial judge." Cold or not, federal judges must maintain the appearance of impartiality. What was true two centuries ago is true today: "Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of

> judges." CODE OF CONDUCT Canon 1 cmt. Public confidence in judicial impartiality cannot survive if judges, in disregard of their ethical obligations, pander to the press.

Id. at 115.

The D.C. Circuit then recited several examples of the type of statements that manifested partiality.

> The problem here is not just what the District Judge said, but to whom he said it and when. His crude characterizations of Microsoft, his frequent denigrations of Bill Gates, his mule trainer analogy as a reason for his remedy -- all of these remarks and others might not have given rise to a violation of the Canons or of § 455(a) had he uttered them from the bench. . . . But then Microsoft would have had an opportunity to object, perhaps even to persuade, and the Judge would have made a record for review on appeal. It is an altogether different matter when the statements are made outside the courtroom, in private meetings unknown to the parties, in anticipation that ultimately the Judge's remarks would be reported. Rather than manifesting neutrality and impartiality, the reports of the interviews with the District Judge convey the impression of a judge posturing for posterity, trying to please the reporters with colorful analogies and observations bound to wind up in the stories they write. Members of the public may reasonably question whether the District Judge's desire for press coverage influenced his judgments, indeed whether a publicity-seeking judge might consciously or subconsciously seek the publicity-maximizing outcome. We believe, therefore, that the District Judge's interviews with reporters created an appearance that he was not acting impartially, as the Code of Conduct and § 455(a) require.

Id. at 115-16.

Interestingly, the D.C. Circuit noted that "Microsoft neither alleged nor demonstrated that [Judge Jackson's misconduct] rose to the level of actual bias or prejudice." Id. at 116. However, the D.C. Circuit flatly concluded that "[t]he District Judge's conduct destroyed the appearance of impartiality." Id. The court did not

entirely reject Judge Jackson's liability findings -- although it remanded to another judge so that the remedy phase could start over.

In its final slap at Judge Jackson, the D.C. Circuit found that it could conduct an appellate review of his findings, despite the judge's stated intent to preclude such a review.

> In reaching these conclusions, we have not ignored the District Judge's reported intention to craft his fact findings and Conclusions of Law to minimize the breadth of our review. The Judge reportedly told Ken Auletta that "what I want to do is confront the Court of Appeals with an established factual record which is a fait accompli." . . . He explained: "part of the inspiration for doing that is that I take mild offense at their reversal of my preliminary injunction in the consent-decree case, where they went ahead and made up about ninety percent of the facts on their own." . . . Whether the District Judge takes offense, mild or severe, is beside the point. Appellate decisions command compliance, not agreement. We do not view the District Judge's remarks as anything other than his expression of disagreement with this court's decision, and his desire to provide extensive factual findings in this case, which he did.

Id. at 118.

Best Answer

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

Judges' Communications about Cases in Which They Are Litigants

Hypothetical 27

One of your partners and closest friends just became a judge. Over dinner, you and she discuss the dramatic changes that her selection will make in her professional life. For instance, she tells you that after handling high-profile litigation for the past two decades, it will be difficult for her to avoid talking about any cases. This starts a debate about what you both have long recognized as the general rule prohibiting judges from talking publicly about their cases.

(a) May a judge talk publicly about a case in which the judge herself is a private litigant?

YES

(b) May a judge talk publicly about a case in which the judge herself is a litigant in her official capacity (such as a mandamus petition)?

NO

Analysis

Although every judicial ethics code prohibits judges' public communications about the cases they are handling as judges, that restriction does not necessarily apply to litigation in which the judge herself is a litigant. However, even that small exception reflects a fine-tuning and balancing of interests.

(a)-(b) The ABA Model Code of Judicial Conduct indicates that

> [n]othwithstanding the restrictions in paragraph (A) [prohibiting judges' public communications about cases], a judge may . . . comment on any proceeding in which the judge is a litigant in a personal capacity.

ABA Model Code of Judicial Conduct, Rule 2.10(D) (2007).

The commentary provides additional guidance.

> This Rule [prohibiting a judge from making "pledges, promises or commitments" about cases that might appear before the court] does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity. In cases in which the judge is a litigant in an official capacity, such as a writ of mandamus, the judge must not comment publicly.

ABA Model Code of Judicial Conduct, Rule 2.10 cmt. [2] (2007) (emphasis added).

The Code of Conduct for United States Judges likewise indicates (in the comment) that "[a] judge may comment publicly on proceedings in which the judge is a litigant in a personal capacity, but not on mandamus proceedings when the judge is a litigant in an official capacity . . . ." Code of Conduct for United States Judges, Canon 3A(6) Commentary (2009).

Best Answer

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

Judges' Communications about Other Judges' Cases

Hypothetical 28

Although you like to relax at home watching TV with your family after a long day of work, you have begun to grow weary of the nearly non-stop "talking heads" commentary about a celebrity murder trial in California. Just as you are about to fall asleep in your easy chair while watching the commentary last evening, you realized that one of the folks being interviewed about the case is a sitting state court judge from New Jersey. Your husband (who is also a lawyer) asks you whether it is appropriate for a New Jersey state court judge to comment on a pending murder trial in California.

May a judge make a public comment about a case pending in some other state's court, and which will never come before the judge?

NO (PROBABLY)

Analysis

It is easy to understand why every judicial ethics code forbids all or most public communications by a judge about cases pending or impending before that judge.

However, every judicial code goes further. The ABA Model Code of Judicial Conduct prohibits judges' public communication that might "reasonably be expected to affect the outcome or impair the fairness," or any "nonpublic comment that might substantially interfere with a fair trial or hearing" -- while a proceeding is "pending or impending in any court." ABA Model Code of Judicial Conduct, Rule 2.10(A) (2007) (emphasis added).

The Code of Conduct for United States Judges indicates that "[a] judge should not make public comment on the merits of a matter pending or impending in any court." Code of Conduct for United States Judges, Canon 3A(6) (2009) (emphasis added).

Not surprisingly, states which have adopted a broader restriction also apply it to cases pending in any court. See, e.g., Virginia Code of Judicial Conduct Canon 3B(9) ("[a] judge shall abstain from public comment about a pending or impending proceeding in any court" (emphasis added)).

Most of the cases and judicial ethics opinions dealing with this rule involve judges' recurring commentary in media outlets.

As might be expected, older judicial ethics opinions tended to frown on such activities. See, e.g., Washington Judicial Ethics Advisory Op. 87-11 (10/23/87) ("A part-time municipal court judge may not write a newspaper column on any legal issues which includes the judge's opinion on recent legislation and court cases. CJC Canon 4 permits a judge to engage in activities to improve the law, legal system, and the administration of justice but only when these activities do not cast doubt on the judge's capability to decide impartially any issue which comes before the judge.").

More recent opinions take differing approaches. For instance, in Florida Judicial Ethics Advisory Op. 99-14 (5/4/99), the Committee indicated that a judge may write a monthly newspaper column on the judicial system and the administration of justice, but would have to avoid discussion of any matters that might come before the judge. In a rarity, one member of the Committee disagreed with this fairly liberal approach, and indicated that "in all likelihood the inquiring judge will end up commenting on matters before the Court and be placed in a very difficult position." Id.

In that same year, however, the Virginia Judicial Ethics Advisory Committee issued an opinion flatly prohibiting judges from appearing on a regular basis on radio or television interview programs or talk shows "concerning legal issues unrelated to the

merits of a pending case or investigation." Virginia Judicial Ethics Advisory Comm. Op. 99-7 (11/17/99). The Virginia Committee described the dangers of such media appearances.

> Issues which merit public discussion on national television and radio often involve cases pending in a court or which may become the subject of a judicial proceeding. It matters not whether the issue is pending before the judge whose commentary is sought. The proscription of a judge's commenting on a pending or impending proceeding applies even if the proceeding is not within the Commonwealth. . . . In today's electronic media a judge's commenting about a case pending in another jurisdiction could influence prospective jurors and witnesses. These commentaries could very easily lessen the public's confidence in the judiciary, especially if the court hearing the case ruled on matters contrary to the opinions expressed by the commenting judge.

Id. (emphases added). Thus, the Virginia Committee worried about the judges' comments: (1) actually affecting the other proceeding, and (2) having an adverse systemic effect on the public's faith in the judicial system.

The Virginia Committee also worried that the judge would be lending the prestige of office to advance the private interests of the newspaper or television network. This prohibition would apply even if the judge did not identify himself or herself as a judge.

> It is of no significance that the judge would not be identified as a judge. A judge is a public official, and it would strain credulity to conclude that the audience, or a part of the audience, would not be aware of his position.

Id. (emphasis added).

The Virginia Committee did not completely prohibit a judge's occasional appearance on commercial radio or television, and provided the factors that should guide a judge's determination about the propriety of such appearances.

> A judge is not necessarily prohibited from all appearances on a commercial radio or television program. Several factors must be considered in determining whether a judge should participate in such programs: The frequency of his appearance, the audience, the subject matter, and whether the program is commercial or non-commercial. . . . For example, an appearance by a judge to discuss the role of the judiciary in government or the court's relationship with community educational and treatment facilities could be appropriate.

Id.

Perhaps the most interesting recent case involving this issue is In re Inquiry of Broadbelt, 683 A.2d 543 (N.J. 1996), cert. denied, 520 U.S. 1118 (1997). In Broadbelt, Municipal Judge Broadbelt appeared over 50 times on Court TV, spoke several times on CNBC about the O.J. Simpson trial and also appeared on local television programs. Judge Broadbelt did not receive any compensation for these appearances.

When his county's Assignment Judge asked Judge Broadbelt to refrain from appearing on any additional programs (after earlier giving him permission to appear on "Geraldo Live"), Judge Broadbelt expressed disagreement with the Assignment Judge. The Assignment Judge referred the issue to the New Jersey Supreme Court's Committee that deals with such matters. That committee found that Judge Broadbelt's appearances violated the New Jersey Ethics Code. Judge Broadbelt petitioned the New Jersey Supreme Court for a review of the Committee's opinion.

The New Jersey Supreme Court agreed with the Committee that Judge Broadbelt's statements about cases in other jurisdictions (including the O.J. Simpson case) violated the judicial canons.

> We find the Canon to be clear and unambiguous: a judge should not comment on pending cases in any

> jurisdiction. By prohibiting judges from commenting on pending cases in any court, we avoid the possibility of undue influence on the judicial process and the threat to public confidence posed by a judge from one jurisdiction criticizing the rulings or technique of a judge from a different jurisdiction.

Id. at 548. The New Jersey Supreme Court also pointed to the "appearance of impropriety" standard in the Judicial Code. Id. at 550.

Best Answer

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

Judges' Personal Communications

Hypothetical 29

You recently became a judge, and seem to be deluged with requests for letters of recommendation from neighbors and friends.

May you send the following letters of recommendation:

(a) A letter recommending a local lawyer for a judgeship that soon will open up in your city?

NO

(b) A letter on court letterhead recommending your next door neighbor's daughter for admission to a local law school?

MAYBE

Analysis

Judges must always avoid explicitly or implicitly using the authority of their office to gain some advantage for themselves, their friends, or their family. For instance, it would be easy to see the possibility of abuse if a judge hearing a case against a university sent a letter of recommendation for a niece who had applied for admission to that university.

At the same time, judges do not forfeit all of their right to participate in such normal everyday processes as letters of recommendation. Thus, the judicial ethics rules try to strike a balance between these two competing principles.

(a) The ABA Model Judicial Code explains that judges may respond to inquiries about judicial candidates -- thus impliedly prohibiting judges from volunteering their opinions. ABA Model Code of Judicial Conduct, Rule 1.3 cmt. [3] (2007) ("Judges

may participate in the process of judicial selection by cooperating with appointing authorities and screening committees, and by responding to inquiries from such entities concerning the professional qualifications of a person being considered for judicial office." (emphases added)).

This balancing presumably permits judges to add their thoughts when called upon, but prevents them from pushing a favored candidate for judicial office.

(b) The ABA Model Judicial Code allows judges' use of official letterhead in such personal letters of recommendation, as long as judges base their recommendations on personal knowledge.

> A judge may provide a reference or recommendation for an individual based upon the judge's personal knowledge. The judge may use official letterhead if the judge indicates that the reference is personal and if there is no likelihood that the use of the letterhead would reasonably be perceived as an attempt to exert pressure by reason of the judicial office.

ABA Model Code of Judicial Conduct, Rule 1.3 cmt. [2] (2007).

Many states take a more narrow view.

- Virginia Judicial Ethics Advisory Comm. Op. 06-01 (10/12/06) (explaining that judges are not per se prohibited from sending such letters of recommendation, but must follow several guidelines: (1) judges should not send letters of recommendation in situations such as those in which someone is seeking to have his civil rights restored, regain permission to possess concealed weapons, or arrange for reinstatement of a job; (2) judges should specifically target the recipient of a letter, and not use salutations such as "To Whom It May Concern," and nearly always should send a written letter rather than initiate a telephone call (which is inherently more coercive); (3) judges "must assure that the form and appearance of their written recommendations do not risk lending the prestige of their judicial office to advance the private interests of others," and therefore should indicate clearly on any official stationery that the letter of recommendation is "personal and unofficial" (and should include this warning even on personal stationery, if "the envelope bears any indication that it comes from a court"); (4) judges should send such letters only if based upon firsthand knowledge,

and "should not provide an opinion about the individual's reputation, or convey what others have told the judge about the individual").

- North Carolina Judicial Standards Comm'n Formal Advisory Op. 2007-03 (8/10/07) ("The language included in the relevant portion of Canon 2B includes . . . a judge may, based on personal knowledge serve as a personal reference or provide a letter of recommendation. This language allows for judges to decline any request to serve as a personal reference or complete the North Carolina Bar Examiner's Certificate of Moral Character. However, if a judge does choose to complete the above mentioned Certificate of Moral Character he or she should do so for only those individuals that the judge has direct personal knowledge.").

- North Carolina Judicial Standards Comm'n Formal Advisory Op. 2007-02 (8/10/07) ("This basic principle should guide every aspect of a judge's consideration. Some common-sense guidelines follow, but are in no way exhaustive: Use personal stationary rather than official letterhead. Since a recommendation will usually be personal rather than official in nature, a judge should use personal stationery, not official court stationery or any facsimile thereof. Canon 2B of the Code provides that a judge 'should not lend the prestige of the judge's office to advance the private interest of others.' However, a judge may reference the judge's judicial office in the letter when it is necessary to explain the context of the judge's observations of the individual. Should a State of North Carolina Agency or official request a judge's input in an official capacity, then the judge may use official stationary [sic] as the request would come in the normal course of the judge's official duties[.]"; "Be as specific as possible to whom you are sending the letter of recommendation, try to avoid addressing the letter to 'whom it may concern'"; "Consider requesting that the letter be treated confidential to the group or individual receiving a letter of recommendation."; "Consider the context of the request for a letter of recommendation. Is the purpose for which the letter is requested something with which the judge should associate?"; "Avoid initiating telephone calls in order to make recommendations. The risk that the call may be perceived as lending the prestige of office is reduced if the judge makes a recommendation over the telephone only in response to an inquiry by the decision maker. Be clear that the recommendation is personal and not an official act."; "Limit letters of recommendation or referrals to only those individuals of whom the judge has personal firsthand knowledge. Limit the substance of the letters of recommendation to information about the individual that the judge has personally observed or experienced.").

Judges (or lawyers involved in analyzing the situation) must therefore determine if the applicable state's judicial ethics principles take a narrower view than the ABA Model Code of Judicial Conduct.

Best Answer

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

Judges' and Judicial Candidates' Communications about Public Policy Issues

Hypothetical 30

You have been asked to participate in a commission charged with reviewing your state's judicial code of ethics. Among other things, you will be asked whether the judicial ethics code should totally prohibit judges from publicly commenting on matters of public policy -- even issues that will never come before the judge.

Should the judicial ethics code prohibit judges from publicly commenting on matters of public policy -- even issues that will never come before the judge?

MAYBE

Analysis

Every state's judicial ethics code prohibits judges from speaking about cases pending before them or in some other court. The ABA Model Judicial Code would only prohibit statements that might adversely affect the proceeding (ABA Model Code of Judicial Conduct, Rule 2.10 (2007)), while some states apply a flat prohibition regardless of the risk of affecting a proceeding. See, e.g., Virginia Code of Judicial Conduct Canon 3B(9).

The Code of Conduct for United States Judges prohibits any "public comment about the merits of a matter pending or impending in any court" -- without any requirement that the comment adversely affect the proceeding. Code of Conduct for United States Judges, Canon 3A(6) (2009).

Apart from this fairly specific rule, courts are left with such vague standards as "appearance of impropriety" and similar general terms.

At the extreme, it would be fairly easy to predict what a court would do. For instance, federal judges would clearly be permitted to speak out in favor of a democratic form of government rather than the dictatorship, but would not be permitted to speak about such specific matters as abortion or Miranda rights -- because those issues might come before the judge.

It is more difficult to apply the rules between these extremes. For instance, should traffic court judges (who will never hear abortion cases) be permitted to speak out publicly on one side or the other of the abortion issue? Most state supreme courts would probably prohibit such public communications.

Well-known judges have run afoul of the prohibition on judges involving themselves in public controversies, even when those controversies will not appear before the judge.

For instance, in Hathcock v. Navistar International Transportation Corp., 53 F.3d 36 (4th Cir. 1995), the Fourth Circuit found that Judge G. Ross Anderson, Jr. (of the District of South Carolina) should have recused himself from a product liability case against Navistar.

In addition to finding that Judge Anderson incorrectly granted default judgment against Navistar and awarded a $6 million fine for alleged discovery abuse, the Fourth Circuit pointed to various statements Judge Anderson made at a December 3, 1993, South Carolina Trial Lawyers Association Auto Torts Seminar -- while "a jury trial on the issue of damages was pending in the case at bar." Id. at 39.

> "Every defense lawyer objects to the net worth coming in [on the issue of punitive damages] and all of that. Then after that verdict you can get up there and call them the

> son-of-a-bitches that they really are." In addition to other rather inflammatory remarks, the judge characterized three pro-plaintiff judicial decisions in the following way:
>
> "What makes [these decisions] so great is that the lawyers that represent these habitual defendants, they met these three decisions with about the same degree of joy and enthusiasm as the fatted calf did when it found out the prodigal son was coming home. That indicates that that's some pretty good decisions."

Id.

The Fourth Circuit relied in part on an earlier Sixth Circuit case, in which a judge during an oral ruling called an automobile defendant "'a bunch of villains . . . interested only in feathering their own nests at the expense of everybody they can.'" Id. at 41 (quoting Nicodemus v. Chrysler Corp., 596 F.2d 152, 155 (6th Cir. 1979)).

The Fourth Circuit also pointed to other actions by Judge Anderson that created an "appearance of impropriety" requiring his recusal.

> Though probably insufficient to merit recusal in isolation, see id., the judge's ex parte contacts requesting the Hathcocks' counsel to draft at least the factual basis of a default order, and possibly its legal conclusions as well, do not foster an impression of objectivity, particularly since Navistar was never given an opportunity to respond to the proposed order. We are also troubled by the judge's willingness to involve the court as a participant in ongoing litigation by directing his law clerk to file an affidavit in response to the Hathcocks' recusal motion.

Id.

More recently, the Judicial Council of the Second Circuit admonished Second Circuit Judge Guido Calabresi (formerly Dean of Yale Law School) for statements Judge Calabresi made in a June 19, 2004, meeting of the American Constitutional

Society. In re Charges of Judicial Misconduct, 404 F.3d 688 (2d Cir. 2005). Judge Calabresi spoke from the floor, rather than as a panelist.

Ironically, he began his discussion with an assurance that he would not do what he then did.

> "Okay, I'm a judge and so I'm not allowed to talk politics and so I'm not going to talk about some of the issues which were mentioned or what some have said is the extraordinary record of incompetence of this administration at any number of levels, nor am I going to talk about what is really a difficult issue which is the education issue, which is an incredibly complicated one, which I'm glad you talked about. I'm going to talk about a deeper structural issue that is at stake in this election, and that has to do with the fact that in a way that occurred before but is rare in the United States, that somebody came to power as a result of the illegitimate acts of a legitimate institution that had the right to put somebody in power. That is what the Supreme Court did in Bush versus Gore. It put somebody in power. Now, he might have won anyway, he might not have, but what happened was that an illegitimate act by an institution that had the legitimate right to put somebody in power. The reason I emphasize that is because that is exactly what happened when Mussolini was put in by the King of Italy, that is, the King of Italy had the right to put Mussolini in though he had not won an election and make him Prime Minister. That is what happened when Hindenburg put Hitler in. I'm not suggesting for a moment that Bush is Hitler. I want to be clear on that, but it is a situation which is extremely unusual."

Id. at 691 (emphases added). Five days later, Judge Calabresi apologized for his remarks. Among other things, Judge Calabresi indicated that:

> "As you know, I strongly deplore the politicization of the judiciary and firmly believe that judges should not publicly support candidates or take political stands. Although what I was trying to do was make a rather complicated academic argument about the nature of reelections after highly contested original elections, that is not the way my words, understandably, have been taken. I can also see why this occurred, despite my statements at the time that what I was

> saying should not be construed in a partisan way. For that I am deeply sorry."

Id. at 692.

The Second Circuit Judicial Council did not find that Judge Calabresi's appearance at and remarks at the American Constitutional Society amounted to a per se violation of any ethics rules. However, it found that Judge Calabresi violated the prohibition on judges' involvement in political activity. The Judicial Council found it unnecessary to impose any punishment for Judge Calabresi's references to Mussolini and Hitler, given the Judge's apology.

Finally, the Judicial Council dealt with an Associated Press story that Judge Calabresi's wife attended a protest at Yale University. The Associated Press reported that Mrs. Calabresi was

> "protesting on behalf of herself and her husband" (identifying him by title, court and name), and that she expressed anger about the President's veracity and conduct of the war.

Id. at 699. The Judicial Council pointed to a letter from Mrs. Calabresi that she had "no recollection" of saying that she was protesting on her husband's behalf, and that Judge Calabresi has repeatedly advised his wife to avoid leaving the impression that she speaks for him as well. The Judicial Council dismissed the claim against Judge Calabresi "for lack of evidence of misconduct." Id. at 700.

Best Answer

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