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LITIGATION ETHICS: PART III (WITNESSES)

Hypotheticals and Analyses

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Paying Fact Witnesses

Hypothetical 1

Your largest client recently downsized its upper management. Unfortunately, now you find that you need the testimony of several retired senior executives. Perhaps a bit bitter about being laid off, several of them have demanded that you reimburse them for their travel expenses, and that you pay for their time.

- (a) May you reimburse the executives for their travel expenses?

YES

- (b) One of the retired executives has started a consulting firm. May you agree to his demand that you pay for the time he spends preparing for his testimony at the hourly rate he charges his consulting clients?

YES

- (c) May you pay the same rate for the time that the retired executive spends actually testifying in a deposition or at the trial?

YES (PROBABLY)

- (d) Another retired executive moved to Florida and plays golf, fishes, or relaxes every day. Can you pay him an hourly rate for the time he spends preparing for his testimony?

YES

- (e) Another retired executive has found a job with a competitor. In addition to being reimbursed for his travel expenses, this fact witness has demanded \$5,000 "to tell the truth" when he testifies. Can you pay him \$5,000 to "tell the truth"?

NO

Analysis

As in so many other situations involving ethics considerations, the issue of paying fact witnesses seems easy to analyze at the extremes.

The ethics rules clearly prohibit paying money in return for favorable testimony. At the other extreme, the ethics rules undoubtedly allow parties to pay a witness's parking charge, mileage or other out-of-pocket expense. If the witness will forfeit a salary for the time that she spends preparing to testify, it also seems fair to reimburse her for this amount (because it also essentially avoids the witness's out-of-pocket loss).

ABA Model Rule 3.4(b) indicates that lawyers shall not "offer an inducement to a witness that is prohibited by law." See also Illinois Rule 3.4(a)(2); Virginia Rule 3.4(c).¹ A comment to ABA Model Rule 3.4 explains that "[w]ith regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law. The common law rule in most jurisdictions is that it is improper to pay an occurrence witness any fee for testifying and that it is improper to pay an expert witness a contingent fee." ABA Model Rule 3.4 cmt. [3].

The ABA dealt with this issue in ABA LEO 402 (8/2/96). The ABA first rejected an earlier Pennsylvania LEO that had held that the ethics rules "can be read to disfavor compensation to non-expert witnesses for time invested in preparing for testimony." Pennsylvania LEO 95-126 (1995). As the ABA explained,

As long as it is made clear to the witness that the payment is not being made for the substance or efficacy of the witness's testimony, and is being made solely for the purpose of compensating the witness for the time the witness has lost in order to give testimony in litigation in which the witness is not a party, the Committee is of the view that such payments do not violate the Model Rules.

¹ Virginia Rule 3.4(c) provides a list of permissible payments. Virginia Rule 3.4(c) ("A lawyer shall not: . . . (c) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law. But a lawyer may advance, guarantee, or pay: (1) reasonable expenses incurred by a witness in attending or testifying; (2) reasonable compensation to a witness for lost earnings as a result of attending or testifying; (3) a reasonable fee for the professional services of an expert witness.")

ABA LEO 402 (8/2/96). Not surprisingly, the ABA explained that any payment must be "reasonable," so it does not influence the witness's testimony.

[T]he amount of such compensation must be reasonable, so as to avoid affecting, even unintentionally, the content of a witness's testimony. What is a reasonable amount is relatively easy to determine in situations where the witness can demonstrate to the lawyer that he has sustained a direct loss of income because of his time away from work -- as, for example, loss of hourly wages or professional fees. In situations, however, where the witness has not sustained any direct loss of income in connection with giving, or preparing to give, testimony -- the lawyer must determine the reasonable value of the witness's time based on all relevant circumstances. Once that determination has been made, nothing in the Model Rules prohibits a lawyer from making payments to an occurrence witness as discussed herein.

Id.²

² Several jurisdictions approved such payments before the ABA issued ABA LEO 402 in 1996. See, e.g., New York LEO 668 (6/3/94) ("There is no ethical limit on the amount an individual may be paid for assistance in the fact finding process, so long as the client consents after full disclosure. The attorney should keep in mind that such pay may affect the amount the attorney may recover in attorneys' fees. An individual testifying at trial may receive a reasonable rate, determined by the fair market value for the time, regardless of whether the individual suffered actual financial loss."; "The term 'loss of time in attending or testifying' has been interpreted to mean 'loss of time in testifying or in otherwise attending court proceedings and preparing therefor.' N.Y. State 547 (1982). The witness' 'loss of time' then must be translated into dollars. Id. A witness who loses wages because of his or her role as a witness may be reimbursed for the money lost. A witness who is unemployed, self-employed, or on salary, also may be compensated since even 'recreation time is susceptible to valuation.' Id. A witness who is reimbursed for loss of free time, or does not lose money as a result of the role as a witness, is still entitled to compensation, but the amount should be given 'closer consideration' than it is when the witness is being reimbursed for lost wages. Id. Thus, 'reasonable compensation' is not merely out-of-pocket expenses or lost wages."; "The amount of compensation that is to be considered 'reasonable' will be determined by the market value of the testifying witness. For example, if in the ordinary course of individual's profession or business, he or she could expect to be paid the equivalent of \$150/hour, he or she may be reimbursed at such rate."; Illinois LEO 87-5 (1/29/88) (citing what was then the Illinois ethics rule's provision allowing payment of "reasonable compensation to a witness for loss of time in attending or testifying" -- Illinois Rule 7-109(c)(2); "It appears clear that the above provisions permit reimbursement to a subpoenaed witness for sums lost by reason of being required to appear at trial. To the same effect, we believe such provisions to permit the payment of reasonable compensation to a witness for time spent in being interviewed. The provisions of Rule 7-109 are not on their face limited to attendance at trial or for purposes of deposition. Nor are they limited to permitting compensation only for time lost from a job or profession. Rather, they are written generally to permit compensation to a witness for loss of time in attending or testifying. We believe such provisions to be broad enough to permit, although certainly not mandate, the payment of reasonable compensation to a witness for time spent in being interviewed. However, to the extent that such compensation is in fact for the purpose of influencing testimony, rendering a prospective witness 'sympathetic' to one's cause, or suborning perjury, it is indefensible. See In re Howard, 69 Ill.2d 343, 372

The Restatement follows essentially the same approach.

A lawyer may not offer or pay to a witness any consideration:

(1) in excess of the reasonable expenses of the witness incurred and the reasonable value of the witness's time spent in providing evidence, except that an expert witness may be offered and paid a noncontingent fee;

(2) contingent on the content of the witness's testimony or the outcome of the litigation

Restatement (Third) of Law Governing Lawyers § 117 (2000). A comment provides more explanation.

A lawyer may pay a witness or prospective witness the reasonable expenses incurred by the witness in providing evidence. Such expenses may include the witness's reasonable expenses of travel to the place of a deposition or hearing or to the place of consultation with the lawyer and for reasonable out-of-pocket expenses, such as for hotel, meals, or child care. Under Subsection (1), a lawyer may also compensate a witness for the reasonable value of the witness's time or for expenses actually incurred in preparation for and giving testimony, such as lost wages caused by the witness's absence from employment.

Restatement (Third) of Law Governing Lawyers § 117 cmt. b (2000).

N.E.2d 371 (1977); In re Rosen, 438 A.2d 316 (N.J. 1981); In re Robinson, 136 N.Y.S. 548 (1912). Thus, an attorney must be wary in instances where the true purpose of payments made may be subject to question.").

The Florida Supreme Court also approved such payments. Florida Bar v. Cillo, 606 So. 2d 1161, 1162 (Fla. 1992) (suspending for six months a Florida lawyer for various misconduct; analyzing among other things, the lawyer's payment to a former client to testify truthfully; "Clearly to induce a witness to testify falsely would be misconduct and more but this is not the issue here. The factual scenario, as I have found it, raised this question. Is it misconduct to induce a witness to tell the truth by offering and giving money or some other valuable consideration? I think not"; "We are concerned, however, that the payment of compensation other than costs to a witness can adversely affect the credibility and fact-finding function of the disciplinary process. We are also concerned with the use of the Bar's disciplinary process for the purpose of extortion. While we do not believe that Cillo's conduct was a violation of the Rules of Professional Responsibility, we do believe that a rule should be developed to make clear that any compensation paid to a claimant or an adverse witness is improper unless the fact-finding body has knowledge and has approved any such compensation.")

Thus, the ABA and the Restatement agree that a litigant may reimburse a fact witness for her travel expenses, and pay a reasonable hourly rate for the time that the witness spends preparing for her testimony and testifying.³

Since the ABA issued its opinion in 1996, most state bars have taken the same approach.

- Alabama LEO RO-97-02 (10/29/97) ("An attorney may not pay a fact or lay witness anything of value in exchange for the testimony of the witness, but may reimburse the lay witness for actual expenses, including loss of time or income."; "Furthermore, payment to a fact witness for his actual expenses and loss of time would constitute 'expenses of litigation' within the meaning of Rule 1.8(e). Subparagraph (1) of that section authorizes an attorney to 'advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter.'").
- California LEO 1997-149 (1997) ("An attorney may pay a non-expert witness for the time spent preparing for a deposition or a trial, but the attorney must comply with the requirements of rule 5-310(B) of the California Rules of Professional Conduct. Compensation for preparation time or for time spent testifying must be reasonable in light of all the circumstances and cannot be contingent upon the content of the witness' testimony or on the outcome of the matter. Possible bases upon which to determine reasonable compensation include the witness' normal rate of pay if currently employed, what the witness last earned, if currently unemployed, or what others earn for comparable activity."; "We conclude that it is not inappropriate to compensate a witness for otherwise uncompensated time necessary for preparation for or testifying at deposition or trial, as long as the compensation is reasonable in conformance with rule 5-310(B), does not violate applicable law, and is not paid to a witness contingent upon the content of the witness' testimony, or the outcome of the case. . . . This applies whether the witness is currently employed, unemployed, retired, suspended or in any other employment status.").
- South Carolina LEO 97-42 (1997) (permitting payment to fact witnesses of expenses and reimbursement for lost time).

³ To be sure, paying a fact witness for the time that she spends actually testifying might seem somewhat "unseemly." Many litigants choose not to pay a fact witness for that time. This prevents the adversary from noting that the fact witness is earning money during her testimony. A clever fact witness asked by the adversary's lawyer whether she is receiving payment while testifying might respond with an answer such as: "Yes I am, but I bet it is less than you are earning right now."

The Delaware Bar offered a thoughtful analysis in a 2003 opinion. Delaware LEO 2003-3 (8/14/03) (holding that a lawyer may pay out-of-pocket travel expenses to witnesses; explaining that a company may compensate a retired employee of another company for his time (at the rate that the retired employee charges in his full-time independent consulting business), but may not compensate a retired company employee for his time at the rate that the employee was paid when last employed at the company -- because the former employee was presently unemployed; noting that there was no evidence that the witness "will lose an economic opportunity by spending time preparing for his testimony and testifying" at the trial; acknowledging that the witness might be entitled to a "somewhat reduced rate of compensation for the burden of devoting his time to prepare for the Delaware Trial rather than enjoying his retirement," but noting that such an inquiry was not before the bar.")

Case law has tended to take the same approach.

- Prasad v. Bloomfield Health Servs., Inc., No. 04 Civ. 380 (RWS), 2004 U.S. Dist. LEXIS 9289, at *5, *15-17, *19 (S.D.N.Y. May 24, 2004) (finding nothing improper in a company's payment of \$125 per hour to a former employee who testified at an arbitration; noting that the former employee "testified that he was not paid to testify in any particular manner" and that the former employer reimbursed him at the \$125 per hour rate "because he was self-employed and that was the rate he received in his consulting business"; "Although the federal courts have reached varying conclusions as to the circumstances in which payments to a fact witness will be deemed improper, they are generally in agreement that a witness may properly receive payment related to the witness' expenses and reimbursement for time lost associated with the litigation. . . . A witness may be compensated for the time spent preparing to testify or otherwise consulting on a litigation matter in addition to the time spent providing testimony in a deposition or at trial."; "That a fact witness has been retained to act as a litigation consultant does not, in and of itself, appear to be improper, absent some indication that the retention was designed as a financial inducement or as a method to secure the cooperation of a hostile witness, or was otherwise improper.").

- Centennial Management Servs., Inc., v. Axa Re Vie, 193 F.R.D. 671, 682 (D. Kan. 2000) ("[T]he Movants have directed the court to no authority supporting their argument that a person violates the anti-gratuity statute by paying a fact witness reasonable compensation for time spent in connection with legitimate, non-testifying activities such as reviewing documents in preparation for the deposition and meeting with lawyers in preparation for the deposition. In fact, the only authority the court has uncovered on this issue suggests that such compensation is lawful. See, e.g., ABA Comm. on Ethics and Professional Responsibility, Formal Op. 96-402 (1996). (Under Rule 3.4(b), occurrence witnesses may be reasonably compensated for time spent in attending a deposition or trial; for time spent in pretrial interviews with the lawyer in preparation for testifying; and for time spent in reviewing and researching records that are germane to his or her testimony).").

To be sure, not every bar and court agree with the ABA's approach. For instance, in one recent case a federal court addressed an award of attorney's fees under a cost-shifting statute that allows the shifting of costs associated with a fact witness. Roemmich v. Eagle Eye Dev., LLC, No. 1:04-cr-079, 2006 U.S. Dist. LEXIS 94320, at *13-14 (D.N.D. Dec. 29, 2006) (awarding only \$3,750 rather than the \$13,250 sought; "While the court is not aware of any North Dakota case law or ethics opinions on point, most jurisdiction[s] have construed similar language as prohibiting payments to fact witnesses for the substance of their testimony, but allowing compensation for time spent in preparation for, and testifying at, trial or deposition, at least when the circumstances warrant such compensation. . . . One of these circumstances is when a fact witness has to spend significant time reviewing records in order to testify. Permitting additional compensation in this situation is fair to the witness. Also, it promotes justice to the extent it results in testimony that is more accurate and meaningful and does not limit the parties to calling only those witnesses who have the resources and the willingness to devout [sic] significant time without compensation.").

A well-known lawyer who deals with ethics issues warns about attaching any conditions to a fact witness's testimony.

Any condition attached to the payments that may be viewed as influencing the testimony of the witness is suspect. For example, in a case in which payment is (1) conditioned on the giving of testimony in a certain way, even if conditioned on "truthful testimony," (2) is made to prevent the witness's attendance at trial, or (3) is contingent to any extent on the outcome of the case, the payment will be deemed unethical. Agreements to protect the former employee from liability, which are made to secure the employee's cooperation as a fact witness, may also be found to constitute "the equivalent of making cash payments to [the witness] as a means of making him sympathetic and securing his testimony."

John K. Villa, Paying Fact Witnesses, ACCA Docket 19, Oct. 2001, at 112, 113 (footnotes omitted).⁴

Some bars and courts are openly critical of paying for a fact witness's time. As mentioned above, ABA LEO 402 (8/2/96) rejected the analysis of a Pennsylvania Legal Ethics Opinion from the previous year.⁵ Other courts express even more hostility.

⁴ Villa also suggests that the party paying the fact witness disclose the payments to the court and to the adversary. "Once the decision is made to compensate a former employee for his or her time in connection with testifying as a fact witness, counsel should inform the court and opposing counsel of this decision, as well as the basis for the payment. Even though permissible, some jurisdictions permit the fact of such a payment to be considered by the trier of fact in assessing the credibility of the witness and the weight to be accorded his or her testimony. The court may order production of the compensation agreement, as well as the production of any documents related to it and any documents reviewed or prepared by the witness. It may also permit the opposing party to treat the witness as a hostile witness for purposes of cross examination." John K. Villa, Paying Fact Witnesses, ACCA Docket 19, Oct. 2001, at 112, 113-14 (footnotes omitted).

⁵ Pennsylvania LEO 95 126A (9/26/95) ("In sum, while there is no express prohibition in the language of Rule 3.4 or the Pennsylvania Witness Compensation Statute, it appears that both sources can be read to disfavor compensation to nonexpert witnesses for the time invested in preparing for testimony. At the very least, should you decide to pay such compensation to the fact witness, that witness must be instructed that, if asked on cross examination, he is to be candid about the nature and amount of the compensation he has been paid. Even with that protective measure, we cannot say with certainty that compensating a nonexpert for preparation time is not without risk of disciplinary enforcement action.").

Other authorities share this hostile approach. New York v. Solvent Chem. Co., 166 F.R.D. 284, 290 (W.D.N.Y. 1996) (assessing a consulting agreement between a company and a former employee who was an important fact witness; approving some of the payments, but condemning other arrangements; "the court finds

Goldstein v. Exxon Research & Eng'g Co., Civ. A. No. 95-2410, 1997 U.S. Dist. LEXIS 14598 (D.N.J. Apr. 16, 1997) (finding unenforceable as against "public policy" a consulting agreement between Exxon and one of its former employees who was a fact witness; specifically rejecting the ABA approach).⁶

Not surprisingly, courts everywhere reject fact witnesses' blatant attempt to "sell" certain testimony in return for compensation. See, e.g., United States v. Blaszak, 349 F.3d 881 (6th Cir. 2003) (affirming a conviction under 18 U.S.C.S. § 201(c)(3) for offering to sell testimony in an antitrust case in exchange for \$500,000); In re Complaint of PMD Enters. Inc., 215 F. Supp. 2d 519, 522 (D.N.J. 2002) (revoking the pro hac vice admission of a lawyer who offered an adversary's key fact witness \$100 per hour to "review and organize certain documents and records"); Florida Bar v. Jackson, 490 So.

nothing improper in the reimbursement of expenses incurred by Mr. Beu in travelling to New York to provide ICC with factual information, or in the payment of a reasonable hourly fee for Mr. Beu's time. But in providing Mr. Beu with protection from liability in the Dover litigation, and in this action, as a means of obtaining his cooperation as a fact witness, ICC and Solvent went too far."; "But it was only after service of the subpoena in July 1995 -- when it became clear that OCC and other parties were intending to obtain both documents and testimony from Mr. Beu -- that ICC moved to acquire Mr. Beu's services as a 'litigation consultant.' The timing of ICC's actions creates, in and of itself, an appearance of impropriety that serves to further undermine the company's claim of work product protection for the consulting agreement and related materials."; ordering the production of all pertinent documents regarding the consulting agreement); Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n, 865 F. Supp. 1516, 1518, 1526 (S.D. Fla. 1994) (approving a party's payment of expenses to fact witnesses, but finding the payment of \$120,000 to fact witnesses to be a "clear violation" of the Florida ethics rule, and excluding "all evidence tainted by the ethical violations"; "Rule 3.4(b) of the Rules of Professional Conduct, The Florida Bar v. Jackson, *supra*, and the aforementioned cases clearly prohibit a lawyer from paying or offering to pay money or other rewards to witnesses in return for their testimony, be it truthful or not, because it violates the integrity of the justice system and undermines the proper administration of justice. Quite simply, a witness has the solemn and fundamental duty to tell the truth. He or she should not be paid a fee for doing so."); Wisconsin LEO E-88-9 (1998) ("[W]e believe that inducements to witnesses that exceed their actual out-of-pocket losses would support findings of SCR 20:3.4(b) violations. And, of equal importance, an opposing counsel's eliciting testimony about excessive witness compensation could adversely impact a witnesses's [sic] credibility, a client's case and a lawyer's 'reasonableness' as a practical qualification on SCR 20:3.4(b)'s amorphous prohibition.").

⁶ National Labor Relations Bd. v. Thermon Heat Tracing Servs., Inc., 143 F.3d 181, 190 (5th Cir. 1998) (in a dissent by Judge Garza, criticizing any payment to fact witnesses; "The common law rule in civil cases in most jurisdictions prohibited the compensation of fact witnesses. . . . The payment of a sum of money to a witness to 'to tell the truth' is as clearly subversive of the proper administration of justice as to pay him to testify to what is not true.").

2d 935 (Fla. 1986) (suspending for three months a lawyer who sought \$50,000 for clients' testimony in a New York lawsuit); In re Howard, 372 N.E.2d 371 (Ill. 1997) (suspending for two years a lawyer who paid (on two occasions) \$50 to an arresting officer for certain testimony).

(a) Every bar and court allow a litigant to pay a witness's reasonable travel expenses.

(b) Most bars and courts allow payment of a reasonable hourly rate that the witness spends preparing for testimony.

(c) Most also permit the payment of an hourly rate for the time that the witness actually spends testifying.

(d) Bars and courts disagree about whether or how much a litigant can pay a witness who will not be incurring any loss by preparing to testify and testifying. The majority rule would allow such payments even to a retired witness -- who may have worked hard to enjoy a stress-free retirement.

(e) Bars and courts normally condemn a payment not tied to a particular loss, but which instead constitutes some-lump sum payment out of proportion to expenses or any reasonable hourly rate.

Best Answer

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

Paying Fact Witnesses a Contingent Fee

Hypothetical 2

One of your company's retired executives initially wanted \$5,000 to "tell the truth" as a fact witness. When you balked at his request, he dropped his demand to \$2,500 -- and tells you that he won't insist on being paid unless you are successful in the trial.

May you pay a fact witness an amount contingent on the case's outcome?

NO

Analysis

Authorities universally prohibit paying fact witnesses any amount that is contingent on a case's outcome.

[T]he offer or payment of allowable expenses may not be contingent on the content of the witness's testimony or the outcome of the litigation or otherwise prohibited by law.

Restatement (Third) of the Law Governing Lawyers § 117 cmt. b (2000).¹

Not surprisingly, bars are quick to discipline lawyers who arrange such contingent payments to fact witnesses. See, e.g., Florida Bar v. Wohl, 842 So. 2d 811, 813 (Fla. 2003) (suspending for ninety days a lawyer who entered into an agreement involving testimony by a former employee of the Winston family diamond business, who was prepared to testify in the estate litigation involving Harry Winston's widow; noting that the agreement called for a "bonus" of up to \$1,000,000 depending on the "usefulness of the information provided"); Committee on Legal Ethics of the State Bar v. Sheatsley, 452 S.E.2d 75, 77 (W. Va. 1994) (issuing a public reprimand critical of a

¹ Virginia LEO 587 (6/14/84) (a lawyer may pay witnesses for the reasonable value of time they have expended, as long as the payment is not an inducement to testify and is not contingent on the outcome of the case; and the lawyer's client remains ultimately responsible for the bill).

lawyer who had agreed to pay his client's former employee \$3,250 to prevent the former employee "from changing his story," and an additional \$3,250 "upon a favorable completion of the case").

Best Answer

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

Government Prosecutors Paying Fact Witnesses

Hypothetical 3

After practicing as a commercial litigator for several years, you began to represent white collar criminal defendants. You are considering filing several motions challenging the government prosecutor's actions.

- (a) May you object to the government's payment to a fact witness of \$5,000 to "tell the truth"?

NO (PROBABLY)

- (b) May you object to the government's offer to reduce the criminal charges against an important witness if he testifies favorably against your client?

NO (PROBABLY)

Analysis

Given the harsh judicial language about the effect of paying fact witnesses in civil cases, one might expect courts to take the same approach when analyzing the government's payments to fact witnesses.

In fact, just the opposite is true. Courts almost seem offended that anyone would challenge the government's use of fact witnesses who have either received cash payments or the government's promise of a reduced sentence in return for testimony.

No practice is more ingrained in our criminal justice system than the practice of the government calling a witness who is an accessory to the crime for which the defendant is charged and having that witness testify under a plea bargain that promises him a reduced sentence. It is difficult to imagine a greater motivation to lie than the inducement of a reduced sentence, but courts uniformly hold that such a witness may testify as long as the government's bargain with him is fully ventilated so that the jury can evaluate his credibility. A witness such as Kelly who is paid a fee for his services has less of an inducement to lie than witnesses who testify with

promises of reduced sentences. It makes no sense to exclude the testimony of witnesses such as Kelly yet allow the testimony of informants such as those in Hoffa and Kimble who are testifying with the expectation of receiving reduced sentences. We therefore join our sister circuits, discussed above, who have faced this problem and conclude that the compensated witness and the witness promised a reduced sentence are indistinguishable in principle and should be dealt with in the same way. We therefore hold that an informant who is promised a contingent fee by the government is not disqualified from testifying in a federal criminal trial. As in the case of the witness who has been promised a reduced sentence, it is up to the jury to evaluate the credibility of the compensated witness.

United States v. Cervantes-Pacheco, 826 F.2d 310, 315 (5th Cir. 1987).

Famous criminal defendants who have unsuccessfully sought to challenge the government's offering of such inducements to fact witnesses include Jimmy Hoffa¹ and Jeffery Skilling.²

One article described the great variety of incentives the government can freely offer prosecution witnesses in return for favorable testimony.

An enormous range of benefits have traditionally been granted to informers. Some lucky Chicago gang members turned informers brought shame upon the local United States Attorney's Office when defense lawyers discovered that the informers received heroin, morphine, phone sex with a government paralegal, clothes, gifts, electronics, access to phones, and conjugal visits in government offices in exchange for their "cooperation" in bringing down the notorious El Rukn gang. . . . In San Diego, one violent criminal facing a twenty-five year sentence for robbery also

¹ Hoffa v. United States, 385 U.S. 293 (1966) (upholding the conviction on jury tampering of Jimmy Hoffa, despite the government's payment to a fact witness's wife of four monthly installments of \$300 each, along with dropping federal and state charges against the fact witness).

² United States v. Skilling, Crim. No. H-04-025, 2006 U.S. Dist. LEXIS 42664 (S.D. Tex. June 23, 2006) (rejecting defendants' efforts to have their defense witnesses immunized because the government had immunized prosecution witnesses).

received conjugal visits in the prosecutor's office, as well as numerous day trips outside jail facilities and a special cell in county jail with a color TV, a private shower and a telephone. He even had nude pictures of himself and his wife taken in the DA's office. . . . While these benefits must be disclosed to the defense and while some of the inducements extend far beyond the bounds of propriety, they do not constitute bribery under the current state of the law.

Barry Tarlow, Can Prosecutors Buy Testimony?, The National Association of Criminal Defense Lawyers Champion Magazine, RICO Report, May 2005, at 55.

Thus, courts take dramatically different approaches to a private litigant's payments to a fact witness and the government's payments to a fact witness. The few courts that even bother trying to explain the distinction sometimes feebly note that the payments are coming from the sovereign government itself rather than from the government's lawyer.

Best Answer

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

Preparing Fact Witnesses for Testimony

Hypothetical 4

You represent a wealthy individual in a child custody case. At your first meeting with the client, you begin to ask him background facts about how he treated his children. The client stops you and asks the following question: "Before I tell you how I treated my children, why don't you tell me the law governing child custody."

May you answer your client's question before examining him about the factual background?

YES (PROBABLY)

Analysis

Preparing fact witnesses to testify involves some flat ethics prohibitions, but a surprising amount of flexibility in seeking to avoid those prohibitions.

The ABA Model Rules and every state's ethics rules contain several general provisions that might govern a lawyer's witness preparation conduct.

First, some of these general provisions address what lawyers might do themselves.

Under ABA Model Rule 8.4

[i]t is professional misconduct for a lawyer to: . . . (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

ABA Model Rule 8.4(b); Virginia Rule 8.4(b); see Illinois Rule 8.4(a)(3).

By referring to "criminal" acts, this rule obviously incorporates various anti-perjury and witness tampering criminal statutes, the violation of which would surely "reflect adversely" on the lawyer's "honesty, trustworthiness or fitness" to practice law.

Under ABA Model Rule 8.4

[i]t is professional misconduct for a lawyer to: . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

ABA Model Rule 8.4(c) (emphasis added); Illinois Rule 8.4(a)(4). See Virginia Rule 8.4(c) (adding the phrase "which reflects adversely on the lawyer's fitness to practice law"). This rule is somewhat more vague than ABA Model Rule 8.4(b), because it does not incorporate the criminal statutes, but rather more generic requirements of honesty.

The ABA Model Rules also contain an often-criticized provision prohibiting a lawyer's conduct that is "prejudicial to the administration of justice." ABA Model Rule 8.4(d); Illinois Rule 8.4(a)(5).¹

Second, in addition to prohibiting lawyers from themselves engaging in wrongdoing, the ABA Model Rules prohibit lawyers from helping their clients engage in general misconduct.

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

ABA Model Rule 1.2(d) (emphases added); Illinois Rule 1.2(d); Virginia Rule 1.2(c).

Two comments deal with this general rule.

[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud.

¹ Some states' ethics rules do not contain this provision. See, e.g., Virginia Ethics Rules.

This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.

[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.

ABA Model Rule 1.2 cmts. [9], [10] (emphases added).²

Third, the ABA Model Ethics Rules also contain somewhat more focused provisions dealing with lawyers offering evidence.

Several of these provisions provide guidance to lawyers acting before they offer evidence.

The ABA Model Ethics Rules contain several provisions dealing with lawyers' involvement with evidence that the lawyer knows to be false.

Starting with the most general prohibition,

² Illinois did not adopt these Comments. Virginia adopted the Comments as Virginia Rule 1.2 cmts. [9], [10].

[a] lawyer shall not: . . . falsify evidence, or counsel or assist
a witness to testify falsely

ABA Model Rule 3.4(b); Illinois Rule 3.4(a)(2); Virginia Rule 3.4(c). This provision prohibits a lawyer's direct involvement in evidence falsification, as well as the lawyer's advice or assistance to any witness (presumably a client or a non-client) to testify falsely.

ABA Model Rule 3.3 indicates that

[a] lawyer shall not knowingly: . . . (3) offer evidence that the lawyer knows to be false

ABA Model Rule 3.3(a)(3) (emphases added); Illinois Rule 3.3(a)(4); Virginia Rule 3.3(a)(4). This prohibition applies to clients and non-clients.

Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes.

ABA Model Rule 3.3 cmt. [5].³

Unlike ABA Model Rule 3.4(c), this provision contains a knowledge requirement.

The Ethics Rules' Terminology section contains the following definition:

"Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

ABA Model Rules-Terminology; Illinois Rules-Terminology; Virginia Rules-Terminology.

Thus, the prohibition on lawyers offering evidence that the lawyer "knows" to be false requires actual knowledge -- although a disciplinary authority or court could show such actual knowledge without a lawyer's confession.

³ Illinois did not adopt this Comment. Virginia adopted a similar statement as Virginia Rule 3.3 cmt. [5].

The ABA Model Rules contain a very useful comment, which provides additional guidance on this issue.

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

ABA Model Rule 3.3 cmt. [8] (emphases added).⁴

States take varied approaches. For example, a Virginia comment has both a forward-looking and backward-looking (remedial) component.

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false, the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

Virginia Rule 3.3 cmt. [6] (emphases added).

The ABA Model Rules also contain guidance for lawyers who do not "know" that evidence is false, but suspect that it is false.

In essence, the ABA Model Rules provide a safe harbor for lawyers who refuse to offer such evidence.

A lawyer may refuse to offer evidence . . . that the lawyer reasonably believes is false.

⁴ Neither Illinois nor Virginia adopted this Comment.

ABA Model Rule 3.3(b) (emphasis added); Virginia Rule 3.3(b); see Illinois Rule 3.3(c).

This provision immunizes the lawyer from criticism under other ethics rules that require the lawyer to diligently represent the client. See ABA Model Rule 1.3.

The ABA Model Rules and every state's ethics rules contain very specific provisions describing a lawyer's responsibility if a client states an intent to commit fraud in a tribunal, or admits to past fraud on a tribunal. Because these deal more with issues of confidentiality (and how a lawyer's duty of confidentiality interacts with the lawyer's duty to the system), this analysis does not deal with that situation.

The Restatement contains essentially the same provisions as the ABA Model Rules and most states' ethics rules.

- (1) A lawyer may not:
 - (a) knowingly counsel or assist a witness to testify falsely or otherwise to offer false evidence;
 - (b) knowingly make a false statement of fact to the tribunal;
 - (c) offer testimony or other evidence as to an issue of fact known by the lawyer to be false.
- (2) If a lawyer has offered testimony or other evidence as to a material issue of fact and comes to know of its falsity, the lawyer must take reasonable remedial measures and may disclose confidential client information when necessary to take such a measure.
- (3) A lawyer may refuse to offer testimony or other evidence that the lawyer reasonably believes is false, even if the lawyer does not know it to be false.

Restatement (Third) of Law Governing Lawyers § 120 (2000).

The Restatement provides a much more detailed and useful discussion than the ethics rules of lawyers' knowledge (and ignorance) that triggers various requirements.

The Restatement first discusses the standard for a lawyer's "knowledge."

A lawyer's knowledge may be inferred from the circumstances. Actual knowledge does not include unknown information, even if a reasonable lawyer would have discovered it through inquiry. However, a lawyer may not ignore what is plainly apparent, for example, by refusing to read a document A lawyer should not conclude that testimony is or will be false unless there is a firm factual basis for doing so. Such a basis exists when facts known to the lawyer or the client's own statements indicate to the lawyer that the testimony or other evidence is false.

Restatement (Third) of Law Governing Lawyers § 120 cmt. c (2000) (emphasis added).

The Restatement also addresses lawyers' knowledge in its discussion of false testimony.

False testimony includes testimony that a lawyer knows to be false and testimony from a witness who the lawyer knows is only guessing or reciting what the witness has been instructed to say. This Section employs the terms "false testimony" and "false evidence" rather than "perjury" because the latter term defines a crime, which may require elements not relevant for application of the requirements of the Section in other contexts. For example, although a witness who testifies in good faith but contrary to fact lacks the mental state necessary for the crime of perjury, the rule of the Section nevertheless applies to a lawyer who knows that such testimony is false. When a lawyer is charged with the criminal offense of suborning perjury, the more limited definition appropriate to the criminal offense applies.

Restatement (Third) of Law Governing Lawyers § 120 cmt. d (2000) (emphasis added).

The Restatement also defines the type of wrongful evidence that a lawyer may not participate in offering.

A lawyer's responsibility for false evidence extends to testimony or other evidence in aid of the lawyer's client offered or similarly sponsored by the lawyer. The responsibility extends to any false testimony elicited by the lawyer, as well as such testimony elicited by another lawyer questioning the lawyer's own client, another witness favorable to the lawyer's client, or a witness whom the lawyer has substantially prepared to testify (see § 116(1)). A lawyer has no responsibility to correct false testimony or other evidence offered by an opposing party or witness. Thus, a plaintiff's lawyer, aware that an adverse witness being examined by the defendant's lawyer is giving false evidence favorable to the plaintiff, is not required to correct it (compare Comment e). However, the lawyer may not attempt to reinforce the false evidence, such as by arguing to the factfinder that the false evidence should be accepted as true or otherwise sponsoring or supporting the false evidence (see also Comment e).

Id. (emphasis added).

Interestingly, a lawyer may elicit false evidence for purposes other than assisting a client's case.

It is not a violation to elicit from an adversary witness evidence known by the lawyer to be false and apparently adverse to the lawyer's client. The lawyer may have sound tactical reasons for doing so, such as eliciting false testimony for the purpose of later demonstrating its falsity to discredit the witness. Requiring premature disclosure could, under some circumstances, aid the witness in explaining away false testimony or recasting it into a more plausible form.

Restatement (Third) of Law Governing Lawyers § 120 cmt. e (2000) (emphasis added).

Illustration 4 indicates that a lawyer who settles a case after eliciting false testimony from a witness (not in furtherance of the lawyer's client's case) does not violate Restatement § 120 by failing to disclose the witness's false statement. As

explained above, it would seem that Virginia Ethics Rules would require such disclosure -- which amount to a non-client's fraud on a tribunal. Virginia Rule 3.3(d).

The Restatement emphasizes the lawyer's duty to work with clients or witnesses who intend to or who have offered false evidence.

Before taking other steps, a lawyer ordinarily must confidentially remonstrate with the client or witness not to present false evidence or to correct false evidence already presented. Doing so protects against possibly harsher consequences. The form and content of such a remonstration is a matter of judgment. The lawyer must attempt to be persuasive while maintaining the client's trust in the lawyer's loyalty and diligence. If the client insists on offering false evidence, the lawyer must inform the client of the lawyer's duty not to offer false evidence and, if it is offered, to take appropriate remedial action (see Comment h).

Restatement (Third) of Law Governing Lawyers § 120 cmt. g (2000).⁵

In discussing reasonable remedial measures that the lawyer must take if such consultation has not been successful, the Restatement again offers much more detailed guidance than the ethics rules.

If the lawyer's client or the witness refuses to correct the false testimony (see Comment g), the lawyer must take steps reasonably calculated to remove the false impression that the evidence may have made on the finder of fact. (Subsection (2)). Alternatively, a lawyer could seek a recess and attempt to persuade the witness to correct the false evidence (see Comment g). If such steps are unsuccessful, the lawyer must take other steps, such as by moving or stipulating to have the evidence stricken or otherwise withdrawn, or recalling the witness if the witness had already

⁵ Interestingly, the Restatement does not require private lawyers to inform non-client witnesses of their Fifth Amendment rights. Restatement (Third) of the Law Governing Lawyers § 106 cmt. c (2000) ("A lawyer other than a prosecutor . . . is not required to inform any nonclient witness or prospective witness of the right to invoke privileges against answering, including the privilege against self-incrimination.")

left the stand when the lawyer comes to know of the falsity. Once the false evidence is before the finder of fact, it is not a reasonable remedial measure for the lawyer simply to withdraw from the representation, even if the presiding officer permits withdrawal (see Comment k hereto). If no other remedial measure corrects the falsity, the lawyer must inform the opposing party or tribunal of the falsity so that they may take corrective steps.

Restatement (Third) of Law Governing Lawyers § 120 cmt. h (2000) (emphases added).

The Restatement includes an explicit statement confirming that "[a] lawyer may interview a witness for the purpose of preparing the witness to testify." Restatement (Third) of Law Governing Lawyers § 116(1) (2000).

Not surprisingly, the Restatement prohibits "[a]ttempting to induce a witness to testify falsely as to material fact." Restatement (Third) of Law Governing Lawyers § 116 cmt. b (2000) (referring to Comment I of Section 120).

The Restatement also contains an interesting discussion of actions that lawyers generally may take in preparing witnesses to testify.

In preparing a witness to testify, a lawyer may invite the witness to provide truthful testimony favorable to the lawyer's client. Preparation consistent with the rule of this Section may include the following: discussing the role of the witness and effective courtroom demeanor; discussing the witness's recollection and probable testimony; revealing to the witness other testimony or evidence that will be presented and asking the witness to reconsider the witness's recollection or recounting of events in that light; discussing the applicability of law to the events in issue; reviewing the factual context into which the witness's observations or opinions will fit; reviewing documents or other physical evidence that may be introduced; and discussing probable lines of hostile cross-examination that the witness should be prepared to meet. Witness preparation may include rehearsal of testimony. A lawyer may suggest choice of words that might be employed to make the witness's meaning clear. However, a lawyer

may not assist the witness to testify falsely as to a material fact (see §120(1)(a)).

Id. § 116 cmt. b (emphases added).

Legal ethics opinions from other jurisdictions provide some guidance to lawyers preparing witnesses for testimony.

For instance, the D.C. Bar dealt with these issues in D.C. LEO 79. Interestingly, the D.C. Bar indicated that

[i]t is not, we think, a matter of undue difficulty for a reasonably competent and conscientious lawyer to discern the line of impermissibility, where truth shades into untruth, and to refrain from crossing it.

D.C. LEO 79 (12/18/79). The case law and other authorities belie this statement.

The D.C. Bar indicated, among other things, that lawyers may suggest specific wording of testimony to their clients, as long as the substance remains the client's truthful statement.

[T]he fact that the particular words in which testimony, whether written or oral, is cast originated with a lawyer rather than the witness whose testimony it is has no significance so long as the substance of that testimony is not, so far as the lawyer knows or ought to know, false or misleading. If the particular words suggested by the lawyer, even though not literally false, are calculated to convey a misleading impression, this would be equally impermissible from the ethical point of view.

Id. (emphasis added). The D.C. Bar also dealt with the propriety of a lawyer's suggestion that the client include information from other sources.

The second question raised by the inquiry -- as to the propriety of a lawyer's suggesting the inclusion in a witness's testimony of information not initially secured from the witness -- may, again, arise not only with respect to written

testimony but with oral testimony as well. In either case, it appears to us that the governing consideration for ethical purposes is whether the substance of the testimony is something the witness can truthfully and properly testify to. If he or she is willing and (as respects his or her state of knowledge) able honestly so to testify, the fact that the inclusion of a particular point of substance was initially suggested by the lawyer rather than the witness seems to us wholly without significance.

Id. (emphasis added). Finally, the D.C. Bar indicated that a lawyer failing to prepare a witness for testimony may not have been sufficiently diligent.

We turn, finally, to the extent of a lawyer's proper participation in preparing a witness for giving live testimony -- whether the testimony is only to be under cross-examination, as in the particular circumstances giving rise to the present inquiry, or, as is more usually the case, direct examination as well. Here again it appears to us that the only touchstones are the truth and genuineness of the testimony to be given. The mere fact of a lawyer's having prepared the witness for the presentation of testimony is simply irrelevant: indeed, a lawyer who did not prepare his or her witness for testimony, having had an opportunity to do so, would not be doing his or her professional job properly. This is so if the witness is also a client; but it is no less so if the witness is merely one who is offered by the lawyer on the client's behalf.

Id. (emphasis added). In reaching these conclusions, the D.C. Bar repeatedly emphasized the curative nature of cross examination. Id.

More recently, the Nassau County (New York) Bar Association held that the New York Ethics Code (which generally follows the old ABA Model Code rather than the new ABA Model Rules) permits a lawyer to make the following statement "[p]rior to discussing the case" with his client -- "as long as the attorney in good faith does not

believe that the attorney is participating in the creation of false evidence." Nassau County (New York) LEO 94-6 (2/16/94):

Before you tell me anything . . . I want to tell you what you have to show in order to have a case. Just because you got hurt it doesn't mean you have a case. I can't tell you what to say happened because I wasn't there. And I am bound by what you tell me happened and it must be the truth. Now, I know the intersection.

Main Street [place where the accident took place] is governed by a Stop Sign. If you went through the Stop Sign without stopping -- you will most likely have no case. If you stopped momentarily and then proceeded through the intersection you might have a case. If you stopped at the intersection and before proceeding to enter the intersection looked carefully and saw no cars that you believed would impede your proceeding then you have a much better case.

Id. (emphasis added). Accord Nassau County (New York) LEO 91-23 (9/25/91), [1991-1995 Ethics Ops.] ABA/BNA Law. Manual on Prof. Conduct 1001:6253 (holding that a lawyer "may inform a prospective client of relevant law regarding issues of a case before listening to the client's statement").

There are surprisingly few articles dealing with the ethical limits of witness preparation.

Perhaps the most often-cited article is Joseph D. Piorkowski, Jr., Professional Conduct and the Preparation of Witnesses for Trial: Defining the Acceptable Limitations of "Coaching", 1 Geo. J. Legal Ethics 389 (1987-1988). This article cites an earlier treatise which described what the article calls the "primary objectives" of witness preparation.

One treatise on witness preparation specifies thirteen primary objectives for this procedure: "help the witness tell

the truth; make sure the witness includes all the relevant facts; eliminate the irrelevant facts; organize the facts in a credible and understandable sequence; permit the attorney to compare the witness' story with the client's story; introduce the witness to the legal process; instill the witness with self-confidence; establish a good working relationship with the witness; refresh, but not direct, the witness' memory; eliminate opinion and conjecture from the testimony; focus the witness' attention on the important areas of testimony; make [sure] the witness understands the importance of his or her testimony; teach the witness to fight anxiety, and particularly to defend him or herself during cross-examination." Although some of these goals are directed at enhancing attorney effectiveness, the overwhelming focus of the procedure is to ensure that the witness testifies truthfully, accurately, concisely, and convincingly.

Id. at 390-91 (footnotes omitted). Elsewhere, the article provides a list of safe instructions that lawyers may give their clients about to testify.

Aron and Rosner [authors of an earlier treatise] recommend that the attorney advise the witness to answer truthfully, to maintain neutrality, to only answer the question asked, to give only the best present recollection, to refrain from volunteering information, to testify only from personal knowledge, to use everyday language, to testify spontaneously, to avoid memorization, to pause before answering, to admit to lack of knowledge where appropriate, and to clarify any unclear questions.

Id. at 391 n.9.

The Georgetown article discusses a number of areas it describes as "gray." For instance, the article discusses testifying witness's use of specific words. The article suggests such "safe" recommendations as avoiding phrases such as "to tell the truth," or "I think I saw." Id. at 399. The article also indicates that lawyers may safely advise their testifying clients to "avoid technical jargon or colloquial expressions," or the use of

"sophisticated, 'formal' speech." Id. at 400. Lawyers may also tell their witnesses to avoid pejorative or offensive phrases to refer to certain people.

However, the article warns that lawyers may not change the substance of a witness's statement.

The attorney's recommendation that the witness modify his intended meaning is clearly prohibited conduct. The most difficult issue, therefore, involves whether an attorney can encourage the substitution of words that do not change the witness' intended meaning, but that modify the potential emotional impact associated with the witness' original choice of words.

Id. (emphasis in original). Because of this risk, "[a]ttorneys should exercise the utmost caution . . . in recommending changes in word choice to a witness." Id. at 402.

The article also discusses a lawyer's suggestions about a testifying client's demeanor. Most lawyers would find such suggestions acceptable, but the article warns that there are limits.

It is at least arguable that when an attorney encourages a witness to appear confident, and during testimony the witness displays a sense of confidence while making an assertion about which he is not in fact confident, the attorney has encouraged the witness to testify "falsely" or to engage in "misrepresentation." For example, suppose a witness in a criminal case is fifty-one percent certain that the defendant was the perpetrator of a given crime. If the prosecutor's statement to the witness to "appear confident" results in the jury perceiving a ninety percent certainty, then the outcome of the litigation may well be altered.

Id. at 404-05 (emphases added). The article generally finds acceptable a lawyer's suggestions about what the client should wear, or what mannerisms the client should use while testifying.

This class of conduct is best illustrated by the use of polite mannerisms and speech or by wearing a suit to court. This behavior is usually intended to convey the message that the witness is a fine, upstanding citizen who would never dream of lying in a court of law. Due to the very general nature of the message, it would be difficult to construe components of demeanor in this category as capable of being falsified or misrepresented.

Id. at 406.

The article also warns of the possible risk in another type of lawyer suggestion about a testifying witness's demeanor.

The last category -- conduct intended to communicate a specific message -- is capable of being false, misrepresentative, or deceitful. Components of demeanor in this class include vocal inflections, emphasis on certain words or phrases, and gestures. Moreover, behavior such as the appearance of surprise or display of emotion may fall within this class to the extent that such conduct is premeditated or feigned. Some aspects of demeanor within this category, such as gestures, clearly cannot be falsified. However, other forms of demeanor intended to convey a specific message may provide a basis for disciplinary liability if a witness were coached to use this demeanor to mislead a jury.

Id. at 406-07 (emphases added).

There is surprisingly little case law providing guidance to lawyers preparing witnesses for testimony.

The United States Supreme Court has provided the absolutely true but remarkably unhelpful directive that

[a]n attorney must respect the important ethical distinction between discussing testimony and seeking improperly to influence it.

Geders v. United States, 425 U.S. 80, 90 n.3 (1976).

As would be expected, courts have dealt severely with lawyers who persuade witnesses to testify falsely. See, e.g., In re Attorney Discipline Matter, 98 F.3d 1082 (8th Cir. 1996) (disbarring a lawyer from practicing in federal court after he was disbarred from Missouri state courts for having arranged for a witness's false testimony); In re Oberhellmann, 873 S.W.2d 851 (Mo. 1994) (disbarring a lawyer who arranged for a client's false testimony).

Maryland's highest court provided useful guidance.

Attorneys have not only the right but also the duty to fully investigate the case and to interview persons who may be witnesses. A prudent attorney will, whenever possible, meet with the witnesses he or she intends to call. The process of preparing a witness for trial, sometimes referred to as "horse shedding the witness," takes many forms, and involves matters ranging from recommended attire to a review of the facts known by the witness. Because the line that exists between perfectly acceptable witness preparation on the one hand, and impermissible influencing of the witness on the other hand, may sometimes be fine and difficult to discern, attorneys are well advised to heed the sage advice of the Supreme Court of Rhode Island: "[I]n the interviews with and examination of witnesses, out of court, and before the trial of the case, the examiner, whoever he may be, layman or lawyer, must exercise the utmost care and caution to extract and not to inject information, and by all means to resist the temptation to influence or bias the testimony of the witnesses."

It is permissible, in a pretrial meeting with a witness, to review statements, depositions, or prior testimony that a witness has given. It also may be necessary to test or refresh the recollection of the witness by reference to other facts of which the attorney has become aware during pretrial preparation, but in so doing the attorney should exercise great care to avoid suggesting to the witness what his or her testimony should be. In some instances, as in the case of an expert witness who will be asked to express an opinion based upon facts related by others, and who is not a factual

witness whose testimony could be influenced by reading what others have said under oath, there is little danger in having the witness review the depositions of others. When, however, the testimony in the deposition bears directly on the facts that the reviewing witness will be asked to recount, and particularly when, as here, the testimony is known by the witness to be exactly that which will be used at trial, and is presented in its most graphic form by videotape, the potential for influencing the reviewing witness is great.

State v. Earp, 571 A.2d 1227, 1234-35 (Md. 1990) (footnote omitted).

One recent well-publicized matter provides an interesting insight into how far lawyers may go when preparing witnesses.

In August, 1997, a lawyer from the asbestos plaintiff's firm of Baron & Budd turned over a witness preparation memorandum that the firm used when preparing its asbestos clients to testify. According to an ABA/BNA article about witness preparation, the Baron & Budd memorandum contained the following statements.

How well you know the name of each product and how you were exposed to it will determine whether that defendant will want to offer you a settlement.

...

Remember to say you saw the NAMES on the BAGS.

...

The more often you were around it, the better for your case. You MUST prove that you breathed the dust while insulating cement was being used.

Remember, the names you recall are NOT the only names there were. There were other names, too. These are JUST the names that YOU remember seeing on your jobsites.

...

It is important to emphasize that you had NO IDEA ASBESTOS WAS DANGEROUS when you were working around it.

...

It is important to maintain that you NEVER saw any labels on asbestos products that said WARNING or DANGER.

...

You will be asked if you ever used respiratory equipment to protect you from asbestos. Listen carefully to the question! If you did wear a mask for welding or other fumes, that does NOT mean you wore it for protection from asbestos! The answer is still "NO"!

...

Do NOT mention product names that were not listed on your Work History Sheets.

...

Do NOT say you saw more of one brand than another, or that one brand was more commonly used than another Be CONFIDENT that you saw just as much of one brand as all the others.

...

Unless your Baron & Budd attorney tells you otherwise, testify ONLY about INSTALLATION of NEW asbestos material, NOT tear-out of the OLD stuff.

...

You may be asked how you are able to recall so many product names. The best answer is to say that you recall seeing the names on the containers or on the product itself. The more you thought about it, the more you remembered!

...

If there is a MISTAKE on your Work History Sheets, explain that the "girl from Baron & Budd" must have misunderstood what you told her when she wrote it down.

Joan C. Rogers, Special Report, Trial Conduct-Witness Preparation Memos Raise Questions About Ethical Limits, 14 ABA/BNA Law. Manual on Prof. Conduct, No. 2, at 48, 49 (Feb. 18, 1998).

As of the date of that special report (February, 1998), the Texas Bar had already dismissed allegations of wrongdoing by Baron & Budd, and no court had yet found anything improper in the memorandum (the ABA/BNA article mentions that Baron & Budd took the position that it also provided its witnesses another memorandum advising the witnesses to tell the truth when they testify, ameliorating the impact of the absence of such a specific instruction in the witness memorandum itself).

According to the ABA/BNA article, several national ethics experts disagree about the ethical propriety of the memorandum.

Interestingly, then-Professor William Hodes of Indiana University School of Law - Indianapolis (then and now a noted ethics expert) acted as a consultant for Baron & Budd. According to Hodes, the memorandum "did not violate legal ethics rules." Id. at 51. As paraphrased in the ABA/BNA article, Hodes explained that "[u]nless there is inconsistency with independently established facts, or a radical departure from a client's unequivocal prior statements, a lawyer is obligated to give the client the benefit of the doubt." Id.

Later case law does not indicate any sanctions imposed on Baron & Budd, which means that the law firm apparently avoided all ethical or court-driven punishment or criticism.

More recently, Mitsubishi Motor Manufacturing criticized a letter distributed by the EEOC to Mitsubishi employees. The EEOC letter contained what it called "a short list of 'memory joggers' that we suggest that you begin thinking about." Id. at 52 (Excerpts from EEOC Letters). The ABA/BNA article recites these "memory joggers," which include particular phrases, comments, actions that the plaintiffs might have experienced at Mitsubishi. Although well-known Professor Ronald Rotunda (then at the University of Illinois) provided an affidavit in support of Mitsubishi's motion for sanctions, a federal judge denied the motion. Id. at 51.

Best Answer

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

Talking with Witnesses during Deposition Breaks

Hypothetical 5

You are preparing your executive vice president to be deposed. She asks whether you will be able to discuss her testimony during deposition breaks.

May you discuss a witness's testimony during a deposition break?

MAYBE

Analysis

A number of courts have severely restricted lawyers' ability to communicate with their witnesses during deposition breaks.

Most notably, in Hall v. Clifton Precision, 150 F.R.D. 525 (E.D. Pa. 1993), the court directly analogized depositions to trials (during which courts specifically prohibit lawyers from speaking with witnesses).

Once the deposition has begun, the preparation period is over and the deposing lawyer is entitled to pursue the chosen line of inquiry without interjection by the witness's counsel. Private conferences are barred during the deposition, and the fortuitous occurrence of a coffee break, lunch break, or evening recess is no reason to change the rules. Otherwise, the same problems would persist. A clever lawyer or witness who finds that a deposition is going in an undesired or unanticipated direction could simply insist on a short recess to discuss the unanticipated yet desired answers, thereby circumventing the prohibition on private conferences. Therefore, I hold that conferences between witness and lawyer are prohibited both during the deposition and during recesses.

Id. at 529. To assure that any such conferences were not misused, the court specifically held that "these conferences are not covered by the attorney-client privilege,

at least as to what is said by the lawyer to the witness" -- and that therefore "any such conferences are fair game for inquiry by the deposing attorney to ascertain whether there has been any coaching and, if so, what." Id. at 529 n.7.

Not all courts have gone as far as the Hall court. In re Stratosphere Corp. Sec. Litig., 182 F.R.D. 614, 622 (D. Nev. 1998) ("[T]his Court disagrees with the contention that any conference counsel may have with the deponent during a deposition waives the claim of privilege as to the communications between client and counsel during any conference or other break in the deposition. Accordingly, the Court will not give the interrogating counsel carte blanche to invade the privileged communications between counsel and his client." (citation omitted); establishing "deposition protocol" including provisions apparently appropriate in Nevada such as "[n]o firearms shall be permitted at depositions").

A number of federal district courts have essentially incorporated the Hall standard into their local rules. For instance, the District of South Carolina Local Civil Rules contain the following provisions.

Counsel and witnesses shall not engage in private, "off the record" conferences during depositions or during breaks or recesses regarding the substance of the testimony at the deposition, except for the purpose of deciding whether to assert a privilege or to make an objection or to move for a protective order.

D.S.C. Loc. Civ. R. 30.04(E).

Maryland takes essentially the same position.

While the interrogation of the deponent is in progress, neither an attorney nor the deponent should initiate a private conversation except for the purpose of determining whether

a privilege should be asserted. To do so otherwise is presumptively improper.

During breaks in the taking of a deposition, no one should discuss with the deponent the substance of the prior testimony given by the deponent during the deposition. Counsel for the deponent may discuss with the deponent at such time whether a privilege should be asserted or otherwise engage in discussion not regarding the substance of the witness's prior testimony.

D. Md. Loc. R., Guideline 5(f), (g).

Various state rules follow the same approach.

Once the deponent has been sworn, there shall be no communication between the deponent and counsel during the course of the deposition while testimony is being taken except with regard to the assertion of a claim of privilege, a right to confidentiality or a limitation pursuant to a previously entered court order.

N.J. Ct. R. 4:14-3(f).

(1) From the commencement until the conclusion of a deposition, including any recesses or continuances thereof of less than five calendar days, the attorney(s) for the deponent shall not: (A) consult or confer with the deponent regarding the substance of the testimony already given or anticipated to be given, except for the purpose of conferring on whether to assert a privilege against testifying or on how to comply with a court order, or (B) suggest to the deponent the manner in which any questions should be answered. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the Court, or to present a motion under paragraph (d) (3).

Del. Ch. Ct. R. 30(d)(1); Del. Super. Ct. R. Civ. P. 30(d)(1).

Interestingly, in criminal litigation such restrictions might actually implicate constitutional principles. For instance, in United States v. Sandoval-Mendoza, 472 F.3d

645 (9th Cir. 2006), the Ninth Circuit addressed a court's prohibition on overnight discussions between a criminal defendant and his lawyer (at least about a client's testimony). On appeal, the defendant argued that the prohibition violated his constitutional rights. The defendant pointed to two United States Supreme Court cases dealing with this issue.

Sandoval-Mendoza argues that the district court's order prohibiting him from discussing his testimony with his lawyer during the recesses amounted to a structural error under Geders v. United States [Geders v. United States, 425 U.S. 80, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976)] and Perry v. Leeke [Perry v. Leeke, 488 U.S. 272, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989)]. See also United States v. Santos, 201 F.3d 953 (7th Cir.2000); Mudd v. United States, 798 F.2d 1509 (D.C.Cir. 1986)]. Perry and Geders reach opposite conclusions based on different facts. In Geders, the trial court prohibited all communication between the defendant and his lawyer during an overnight recess between direct and cross examination. The Supreme Court held that this prohibition required reversal because it deprived the defendant of his Sixth Amendment right to counsel. [Geders v. United States, 425 U.S. 80, 91-92, 96 S.Ct. 1330, 47 L.Ed.2d 592 (1976)]. In Perry, the trial court prohibited all communication between the defendant and his lawyer during a fifteen minute recess between direct and cross examination. The Supreme Court held that this prohibition did not violate the Sixth Amendment. [Perry v. Leeke, 488 U.S. 272, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989)]. Perry distinguished Geders, on the ground that "the normal consultation between attorney and client that occurs during an overnight recess would encompass matters that go beyond the content of the defendant's own testimony-matters that the defendant does have a constitutional right to discuss with his lawyer, such as the availability of other witnesses, trial tactics, or even the possibility of negotiating a plea bargain. [Perry v. Leeke, 488 U.S. 272, 284, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989).]

Id. at 650 & nn.14, 15, 16, 17, 18.

Not surprisingly, the court found that "the facts of this case fall in the middle." Id.

The district court instructed Sandoval-Mendoza's lawyer, "You can communicate. Just not concerning cross, his testimony, now that he's on cross-examination, unless that's concluded. That doesn't mean you can't talk with your client at all, just not concerning his testimony."

Id.

The Ninth Circuit cited two other circuits (including the District of Columbia Circuit) that prohibit such restrictions. The Ninth Circuit acknowledged that "this is a difficult question. Cross examination best exposes the truth when a witness must answer questions unaided. Coaching may vitiate its value. But it is hard to see how a defendant and his lawyer can communicate without implicit coaching." Id. at 651. The Ninth Circuit ultimately concluded that the district court's restriction violated the criminal defendant's Sixth Amendment rights.

[W]e conclude that trial courts may prohibit all communication between a defendant and his lawyer during a brief recess before or during cross-examination, but may not restrict communications during an overnight recess.

Id. The court did not have to decide whether the district court's prohibition independently required a new trial, because it found that another error justified a new trial.

Best Answer

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

Representing Deposition Witnesses

Hypothetical 6

Your adversary has scheduled the depositions of your client's four most senior executives. Your client's in-house lawyer suggests that you represent the executives at their depositions.

Should you represent your client's executives at their depositions?

NO (PROBABLY)

Analysis

Although many lawyers reflexively choose to represent their corporate clients' employees in depositions, they should not do so without assessing the benefits and the risks.

A corporation's lawyer presumably wants to represent an executive during his deposition so that the lawyer can (1) engage in privileged communications to prepare for the deposition, and during breaks in the deposition (where permitted); and (2) instruct the witness not to answer questions that would intrude into the corporation's attorney-client privilege.

However, in the vast majority of courts, a corporation's lawyer can take advantage of these benefits without representing the deposition witness. Peralta v. Cendant Corp., 190 F.R.D. 38, 39 (D. Conn. 1999); United States ex rel. Hunt v. Merck-Medco Managed Care, LLC, 340 F. Supp. 2d 554, 556 (E.D. Pa. 2004); Surles v. Air France, No. 00 Civ. 5004 (RMB)(FM), 2001 WL 815522, at *5-6 (S.D.N.Y. July 19, 2001). Under the standard formulation of Upjohn, the corporation's lawyer may engage

in privileged communications with any corporate employee, as long as the lawyer is obtaining facts that she needs to give legal advice to the company. The privilege normally applies even to communications with former corporate employees.¹ And because the privilege belongs to the corporation and not to the individual employee, the corporation's lawyer presumably can instruct the employee not to destroy the privilege that she does not own. Thus, there seems to be no added benefit to a company's lawyer also representing the deposition or trial witness.

In contrast, there are some possible risks in doing so. Establishing a full attorney-client relationship with a corporate employee creates a joint representation on the same matter -- the deposition (or even the litigation). Absent some agreement to the contrary, a lawyer jointly representing multiple clients in the same matter (1) cannot keep secrets from either client (meaning that the lawyer would have to share with the employee everything the lawyer has learned from the company about the litigation or the deposition), and (2) must be totally loyal to both clients (meaning that the development of adversity between them probably would trigger the lawyer's withdrawal from representing both of them). Restatement (Third) of Law Governing Lawyers § 75

¹ Export-Import Bank of the U.S. v. Asia Pulp & Paper Co., 232 F.R.D. 103, 112 (S.D.N.Y. 2005) (holding that the attorney client privilege and the work product doctrine protect the deposition preparation discussions between a company's lawyer and a former company employee; "Virtually all courts hold that communications between company counsel and former company employees are privileged if they concern information obtained during the course of employment. . . . It is true, as APP contends, that the privilege guarding such discussions will not protect pre-deposition conversations that are held to refresh a deponent's memory. . . . However, this is a very narrow exception. Pre-deposition conversations may also be work product; to the extent Ex-Im's attorneys communicated their legal opinions and theories of the case, their conversations are immune from discovery. . . . APP has had its opportunity to obtain from Ms. Mostofi the non privileged information to which it is entitled. The benefit that might be obtained from asking Ms. Mostofi about communications with Ex-Im lawyers that neither concerned information she learned while she was an Ex-Im employee nor was work product is outweighed by the burden a new deposition would impose on Ex-Im.").

cmt. d (2000); Sec. Investor Prot. Corp. v. Stratton Oakmont, Inc., 213 B.R. 433, 439 (Bankr. S.D.N.Y. 1997); ABA Model Rule 1.7 cmts. [29] - [32].

Somewhat surprisingly, two recent high-profile cases involved a corporation's lawyer also representing a corporate executive in depositions -- which the courts held did not prevent the lawyers from later representing the corporation adverse to those executives.²

Thus, this common practice apparently has not caused any lawyer to be "burned" severely enough to generate a decision, but lawyers should be wary nevertheless.

Best Answer

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

² United States v. Stein, 463 F. Supp. 2d 459, 466 (S.D.N.Y. 2006) (in an opinion by District Judge Lewis Kaplan, assessing an effort by a KPMG partner to prevent KPMG from waiving the attorney-client privilege otherwise covering communications between KPMG's lawyers and a partner; finding that the partner could not prevent KPMG from waiving the privilege because the partner was not a joint client of KPMG's lawyers; rejecting the partner's argument that KPMG's lawyer had previously represented a partner on two occasions; "To begin with, the occasions on which Warley and KPMG were jointly represented occurred in circumstances in which Warley was a witness, not a party, to the litigation. The Court is not persuaded that representation of an employee by employer-retained counsel where the employee's role is that of a witness in a lawsuit against the employer could give rise to a reasonable expectation on the part of the employee that all communications she might have with employer-retained counsel, even a long time thereafter, were made in the context of an individual attorney-client relationship."); Under Seal v. United States (In re Grand Jury Subpoena Under Seal), 415 F.3d 333, 336-37 (4th Cir. 2005) (addressing a corporate employee's claim that he subjectively believed that the company's in-house and outside lawyers jointly represented him and the company; ultimately rejecting his claim; noting but not working into the analysis the fact that company's in-house and outside lawyers represented the executive during an interview before the SEC; explaining that both lawyers "stated that they represented [the executive] 'for purposes of [the] deposition.'").

Discovery of Testifying Experts

Hypothetical 7

You mostly practice in state court, but recently filed a lawsuit in federal court. You've been working with a testifying expert for the past six weeks. During a recent telephone call with your adversary's lawyer, you are surprised when she indicated that you will have to produce all of the documents you shared with your testifying expert -- even if they were privileged or work product, and even if the expert did not rely on them.

Must you produce all documents you shared with a testifying expert, even if they are privileged or work product, and even if the expert did not rely on them?

YES (PROBABLY)

Analysis

Federal and state courts have wrestled with the interplay between the discovery rules, the attorney-client privilege and work product protection, and the rules governing testifying experts.

Courts generally agree that materials created by testifying experts do not deserve privilege or work product protection.¹ Testifying experts generally must keep drafts of what they create.²

The more serious issue arises when courts analyze the waiver effect of lawyers sharing privileged or work product materials with their testifying experts.

¹ MCI Commc'ns Corp. v. Dataline, Inc., No. 01 Civ. 3849 (LAP)(DEF), 2001 U.S. Dist. LEXIS 18144 (S.D.N.Y. Oct. 29, 2001) (finding that the work product doctrine did not protect documents written by a testifying expert and sent to a lawyer who hired the expert).

² Trigon Ins. Co. v. United States, 204 F.R.D. 277, 283 & n.8 (E.D. Va. 2001) (citing the 1993 amendments to Federal Rule 26 in concluding that materials shared with the testifying expert must be produced; holding that because "drafts [of the expert's reports] may be used for cross-examination and other purposes, and are not protected by another doctrine of privilege, drafts should be disclosed where, as here, they are not solely the product of the experts['] own thoughts and work"; concluding that there was no reason to decide whether experts must retain drafts that they themselves create, but noting that "[t]here are cogent reasons which militate against such a requirement").

Courts everywhere agree that disclosing privileged communications to a testifying expert destroys that fragile protection.³

Most courts also find that sharing fact work product with a testifying expert generally waives that protection.⁴ This is because the fact work product protection provides only a minimal immunity from discovery, and the adversary can almost always prove that it has "substantial need" for the material shared with the testifying expert, who might have relied on them in formulating her opinion.

The real debate comes with the analysis of opinion work product that lawyers share with their testifying experts. Federal courts were split on this issue before a 1993 rules change. Some courts held that the disclosure rules for testifying experts trumped the heightened opinion work product protection that appears in Fed. R. Civ. P. 26.⁵ Other courts disagreed, and held that the testifying expert rule governed testifying experts, and therefore outweighed any protection for opinion work product.⁶

³ Construction Indus. Servs. Corp. v. Hanover Ins. Co., 206 F.R.D. 43 (E.D.N.Y. 2002) (acknowledging that most cases discuss the work product protection for documents shared with a testifying expert, but holding that the shared documents are not entitled to any attorney-client privilege protection either).

⁴ Keough v. Texaco, Inc., No. 97 Civ. 5981(LMM)(MHD), 2002 U.S. Dist. LEXIS 4385 (S.D.N.Y. Mar. 14, 2002) (finding that neither the attorney-client privilege nor the work product doctrine applies to a plaintiff's diary submitted in unredacted form to a testifying psychiatric expert).

⁵ In re Air Crash Disaster at Stapleton Int'l Airport, 720 F. Supp. 1442, 1444 (D. Colo. 1988) ("the privilege normally afforded work product gives way to the realities of expert preparation in regard to materials presented to an expert for consideration in forming an opinion to which he will testify at trial").

⁶ County of Suffolk v. Long Island Lighting Co., 122 F.R.D. 120, 122 (E.D.N.Y. 1988) ("[T]he work-product privilege has been held not to apply to opinions and documents generated or consulted by an expert retained to testify at trial."; ordering production of a testifying expert's opinions, except for any "documents which reflected counsel's opinions").

The 1993 Federal Rules change swung the balance far in favor of disclosure.⁷

The vast majority of federal courts now hold that a lawyer sharing opinion work product with the testifying expert waives that protection.⁸ Only a handful of federal courts continue to hold otherwise.⁹

In federal courts taking the majority view, the only remaining grounds for a testifying expert to withhold opinion work product is that she did not review it.¹⁰ This can be very difficult for a testifying expert to establish.¹¹

⁷ Synthes Spine Co. v. Walden, 232 F.R.D. 460, 462-63 (E.D. Pa. 2005) (explaining that the 1993 changes in the Federal Rules "broadened the scope of discoverable information and the methodology for obtaining this information. Rule 26(b)(4) was expanded to permit the taking of depositions of testifying experts. . . . Furthermore, Rule 26(a)(2)(B) was added to require testifying experts to submit an expert report, which, in turn, must disclose, *inter alia*, 'the data or other information considered by the witness in forming the opinions.' . . . [I]t is clear from such commentary that the term 'considered' in Rule 26(a)(2)(B) exceeds the more narrow definition of 'relied upon,' referring instead to any information furnished to a testifying expert that such an expert generates, reviews, reflects upon, reads, and/or uses in connection with the formulation of his opinions, even if such information is ultimately rejected." (emphasis in original); adopting the majority view that all material considered by a testifying expert must be produced).

⁸ In re Pioneer Hi-Bred Int'l, Inc., 238 F.3d 1370 (Fed. Cir. 2001) (holding that sharing privileged communications with a testifying expert waived the privilege).

⁹ St. Marys Area Water Auth. v. St. Paul Fire & Marine Ins. Co., Civ. No. 1:CV-04-1593, 2006 U.S. Dist. LEXIS 39639, at *5-6, *7 (M.D. Pa. June 15, 2006) (acknowledging that "[t]he majority of courts that have addressed the argument that Rule 26(a)(2)(B) requires discovery of attorney work-product disclosed to experts have found in favor of discovery in such instances"; holding that the Third Circuit had taken a different approach in Bogosian v. Gulf Oil Corp., 738 F.2d 587 (3d Cir. 1984) and In re Cendant Corp. Sec. Litig., 343 F.3d 658 (3d Cir. 2003); "Given that In re: Cendant Corp. was decided ten years after Rule 26 was amended, we cannot find that the Third Circuit's holding in Bogosian is inapplicable to the instant case. As such, we must find that core attorney work-product cannot be discovered under Rule 26 even if it is disclosed to an expert.").

¹⁰ Sicurelli v. Jeneric/Pentron Inc., No. 03-CV-4934 (SLT) (KAM), 2006 U.S. Dist. LEXIS 29813, at *13 (E.D.N.Y. May 16, 2006) (in a patent infringement case, explaining that "[t]he party resisting disclosure bears the burden of showing that an expert did not consider certain documents in forming his opinion"; finding that the party cannot meet its burden by relying on the expert's statements alone).

¹¹ Aniero Concrete Co. v. New York City Sch. Constr. Auth., No. 94 Civ. 9111(CSH)(FM), 2002 U.S. Dist. LEXIS 2892, at *10, *11 (S.D.N.Y. Feb. 21, 2002) ("Most courts interpreting the Rule 26(a)(2)(B) requirement that documents be 'considered' by a testifying expert before they must be disclosed have concluded that the term extends not just to the documents relied on by an expert, but also to any documents 'that were provided to and reviewed by the expert.'" (citation omitted); explaining that the party could support a work product claim by showing that his expert had not "considered" the document; concluding that "I need not resolve whether an expert's failure to review the documents furnished by counsel would exempt them from disclosure because Aetna has not shown that this, in fact, [sic] what occurred. At best, Mr. Cashin [testifying expert] indicated that he does not 'recall' reviewing the Contested Documents. This is a far cry from showing that he never reviewed them. Moreover, during his testimony Mr. Cashin conceded that it is his firm's regular practice to review

Thus, federal court practitioners are wise to assume that every communication they have with their testifying expert is "fair game" for discovery. Conceivably, the adversary can even depose the lawyer about communications that he has with a testifying expert.

In state courts, the debate continues to rage. Many courts did not alter their work product rules in 1993 to match the Federal Rules change. In these courts, it can sometimes be unclear whether disclosure of opinion work product to a testifying expert waives that protection. For instance, Virginia did not change its state court rules to match the Federal Rules' 1993 change. One Virginia circuit court has applied the old pre-1993 approach¹² while another Virginia circuit court has applied the newer approach.¹³

Best Answer

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

documents similar to the Contested Documents to determine if they are relevant. He also admitted that there is no reason to believe that this policy was not followed here.").

¹² Moyers v. Steinmetz, 37 Va. Cir. 25 (Winchester 1995) (ordering production of a lawyer's letter to an expert witness after redaction of the lawyer's mental impressions, opinions and legal theories; noting that no Virginia appellate court had ruled on the issue of whether making a privileged document available to an expert witness waives the privilege).

¹³ Wilson v. Rogers, 53 Va. Cir. 280, 282 (Portsmouth 2000) (relying upon Lamonds v. General Motors Corp., 180 F.R.D. 302 (W.D. Va. 1998), as representing "the more modern application of discovery practice," and holding that "to the extent that the materials sought relate to the preparation of expert testimony for trial they should be produced"; nevertheless holding that a letter from a testifying expert to counsel for the defendant were protected from disclosure because the letter and its attachments "suggest possible theories of defense as opposed to the opinion rendered by the expert. . . . By disclosing material to an expert to assist him in preparing expert opinion for trial, counsel opens the discovery door. On the other hand, asking an expert to assist counsel in preparation for cross-examination of another expert moves into the area of legal theories which are protected by the rule."; ordering production of correspondence between the defendant's counsel and testifying expert that the testifying expert "would use . . . in preparation of his opinion").

Paying Testifying Experts

Hypothetical 8

You have had some trouble finding a testifying expert to support your theory in a case coming to trial soon. You recently hired an agency which advertised its ability to find experts in nearly any topic. You eventually find a mediocre expert, and you worry that he will not do a very good job.

- (a) May you enter into an arrangement in which the testifying expert's fee is contingent on the outcome of the case?

NO

- (b) May you enter into an arrangement in which the agency's fee is contingent on the outcome of the case?

MAYBE

Analysis

- (a) The authorities agree that a party cannot pay an expert's fee that is contingent on the case's outcome.

A fee paid an expert witness may not be contingent on the content of the witness's testimony or the result in the litigation.

Restatement (Third) of the Law Governing Lawyers § 117 cmt. c (2000); Alabama LEO RO-97-02 (10/29/97) ("An attorney may pay an expert witness a reasonable and customary fee for preparing and providing expert testimony, but the expert's fee may not be contingent on the outcome of the proceeding."; "The situation may arise when an expert witness would also be in a position to provide factual testimony in addition to his paid expert testimony. Under these circumstances, the attorney would not be ethically precluded from paying the witness, in his role as expert, his usual and customary fee.

However, caution should be exercised that the attorney does not pay the expert more than his usual and customary fee or pay him for more time than he actually expended in preparing and providing his expert testimony, since any excess or unusual fee could be construed as payment for his testimony as a fact witness.").

Although the expert must be paid regardless of the case's outcome, the client's payment can in some states be contingent on the case's outcome. All states' ethics rules allow the lawyer to advance the client's litigation expenses, including expert fees. ABA Model Rule 1.8(e). Some states permit an arrangement under which the client need not pay the lawyer back for these advanced expenses unless the client wins the case. Illinois Rule 1.8(d).¹ Other states require that the client be ultimately responsible for paying back the lawyer.

Some states follow a more subtle approach. For instance, in Virginia a lawyer may advance such litigation expenses as an expert's fee on behalf of an indigent client with no expectation of reimbursement. Virginia Rule 1.8(e).² For all other clients, a Virginia lawyer may advance litigation expenses such as an expert's fee, but the client must remain ultimately liable. Id. Of course, this general rule raises an additional question -- must the lawyer in that situation sue the client for recovery of the lawyer's

¹ "While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to the client, except that a lawyer may advance or guarantee the expenses of litigation, including, but not limited to, court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence if: (1) the client remains ultimately liable for such expenses; or (2) the repayment is contingent on the outcome of the matter; or (3) the client is indigent." Illinois Rule 1.8(d).

² "A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, provided the client remains ultimately liable for such costs and expenses; and (2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client." Virginia Rule 1.8(e).

expenses if the client refuses to repay the lawyer after losing the case? Virginia follows almost a "don't ask, don't tell" policy. As the Virginia Bar has explained it, the lawyer need not sue every client for reimbursement, but likewise may not adopt a policy of never suing any clients for reimbursement. Virginia LEO 1237 (7/13/89) (a lawyer may pursue a collection case against a former client to pay for copying charges which the lawyer advanced, but is not required to undertake such efforts if they would be fruitless or involve so little money as to be not worthwhile; although the Code of Professional Responsibility does not require the lawyer to pursue such collection efforts, the Bar held that "[a] consistent policy of not proceeding against clients for the collection of expenses advanced would be improper").

(b) It is more difficult to analyze whether a client can pay a contingent fee to an agency which finds experts, even though the expert would be paid regardless of the case's outcome.

For instance, Illinois has struggled with this issue. In Illinois LEO 86-3, the Illinois Bar addressed the ethical propriety of a lawyer working with a witness service organization which offered to find an expert medical witness to testify on behalf of the lawyer's injured client. The organization presented a contract requiring the client to pay the expert's fee -- which would be paid in advance of the expert's testimony and would not be contingent on the case's outcome. However, the witness service organization's finder's fee would be contingent on the outcome of the case, although the expert would not know it. The Illinois Bar condemned the arrangement.

The basic substance of the arrangement, no matter how cloaked, is the outcome of the case. If very favorable,

the finder's fee is enlarged; if unfavorable, the fee diminishes. The outcome, of course, is dependent, to a degree in each instance, on the testimony of the expert witness. In some instances the outcome could be wholly dependent on the expert's testimony.

It is the Committee's conclusion that the hiring of an expert witness through a third-party agency where the agency's fee is dependent on the outcome of the matter is an improper circumvention of the meaning and intent of Rule 7-109(c).

Illinois LEO 86-3 (7/86).

An Illinois court dealt with a similar arrangement ten years later. In First National Bank v. Malpractice Research, Inc., 674 N.E.2d 481, 483 (Ill. Ct. App. 1996), rev'd, 688 N.E.2d 1179 (Ill. 1997), the court analyzed a contract between medical malpractice plaintiffs and a medical/legal consulting firm hired

to provide technical assistance for the education of counsel, to endeavor to obtain expert witnesses, and to assist in marshalling evidence in support of the medical malpractice claim.

In addition to an hourly rate, the consulting firm charged a contingent fee of 20% of any amount recovered in the medical malpractice case. When the plaintiffs' replacement lawyer refused to pay the contingent fee, the consulting firm sued. The court specifically rejected the applicability of the earlier LEO.

We think it clear that the Illinois State Bar Association does not express the public policy of the State of Illinois. As we have stated, the public policy of this State is to be found in its Constitution, statutes, and judicial decisions.

Id. at 485. The court found nothing wrong with the arrangement.

We do not see any overwhelming danger of subornation of perjury in the contract. The witnesses sought to be procured

are expert opinion witnesses as opposed to fact witnesses. Defendants are not obligated to find witnesses to testify to any specific facts or opinions. Furthermore, defendants receive their contingent fee whether or not witnesses are found, if plaintiffs are successful in their medical malpractice action. The temptation for subornation of perjury which was present in Gillett and Goodrich does not appear to be present in the case at bar. While defendants have an interest in seeing that plaintiffs prevail in the medical malpractice action, [a] defendant can influence the result in ways other than suborning perjury. Under the contract, the defendants are obligated to assist plaintiffs in numerous ways other than the procurement of expert witnesses. We conclude that the contract does not create a real and substantial danger of subornation of perjury such that its enforcement would be contrary to the public interest.

Id. In fact, the court praised the arrangement. "We conclude that medical/legal consulting firms such as defendants can provide a legitimate and valuable service to those injured through medical malpractice, but that many cannot afford such services except through a contingent fee contract. We do not find that the contract between plaintiffs and defendants is so capable of producing harm that its enforcement would be contrary to the public interest." Id. at 486.

The Illinois Supreme Court reviewed this decision about one year later. First Nat'l Bank v. Malpractice Research, Inc., 688 N.E.2d 1179 (Ill. 1997). Noting that states take differing approaches to the issue, the Illinois Supreme Court found the arrangement unethical.

We believe that the same evils identified by the court many years ago in Gillett and Goodrich [19th century cases condemning the payment of contingent fees to fact witnesses] operate here. A witness finder of the type used in this case has the same incentive to locate a person who will maximize the finder's own recovery and not simply serve as a reliable witness, a practice Gillett and Goodrich decried.

The involvement of an expert witness, as in this case, rather than an occurrence witness, as in Gillett and Goodrich, does not alter the analysis: the same improper motivation to the finder may be present with either type of witness. We realize, as the Foundation emphasizes, that the contingent fee required by the present contract is not paid to the expert witnesses located by the Foundation. The same arrangement was present in Gillett and Goodrich, however, and those cases still found the contingent fee agreements to be invalid. Moreover, unlike attorneys, who may be paid on a contingent-fee basis, witness finders operate outside the supervision of the courts and are not restricted by any ethical or statutory limitations on the amounts of their fees. We believe that the contract at issue here falls squarely within the prohibition previously recognized by this court in Gillett and Goodrich and thus violates public policy.

Id. at 1184.

Best Answer

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

Discovery of Non-Testifying Experts

Hypothetical 9

You are looking for a testifying expert who will understand a very complicated situation, and provide the type of testimony that will help your client. You have hired two experts as non-testifying consultants. After meeting independently with the consultants, you find that one would actually provide damaging expert testimony if called to the stand, but that the other believes in your theory and is willing to provide favorable expert testimony.

- (a) May you designate the helpful expert as a testifying expert without revealing the other consultant's conclusions?

YES (PROBABLY)

- (b) Must you include correspondence to and from the other consultant on your privilege log?

NO (PROBABLY)

Analysis

In sharp contrast to the discovery rules governing testifying experts, non-testifying experts are generally immune from discovery.¹ Most courts even allow the party hiring such a non-testifying expert to withhold her identity.² The party generally does not even have to log documents created by the non-testifying expert.³

¹ Thuma v. PolyMedica Corp. (In re PolyMedica Corp. Sec. Litig.), 235 F.R.D. 28, 30 (D. Mass. 2006) (assessing plaintiffs' efforts to obtain the production of documents "underlying" a report PriceWaterhouseCoopersLLP ("PWC") prepared for two of its clients, and which the client disclosed to the plaintiffs and to the SEC; noting that the defendants had designated PWC a non-testifying expert; "The protection afforded non-testifying experts is distinct from the work-product doctrine and the attorney-client privilege.").

² Crouse Cartage Co. v. Nat'l Warehouse Inv. Co., Cause No. IP 02-071 C T/K, 2003 U.S. Dist. LEXIS 478, at *4, *6-7, *8, *9 (S.D. Ind. Jan. 13, 2003) (assessing the plaintiff's retention of a real estate broker before filing the lawsuit; noting that the plaintiff "asserts that the identity and documentation generated by its real estate broker are protected by the work product doctrine since the broker was retained in anticipation of litigation"; noting that the real estate broker was a non-testifying expert under Rule 26(b)(4)(B); explaining that "[t]he underlying rule of nondisclosure invites shopping for favorable expert witnesses and facilitates the concealment of negative test results. . . . Crouse has the burden of demonstrating that the real estate broker's role was that of a non-testifying expert. . . . The key inquiry under Rule 26(b)(4)(B) is whether the consultation

Best Answer

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

took place in anticipation of litigation."; finding that the plaintiff had met this burden by showing that it retained the real estate broker one month after retaining a lawyer to file the lawsuit, and hired the real estate broker "specifically for the purpose of evaluating [its] potential damages in anticipation of litigation against Defendants" (internal quotations omitted); noting that the plaintiff "has certified to the Court that he has not determined whether he will utilize the real estate broker as a damage expert at trial"; noting that defendants could not establish the "exceptional circumstances" necessary to undertake discovery of the non-testifying expert).

³ Ludwig v. Pilkington N. Am., Inc., No. 03 C 1086, 2003 U.S. Dist. LEXIS 17789, at *10-11 (N.D. Ill. Sept. 30, 2003) (finding "that the consultants' documents at issue are exempt from discovery on the ground that they are non-testifying expert information. As a threshold matter, non-testifying expert information is entirely exempt from discovery not on the basis of privilege but, rather, on the basis of unfairness. . . . Where documents are withheld under a claim that they are exempt from discovery altogether under Rule 26(b)(4)(B), there is no express requirement that a privilege log be produced. . . . Thus, plaintiffs' contention that PNA's non-testifying expert information is subject to disclosure on a privilege log under rule 26(b)(5) is simply incorrect.")

Paying Non-Testifying Experts

Hypothetical 10

You have hired a non-testifying expert to help you understand the facts of a complicated case, and "vet" several testifying experts whom you are considering hiring.

May the fee you pay the non-testifying expert be contingent on the outcome of the case?

YES

Analysis

Most authorities allow payment of a contingent fee to a non-testifying expert. Virginia LEO 1047 (3/8/88) (a lawyer may engage a medical consulting firm that receives compensation on a contingent fee basis as long as the lawyer does not share any portion of his fee with a consulting firm and as long as no payments to any expert witness the consulting firm might provide are contingent on the outcome of the case in which the expert testifies); Virginia LEO 449 (4/13/82) (a lawyer may arrange for a medical expert to provide technical assistance on a contingent fee basis, because the ban on contingent fee arrangements applies to expert witnesses, not consultants).

Best Answer

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

Experts' Conflicts of Interest

Hypothetical 11

You just received an angry call from the lawyer representing an adversary. She claims that you have acted unethically by hiring a testifying expert that she had actually interviewed several months earlier. Although she had not retained the testifying expert, she claims to have shared confidential information with the expert.

- (a) May you hire a testifying expert who has received material confidential information from the adversary?

NO

- (b) May you hire a testifying expert who works at the same engineering firm as the expert who had been interviewed by your adversary (as long as he had not learned any of the confidential information provided to his colleague)?

YES

Analysis

- (a) Not surprisingly, a litigant cannot hire an expert who has previously interviewed the adversary and received material information from the adversary in a confidential setting.¹

¹ Grioli v. Delta Int'l Machinery Corp., 395 F. Supp. 2d 11, 13, 14-15 (E.D.N.Y. 2005) (holding that a saw manufacturer's former lawyer cannot act as an expert for a plaintiff suing the saw manufacturer; "The courts that have encountered the issue of an expert who formerly had a relationship with an adverse party have employed a three part test to determine whether the expert should be disqualified: (1) was it objectively reasonable for the first party who retained the expert to conclude that a confidential relationship existed; (2) was any confidential or privileged information disclosed by the first party to the expert; and (3) does the public have an interest in allowing or now allowing the expert to testify. . . . In this case Pilchowski's prior representation of the Defendant as an attorney was extensive and lengthy. As to the governing elements, first, there is no dispute that a confidential relationship existed when Pilchowski represented the Defendant as trial counsel. Second, during the sixteen years that Pilchowski represented Delta and Rockwell, he had access to confidential information that is particularly relevant to the instant case. Such confidential information includes the litigation strategies for the defense of bench saw and table saw personal injury products liability cases; the assessment of the strengths and weaknesses of these types of cases; and the anticipated defenses for these types of cases. His confidential information involved some of the very same issues as are present in this case."; "Based on Delta's submission, it has shown that it disclosed to Pilchowski its judgments on the safety, design, and alternatives to the same table saw at issue in this case. Pilchowski's proposed testimony in this case about his patented interlocked blade guard system will necessarily involve a consideration of his experience with the saw and the confidential information he was privy to as counsel for the defendant. In

Several courts have disqualified lawyers who had retained experts in such a situation. Cordy v. Sherwin-Williams Co., 156 F.R.D 575 (D.N.J. 1994) (disqualifying both the defense law firm which had hired a testifying expert who had previously received information from the plaintiff, and the expert himself); Wang Labs., Inc. v. Toshiba Corp., 762 F. Supp. 1246 (E.D. Va. 1991) (disqualifying defendant's expert because he had earlier met with and received confidential information from plaintiff's lawyer); Shadow Traffic Network v. Superior Court, 29 Cal. Rptr. 2d 693, 700 (Cal. Ct. App. 1994) (disqualifying defendant's law firm because two of its lawyers had met with an accounting expert who had earlier met with and received confidential information from plaintiff's lawyers; "We therefore conclude that communications made to a potential expert in a retention interview can be considered confidential and therefore subject to protection from subsequent disclosure even if the expert is not thereafter retained as long as there was a reasonable expectation of such confidentiality." (footnote omitted)). But see In re American Home Prods. Corp., 985 S.W.2d 68, 73 (Tex. 1998) (refusing to disqualify a law firm which retained a testifying expert who had previously worked for the opponent, because "if communications with an expert may be discovered during the course of litigation by opposing counsel, that information cannot be considered confidential, and the fact that it has been shared with opposing counsel cannot be the basis for disqualification").

addition, the testimony may involve his prior discussions with principals of the Defendant and raise the potential for a breach of Delta's confidences.")

(b) Interestingly, experts apparently are not governed by the type of automatic imputation principles that apply to law firms.²

Best Answer

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

² Moya v. Ford Motor Co., No. CIV-S-95-1238 DFL GGH, 1997 U.S. Dist. LEXIS 23568, at *16-17 (E.D. Cal. Apr. 23, 1997) (because a consulting firm is not subject to the same imputation of knowledge principles as a law firm, one member of a consulting firm can be a non-testifying expert and review privileged information while another member can be a testifying expert, and will not be required to produce the privileged information unless the testifying employee actually reviewed it; "The law cannot be that if one hires a member of a large consulting company to testify as an expert that all other consulting work ever done by any member of the same consulting company on the same or related cases must be disclosed whatever the relationship of that work to the subject matter considered by the testifying employee. Plaintiffs point to no case that supports this theory.").

Ex Parte Communications with an Adversary's Testifying Expert

Hypothetical 12

You are representing your client in litigation pending in another state, and you are familiarizing yourself with the pertinent ethics rules.

- (a) May you contact an adversary's testifying expert ex parte?

NO

- (b) May your testifying expert contact the adversary's testifying expert ex parte?

MAYBE

Analysis

- (a) The ethics rules prohibit ex parte contacts with an adversary represented by a lawyer.

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

ABA Model Rule 4.2; Illinois Rule 4.2 (which also contains the phrase "or cause another to communicate"); Virginia Rule 4.2.

Of course, the issue here is whether the adversary's expert is considered a "person" who is off-limits under this rule.

Not surprisingly, courts generally condemn a lawyer's ex parte contacts with the adversary's expert. Erickson v. Newmar Corp., 87 F.3d 298 (9th Cir. 1996) (finding that

a lawyer had acted unethically in dealing with a pro se plaintiff's expert;¹ explaining that the lawyer had offered to hire the pro se plaintiff's expert to assist in an unrelated case that the lawyer was handling; noting that several state bars have specifically prohibited a lawyer's ex parte contacts with the adversary's testifying expert; noting that the pro se plaintiff had dropped his expert after discovering the arrangement, because the plaintiff no longer trusted the expert; holding that the defense lawyer's "witness tampering" deprived the pro se plaintiff of an expert, and therefore justified a new trial); In re Firestorm 1991, 916 P.2d 411, 419 (Wash. 1996) (finding that plaintiff's lawyers had improperly engaged in an ex parte interview with defendant's expert, but declining to disqualify the lawyers because "disqualification should be imposed sparingly").

As in other areas, there seems to have been an evolution in courts' and bars' approach to this issue.

For instance, in Virginia LEO 1076 (5/17/88), the Bar indicated that a lawyer may have ex parte contacts with an adversary's expert witness, although "courtesy" would suggest that the lawyer advise the adversary's lawyer. Accord Virginia LEO 1235 (5/30/89) (a defense lawyer may interview the plaintiff's expert even after losing a motion to allow a deposition of the expert; overruled by Virginia LEO 1639 and Va. Code § 8.01-339(D)).

¹ Some older state legal ethics opinions surprisingly take a different view.

In a stark contrast, a Virginia federal court recently sanctioned a plaintiff's lawyer for what the court clearly viewed as improper ex parte contacts between the plaintiff's lawyer and the defendant's expert's employer.²

(b) To the extent that the ethics rules apply to a lawyer's ex parte contacts with an adversary's expert, the lawyer will be barred from doing through the expert what the lawyer could not do himself or herself.³ ABA Model Rule 8.4(a) ("It is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.").

This hypothetical comes from a Virginia legal ethics opinion. In Virginia LEO 1678 (9/5/96), the Bar indicated that a lawyer (acting directly or through an expert

² Sanderson v. Boddie-Noell Enters., Inc., 227 F.R.D. 448, 453-54, 455 (E.D. Va. 2005) (assessing a plaintiff lawyer's ex parte contacts with the employer of the defendant's expert witness; noting that plaintiff had called a local television station looking for an expert, and was told by the station's advertising manager that the television station did not allow any of its meteorologists to serve as expert witnesses in civil cases; explaining that when the defendant designated one of the station's meteorologists as its expert, the plaintiff's lawyer called the station back and complained; noting that the station thereafter prohibited the defendant's expert to testify; concluding that plaintiff's lawyer (who was a "significant advertising customer" of the television station) had improperly induced the television station to prohibit its meteorologist from acting as defendant's expert; "As a direct and reasonably foreseeable consequence of that communication, WRIC [defendant's expert's employer] prohibited Mr. Bernier [defendant's expert witness] from testifying, notwithstanding that Mr. Bernier previously had testified over a dozen times while under the employ of WRIC, including one previous appearance on behalf of the defendant in this case [noting that Bernier had actually testified as an expert two or three times each year from 1984 until 2005]. Thus, Mr. Bieber [plaintiff's lawyer] deliberately set into motion a series of events that had the effect of obstructing the defendant's ability to use the services of its designated expert witness. Whether he intended that result is not dispositive of the issue because Mr. Bieber is chargeable with knowledge of the reasonably foreseeable consequences of the acts in which he deliberately engaged."; finding a violation of Virginia Rule of Professional Conduct 3.4(a), and sanctioning Mr. Bieber; "On balance, the appropriate sanction is to require Mr. Bieber to compensate the defendant for the fees charged by Mr. Bernier, the fees of the replacement expert, and the fees incurred by defendant's counsel in working with Mr. Bernier, in prosecuting this motion and in securing and working with a new expert, as well as fees proximately caused by the delay that necessarily will occur hereafter. Counsel shall submit forthwith a statement of fees charged by Mr. Bernier and Mr. Bieber shall pay those immediately. At the conclusion of this action, counsel shall submit a statement for all other fees and expenses.").

³ In fact, some states (including Illinois) have included the phrase "or cause another to communicate" in their version of Rule 4.2. See Illinois Rule 4.2.

witness) may not "advise the other party's expert witness not to testify," although the lawyer has no duty to take any measures in response to the lawyer's expert acting independently in convincing the opposing expert not to testify, unless the "tampering" is a "fraud on the tribunal" or the lawyer hired the expert "merely to harass or maliciously injure plaintiff by subverting plaintiff's employment" of an expert, which had not occurred there).

Best Answer

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

Rationale for the Witness-Advocate Rule

Hypothetical 13

You and a friend have been discussing the reason why every state's ethical rule generally prohibits the same lawyer from acting both as a witness and as an advocate in the same trial. You disagree about the effect of such a dual role on a jury. You think that a jury will give less weight to the factual testimony of a lawyer who is also acting as an advocate in that case, because the lawyer is so obviously interested in the outcome of the case for his client. Your friend thinks that the jury will give more weight to the lawyer's testimony, because she obviously is acting as an officer of the court in the proceeding itself.

Is the jury likely to provide less weight to the factual testimony of a lawyer who is acting as an advocate in the trial?

MAYBE

Analysis

The witness-advocate rule (sometimes called the advocate-witness rule),¹ has a long history, but a very uncertain rationale.

Early History

Interestingly, one court has traced the attorney-client privilege back to an incident during Roman times that actually involved the witness-advocate rule. In Evergreen Trading, LLC v. United States, the Court of Federal Claims explained that in 70 BC Cicero refrained from calling as a witness an advocate for Sicily's governor (whom Cicero was prosecuting for corruption).² Thus, perhaps the earliest mention of the

¹ Sea Tow Int'l, Inc. v. Pontin, No. CV-06-3461 (SJF)(ETB), 2007 U.S. Dist. LEXIS 85527 (E.D.N.Y. Nov. 19, 2007).

² Evergreen Trading, LLC v. United States, 80 Fed. Cl. 122, 128 n.6 (Fed. Cl. 2007).

attorney-client privilege involved the inconsistency between a lawyer acting as a witness and as an advocate.

Another court has recently explained that the origins of the witness-advocate rule "may be traced to the common law principle of evidence that neither a party nor his agent is competent as a witness on the party's behalf." Landmark Graphics Corp. v. Seismic Micro Tech., Inc., Civ. A. No. H-05-2618, 2007 U.S. Dist. LEXIS 6897, at *9 (S.D. Tex. Jan. 31, 2007) (quoting FDIC v. United States Fire Ins. Co., 50 F.3d 1304, 1311 (5th Cir. 1995)). It therefore appears that the inconsistency between lawyers acting both as witnesses and as advocates initially prevented the lawyers from testifying on behalf of their clients. The rule now has exactly the opposite effect -- demanding that the lawyers act as witnesses rather than as advocates if they have to make a choice.

The United States Supreme Court first dealt with the witness-advocate rule in 1886. The Court held that the trial court had erred in not permitting the plaintiff to call his lawyer as a witness on his behalf.

There is nothing in the policy of the law, as there is no positive enactment, which hinders the attorney of a party prosecuting or defending in a civil action from testifying at the call of his client. In some cases it may be unseemly, especially if counsel is in a position to comment on his own testimony, and the practice, therefore, may very properly be discouraged; but there are cases, also, in which it may be quite important, if not necessary, that the testimony should be admitted to prevent injustice or to redress wrong.

French v. Hall, 119 U.S. 152, 154-55 (1886) (emphasis added). This certainly represented an inauspicious start for what eventually became an ethics rule of great

strength -- prohibiting exactly the type of behavior that the United States Supreme Court permitted.

Ethics Codes and Rules

By 1908, the organized bar had adopted a canon prohibiting lawyers from playing both roles at the same trial.

When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel. Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client.

ABA, Canons of Professional Ethics, Canon 19 (1908).

The well-known University of Texas professor John Sutton defended a strict interpretation of the witness-advocate rule in an influential 1963 Texas Law Review article.³ Among other things, Professor Sutton argued that an individual witness-advocate's disqualification should be imputed to an entire law firm.

The old ABA Model Code placed the witness-advocate rule in Canon 5, which dealt with conflicts of interest -- rather than the canon dealing with trial tactics.

A number of states continue to follow the old Model Code formulation.

For instance, New York DR 5-102 essentially follows the old ABA Code language:

(A) A lawyer shall not act, or accept employment that contemplates the lawyer's acting, as an advocate on issues of fact before any tribunal if the lawyer knows or it is obvious that the lawyer ought to be called as a witness on a

³ John F. Sutton, Jr., The Testifying Advocate, 41 Tex. L. Rev. 477-98 (Apr. 1963).

significant issue on behalf of the client, except that the lawyer may act as an advocate and also testify:

1. If the testimony will relate solely to an uncontested issue.
2. If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.
3. If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer or the lawyer's firm to the client.
4. As to any matter, if disqualification as an advocate would work a substantial hardship on the client because of the distinctive value of the lawyer as counsel in the particular case.

(B) Neither a lawyer nor the lawyer's firm shall accept employment in contemplated or pending litigation if the lawyer knows or it is obvious that the lawyer or another lawyer in the lawyer's firm may be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony would or might be prejudicial to the client.

(C) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer ought to be called as a witness on a significant issue on behalf of the client, the lawyer shall not serve as an advocate on issues of fact before the tribunal, except that the lawyer may continue as an advocate on issues of fact and may testify in the circumstances enumerated in DR 5-102 [1200.21] (B)(1) through (4).

(D) If, after undertaking employment in contemplated or pending litigation, a lawyer learns or it is obvious that the lawyer or a lawyer in his or her firm may be called as a witness on a significant issue other than on behalf of the client, the lawyer may continue the representation until it is apparent that the testimony is or may be prejudicial to the client at which point the lawyer and the firm must withdraw from acting as an advocate before the tribunal.

New York DR 5-102 [1200.21] (emphases added).

Illinois also currently follows the old Model Code format (although labeled Rule 3.7). Proposed Illinois ethics rules changes would follow the new ABA Rule approach.⁴

ABA Model Rule 3.7 deals with the witness-advocate rule with a very different approach from the old Code.

- (a) A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness unless:
- (1) the testimony relates to an uncontested issue;
 - (2) the testimony relates to the nature and value of legal services rendered in the case; or
 - (3) disqualification of the lawyer would work substantial hardship on the client.

ABA Model Rule 3.7 (emphases added).

The Restatement takes the same basic approach, but with more detail, and with provisions that deal with issues not addressed in the ABA Model Code or the ABA Model Rule.⁵

⁴ Proposed Illinois Rule 3.7 (Proposal 04-18 c/w Proposal 04-19)(Ill. S. Ct. Rules Comm. Public Hr'g, Sept. 14, 2007).

⁵ Restatement (Third) of Law Governing Lawyers § 108 (2000) ("(1) Except as provided in Subsection (2), a lawyer may not represent a client in a contested hearing or trial of a matter in which: (a) the lawyer is expected to testify for the lawyer's client; or (b) the lawyer does not intend to testify but (i) the lawyer's testimony would be material to establishing a claim or defense of the client, and (ii) the client has not consented as stated in § 122 to the lawyer's intention not to testify. (2) A lawyer may represent a client when the lawyer will testify as stated in Subsection (1)(a) if: (a) the lawyer's testimony relates to an issue that the lawyer reasonably believes will not be contested or to the nature and value of legal services rendered in the proceeding; or (b) deprivation of the lawyer's services as advocate would work a substantial hardship on the client; or (c) consent has been given by (i) opposing parties who would be adversely affected by the lawyer's testimony and, (ii) if relevant, the lawyer's client, as stated in § 122 with respect to any conflict of interest between lawyer and client (see § 125) that the lawyer's testimony would create. (3) A lawyer may not represent a client in a litigated matter pending before a tribunal when the lawyer or a lawyer in the lawyer's firm will give testimony materially adverse to the position of the lawyer's client or materially adverse to a former

Most states follow the new ABA Model Rule formulation, although a number of states have unique provisions that dramatically affect the analysis. For instance, the California witness-advocate rule on its face applies only to jury trials.⁶

Rationale for the rule

From the beginning, bars and courts have not been able to agree on the underlying rationale for the witness-advocate principle. Every authority agrees that there are three constituents which deserve protection.

First, some authorities suggest that the rule is designed to protect the lawyer's client. As one ABA legal ethics opinion explained,

[b]ut given a choice between two or more witnesses competent to testify as to contested issues, and other factors being equal, a client's cause is best served by having the testimony from the witness not subject to impeachment for interest in the outcome of the trial. Because a trial advocate clearly possesses such an interest, his testimony, or that of a lawyer in his firm, is properly subject to inquiry based on such interest, perhaps including elements of his fee arrangement in some instances. Thus, the weight and credibility of testimony needed by the client may be discounted and in some cases the effect will be detrimental to the client's cause.

ABA LEO 339 (1/31/75) (emphasis added). A number of courts adopt this approach.⁷

The Restatement also mentions the client's protection.⁸

client of any such lawyer with respect to a matter substantially related to the earlier representation, unless the affected client has consented as stated in §122 with respect to any conflict of interest between lawyer and client (see § 125) that the testimony would create. (4) A tribunal should not permit a lawyer to call opposing trial counsel as a witness unless there is a compelling need for the lawyer's testimony.").

⁶ Cal. Rules of Prof'l Conduct 5-210 (2007) ("A member shall not act as an advocate before a jury which will hear testimony from the member unless: (A) The testimony relates to an uncontested matter; or (B) The testimony relates to the nature and value of legal services rendered in the case; or (C) The member has the informed written consent of the client. If the member represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the member is employed and shall be consistent with principles of recusal. ").

Second, some courts emphasize that the rule protects the adversary.

The rule is designed to protect the adverse party, as the "jury may view an attorney as possessing special knowledge of a case and therefore accord a testifying attorney's arguments undue weight."

Shabbir v. Pakistan Int'l Airlines, 443 F. Supp. 2d 299 (E.D.N.Y. 2005) (citation omitted; emphasis added). A number of courts agree with this approach.⁹ The ABA Model Rules recognize the adversary's interest.¹⁰

Third, some authorities point to the rule's benefit in avoiding damage to the adversarial system itself. For instance, one court explained that

[t]he basic reasoning behind disqualification under the "advocate-witness" rule, is to prevent the unseemly spectacle of the attorney who is representing a party on trial, leave counsel table and testify as a witness. Further, the attorney should not vouch for his own testimony on opening or summation. Finally, it avoids conflicts between the testifying attorney and his client.

⁷ Freeman v. Vicchiarelli, 827 F. Supp. 300 (D.N.J. 1993); MacArthur v. Bank of New York, 524 F. Supp. 1205 (S.D.N.Y. 1981); John F. Sutton, Jr., The Testifying Advocate, 41 Tex. L. Rev. 477-98 (Apr. 1963).

⁸ Restatement (Third) of Law Governing Lawyers § 108 cmt. b (2000) ("Rationale. Combining the role of advocate and witness creates several risks. The lawyer's role as witness may hinder effective advocacy on behalf of the client. The combined roles risk confusion on the part of the factfinder and the introduction of both impermissible advocacy from the witness stand and impermissible testimony from counsel table. Concomitantly, an advocate may not interfere with an opposing counsel's function as advocate by calling him or her to the witness stand, except for compelling reasons (see Subsection (4) & Comment I). When a lawyer will give testimony adverse to the lawyer's client, a conflict of interest is presented that must either be avoided by withdrawal of the lawyer and the lawyer's firm or, where permitted, consented to by the client as provided in §122 (see Subsection (3) & Comment f).").

⁹ Sea Tow Int'l, Inc. v. Pontin, No. CV-06-3461 (SJF)(ETB), 2007 U.S. Dist. LEXIS 85527 (S.D.N.Y. Nov. 19, 2007).

¹⁰ ABA Model Rule 3.7 cmt. [2] ("The tribunal has proper objection when the trier of fact may be confused or misled by a lawyer serving as both advocate and witness. The opposing party has proper objection where the combination of roles may prejudice that party's rights in the litigation. A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.").

Zito v. Fischbein Badillo Wagner Harding, No. 602308/04, 2005 N.Y. Misc. LEXIS 3526, at *9 (N.Y. Sup. Ct. Nov. 22, 2005) (emphasis added). A number of courts recognize this interest.¹¹ The ABA Model Rules cite the need to protect the tribunal in several comments to Model Rule 3.7.¹²

It seems odd for such a long-standing and well-recognized rule to rest on such indefinite grounds. Perhaps the rule is intended to serve all three functions.¹³

Effect on the jury

The lack of any clear rationale for the rule also reflects itself in courts' descriptions of how a jury might react to hearing factual testimony from a lawyer who also acts as an advocate for a party in the trial.

A comment to the old ABA Model Code described both possible effects on the jury, without explaining which one presented the greater worry.

Occasionally a lawyer is called upon to decide in a particular case whether he will be a witness or an advocate. If a lawyer is both counsel and witness, he becomes more easily impeachable for interest and thus may be a less effective witness. Conversely, the opposing counsel may be handicapped in challenging the credibility of the lawyer when the lawyer also appears as an advocate in the case. An advocate who becomes a witness is in the unseemly and ineffective position of arguing his own credibility. The roles of an advocate and of a witness are inconsistent; the function of an advocate is to advance or argue the cause of another, while that of a witness is to state facts objectively.

ABA Model Code EC 5-9 (1980) (emphasis added).¹⁴

¹¹ MacArthur v. Bank of New York, 524 F. Supp. 1205 (S.D.N.Y. 1981).

¹² ABA Model Rule 3.7 cmts. [1], [2], [3].

¹³ Restatement (Third) of Law Governing Lawyers § 108 cmt. b (2000).

The courts dealing with this issue are also almost unapologetically unclear. For instance, one court explained that

[a]ny statements they would make at trial regarding the foreclosure or any subsequent, related events would completely confuse a jury because they would attribute too much, or possibly too little, weight to the attorneys' testimony.¹⁵

Stewart v. Bank of Am., N.A., 203 F.R.D. 585, 587 (M.D. Ga. 2001) (emphases added).

This uncertainty about the jury's reaction highlights the argument in favor of the witness-advocate rule that focuses on the systemic interests, rather than the client's or the adversary's interests.

Other issues

As courts have dealt with other witness-advocate issues, a number of points have emerged.

First, most courts reject what was at one time the general rule -- prohibiting lawyers from testifying if they were also acting as advocates.¹⁶ On the other hand, the Restatement explains that courts may sometimes exclude such testimony.¹⁷

¹⁴ Discussed in article by Erik G. Luna, Avoiding a 'Carnival Atmosphere': Trial Court Discretion and the Advocate-Witness Rule, 18 Whittier L. Rev. 447, 458 n.87 (1996-1997).

¹⁵ Other courts have said essentially the same thing. World Youth Day, Inc. v. Famous Artists Merch. Exch., Inc., 866 F. Supp. 1297, 1303 (D. Colo. 1994) ("Here, there is a substantial risk that a jury will be confused by an advocate also appearing as a witness. The jury may attribute too much or too little weight to Zalon's testimony because of his dual role.").

¹⁶ M.K.B. v. Eggleston, 414 F. Supp. 2d 469 (S.D.N.Y. 2006); Beneficial Dev. Corp. v. City of Highland Park, 606 N.E.2d 837 (Ill. App. Ct. 1992), aff'd in part and rev'd in part, 641 N.E.2d 435 (Ill. 1994). But see Smith v. Wharton, 78 S.W.3d 79 (Ark. 2002). This approach certainly is consistent with the emphasis on searching for the truth -- which is more likely to come from the mouth of witnesses than advocates.

¹⁷ Restatement (Third) of Law Governing Lawyers § 108 cmt. k (2000).

Second, the witness-advocate rule involves such institutional concerns that some courts raise the rule's application sua sponte, even if no party before the court raises it.¹⁸

Third, a few states still allow an interlocutory appeal of an order disqualifying a lawyer under the witness-advocate rule.¹⁹ Not surprisingly, some appellate courts reverse the trial court's order disqualifying a lawyer under the witness-advocate rule, while other courts affirm the disqualification. In those jurisdictions which do not permit interlocutory appeals, a client will be hard pressed to establish any provable prejudice from losing his trial counsel to the witness-advocate rule. For instance, in one recent case, the Eighth Circuit found that the lower court had abused its discretion in prohibiting a disqualified lawyer from engaging in any pretrial activities.²⁰ However, the circuit court found that the trial court's denial of counsel to the client was harmless error.

The Drostes have not indicated what, if anything, their original lawyer would have done differently with respect to pretrial matters, or indicated how they were prejudiced by the conduct of substitute counsel. We therefore conclude any error the district court committed when it made the disqualification effective immediately was harmless.

Droste v. Julien, 477 F.3d 1030, 1036 (8th Cir. 2007).

¹⁸ Estate of Andrews v. United States, 804 F. Supp 820 (E.D. Va. 1992); MacArthur v. Bank of New York, 524 F. Supp. 1205 (S.D.N.Y. 1981).

¹⁹ A.B.B. Sanitec West, Inc. v. Weinsten, 2007 Ohio 2116 (Ohio Ct. App. 2007); D.J. Inv. Group, L.L.C. v. DAE/Westbrook, L.L.C., 147 P.3d 414 (Utah 2006); Amos v. Cohen, 806 N.E.2d 1014 (Ohio Ct. App. 2004); McKenzie v. City of Omaha, 668 N.W.2d 264 (Neb. Ct. App. 2003); State v. Van Dyck, 827 A.2d 192 (N.H. 2003); Zurich Ins. Co. v. Knotts, 52 S.W.3d 555 (Ky. 2001).

²⁰ Droste v. Julien, 477 F.3d 1030 (8th Cir. 2007).

Fourth, some courts have articulated the basic and common-sense rule that "doubts about whether a lawyer may be called as a witness should be resolved in favor of the lawyer being permitted to testify and against the lawyer acting as an advocate."²¹

Best Answer

Given the murky rationale for the witness-advocate rule and opinions which do not provide any clear guidance, it is unclear whether a jury will provide more or less weight to the testimony of a lawyer who is also acting as an advocate. The best answer to this hypothetical is **MAYBE**.

²¹ Eon Streams, Inc. v. Clear Channel Commc'ns, Inc., No. 3:05-CV-578, 2007 U.S. Dist. LEXIS 23950, at *12 (E.D. Tenn. Mar. 27, 2007).

Application of the Witness-Advocate Rule to Judge Trials and Pretrial Proceedings

Hypothetical 14

You and a friend had been debating the rationale for an application of the witness-advocate rule. After deadlocking in your discussion of the jury's reaction to the same lawyer acting as both a witness and an advocate, you seem to agree on one point -- that the witness-advocate rule should not apply to judge trials or pretrial proceedings before a judge. Both of you think that judges should be capable of distinguishing between the different roles that lawyers play, and therefore will not suffer from the confusion that a jury might face.

- (a) Should the witness-advocate rule apply to trials before a judge?

MAYBE

- (b) Should the witness-advocate rule apply to pretrial proceedings?

MAYBE

Analysis

Although the basic witness-advocate rule can be easily stated, applying the principle presents a number of very difficult issues. Among other things, courts have debated the rule's applicability to judge trials, and to pretrial proceedings.

In some states, the applicable rule itself extends only to jury trials.¹

In states with ethics rules that are less clear, courts must deal with this issue.

- (a) Because most of the academic and judicial discussion about the witness-advocate rule involves possible jury misperception, some courts hold that the

¹ Cal. Rules of Prof'l Conduct 5-210 (2007) ("A member shall not act as an advocate before a jury which will hear testimony from the member unless: (A) The testimony relates to an uncontested matter; or (B) The testimony relates to the nature and value of legal services rendered in the case; or (C) The member has the informed written consent of the client. If the member represents the People or a governmental entity, the consent shall be obtained from the head of the office or a designee of the head of the office by which the member is employed and shall be consistent with principles of recusal.").

rule simply does not apply to judge trials. For instance, one court recently refused to apply the rule to the trial in which the judge will act as a factfinder.

The cases cited by Plaintiff are all cases from Georgia state courts, which presumably involved jury trials. In the instant case, neither party has timely requested a jury trial; therefore, the matter will be tried before the undersigned, who will act as fact-finder. When a judge is the trier of fact, the danger that the trier of fact will be unable to distinguish between testimony and advocacy is eliminated.

Hays v. Paradise Mission Church, Inc. (In re Harrington, George & Dunn, P.C.), Ch. 7 Case No. 05-91725, Adv. No. 06-6253, 2007 Bankr. LEXIS 2160, at *6 (Bankr. N.D. Ga. May 29, 2007) (emphasis added); State v. Van Dyck, 827 A.2d 192, 195 (N.H. 2003) ("Unlike a jury, a judge is unlikely to confuse the roles of advocate and witness or to deem an attorney credible simply because he is an attorney.").

On the other hand, a number of courts have just as vigorously argued that the rule applies to judge trials just as it does to jury trials. For instance, in Estate of Andrews, Judge Robert Payne of the Eastern District of Virginia found that Virginia's rule applied to judge trials.

Although this matter is to be tried to the court without a jury, the court finds that the VCPR's ethical mandates, particularly those founded on concerns of institutional integrity, apply equally to jury and non-jury trials. Indeed, it would be unsound to make the applicability of the witness-advocate rule turn on whether the case is a bench trial because, for example, a lawyer could be perceived as acting for his or her self-interest in waiving a jury trial simply in order to continue the representation.

Estate of Andrews v. United States, 804 F. Supp 820, 827 n.2 (E.D. Va. 1992) (emphasis added).

The Restatement follows this approach.²

(b) Determining the witness-advocate rule's applicability to pretrial proceedings depends on whether the rule should be applied literally or in light of its rationale (however confusing that is).

On its face, ABA Model Rule 3.7 applies the witness-advocate rule only to trials. ABA Model Rule 3.7. The Restatement applies the rule to "a contested hearing or trial of a matter."³ Some states' rules will apply a variation of this theme. For instance, the Virginia Rule 3.7 applies to "an adversarial proceeding."⁴ The Restatement uses the term "contested proceedings."⁵ One authority has relied on the applicable rule's literal language in applying the witness-advocate rule to only trials.⁶

However, other authorities warn that the rules should not be interpreted too literally. For instance, an early New York City Bar ethics opinion urges a more expansive interpretation.

Read literally, the language of DR 5-101 and DR 5-102 applies only to trial proceedings. Problems inherent in the dual role of advocate and witness, however, are not confined to trial. . . . See also General Mill Supply Co. v. SCA Services, Inc., 697 F.2d 704, 715-16 (6th Cir. 1982) (rejecting the notion that references to the word 'trial' in the

² Restatement (Third) of Law Governing Lawyers § 108 cmt. c (2000) ("The basic prohibition against an advocate testifying. The advocate-witness rule applies in all contested proceedings in which a lawyer appears as both advocate and witness, including trials, hearings on motions for preliminary injunction and for summary judgment, and trial-type hearings before administrative agencies. The rule applies whether the case is being tried to a judge or jury. In trials to a judge, less need may exist for exacting application of the rule in some situations, such as when dealing with contested pretrial matters, particularly where the testimony of the advocate will not be lengthy (also see Comment g).").

³ Restatement (Third) of Law Governing Lawyers § 108 (2000).

⁴ Virginia Rule 3.7(a).

⁵ Restatement (Third) of Law Governing Lawyers § 108 cmt. c (2000).

⁶ Pennsylvania LEO 96-15 (3/20/1996).

disciplinary rules under Canon 5 should be read literally). It would be artificial to confine operation of the lawyer-as-witness rule to representation at trial merely because the rule speaks to the most common context in which the problem arises.

New York City LEO 1988-9 (11/28/88) (emphases added).

A number of courts have applied the witness-advocate rule to such pretrial proceedings as a sentencing hearing⁷ or a summary judgment hearing in which a lawyer filed an affidavit.⁸

If the court applies the witness-advocate rule to a pretrial proceeding, the next issue is whether a lawyer who has testified at a pretrial proceeding (forfeiting her opportunity to be an advocate at that proceeding) may become involved again as an advocate later in the case. This debate involves the scope of permissible activities by an individually disqualified lawyer.

Best Answer

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

⁷ United States v. Dyess, 231 F. Supp. 2d 493 (S.D. W. Va. 2002).

⁸ Zurich Ins. Co. v. Knotts, 52 S.W.3d 555 (Ky. 2001).

Best Time to Address the Witness-Advocacy Rule

Hypothetical 15

You and your friend disagree about the best time for a trial court to address any witness-advocate issues. Your friend thinks that the trial court should address the issue as soon as possible, so that all of the parties and their lawyers know what role they can play in the pretrial proceedings and the trial itself. You vehemently disagree, contending that it does not make sense to address the witness-advocate issue until the last minute -- both because most cases settle before trial (meaning that the judge will never have to bother with any witness-advocate issues) and because it will not be clear until the end of discovery whether the lawyer will or will not have to testify.

Should trial courts address any witness-advocate issues as soon as possible?

MAYBE

Analysis

Courts take varying views on the appropriate time to address any witness-advocate issue. Not surprisingly, their view largely depends on whether the court applies the rule only to trials (in which case the court would tend to postpone any analysis until just before the trial) or whether the court applies the rule to pretrial activities (in which case the court would analyze the issue as soon as possible).

The ABA Code's formulation affected this analysis. The old ABA Model Code indicated that lawyers knowing that they "ought to" be witnesses on behalf of the client "shall not accept employment in contemplated or pending litigation." DR 5-101(B). Thus, the ABA Model Code applied even to a lawyer's decision whether to accept employment or not.

States continuing to follow the old ABA Code formulation continue to take this approach.

DR 5-101(B) applies before employment is accepted by an attorney. The rule requires that the attorney not accept employment if it is clear the attorney will or ought to be called as a witness, unless one of the enumerated exceptions apply [sic].

A.B.B. Sanitec West, Inc. v. Weinsten, 2007 Ohio 2116, at ¶ 15 (Ohio Ct. App. 2007) (emphasis added).¹

Courts taking this basic attitude have explained that they can deal with the witness-advocate rule even though there has not been any discovery.² For instance, one recent decision indicated that the court could disqualify a lawyer under the witness-advocate rule even before the lawyer's deposition.³

Some courts applying this approach (either under the old Code formulation or the new Rule formulation) cite a party's failure to raise the witness-advocate rule early enough as essentially waiving the right to object.⁴

A number of courts have taken the common-sense approach that a party falling short of the standard for disqualifying the adversary's lawyer under the witness-advocate rule can always try again if circumstances change. Metropolitan P'ship, Ltd. v. Harris, Civ. A. No. 3:06CV522-W, 2007 U.S. Dist. LEXIS 68606 (W.D.N.C. Sept. 17, 2007) (explaining that a litigant had fallen short in establishing that

¹ Accord Illinois LEO 84-07 (12/84); Illinois LEO 84-06 (12/84).

² Stewart v. Bank of Am., N.A., 203 F.R.D. 585 (M.D. Ga. 2001); Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher, 747 N.Y.S.2d 441 (N.Y. App. Div. 2002).

³ Carta v. Lumbermens Mut. Cas. Co., 419 F. Supp. 2d 23 (D. Mass. 2006).

⁴ Freeman v. Vicchiarelli, 827 F. Supp. 300 (D.N.J. 1993) (holding that a party must assert the witness-advocate rule in a timely fashion or waive it); Talvy v. American Red Cross, 618 N.Y.S.2d 25 (N.Y. App. Div. 1994) (holding that the plaintiff had waited three years to raise a witness-advocate rule (until after the discovery was over), and therefore had forfeited the chance to seek disqualification of the adversary's lawyer).

the adversary's lawyer's testimony was necessary, but could return to court if circumstances changed).⁵

Many courts take exactly the opposite approach. These courts explain that determining the witness-advocate rule's applicability should wait until the facts develop -- so the court can determine if the lawyer is a necessary witness. As one court recently explained,

[a]s to all such factual matters, however, it is unclear at this early stage of the proceedings which, if any, of the events to which Aretakis was a witness will ultimately remain contested issues at trial. The parties may well agree to the existence of certain facts which would obviate the necessity for Aretakis' testimony on those matters. Other issues may be dismissed from the litigation of the case through voluntary dismissal, defendants' presently pending motion to dismiss a portion of the amended complaint or on a motion for summary judgment pursuant to Fed. R. Civ. P. 56. Thus, at this stage the scope of the Lymans' claims which will remain at issue for trial has not been resolved nor have the factual issues which will be in dispute at trial [sic]. Absent such determinations, it would require undue speculation to determine whether issues will remain for trial as to which Aretakis ought to testify.

Lyman v. City of Albany, No. 06-CV-1109 (LEK/DRH), 2007 U.S. Dist. LEXIS 10359, at *10-11 (N.D.N.Y. Feb. 12, 2007). Some courts have explained that the court might avoid the entire issue because the case might settle or certain issues become irrelevant. Norman Reitman Co. v. IRB-Brasil Resseguros S.A., No. 01 Civ. 0265 (RCC), 2001 U.S. Dist. LEXIS 16073 (S.D.N.Y. Sept. 24, 2001); ABA LEO 1529

⁵ Shabbir v. Pakistan Int'l Airlines, 443 F. Supp. 2d 299 (E.D.N.Y. 2005) (declining to disqualify a lawyer, but indicating that the adversary can try again if the issue on which the lawyer could testify becomes material); Golomb & Honik P.C. v. Ajaj, 51 Pa. D. & C.4th 320 (C.P. 2001) (holding that the lawyer need not be disqualified under the witness-advocate rule for now).

(10/20/89). A number of courts have taken a similar approach, and declined to address the issue because it was premature.⁶ One court bluntly held that it was too early to hear any witness-advocate motions because there were still nine months before the trial.⁷ Another court explained that determining whether a lawyer must be a witness necessarily "awaits the eve of trial."⁸

Some courts insist that any analysis of the witness-advocate rule should wait until the lawyer has been deposed.

Because Merolla has not yet been deposed, however, there is no proof of the substance of Merolla's deposition testimony. At this point, Richelo's claim that he needs Merolla's testimony to support his defense is based upon his mere speculation as to what that testimony might entail and is insufficient to serve as a basis to automatically disqualify Merolla. . . . Otherwise, any party could successfully move to disqualify an opposing attorney by simply averring that the opposing attorney might possess information that is damaging to the attorney's client's case and, therefore, that the attorney is likely to be a necessary witness in the moving party's case. To approve of such a tactic would be opening the door to blatant misuse of a rule that already has great potential for abuse.

Clough v. Richelo, 616 S.E.2d 888, 894 & n.7 (Ga. Ct. App. 2005) (footnote omitted), cert. denied, No. S05C1839, 2005 Ga. LEXIS 738 (Oct. 24, 2005).

One case presented an interesting example of how changes in the context might alter the analysis. In 1995, a court disqualified a lawyer from acting as an advocate because the lawyer had testified as an expert in a pretrial patent issue, and apparently

⁶ Landmark Graphics Corp. v. Seismic Micro Tech., Inc., Civ. A. No. H-05-2618, 2007 U.S. Dist. LEXIS 6897 (S.D. Tex. Jan. 31, 2007) (holding that it was too early to determine if the lawyer was a necessary witness).

⁷ First Republic Bank v. Brand, 51 Pa. D. & C.4th 167 (C.P. 2001).

⁸ Albert M. Greenfield & Co. v. Alderman, 52 Pa. D. & C.4th 96, 116 (C.P. 2001).

hurt his client's position. However, the Federal Circuit later articulated a different standard for patent cases, which meant that the lawyer's testimony actually did not prejudice his client. Given this change, Judge Constance Baker Motley vacated her earlier disqualification of the lawyer. Genentech, Inc. v. Novo Nordisk A/S, 923 F. Supp. 61 (S.D.N.Y. 1996).

Best Answer

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

Application of the Witness-Advocate Rule to Lawyers Representing Themselves

Hypothetical 16

Even though you normally represent clients in litigation, it looks as if you might soon be involved in litigation as a party. You have begun to wonder about the witness-advocate rule's applicability to several situations that might arise in the near future.

- (a) May you represent yourself as an advocate pro se even if you have to testify as a fact witness in the trial?

YES

- (b) If you are acting as an executor, may you testify and also act as an advocate at trial?

NO (PROBABLY)

- (c) May you represent a corporation of which you are the sole shareholder, if you will have to testify as a fact witness at the trial?

MAYBE

- (d) You, your husband, and your daughter are all plaintiffs in an action against a school board, alleging discrimination against your disabled daughter. May you represent yourself, your husband, and your daughter at the trial?

NO (PROBABLY)

Analysis

Bars and courts have debated the witness advocate rule's applicability to lawyers representing themselves pro se in different capacities.

- (a) A number of courts have held that lawyers representing themselves pro se may act as both witnesses and advocates at the same trial. Zito v. Fischbein Badillo Wagner Harding, No. 602308/04, 2005 N.Y. Misc. LEXIS 3526 (N.Y. Sup. Ct. Nov. 22,

2005). The Restatement takes this approach.¹ Not surprisingly, courts have taken this approach in lawsuits in which lawyers have sued clients for unpaid fees² and in clients' malpractice cases against lawyers.³ Interestingly, the Texas ethics rules have an explicit exception which allows lawyers to represent themselves pro se even if they must be witnesses.⁴

Not surprisingly, the Southern District of New York has held that a lawyer may not be both a class representative and a class lawyer. Jacobs v. Citibank, N.A., No. 01 Civ. 8436 (JSR)(KNF), 2003 U.S. Dist. LEXIS 2880 (S.D.N.Y. Feb. 25, 2003), appeal dismissed, 82 F. App'x 735 (2d Cir. 2003) (unpublished opinion). The Restatement follows the same approach.⁵

(b) Lawyers representing themselves in their role as executor do not necessarily fall under the general rule which permits lawyers representing themselves pro se to also testify as fact witnesses.

For instance, Judge Robert Payne of the Eastern District of Virginia held that the general approach permitting lawyers to represent themselves pro se did not apply when the lawyer was acting as an executor.

¹ Restatement (Third) of Law Governing Lawyers § 108 cmt. d (2000) ("An advocate appearing pro se. A lawyer (or any other party) appearing pro se is entitled to testify as a witness, but the lawyer is subject to the Section with respect to representing other co-parties as clients. The tribunal may order separate trials where joinder of the pro se lawyer-litigant with other parties would substantially prejudice a co-party or adverse party. When a lawyer appears as the advocate for a class and claims to be the party representative of the class as well, a tribunal may refuse to permit the litigation to proceed in that form.").

² Presnick v. Esposito, 513 A.2d 165 (Conn. App. Ct. 1986); Illinois LEO 92-13 (1/22/1993).

³ Farrington v. Law Firm of Sessions, Fishman, 687 So. 2d 997 (La. 1997).

⁴ Calhoun v. City of Austin, No. A-06-CA-185 AWA, 2007 U.S. Dist. LEXIS 8693 (W.D. Tex. Feb. 6, 2007).

⁵ Restatement (Third) of Law Governing Lawyers § 108 cmt. d (2000).

This rationale does not apply to the facts of this case. Although Payne is a named party, his status as a party is a mere formality. Payne is a party only in his representative capacity as a co-executor of the Estate. Consequently, he has no personal stake or interest in the outcome of the suit. . . . Payne's role is closer to that of a witness-advocate than to that of a lawyer-litigant-witness.

Estate of Andrews v. United States, 804 F. Supp 820, 827 (E.D. Va. 1992).

One New York case addressed this issue in detail. In re Estate of Walsh, 840 N.Y.S.2d 906 (Sur. Ct. 2007). The court held that a lawyer could not represent himself as executor, because he was acting as the fiduciary for others rather than acting on his own behalf.

Weighing the public policy reasons for disqualification of an attorney under the advocate-witness rule against the public policy reasons for granting parties the right to self-representation, the former must prevail where the attorney is not a party, individually, but instead, is a party as the personal representative of an estate. The obvious rationale for the right to self-representation is that litigants have a right to advocate on their own behalf where their own freedom or property interests are at stake. Here, the petitioner has no such interest at stake. The fact that the attorney-executor would receive a larger statutory commission should the estate prevail in this proceeding is not the type of direct of [sic] financial interest that attorneys must have as litigants in order to represent themselves notwithstanding that they will testify at the trial. No attorney would ever be disqualified under the advocate-witness rule if they were permitted to argue that they will incur a direct financial loss due to lost fees.

Id. at 910-11 (emphasis added). Interestingly, the court held that "the same result may not occur where the attorney-fiduciary is the sole beneficiary of the estate or where a surcharge is being sought against the attorney-fiduciary in an accounting or other proceeding." Id. at 911.

This seems like an odd result. The court found that the lawyer's freedom to represent himself pro se applied only when the lawyer had his own money at stake. Yet that would be the precise situation when the witness-advocate rule would seem to apply with the greatest strength as well. In other words, one might think that the witness-advocate rule would prevent lawyers from representing themselves when their own money was at stake, but the pro se rule has exactly the opposite effect.

In analyzing this issue, the court explained another dichotomy that establishes just how complex this rule can be.

[W]here attorneys are themselves parties to litigation, including litigation involving a partnership of which the attorney is a partner, the right of litigants to represent themselves usually trumps disqualification under the advocate-witness rule with the result that attorney-litigants may represent themselves pro se, as well as the partnerships of which they are members, notwithstanding that they will testify at the trial.

Id. at 909. Thus, just this one New York case held that (1) a lawyer may not represent himself as an executor if he has to testify at the trial, unless he is the sole beneficiary of the estate; and (2) a lawyer may represent his partnership even if he has to testify at the trial. It is very difficult to discern any logical reason for these quite different rules.

(c) Several courts have addressed this issue where the attorney is the sole shareholder.

A New York state court explained that a lawyer who is the sole shareholder of a closed corporation may not represent the corporation if she had to testify at the trial.

[W]here an attorney, the sole shareholder of a close corporation, sought to both represent the corporation and testify at the trial, the court, in weighing the competing public

policies of the right to pro se representation and disqualification under the advocate-witness rule, determined that disqualification was necessary because the attorney was representing a separate legal entity, the corporation, and not herself, individually, pro se.

In re Estate of Walsh, 840 N.Y.S.2d 906, 909 (Sur. Ct. 2007).

An earlier Iowa Supreme Court case took exactly the opposite approach, holding that the situation is analogous "to pro se representation by an individual lawyer-litigant." National Child Care, Inc. v. Dickinson, 446 N.W.2d 810, 812 (Iowa 1989). The Iowa Supreme Court found the analogy "instructive" and explained that it "illustrates that the policy reasons underlying [the witness-advocate rule] simply do not apply to the situation involving [the lawyer's] representation of [the corporation of which he is sole shareholder] in the present litigation." Id.

(d) An Ohio court addressed this situation. Horen v. Board of Educ., 2007 Ohio 6883 (Ohio Ct. App. 2007). The mother was also a lawyer, and represented herself, her husband, and her daughter in filing the lawsuit. The court first held that the mother could represent herself in the lawsuit, citing several other cases allowing the lawyer to represent herself in the lawsuit. Id. ¶ 31 (explaining that "[t]here are several federal courts that have addressed the issue and held that an attorney may always represent himself in his own litigation even if he must testify as to the substantive facts of the case"). Among other things, the court explained that a lawyer representing himself pro se "is already subject to cross-examination regarding his own case," and that "the jury would be able to understand that the attorney has a personal interest in

the outcome of [the claim] and it could evaluate the credibility of the attorney's testimony on that basis." Id.

However, the court disqualified the lawyer from representing her husband and daughter in the case. Thus, the case proceeded with the mother representing herself (and testifying as a witness), but with another lawyer representing the husband and the daughter.

The Virginia Bar has indicated in a similar situation that a lawyer can represent himself pro se, as well as represent another co-defendant.⁶

The Restatement mentions the possibility of separate trials in this situation.⁷

Best Answer

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

⁶ Virginia LEO 1498 (12/14/92) (a lawyer who is named as a co-defendant may act as an advocate for the client and a witness and advocate for himself or herself, unless the lawyer's testimony would be prejudicial to the client).

⁷ Restatement (Third) of Law Governing Lawyers § 108 cmt. d (2000).

Effect of the Adversary's Intent to Call the Lawyer as a Witness

Hypothetical 17

You assisted your client in a transaction last year, which is now the subject of litigation. Mindful of the witness-advocate rule, you do not believe that you are a "necessary" witness on your client's behalf. You are very certain that any testimony you might provide would assist rather than prejudice your client. However, your adversary has indicated that it intends to notice your deposition and call you as a trial witness.

(a) May the adversary take your deposition during the discovery phase of the case?

NO (PROBABLY)

(b) Must you be disqualified if the adversary calls you as a witness at the trial?

NO (PROBABLY)

Analysis

Much of the witness-advocate rule analysis involves a lawyer's decision whether to testify on behalf of her client, or the court's decision that the lawyer should testify regardless of the client's desires.

The adversary's intent to depose or call the lawyer as a witness implicates other issues.

(a) Not surprisingly, an effort by one litigant's lawyer to depose the adversary's lawyer raises privilege and other issues.

Given the role of lawyers in the adversarial system and their general personality tendencies, it should come as no surprise that lawyers' depositions of their opponents would frequently degenerate into unbecoming fights.¹ As one court noted, such

¹ Prevue Pet Prods., Inc. v. Avian Adventures, Inc., 200 F.R.D. 413, 418-19 (N.D. Ill.

depositions disrupt the adversarial system, "lower the standards of the profession," "add to the costs and time spent in litigation," trouble the lawyer being deposed, and "create a chilling effect between the attorney and client."² In addition to the systemic and emotional issues, the court also noted that such a deposition "involves forays into the area most protected by the work product doctrine—that involving an attorney's mental impressions or opinions."³

For all these reasons, most courts apply special standards when determining whether one litigant's lawyer will be allowed to depose the adversary's lawyer.

Courts recognizing the inherent dangers (both to the system and to privilege and work product doctrine protections) of allowing an adversary's lawyer to depose the other adversary's lawyer began to set a higher standard for such depositions.

In 1986, the Eighth Circuit articulated what has become a widely used standard. In Shelton v. American Motors Corp.,⁴ the Eighth Circuit held that a party asking to depose another party's lawyer had to demonstrate that "(1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case."⁵

2001).

² N.F.A. Corp. v. Riverview Narrow Fabrics, Inc., 117 F.R.D. 83, 85 (M.D.N.C. 1987).

³ Id.

⁴ 805 F.2d 1323 (8th Cir. 1986).

⁵ Id. at 1327 (citations omitted).

Many courts follow this Shelton standard or a variation of the Shelton standard.⁶ Courts following the basic Shelton approach have also adopted similar protections, such as requiring the party seeking the deposition to depose others first before trying to establish grounds for deposing the lawyer.⁷ Some courts (such as the Second Circuit) explicitly decline to follow the Shelton standard.⁸ Other courts are less protective than Shelton, but will sometimes limit the scope of the inquiry or take some other less protective steps.⁹

Because most of the systemic risks of deposing an adversary's lawyer are far more acute in situations involving opposing trial counsel, some courts have found that the Shelton standard does not apply to an adversary's transaction lawyer who will not be trial counsel.¹⁰ Other courts apply the Shelton standard even to those depositions, but note that depositions of those lawyers are more likely to pass muster under Shelton.¹¹

Reflecting their worry about both the systemic issues and the privilege and work product issues, some imaginative courts have directed that any discovery of an

⁶ Delor v. Interkosmos Media Group, Inc., Civ. A. No. 04-3262 SECTION "J" (2), 2005 U.S. Dist. LEXIS 13410, at *3 (E.D. La. June 24, 2005).

⁷ Theriot v. Parish of Jefferson, Civ. A. No. 95-2453, 1996 WL 586386, at *3 (E.D. La. Oct. 9, 1996).

⁸ Official Comm. of Unsecured Creditors of Hechinger Inv. Co. of Del., Inc. v. Friedman, 350 F.3d 65, 71 (2d Cir. 2003).

⁹ Sadowski v. Gudmundsson, 206 F.R.D. 25 (D.D.C. 2002).

¹⁰ Anserphone of New Orleans, Inc. v. Protocol Commc'ns, Inc., Civ. A. No. 01-3740 SECTION "A" (1), 2002 U.S. Dist. LEXIS 16876 (E.D. La. Sept. 9, 2002).

¹¹ United States Fid. & Guar. Co. v. Braspetro Oil Servs. Co., Nos. 97 Civ. 6124 (JGK)(THK) & 98 Civ. 3099 (JGK)(THK), 2000 U.S. Dist. LEXIS 12669, at *10-11 (S.D.N.Y. Aug. 31, 2000).

adversary's lawyer be limited in some fashion. Courts have ordered the following limitations:

- The lawyer's deposition should not take place until after others have been deposed;¹²
- The lawyer's deposition could proceed only when a court would be available to rule on any questions as they arise;¹³
- Any deposition could be limited to a certain number of hours;¹⁴
- Any deposition could be limited in scope to certain questions;¹⁵
- Any deposition could specifically exclude questions about the lawyer's opinions;¹⁶
- Any deposition could be taken by written questions.¹⁷

Courts less inclined to protect lawyers from such depositions have noted that "written questions and interrogatories would be an extremely cumbersome and ineffective discovery technique."¹⁸ Another court called oral deposition "a far superior discovery tool to one by written questions."¹⁹

(b) For obvious reasons, an adversary's stated intent to call the opposing lawyer as a witness does not necessarily result in that lawyer's disqualification under the

¹² Singer v. Guckenheimer Enters., Inc., Civ. A. No. 03-0026, 2004 U.S. Dist. LEXIS 13258, at *19 (E.D. Pa. July 13, 2004).

¹³ City of Oldsmar v. Kimmins Contracting Corp., 805 So. 2d 1091 (Fla. Dist. Ct. App. 2002).

¹⁴ Johnston Dev. Group, Inc. v. Carpenters Local Union No. 1578, 130 F.R.D. 348, 355 (D.N.J. 1990).

¹⁵ Chivers v. Central Noble Cmty. Schs., Cause No. 1:04-CV-00394, 2005 U.S. Dist. LEXIS 16057, at *13-14 (N.D. Ind. Aug. 4, 2005).

¹⁶ Nguyen v. Excel Corp., 197 F.3d 200, 210 (5th Cir. 1999).

¹⁷ Cox v. Administrator United States Steel & Carnegie, 17 F.3d 1386, 1423 (11th Cir. 1994), cert. denied, 513 U.S. 1110 (1995).

¹⁸ United States Fid. & Guar. Co. v. Braspetro Oil Servs. Co., Nos. 97 Civ. 6124 (JGK)(THK) & 98 Civ. 3099 (JGK)(THK), 2000 U.S. Dist. LEXIS 12669, at *20 (S.D.N.Y. Aug. 31, 2000).

¹⁹ Delor v. Intercosmos Media Group, Inc., Civ. A. No. 04-3262 SECTION "J" (2), 2005 U.S. Dist. LEXIS 13410, at *5 (E.D. La. June 24, 2005).

witness-advocate rule. If it did, lawyers would think of an excuse in every case to depose the other lawyer, thus knocking him out of the case.

Numerous courts have stated the general proposition that

[t]he fact that an opposing party intends to call an attorney as a witness is not dispositive; rather, "[d]isqualification may be required only when it is likely that the testimony to be given by the witness is necessary . . . [, a] finding [that] takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence"

Nicola v. Barrett, 840 N.Y.S.2d 677, 679-80 (N.Y. App. Div. 2007) (emphasis added).

Another New York state court opinion also held that a party's "assertion that she plans to depose and then call [as] a trial witness one or more of the attorneys" representing the other side "because they have 'information or records pertinent to the trial of this action'" is, as the court put it, "plainly insufficient to warrant disqualification at this time."

Andiero Partners, L.P. v. Duggan, [No number in original], 2007 N.Y. Misc. LEXIS 2246, at *17-18 (Sur. Ct. Jan. 29, 2007).

As in the Shelton standard applied to depositions, most courts do not permit one lawyer to list the other lawyer as a trial witness absent "compelling need."²⁰

Best Answer

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

²⁰ Mettler v. Mettler, 928 A.2d 631, 635-36 & n.2 (Conn. Super. Ct. 2007); Restatement (Third) of Law Governing Lawyers § 108 cmt. I (2000).

Application of the Witness-Advocate Rule When a Lawyer's Testimony Will Hurt the Client

Hypothetical 18

You handled a client's business transaction last year, and now want to represent that client in litigation involving the transaction. The other side has moved to disqualify you from representing your client. It argues that it intends to call you as a witness (both in a deposition and at the trial), and that your testimony will hurt your client because you will contradict your corporate client's president's recollection about several key meetings.

If your testimony would contradict your client's president's testimony, is your adversary likely to succeed in seeking your disqualification?

YES

Analysis

One might think that a lawyer's adversary should not be able to seek her disqualification based on an argument that the lawyer's testimony will hurt her client. An argument like that seems transparently tactical. If the lawyer's testimony would actually hurt her client, why wouldn't the adversary welcome that situation?

The ABA Model Code nevertheless held that lawyers finding themselves in this situation might face disqualification. Thus, states (such as Illinois) which continue to follow the old ABA Model Code formulation analyze the issue as follows.

If a lawyer knows or reasonably should know that the lawyer may be called as a witness other than on behalf of the client, the lawyer may accept or continue the representation until the lawyer knows or reasonably should know that the lawyer's testimony is or may be prejudicial to the client.

Illinois Rule 3.7(b). The ABA Model Rules indicate that

[i]n determining if it is permissible to act as advocate in a trial in which the lawyer will be a necessary witness, the lawyer must also consider that the dual role may give rise to a conflict of interest that will require compliance with Rules 1.7 or 1.9. For example, if there is likely to be substantial conflict between the testimony of the client and that of the lawyer the representation involves a conflict of interest that requires compliance with Rule 1.7. This would be true even though the lawyer might not be prohibited by paragraph (a) from simultaneously serving as advocate and witness because the lawyer's disqualification would work a substantial hardship on the client. Similarly, a lawyer who might be permitted to simultaneously serve as an advocate and a witness by paragraph (a)(3) might be precluded from doing so by Rule 1.9. The problem can arise whether the lawyer is called as a witness on behalf of the client or is called by the opposing party. Determining whether or not such a conflict exists is primarily the responsibility of the lawyer involved. If there is a conflict of interest, the lawyer must secure the client's informed consent, confirmed in writing. In some cases, the lawyer will be precluded from seeking the client's consent. See Rule 1.7.

ABA Model Rule 3.7 cmt. [6].

Several courts have disqualified lawyers in this situation. For instance, one federal court disqualified a lawyer because (among other things) his testimony contradicted his client's testimony. Omnicare, Inc. v. Provider Servs., Inc., No. 1:05 CV 2609, 2006 U.S. Dist. LEXIS 6497 (N.D. Ohio Feb. 21, 2006). Another federal court disqualified a lawyer who was representing his secretary in a personal injury case. The court noted that the secretary claimed substantial damages, but that the lawyer hoping to represent his secretary hired her as a full-time employee shortly after the accident. Clark v. R.D. Werner Co., Civ. A. No. 99-1426 SECTION "N," 2000 U.S. Dist. LEXIS 858 (E.D. La. Jan. 25, 2000).

To be sure, courts clearly view with great skepticism an adversary's attempt to disqualify a lawyer on this basis. For instance, Judge Robert Payne of the Eastern District of Virginia indicated that a lawyer seeking to disqualify her counterpart under this standard faces a "substantial burden." Personalized Mass Media Corp. v. Weather Channel, Inc., 899 F. Supp. 239, 243 (E.D. Va. 1995) (disqualifying Howrey & Simon). Other courts have similarly held that an advocate hoping to disqualify the other side's lawyer must point to specific prejudice, and establish a "substantial likelihood" of prejudice.¹

Some courts have found that the adversary has met this heavy burden, and disqualified the other side's lawyer.²

Best Answer

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

¹ Solow v. Conseco, Inc., No. 06 Civ. 5988 (BSJ)(THK), 2007 U.S. Dist. LEXIS 40479 (S.D.N.Y. June 4, 2007) (refusing to disqualify Kirkland & Ellis from representing its client in litigation over the sale of the GM Building in Manhattan); Occidental Hotels Mgmt., B.V. v. Westbrook Allegro L.L.C., 440 F. Supp. 2d 303 (S.D.N.Y. 2006); United States v. Poulsen, No. CR2-06-129, 2006 U.S. Dist. LEXIS 68214 (S.D. Ohio Sept. 12, 2006); Pereira v. Allboro Bldg. Maintenance, Inc. (In re Allboro Waterproofing Corp.), 224 B.R. 286 (Bankr. E.D.N.Y. 1998) (denying the motion to disqualify); Laro Serv. Sys. Inc. v. New York City Bus. Integrity Comm'n, No. 112884/05, 2005 N.Y. Misc. LEXIS 3492 (N.Y. Sup. Ct. Oct. 12, 2005) (refusing to disqualify Gibson Dunn); Restatement (Third) of Law Governing Lawyers § 108 cmt. c (2000) ("A lawyer serving in a capacity other than that of a courtroom advocate is not precluded from being a witness for the lawyer's client. For example, a lawyer is not subject to the rule who does not appear on a list of counsel, or will not sit at counsel table or otherwise physically appear in support of advocacy. The rule does not require disqualification if the lawyer gives testimony in a proceeding separate from the matter in which the lawyer appears as advocate. Similarly, a lawyer who testifies before a judicial officer concerning only a preliminary motion is not thereby disqualified from serving as advocate at a subsequent trial before a jury.").

² United States v. Dyess, 231 F. Supp. 2d 493 (S.D. W. Va. 2002) (disqualifying the United States government's chief prosecutor); Feinstein v. Carl, 791 N.Y.S.2d 869 (N.Y. Sup. Ct. 2004) (unpublished opinion); Weigel v. Farmers Ins. Co., 158 S.W.3d 147 (Ark. 2004) (affirming disqualification of a lawyer).

Standard for Judging the Need for a Lawyer's Testimony

Hypothetical 19

You handled a business transaction for a client last year, which is now the subject of litigation. Your adversary has moved to disqualify you, arguing that it intends to call you as a witness on two factual issues.

- (a) Will your adversary succeed in seeking your disqualification if you must testify about a comment your adversary's president made in your presence about a relatively minor issue?

NO (PROBABLY)

- (b) Will your adversary succeed in seeking your disqualification if you must testify about a meeting at which each side in the negotiation was represented by two lawyers and two corporate representatives?

MAYBE

Analysis

Courts attempting to apply the witness-advocate rule often have a very difficult time determining whether the lawyer who hopes to act as an advocate must also be a fact witness.

Not surprisingly, this issue does not arise if the client and his lawyer decide that the lawyer will testify on the client's behalf. In that event, the lawyer can continue acting as an advocate only under one of the exceptions to the witness-advocate rule. In other words, the court does not need to address the necessity for the lawyer's factual testimony if the lawyer decides to testify.¹

¹ Restatement (Third) of Law Governing Lawyers § 108 cmt. e (2000) ("The effect of an advocate's announced intent or status as a material witness. Subsection (1)(a) generally prohibits a lawyer from being both advocate and witness. Prohibition is not affected by the character of the testimony as cumulative.").

The court must address the necessity of a lawyer's testimony only if the adversary announces the intent to call the lawyer as a witness. For obvious reasons, the adversary's merely calling the lawyer as a witness cannot automatically justify disqualifying the lawyer -- or else litigants would try that tactic in every case. Instead, the adversary announcing an intent to call the other side's lawyer as a witness must demonstrate that the lawyer should be a witness. The issue here is what level of necessity the adversary must establish.

In some situations the issue involves the client's ability to consent to foregoing the lawyer's helpful testimony in order to keep the lawyer as the client's advocate. Assuming that the client chooses not to call her lawyer as a witness, the other side might argue that the lawyer should be a witness and therefore cannot also act as an advocate. Here, it seems appropriate for courts to take a very skeptical view of the adversary's concern about a client putting on its best case. This situation has generated considerable debate about just how "necessary" the lawyer's testimony might be.

The old ABA Model Code formulation (still followed in some states) indicates the lawyer may not act as an advocate if the lawyer "ought" to be a fact witness at the same trial. Fognani v. Young, 115 P.3d 1268 (Colo. 2005). As the Colorado Supreme Court stated,

[i]nterpretation of "ought to be called" under the Code often reverberated between two strict polar opposite requirements. Some courts imposed disqualification even if the attorney's testimony was minimally useful. See Supreme Beef Processors, Inc. v. Am. Consumer Indus., Inc., 441 F. Supp. 1064, 1068 (N.D. Tex. 1977) (holding that the client is

entitled to "every scrap of favorable evidence," not just that which is essential to the case). Other jurists strictly interpreted the Code to require disqualification only if the lawyer's testimony was "crucial," "indispensable," "obligatory," or "pivotal." See Luna, supra, at 454; accord Wickes v. Ward, 706 F. Supp. 290, 292 (S.D.N.Y. 1989). It appears, however, that the majority of courts read the Code's "ought to be called" language as requiring that the lawyer's testimony be "necessary" or "indispensable" and not just useful. See John J. Dalton, The Advocate-Witness Rule: Problems and Pitfalls, C641 ALI-ABA Continuing Legal Education 313, 317 (1991). Thus, while not requiring that the attorney's testimony be indispensable, by its adoption of the "necessary" language, the Rule places a higher burden on the moving party, signaling the ABA's retreat from the stricter standard that required disqualification if the testimony was even somehow useful.

Id. at 1273.

To be sure, most courts equated the "ought to" standard in the old ABA Model Code formulation to mean "necessary" (which is the word used in the ABA Model Rules).²

Even under the ABA Model Rule formulation requiring disqualification only if the lawyer is a "necessary" witness,³ courts have had difficulty defining that standard.

Courts seem to focus on several factors.

Testimony may be relevant and even highly useful but still not strictly necessary A finding of necessity takes into account such factors as the significance of the matters, weight of the testimony, and availability of other evidence.

² Norman Reitman Co. v. IRB-Brasil Resseguros S.A., No. 01 Civ. 0265 (RCC), 2001 U.S. Dist. LEXIS 16073 (S.D.N.Y. Sept. 24, 2001); Hakimian Mgmt. Corp. v. Richard C. Fiore, Inc., 847 N.Y.S.2d 896 (N.Y. Sup. Ct. 2007) (unpublished opinion); Sicurelli v. Sicurelli, No. 99-12169, 2005 N.Y. Misc. LEXIS 3244, at *5 (N.Y. Sup. Ct. Feb. 4, 2005); Talvy v. American Red Cross, 618 N.Y.S.2d 25 (N.Y. App. Div. 1994). But see MacArthur v. Bank of New York, 524 F. Supp. 1205, 1208 (S.D.N.Y. 1981) (explaining that the "ought to" standard means that the lawyer's testimony would be "significantly useful").

³ ABA Model Rule 3.7(a).

Laro Serv. Sys. Inc. v. New York City Bus. Integrity Comm'n, No. 112884/05, 2005 N.Y. Misc. LEXIS 3492, at *7-8 (N.Y. Sup. Ct. Oct. 12, 2005). Thus, courts tend to analyze (1) the materiality of the issue, and (2) the importance of the lawyer's testimony on that issue.

Not surprisingly, courts disagree about the level of necessity that the adversary must establish before the court will disqualify a lawyer. The various court approaches reflect a spectrum of necessity.

Some courts tend to disqualify a lawyer only if her testimony is both material and unavailable through any other source of evidence.

For instance, the District of Massachusetts recently disqualified a lawyer.

The proposed testimony of the plaintiff's counsel is not only material and relevant, it is also not cumulative and is unobtainable elsewhere. As mentioned above, there is no one else who could testify to the matters about which the plaintiff's counsel will be able to testify. Indeed, without the testimony from the plaintiff's attorneys, it is hard to see how the plaintiff's case could even go forward. The attorneys are crucial witnesses who will be able to offer testimony which will make or break the plaintiff's case. No one else is in that unique position, not even the plaintiff herself. In short, it is clear that the plaintiff's lawyers are necessary witnesses, as that term is understood in Rule 3.7.

Carta v. Lumbermens Mut. Cas. Co., 419 F. Supp. 2d 23, 31 (D. Mass. 2006). The Eastern District of New York recently reached the same conclusion in a criminal case.

As such, Majid's testimony is necessary to plaintiffs' case because first, it is undisputed that the only direct evidence regarding the conversations between Majid and the DA's Office is the testimony of Majid himself and of the ADAs, respectively. Second, as discussed supra, defendants dispute both the timing and the substance of these alleged conversations, leaving Majid's testimony as

the only direct evidence supporting plaintiffs' depiction of certain critical events -- specifically, the alleged phone conversations between Majid and the DA's office.

Crews v. County of Nassau, No. 06-CV-2160 (JFB)(WDW), 2007 U.S. Dist. LEXIS 6572, at *14 (E.D.N.Y. Jan. 30, 2007) (emphasis added).

Similarly, the Eighth Circuit recently affirmed a lower court's disqualification of a lawyer, explaining that the standard essentially means that the lawyer must be "the 'only' person who could testify to a disputed issue." Droste v. Julien, 477 F.3d 1030, 1033 (8th Cir. 2007). One court held that even "highly useful" testimony does not meet the "necessary" standard.⁴ Another court explained that a lawyer is a necessary witness only if she has "unique" knowledge.⁵

Other courts are much more likely to disqualify a lawyer -- finding that the lawyer may not act as an advocate even if the matter is not critical to the case, and even if the lawyer is not the only possible source of evidence. For instance, one court has used the phrase "central" issue.⁶

At the other end of the spectrum, courts have debated whether a lawyer must be disqualified if he is not the only source of evidence. Some courts take a fairly basic approach to this issue, declining to disqualify a lawyer if her testimony would be "cumulative."⁷

⁴ Laro Serv. Sys. Inc. v. New York City Bus. Integrity Comm'n, No. 112884/05, 2005 N.Y. Misc. LEXIS 3492, at *7-8 (N.Y. Sup. Ct. Oct. 12, 2005).

⁵ Shabbir v. Pakistan Int'l Airlines, 443 F. Supp. 2d 299 (E.D.N.Y. 2005).

⁶ Calhoun v. City of Austin, No. A-06-CA-185 AWA, 2007 U.S. Dist. LEXIS 8693, at *10 (W.D. Tex. Feb. 6, 2007).

⁷ Calhoun v. City of Austin, No. A-06-CA-185 AWA, 2007 U.S. Dist. LEXIS 8693 (W.D. Tex. Feb. 6, 2007); ODS Optical Disc Service GmbH v. Toshiba Corp., 838 N.Y.S.2d 503 (N.Y. App. Div. 2007); Latimi v.

Other courts are far more likely to disqualify a lawyer even if others can testify about the same factual matter. For instance, one court recently explained that

[t]hough other witnesses could testify as to what occurred at the meeting, [lawyer's] testimony may be the preferred course to authenticate the minutes and to explain their content.

Eon Streams, Inc. v. Clear Channel Commc'ns, Inc., No. 3:05-CV-578, 2007 U.S. Dist. LEXIS 23950, at *13 (E.D. Tenn. Mar. 27, 2007) (emphasis added). That court ultimately concluded that "any person testifying to a contested issue is a necessary witness." Id. (emphases added). The Restatement takes this type of approach.

As recognized in Subsection (1)(b), in certain circumstances a lawyer is a necessary witness and subject to the prohibition against advocacy, regardless of the lawyer's possible inclination not to testify. A lawyer's testimony is material within the meaning of the Subsection when a reasonable lawyer, viewing the circumstances objectively, would conclude that failure of the lawyer to testify would have a substantially adverse effect on the client's cause. The forensic value of evidence must be assessed in practical terms. If other evidence is significantly less probative or credible or the issue is critical and contested, the lawyer's testimony, although cumulative, may be of significant forensic value and thus material.

Restatement (Third) of Law Governing Lawyers § 108 cmt. e (2000) (emphasis added).

Not surprisingly, this debate often involves scenarios that many lawyers face -- either as the transactional lawyers who were involved in the facts being litigated, or as

New York City Transit Auth., No. 080217/2006, 2007 N.Y. Misc. LEXIS 5424 (N.Y. Civ. Ct. July 3, 2007); Lyman v. City of Albany, No. 06-CV-1109 (LEK/DRH), 2007 U.S. Dist. LEXIS 10359 (N.D.N.Y. Feb. 12, 2007); Clough v. Richelo, 616 S.E.2d 888 (Ga. Ct. App. 2005), cert. denied, Case No. S05C1839, 2005 Ga. LEXIS 738 (Oct. 24, 2005).

eye witnesses to incidents that become important in the case.⁸ One court has warned transactional lawyers that they might have to drop out of a representation if the transaction results in litigation.

Finally, defendant objects that the effect of the court's ruling, if consistently applied, would be to prevent a law firm from maintaining a continuing relationship with a client. That fear is groundless. A lawyer can choose, as McNicol did here, to participate actively in a client's business affairs-not just as an adviser, but also as a negotiator and agent. (McNicol was also a director and a member of the executive committee of the company that plaintiff claims to have rehabilitated.) Such conduct is entirely proper. But if an attorney chooses to become intimately involved in the client's business, then he or she must be prepared to step aside if the matters involved result in litigation. This may be displeasing to firms that wish to have some members act as businessmen and others as litigators. But when these firms place themselves in the position of having an attorney acquire information that makes his testimony necessary, they must accept the consequences.

MacArthur v. Bank of New York, 524 F. Supp. 1205, 1211 (S.D.N.Y. 1981) (emphasis added).

One astute court has also explained that litigants have only so much control over whether their lawyers will be witnesses at the trial.

Whether Miller intends to utilize Benson as a witness or not, as a practical matter Benson cannot avoid being a witness. At any trial of this case, Miller will be asked, whether by Benson or by counsel for Colorado Farms, about his communications with his lawyer, about the advice which

⁸ Restatement (Third) of Law Governing Lawyers § 108 cmt. e, illus. 1 (2000) ("1. Lawyer One represented Seller in negotiating the sale of Seller's real estate and at the closing of the transaction. In each negotiating session and at the closing, the only parties present were Seller, Lawyer One, Buyer, and Buyer's lawyer. Buyer has now filed suit against Seller to rescind the transaction for fraud, alleging that Seller and Lawyer One made misrepresentations during the negotiations and at the closing. The evidence of what was said is sharply conflicting. Lawyer One would be regarded as a material witness for Seller.").

the lawyer provided, and about his reliance upon the advice. And who was that lawyer? Mr. Benson, who stands before the jury as advocate for Miller. Thus, even if Benson did not testify at the trial, he would appear to the jury as a mute witness with regard to the matters about which Miller will testify. Whether intended or not, Benson would not be able to present this case to a jury without being both witness and advocate to the events which are at the heart of this case.

Miller v. Colorado Farms, Civ. A. No. 97-WY-2015-WD, 2001 U.S. Dist. LEXIS 7553, at *12-13 (D. Colo. May 30, 2001) (emphasis added).⁹

Many courts have declined to disqualify lawyers under the witness-advocate rule, finding that they are not necessary witnesses.¹⁰ Other courts have disqualified lawyers whom they have found to be necessary witnesses.¹¹

Best Answer

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

⁹ Accord United States v. Kerik, No. 07 Cr. 1027, 2008 U.S. Dist. LEXIS 5056 (S.D.N.Y. Jan. 23, 2008).

¹⁰ United States v. Fumo, 504 F. Supp. 2d 6 (E.D. Pa. 2007); Sea Tow Int'l, Inc. v. Pontin, No. CV-06-3461 (SJF)(ETB), 2007 U.S. Dist. LEXIS 85527 (E.D.N.Y. Nov. 19, 2007); Bedree v. Lebamoff, Cause No. 1:04-CV-427, 2007 U.S. Dist. LEXIS 84630 (N.D. Ind. Nov. 14, 2007); Eaton v. Siemens, No. 2:07-cv-0315 FCD KJM, 2007 U.S. Dist. LEXIS 58621 (E.D. Cal. Aug. 10, 2007); Metropolitan P'ship, Ltd. v. Harris, Civ. A. No. 3:06CV522-W, 2007 U.S. Dist. LEXIS 68606 (W.D.N.C. Sept. 17, 2007); Solow v. Conseco, Inc., No. 06 Civ. 5988 (BSJ)(THK), 2007 U.S. Dist. LEXIS 40479 (S.D.N.Y. June 4, 2007); Nicola v. Barrett, 840 N.Y.S.2d 677 (N.Y. App. Div. 2007); Mettler v. Mettler, 928 A.2d 631 (Conn. Super. Ct. 2007); State v. Oster, Civ. A. No. P1-02-3047A, 2007 R.I. Super. LEXIS 169 (R.I. Super. Ct. Nov. 28, 2007); Andiero Partners, L.P. v. Duggan, [No number in original], 2007 N.Y. Misc. LEXIS 2246 (Sur. Ct. Jan. 29, 2007); Laro Serv. Sys. Inc. v. New York City Bus. Integrity Comm'n, No. 112884/05, 2005 N.Y. Misc. LEXIS 3492 (N.Y. Sup. Ct. Oct. 12, 2005); McKenzie v. City of Omaha, 668 N.W.2d 264 (Neb. Ct. App. 2003); State v. Van Dyck, 827 A.2d 192 (N.H. 2003); Security Gen. Life Ins. Co. v. Superior Court, 718 P.2d 985 (Ariz. 1986).

¹¹ Williams v. Borden Chem., Inc., 501 F. Supp. 2d 1219 (S.D. Iowa 2007); Kent v. Scamardella, No. 07 Civ. 844 (SHS), 2007 U.S. Dist. LEXIS 50376 (S.D.N.Y. July 11, 2007), complaint dismissed, 2007 U.S. Dist. LEXIS 78648 (S.D.N.Y. Oct. 18, 2007); Beller v. Crow, 742 N.W.2d 230 (Neb. 2007); Weige v. Farmers Ins. Co., 158 S.W.3d 147 (Ark. 2004); Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher, 747 N.Y.S.2d 441 (N.Y. App. Div. 2002); Stewart v. Bank of Am., N.A., 203 F.R.D. 585 (M.D. Ga. 2001); World Youth Day, Inc. v. Famous Artists Merchandising Exchange, Inc., 866 F. Supp. 1297 (D. Colo. 1994).

Effect of Client Consent

Hypothetical 20

You have represented a small businesswoman for nearly a decade. Among other things, you just filed a lawsuit on her behalf against a rival company, claiming various business torts. You have warned your client that the other side might move to disqualify you as an advocate, because you were either the only participant or one of only a few participants in several communications that might be important in the case. Your client has told you that she is willing to forego whatever helpful testimony you might offer on those matters -- in order to keep your services as an advocate. You are flattered by your client's loyalty, but wonder about its effectiveness.

May a client forego a lawyer's helpful testimony to retain the lawyer's services as an advocate?

MAYBE

Analysis

Courts' analysis of a client's consent in this setting highlights the systemic nature of the interests involved in the witness-advocate rule's application.

One might think that a sophisticated client should be able to decide whether to forego favorable testimony to keep a favorite litigator as the trial lawyer. On the other hand, it might make sense for the court to play some role in that determination -- either to protect clients making bad decisions, or to protect the institutional interests of the court.

The Restatement allows the client to make the decision.¹

¹ Restatement (Third) of Law Governing Lawyers § 108 cmt. e (2000) ("The decision whether a lawyer whose testimony is material should continue in the matter as advocate is one for the client (see § 22). Since the lawyer might be disinclined to testify in order to remain as advocate, a conflict of interest is presented (see § 125). The conflict is consentable when the lawyer can adequately represent the client in the litigation without providing the testimony (see § 122(2)(c)), and when the client gives informed consent to the conflict (see § 122(1)). The client must understand the implications of consent.");

The courts are about evenly split on the issue of client consent.

In United States v. Fumo, 504 F. Supp. 2d 6 (E.D. Pa. 2007), for instance, the court held that a criminal defendant may consent to give up helpful testimony from his lawyer in order to keep the lawyer as his advocate. Interestingly, the court noted that the criminal defendant had hired a separate lawyer to help him make this decision. Accord BSW Dev. Group v. City of Dayton, Case No. C-3-93-438, 1995 U.S. Dist. LEXIS 22183, at *15 n.11 (S.D. Ohio Sept. 13, 1995) ("[w]hen a sophisticated client makes an informed choice not to call its attorney as a witness, even though counsel may be a potential witness, courts have held that it is not necessary to disqualify counsel. . . . Therefore, if Plaintiffs decide that Brannon's testimony is not necessary, the basis for disqualifying him will have disappeared.").

Another decision issued by a New York court questioned the idea of ignoring the client's wishes.

Where a client knowingly chooses to forego the testimony of its lawyer because it prefers to continue the representation of its law firm, it is curious indeed for the adversary to insist that the lawyer ought to be called as a witness for that client, and for a court on that basis to disqualify the lawyer or the lawyer's firm.

Restatement (Third) of Law Governing Lawyers § 108 cmt. k (2000) ("When a lawyer's material testimony as a necessary witness (see Comment e) would be favorable to the lawyer's client, the lawyer's announced intention not to testify and to continue as advocate should be accepted by the tribunal when it appears that the lawyer's client has adequately consented after appropriate consultation (see generally § 122 & Comment e hereto). If the client gives informed consent to the lawyer's not testifying for the client, other parties have no standing to object to the lawyer's failure to testify. If the lawyer proposes to testify, opposing parties have standing to invoke the rules of Subsections (1), (2) and (3). If an opposing party proposes to call the lawyer as a witness, the client or lawyer has standing to invoke the rule of Subsection (4) (see Comment l hereto).").

Laro Serv. Sys. Inc. v. New York City Bus. Integrity Comm'n, No. 112884/05, 2005 N.Y. Misc. LEXIS 3492, at *8 (N.Y. Sup. Ct. Oct. 12, 2005) (emphasis added) (refusing to disqualify the law firm of Gibson, Dunn).

In contrast, a Northern District of New York decision flatly stated that "[t]he rule does not permit a client to waive his attorney's testimony if it would be significantly useful in order to retain him as counsel." Lyman v. City of Albany, No. 06-CV-1109 (LEK/DRH), 2007 U.S. Dist. LEXIS 10359, at *9 (N.D.N.Y. Feb. 12, 2007). This ruling followed a much earlier Southern District of New York decision which explained this approach in more detail.

Nor may the client waive the rule's protection by promising not to call the attorney as a witness. The ostensible paternalism of disregarding such waivers is justified by the circumstances in which the problem arises. The client will generally be reluctant to forego the assistance of familiar counsel or to incur the expense and inconvenience of retaining another lawyer. The most serious breaches of the rule, in which an attorney has become intimately involved in the subject matter of the dispute, will often be the very situations in which withdrawal is most burdensome. Moreover, the party will generally be guided in its decision by the very attorney whose continued representation is at issue. At the same time, the attorney will be reluctant to jeopardize good relations with the client and may -- against his better judgment -- defer to the client's desire for representation.

MacArthur v. Bank of New York, 524 F. Supp. 1205, 1209 (S.D.N.Y. 1981) (emphasis added). A number of other courts have taken this approach.²

² Freeman v. Vicchiarelli, 827 F. Supp. 300 (D.N.J. 1993); Estate of Andrews v. United States, 804 F. Supp. 820 (E.D. Va. 1992).

Best Answer

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

"Substantial Hardship" Exception

Hypothetical 21

You have represented a local businessman in essentially all of his matters for the past twenty years. You just helped him in a transaction last year, and now want to act as his trial lawyer in the litigation even though you probably will be called as a necessary witness.

May you avoid disqualification by arguing that losing you as the trial lawyer will cause your client a "substantial hardship"?

NO (PROBABLY)

Analysis

The witness-advocate rule contains a number of exceptions. If one of the exceptions applies, the same lawyer may act both as an advocate and as a witness in the same proceeding.

Under ABA Model Rule 3.7, the exceptions apply if

- (1) the testimony relates to an uncontested issue;
- (2) the testimony relates to the nature and value of legal services rendered in the case; or
- (3) disqualification of the lawyer would work substantial hardship on the client.

ABA Model Rule 3.7(a). Of course, these exceptions only apply if the adversary seeks the lawyer's disqualification -- not if the lawyer's testimony will hurt the client.¹

¹ Restatement (Third) of Law Governing Lawyers § 108 cmt. f (2000).

The first exception applies to such matters as the uncontested introduction of a document or some other basic fact.² The second exception applies to a post-trial effort by the lawyer to recover attorneys' fees under some statute or contractual provision.³

Most of the judicial debate involves the third exception, called the "substantial hardship" exception.

Every court seems to worry about this exception swallowing the rule.

One Eastern District of New York decision explained how most courts approach this issue.

The "substantial hardship" exception[] must be narrowly construed, . . . and does not favor the retention of Majid as counsel in this case. First, to satisfy the exception, a party must show that the hardship derives from the "distinctive value" offered by the attorney as counsel in this case. Plaintiffs have failed to present any distinctive benefit that would be conferred on plaintiffs by Majid's continued representation in this case Second, plaintiffs cannot satisfy the exception by merely pointing to the cost and delay

² ABA Model Rule 3.7 cmt. [3] ("Paragraph (a)(1) recognizes that if the testimony will be uncontested, the ambiguities in the dual role are purely theoretical."); Restatement (Third) of Law Governing Lawyers § 108 cmt. g (2000) ("An advocate may testify for the lawyer's client to establish a necessary fact that is not significantly contested, for example, to establish the chain of custody or genuineness of a document. Thus, it is customary for advocates to attest to the genuineness of documents when supporting a motion based on facts. Even at a trial, counsel ordinarily may assume that the opposing party will stipulate to apparently uncontested facts. Refusal of an opposing party to do so should not put the advocate's client to the risks and expense of obtaining either other witnesses or other counsel.").

³ ABA Model Rule 3.7 cmt. [3] ("Paragraph (a)(2) recognizes that where the testimony concerns the extent and value of legal services rendered in the action in which the testimony is offered, permitting the lawyers to testify avoids the need for a second trial with new counsel to resolve that issue. Moreover, in such a situation the judge has firsthand knowledge of the matter in issue; hence, there is less dependence on the adversary process to test the credibility of the testimony."); Restatement (Third) of Law Governing Lawyers § 108 cmt. g (2000) ("The value of legal services rendered in the proceeding may be testified to by an advocate. The exception applies only with respect to legal services rendered in the proceeding in which the testimony will be given and in ancillary proceedings. The exception rests on the need for testimony on such questions by lawyers who participated in providing the services and on the assumption that the issue will normally be tried before a judge in a collateral proceeding rather than before the jury hearing the merits, such as in many fee-shifting situations. However, the exception also applies to jury-tried issues.").

of obtaining substitute counsel. For the purposes of the witness-advocate rule, "substantial hardship" does not include such "[c]ost and delay": "if [the] cost of retaining substitute counsel were, without more, deemed to constitute 'substantial hardship' . . . the exception would swallow the rule."

Crews v. County of Nassau, No. 06-CV-2610 (JFB)(WDW), 2007 U.S. Dist. LEXIS 6572, at *17-18 (E.D.N.Y. Jan. 30, 2007) (citation omitted) (emphasis added).

Another court from Ohio echoed this approach.

Ohio courts have interpreted this exception under the prior disciplinary rules as requiring that the attorney prove that his counsel has a distinctive value and that the inability to utilize his counsel would result in a substantial hardship to the client. . . . Distinctive value is defined as legal expertise. . . . Mere familiarity with the case or additional expenses is insufficient to meet this exception.

Horen v. Board of Educ., 2007 Ohio 6883, at ¶ 28 (Ohio Ct. App. 2007) (emphases added) (disqualifying a lawyer from representing her husband and daughter in a lawsuit against a school district based on alleged discrimination against her disabled daughter; allowing the lawyer to represent herself as the daughter's mother). Most courts take this approach.⁴

The Restatement provides a list of factors to analyze in making this determination.

⁴ Estate of Andrews v. United States, 804 F. Supp 820, 829 (E.D. Va. 1992) ("The 'substantial hardship' exception to the witness-advocate rule is construed narrowly. . . . It is therefore well-settled that the expense and possible delay inherent in any disqualification of counsel are insufficient to satisfy the 'substantial hardship' exception to the witness-advocate rule."); A.B.B. Sanitec West, Inc. v. Weinsten, 2007 Ohio 2116 (Ohio Ct. App. 2007); Fognani v. Young, 115 P.3d 1268, 1275 (Colo. 2005) ("[W]hen determining whether the disqualification would impose a substantial hardship on the client, we consider all relevant factors in light of the specific facts before the court, including the nature of the case, financial hardship, giving weight to the stage in the proceedings, and the time at which the attorney became aware of the likelihood of his testimony. In addition, we also consider whether the client has secured alternative representation.").

Relevant factors include the length of time the lawyer has represented the client, the complexity of the issues, the client's economic resources, the lawyer's care in attempting to anticipate or avoid the necessity of testifying, the extent of harm to the lawyer's client and opposing parties from the blending of the roles of advocate and witness, additional expense that disqualification would entail, and the effect of delay upon the interests of the parties and the tribunal.

Restatement (Third) of Law Governing Lawyers § 108 cmt. h (2000).

The ABA has provided some examples of situations in which the "substantial hardship" principle might apply.

Despite these considerations, exceptional situations may arise when these disadvantages to the client would clearly be outweighed by the real hardship to the client of being compelled to retain other counsel in the particular case. For example, where a complex suit has been in preparation over a long period of time and a development which could not be anticipated makes the lawyer's testimony essential, it would be manifestly unfair to the client to be compelled to seek new trial counsel at substantial additional expense and perhaps to have to seek a delay of the trial. Similarly, a long or extensive professional relationship with a client may have afforded a lawyer, or a firm, such an extraordinary familiarity with the client's affairs that the value to the client of representation by that lawyer or firm in a trial involving those matters would clearly outweigh the disadvantages of having the lawyer, or a lawyer in the firm, testify to some disputed and significant issue.

ABA LEO 339 (1/31/75).⁵

⁵ ABA Model Rule 3.7 cmt. [4] ("[P]aragraph (a)(3) recognizes that a balancing is required between the interests of the client and those of the tribunal and the opposing party. Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer's testimony, and the probability that the lawyer's testimony will conflict with that of other witnesses. Even if there is risk of such prejudice, in determining whether the lawyer should be disqualified, due regard must be given to the effect of disqualification on the lawyer's client. It is relevant that one or both parties could reasonably foresee that the lawyer would probably be a witness. The conflict of interest principles stated in Rules 1.7, 1.9 and 1.10 have no application to this aspect of the problem.").

Not surprisingly, courts examine a number of factors in applying the "substantial hardship" test.

First, courts sometimes look at the foreseeability of the lawyer's testimony in applying the substantial hardship test.⁶ These courts reason that a litigant who should have known that her lawyer would be disqualified under the witness-advocate rule should not be permitted to claim "substantial harm" in arguing against disqualification.

Second, courts also look at the time left before trial -- the greater the time before the trial, the less likely the client is to succeed in a "substantial hardship" argument.⁷ Of course, those courts which hold off on analyzing the witness-advocate rule until late in the proceeding obviously deal with a stronger argument by the litigant who might lose her lawyer just before the trial. One court held that it could avoid any substantial hardship to the client by delaying the trial until the client could arrange for a new lawyer.⁸ Other courts have looked to whether the client has local counsel who can take over.⁹ The Restatement explains that the court can order other remedial steps.¹⁰

⁶ Eon Streams, Inc. v. Clear Channel Commc'ns, Inc., No. 3:05-CV-578, 2007 U.S. Dist. LEXIS 23950 (E.D. Tenn. Mar. 27, 2007); Beller v. Crow, 742 N.W.2d 230 (Neb. 2007); Horen v. Board of Educ., 2007 Ohio 6883 (Ohio Ct. App. 2007); Weigel v. Farmers Ins. Co., 158 S.W.3d 147 (Ark. 2004).

⁷ Kent v. Scamardella, No. 07 Civ. 844 (SHS), 2007 U.S. Dist. LEXIS 50376 (S.D.N.Y. July 11, 2007), complaint dismissed, 2007 U.S. Dist. LEXIS 78648 (S.D.N.Y. Oct. 18, 2007); Stewart v. Bank of Am., N.A., 203 F.R.D. 585 (M.D. Ga. 2001) (holding that the client had not met the standard, and noting that there had been no discovery and no trial date set).

⁸ Clark v. R.D. Werner Co., Civ. A. No. 99-1426 SECTION "N," 2000 U.S. Dist. LEXIS 858 (E.D. La. Jan. 25, 2000).

⁹ Beller v. Crow, 742 N.W. 2d 230 (Neb. 2007).

¹⁰ Restatement (Third) of Law Governing Lawyers § 108 cmt. k (2000).

Two cases show the varying approaches that courts take to the substantial hardship rule. In one case, a New Hampshire state court refused to disqualify plaintiff's lawyer.

It is beyond question that Attorney Schulte's knowledge of the transactions involved in the present case is extensive. He has represented the plaintiff in these matters for six years. He has become intimately familiar with the numerous details involved. He has participated in the discovery process, and has a consummate understanding of his client's needs.

In determining whether Attorney Schulte's knowledge of this case is unique, so as to justify the application of the hardship exception, we must ask whether the facts and transactions involved are significantly complex. The numerous transactional relationships, both personal and professional, that gave rise to this litigation are not simple. The conduct of the parties exists against a backdrop of complex business and personal transactions that vex the unfamiliar observer. A master's compilation of the essential facts numbers a full fourteen pages in length. The operation of Action Enterprises involved no fewer than three complex separate business agreements, including two partnerships and a corporation. Intricate and lengthy negotiations took place. Under these circumstances, we think that Attorney Schulte's extended involvement with this case renders him particularly and uniquely qualified to represent the plaintiff, so that his departure would work an unreasonable hardship upon his client.

McElroy v. Gaffney, 529 A.2d 889, 893 (N.H. 1987).

In stark contrast, the District of Massachusetts disqualified a lawyer, despite noting that the case had been pending for twelve years.

Another of the plaintiff's arguments is that the motion should not be allowed because disqualification will work a substantial hardship on her. Specifically, says the plaintiff, she works full-time, lives out of state and has contacted two other firms which have declined to take her case. Moreover,

the plaintiff asserts that since this case has spanned twelve years, for successor counsel to get up to speed on the case would be a "staggering" undertaking. . . . Unfortunately for the plaintiff, she has not shown that the substantial hardship exception to Rule 3.7 applies to her case.

Carta v. Lumbermens Mut. Cas. Co., 419 F. Supp. 2d 23, 31 (D. Mass. 2006) (noting that the exception is "construed narrowly," and requires "something beyond the normal incidents of changing counsel, such as the loss of extensive knowledge of a case based upon the long-term relationship between the client and counsel and substantial discovery conducted in the actual litigation" (quoting Brown v. Daniel, 180 F.R.D. 298, 302 (D.S.C. 1998))).

Not surprisingly, some clients succeed in convincing the court that they will suffer "substantial hardship" if they lose their trial lawyer.¹¹ One state court decision demonstrated this fairly forgiving view.

Disqualification separates a party from the counsel of its choice with immediate and measurable effect. Here, attorney Franklin has lived through the previous litigation from its inception and has in his memory, or at his fingertips, knowledge of the case no one else could duplicate. Moreover, regardless of the level of competency of a successor attorney, the degree of confidence and trust that has developed between the Knottses and Franklin cannot be replaced. Franklin has stated that he will not be called to testify on behalf of the Knottses and, in fact, has no information that it is crucial to the Knottses claims against Zurich. We agree with the Court of Appeals that disqualification of Franklin would work a substantial hardship upon the Knottses and would result in irreparable harm.

¹¹ United States v. Fumo, 504 F. Supp. 2d 6 (E.D. Pa. 2007); Xcentric Ventures, LLC v. Stanley, No. CV-07-00954-PHX-NVW, 2007 U.S. Dist. LEXIS 55459 (D. Ariz. July 27, 2007); Calhoun v. City of Austin, No. A-06-CA-185 AWA, 2007 U.S. Dist. LEXIS 8693 (W.D. Tex. Feb. 6, 2007); D.J. Inv. Group, L.L.C. v. DAE/Westbrook, L.L.C., 147 P.3d 414 (Utah 2006).

Zurich Ins. Co. v. Knotts, 52 S.W.3d 555, 560 (Ky. 2001) (emphases added).

Other courts have no problem disqualifying such lawyers.¹²

Best Answer

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

¹² 155 North High, Ltd. v. Cincinnati Ins.Co., 650 N.E.2d 869 (Ohio 1995) (disqualifying the lawyer after finding no substantial hardship); Amos v. Cohen, 806 N.E. 2d 1014 (Ohio Ct. App. 2004) (affirming disqualification of the lawyer).

Imputation of Disqualification

Hypothetical 22

You and your client agree that you will have to testify on her behalf in an upcoming trial.

May one of your partners serve as trial counsel in the trial if you have to testify as a witness in that trial?

YES

Analysis

One of the most dramatic signs that the witness-advocate rule has diminished in its intensity over the past few decades involves the imputation of an individual lawyer's disqualification.

Under the old ABA Model Code formulation, neither the individually disqualified lawyer nor anyone in that lawyer's firm could act as an advocate. ABA Model Code DR 5-101(B). An influential 1963 Texas Law Review article argued in favor of such a broad imputation rule.¹

Several old decisions mercilessly imputed an individual lawyer's disqualification.²

Of course, an individual lawyer's disqualification based on testimony that would hurt his client clearly bars anyone in that firm from representing the client. In that situation, standard conflicts rules prevent any lawyer in the firm from harming the client.³

¹ John F. Sutton, Jr., The Testifying Advocate, 41 Tex. L. Rev. 477-98 (Apr. 1963).

² MacArthur v. Bank of New York, 524 F. Supp. 1205 (S.D.N.Y. 1981).

³ Restatement (Third) of Law Governing Lawyers § 108 cmt. f (2000).

Apart from that situation, the ABA Model Rules totally changed the standard imputation rule. Under the current ABA approach, "[a] lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or Rule 1.9."⁴

The Restatement⁵ and numerous court decisions⁶ have applied this new standard, which disqualifies only the lawyer who must actually testify as a fact witness.

States move in this direction at varying speeds. For instance, New York did not drop its imputation rule until 1990.⁷ Ohio did not switch until 2006.⁸

It is unclear why bars have dropped the imputation rule, apart from their general retreat from a strict witness-advocate rule approach. To the extent that the jury might be affected by the obvious self-interest of a lawyer testifying on behalf of her client while

⁴ ABA Model Rule 3.7(b); ABA Model Rule 3.7 cmt. [5] ("Because the tribunal is not likely to be misled when a lawyer acts as advocate in a trial in which another lawyer in the lawyer's firm will testify as a necessary witness, paragraph (b) permits the lawyer to do so except in situations involving a conflict of interest."); ABA Model Rule 3.7 cmt. [7] ("Paragraph (b) provides that a lawyer is not disqualified from serving as an advocate because a lawyer with whom the lawyer is associated in a firm is precluded from doing so by paragraph (a). If, however, the testifying lawyer would also be disqualified by Rule 1.7 or Rule 1.9 from representing the client in the matter, other lawyers in the firm will be precluded from representing the client by Rule 1.10 unless the client gives informed consent under the conditions stated in Rule 1.7.").

⁵ Restatement (Third) of Law Governing Lawyers § 108 cmt. f (2000) ("Although effective client consent removes the conflict between client and lawyer, an opposing party has standing to object to the lawyer's continued advocacy when the advocate personally will testify.")

⁶ Hays v. Paradise Mission Church, Inc. (In re Harrington, George & Dunn, P.C.), Ch. 7 Case No. 05-91725, Adv. No. 06-6253, 2007 Bankr. LEXIS 2160 (Bankr. N.D. Ga. May 29, 2007); Eon Streams, Inc v. Clear Channel Commc'ns, Inc., No. 3:05-CV-578, 2007 U.S. Dist. LEXIS 23950 (E.D. Tenn. Mar. 27, 2007); Hakimian Mgmt. Corp. v. Richard C. Fiore, Inc., 847 N.Y.S.2d 896 (N.Y. Sup. Ct. 2007)(unpublished opinion); NYC Med. & Neurodiagnostic, P.C. v. Republic W. Ins. Co., 784 N.Y.S.2d 840 (N.Y. Civ. Ct. 2004); Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher, 747 N.Y.S.2d 441 (N.Y. App. Div. 2002); Talvy v. American Red Cross, 618 N.Y.S. 2d 25 (N.Y. App. Div. 1994); Illinois LEO 93-7 (1/21/94); Beneficial Dev. Corp. v. City of Highland Park, 606 N.E.2d 837 (Ill. App. Ct. 1992), aff'd in part and rev'd in part, 641 N.E.2d 435 (Ill. 1994).

⁷ Zito v. Fischbein Badillo Wagner Harding, No. 602308/04, 2005 N.Y. Misc. LEXIS 3526, at *7 (N.Y. Sup. Ct. Nov. 22, 2005).

⁸ Omicare, Inc. v. Provider Servs., Inc., No. 1:05 CV 2609, 2006 U.S. Dist. LEXIS 6497 (N.D. Ohio Feb. 21, 2006).

also acting as the client's advocate, why wouldn't the jury be similarly influenced by one of the advocate's partners taking a stand? The testifying partner obviously shares the advocate's interest (both emotional and financial) in having the client win the case. Courts have not addressed the rationale for the rules change, instead usually just citing the change in declining to impute disqualification.

Even if an entire law firm must be disqualified because of prejudicial testimony, courts must sometimes still wrestle with the law firm playing a role. For instance, in one case, the Eastern District of Louisiana applied that general approach in disqualifying an entire law firm. However, the court held that the firm's lawyers and staff could participate in some ways.

Finally, if Shushan is prohibited from serving as plaintiff's associate counsel, plaintiff requests that Shushan's firm and staff be allowed to continue with the preparation and presentation of plaintiff's case. The Court finds that it is necessary to disqualify Shushan from representing plaintiff at any stage of these proceedings, as there exists potential for his testimony to be prejudicial to plaintiff. In addition, Shushan's own conduct in hiring plaintiff as a permanent employee may be at issue, and this may impede his ability to give plaintiff impartial advice. In light of the upcoming trial date, however, the Court will not prohibit Shushan's staff from aiding Landry in his acquisition of knowledge of the facts and circumstances surrounding plaintiff's claims and in his preparation for presentation of plaintiff's claims at trial.

Clark v. R.D. Werner Co., Civ. A. No. 99-1426 SECTION "N," 2000 U.S. Dist. LEXIS 858, at *7 (E.D. La. Jan. 25, 2000) (emphasis added). In fact, the law firm's duty to its former client presumably would require it to continue acting as a source of historic knowledge.

Best Answer

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

Application of the Witness-Advocate Rule to Nonlawyer Employees

Hypothetical 23

Your paralegal had a one-on-one conversation about an important matter with a witness. That witness now appears poised to provide totally different testimony against your client at an upcoming trial.

May you continue to act as an advocate in the trial if your paralegal will testify about the conversation?

YES

Analysis

The witness-advocate rule applies only to lawyers.¹ As the Southern District of New York explained,

[a]s for the paralegals and interns, they are in principle no different from the office investigators that law firms typically call to testify to disputed facts.

M.K.B. v. Eggleston, 414 F. Supp. 2d 469, 471 (S.D.N.Y. 2006).²

¹ Restatement (Third) of Law Governing Lawyers § 108 cmt. j (2000) ("Testimony by nonlawyer employee or agent of an advocate. The rule of Subsection (1) does not apply to an advocate's nonlawyer employees or agents who do not sit at counsel table or otherwise visibly function in support of advocacy before the factfinder. The exception applies to paralegals, investigators, secretaries, accountants, or other nonlawyer employees, agents, or independent contractors such as investigators. Under rules of evidence, the relationship between such a witness and an advocate may be shown to impeach the person's testimony.").

² Accord Mettler v. Mettler, 928 A.2d 631 (Conn. Super. Ct. 2007); NYC Medical & Neurodiagnostic, P.C. v. Republic W. Ins. Co., 784 N.Y.S.2d 840 (N.Y. Civ. Ct. 2004); Virginia LEO 1668 (2/28/96) (A law firm may represent the defendant beneficiaries in a will contest even though a lawyer at the firm prepared the will and nonlawyer employees witnessed the will, because (1) the lawyer preparing the will was no longer at the firm, and the witness-advocate rule only applies if the lawyer/witness still practices at the firm; and (2) the witness-advocate rule does not apply when nonlawyer employees are called as witnesses.); Virginia LEO 1521 (5/11/93) (A lawyer may represent a developer in litigation in which an employee of a title company (of which the lawyer is part owner) may have to testify, because the witness-advocate rule applies only when a lawyer must testify.)

One might wonder why courts are so quick to apply a totally different rule to nonlawyer employees. To the extent that the jury would either give extra credit or less credit to a lawyer's testimony because the lawyer is representing the client, one might wonder why the jury would not have exactly the same reaction to testimony by the paralegal assisting the lawyer.

Best Answer

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

Permissible Post-Disqualification Activities

Hypothetical 24

You have always practiced on your own. Your largest client just asked you to represent her in an important commercial dispute headed for litigation. You played an integral role in the background incidents, and will have to testify for your client at trial about meetings in which you were the only participant acting on your client's behalf. However, your client wants you to play as active a role as you possibly can before (and possibly after) the trial.

Even if you are disqualified by the witness-advocate rule from acting as your client's trial advocate, may you undertake the following activities on your client's behalf?

- (a) Work "behind the scenes" in drafting briefs, cross-examination outlines, etc.?

YES

- (b) Represent your client at settlement negotiations?

MAYBE

- (c) Take depositions?

MAYBE

- (d) Attend depositions on your client's behalf?

MAYBE

- (e) Argue at pretrial non-evidentiary hearings on issues (such as venue or summary judgment) that involve issues that will not come up again at the trial?

MAYBE

- (f) Argue at pretrial evidentiary hearings?

MAYBE

- (g) Testify at a pretrial evidentiary hearing, as long as the issue will not come up again at the trial.

MAYBE

- (h) Sit at counsel table during the trial?

NO (PROBABLY)

- (i) Argue on your client's behalf on appeal?

MAYBE

Analysis

As in so many other aspects of the witness-advocate rule, the trend has been toward decreasing the rule's stringent approach. However, courts still take widely varying views on exactly what activities an individually disqualified lawyer may undertake (assuming that the lawyer's testimony will help rather than hurt the client).

This issue differs from the analysis of the witness-advocate rule's applicability to pretrial proceedings or other activities. In those settings, the court must decide if the witness-advocate rule applies at that proceeding -- in other words, whether the lawyer may testify at the proceeding and also argue on behalf of her client at the proceeding.

In contrast, courts examining what activities lawyers can take after disqualification have to determine the scope of that disqualification. The paradigm example is the lawyer who announces at the beginning of a case that he realizes he will have to testify on his client's behalf at the trial, and therefore will not act as an advocate at the trial. Similarly, the adversary might successfully move to disqualify the lawyer as

the trial advocate, at a time where both parties have other activities to undertake in preparation for that trial.

In either of these situations, courts must decide what such a disqualified lawyer can and cannot do -- before the trial, at the trial or after the trial.

As early as 1989, the ABA indicated that an individually disqualified lawyer may undertake essentially any pretrial activity.

There are a number of reasons for applying this test and permitting the lawyer-witness to serve as an advocate during the pre-trial stage. First, the necessity to testify may not come about as the case may be settled and not go to trial. Second, even if the case does go to trial, other evidence may be available in place of the lawyer's testimony. Third, a client might choose to forego the testimony of the lawyer because the client prefers to have the lawyer continue to serve as advocate at trial. In any event, once there is client consent after consultation (as described below), there is little likelihood of prejudice to either the client or the justice system, particularly since under the Model Rules the lawyer's partner is permitted to assume the role of advocate at the trial. Moreover, the lawyer who is the potential witness may have more knowledge about the facts of the case than any lawyer in the firm, and it would be unfair to the client not to permit that lawyer to participate in pre-trial proceedings. Accordingly, a lawyer may serve as an advocate in taking depositions of witnesses and engaging in other pre-trial discovery as well as in arguing pre-trial motions and appeals from decisions on those motions as long as the other requirements of Rule 3.7 are met.

ABA LEO 1529 (10/20/89).

A number of courts have articulated this basic approach, without undertaking an activity-by-activity survey of permissible conduct. For instance, one Southern District of New York decision blithely allowed a law firm to continue as usual, but ordered it to designate a trial lawyer just before the trial.

Therefore it is ordered that the Manning firm be disqualified from acting as trial counsel for plaintiffs but be permitted to pursue pretrial activities. When the case is ready for trial, the firm of Manning & Carey is ordered to designate in the note of issue or pretrial order, as the case may be, the individual or firm which will represent plaintiffs at trial and to take no active role in the courtroom conduct of the case.

Norman Norell, Inc. v. Federated Dep't Stores, Inc., 450 F. Supp. 127, 131 (S.D.N.Y. 1978) (emphasis added).¹

Other courts have been much more strict (discussed below).

An Eighth Circuit decision highlighted courts' changing attitudes. The Eastern District of Missouri disqualified plaintiff's lawyer, who intended to testify on his clients' behalf. During a telephonic conference, the district court "made the disqualification effective immediately and gave the [plaintiffs] ten days in which to have a new lawyer enter an appearance on their behalf." On appeal, the Eighth Circuit reversed. Droste v. Julien, 477 F.3d 1030, 1034 (8th Cir. 2007). That court held that the trial court "abused its discretion in making the disqualification motion effective immediately." Id. at 1036.

One purpose of the necessary witness rule is to avoid the possible confusion which might result from the jury observing a lawyer act in dual capacities -- as witness and advocate. The jury is usually not privy to pretrial proceedings, however, so the rule does not normally disqualify the lawyer from performing pretrial activities; the one exception is when the "pretrial activity includes obtaining evidence which, if admitted at trial, would reveal the attorney's dual role." . . . In this case, there is no indication

¹ Accord Clough v. Richelo, 616 S.E.2d 888 (Ga. Ct. App. 2005), cert. denied, No. S05C1839, 2005 Ga. LEXIS 738 (Oct. 24, 2005); Golomb & Honik P.C. v. Ajaj, 51 Pa. D. & C.4th 320 (C.P. 2001); First Republic Bank v. Brand, 51 Pa. D. & C.4th 167 (C.P. 2001); Greenfield & Co. v. Alderman, 52 Pa. D. & C.4th 96 (C.P. 2001).

lawyer Adams's pretrial activity would have revealed her dual role at trial.

Id. at 1035-36.² Interestingly, the Eighth Circuit found that the court's error was harmless, because the plaintiffs could not point to anything that their original lawyer would have done that their new lawyer had not done after replacing him.

In contrast, some courts continue to take a remarkably strict view of what a disqualified lawyer may do before the trial.

Although Rule 3.7 states only that a lawyer who may be called as a witness should not be trial counsel, the Sixth Circuit has long held that, "when an attorney knows that he will or ought to be called as a witness, he should withdraw from representation." . . . This admonishment includes pre-trial activities as well as trial. The Sixth Circuit has stated that: "By Webster's Unabridged a 'trial' is: . . . 2. The formal examination of the matter in issue in a cause before a competent tribunal for the purpose of determining such issue: the mode of determining a question of fact in a court of law. . . . b. All proceedings from the time the parties are called to try their cases in court or from the time when issue is joined to the time of final determination." . . . The Federal Rules of Civil Procedure similarly provide that a trial is a "[s]eamless web to the ascertainment of issues at the pretrial proceedings. . . ." Id. at 716. Because of the "seamless" nature of a trial, whether a disqualification is operative pre-trial, for trial, or for both is a matter within the discretion of the court. Id. A court has the power to disqualify an attorney for pre-trial and trial proceedings.

Eon Streams, Inc. v. Clear Channel Commc'ns, Inc., No. 3:05-CV-578, 2007 U.S. Dist.

LEXIS 23950, at *16-17 (E.D. Tenn. Mar. 27, 2007) (emphases added).

² Accord Levit v. Herbst (In re Thomas Consol. Indus., Inc.), 289 B.R. 647, 653-54 (N.D. Ill. 2003) ("The plain text of LR83.53.7(a), taken together with the committee comment, clearly contemplates that an attorney-witness will not be precluded from participating in all phases of a case, but rather only in trial and evidentiary proceedings involving the testimony of witnesses before a factfinder. Moreover, LR83.53.7(c) provides that 'nothing in this rule shall be deemed to prohibit a lawyer barred from acting as advocate in a trial or evidentiary proceedings from handling other phases of the litigation.' The caselaw decided under these provisions fully supports the plain reading of this language.").

One court has articulated at some length why the witness-advocate rule should be applied to pretrial proceedings as well.

If the attorney-witness rule operated only at the trial stage of litigation as Plaintiff suggests, the policies inherent in RPC 3.7 would be defeated. An attorney facing disqualification at the trial stage might be too anxious to settle a dispute before trial. Conversely, opposing counsel, armed with the knowledge that opposing counsel faces disqualification, might be unwilling to accept an otherwise attractive settlement offer. Finally, allowing an attorney who will testify to continue as advocate up to the time of a trial would put me in the compromising position of choosing whether to force the advocate's client to start over with a new attorney on the eve of trial, to bar testimony necessary to decide the merits of the case, or to abrogate my duty to apply RPC 3.7. Such procedural distortions raise the specter of the 'appearance of impropriety' and the possibility of strategic procedural behavior to the detriment of reaching the merits of the case. Early application of the attorney-witness rule is necessary for the smooth operation of adversarial adjudication.

Freeman v. Vicchiarelli, 827 F. Supp. 300, 304 (D.N.J. 1993).

Not surprisingly, there are decisions going both ways on nearly every pretrial activity that a lawyer might undertake.

(a) Behind the scenes activities. Every court agrees that a disqualified lawyer may work "behind the scenes" to help his client.

One court explained that

all of those reasons should not prevent the attorney from working on the matter in a "behind the scenes" capacity. For example, the disqualified attorney herein, could assist the trial attorney to prepare for the questioning of witnesses, preparing motion papers, etc. To the extent that the court has disqualified attorneys herein, the disqualification is limited to appearances at trial, on depositions or at court appearances.

Zito v. Fischbein Badillo Wagner Harding, No. 602308/04, 2005 N.Y. Misc. LEXIS 3526, at *9-10 (N.Y. Sup. Ct. Nov. 22, 2005).

(b) Representing the client at settlement negotiations. Courts disagree about individually disqualified lawyers' involvement in settlement negotiations.

As one court explained,

The dangers inherent in having a lawyer potentially testify as a witness stem from the strong possibility that the lawyer's credibility will be placed in issue or that the jury will be unduly influenced by the testimony. Such potential for prejudicial impact does not exist through and at a settlement or pre-trial conference where no testimony is being taken and no jury is present.

Moyer v. 1330 Nineteenth Street Corp., 597 F. Supp. 14, 17 (D.D.C. 1984).³

On the other hand, several courts have inexplicably indicated that an individually disqualified lawyer could not represent his client in mediations.⁴

(c) Taking depositions. Because depositions play such a critical role in pretrial discovery, many decisions dealing with permissible pretrial activity involve depositions.

As explained above, an ABA Legal Ethics Opinion flatly explained that a disqualified lawyer "may serve as an advocate in taking depositions of witnesses." ABA

³ Accord United States v. Gomez, 584 F. Supp. 1185, 1190 (D.R.I. 1984) ("Jaime need not be totally cut off from the perceived benefits of Ruginski's counsel. Ruginski may (i) continue to handle pre-trial discovery and pre-trial motions for his client, (ii) engage in Fed. R. Crim. P. 11 plea negotiations on Jaime's behalf; (iii) represent Jaime at pre-trial and chambers conferences, and (iv) participate fully in sentencing and post-trial matters in the district court, should the same come to pass. Ruginski may not, however, participate in the conduct of jury empanelment or of the trial itself, nor may he be seated at counsel table." (footnote omitted)).

⁴ Fognani v. Young, 115 P.3d 1268 (Colo. 2005); Freeman v. Vicchiarelli, 827 F. Supp. 300 (D.N.J. 1993) (holding that the witness-advocate rule prevented an individually disqualified lawyer from participating on behalf of his client).

LEO 1529 (10/20/89). Some courts have likewise indicated that an individually disqualified lawyer can take depositions.⁵

Other courts have held that a disqualified lawyer may not take any depositions. "To the extent that the court has disqualified attorneys herein, the disqualification is limited to appearances at trial, on depositions or at court appearances." Zito v. Fischbein Badillo Wagner Harding, No. 602308/04, 2005 N.Y. Misc. LEXIS 3526, at *9-10 (N.Y. Sup. Ct. Nov. 22, 2005); Massachusetts Sch. of Law v. ABA, 872 F. Supp. 1346, 1380-81 (E.D. Pa 1994).

One court took the same approach, and explained its reasoning.

Though the point is arguable under the Model Rules, the Court continues to believe it is appropriate to disqualify Mr. Culp from conducting or appearing at depositions. Depositions may be offered into evidence at trial and if Mr. Culp is the one taking the deposition, or appears at the deposition to defend or for some other purpose, there is a risk that the offer of the deposition at trial would reveal Mr. Culp's dual role to the factfinder, thus implicating the concern over factfinder confusion at the heart of the advocate-witness rule.

Williams v. Borden Chem., Inc., 501 F. Supp. 2d 1219, 1222 n.5 (S.D. Iowa 2007)

(emphasis added).⁶ Several years earlier, the Northern District of Illinois took the same approach in the context of videotaped depositions.

St. Paul has asked for a protective order barring Gross from participating in the depositions in this case. Its arguments are unpersuasive, except to the extent that a videotape of a deposition may be replayed at trial in place of the witness'

⁵ Landmark Graphics Corp. v. Seismic Micro Tech., Inc., Civ. A. No. H-05-2618, 2007 U.S. Dist. LEXIS 6897 (S.D. Tex. Jan. 31, 2007); Columbo v. Puig, 745 So. 2d 1106, 1108 (Fla. Dist. Ct. App. 1999).

⁶ Accord World Youth Day, Inc. v. Famous Artists Merch. Exch., Inc., 866 F. Supp. 1297 (D. Colo. 1994).

trial testimony. Under that circumstance, Gross may not participate in the deposition or appear on the videotape. Otherwise, he is free to participate in any depositions taken in this action.

AAA Plumbing Pottery Corp. v. St. Paul Ins. Co., No. 94 C 5245, 1995 U.S. Dist. LEXIS 15131, at *17 (N.D. Ill. Oct. 10, 1995).

In some situations, courts make distinctions that seem almost impossible to justify. For instance, in New Gold Equities Corp. v. Capital Growth Real Estate, Inc., No. 89 Civ. 5472 (LBS), 1990 U.S. Dist. LEXIS 3854 (S.D.N.Y. Apr. 9, 1990), the Southern District of New York addressed the issue of the plaintiff's president (who was also a lawyer) taking depositions. The court held that the president/lawyer would be allowed to depose party-witnesses, because "given Mr. Romer's [president/lawyer] knowledge of the facts, he could more efficiently question those witnesses." Id. at *3. However, the court held that the president/lawyer could not depose non-party witnesses. The court explained that

These depositions may ultimately become trial testimony and can always be used at trial for impeachment, and thus the jury may well hear questions that make it obvious that the questioning attorney was a participant in the events concerning which he is interrogating the witness. In the absence of any persuasive reason for permitting this sort of results, I conclude that Mr. Romer should not be permitted to depose non-party witnesses with whom he had contact in connection with the events that are the subject of the lawsuit.

Id. at *4.

Another decision barred a disqualified lawyer from taking depositions, and ordered that the lawyer's name be redacted from the depositions he had already taken.

The Court's decision does not bar Holtmann from acting as Defendants' counsel all together. He may serve as an advocate in pretrial motions and appeals from orders arising therefrom not involving appearance before a jury, non-evidentiary hearings and conferences. However, he may not appear as counsel at any depositions and any depositions previously taken should be redacted to remove any reference to Holtmann serving as counsel in this action before being submitted as evidence in the trial. As in Lowe, Holtmann's name should be redacted from any pleadings on which Holtmann appears as counsel if the pleadings will be introduced as evidence that will be viewed by the jury. He will not be required to withdraw as counsel.

State Farm Mut. Auto. Ins. Co. v. Dowdy, 445 F. Supp. 2d 1285, 1289 (N.D. Okla. 2006)
(emphasis added).

(d) Attending depositions. As explained above, some courts have ordered the redaction of a lawyer's name from the record of depositions already taken -- meaning that those courts presumably would not have allowed the lawyer to attend the depositions if they occurred after the lawyer's disqualification.

(e) Arguing at pretrial nonevidentiary hearings. One Southern District of New York decision allowed an individually disqualified lawyer to handle a summary judgment argument at which no evidence would be taken. MacArthur v. Bank of New York, 524 F. Supp. 1205 (S.D.N.Y. 1981). As explained above, the ABA took this approach in ABA LEO 1529 (10/20/89).⁷

⁷ Accord BSW Dev. Group v. City of Dayton, Case No. C-3-93-438, 1995 U.S. Dist. LEXIS 22183, at *13 (S.D. Ohio Sept. 13, 1995) (allowing a disqualified lawyer to participate in procedures "such as discovery and motion practice").

In contrast, another case indicated that discovery and trial are a "[s]eamless web," so that the court could disqualify a lawyer from all "pre-trial and trial proceedings."⁸

(f) Arguing at pretrial evidentiary hearings. Not many courts seem to have addressed this issue.

At least one court distinguished between a lawyer's role in pretrial activities that do not involve evidence (which presumably would be permissible) and pretrial activities which involve "obtaining evidence" -- which might ultimately be revealed to the factfinder at trial, and thus would not be permissible. Droste v. Julien, 477 F.3d 1030, 1036 (8th Cir. 2007).⁹

As indicated above, some courts simply permit pretrial activities without providing much detail. For instance, one court pointed to the "advocate at a trial" language in explaining that "therefore there is no reason why [the disqualified lawyer] cannot participate in all other stages of this proceeding." Power Up of S.E. La., Inc. v. Power Up U.S.A., Inc., Civ. A. No. 94-1441 SECTION "G," 1994 U.S. Dist. LEXIS 11918, at *8 (E.D. La. Aug. 24, 1994).

⁸ Eon Streams, Inc. v. Clear Channel Commc'ns, Inc., No. 3:05-CV-578, 2007 U.S. Dist. LEXIS 23950, at *16-17 (E.D. Tenn. Mar. 27, 2007) (citation omitted).

⁹ Levit v. Herbst (In re Thomas Consol. Indus., Inc.), 289 B.R. 647, 653-54 (N.D. Ill. 2003) ("The plain text of LR83.53.7(a), taken together with the committee comment, clearly contemplates that an attorney-witness will not be precluded from participating in all phases of a case, but rather only in trial and evidentiary proceedings involving the testimony of witnesses before a factfinder. Moreover, LR83.53.7(c) provides that 'nothing in this rule shall be deemed to prohibit a lawyer barred from acting as advocate in a trial or evidentiary proceedings from handling other phases of the litigation.' The caselaw decided under these provisions fully supports the plain reading of this language.").

Of course, courts which do not permit lawyers to argue at non-evidentiary pretrial hearings presumably would not allow them to engage in such arguments at pretrial evidentiary hearings.

(g) Testifying at pretrial evidentiary hearings. Although not many courts have addressed this situation, several courts have held that a lawyer could testify at a pretrial evidentiary hearing and still participate in the trial as counsel. United States v. Johnson, 131 F. Supp. 2d 1088 (N.D. Iowa 2001); accord Restatement (Third) of Law Governing Lawyers § 108 cmt. c (2000). The New Hampshire Supreme Court held that a lawyer's testimony at a pretrial matter would not necessitate his disqualification as trial counsel. State v. Van Dyck, 827 A.2d 192, 195 (N.H. 2003).

In contrast, the Virginia Bar took a very strict view of the witness advocate rule in a legal ethics opinion dealing with this issue.

In Virginia LEO 1709 (2/24/98), the Virginia Bar held that a lawyer could not act as trial counsel after having testified in a venue hearing, although the venue issue had been resolved by the court, and therefore "will not come up again during the trial on the merits." The Virginia Bar also held that the client could not hire another lawyer to file the complaint, testify himself at the venue hearing and then arrange to enter his appearance "as counsel of record after the pre-trial hearing on venue is concluded."

The use of another attorney only to file suit and examine the attorney-witness, so that the attorney-witness can then take over the case as an advocate and be substituted as counsel, violates DR 1-102(A)(2) (a lawyer may not circumvent a disciplinary rule through the actions of another). In addition, such a situation, if considered acceptable under the Code of Professional Responsibility, would enable the unscrupulous lawyer to manipulate and fashion his testimony to advance

his own self-interest in prevailing as a[n] advocate for the client. Therefore, in the committee's opinion, the disqualification of the witness-advocate cannot be avoided by the limited employment of outside counsel with an understanding that the witness-advocate will appear later as counsel of record in the same case.

Virginia LEO 1709 (2/24/98).

(h) Sitting at counsel table at trial. One court recently found that an individually disqualified lawyer should not be allowed to sit at counsel table.

If Holtmann was allowed to sit at counsel table, he would be introduced as counsel for the Defendants as part of voir dire. Additionally, the Court notes that it is a standard jury instruction in this district, read by the presiding judge and then sent in written form into the jury room, that the statements of counsel are not to be considered as evidence. Finally, it would be fundamentally unfair to allow Defendants to have a fact witness who is able to hear the testimony of all other fact witnesses and consult with counsel regarding their examination and/or cross examination if Plaintiff were not given the same opportunity. The Rule was developed to level the playing field. Defendants' position would effectively add a twelfth man to Defendants' team.

State Farm Mut. Auto. Ins. Co. v. Dowdy, 445 F. Supp. 2d 1285, 1289 (N.D. Okla. 2006).¹⁰

(i) Arguing on appeal. As early as 1980, the ABA indicated that an individually disqualified lawyer may argue the appeal of a case in which he testified, as long as his testimony was not material in that appeal. ABA LEO 1446 (2/2/80).¹¹ Some courts explicitly indicate that disqualified lawyers may argue appeals.¹² At least one court has generically indicated that a disqualified lawyer may participate in "post-trial

¹⁰ Accord Smith v. Wharton, 78 S.W.3d 79 (Ark. 2002); United States v. Gomez, 584 F. Supp. 1185, 1190 (D.R.I. 1984).

proceedings of this cause." Columbo v. Puig, 745 So. 2d 1106, 1108 (Fla. Dist. Ct. App. 1999).

Best Answer

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

¹¹ Accord ABA LEO 1503 (10/30/83); New York City LEO 1988-9 (11/28/88); New Jersey LEO 566 (8/15/85).

¹² Klupt v. Krongard, 728 A.2d 727, 742 n.6 (Md. Ct. Spec. App. 1999).