UPL, MDP AND MJP (DEFINING WHAT LAWYERS DO AND WHERE THEY CAN DO IT): PART I

Hypotheticals and Analyses*

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

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Public Policy Debate

Hypothetical 1

You just participated as the "lawyer" representative on a diverse panel debating the wisdom of loosening unauthorized practice of law rules. Not surprisingly, the nonlawyer representatives have argued that society would benefit by allowing insurance agents to provide simple estate planning advice, permitting marital counselors to assist in simple divorces, etc. The audience at a recent public hearing seemed very sympathetic to these arguments, and you wonder what arguments you can or should muster in response.

Would society benefit from loosening unauthorized practice of law rules to allow nonlawyers to provide such simple services?

(A) YES

(B) NO

MAYBE

Analysis

For well over 100 years, America has debated this issue. The organized bar has emphasized the danger to society of allowing nonlawyers to engage in such activities. Others have argued that society would benefit by allowing nonlawyers to engage in such simple steps, which arguably would make services more widely available and lower costs.

The Restatement extensively discusses this broad debate.

> Controversy has surrounded many out-of-court activities such as advising on estate planning by bank trust officers, advising on estate planning by insurance agents, stock brokers, or benefit-plan and similar consultants, filling out or providing guidance on forms for property transactions by real-estate agents, title companies, and closing-service companies, and selling books or individual forms containing instructions on self-help legal services or accompanied by

> personal, nonlawyer assistance on filling them out in connection with legal procedures such as obtaining a marriage dissolution. The position of bar associations has traditionally been that nonlawyer provision of such services denies the person served the benefit of such legal measures as the attorney-client privilege, the benefits of such extraordinary duties as that of confidentiality of client information and the protection against conflicts of interest, and the protection of such measures as those regulating lawyer trust accounts and requiring lawyers to supervise nonlawyer personnel. Several jurisdictions recognize that many such services can be provided by nonlawyers without significant risk of incompetent service, that actual experience in several states with extensive nonlawyer provision of traditional legal services indicates no significant risk of harm to consumers to such services, that persons in need of legal services may be significantly aided in obtaining assistance at a such lower price that would be entailed by segregating out a portion of a transaction to be handled by a lawyer for a fee, and that many persons can ill afford, and most persons are at least inconvenienced by, the typically higher cost of lawyer services. In addition, traditional common-law and statutory consumer-protection measures offer significant protection to consumers of such nonlawyer services.

Restatement (Third) of Law Governing Lawyers § 4 cmt. c (2000). The Restatement described a recent trend toward permitting nonlawyers to provide such services.

> Courts, typically as the result of lawsuits brought by bar associations, began in the early part of the 20th century to adapt common-law rules to permit bar associations and lawyer-competitors to seek injunctions against some forms of unauthorized practice by nonlawyers. The courts also played a large role in attempting to define a delineate such practice. The primary justification given for unauthorized practice limitations was that of consumer protection -- to protect consumers of unauthorized practitioner services against the significant risk of harm believed to be threatened by the nonlawyer practitioner's incompetence or lack of ethical constraints. Delineating the respective areas of permissible and impermissible activities has often been controversial. Some consumer groups and governmental agencies have criticized some restrictions as over-protective, anti-competitive, and costly to consumers.

> In the latter part of the 20th century, unauthorized practice restrictions has lessened, to a greater or lesser extent, in most jurisdictions. In some few jurisdictions traditional restraints are apparently still enforced through active programs. In other jurisdictions, enforcement has effectively ceased, and large numbers of lay practitioners perform many traditional legal services. Debate continues about the broad public-policy elements of unauthorized-practice restrictions, including the delineation of lawyer-only practice areas.

Restatement (Third) of Law Governing Lawyers § 4 cmt. b (2000).[1]

The bars' narrow view of permissible activities by nonlawyers has drawn complaints from numerous sources. The popular press joined this chorus. In August 2011, a Wall Street Journal article articulated a typical approach.

> The reality is that many more people could offer various forms of legal services today at far lower prices if the American Bar Association (ABA) did not artificially restrict the number of lawyers through its accreditation of law schools -- most states require individuals to graduate from such a school to take their bar exam -- and by inducing states to bar legal services by non-lawyer-owned entities. It would be better to deregulate the provision of legal services. This would lower prices for clients and lead to more jobs.
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> . . . .
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> The competition supplied by new legal-service providers, who may or may not have some type of law degree and may even work for a non-lawyer-owned firm, will not only lead to aggressive price competition but also a search for more efficient methods to serve clients.
>
> . . . .

[1] Restatement (Third) of Law Governing Lawyers § 4 reporter's notes cmt. c (2000) ("Courts are often divided over whether a particular area on nonlawyer practice is unauthorized, for example in the situation of banks, real estate agents, or similar nonlawyers filling in blanks in standard contract forms as a part of transactions in which they are otherwise involved, although in recent years courts have shown a pronounced inclination to hold that particular activity by nonlawyers is in the public interest and thus justified. . . .").

> Allowing accounting firms, management consulting firms, insurance agencies, investment banks and other entities to offer legal services would undoubtedly generate innovations in such services and would force existing law firms to change their way of doing business and to lower prices.
>
> Entry deregulation would also expand individuals' options for preparing for a career in legal services, including attending vocational and online schools and taking apprenticeships without acquiring formal legal education. Established law schools would face pressure to reduce tuition and shorten the time to obtain a degree, which would substantially reduce the debt incurred by those who choose to go to those schools.
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> Supporters of occupational licensing to restrict the number of lawyers in the United States are wrong to assert that deregulation would unleash a wave of unscrupulous or incompetent new entrants into the profession. Large companies seeking advice in complex financial deals would still look to established lawyers, most of whom would probably be trained at traditional law schools but may work for a corporation instead of a law firm.
>
> Others, seeking simpler legal services such as a simple divorce or will, would have an expanded choice of legal-service providers, which they would choose only after consulting the Internet or some other modern channel of information about a provider's track record. Just as the medical field has created physician assistants to deal with less serious cases, the legal profession can delegate simple tasks.
>
> The track record of deregulation naysayers is hardly impressive—after all, some predicted in 1977 that airline deregulation would lead to a United Airlines monopoly. And while we cannot predict all the effects of legal services deregulation, we are confident that those services would be more responsive to consumers and that there would be more jobs in the legal profession.

Clifford Winston & Robert W. Crandall, Time to Deregulate the Practice of Law, Wall Street Journal, Aug. 22, 2011, at A13.

Unfortunately for lawyers, it can be difficult to identify serious societal harm caused by some of the various federal and state regulatory and court-created exceptions allowing nonlawyers to engage in what traditionally was the practice of law.

Best Answer

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

N 3/12

Power to Define and Regulate the Practice of Law

Hypothetical 2

You have never given much thought to who defines and regulates the practice of law, but your law-student daughter just asked you that question over dinner.

Who defines and regulates the practice of law?

(A) COURTS, THROUGH RULES?

(B) COURTS, THROUGH CASE LAW?

(C) COURTS, THROUGH ADVISORY OPINIONS?

(D) THE LEGISLATURE, BY STATUTE?

ANY OF THESE (DEPENDING ON THE STATE)

Analysis

States define the practice of law in a variety of ways, which adds to the confusion about the contours of acceptable and unacceptable activities by nonlawyers.

The American Bar Association Standing Committee on Client Protection periodically surveys unauthorized practice of law issues. The ABA's 2015 survey prompted responses from 20 jurisdictions.

The responses highlighted the variety of state approaches to defining and regulating the practice of law.

> The majority of responding jurisdictions have definitions for both the "practice of law" and the "unauthorized practice of law." "Practice of law" definitions are established by court rule in fifteen jurisdictions, by statute in sixteen, through case law in twenty-one, and through advisory opinions in three jurisdictions. Many jurisdictions have definitions in more than one resource, such as Pennsylvania, which has practice definitions in case law and advisory opinion.

> "Unauthorized practice of law" definitions usually are found either in statutes (fourteen jurisdictions), through a court rule (thirteen jurisdictions) or some combination of statute, rule, case law and advisory opinion.

Am. Bar Ass'n Standing Comm. on Client Protection, 2015 Survey of Unlicensed Practice of Law Committees, at 1 (September 2015).

The Restatement indicates that the ultimate responsibility for these tasks normally rests with courts, rather than the legislature or states' administrative bureaucracies.

> Several courts have stated in very broad terms that the definition of unauthorized practice, because it involves regulation of the legal profession, is ultimately a question reserved by the state's constitution exclusively to the courts, precluding inconsistent legislative or administrative regulation.

Restatement (Third) of Law Governing Lawyers § 4 reporter's notes cmt. c (2000). Case law[1] and legal ethics opinions[2] confirm this observation.

Although states' varying approaches to this power can make it difficult to define the line between acceptable and unacceptable activities, the main impact of this diffused authority probably involves the impact on various interest group's (including lawyers) attempting to shape state policy on unauthorized practice of law issues.

Interestingly, Native American nations also play a key role in licensing lawyers.

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[1] Real Estate Bar Ass'n for Mass., Inc. v. National Real Estate Info. Servs., Inc., 608 F.3d 110 (1st Cir. 2010) (certifying to the Massachusetts Supreme Court the question of Massachusetts's definition of the practice of law, in connection with actions by a company which provides title insurance and other real estate services).

[2] Maryland LEO 00-05 (2005) ("Whether an attorney licensed in Washington, D.C. can prepare wills or any other estate planning documents for residents of Maryland is a question for which there appears to be no Maryland authority. Although this could be taken to imply that there is no such prohibition, it clearly is a decision for which a practitioner must alone be responsible. Ultimately, it is for the Maryland Court of Appeals to decide if the practitioner's conduct constitutes the unauthorized practice of law.").

- P.J. D'Annunzio, No Penalty for Oil and Gas Consultant for Unauthorized Practice of Law, Legal Intelligencer, Apr. 9, 2014 ("Although a natural gas consultant was found to have engaged in the unauthorized practice of law for helping draft a lease, the state Superior Court dismissed the counterclaims against him."; "Judges on the panel said the consultant's advice provided a benefit to his clients, who were preparing to lease their property."; "The clients who sought to lease their property for gas drilling -- Laurel Hill Game and Forestry Club and Williamson Trail Resources -- said William A. Capouillez was unjustly enriched when he was contracted to draft a lease and provide them with legal advice while not being licensed to practice law."; "The Superior Court last week affirmed the Lycoming County Court of Common Pleas' dismissal of an unjust enrichment counterclaim against Capouillez."; "In an unpublished memorandum, Judge Judith Ference Olson agreed with the trial court's determination that 'it would be inequitable for [Capouillez], who provided valuable services to the other parties, to be deprived of any consideration that he received.'"; "She said that the clients should pay for services that the consultant rendered."; "'It would be unfair,' Olson went on, 'for Laurel Hill and Williamson Trail to use [Capouillez's] services to their benefit and then cry foul that he lacked accreditation and authorization in order to deprive him of payment.'").

Best Answer

The best answer to this hypothetical is **ANY OF THESE (DEPENDING ON THE STATE)**.

B 9/12

Power to Enforce Unauthorized Practice of Law Restrictions

Hypothetical 3

Your law-student daughter just asked you how states define the practice of law, and draw the line between what nonlawyers can and cannot do. Although you were unable to answer that question, she quickly followed up with another question that has you equally stumped -- dealing with which branch of government enforces unauthorized practice of law restrictions.

Who enforces unauthorized practice of law restrictions?

(A) STATE BARS?

(B) COURT COMMISSIONERS?

(C) CRIMINAL PROSECUTORS?

ANY OF THESE (DEPENDING ON THE STATE)

Analysis

States not only differ in which branch of government defines the practice of law, they also take varying approaches to enforcement of any restrictions.

Interestingly, a 2000 law review article explained that unauthorized practice of law enforcement is a relatively new phenomenon.

> Until the 1930s, the state bars rarely invoked unauthorized-practice-of-law claims against non-lawyers. The economic pressure of the post-Depression society led state bars to form unauthorized-practice-of-law committees and to enforce the unauthorized-practice laws against non-lawyers.

John S. Dzienkowski & Robert J. Peroni, Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century, 69 Fordham L. Rev. 83, 90-91 (Oct. 2000) (footnotes omitted).

The 2015 survey conducted by the American Bar Association Standing Committee on Client Protection described the responses the survey received from 20 jurisdictions.

> Enforcement authority against UPL is established by court rule in nineteen jurisdictions, by statute in twenty-eight. Most responding jurisdictions report enforcement authority by both statute and court rule. In most jurisdictions there are two or more authorities to enforce UPL regulations, including states attorneys general, state bar committees/counsel, state supreme court committees/commissions, and local and county attorneys. UPL enforcement in the majority of the responding jurisdictions is funded through bar association dues or lawyer assessments or the state supreme court. Most jurisdictions either do not have a specific annual expenditure for UPL enforcement or were unaware of the exact amount. The Florida Bar continues to lead the country in funding UPL enforcement, spending approximately $1.8 million annually. Other jurisdictions providing a significant budget for enforcement are Ohio, Colorado, Nebraska, and Texas.

Am. Bar Ass'n Standing Comm. on Client Protection, 2015 Survey of Unlicensed Practice of Law Committees, at 1-2 (September 2015).

Interestingly, the ABA survey found that some jurisdictions have essentially stopped enforcing the unauthorized practice of law restrictions.

> Several jurisdictions have more than one entity responsible for UPL enforcement. Twenty-three jurisdictions actively enforce UPL regulations, although some jurisdictions indicate that insufficient funding or resources make enforcement challenging. Nine jurisdictions stated that enforcement is inactive or non-existent.

Not surprisingly, states' approaches to this issue continue to evolve. For instance, in April 2010 the Montana Supreme Court disbanded its commission on unauthorized practice, and handed over that duty to the Montana State Attorney

General's Consumer Protection Office. In re Dissolving Comm'n on Unauthorized Practice of Law, 242 P.3d 1282 (Mont. 2010).

Those states which continue to enforce unauthorized practice of law restrictions can rely on a variety of remedies for improper action by nonlawyers. The 2012 ABA survey reported on numerous remedies relied upon by the 20 jurisdictions that responded to the ABA.

> The penalties/sanctions for UPL violations that are available to enforcement authorities include (by number of responding jurisdictions): civil injunctions (35), criminal fines (23), prison sentence (21), civil contempt (20), restitution (15), and civil fines (15). Other remedies may be available. Most jurisdictions have several available remedies.

Am. Bar Ass'n Standing Comm. on Client Protection, 2015 Survey of Unlicensed Practice of Law Committees, at 2 (September 2015).

As with states' approaches to enforcement responsibility, states' remedies change from time to time. A New York bill introduced in March 2011 would change the unauthorized practice of law from misdemeanor into a Class E felony.

> Practicing law in New York without a license would be elevated to a felony from a misdemeanor under a bill that was approved by the state Senate this week and sent to the Assembly. The measure (S. 1998) would provide the same penalty for the false practice of law as for impersonating other state-licensed professionals such as physicians, veterinarians, pharmacists, dentists, certified public accountants and nurses.
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> "People entrust attorneys to carry out some of their most important personal and financial wishes, such as wills, home purchases and marital separations," Senate sponsor Charles J. Fuschillo Jr., R-Merrick, said in a statement. "It makes no sense that someone who defrauds consumers and jeopardizes their legal wishes faces misdemeanor

> charges while someone who impersonates a landscape architect or interior designer is guilty of a felony."
>
> A misdemeanor is punishable by up to one year in jail. A Class E felony carries a prison term of up to four years. The legislation was approved 59-0 by the Senate on Monday

Joel Stashenko, New York Bill Would Make it a Felony to Impersonate a Lawyer, New York Law Journal, Mar. 10, 2011. A similar Virginia legislative proposal has not been approved by the Virginia General Assembly.

Despite this sometimes uncertain and changing enforcement regime, state courts generally uphold unauthorized practice of law restrictions.

- Celis v. State, 354 S.W.3d 7, 15-16, 16 (Tex. App. 2011) (upholding the constitutionality of a Texas law making it a felony for a nonlawyer to falsely hold himself out as a lawyer; upholding the conviction of a lawyer practicing in Texas who falsely claimed to be a Mexican lawyer entitled to act as a foreign legal consultant; "The evidence established that appellant held himself out as a lawyer with CGT Law Group International, LLP, a law firm located in Nueces County, Texas founded by appellant and others. Appellant has not been admitted to the practice of law in Texas. Although appellant described himself as a lawyer from Mexico, he is not certified as a foreign legal consultant. According to the testimony of Josh Hensley, the Director of Eligibility and Examination of the Texas Board of Law Examiners, a person who has a certificate as a foreign legal consultant is considered to be affiliated with the State Bar of Texas, and is allowed to have a law practice limited to advising clients about the laws of Mexico while maintaining an office in Texas. The Texas Board of Law Examiners requires attorneys from Mexico to produce a 'cedula' as evidence of the person's ability to practice law in Mexico, as well as a certificate from Mexico's Ministry of Education stating that the person is currently meeting the requirement to be a lawyer in Mexico."; "The evidence, including appellant's sworn testimony, established that appellant does not have a cedula."), petition for discretionary review granted, PD-1584-11, 2012 Tex. Crim. App. LEXIS 198 & PD-1585-11, 2012 Tex. Crim. App. LEXIS 199 (Tex. Crim. App. Feb. 1, 2012) (unpublished opinion).

In fact, some prosecutors are not shy in their zealous enforcement of unauthorized practice of law restrictions. In 2010, prosecutors arrested Greene County,

Virginia Commissioner of Revenue for unauthorized practice of law. A newspaper article described the circumstances.

- Susan Gibbs, Local Official Arrested, Greene County Record, Nov. 19, 2010 ("Greene County Commissioner of Revenue Larry Snow, 61, was arrested Tuesday, November 9 and charged with practicing law without a license."; "'I want to be up front about this,' Snow told the Greene County Record when he informed the paper of his arrest the morning of Wednesday, Nov. 10."; "At the time, Snow made a brief statement. 'An elderly widow concerned with her health asked me to give her information about what she could do with her property,' Snow said. 'I told her what I knew. She told me what she wanted and asked me to type it up. That document was notarized by a notary public currently employed at the Greene County Department of Social Services.' Greene County Director of Social Services James Howard had no comment about the case."; "Snow was arrested by Special Agent Charles F. Myers of the Virginia State Police. Snow's first court appearance was Nov. 17 in Greene County General District Court."; "'Because it involves an elected official we can neither confirm nor deny our involvement in the case,' said Corinne Geller, spokeswoman for the Virginia State Police. 'That is our policy as mandated by the Office of the Attorney General.' Geller also said that she had received instructions to refer all questions on the matter to the Office of the Attorney General."; "The Office of the Attorney General is handling the case because it is the office that handles cases of practicing law without a license, the office's director of communication, Brian Gottstein, told the Record by e-mail. When asked who is responsible for overseeing elected constitutional officers - such as Snow - Gottstein said, 'it would be the voters and the law.'"; "The director of communications would not answer additional questions regarding the case."; "'Regarding your other questions, we do not comment on ongoing investigations,' his e-mail stated."; "According to the Code of Virginia, it is []§24.2-231, an elected official can be removed from public office if convicted of a felony."; "Snow's charge is defined on the warrant of arrest as a Class 1 misdemeanor, which, according to the Code of Virginia, carries a maximum punishment of 12 months jail time and a fine of up to $2,500, either or both."; "The case is to be prosecuted by the City of Charlottesville's Deputy Commonwealth's Attorney Claude Worrell."; "Dave Chapman, commonwealth's attorney for the City of Charlottesville, refused to comment on the case."; "'We maintain a policy of not commenting on pending cases except in the context of court proceedings,' Chapman said. He explained that the only permitted exceptions to that rule are in the interest of law enforcement or public safety.").

This local Virginia elected official was found guilty of a misdemeanor violation -- perhaps because of his fairly unrepentant attitude.

- Jane DeGeorge, Commissioner of Revenue Snow Found Guilty, Greene County Record, Dec. 30, 2010 Greene County Commissioner of Revenue Larry Snow was found guilty of practicing law without a license last week. . . . Snow's defense attorney, David Randle of Stanardsville, said that the commissioner of revenue's only motivation was to help a person he considered a friend who did not otherwise have the means to hire a private attorney. 'He was not trying to make money on the side,' Randle said. . . . The prosecutor initially told the judge that Snow had told the arresting officer that he had helped prepared the deed, that he had done it in the past, and that he would do it again. . . . Snow's attorney said that these statements referred only to the action of helping a friend, and that the commissioner of revenue did not mean that he would help prepare other deeds in the future.

Other states are equally aggressive.

- Matt Fair, Phony Atty Gets 12 Years Following Fraud Conviction, Law360, July 11, 2018 ("A real federal judge sentenced a phony attorney to a dozen years in prison on Wednesday in Pennsylvania for running a fraudulent law practice out of his New Jersey home that duped more than a hundred victims into paying for his services over the course of more than a decade."; "U.S. District Judge Gene Pratter said that her sentence in the case reflected the fact that Leaford George Cameron had shown little remorse for his actions, had been uncooperative with prosecutors and the court, and had failed to learn from prior convictions for nearly identical conduct."; "Cameron was convicted in February on six counts, including fraud and making false statements, for posing as a lawyer on behalf of clients in state and federal courts across the country using stolen attorney identification numbers."; "Prosecutors said this was Cameron's third time being found guilty for posing as an attorney, and that the most recent charges stemmed from fraudulent legal work he performed while on probation following a 2014 conviction."; "The first conviction, according to court records, occurred in 1993.").

- Christine Powell, Mass. Man Ordered To Stop Unauthorized Practice of Law, Law360, Dec. 18, 2017) ("A Massachusetts state judge blocked a man from illicitly practicing law after Attorney General Maura Healey accused him of giving struggling consumers deceptive advice about mortgage loan modifications and bankruptcy, Healey's office announced Monday."; "Essex Superior Court Judge James Lang ruled in favor of Healey's office on Dec. 14 by ordering a preliminary injunction against Homayoun Maali, whom Healey's office has accused in a civil lawsuit of flouting the Massachusetts Consumer Protection Act and other state regulations."; "Specifically, Healey's office has asserted that Maali charged down-and-out consumers thousands of dollars in illegal fees to compile loan modification applications and bankruptcy petitions afer promising he

could assist them in lowering their mortgage payments or avoiding foreclosure or eviction."; "In reality, rather than avoiding foreclosure or eviction, consumers who paid Maali for his services – which he is neither licensed nor qualified to perform in Massachusetts – often would up facing those kinds of proceedings, Healey's office has alleged."; "Under Judge Lang's order, Maali is prohibited from giving consumers advice about loan modifications or bankruptcy, charging them fees for any such services, 'practicing law or representing in any way that [he] is an attorney or otherwise qualified to give legal advice in Massachusetts' and destroying relevant records." (alteration in original)).

- Jason Grant, Upstate Woman Pleads To Bilking Inmates Using Fake Law Firm, N.Y.L. J., Nov. 1, 2017 ("A felon who posed as a lawyer and operated a fake law firm while handling hundreds of inmate cases, including parole appeals, has pleaded guilty to fraud and will spend more time behind bars, state Attorney General Eric Schneiderman announced."; "Antonia Barrone, who used at least six aliases, including the name Mario Vrendenburg, has pleaded guilty to running a phony law firm known as NYS Prisoner Assistance Center, or NY Parole Aids. Working form her Albany home but using that business front, she defrauded more than 400 New Yorkers out of thousands of dollars over nearly five years, Schneiderman's office said.").

- Kali Hays, 'Scam Artist' Charged For Posing As Immigration Attorney, Law360, Dec. 9, 2016) ("A Los Angeles business owner is facing several felony charges for deceiving immigrants by posing as an immigration attorney and providing legal consultations and services without any accreditation, and even holding himself out as such on both mainstream and Spanish-language media platforms, U.S. Immigration and Customs Enforcement said Thursday."; "In a press release, ICE said the owner of Coalición Latinoamericana Internacional, Oswaldo Rafael Cabrera, 48, was arrested Wednesday after the California Attorney General's Office issued an arrest warrant coinciding with an affidavit charging Cabrera with multiple counts of grand theft, attempted perjury and conspiracy for falsely claiming to be an immigration lawyer and expert and charging up to $9,000 for his services."; "California Attorney General Kamala D. Harris characterized Cabrera as a 'scam artist' in a statement, and a man who worked to 'exploit immigrants trying to navigate a complex system.'").

- Jimmy Hoover, NJ Man Had Fake Immigration Practice For Years, Feds Say, Law360, Sept. 10, 2015 ("A New Jersey man faces up to 75 years in prison after a federal grand jury indicted him Thursday for allegedly pretending to be a lawyer and running a fake immigration law practice for more than 10 years, the Department of Justice said."; "Leaford G. Cameron, 62, may also be liable for $1.5 million in fines for the alleged

fraud scheme, in which prosecutors say, starting in 2003, Cameron duped as many as 74 victim 'clients' all along the East Coast as well as Jamaica and India, often submitting legal filings and appearing in court on their behalf, attesting, while under penalty of perjury, that he was in fact licensed to practice in the state."; "The charges include mail fraud, wire fraud and false statements."; "'Defendant Leaford George Cameron was not, and has never been, a member of the bar of the Commonwealth of Pennsylvania, nor an attorney licensed to practice law by the Supreme Court of Pennsylvania,' read the indictment.'").

- United States v. Kieffer, 681 F.3d 1143, 1146 (10th Cir. 2012) (upholding the conviction of an imposter who practiced law without even being a lawyer, but reversing a nine year prison sentence; "By all appearances, Defendant Howard Kieffer had a successful nationwide criminal law practice based in Santa Ana, California. Defendant held himself out as Executive Director of Federal Defense Associates, and touted his services through websites, legal conferences, and professional contacts. As early as 1997, Defendant appeared as co-counsel of record in United States v. Olsen, 1997 WL 67730 (9th Cir. 1997) (unpublished). Over the next few years, Defendant gained admission to a slew of federal trial and appellate courts around the country, where he appeared on behalf of numerous criminal defendants. All the while, Defendant had a secret. He is not and never has been an attorney. He never went to law school, never sat for a bar exam, and never received a license to practice law."; "Defendant no longer has a secret. In 2009, a jury in the District of North Dakota convicted Defendant of mail fraud, in violation of 18 U.S.C. § 1341, and making false statements, in violation of 18 U.S.C. § 1001. The jury found Defendant gained admission to the District of North Dakota by submitting a materially false application to the court. He then relied on that admission to gain admission to the District of Minnesota, District of Colorado, and Western District of Missouri. Once admitted in those districts, Defendant proceeded to appear on behalf of federal criminal defendants unaware of his true identity. The district court sentenced Defendant to 51 months imprisonment and ordered him to pay $152,750 in restitution to six victims of his scheme.").

These states' aggressive actions contrast with some states' nearly complete abandonment of any unauthorized practice of law enforcement.

Best Answer

The best answer to this hypothetical is **ANY OF THESE (DEPENDING ON THE STATE)**.

B 9/12

Defining the Practice of Law

Hypothetical 4

Your law-student daughter seems to be practicing her cross-examination skills over dinner. After asking you about how states define, regulate and enforce unauthorized practice of law restrictions, she asks perhaps the most elemental question about the profession in which you engage in which she will soon join you.

What is the "practice of law"?

STATES SEEM TO AGREE ON AT LEAST THE CORE ACTIONS THAT DEFINE THE PRACTICE OF LAW: APPEARING IN COURT, PREPARING PLEADINGS, DRAFTING OTHER DOCUMENTS THAT DEFINE PEOPLES' RIGHTS, AND PROVIDING LEGAL ADVICE

Analysis

Although it may be difficult for self-absorbed lawyers to accept, both the phrase "unauthorized practice of law" and the concept are hazy and uncertain at best -- yet can form the basis for severe penalties.

The Restatement explains this strange dichotomy of uncertain definitions yet great stakes.

> To some, the expression "unauthorized practice of law" by a nonlawyer is incongruous, because it can be taken to imply that nonlawyers may engage in some aspects of law practice, but not others. The phrase has gained near-universal usage in the courts, ethics-committee opinions, and scholarly writing, and it is well understood not to imply any necessary area of permissible practice by a nonlawyer. Moreover, a nonlawyer undoubtedly may engage in some limited forms of law practice, such as self-representation in a civil or criminal matter . . . . It thus would not be accurate for the black letter to state flatly that a nonlawyer may not engage in law practice.

> A nonlawyer who impermissibly engages in the practice of law may be subject to several sanctions, including injunction, contempt, and conviction for crime.

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

The Restatement also offers an understated explanation of the great difficulties courts and other state institutions have had in actually defining the practice of law. The simple truth is that it can be nearly impossible to precisely define the practice of law. The Restatement recognizes this awkward reality.

> Courts have occasionally attempted to define unauthorized practice by general formulations, none of which seems adequately to describe the line between permissible and impermissible nonlawyer services, such as a definition based on application of difficult areas of the law to specific situations. . . . Many courts refuse to propound comprehensive definitions, preferring to deal with situations on their individual facts.

Restatement (Third) of Law Governing Lawyers § 4 reporter's note cmt. c (2000). As one court similarly explained,

> it is often difficult, if not impossible, to lay down a formula or definition of what constitutes the practice of law.

Sudzus v. Dep't of Employment Sec., 914 N.E.2d 208, 215 (Ill. App. Ct.), appeal denied, 920 N.E.2d 1082 (Ill. 2009) (unpublished opinion). Other courts have expressed similar sentiments.[1]

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[1] In re Dissolving Comm'n on Unauthorized Practice of Law, 242 P.3d 1282, 1283 (Mont. 2010) (dissolving the bar's Commission on the unauthorized practice of law, and explaining that the Attorney General will now handle any UPL matters; "We conclude that the array of persons and institutions that provide legal or legally-related services to members of the public are, literally, too numerous to list. To name but a very few, by way of example, these include bankers, realtors, vehicle sales and finance persons, mortgage companies, stock brokers, financial planners, insurance agents, health care providers, and accountants. Within the broad definition of § 37-61-201, MCA, it may be that some of these professions and businesses 'practice law' in one fashion or another in, for example, filling out legal forms, giving advice about 'what this or that means' in a form of contract, in estate and retirement planning, in obtaining informed consent, in buying and selling property, and in giving tax advice. Federal and state

Perhaps the best evidence of the great difficulty the legal profession has in defining itself involves the ABA's efforts to articulate a proposed definition of practicing law. The American Bar Association Taskforce on the Model Definition of the Practice of Law offered the following proposed draft definition in September 2002.

> The "practice of law" is the application of legal principles and judgment with regard to the circumstances or objectives of a person that require the knowledge and skill of a person trained in the law. . . . A person is presumed to be practicing law when engaging in any of the following conduct on behalf of another: (1) Giving advice or counsel to persons as to their legal rights or responsibilities or to those of others; (2) Selecting, drafting, or completing legal documents or agreements that affect the legal rights of a person; (3) Representing a person before an adjudicative body, including, but not limited to, preparing or filing documents or conducting discovery; or (4) Negotiating legal rights or responsibilities on behalf of a person.

ABA Ctr. for Prof'l Responsibility, Task Force on Model Definition of the Practice of Law (Draft, Sept. 18, 2002). Remarkably, the ABA could not agree on the definition of what

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administrative agencies regulate many of these professions and businesses via rules and regulations; federal and state consumer protection laws and other statutory schemes may be implicated in the activities of these professions and fields; and individuals and non-human entities may be liable in actions in law and in equity for their conduct. Furthermore, what constitutes the practice of law, not to mention what practice is authorized and what is unauthorized is, by no means, clearly defined. Finally, we are also mindful of the movement towards nationalization and globalization of the practice of law, and with the action taken by federal authorities against state attempts to localize, monopolize, regulate, or restrict the interstate and international provision of legal services."); State ex rel. Indiana State Bar Ass'n v. United Fin. Sys. Corp., 926 N.E.2d 8, 14 (Ind. 2010) ("Although it is the province of this Court to determine what acts constitute the practice of law, we have not attempted to provide a comprehensive definition because of the infinite variety of fact situations. . . . Nor do we attempt to do so today."); Sudzus, 914 N.E.2d at 215 (holding that a nonlawyer's role for his employer in an unemployment compensation hearing did not amount to the unauthorized practice of law; "Running through both contentions is an awareness that it is often difficult, if not impossible, to lay down a formula or definition of what constitutes the practice of law. . . . Hence, definition of the term 'practice of law' defies mechanistic formulation."); Pennsylvania LEO 90-02 (3/2/90) (explaining that "[w]hat activity constitutes the 'practice of law' in Pennsylvania is, as in most states, undefined").

its members do, and abandoned its task on March 28, 2003.[2] The final Task Force suggested, among other things, that jurisdictions should apply their "common sense" when articulating a definition of the practice of law.[3]

The ABA Model Rules now contain a fairly sheepish comment.

> The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons.

ABA Model Rule 5.5 cmt. [2].

Some states seem to have floundered more than others in attempting to define the practice of law. For instance, in 2003 the Illinois Bar cited a 1966 case with the remarkably unhelpful guidance that if the acts being analyzed "require legal expertise or knowledge or more than ordinary business intelligence, they constitute the practice of law."[4] It is difficult to imagine any more amorphous and unhelpful definition.

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[2] Later that year, the ABA adopted a fairly bland call for each jurisdiction to adopt its own definition, with certain core principles. ABA Task Force on Model Definition of the Practice of Law, Report & Recommendation to the House of Delegates (adopted Aug. 11, 2003), available at http://www.americanbar.org/content/dam/aba/migrated/cpr/model-def/taskforce_rpt_328.authcheckdam.pdf ("RESOLVED, that the American Bar Association recommends that jurisdiction adopt a definition of the practice of law."; "FURTHER RESOLVED, that each jurisdiction's definition should include the basic premise that the practice of law is the application of legal principles and judgment to the circumstances or objectives of another person or entity."; "FURTHER RESOLVED, that each jurisdiction should determine who may provide services that are included within the jurisdiction's definition of the practice of law and under what circumstances, based upon the potential harm and benefit to the public. The determination should include consideration of minimum qualifications, competence and accountability.").

[3] Id.

[4] Illinois LEO 02-04 (4/2003) ("In determining whether certain conduct constitutes the practice of law, the courts look to the character of the acts themselves. Chicago Bar Ass'n v. Quinlan & Tyson, Inc., 34 Ill. 2d 116, 120, 214 N.E. 2d 771, 774 (1966). If those acts require legal expertise or knowledge or more than ordinary business intelligence, they constitute the practice of law. Id.; In re Howard, 188 Ill. 2d 423, 438, 721 N.E. 2d 1126, 1134 (1999); In re Discipio, 163 Ill. 2d 515, 523, 645 N.E. 2d 906, 910 (1994). See also Rotunda, Professional Responsibility 123 (3d ed) (noting that in general, the courts have held that a person practices law when the person applies the law to the facts of a particular case).

Some states have what could only be called a goofy definition of the practice of law. For instance, the Rules of the Supreme Court of Virginia define the practice of law as someone providing legal advice for a third party who is "not his regular employer." Va. Sup. Ct. R. pt. 6, § I(B)(1). Interestingly, this definition could be read to mean that in-house lawyers are not practicing law at all.

One Virginia state court actually pointed to this definition in finding that the attorney-client privilege did not protect communications between in-house lawyers and their clients. Belvin v. H.K. Porter Co., 17 Va. Cir. 303, 307-08 (Va. Cir. Ct. 1989) (explaining that "[a]ttorney-client privileges in Virginia regardless of what it is in other jurisdictions is clearly defined in the Rules of Court, Part Six, Integration of the State Bar, Section I. Unauthorized Practice Rules and Consideration. . . . Whatever the law may be elsewhere, the relationship of attorney and client is defined in Virginia by the preceding rules of court, and that relationship as defined must be the predicate for determining whether or not the attorney-client privilege exists. In this State under the rules and law of this State and the facts of this case, the privilege does not exist because the relationship of attorney-client does not exist between the lawyers and the OCF legal department and the corporation by which they are employed." (emphasis added)).

Even the Virginia Bar seems to have made this mistake on one occasion. Virginia LEO 1172 (12/19/88, clarified 4/19/90). However, the Virginia Bar soon

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While the charge of unauthorized practice of law typically relates to legal work performed by non-attorneys, the Committee recognizes that it also applies to attorneys licensed in other states who perform legal services within the foreign jurisdiction without being licensed or otherwise authorized to do so.").

corrected itself. Virginia LEO 1211 (4/19/89) (explaining that in-house lawyers do have an attorney-client relationship with employer, and therefore may not ask for an indemnity agreement).

This weird approach reached a crescendo in 1994, when the Virginia Bar held that a nonlawyer could provide legal advice to a company, and even call herself "general counsel."

> I am writing in response to your letter of March 31, 1994 requesting an Unauthorized Practice of Law advisory opinion dealing with the employment of a non-lawyer as in-house general counsel to a Virginia corporation.
>
> . . . .
>
> . . . [I]n the circumstances you describe, the Committee is of the opinion that it does not constitute the unauthorized practice of law for a non-lawyer to provide legal advice to or prepare legal instruments for his regular corporate employer since the definition of the practice of law does not encompass one who undertakes to provide such services to a regular employer. The Committee is of the further opinion that it is not improper for a non-lawyer to use the title "General Counsel" when employed by a corporation and performing such permissible tasks as described above.

Virginia UPL Op. 178 (8/12/94) (emphases added). The Virginia Supreme Court ultimately adopted a rule requiring all in-house lawyers (not fully admitted in Virginia) to either register with the bar or obtain a certification. That rule implicitly acknowledges that in-house lawyers are actually practicing law.

Although every state defines the practice of law in a slightly different way, most identify certain core activities as constituting the practice of law -- appearing in court; preparing pleadings; drafting other documents that define people's rights (such as deeds, wills, etc.); and providing legal advice.

Several state courts and bars have used essentially the same words.

- Smith v. Hewlett-Packard Co., Case No. 2:15-cv-484-GMN-VCF, 2016 U.S. Dist. LEXIS 75938, at *4, *4-5, *5, *5-6 (D. Nev. June 9, 2016) (rejecting plaintiff's motion to disqualify and sanction defendant's lawyer based on plaintiff's argument that defendant's lawyer lied about her practice of law in Pennsylvania; "Although the 'practice of law' may be difficult to define, it most assuredly encompasses: advising clients regarding the law; preparing documents for client which require a familiarity with legal principles beyond the ken of the ordinary layman such as wills and contracts; and appearing for client before public tribunals charged with the power of determining liberty or property rights.' Gmerek v. State Ethics Com'n, 751 A.2d 1241, 1251 (Pa. Commw. Ct. 2000). 'However, it is important to stress that the 'practice of law' is not limited to a lawyer's appearance in court.' Id."; "Plaintiffs argue that Elam's [lawyer] two appearances in Pennsylvania District Court do not constitute the 'regular practiced law.' Plaintiffs' argument adopts an extremely narrow definition of the term 'practice of law.' Pennsylvania courts have addressed and rejected Plaintiffs' definition."; "Furthermore Plaintiffs' definition is out of place in a modern legal market. In the era of the legal specialist, Plaintiffs' definition leads to the absurd conclusion that every transactional lawyer or in-house counsel does not 'practice law' simply because they do not regularly appear in court. Since this court does not accept Plaintiffs' definition of 'practice of law,' it finds that Elam made no misrepresentation on her pro hac vice petition."; "Plaintiffs argue that Elam engaged in the unauthorized practice of law when she continued to work for HP in Virginia despite not being admitted to the Virginia state bar and without a corporate counsel certificate. Smith's argument ignores that fact that the Virginia Rules of Professional Conduct permit attorneys like Elam to provide legal services to out-of-state clients while residing in Virginia. Furthermore Elam promptly obtained a Virginia corporate counsel certificate once Plaintiff's counsel had brought this oversight to her attention. . . . Elam's conduct in Virginia does not constitute the unauthorized practice of law.").

- Illinois LEO 13-03 (1/2013) (holding that a nonlawyer could not represent a party to an arbitration under the Financial Industry Regulatory Authority ("FINRA") Code of Arbitration Procedure for Customer Disputes; "While acknowledging that what constitutes the practice of law defies mechanical formulation, Illinois law recognizes that it encompasses not only court appearances but also services rendered out of court which include the giving of legal advice or requiring the use of any degree of legal knowledge or skill.").

- Medlock v. Univ. Health Servs., Inc., 743 S.E.2d 830, 831 (S.C. 2013) ("South Carolina limits the practice of law to licensed attorneys. . . . The generally understood definition of the practice of law embraces the

preparation of pleadings and other papers incident to actions and special proceedings, and the management of such actions and proceedings on behalf of clients before judges and courts. . . . However, this Court has consistently refrained from adopting a definition of 'the practice of law.' . . . It is the character of the services rendered, and not the denomination of the tribunal where the services are rendered, that determines whether such services constitute the practice of law."; "[W]e now hold a non-attorney may represent a business entity in the probate court to make an estate claim and subsequently petition for allowance of the claim without engaging in the unauthorized practice of law.").

- Ohio UPL Advisory Op. 11-01 (10/7/11) ("The court has defined the unauthorized practice of law as 'the rendering of legal services for another by any person not admitted [or otherwise registered or certified] to practice [law] in Ohio.' Gov. Bar R. VII(2)(A). Although 'rendering of legal services' is not defined by statute or rule in Ohio, it has been addressed in a body of Supreme Court decisions dating back to the 1930's. In the seminal Dworken case, the court held, 'the practice of law is not limited to the conduct of cases in court. It embraces the preparation of pleadings and other papers incident to actions and special proceedings and the management of such actions and proceedings on behalf of clients before judges and courts, and in addition conveyancing, the preparation of legal instruments of all kinds, and in general all advice to clients and all action taken for them in matters connected with the law.' Land Title Abstract & Trust Co. v. Dworken (1934), 129 Ohio St. 23, 28, 1 O.O. 313, 193 N.E. 650, 652, quoting People v. Alfani (1919), 125 N.E. 671.").

- In re Wolf, 21 So. 3d 15, 17 (Fla. 2009) ("'We think that in determining whether the giving of advice and counsel and the performance of services in legal matters for compensation constitute the practice of law it is safe to follow the rule that if the giving of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law.'" (citation omitted)).[5]

[5] In re Wolf, 21 So. 3d 15, 17, 17-18, 17 (Fla. 2009) (emphases added) (refusing to reinstate a suspended Florida lawyer who had engaged in the practice of law during his suspension; first explaining that the court had earlier defined the practice of law as follows: "'We think that in determining whether the giving of advice and counsel and the performance of services in legal matters for compensation constitute the practice of law it is safe to follow the rule that if the giving of such advice and performance of such services affect important rights of a person under the law, and if the reasonable protection of the rights

- In re Wiles, 210 P.3d 613, 617, 618 (Kan. 2009) (disbarring a lawyer for engaging in the unauthorized practice of law after his license was suspended; "The focus of the hearing panel's conclusions regarding McKinney's complaint was Wiles' use of professional letterhead that portrayed him as an 'Attorney At Law' who was 'Licensed in Missouri and Kansas' after his Missouri law license had been suspended. . . . [i]n finding that Wiles violated KRPC 5.5(a) by engaging in the unauthorized practice of law."; also concluding that the lawyer had actually engaged in the unauthorized practice of law; explaining that "[a] general definition of the 'practice of law' has been quoted with approval as follows: 'As the term is generally understood, the 'practice' of law is the doing or performing of services in a court of justice, in any matter depending therein, throughout its various stages, and in conformity to the adopted rules of procedure. But in a larger sense it includes legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are secured, although such matter may or may not be depending in a court.' State ex rel. Boynton v. Perkins, 138 Kan. 899, 907-08, 28 P.2d 765 (1934) (quoting Eley v. Miller, 7 Ind. App. 529, 34 N.E. 836 [1893])." (emphasis added)).

- In re Garas, 881 N.Y.S.2d 744, 746, 745, 746, 747 (N.Y. App. Div. 2009) (explaining that "the provision of closing services such as the preparation of deeds constitutes the practice of law" (emphasis added); "Respondent formed Resale Closing Services, LLC (RCS), for the purpose of bidding on a contract with the United States Department of Housing and Urban Development (HUD) for the provision of closing agent services on the sale of previously foreclosed properties. The HUD contract required the designation as 'key personnel' of an admitted attorney. RCS consisted of two members: respondent and a nonlawyer. The nonlawyer member owned a majority

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and property of those advised and served requires that the persons giving such advice possess legal skill and a knowledge of the law greater than that possessed by the average citizen, then the giving of such advice and the performance of such services by one for another as a course of conduct constitute the practice of law.'" (quoting State ex rel. Florida Bar v. Sperry, 140 So. 2d 587, 591 (Fla. 1962), vacated on other grounds, 373 U.S. 379 (1963)); explaining that the suspended lawyer Wolf had violated this UPL standard; "[A]lthough Wolf informed his clients that he could not dispense legal advice, he was not simply identifying applicable statutes and ordinances with regard to opening arcades. In fact, Wolf testified that he would find the ordinances applicable to the jurisdiction in which an arcade was located and admittedly provided this advice based on his legal skill, which is greater than that possessed by the average citizen. Further, as stated above, Wolf gave advice on opening arcades, reported on changes in the law applicable to this area, reviewed leases, researched ordinances applicable to new arcade sites, and consulted with a representative of a state attorney's office on the proper interpretation of gaming law for an attorney's criminal client. Based on the definition in Sperry, trading on one's enhanced legal skill and knowledge to advise clients on how to legally proceed with a business transaction and on changes in the law based on statutory research and legal interpretation is the province of licensed attorneys. Accordingly, the referee's conclusion that Wolf's actions did not constitute the practice of law is erroneous and is disapproved."; "We agree with the Bar that Wolf should not be reinstated because he practiced law while under suspension and, therefore, was not in strict compliance with this Court's suspension order.").

share of the corporation, and the two members shared in profits and losses according to their membership interests. The nonlawyer was paid an annual salary as general manager of RCS, and respondent received an annual fee for his services as general counsel. HUD accepted the bid of RCS, and the nonlawyer member established an office in Buffalo. The services provided by nonlawyer employees of RCS included the preparation of deeds. Although respondent reviewed the prepared deeds and title searches, he had no involvement in the day-to-day operations of RCS, and he exercised no supervisory authority over the nonlawyer member, who administered the services provided under the HUD contract. In addition, respondent and the nonlawyer member opened a noninterest-bearing trust account as joint signatories, through which the proceeds of each sale were disbursed. Nonlawyer employees of RCS attended closings for which RCS provided services."; "[w]hile the applicable statutes make it clear that the provision of closing services such as the preparation of deeds constitutes the practice of law, an exception has been recognized for a single transaction that occurred incident to otherwise authorized business and did not involve the rendering of legal advice" (emphasis added); "[w]e find that the services provided by RCS and GLF pursuant to the HUD contracts constituted the practice of law"; "We thus find that respondent has committed professional misconduct by forming a corporation with a nonlawyer for the provision of those services, failing to exercise oversight of its activities or employees and failing to safeguard sale proceeds in an adequate manner.").

- Illinois LEO 94-5 (7/1994) ("The threshold issue presented is whether the representation of a party to an arbitration proceeding is the practice of law. In general, the courts have held that a person practices law when the person applies the law to the facts of a particular case. Rotunda, Professional Responsibility 123 (3d ed. 1992). The Illinois position is consistent with the general rule. The Supreme Court has held that the practice of law involves more than the representation of parties in litigation and includes the giving of advice or the rendering of any services requiring the use of legal skill or knowledge. People v. Schafer, 404 Ill. 45, 87 N.E.2d 773, 776 (1949). In a case directly relevant to the present inquiry, the Supreme Court held that the representation of parties in contested workers' compensation matters before an arbitrator of the Illinois Industrial Commission constituted the practice of law. People v. Goodman, 366 Ill. 346, 8 N.E. 2d 941, [sic] (1937). The respondent in Goodman had argued that he was not practicing law because he was representing parties before an administrative agency rather than a court. The Supreme Court responded that the 'character of the act done, and not the place where it is committed' is the decisive factor. 8 N.E.2d at 947. In view of these authorities, the Committee concludes that the representation of a party in a contested arbitration proceeding would be considered the practice of law." (emphasis added)).

- Illinois LEO 93-15 (3/1994) ("The practice of law has been defined generally as giving of advice or rendering any sort of service by any person, firm or corporation when the giving of advice or rendering of such service requires the use of any degree of legal knowledge or skill. It has been defined as appearing in court or before tribunals representing one of the parties, counseling, advising such parties and preparing evidence, documents and pleadings to be presented. It has been defined as preparing documents the legal effect of which must be carefully determined according to law. It has been defined as referral to attorneys for service; advising or filling out of forms; negotiations with third parties and, in short, engaging in any activities which require the skill, knowledge, training and responsibility of an attorney." (emphases added)).

Best Answer

The best answer to this hypothetical is **STATES SEEM TO AGREE ON AT LEAST THE CORE ACTIONS THAT DEFINE THE PRACTICE OF LAW: APPEARING IN COURT, PREPARING PLEADINGS, DRAFTING OTHER DOCUMENTS THAT DEFINE PEOPLES' RIGHTS, AND PROVIDING LEGAL ADVICE**.

N 3/12

Assisting UPL Violations

Hypothetical 5

As a recent law school graduate, you have had quite a bit of trouble finding work. You just received an offer to earn a fairly good salary from a company that assists people in their trust and estate planning. The company employs nonlawyer sales representatives to meet with customers and discuss their estate planning needs. These sales representatives fill out forms, which you then use to communicate with the company's main office in California. Folks in the main office prepare the estate planning documents that the customers require. You review the estate planning documents prepared by the California home office before giving them to the company sales representatives, who present them to the customers for signature. You also send the customers a letter describing your role, and sometimes communicate by telephone with the customers if they have any questions.

Does your prospective employer's process violate any UPL laws?

YES (PROBABLY)

Analysis

Lawyers who are not licensed in a state cannot practice law in that state, because doing so would violate the unauthorized practice of law statutes and regulations in that state.

In addition to such a primary violation of the UPL laws, lawyers can also face liability (or worse) for assisting nonlawyers in the unauthorized practice of law.

This hypothetical deals with this secondary type of exposure -- facing lawyers who assist those without a law degree in practicing law.

Licensed lawyers can run afoul of a state's unauthorized practice of law principles in three ways.

First, lawyers can improperly assist nonlawyers in committing the unauthorized practice of law. The Restatement articulates this principle.

> A person not admitted to practice as a lawyer . . . may not engage in the unauthorized practice of law, and a lawyer may not assist a person to do so.

Restatement (Third) of Law Governing Lawyers § 4 (2000).[1] A comment provides some guidance.

> The lawyer codes have traditionally prohibited lawyers from assisting nonlawyers in activities that constitute the unauthorized practice of law. That prohibition is stated in the Section. The limitation supplements requirements that lawyers provide adequate supervision to nonlawyer employees and agents . . . . By the same token, it has prevented lawyers from sponsoring non-law-firm enterprises in which legal services are provided mainly or entirely by nonlawyers and in which the lawyer gains the profits.

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

States can severely punish such misconduct.

- In re Terc, 987 N.Y.S.2d 865, 865-66, 866 (N.Y. App. Div. 2014) (issuing a public censure of a lawyer who assisted nonlawyers in the practice of law; "The respondent created a retainer agreement for the Vasquez firm, and all legal fees were paid to the Vasquez firm. The respondent knew that Mr. Vasquez received $300 from those legal fees on a monthly basis. The respondent helped create a website describing the Vasquez firm as a 'law firm' engaged in the practice of law in New York, specifically in the areas of immigration, divorce, domestic relations, criminal law, and real estate. The website provided legal advice on various legal topics. The respondent also created business cards that represented that the Vasquez firm engaged in the practice of law in New York, specifically, in the areas of bankruptcy, criminal law, family law, and divorce law."; "The respondent knew that Mr. Vasquez was not an attorney admitted to the practice of law in New York. He knew, or should have known, that, pursuant to 22 NY-CRR 521.3(f), Mr. Vasquez, as a legal consultant, was prohibited from holding himself out as an attorney.").

[1] Restatement (Third) of Law Governing Lawyers § 5 (2000) ("(1) A lawyer is subject to professional discipline for violating any provision of an applicable lawyer code. (2) A lawyer is also subject to professional discipline under Subsection (1) for attempting to commit a violation, knowingly assisting or inducing another to do so, or knowingly doing so through the acts of another.").

- In re Panel Case No. 23236, 728 N.W.2d 254 (Minn. 2007) (issuing a private reprimand of a lawyer who discovered that a lawyer under his supervision had not been authorized to practice law due to a failure to comply with CLE requirements; noting that the lawyer immediately changed the law firm's website information about the suspended lawyer, and restricted the suspended lawyer to work that could be performed by a non-lawyer; explaining that a law firm client (a governmental entity) inquired about the website change, but that the lawyer did not inform the client that the suspended lawyer had performed work for that client for over two years; explaining that the law firm eliminated the suspended lawyer's time from pending bills sent to the government client, and refunded all fees paid to the law firm based on the suspended lawyer's work during the time he should not have been practicing law; noting that the government client nevertheless filed an ethics charge; holding that the lawyer had violated the ethics rules by not advising clients of all material facts).

Such nonlawyers can even include law school graduates who never became authorized to practice.

- Rich v. Simoni, 772 S.E.2d 327, 329, 331-32, 334 (W. Va. 2015) (holding that a law school graduate who had never become a practicing lawyer could not share in a legal fee; "The underlying litigation arose from an agreement between Mr. Rich and Dr. Simoni [former W. Va. Univ. professor and Ph.D, who obtained a law degree from W. Va. Univ. Law School but failed the bar four times] to compensate Dr. Simoni for his efforts in connection with various class action suits, including the Fairmont and Spelter litigations. According to Dr. Simoni, his initial understanding when he and Mr. Rich first agreed to work together was that they would 'share the benefits half/half, 50/50.' That notion of an even split continued until April 2002 when a discussion ensued outside Mr. Rich's Morgantown, West Virginia, office. During this meeting, Mr. Rich purportedly informed Dr. Simoni that 'he was reducing [Dr. Simoni's] share from 50 percent to 20 percent.'"; "Arguing that the Rules of Professional Conduct are nothing more than rules of reason, Dr. Simoni posts that those rules cannot stand as a bar to the enforcement of a fee-sharing agreement that is predicated on the reasonable value of services provided. Consequently, he urges us to find that the Rules of Professional Conduct do not have the equivalent weight to laws enacted by our state legislature." (footnotes omitted); "[W]e now hold that Rule 5.4 of the West Virginia Rules of Professional Conduct, which proscribes the sharing of fees between lawyers or law firms and nonlawyers, is an explicit judicial declaration of West Virginia public policy with the force and effect of law. Accordingly, a fee-sharing agreement between a lawyer or a law firm and a nonlawyer that violates the provisions of Rule 5.4 of the West Virginia Rules of Professional Conduct is

void as against public policy and wholly unenforceable."; "Based upon this Court's concerns that the attorneys involved in this case may have engaged in unethical conduct with regard to fee-sharing agreements, we are alerting the Office of Disciplinary Counsel regarding the need for further inquiry into these matters.").

Second, lawyer can assist disbarred or suspended lawyers in continuing to illegally practice law.

- Andrew Strickler, Ill. Atty Censured For Not Banning Disbarred Wife From Firm, Law360, Jan. 17, 2018 ("The Illinois Supreme Court has censured a lawyer for failing to prevent his disbarred wife from practicing in his office."; "Stanley Niew, a labor and employment lawyer in Oak Brook, Illinois, was formally charged last year with assisting an unlicensed attorney to practice law by allowing his wife, Kathleen, to use his firm's office months after she had been disbarred."; "She lost her law license in November 2013 after she was assused in mishandling approximately $2.34 million belonging to clients she had represented in a real estate deal, and was later hit with a federal prison sentence for her role in a fraudulent investment scheme, according to a 2016 complaint."; "Over the seven months following the disciplinary action, Stanley Niew allowed his wife to maintain an office in his suite, where she was 'physically present in the office four or five times per week,' the complaint said."; "During that period, Kathleen Niew also met with clients, used the firm's email system, conducted meetings and directed a firm associate to do legal work, according to the complaint.").

- In re Sishodia, 60 N.Y.S.3d 153, 155-56 (N.Y. App. Div. 2017) (per curiam) (suspending a lawyer for two years because she ran a law firm based on orders from a suspended lawyer; "Based upon these facts, respondent makes several admissions of misconduct. Respondent admits that by acting on behalf of the Firm at Mr. Nihamin's direction while he was suspended, she aided a nonlawyer in the unauthorized practice of law and engaged in conduct prejudicial to the administration of justice (Rules of Professional Conduct [22 NYCRR 1200.0] rules 5.5[b]; 8.4[d]). She also admits that, by authorizing an affidavit, in her name, containing false statements to be filed with this Court, she knowingly made a false statement of fact to a tribunal, engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, and engaged in conduct prejudicial to the administration of justice (Rules of Professional Conduct [22 NYCRR 1200.0] rules 3.3[a][1]; 8.4[c], [d])." (alterations in original)).

- Andrew Strickler, Ga. Lawyer Who Hired Disbarred Atty As Paralegal Suspended, Law360, May 16, 2017 ("A Georgia lawyer recently ordered to

take ethics and professionalism training after pressing a bogus case against U-Haul International Inc. was suspended Monday by the state Supreme Court for hiring a disbarred lawyer as a paralegal and abandoning a client."; "The unanimous six-month suspension decision for Michael Robert Johnson Sr. found the Atlanta-area attorney took a $2,500 deposit from a client with a civil records matter last year but handed the case over to the paralegal, a disbarred lawyer Johnson employed."; "In issuing the suspension, the court declined to accept a bar recommendation that the sanction be limited to a reprimand, saying Johnson's disciplinary record and the willful nature of his misconduct warranted tougher punishment."; "Johnson 'failed to personally do any work at all on the matter and instead allowed the disbarred attorney to have contact with the client in person, by telephone, and through written correspondence,' according to the decision. And after the client realized that Johnson and the paralegal had abandoned his case without doing any work and tried to fire the lawyer, Johnson also failed to refund the unearned fee."; "'Johnson (and his paralegal) ultimately abandoned the legal matter to the client's detriment,' the court said.")

- Martin Bricketto, NJ Supreme Court Suspends Name-Lending Lawyer, Law360, Jan. 14, 2016 ("An attorney who lent his name to a now-dissolved firm that handled mortgage modification and real estate work, in a move that enabled another lawyer to improperly practice law in New Jersey, was hit with a three-month suspension Wednesday by the state Supreme Court."; "Mark Edelstein had admitted that his partnership with Todd Ferentz & Edelstein LLP was a legal fiction and that he lent his law license so a California attorney, Frederick Todd, could run a law firm in New Jersey, accordingly to case documents. Edelstein never handled any client matters with the firm, supervised staff or personally signed any documents, though he allowed the firm to use a stamp of his signature."; "The high court backed a suspension for Edelstein, a state bar member since 2007, following the New Jersey Disciplinary Review Board's November finding of clear evidence that Edelstein violated rules of professional conduct by letting the firm borrow his name and signature and by failing to ensure that nonlawyer staff adhered to ethical standards.").

- In re Thalasinos, 981 N.Y.S.2d 714, 715 (N.Y. App. Div. 2014) (suspending for one year a lawyer who assisted his suspended colleague in the unauthorized practice of law; "Respondent did not initially believe that assisting SA in immigration matters constituted aiding the unauthorized practice of law, and only became aware of this after he became the subject of a DDC investigation. SA was ineligible to practice before the United States Citizenship and Immigration Service (USCIS) and the Immigration Court because he was required to be an attorney in good

standing 'of the bar of the highest court of any State . . . and is not under any order suspending . . . or otherwise restricting him in the practice of law.' (8 CFR 1001.1[f]; 1292.1[a][1])."; "Respondent assisted SA's office in Astoria, Queens. The office and all client files belonged to SA. Respondent was paid $400-500 per day for immigration-related appearances. Respondent would meet with SA the day prior to (or, in some cases, the day of) a proceeding and SA would instruct him as to what he must do at the proceeding. Respondent would not meet with the client until the actual day of the proceeding. Due to his lack of experience in immigration law, respondent allowed SA to make all legal (and non legal) decisions with respect to the cases. In addition, all letters and documents were prepared by SA. Respondent never executed retainer agreements with the clients, nor did he ever receive any payments from the clients. Respondent estimated that he appeared at 10-12 immigration hearings (before the USCIS) for SA during the three years.").

- Disciplinary Counsel v. Troller, 6 N.E.3d 1138, 1139 (Ohio 2014) (suspending for two years (with six months stayed) a lawyer who acted as a chief legal officer for a corporation after suspension of his license; "[T]he panel found that by continuing to perform his job duties as the chief legal officer for Clopay Corporation, Troller continued to practice law for six years after his license was suspended by this court. . . . We agree that Troller committed the charged misconduct and adopt the sanction recommended by the board.").

- Peter Vieth, Lawyer covered for suspended colleague, Virginia State Bar charges, Va. Laws. Wkly., May 20, 2014 ("An Ashland lawyer is in trouble with the Virginia State Bar [VSB] for allegedly helping to keep a law office going after its owner was suspended by the VSB."; "A disciplinary subcommittee charges that attorney William V. Riggenbach acted as cover in 2012 while Robert Smallenberg continued to practice law without a valid license. The arrangement left multiple clients with poor legal work and lost fees, the bar says."; "Riggenbach started work as an employee at Smallenberg's Metropolitan Law Center LLP in Ashland shortly after Smallenberg was suspended for three years in May 2012, according to the VSB charges."; "Even though Riggenbach was the only lawyer at the office with a valid license at the time, he told the bar he thought Smallenberg was still licensed, the bar said. Riggenbach claimed he believed Smallenberg's suspension had been stayed by the state Supreme Court."; "In fact, the VSB charged, the court had denied the stay and Smallenberg was suspended. Nevertheless, Smallenberg continued to practice law and manage operations at the office, including management of the bank accounts, the bar said."; "By October, Riggenbach learned that Smallenberg was officially suspended and that

the VSB was investigating the operations of the law office, the bar said."; "Based on advice from the VSB's Ethics Hotline, Riggenbach formed a new corporation with himself as sole owner and opened new bank accounts for that corporation."; "But changing the structure of the firm failed to change its practice, the bar said. The new corporation essentially continued the operation of Smallenberg's old practice, the Virginia State Bar said. Although Smallenberg was designated as a paralegal, he continued to manage the office and its bank accounts, the Virginia State Bar charged.").

- Kentucky Bar Ass'n v. Unnamed Attorney, 191 S.W.3d 640 (Ky. 2006) (privately reprimanding a lawyer who had hired a suspended lawyer as an independent contractor and allowed the suspended lawyer to attend client meetings and answer clients' questions).

- In re Comish, 889 So. 2d 236 (La. 2004) (suspending a lawyer for one year and one day, because the lawyer permitted a disbarred lawyer (acting as a paralegal) to engage in such activities as signing his name as a notary, depositing trust money into his own account, meeting with clients, communicating with adjusters, handling fees, negotiating settlements, etc. -- all without adequate supervision).

Third, lawyers can engage in activities constituting the practice of law in states where they are not licensed or otherwise permitted to practice law. This involves what is called "multijurisdictional practice" -- lawyers engaging in activities outside the states where they are licensed.[2]

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[2] The ABA Model Rules contain a fairly basic prohibition:

> A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

ABA Model Rule 5.5(a). A comment provides an explanation.

> A lawyer may practice law only in a jurisdiction in which the lawyer is authorized to practice. A lawyer may be admitted to practice law in a jurisdiction on a regular basis or may be authorized by court rule or order or by law to practice for a limited purpose or on a restricted basis. Paragraph (a) applies to unauthorized practice of law by a lawyer, whether through the lawyer's direct action or by the lawyer assisting another person.

ABA Model Rule 5.5 cmt. [1].

Fourth, a lawyer can improperly assist out-of-state lawyers in committing the unauthorized practice of law in states where those lawyers are not licensed.[3]

A 2009 Ohio case dealt with the first type of violation, imposing over $6 million in penalties against two companies engaged in the described process.

- Columbus Bar Ass'n v. Am. Family Prepaid Legal Corp., 916 N.E.2d 784, 786, 796, 796-97, 797 (Ohio 2009) (imposing over $6,000,000 in penalties against two companies who advertised in Ohio for customers seeking wills, trusts and other estate planning tools, despite the involvement of lawyers in preparing the documents; "[W]e have repeatedly held that these enterprises, in which the laypersons associated with licensed practitioners in various minimally distinguishable ways as a means to superficially legitimize sales of living-trust packages, are engaged in the unauthorized practice of law. We have also repeatedly held that by facilitating such sales, licensed lawyers violate professional standards of competence and ethics, including the prohibition against aiding others in the unauthorized practice of law. Today, we reaffirm these holdings and admonish those temped to profit by such schemes that these enterprises are unacceptable in any configuration."; "Here, American Family's sales agents, in the guise of selling prepaid legal plans, advised prospects on the benefits of its estate-planning tools. After signing up the prospect, the agents obtained sensitive financial information from the customer and delivered the agreement and the information to the Ohio office. The resident attorney (a virtual captive of American Family) sent a letter to the customer and the customer's information to the California home office for document preparation. The resident attorney rarely, if ever, communicated with the customer; if he did, he communicated by telephone."; "The California office prepared the documents and returned them to the Ohio office for delivery to the customers. The resident attorney spent little time reviewing the documents. Without any personal contact with the customer, the attorney could not possibly have given the customer the individualized legal advice that it was his professional and ethical duty to give. He could not determine whether the estate-planning products suited the customers, and he could not determine whether the customer was competent to enter into the estate-planning arrangements."; "The attorney left it to Heritage's insurance agents to explain the documents as they secured the signatures of the customers. These agents had no incentive to deliver the documents other than to solicit additional insurance business from the customer, which provided the agent with the only compensation he would receive in the transaction. The agent's objective was to obtain the signatures through

[3] Id.

whatever means he could, including pressure tactics, so he could then sell annuities."; "All of the foregoing establishes by a preponderance of the evidence that respondents engaged in the unauthorized practice of law.").

Other courts have reached the same conclusion about similar arrangements.

- In re Wall, 73 N.E.3d 170, 171-72, 172, 176 (Ind. 2017) (suspending a lawyer for thirty days; finding that he had assisted a company in the unauthorized practice of law; "CAS advertised its services to consumers in Florida and elsewhere, including Indiana, and solicited local counsel in states other than Florida. Under the terms of CAS's contractual arrangements with clients and local counsel, most client work was handled by central staff (including lawyers and nonlawyer assistants) in Florida, with local counsel's involvement generally limited to aspects of the case requiring a local attorney's services. In a typical case, prospective clients would discuss their options with a CAS intake paralegal and then enter into a representation agreement with CAS. CAS typically charged clients an upfront 'nonrefundable' fee and, in many instances, ongoing monthly fees."; "In 2012 Respondent signed agreements with CAS, first as an 'associate' and later as a 'partner,' under which Respondent would provide discrete services to CAS's Indiana bankruptcy and foreclosure defense clients. CAS entered into similar agreements with other Indiana attorneys as well. Respondent received fixed sums for select services, sums that represented only a small fraction of the total fee charged to clients by CAS. As a 'partner,' Respondent also received $25 for every case assigned to other CAS-associated attorneys in Indiana as well as minimum wage for 10-20 hours per week as 'partner pay.'"; "Respondent's role in these cases generally was as follows. A CAS paralegal would assign a case to Respondent after the client had signed a representation agreement with CAS. Respondent then would perform a 'welcome call' to the client and explain that he would be the 'boots in the trenches' for CAS, assisting the client either through mortgage modification services or foreclosure defense. In most instances though, Respondent's sole objective was to get the mortgagee to agree to a modification. CAS's business model contemplated that most document preparation and client communication would be performed by CAS staff in Florida. However, Respondent testified he reviewed all pleadings and made changes where warranted before signing and filing them, and he testified he made himself available to clients above and beyond the 'welcome call' CAS paid him to make."; "Having reached this conclusion, it follows that Respondent assisted in the unauthorized practice of law. The observation we made with respect to a similar arrangement in Dilk [Matter of Dilk, 2 N.E.3d 1263 (Ind. 2014)] holds equally true here: 'Without the involvement of Respondent, the [company] could not have provided the services they offered to homeowners. Selling the assistance of an attorney to defend a foreclosure action was a necessary part of their business model.' Id. at 1265. We acknowledge Respondent's testimony that he sometimes

provided services for his CAS clients above and beyond what was minimally required of him under his agreements with CAS, and that he subjectively believed he was treating his CAS clients on a similar footing with his other clients. These factors mitigate, but do not excuse, Respondent's misconduct. CAS was engaged in the unauthorized practice of law, and Respondent assisted in that endeavor. Accordingly, we find Respondent violated Rule 5.5(a).").

- Gina Passarella, Lawyer Disbarred for Unauthorized Practice Of Law Schemes, Legal Intelligencer, July 31, 2014 ("A Montgomery County attorney was disbarred Tuesday by the state Supreme Court for his role in several estate-planning companies that had nonlawyers drafting trusts for the elderly."; "The Disciplinary Board of the Pennsylvania Supreme Court determined after nine days of hearings that attorney Brett Weinstein of King of Prussia, Pa., had violated several Rules of Professional Conduct by having little if any contact with clients of several estate-planning businesses who were assisted in drafting trusts by nonlawyer employees of the companies associated with Weinstein's law office."; "'From 2001 to 2012, [Weinstein], both in his solo practice and acting in concert with Barry Bohmueller, Esquire, assisted sales and delivery agents for a series of estate planning companies in the unauthorized practice of law,' the Disciplinary Board said in its report and recommendation of disbarment to the Supreme Court. 'In the course of his participation in these activities, [Weinstein] engaged in false and misleading conduct, failed to consult with his clients concerning their objectives and placed his own interests above his responsibilities.'"; "Bohmueller, according to the opinion, was simultaneously charged by the board for acting in cooperation with Weinstein. The cases were consolidated for purposes of the disciplinary hearing, but separate hearing committee reports were filed. According to Bohmueller's history report on the Disciplinary Board's website, the hearing committee recommended a two-year suspension for Bohmueller in August 2013 and asked the Supreme Court in March 2014 to act on the recommendation. The board's report on Weinstein was also dated March 2014. The Supreme Court has not ruled on Bohmueller's recommended punishment.").

- Attorney Grievance Comm'n v. Chapman, 60 A.3d 25, 43, 45, 46 (Md. 2013) (suspending for ninety days a lawyer who had entered into an arrangement with a nonlawyer loan modification consultant, which essentially allowed the consultant to avoid restrictions on such consultants who were not lawyers; "The Commission essentially argues that Mr. Chapman abdicated his professional responsibility by ceding all responsibility for the loan modification work to Mr. Weiskerger and his associates. In response, Mr. Chapman argues that he established a system to oversee the loan modification work through regular email communication and weekly review meetings."; "While I found Mr. Chapman's testimony credible that he and Mr. Weiskerger were in

regular communication, and that they met weekly for a half hour or so to discuss matters, there was no evidence that he had any familiarity with either the Bogarosh or the Butler matters until after the complaints were filed. Rather, the testimony demonstrated that Mr. Weiskerger was responsible for generating much, if not all[,] of the loan modification business. He conducted the initial client meetings, he set the strategy, and his associates processed the necessary papers, called the banks, and communicated with the clients. Mr. Chapman had essentially no contact with these clients. Other than isolated instances, he met with none of the loan modification clients and all of the substantive loan modification work was managed and directed by his consultant."; "Certainly a firm can engage consultants to assist in representation without violating an ethical obligation. Similarly, lawyers and firms can, and often do[,] delegate responsibility for much of the file or case processing to paralegals or other paraprofessionals. In the latter instance, the lawyer clearly has an ethical obligation to oversee and manage the work delegated to junior lawyers and non-lawyers within an office. The distinction in this case, and the flaw in the arrangement, is that virtually all core case responsibility was ceded by the consultant."; "The Consulting Arrangement enabled JW Capital to avoid the clear statutory requirements for license, contract disclosures, and fees, in exchange for a fee paid to Mr. Chapman, with no expectation that he would directly undertake to direct the work to be done. However earnestly Mr. Chapman believed that arrangement comported with the statutory or his ethical requirements, it operated to misrepresent and mislead clients into believing they engaged the services of a law firm, rather than an unlicensed foreclosure consultant. For that reason, the Court finds clear and convincing evidence of a violation of MRPC 8.4."; "The business association between Mr. Weiskerger and Mr. Chapman was designed to allow Mr. Weiskerger to continue to provide loan modification services without a license, and to demand fees in advance. Mr. Chapman's involvement served to cloak those services with the aura of a law firm, thereby allowing Mr. Weiskerger to continue in a manner that would not otherwise be permitted. While there's nothing inherently wrong with a lawyer engaging a consultant, or with passing through a payment of a fee for the reasonable value of those consulting services, the operation in this instance is not that model. It is more akin to payment of a fee by a business for use of the cache of the law firm. The law firm is not much more than a prop to attract business that does not require special legal acumen or skill. Of particular concern in this case, the affiliation with the law firm enabled those non-legal loan modification services to be done by non-lawyers not affiliated with the firm in a manner that would not otherwise be permitted.").

- State ex rel. Indiana State Bar Ass'n v. United Fin. Sys. Corp., 926 N.E.2d 8, 12, 13, 14, 13 (Ind. 2010) (finding that an insurance marketing agency had engaged in the unauthorized practice of law because its marketing process did not sufficiently involve a lawyer in a preparation of documents; explaining

the insurance marketing agency's way of doing business; "Once a sale was made, the Estate Planning Assistant or Health Planning Assistant secured full or partial payment from the client on the spot. The forms containing the client's personal and financial information were routed to UFSC's in-house counsel, David McInerney, who then provided the information to one of the panel attorneys with whom UFSC has contracted. The estate plans sold by UFSC throughout the country were all processed in Indianapolis and routed to panel attorneys in Indiana and other states to draft documents for the plans." (footnote omitted); "Upon receiving a client's information, the panel attorney called the client, knowing the client had already paid for a certain estate plan. . . . UFSC insists that the panel attorneys had the freedom to exercise their own independent judgment in ensuring that the client had an estate plan suitable for his or her interests. Notably though, of the 1,306 estate plans sold in Indiana from October 2006 to May 2009, only nine of these clients downgraded to a less expensive plan following consultation with a panel attorney. Further, because a panel attorney was paid a flat fee of only $225 for drafting the estate planning documents, any consultation between the panel attorney and the client above and beyond the initial phone call generally was not financially feasible."; "The documents prepared by the panel attorney were then sent back to UFSC and bound. A Financial Planning Assistant was paid $75 to deliver the documents and assist the client in executing them."; explaining the minimal involvement of a lawyer in the process; "Several panel attorneys utilized standardized estate planning documents and forms that had been prepared and provided by UFSC, and the letters sent by the panel attorneys to the Financial Planning Assistants regarding the execution of the estate planning instruments also were prepared by UFSC. . . . Explanation to the client of the relevance and purposes of the documents being executed typically was delegated to the Financial Planning Assistants." (footnote omitted); holding that "[a]lthough it is the province of this Court to determine what acts constitute the practice of law, we have not attempted to provide a comprehensive definition because of the infinite variety of fact situations. . . . Nor do we attempt to do so today."; but enjoining the respondents from engaging in the practice described above, and also ordering them to pay attorneys' fees; "The disparity of fees earned, between the Estate Planning Assistants and Health Planning Assistants on the one hand (between $750 and $900 per sale of the most expensive estate plan package) and the panel attorneys on the other hand ($225 for drafting the documents and consulting with the client by phone), is indicative of an emphasis on sales and revenue rather than the provision of objective, disinterested legal advice. So too is the fact that an estate plan is sold to the client prior to any attorney involvement whatsoever.").

- New Jersey LEO 716 (and UPL Op. 45) (6/26/09) (generally condemning New Jersey lawyers' involvement with loan modification companies; "The inquiries presented to the hotline generally involve three scenarios. In the

first scenario, a for-profit loan modification company approaches homeowners directly and indicates that it is working with an attorney. The homeowner either: (1) pays one fee to the company, a portion of which the company pays over to the attorney; (2) pays one fee to the attorney named by the company, a portion of which the attorney pays over to the company; or (3) pays separate fees to the company and to the attorney."; finding the first scenario improper; "[A] New Jersey attorney is prohibited from paying monies to a for-profit loan modification company that farms legal work to the attorney or recommends the attorney's services."; explaining in more detail the second scenario; "In the second scenario, the attorney works as in-house counsel to the for-profit loan modification company and provides legal services to the company's customers. A variation of this scenario is an attorney formally affiliating or partnering with the [loan modification] company or being separately retained by the company to re-negotiate loans with its customers' lenders. In each of these situations, the loan modification company approaches homeowners directly and solicits the work."; finding this scenario improper; "A New Jersey attorney may not provide legal advice to customers of a for-profit loan modification company, whether the attorney be considered in-house counsel to the company, formally affiliated or in partnership with the company, or separately retained by the company."; providing more detail about the third scenario; "In the third scenario, the attorney or law firm brings a financial or mortgage analyst in-house or contracts with an analyst, who processes the homeowner's paperwork and may take initial steps in renegotiating the loan under the supervision of the attorney. The attorney or law firm solicits the work in accordance with the attorney advertising rules and the homeowners approach and retain the attorney directly."; finding this scenario acceptable under certain circumstances; "A New Jersey attorney may use an in-firm financial or mortgage analyst or contract with an analyst in the course of providing loan or mortgage modification services for homeowners who have directly retained the law firm. Just as an attorney may contract with a certified public accountant or other person with specialized knowledge to assist the attorney in the provision of legal services, an attorney may use, either within the firm or as a contractor, a financial or mortgage analyst to assist in mortgage modification work. The attorney is responsible for and must supervise the work performed by the analyst employee or contractor. The client homeowner must retain the attorney directly and the solicitation of the homeowner for mortgage modification services must be done by the law firm in accordance with the attorney advertising rules. The compensation paid for services by an analyst must, however, not be improper fee-sharing."; "[W]hile an attorney may hire a financial or mortgage analyst as employee or contract consultant, payments for the work cannot directly or indirectly be based on the number of clients the analyst brings to the firm.").

- Missouri LEO 930172 (1993) (posing the following question: "Attorney accepts referrals for estate planning from insurance agents. Attorney is

available in person or by telephone to answer legal questions. The agent is not obligated to recommend Attorney. The agent obtains basic estate planning information using a form and sends it to Attorney. Attorney is paid directly by the client and pays no part of the fee to the agent. Attorney reviews the information and contacts the client. Attorney prepares estate planning documents. Attorney gives the documents to the agent for delivery to the client. The agent assists the client with execution and transfer of assets. Clients are told to contact Attorney with questions."; answering as follows: "It appears the agent is engaging in in[-]person solicitation on Attorney's behalf in violation of Rule 4-7.3(b). Based on a review of the forms, it appears legal advice would be needed to fill them out. Since they are filled out by the agent and the client, it appears the agent is engaged in the unauthorized practice of law and Attorney is violating Rule 4-5.5 by assisting the unauthorized practice. Because the agent does not have a relationship with Attorney and is not supervised by Attorney, giving the documents to the agent for delivery would create problems with confidentiality under Rule 4-1.6 and would further involve the unauthorized practice of law.").

Not every state would be this harsh, but lawyers worried about committing UPL violations must avoid essentially forfeiting the attorney-client relationship to nonlawyers.

In contrast, some other courts have approved similar-sounding arrangements.

- Boone v. Quicken Loans, Inc., 803 S.E.2d 707, 709, 711, 713 (S.C. 2017) (holding that lawyers assisting the Quicken Loans company were not engaging in the unauthorized practice of law, contrary to what the Special Referee had concluded; "We find the record in this case shows licensed South Carolina attorneys were involved at every critical step in these refinancing transactions, as required by our precedents. We also find that requiring more attorney involvement would not effectively further our stated goal of protecting the public from the dangers of UPL. We therefore respectfully reject the Special Referee's conclusion that Quicken Loans and Title Source committed UPL. Because we reject the finding of UPL, we need not address the parties' remaining exceptions, including Homeowners' request that we declare their mortgages void and certify this case as a class action."; "Under the Quicken Loans refinance procedure, the borrowers have already purchased the property and are simply seeking a new mortgage loan (presumably with more favorable terms) to replace the existing loan. The process begins with a potential borrower completing a loan application, which is typically done online. Thereafter, the borrower speaks on the telephone with a licensed mortgage banker employed by Quicken Loans. Each borrower is informed that he or she has the right to select legal counsel to represent him or her in the transaction and asked whether he or she has a preference as to a specific attorney. If the borrower does not desire to use a

particular attorney during the loan transaction, Quicken Loans engages Title Source, a nationwide provider of settlement services and title insurance, to provide the necessary settlement services. Title Source, in turn, subcontracts with various individuals and entities (including licensed South Carolina attorneys) to perform those various services in compliance with South Carolina law." (footnote omitted); "The absence of a precise definition is deliberate. This Court has resisted attempts to establish a bright-line definition of what constitutes the practice of law, explaining 'what constitutes the practice of law must be decided on the facts and in the context of each individual case.'. . . Indeed, in 1992, we declined to adopt a set of rules proposed by the South Carolina Bar which were designed to define and delineate those activities which constitute the practice of law because we determined 'it is neither practicable nor wise to attempt a comprehensive definition by way of a set of rules." (footnote omitted); "As protection of the public is, and has always been, the lodestar of our context-dependent approach to determining whether an activity constitutes the practice of law, this Court has refused to require attorney involvement it did not find necessary to protect the public. For instance, even though the Court has determined that, in the context of a real estate transaction, the disbursement of loan proceeds must be supervised by an attorney, the Court nevertheless refused to 'specify the form that supervision must take.'")

Best Answer

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

N 3/12

Drawing the Line Between Permissible and Impermissible Actions by Nonlawyers

Hypothetical 6

While you chose to attend law school, your sister decided to obtain a degree in social work and devote her life to helping the Navajo in New Mexico. Your sister just called to ask whether she can help needy folks without engaging in the unauthorized practice of law.

Without engaging in the unauthorized practice of law, may your sister undertake the following activities in connection with needy folks' small claims court proceedings:

(a) Provide legal advice to the litigant about the best strategy to follow in small claims court?

NO

(b) Describe the small claims court process and timing?

YES

(c) Complete small claims court form documents by typing (verbatim) into the form a narrative supplied by the litigant seeking her assistance?

YES

(d) Review and revise the litigant's narrative before typing it into the small claims court forms.

NO (PROBABLY)

(e) Select the proper form for the litigant to use when filing in small claims court?

NO (PROBABLY)

Analysis

As one would expect from the remarkably vague and unhelpful definitions of the "practice of law," whichever state bureaucracy enforces unauthorized practice of law rules often finds it almost impossible to distinguish between permissible and impermissible actions by nonlawyers.

For example, in 2002 the ABA had to carefully explain why nonlawyer mediators may safely assist mediating parties in writing up whatever agreement the mediator has successfully arranged.[1] Otherwise, even the societally beneficial mediation process could result in the mediator engaging in criminal misconduct.

Well-known Stanford Law School professor Deborah Rhode has humorously noted that even Ann Landers could easily be accused of unauthorized practice of law.[2]

State bars and courts have struggled with drawing the line between permissible authority and the illegal practice of law by nonlawyers.

- In re Morales, 151 A.3d 333, 334, 335-36, 337, 338, 339, 340 (Vt. 2016) ("This case calls upon us to consider the applicability of the prohibition against the unauthorized practice of law to the activities of a 'jailhouse lawyer.' In February 2016, the State filed an information in this Court against Serendipity Morales, an inmate at the Marble Valley Regional Correctional

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[1] ABA Section for Dispute Resolution, Resolution of Mediation & the Unauthorized Practice of Law (adopted Feb. 2, 2002) ("When an agreement is reached in a mediation, the parties often request assistance from the mediator in memorializing their agreement. The preparation of a memorandum of understanding or settlement agreement by a mediator, incorporating the terms of settlement specified by the parties, does not constitute the practice of law. If the mediator drafts an agreement that goes beyond the terms specified by the parties, he or she may be engaged in the practice of law. However, in such a case, a mediator shall not be engaged in the practice of law if (a) all parties are represented by counsel and (b) the mediator discloses that any proposal that he or she makes with respect to the terms of settlement is informational as opposed to the practice of law, and that the parties should not view or rely upon such proposals as advice of counsel, but merely consider them in consultation with their own attorneys.").

[2] Jeffrey S. Klein, Making a Practice of Friendly Advice, Los Angeles Times, Feb. 14, 1985 ("Rhode, who authored a well-known study on the subject in 1981 . . . points out that even some of the advice of syndicated columnist Ann Landers could be construed as the unauthorized practice of law.").

Center, alleging she engaged in the unauthorized practice of law by helping fellow inmates in their cases, including performing legal research and drafting motions. In this probable cause review, we consider whether there is probable cause to believe that defendant has committed the alleged offenses. We conclude that there is not and accordingly dismiss the State's information without prejudice."; "This Court has historically defined the unauthorized practice of law broadly, to include not merely holding oneself out as an attorney, but also providing services that require legal knowledge or skill such as drafting legal documents and giving legal advice -- at least when one charges a fee for those services. More recent social and legal developments reflect a trend toward a somewhat more purpose-driven approach to defining the scope of the unauthorized practice of law."; "Although the above caselaw [*In re Welch*, 185 A.2d 458, 459 (Vt. 1962)] articulates an expansive definition of the practice of law, as the Attorney General has argued in this case, 'This decades-old definition does not reflect the reality of practice in Vermont and does not provide sufficient guidance to prosecutors, practitioners, and the public.' Notwithstanding the above broad definitions of the unauthorized practice, this Court has allowed nonlawyers to appear in court in certain specified circumstances, as have some administrative agencies. In its prosecutorial role, the Attorney General has likewise taken a narrower view of the unauthorized practice. These legal developments have tempered the breadth of the unauthorized practice prohibition, and reflect a recognition that the unauthorized practice prohibition should be applied consistent with its underlying purposes of public protection."; "Similarly, this Court has applied a standard articulated by the Legislature in allowing nonattorneys to represent a corporation in court under certain circumstances."; "And, applying another standard articulated by the Legislature, this Court has recognized that nonattorney employees of the Office of Child Support may sign complaints and motions and participate in child support hearings before a magistrate."; "Nonlawyers are also permitted to represent certain parties in some state administrative proceedings."; "And finally, as noted above, in its prosecutorial capacity, the Attorney General has represented that it does not consider providing 'legal advice internally within a company, department or other entity' by an individual not admitted to practice law in Vermont to constitute unauthorized practice."; "In addition to the above general considerations, we are guided in this case by two factors particular to the inmate context. First, 'jailhouse lawyers' who give legal assistance to fellow inmates but are not themselves licensed or formally law trained, are a well-established fixture in the justice system. Second, incarcerated inmates face particular challenges in accessing legal advice, and those challenges raise serious public policy, and in some circumstances, constitutional concerns."; "In this context, although there may be some limits on the ways in which an inmate can give legal help to another, we are wary of adopting a definition of unauthorized practice of law that would subject individuals to a finding of criminal contempt

for engaging in conduct that has been tolerated and arguably even supported by the State.").

- Fla. Bar Advisory Opinion -- Medicaid Planning Activities by Nonlawyers, 183 So. 3d 276, 286 (Fla. 2015) ("It is the opinion of the Standing Committee that it constitutes the unlicensed practice of law for a nonlawyer to draft a personal service contract and to determine the need for, prepare, and execute a Qualified Income Trust including gathering the information necessary to complete the trust. Moreover, a nonlawyer should not be authorized to sell personal service or Qualified Income Trust forms or kits in the area of Medicaid planning."; "It is also the opinion of the Standing Committee that it constitutes the unlicensed practice of law for a nonlawyer to render legal advice regarding the implementation of Florida law to obtain Medicaid benefits. This includes advising an individual on the appropriate legal strategies available for spending down and restructuring assets and the need for a personal service contract or Qualified Income Trust."; "It is the position of the Standing Committee that a nonlawyer's preparation of the Medicaid application itself would not constitute the unlicensed practice of law as it is authorized by federal law. As noted earlier, it is also not the unlicensed practice of law for DCF [Dep't of Children & Families] staff to tell Medicaid applicants about Medicaid trusts and other eligibility laws and policies governing the structuring of income and assets when relevant to the applicant's facts and financial situation. This proposed advisory opinion is the Standing Committee on Unlicensed Practice of Law's interpretation of the law.").

- Fla. Bar re Advisory Opinion -- Activities of Cmty. Ass'n Mnagers, 164 So. 3d 650, 653-54 (Fla. 2015) (reaffirming a 1996 opinion that a condominium association may not engage in activities that constitute the practice of law; "The petitioner also asked if it was the unlicensed practice of law for a CAM to engage in any of the following activities (hereinafter '2012 request'): '(1) Preparation of a Certificate of assessments due once the delinquent account is turned over to the association's lawyer; (2) Preparation of a Certificate of assessments due once a foreclosure against the unit has commenced; (3) Preparation of Certificate of assessments due once a member disputes in writing to the association the amount alleged as owed; (4) Drafting of amendments (and certificates of amendment that are recorded in the official records) to declaration of covenants, bylaws, and articles of incorporation when such documents are to be voted upon by the members; (5) Determination of number of days to be provided for statutory notice; (6) Modification of limited proxy forms promulgated by the State; (7) Preparation of documents concerning the right of the association to approve new prospective owners; (8) Determination of affirmative votes needed to pass a proposition or amendment to recorded documents;

(9) Determination of owners' votes needed to establish a quorum; (10) Drafting of pre-arbitration demand letters required by 718.1255, Fla. Stat.; (11) Preparation of construction lien documents (e.g., notice of commencement, and lien waivers, etc.); (12) Preparation, review, drafting and/or substantial involvement in the preparation/execution of contracts, including construction contracts, management contracts, cable television contracts, etc.; (13) Indentifying, through review of title instruments, the owners to receive pre-lien letters; and (14) Any activity that requires statutory of case law analysis to reach a legal conclusion.").

- Jonak v. McDermott, 511 B.R. 586, 588-89, 595-96 (D. Minn. 2014) (entering an injunction that bar nonlawyers from engaging in the unauthorized practice of law; "Mr. Jonak, who is not an attorney, is the sole shareholder, president and operating principal of 3rd Millennium Systems, Inc., doing business as ALC. . . . ALC is not a law firm nor does it employ counsel admitted to practice in the United States District Court for the District of Minnesota."; "Among the services that ALC provided customers were legal services plans for various subject matters, including bankruptcy."; "Minnesota state law also prohibits the unauthorized practice of law. Minn. Stat. § 481.02, Subd. 1. The Bankruptcy Court found that in six of the 18 cases at issue, Mr. Jonak engaged in the unauthorized practice of law within the scope of Minn. § 481.02, Subd. 1, contrary to 11 U.S.C. § 110(k), and gave legal advice, in violation of 11 U.S.C. § 110(e)(2). . . . Although Mr. Jonak is not an attorney, the Bankruptcy Court concluded that he gave 'advice as to the bankruptcy process, the substantive law of bankruptcy, and the effect of both on those debtors' options in filing for bankruptcy.' (Id.) Appellants do not directly challenge this determination on appeal." (footnote omitted)).

- Alabama LEO R0 2014-01 (2014) (holding that a nonlawyer cannot represent a third person in a Alabama arbitration, because it would amount to the unauthorized practice of law; also holding that a Alabama lawyer had a duty to advise the arbitrator of the nonlawyer's participation; "[A]bsent a federal or state statute allowing such, the representation of a party by a non-lawyer in a court-ordered arbitration proceeding in Alabama would constitute the unauthorized practice of law. Moreover, a lawyer has an obligation to bring the matter of the non-lawyer's representation of a party to the attention of the arbitrator and where appropriate, to the attention of the court."; "It is the opinion of the Disciplinary Commission that under section (b)(1) of the UPL statute a non-lawyer may not represent a party during a arbitration absent an express federal or state statute or law allow for such. A non-lawyer representative would be making an appearance in a representative capacity. Moreover, it is presumed that during the arbitration, the non-lawyer representative would be introducing exhibits, conducting examination of witnesses, including expert witnesses, objecting to exhibits and making legal

arguments on behalf of the party and/or providing legal advice to the party. Such activities generally require the skill and judgment of a licensed attorney and under the UPL statute constitutes the practice of law."; "In addition, Rule 5.5, Ala. R. Prof. C., prohibits a licensed Alabama lawyer from assisting 'a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.' If a lawyer were to stay silent and allow a non-lawyer to represent a party in a arbitration, that lawyer would be aiding and abetting that non-lawyer in the unauthorized practice of law. As such, a lawyer has an obligation to bring the matter of the non-lawyer's representation of a party to the attention of the arbitrator and where appropriate, to the attention of the court and the Office of General Counsel.").

- Francis v. Francis, 847 N.W.2d 131, 133, 133-34 (N.D. 2014) (finding a nonlawyer had improperly assisted a wife in a domestic violence case by engaging in the unauthorized practice of law; "Leon Francis argues the district court abused its discretion in allowing Glen Hase, an advocate with the Rape and Abuse Crisis Center, to excessively participate in the hearing on Nichole Francis's petition for a domestic violence protection order. Leon Francis alleges the district court erred in giving Hase the same deference as an attorney, specifically taking issue with her preparation of legal documents, conducting direct and redirect examination of Nichole Francis during a hearing, and introducing evidence and asserting objections during the hearing."; "Hase's participation exceeded that permitted by this Court's administrative rules. N.D. Sup. Ct. Admin. R. 34, § 5. Hase complied with the rules in completing forms, sitting with Nichole Francis during court and making statements at the district court's request. Hase exceeded the scope of the rules by objecting on behalf of Nichole Francis.").

- Virginia UPL Op. 216 (10/8/13) (explaining that a probation officer's sentencing recommendations do not amount to the unauthorized practice of law; such probation officers are not representing or advising another about the "application of legal principles" or engaging in any other type of behavior defined as the practice of law; instead, probation officers prepare the recommendation "as part of [their] job, under order from a court, to report to the court.")

- P.J. D'Annunzio, No Penalty for Oil and Gas Consultant for Unauthorized Practice of Law, Legal Intelligencer, Apr. 9, 2014 ("Although a natural gas consultant was found to have engaged in the unauthorized practice of law for helping draft a lease, the state Superior Court dismissed the counterclaims against him."; "Judges on the panel said the consultant's advice provided a benefit to his clients, who were preparing to lease their property."; "The clients who sought to lease their property for gas drilling -- Laurel Hill Game and Forestry Club and Williamson Trail Resources -- said William A. Capouillez was unjustly enriched when he was contracted to draft a lease and provide

them with legal advice while not being licensed to practice law."; "The Superior Court last week affirmed the Lycoming County Court of Common Pleas' dismissal of an unjust enrichment counterclaim against Capouillez."; "In an unpublished memorandum, Judge Judith Ference Olson agreed with the trial court's determination that 'it would be inequitable for [Capouillez], who provided valuable services to the other parties, to be deprived of any consideration that he received.'"; "She said that the clients should pay for services that the consultant rendered."; "'It would be unfair,' Olson went on, 'for Laurel Hill and Williamson Trail to use [Capouillez's] services to their benefit and then cry foul that he lacked accreditation and authorization in order to deprive him of payment.'").

- Crawford v. Cent. Mortg. Co., 744 S.E.2d 538, 539, 542 (S.C. 2013) ("These cases present the novel question of whether a loan modification constitutes the unauthorized practice of law. Cassandra Crawford and James Warrington (collectively, Petitioners) own properties facing foreclosure. Prior to these foreclosure actions, Petitioners obtained loan modifications from their respective lenders to extend their loans' maturity dates and receive additional time to pay. Petitioners failed to make timely payments under the modified loan terms, and now seek to prevent foreclosure by arguing that their lenders engaged in the unauthorized practice of law by modifying the loans without an attorney. We disagree, and hold that modifying a loan without the participation of an attorney does not constitute the unauthorized practice of law."; "Petitioners argue loan modifications 'change the existing terms of the legal rights of the parties' by altering interest rates and repayment terms. Petitioners further assert that because the modification agreements have a 'legal effect,' the agreements must constitute the unauthorized practice of law. We disagree."; "Requiring attorney supervision over a loan modification would create a cost to the consumer outweighed by the benefit. Additionally, the existence of a robust regulatory regime and competent non-attorney professionals militates against extending the attorney supervision requirement to loan modifications.").

- In re Amendments to Rules Regulating Fla. Bar, 101 So. 3d 807, 837, 837-38 (Fla. 2012) (defining the impermissible activity by a nonlawyer completing various forms; Rule 10-2.2(b)-(c): "(b) Forms Which Have Not Been Approved by the Supreme Court of Florida. (1) It shall not constitute the unlicensed practice of law for a nonlawyer to engage in a secretarial service, typing forms for self-represented persons by copying information given in writing by the self-represented person into the blanks on the form. The nonlawyer must transcribe the information exactly as provided in writing by the self-represented person without addition, deletion, correction, or editorial comment. The nonlawyer may not engage in oral communication with the self-represented person to discuss the form to assist the self-represented

person in completing the form."; "(2) It shall constitute the unlicensed practice of law for a nonlawyer to give legal advice, to give advice on remedies or courses of action, or to draft a legal document for a particular self-represented person. It also constitutes the unlicensed practice of law for a nonlawyer to offer to provide legal services directly to the public."; "(c) As to All Legal Forms. (1) Except for forms filed by the petitioner in an action for an injunction for protection against domestic or repeat violence, the following language shall appear on any form completed by a nonlawyer and any individuals assisting in the completion of the form shall provide their name, business name, address, and telephone number on the form: This form was completed with the assistance of: . . . . (Name of Individual) . . . . (Name of Business) . . . . (Address) . . . . (Telephone Number) . . . .").

- Disciplinary Counsel v. Alexicole, Inc., 822 N.E.2d 348, 350 (Ohio 2004) ("Respondents are therefore enjoined from any further conduct that constitutes the unauthorized practice of law, as follows: 1. Respondents will not represent Ohio residents in securities arbitration matters and/or activities, including but not limited to providing legal advice as to securities and/or securities-arbitration claims, preparing statements of claims, preparing discovery, participating in prehearing conferences, participating in settlement negotiations, and attending mediation and/or arbitration hearings with or on behalf of claimants."; "2. Unless Dahdah becomes an attorney at law licensed and in good standing to practice law in the state of Ohio, Dahdah will not provide legal advice to any person in Ohio, including but not limited to advice regarding the filing of a claim for a securities violation and advice regarding a person's right as a claimant or defendant in securities arbitration, a lawsuit, or other legal or quasi-legal proceeding, including any terms and conditions of a settlement of any dispute."; "3. Unless Dahdah becomes an attorney at law licensed and in good standing to practice law in the state of Ohio, Dahdah will not represent the interest or legal position of Alexicole, Inc., or any corporation before any legal or quasi-legal body, or in any legal action, settlement, or dispute in the state of Ohio."; [Editor's note: Effective Feb. 1, 2007, Ohio adopted new ethics rules, including Rule 5.5(c)(3), allowing out-of-state lawyers to engage in services "reasonably related" to Ohio arbitrations]).

- In re Estate of Margow, 390 A.2d 591, 597 (N.J. 1978) (not for publication) (holding that a nonlawyer had engaged in the unauthorized practice of law for preparing a will for another person; "[W]e hold that proponent engaged in the unauthorized practice of law in violation of *N.J.S.A.* 2A:170-78 and *N.J.S.A.* 2A:170-80 by offering legal counsel to testatrix as to her estate needs and by actively participating in the drafting of her will. Under the circumstances of this case and especially in view of the climate in which she acquired

nomination as executrix, proponent must be denied the benefits of that position.").

Courts have even assessed whether lawyers' document review amounts to the practice of law – which has overtime and multijurisdictional implications.

- Lola v. Skadden, Arps, Slate, Meagher & Flom LLP, 620 F. App'x 37, 39, 41, 42, 44, 25 (2d Cir. 2015) (finding that a document reviewer was not providing legal advice, and therefore could pursue an FLSA lawsuit seeking overtime pay; "David Lola, on behalf of himself and all others similarly situated, appeals from the September 16, 2014 opinion and order of the United States District Court for the Southern District of New York (Sullivan, J.) dismissing his putative collective action seeking damages from Skadden, Arps, Slate, Meagher & Flom LLP and Tower Legal Staffing, Inc. for violations of the overtime provision of the Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq. ('FLSA'), arising out of Lola's work as a contract attorney in North Carolina. We agree with the district court's conclusion that: (1) state, not federal, law informs FLSA's definition of 'practice of law'; and (2) North Carolina, as the place where Lola worked and lived, has the greatest interest in this litigation, and thus we look to North Carolina law to determine if Lola was practicing law within the meaning of FLSA. However, we disagree with the district court's conclusion, on a motion to dismiss, that by undertaking the document review Lola allegedly was hired to conduct, Lola was necessarily 'practicing law' within the meaning of North Carolina law. We find that accepting the allegations as pleaded, Lola adequately alleged in his complaint that his document review was devoid of legal judgment such that he was not engaged in the practice of law, and remand for further proceedings."; "Lola urges us to fashion a new federal standard defining the 'practice of law' within the meaning of Section 541.304. We decline to do so because we agree with the district court that the definition of 'practice of law' is 'primarily a matter of state concern.'" (citation omitted); "Regulating the 'practice of law' is traditionally a state endeavor. No federal scheme exists for issuing law licenses."; "We thus find no error with the district court's conclusion that we should look to state law in defining the 'practice of law.'"; "The district court erred in concluding that engaging in document review per se constitutes practicing law in North Carolina. The ethics opinion does not delve into precisely what type of document review falls within the practice of law, but does note that while 'reviewing documents' may be within the practice of law, '[f]oreign assistants may not exercise independent legal judgment in making decisions on behalf of a client.' N.C. State Bar Ethics Committee, 2007 Formal Ethics Op. 12. The ethics opinion strongly suggests that inherent in the definition of 'practice of law' in North Carolina is the exercise of at least a modicum of independent legal judgment."; "[M]any other states also consider the exercise of some legal judgment an essential element of the practice of law."; "The gravamen

of Lola's complaint is that he performed document review under such tight constraints that he exercised no legal judgment whatsoever -- he alleges that he used criteria developed by others to simply sort documents into different categories. Accepting those allegations as true, as we must on a motion to dismiss, we find that Lola adequately alleged in his complaint that he failed to exercise any legal judgment in performing his duties for Defendants. A fair reading of the complaint in the light most favorable to Lola is that he provided services that a machine could have provided. The parties themselves agreed at oral argument that an individual who, in the course of reviewing discovery documents, undertakes tasks that could otherwise be performed entirely by a machine cannot be said to engage in the practice of law. We therefore vacate the judgment of the district court and remand for further proceedings consistent with this opinion.").

- Henig v. Quinn Emanuel Urquhart & Sullivan, LLP, 151 F. Supp. 3d 460, 465, 469-70 (S.D.N.Y. 2015) (dismissing an FSLA case against Quinn Emanuel in which a privilege-reviewing lawyer sought overtime pay; rejecting the lawyer's argument that he was not practicing law; pointing to Quinn Emanuel's training mentioning the legal judgment required for privilege review; "One line in the Presentation explicitly states that '[p]rivilege can be tricky and there are a lot of gray areas.'" (internal citation omitted); "Plaintiff's tagging history and his other descriptions of his role on the Document Review Project, however, confirm that his job involved more than the largely mindless task that would result from following the verbal instructions to the letter. . . . Plaintiff's tagging on these documents, along with his comments on the potentially privileged nature of others, reveal that he understood the process by which he was meant to review documents could -- and did -- require him to exercise legal judgment.").

- District of Columbia UPL Op. 21-12 (1/12/12) (providing guidance to "discovery service companies" operating in Washington, D.C.; explaining the background; "In recent years, companies seeking to assist legal services organizations with document review have dramatically expanded the scope of their services. For example, some companies offer not only attorneys to staff document review projects, but also offer the physical space where the document review will take place, computers for conducting the review, and servers for hosting the documents to be reviewed. These companies also offer a host of related services, from e-discovery consulting to database management to the eventual production of documents in litigation."; "At the same time, discovery service companies have begun to describe their services in increasingly broad language. They use terms like 'one-stop shopping,' 'comprehensive review and project management,' and 'fully managed document review.'"; "In addition, some companies have sought to distinguish their services by promoting the legal expertise or qualifications of

> their staff. These statements do not appear to refer to the expertise of attorneys that the company seeks to place for document review projects. Instead, these companies tout the expertise of persons who work for the discovery services company itself. Some companies have described these individuals as 'seasoned litigators,' and have promoted particular 'practice areas' such as intellectual property, patent litigation, class action lawsuits, and mergers and acquisitions."; "[A] statement that a given company 'design[s], develop[s], and manage[s] the entire review process' could mean that the company is selecting attorneys to work on a project and supervising the exercise of their legal judgment. If the company does so in the District of Columbia, it would be engaging in the practice of law under Rule 49 . . . ." (alterations in original); "[T]he extent that discovery services use a District of Columbia address, or advertise themselves as available to assist with discovery projects in the District, Rule 49's holding out prohibition does apply."; "[T]he final selection of attorneys to staff a document review project must be made by a member of the D.C. Bar with an attorney-client relationship with the client, the attorney's legal work must be directed or supervised by a D.C. Bar member who represents the client, and the discovery services company may not otherwise violate Rule 49 or attempt to supervise the document review attorney."; "[D]iscovery services companies that are not otherwise authorized to practice law in the District of Columbia may not provide legal advice to their clients, nor may they hold out themselves or any attorneys on their staff as authorized to practice law in the District of Columbia."; "Broad statements that a company can manage the entire document review or discovery process -- by providing 'soup-to-nuts' or 'end-to-end' solutions, *e.g.* -- have a serious potential to mislead."; "[I]n order to avoid creating the impression that the company or its staff is authorized to practice law in the District of Columbia, statements regarding the legal experience of the companies' staff must be accompanied by a prominent disclaimer that the company is not authorized to practice law or provide legal services in the District of Columbia, and that the company's staff members cannot represent outside clients or provide legal advice."; "While a D.C. Bar member may individually be authorized to practice law in the District, a company providing such an attorney's legal services would necessarily run afoul of the restrictions placed on attorney referral articulated in the Committee's Opinion 6-99." (emphases added)).

Virginia dealt with this issue in 2005

> the Committee concludes that the preparation of warrants in debt and other forms necessary for pro se representation ("legal instruments of any character") in Small Claims Court by a non-attorney social worker would be the unauthorized practice of law if the non-attorney social worker selects the forms for the litigant or advises the litigant as to which forms

> are appropriate based on the litigant's particular case; or provide[s] any legal advice to the litigant. The social worker may assist the litigant with completion of the form document using language specifically dictated by the litigant.

Virginia UPL Op. 207 (8/26/05) (emphasis added).

In a parallel ethics opinion, the Virginia Bar addressed an inquiry from an attorney who indicated that she "would be training social workers to assist members of the public in filling out forms for use in small claims court, usually to obtain payment of back wages from employers." Virginia LEO 1792 (1/10/06).

The Virginia Bar found that a lawyer could not assist the social worker in how to help their clients in completing the forms.

> Comment One to Rule 5.5 states that the rule is not intended to prohibit lawyers "from providing professional advice and instruction to nonlawyers whose employment requires knowledge of the law." Examples cited in that comment are claims adjusters, employees of financial or commercial institutions, and social workers. The critical distinction here is between employment that "requires knowledge of the law" and employment that actually is the practice of law. A nonlawyer's employment may well entail a necessary understanding of pertinent law; that knowledge, however, does not provide authority to provide legal services based on that understanding. Comment One is intended to allow lawyers to provide training on the law needed for performance of a job; it does not provide the receivers of that training an exception to the Unauthorized Practice Rules. To reiterate, this attorney cannot instruct these social workers in the unauthorized practice of law.

Virginia LEO 1792 (1/10/06).

Best Answer

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

N 3/12

"Self-Help" Books and Online Services

Hypothetical 7

One of your law school classmates was always more entrepreneurial than you were. She has now come to you with a proposition that seems potentially lucrative but has you worried. She wants you to help her create and market software that consumers can use to create simple legal documents without the direct assistance of a lawyer. Given both the vague definition of the "practice of law," and the severe punishment that states have imposed on lawyers assisting the unauthorized practice of law, you jokingly tell your husband that your roommate has asked you to become involved in what you call "LegalDoom.com."

Would you be assisting the unauthorized practice of law by helping a for-profit company create and market software that customers can use to create their own wills, deeds, articles of incorporation, etc.?

MAYBE

Analysis

Given the uncertain definition of the "practice of law," it should come as no surprise that entrepreneurs have occasionally attempted to market mechanisms for customers to prepare their own documents such as wills, divorce pleadings, articles of incorporation, etc. Predictably, bars usually have resisted such efforts, and targeted those entrepreneurs and the lawyers assisting them.

The Restatement notes that

> [c]ontroversy has surrounded many out-of-court activities such as advising on estate planning by bank trust officers, advising on estate planning by insurance agents, stock brokers, or benefit-plan and similar consultants, filling out or providing guidance on forms for property transactions by real-estate agents, title companies, and closing-service companies, and selling books or individual forms containing instructions on self-help legal services or accompanied by personal, nonlawyer assistance on filling them out in

> connection with legal procedures such as obtaining a marriage dissolution.

Restatement (Third) of Law Governing Lawyers § 4 cmt. c (2000) (emphasis added).

History

This "controversy" has spanned decades. For instance, in the 1960s nonlawyer Norman Dacey was convicted of a misdemeanor and faced jail time in 1968 for publishing a book entitled How to Avoid Probate.[1] One author has noted that in 1966 Dacey's book outsold another book published in the same year -- Masters and Johnson's Human Sexual Response.[2] Dacey ultimately won his fight. A New York appellate court eventually upheld Dacey's claim that he had the constitutional right to publish such a book.[3]

Just a few years later, Texas dealt with a similar issue. A law review article described that incident.

> In the 1969 case of Palmer v. Unauthorized Practice Committee of the State Bar of Texas, [438 S.W.2d 374 (Tex. Civ. App. 1969)] the court enjoined the sale of blank will forms by a lay person, on the theory that a form is 'almost a will itself' and is 'misleading and certainly will lead to unfortunate consequences for any layman who might rely upon the 'form' and the definitions attached.' Palmer briefly acknowledged and then dismissed a possible free speech challenge to its holding, noting that '[c]onstitutional rights of speech, publication and obligation of contract are not

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1 Catherine J. Lanctot, Does LegalZoom Have First Amendment Rights? Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law, Villanova Public Law & Legal Theory Working Paper Series, June 2011, at 112-14 (explaining that a nonlawyer named Norman Dacey was convicted of a misdemeanor and faced thirty days in jail in 1968 for publishing the book How to Avoid Probate; explaining his constitutional claim was eventually upheld by the New York Court of Appeals in December 1967).

2 Id. at 112.

3 Id.

> absolute, and in a given case where the public interest is involved, courts are entitled to strike a balance between fundamental constitutional freedoms and the state's interest in the welfare of its citizens.

Catherine J. Lanctot, Does LegalZoom Have First Amendment Rights? Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law, Villanova Public Law & Legal Theory Working Paper Series, June 2011, at 125, 126, 127 (footnotes omitted).

Texas dealt with this issue again about 30 years later. The Texas Bar's Unauthorized Practice of Law Committee successfully obtained summary judgment in its claim that the software "Quicken Family Lawyer" violated Texas law. The bar might have won the battle, but ultimately lost the war[4] -- because the Texas legislature simply changed Texas law while the case was on appeal to the Fifth Circuit.[5]

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[4] Catherine J. Lanctot, Does LegalZoom Have First Amendment Rights? Some Thoughts About Freedom of Speech and the Unauthorized Practice of Law, Villanova Public Law & Legal Theory Working Paper Series, June 2011, at 125, 126, 127 ("Despite Palmer's precedent, the constitutional issue with respect to publication of legal information reemerged in 1998. The Texas Bar's Unauthorized Practice of Law Committee attempted to enjoin the sale of a CD-ROM entitled 'Quicken Family Lawyer.' The software contained one hundred different legal forms and instructions on how to fill them out. As such, the software resembled a legal form book. Unlike the form book however, the software prompted a user for certain information -- such as state of residence -- and then would identify particular forms as being suitable for that particular state." (footnote omitted); "In 1999, a federal district court held that the sale of this computer software in Texas constituted unauthorized practice of law and was unprotected by the First Amendment. Judge Barefoot Sanders concluded that the software 'purports to select' the appropriate document, 'customizes the documents' and 'creates an air of reliability about the documents, which increases the likelihood that an individual user will be misled into relying on them.'" (footnote omitted); "The First Amendment holding did not last for long. After a vigorous lobbying campaign, the Texas State Legislature amended its unauthorized practice of law statute to permit the sale of software like Quicken Family Lawyer. In response, the Fifth Circuit vacated and remanded the district court's opinion in Unauthorized Practice of Law Committee v. Parsons Technology, Inc., without ever reaching the constitutional question. Since Parsons, no court decision has addressed the constitutional question presented by the sale of blank legal forms." (footnote omitted)).

[5] Unauthorized Practice of Law Comm. v. Parsons Tech. Inc., 179 F.3d 956, 956 (5th Cir. 1999) ("Subsequent to the filing of this appeal, however, the Texas Legislature enacted an amendment to § 81.101 providing that 'the "practice of law" does not include the design, creation, publication, distribution, display, or sale . . . [of] computer software, or similar products if the products clearly and conspicuously state that the products are not a substitute for the advice of an attorney,' effective immediately. H.B. 1507, 76th Leg., Reg. Sess. (Tex. 1999). We therefore VACATE the injunction and judgment in favor of plaintiff-appellate and REMAND to the district court for further proceedings, if any should be necessary, in light of the amended statute. Each party shall bear its own costs.").

The controversy over such software products continued to involve state bars. Some states took a fairly forgiving attitude.

- New Jersey UPL Op. 47 (6/13/11) (explaining that nonlawyers may be involved in preparing certain kinds of corporate documents; "The Committee, however, differentiates between drafting corporate operating agreements, by-laws, resolutions, and similar legal documents and drafting routine certificates. These certificates follow a prepared form that is readily available to the public. The New Jersey Department of the Treasury, Division of Revenue, offers an online fill-in-the-blank form for the formation of various corporations, including professional corporations, limited liability companies, and limited liability partnerships. Many accountants use these prepared forms, and the Committee is aware that various Internet business service providers also offer fill-in-the-blank forms of certificates for a minimal charge."; "The Committee finds that the public does not need to be protected by a rule that prohibits nonlawyers from offering customers fill-in-the-blank prepared certificates."; "[N]onlawyers may provide customers with fill-in-the-blank prepared forms for certificates and may type, transcribe, or translate the information provided by the customers onto the form, but they may not counsel, advise, analyze, or otherwise help the customer fill out the form."; "[C]orporate operating agreements, by-laws, resolutions, and similar legal documents require legal expertise and may only be drafted by a lawyer. Nonlawyers, however, may present to customers prepared, fill-in-the-blank certificates of incorporation, certificates of formation, statements of qualification, and certificates of limited partnership and type, transcribe, or translate the customers' information in the form documents. Nonlawyers may not advise or counsel the customer as to the appropriate contents of the forms, but certified public accountants may advise clients as to the appropriate contents of certificates provided they inform their clients that assistance of counsel in the drafting of such documents is advisable.").

Most states took a far more restrictive view. For instance, most states initially declared LegalZoom's activities illegal.

- New Jersey LEO 732 (6/21/17) (in an opinion by the New Jersey Advisory Committee on Professional Ethics, explaining that New Jersey lawyers could not participate in LegalZoom or Rocket Lawyer because they were not officially registered legal service plans in New Jersey; also holding that New Jersey lawyers could not participate in Avvo because arrangement impermissible referral fee splitting; "LegalZoom offers what appear to be legal service plans to users through its website. For Business Advantage Pro, users pay a monthly flat fee subscription and receive legal advice on limited business matters. For Legal Advantage Plus, users pay a monthly flat

fee and receive legal advice on various matters such as estate planning, family law, and tax. Under both plans, users receive 'unlimited' 30-minute consultations with lawyers. Users may make appointments with participating lawyers or request to receive a phone call from the 'first available' lawyer. Users may receive additional services directly from participating lawyers at a discounted fee rate. The 'Join Our Attorney Network' page of the LegalZoom website states that lawyers do not pay LegalZoom to participate; the monthly subscription fees are retained by LegalZoom."; "Rocket Lawyer offers what appear to be legal service plans to users for a monthly flat fee; subscribing users receive limited legal advice on document-related matters, such as enforcing a legal document (called 'document defense'). Users also receive a 'free' 30-minute consultation with a lawyer, and can use the 'ask a lawyer' section of its website for legal advice. Participating lawyers do not pay Rocket Lawyer but agree to offer a discounted fee for additional services; Rocket Lawyer retains the monthly subscription fee."; "The LegalZoom and Rocket Lawyer offerings appear to be legal service plans, as they 'furnish' and 'pay for' limited legal services through outside participating lawyers to 'members' who pay a monthly subscription ('membership') fee. Members select lawyers from the respective websites; participating lawyers are not officially affiliated with LegalZoom or Rocket Lawyer; and members become clients of the participating lawyer. As of the date of this Joint Opinion, however, neither organization has registered a legal service plan with the Administrative Office of the Courts. Therefore, New Jersey lawyers may not provide legal services to members of these unregistered legal service plans."; "Avvo offers, on its website, two legal services products: Avvo Advisor and Avvo Legal Services. Through Avvo Advisor, users may purchase a 15-minute telephone conversation with a lawyer for a flat fee. The user pays the fee to Avvo, Avvon contacts participating lawyers, and the first lawyer who responds to Avvo gets the job. Users can also select a lawyer from the Avvo profiles of participating lawyers. After the telephone conversation is complete, Avvo electronically deposits the flat fee into the lawyer's bank account and then withdraws a 'marketing fee' (currently $10, about 25% of the $39.95 flat fee for the legal consultation). Avvo suggests that the deposit be made into the lawyer's trust account, and the withdrawal be taken from the lawyer's operating account."; "Through Avvo Legal Services, users may purchase various legal services for fixed fees paid to Avvo, such as an uncontested divorce or a green card application. Participating lawyers provide these services to the user. When the services are completed, Avvo deposits the fees into the lawyer's bank account and then withdraws a 'marketing fee' in set amounts that vary according to the fee charged for the specific legal service."; "The Committees find that the Avvo business model violates Rules of Professional Conduct 5.4(a). The participating lawyer receives the set price for the legal service provided, then pays a portion of that amount to Avvo. The label Avvo assigns to this payment ('marketing fee') does not determine the purpose of the fee."; "The

Committees find that the 'marketing fee' that lawyers pay Avvo after providing legal services to clients is not for the 'reasonable cost of advertising' but, instead, is an impermissible referral fee."; "In New Jersey, lawyers are not required to hold advance payment of fees in their trust account absent an agreement with the client; while that is the better practice, they may deposit such monies in their operating account. In re Stern, 92 N.J. 611 (1983); Michels, K., New Jersey Attorney Ethics, § 8:4-3a, p. 126-27 (Gann 2017)."; "Avvo claimed that the 'marketing fee' is not a referral fee but an advertising cost, and because the 'marketing fee' is a separate transaction, there is no improper fee sharing. The label and timing of the fee does not transform it into an advertising cost. This fee varies depending on the cost of the legal service provided, which is inconsistent with the essential elements of an advertising cost. Avvo defended the varying amounts of its 'marketing fees' by stating that in the online market, bigger-ticket services should have bigger-ticket fees. It stated that it spends more to advertise the range of services and takes a bigger payment processing risk for more expensive services. The Committees are not convinced that the sliding scale of fees for legal services rendered bear any relation to marketing."; "In sum, the Committees find that the Avvo website offers an impermissible referral service, in violation of Rules of Professional Conduct 7.2(c) and 7.3(d), as well as improper fee sharing with a nonlawyer in violation of Rule of Professional Conduct 5.4(a). LegalZoom and Rocket Lawyer avoid those problems but appear to be offering legal service plans that have not been registered pursuant to Rule of Professional Conduct 7.3(e)(4)(vii). New Jersey lawyers may not participate in the Avvo legal service programs. In addition, New Jersey lawyers may not participate in the LegalZoom or Rocket Lawyer legal service plans because they are not registered with the New Jersey Supreme Court (Administrative Office of the Courts).").

- Pennsylvania LEO 2010-01 (2010) (finding that LegalZoom violated Pennsylvania's UPL rules; agreeing with other courts that LegalZoom was committing the unauthorized practice of law; "While the PBA UPL committee clearly recognizes that anyone may sell 'forms' or provide solely clerical assistance in completing them, it is clear from the advertising and the fees being charged by LDPS that [they] are offering more than rote forms to be typed upon by a clerk. It is the PBA UPL Committee's opinion that there is a reasonable factual basis that legal document preparation services, whether online or in person at a specific site, are engaging in the unauthorized practice of law in Pennsylvania. This conclusion is based upon such services, and public descriptions of their own activities. Clearly their conduct goes beyond merely clerical or rote completion of form documents provided by a customer." (footnote omitted); concluding as follows: "It is the opinion of the Pennsylvania Bar Association Unauthorized Practice of Law Committee that the offering or providing [in Pennsylvania] of legal document preparation services as described herein (beyond the supply of preprinted forms selected

by the consumer not the legal document preparation service), either online or at a site in Pennsylvania is the unauthorized practice of law and thus prohibited, unless such services are provided by a person who is duly licensed to practice law in Pennsylvania retained directly for the subject of the legal services.").

- Conn. UPL Op. 2008-01 (2008) ("It is the Committee's opinion that there is a reasonable factual basis for believing that LegalZoom, and We the People are engaged in the unauthorized practice of law in Connecticut. This conclusion is based on the services' public descriptions of their own activities. Their conduct goes well beyond mere stenographic completion of documents provided by a customer. These services design, craft, and select the documents based on legal research and legal experience, and hold the documents out as suitable to a particular customer's needs. Supervising attorneys or experts are also available during the document preparation process. Their involvement would be an unnecessary expense to any [stenographic] activity. The involvement adds value only if they are giving legal advice. Lawyers, whether admitted in this state or elsewhere, are prohibited from engaging in the unauthorized practice of law in Connecticut including assisting another in doing so in this state.").

- Ohio UPL Op. 2008-03 (12/12/08) ("[I]t is the Board's opinion that an online service that prepares a legal document or instrument for a customer by selecting an appropriate legal form, makes choices for inclusion of certain provisions in the form, and generally aids in the preparation of the document or instrument is not a scrivener service and is prohibited in Ohio. Legal document preparation without the direct supervision of an Ohio licensed attorney, whether by completing forms selected by an unlicensed individual, or through the creative drafting of documents, unavoidably leads to the unlicensed individual or entity engaging in the rendering of a legal service that involves the giving of legal advice. Gov. Bar R. VII(2)(A). Unless a preprinted legal form is chosen by the consumer, without assistance, guidance, selection, or direction from the online service, and the consumer provides all information for the form without prompting for key or relevant information, the combined activities of an online service will normally constitute the unauthorized practice of law in Ohio.").

LegalZoom and similar entities eventually resolved every state's objections.

- General Assembly of North Carolina Session 2015, Session Law 2016-60, House Bill 436 (6/30/16) ("AN ACT TO FURTHER DEFINE THE TERM "PRACTICE LAW" FOR THE PURPOSE OF PROTECTING MEMBERS OF THE PUBLIC FROM HARM RESULTING FROM THE UNAUTHORIZED PRACTICE OF LAW BY A PERSON WHO IS NOT A TRAINED AND

LICENSED ATTORNEY."; "The General Assembly of North Carolina enacts: Section 1. G.S. 84-2.1 reads as rewritten: '§84-2.1. 'Practice law' defined. (a) The phrase 'practice law' as used in this Chapter is defined to be performing any legal service for any other person, firm or corporation, with or without compensation, specifically including the preparation or aiding in the preparation of deeds, mortgages, wills, trust instruments, inventories, accounts or reports of guardians, trustees, administrators or executors, or preparing or aiding in the preparation of any petitions or orders in any probate or court proceeding; abstracting or passing upon titles, the preparation and filing of petitions for use in any court, including administrative tribunals and other judicial or quasi-judicial bodies, or assisting by advice, counsel, or otherwise in any legal work; and to advise or give opinion upon the legal rights of any person, firm or corporation: Provided, that the above reference to particular acts which are specifically included within the definition of the phrase 'practice law' shall not be construed to limit the foregoing general definition of the term, but shall be construed to include the foregoing particular acts, as well as all other acts within the general definition."; (b) The phrase 'practice law' does not encompass: (1) The drafting or writing of memoranda of understanding or other mediation summaries by mediators at community mediation centers authorized by G.S. 7A-38.5 or by mediators of employment-related matters for The University of North Carolina or a constituent institution, or for an agency, commission, or board of the State of North Carolina. (2) The selection or completion of a preprinted form by a real estate broker licensed under Chapter 93A of the General Statues, when the broker is acting as an agent in a real estate transaction and in accordance with rules adopted by the North Carolina Real Estate Commission, or the selection or completion of a preprinted residential lease agreement by any person or Web site provider. Nothing in this subdivision or in G.A. 84-2.2 shall be construed to permit any person or Web site provider who is not licensed to practice law in accordance with this Chapter to prepare for any third person any contract or deed conveying any interest in real property, or to abstract or pass upon title to any real property, which is located in this State."; "(3) The completion of or assisting a consumer in the completion of various agreements, contracts, forms, or other documents related to the sale or lease of a motor vehicle as defined in G.S. 20-286(10), or of products or services ancillary or related to the sale or lease of a motor vehicle, by a motor vehicle dealer licensed under Article 12 of Chapter 20 of the General Statutes.'"; indicating that the selection of preparation of legal documents does not violate the UPL prohibition as long as the preparer meets certain requirements, including having a North Carolina lawyer review the blank templates and that the form does not disclaim warranties, etc.).

- LegalZoom.com, Inc., v. N.C. State Bar, 2015 NCBC 96 ¶¶ 1, 2 (N.C. Super. Ct. Oct. 22, 2015) ("The parties agree that the definition of the 'practice of law' as set forth in N.C.G.S. § 84-2.1 does not encompass LegalZoom's operation

of a website that offers consumers access to interactive software that generates a legal document based on the consumer's answers to questions presented by the software so long as LegalZoom complies with the provisions of Paragraph 2 below."; "LegalZoom agrees that it must continue to ensure, for the shorter of a period of two (2) years after the entry of this Consent Judgment or the enactment of legislation in North Carolina revising the statutory definition of the 'practice of law', that: LegalZoom.com, Inc. v. N.C. State Bar, 2015 NCBC 96."; "(a) LegalZoom shall provide to any consumer purchasing a North Carolina product (a North Carolina Consumer) a means to see the blank template or the final, completed document before finalizing a purchase of that document"; "(b) An attorney licensed to practice law in the State of North Carolina has reviewed each blank template offered to North Carolina Consumers, including each and every potential part thereof that may appear in the completed document. The name and address of each reviewing attorney must be kept on file by LegalZoom and provided to the North Carolina Consumer upon written request" "(c) LegalZoom must communicate to the North Carolina Consumer that the forms or templates are not a substitute for the advice or services of an attorney"; "(d) LegalZoom discloses its legal name and physical location and address to the North Carolina Consumer"; "(e) LegalZoom does not disclaim any warranties or liability and does not limit the recovery of damages or other remedies by the North Carolina Consumer; and (f) LegalZoom does not require any North Carolina Consumer to agree to jurisdiction or venue in any state other than North Carolina for the resolution of disputes between LegalZoom and the North Carolina Consumer.").

- Monica Bay, Game Change: ABA Pilots With RocketLawyer; The American Bar Association turns to an unexpected partner to get lawyers business, Law Tech. News, Oct. 1, 2014 ("Hell may have just frozen over. After years of outright hostility, the organized bar is not only acknowledging the role of Web-based self-help, lawyer referral services, and lawyer marketing but is about to actively participate with one of the most visible providers. On Aug. 8, at the 2014 annual meeting of the American Bar Association in Boston, the ABA and Rocket Lawyer, a San Francisco-based online legal services provider, announced in a press release that they are 'teaming up to explore innovative solutions to a vexing legal paradox -- the difficulty small businesses face finding affordable legal services at a time when many lawyers would welcome expanding professional opportunities.'"; "Translation: Solo and small firm lawyers serving individuals individuals and small businesses are having trouble running their shops profitably, while 80 percent of Americans can neither find nor afford routine legal services (wills, real estate, medical directives, incorporations, trademarks, personal injury, etc.)."; "The two entities will 'collaborate to test new ways to empower lawyers to deliver affordable online legal services to small businesses and the self-employed,' the press release continued. 'The pilot program will be designed to connect

the ABA's network of practicing lawyers to prospective clients through Rocket Lawyer's cloud-based platform.'"; "Quotes in the joint press release hint at the underlying historical friction. Outgoing ABA President James Silkenat said, 'We look forward to working with Rocket Lawyer on this pilot program to identify ways for our members to serve more clients while remaining faithful to the legal profession's high standards and ethics and professionalism.' Rocket Lawyer founder/CEO Charley Moore 'describes the agreement as a pioneering effort to democratize access to legal counsel using technology: 'At its best, our legal system encourages innovation and facilities progress. We applaud the [ABA] for working with us to find new ways to expand legal representation from qualified attorneys through video and mobile technologies.'"; "In the past, most bar associations (local, state and national) viewed Web-based self-help, legal services and attorney marketing as anathema and used everything from aggressive 'unauthorized practice of law' litigation to stiff ethics rules to prosecute offenders. California, Texas and Florida have been among the most aggressive state bars. A few examples: California (and most states) will not accredit continuing legal education programs about lawyer marketing; Searcy Denney Scarola Barnhart & Shipley, a personal injury firm, sued the Florida Bar in federal court, asserting that the bar's advertising rules violated the First Amendment and were unconstitutionally vague. The vagueness claim was dismissed with prejudice in July but the litigation continues, said Adam Losey, an associate at Foley & Lardner who resides in Orlando. Prior to the litigation, a number of the advertising rules were deleted and replaced. Florida's new rules require that certain statements in advertisements must be 'objectively verifiable,' Losey said; Famously, the State Bar of Texas and the Supreme Court of Texas went so far as to try to ban self-help legal books and software from Nolo Press and others, citing UPL statues. 'After a two-year fight, the Texas legislature finally passed a law in 1998 to make it clear that selling law books and software was not 'practicing law without a license,' recalls Nolo on its website."; "More recently, at Stanford Law School's 2014 'Code X' conference, Edward Hartman, co-founder of LegalZoom -- which offers state-specific business and personal legal forms and documents (some with attorney help) -- reported that the South Carolina Supreme Court 'finally said that LegalZoom is not unauthorized practice of law.'"; "After decades of chest-thumping by bar groups pledging to address the problem, without success, technology may be the ultimate answer. 'We are at the early stages of reviewing how the ABA might use Rocket Lawyer's online platform to develop a pilot program to expand legal services ethically and professionally,' current ABA president William Hubbard told Law Technology News in mid-September. 'We want to look at whether there are ways to link up small businesses that have difficulty locating affordable legal services with lawyers who are interested in expanded professional opportunities,' said Hubbard, a partner at Nelson Mullins Riley & Scarborough. Beyond that, the ABA and Rocket Lawyer remain mum about the details of the pilot project. In August,

Silkenat told The Wall Street Journal that the basic plan would be to have a few hundred ABA members in a few states use the site. 'We'll monitor the kind of services they provide, how clients respond to them, make sure it really is the underserved communities they are responding to,' he said. Rocket Lawyer will not make a profit off the pilot, he told the WSJ. 'But the company will benefit from the ABA's imprimatur,' said Silkenat. 'From Rocket Lawyer's point of view, I think they see us as a validating part of the process. We have access to tremendously qualified lawyers throughout the country.'").

Best Answer

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

N 3/12

Exception for Pro Se Litigants

Hypothetical 8

You always figured that nonlawyers could represent themselves in court. However, a pro se adversary just filed a pleading that had been signed on her behalf by her so-called "representative."

Is a court likely to recognize such a pleading as permissible and legitimate?

NO

Analysis

Every state permits litigants to represent themselves, even if they are not lawyers. The Restatement explains this concept.

> Every jurisdiction recognizes the right of an individual to proceed "pro se" by providing his or her own representation in any matter, whether or not the person is a lawyer. Because the appearance is personal only, it does not involve an issue of unauthorized practice. The right extends to self-preparation of legal documents and other kinds of out-of-court legal work as well as to in-court representation. In some jurisdictions, tribunals have inaugurated programs to assist persons without counsel in filing necessary papers, with appropriate cautions that court personnel assisting the person do not thereby undertake to provide legal assistance. The United States Supreme Court has held that a person accused of crime in a federal or state prosecution has, as an aspect of the right to the assistance of counsel, the constitutional right to waive counsel and to proceed pro se. In general, however, a person appearing pro se cannot represent any other person or entity, no matter how close the degree of kinship, ownership, or other relationship.

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

However, states restrict the pro se "exception" to a litigant representing himself or herself. Thus, courts nearly always consider pleadings to be nullities if signed by someone other than the pro se litigants themselves.

- White v. Clay, 2013 Ark. App. 166, at 5-6 (Ark. Ct. App. 2013) (dismissing a prisoner's malpractice claim as time-barred, because a pleading filed by his mother on his behalf was a nullity; "Although Mr. Clay similarly contends that his mother signed the answer with his permission, pursuant to an alleged power of attorney, we hold that because Mr. Clay's answer was not signed by him or a person authorized to practice law in Arkansas, it was invalid. Mr. Clay's mother was not authorized to sign the answer on his behalf, and there is nothing in the record to show that she held a valid power of attorney.").

- New Jersey LEO 50 (3/2013) ("The Committee on the Unauthorized Practice of Law received a complaint alleging that a nonlawyer attempted to represent a grievant in an attorney discipline matter. The nonlawyer argued that his conduct was permitted because the grievant had executed a power of attorney authorizing him to act as the grievant's agent. The Committee hereby issues this Opinion to clarify that a nonlawyer holding a power of attorney is not authorized to act as a lawyer licensed in the State of New Jersey. A power of attorney does not permit a nonlawyer to provide legal services or advice, or represent the principal in any judicial or quasi-judicial forum. A nonlawyer who acts in this manner engages in the unauthorized practice of law."; "A power of attorney cannot authorize an agent to perform acts that would be considered the practice of law. Only the New Jersey Supreme Court has the power to regulate the practice of law and to decide who is authorized to practice law." (footnote omitted); "Powers of attorney often include provisions empowering the agent to 'pursue claims and litigation.' This provision permits the agent to act on behalf of the principal *as the client* in a lawsuit. An attorney-in-fact (the holder of a power of attorney) may make decisions concerning litigation for the principal, such as deciding to settle a case, but a nonlawyer attorney-in-fact may not act as lawyer to implement those decisions. . . . Nor may an agent appear on behalf of a principal in court as a *pro se* party; only the real party in interest -- the principal, not a nonlawyer agent -- is permitted to appear in court *pro se*."; "Providing legal advice and representing parties in court or in quasi-judicial forums such as

attorney discipline proceedings or administrative agency hearings is the practice of law."; "The Committee considered whether it is in the public interest to permit nonlawyers who hold powers of attorney to provide legal services or represent parties in court or a quasi-judicial forum. Permitting nonlawyers who hold a power of attorney to practice of law would expose members of the public to persons who are not bound by the *Rules of Professional Conduct* and who do not have any training in law. It would interfere with the orderly administration of justice and judges' expectations that representatives appearing in court will act ethically. It would abrogate New Jersey's licensing and admission requirements. The Committee finds that it is not in the public interest to permit the practice of law by nonlawyers who have been appointed agent of a principal pursuant to a power of attorney. Such conduct is the unauthorized practice of law.").

- Todd v. Franklin Collection Serv., Inc., 694 F.3d 849, 850, 851, 852 (7th Cir. 2012) (holding that a nonlawyer who acquired assignments of debtors' claims against that collection agency could not pursue cases against the collection agency despite his argument that he was representing himself pro se and pursuing his own claim; "The issue in this appeal is whether the district court properly dismissed the claims purportedly assigned to Michael Todd after determining that he was engaged in the unauthorized practice of law. Todd attemped to purchase claims against Franklin Collection Service, a collection agency, from Vicki Fletcher -- who had no relationship to Todd before she assigned her claims to him. He then sued Franklin for violations of the Fair Debt Collection Practices Act, 15 U.S.C. § 1692, and for common law negligence."; "Todd responded that the assignment was valid and that he was not engaged in the unauthorized practice of law because he was representing only himself and pursuing claims that he now owned."; "The district court correctly ruled that the assignment was void as against public policy because Todd was using it to attempt to engage in the unauthorized practice of law. Illinois public policy forbids the assignment of legal claims to non-attorneys in order to litigate without a license."; "By attempting to litigate Fletcher's claims through the guise of an assignment, Todd sought to practice law without a license, and therefore the assignment violated public policy.").

- Aguilera v. Christian, 699 S.E.2d 517, 519 (Va. 2010) ("Both the statute and the rule unambiguously state that a party not

represented by an attorney "shall sign" a pleading. Nothing in this language permits a person other than a licensed attorney to sign a pleading on behalf of an unrepresented party. The policy underlying this requirement is clear. Our legal system allows parties in litigation to proceed either pro se or through representation by a duly licensed attorney. . . ."; "Accordingly, in this case, Aguilera's signature on the complaint was invalid and a nullity because it was not signed by Aguilera, the party with the cause of action, or by an attorney licensed to practice law in this Commonwealth. Therefore, the trial court did not err in dismissing the complaint and we will affirm the judgment of the trial court.").

At least one court has been more lenient.

- Beard v. Branson, 528 S.W.3d 487, 489-90 (Tenn. 2017) (holding that a husband's wrongful death case was not a nullity because the surviving spouse filed it without a lawyer; "We granted permission for this appeal to determine whether a surviving spouse who files a wrongful death lawsuit is acting as a legal representative of the decedent and whether a wrongful death lawsuit filed pro se by the surviving spouse is void ab initio based on the spouse's pro se status. In this case, the decedent's surviving spouse filed a pro se wrongful death health care liability lawsuit shortly before the one-year statute of limitations lapsed. After expiration of the limitations period, the spouse retained an attorney and filed an amended complaint. In the ensuing discovery, the defendants learned that the decedent had two daughters, both of whom were statutory beneficiaries in the wrongful death action. The defendants filed motions for summary judgment. They argued that the spouse's initial pro se complaint was filed in a representative capacity on behalf of the decedent and the other statutory beneficiaries and that it was, therefore, void ab initio; thus, the filing of the amended complaint could not relate back to the date of the initial complaint, and the lawsuit was time-barred. The trial court denied the summary judgment motions and permitted the amended complaint to relate back to the date of the initial pro se complaint. It then conducted a jury trial; the jury found both defendants liable and awarded damages. The defendant hospital appealed the denial of summary judgment. Adopting the defendant's argument, the Court of Appeals reversed. The plaintiff now appeals. Under the plain language of Tennessee's wrongful death statutes, the decedent's right of action 'pass[es] to' the surviving spouse upon the decedent's death, and the surviving spouse asserts the right of action for the benefit of himself and other beneficiaries. Tenn. Code Ann. § 20-5-106(a) (2009 & Supp. 2016). Consequently, we hold that the surviving spouse did not file the initial pro se complaint as the legal representative of either the decedent or the decedent's estate. As we construe our wrongful death statutes, in filing the pro se complaint, the

> surviving spouse was acting to a large extent on his own behalf and for his own benefit pursuant to his right of self-representation. Under the facts of this case, we hold that the initial pro se complaint was not void ab initio, it served to toll the statute of limitations, and the trial court did not err in allowing the filing of the amended complaint to relate back to the date of the initial complaint. Accordingly, we reverse the decision of the Court of Appeals, affirm the trial court's denial of summary judgment, and remand to the Court of Appeals for consideration of the other issues that were properly raised on appeal but not addressed." (alteration in original)).

Interestingly, one court considered a pleading to be nullity when signed by a represented litigant and not by his lawyer.

- Lipoli v. Stutesman, Civ. Dkt. No. CL12-349, slip op. at 2, 4 (Va. Cir. Ct. (Norfolk) Aug. 1, 2012) (finding invalid a complaint listing plaintiff's lawyers but signed only by the plaintiff and not by a lawyer; "In the case at hand, Plaintiff's individual signature is the only signature on the Complaint. Plaintiff signed the pleading but did not provide her address. There is no indication that Plaintiff is an unrepresented party or proceeding *pro se*, because of the names and address of two attorneys on the pleading. The attorneys' names and address appear at the end of the pleading, without a signature. The Court finds that Plaintiff is a represented party; therefore, under § 8.01-271.1, an attorney must have signed her pleading."; "The statute of limitations bars the cause of action that is described in the Amended Complaint, as it accrued more than two years period prior to filing. The Court cannot authorize an amendment to relate back when the sole purpose is to correct a defect in signature. The defect in the signature causes the action to be an invalid proceeding which cannot be nonsuited. Therefore, the Plaintiff's Motions for Leave to Amend and Motion for Nonsuit are OVERRULED, and Defendant's Motion to Strike the Pleadings is GRANTED.").

This issue most commonly arises when sole or majority owners of corporations, partnership, etc. seek to represent those entities. Those efforts normally fail, and sometimes trigger sanctions.

Best Answer

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

N 3/12

Statutory/Regulatory Exceptions

Hypothetical 9

Your gardener asked you this morning about a problem that he is facing with the Social Security Administration. Specifically, he has been very dissatisfied with the person he hired to help him pursue a Social Security claim. You do a little background checking, and you find that your gardener is being represented in his dispute with the Social Security Administration by one of his neighbors -- who apparently attended one year of law school before flunking out.

Is your gardener's neighbor engaged in the unauthorized practice of law?

NO

Analysis

Various statutes and regulations allow nonlawyers to represent third persons in certain contexts.

A 2000 law review article puts some of these regulatory exceptions in historical context.

> Some of these examples are explained by historic industry practices, and others are explained by the market power of the other professions involved in the service. For example, non-lawyers at banks are permitted to draft routine mortgages and non-lawyers are permitted to execute these legal documents with bank clients without running afoul of the unauthorized-practice-of-law prohibitions. Bank employees are also permitted to execute the joint tenancy with right of survivorship agreements on standard bank accounts. The theory underlying these practices is that the transactions are relatively common and straightforward for the client to understand, and society is unwilling to force consumers to incur legal fees for making these types of uncomplicated legal decisions. Many of these documents are also non-negotiable, form agreements and could not be modified by the client even if represented by an independent lawyer. The real estate industry in most states has been

> given the power to execute contracts on residential property in which the agent holds a commission.

John S. Dzienkowski & Robert J. Peroni, Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century, 69 Fordham L. Rev. 83, 95 (Oct. 2000) (footnotes omitted).

The 2015 American Bar Association Standing Committee on Client Protection described various state regulations permitting certain nonlawyers to engage in the practice of law in particular situations.

> Twenty-one jurisdictions authorize nonlawyers to perform some legal services in limited areas, generally under the supervision of a lawyer. Washington adopted the Limited Legal License Technician Rule in 2012 which allows properly licensed nonlawyer legal professionals to provide limited representation in family law matters. Of those responding to the 2015 questionnaire, six jurisdictions are contemplating the limits on nonlawyer service providers. Other allowable nonlawyer activities include: real estate agents/brokers may draft documents for property transactions or attend real estate closings; nonlawyers may attend (and in some states participate in) administrative proceedings; and participate in alternative dispute resolution proceedings. Many of these jurisdictions do not classify these activities as the practice of law.

Am. Bar Ass'n Standing Comm. on Client Protection, 2015 Survey of Unlicensed Practice of Law Committees, at 2 (September 2015).

Not surprisingly, federal laws and regulations normally trump any particular state UPL rules. See, e.g., Casey v. FDIC, 583 F.3d 584 (8th Cir. 2009) (holding that federal law regarding a mortgage lender's charging of a fee for preparation of loan documents preempts any state UPL laws).

While these types of statutory and regulatory exceptions make sense in the transactional context, many states adopted exceptions even in the litigation context -- which is universally recognized as among the core activities constituting the practice of law. The Restatement describes some of the exceptions.

> Certain activities, such as the representation of another person in litigation, are generally proscribed. Even in that area, many jurisdictions recognize exceptions for such matters as small-claims and landlord-tenant tribunals and certain proceedings in administrative agencies. Moreover, many jurisdictions have authorized law students and others not admitted in the state to represent indigent persons or others as part of clinical legal-education programs.

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

The Social Security Act permits anyone to represent a third person in pursuing a Social Security claim.

- 42 U.S.C. § 406(a)(1) ("The Commissioner of Social Security may prescribe rules and regulations governing the recognition of agents or other persons, other than attorneys as hereinafter provided, representing claimants before the Commissioner of Social Security, and may require of such agents or other persons, before being recognized as representatives of claimants that they shall show that they are of good character and in good repute, possessed of the necessary qualifications to enable them to render such claimants valuable service, and otherwise competent to advise and assist such claimants in the presentation of their cases." (emphasis added)).

For lawyers, statutes like this can affect the analysis in several situations.

First, law firms can employ nonlawyers to represent third persons in such settings, but must fully disclose such employees' status.

- North Carolina LEO 2005-2 (4/15/05) (acknowledging that the Social Security Act permits nonlawyers to represent Social Security claimants, but holding that lawyers employing such nonlawyers must disclose their status to prospective clients and in any advertisements).

Second, lawyers admitted only in another state can represent third persons in such situations -- because nonlawyers may do so.

- Nevada LEO 40 (3/7/08) (allowing an out-of-state lawyer to represent Social Security claimants; citing a statute permitting such activity: "'An attorney in good standing who is admitted to practice before the highest court of the State, Territory, District, or insular possession of his residence or before the Supreme Court of the United States or the inferior Federal courts shall be entitled to represent claimants before the Commissioner of Social Security.' 42 U.S.C.A. § 406(a)(1) (1999) (emphasis added)."; explaining that "[t]herefore, an attorney not authorized to practice law in Nevada does not violate Rule of Professional Conduct 5.5 or Supreme Court Rule 42 by representing a claimant in proceedings before the Social Security Administrator so long as: (1) He is admitted to practice in the state of his residence, before the Supreme Court of the United State[s] or before another US court; and (2) He does not establish an office or regular presence in the State of Nevada for the practice of law (Rule of Professional Conduct 5.5(d)(2)). It should be noted that the laws and regulations governing the Social Security Administration also permit the representation of claimants in proceeding before the Commissioner of Social Security by 'non-attorneys.' See 42 U.S.C.A. § 406(a) (1999). This opinion does not and should not be construed to address the question whether such representation by persons other than attorneys constitutes the unauthorized practice of law within the meaning of NRS 7.285. Interpretation of that or any other statute is beyond the purview of this committee's authority. The person requesting this opinion, however, is an attorney subject to the Nevada Rules of Professional Conduct and the disciplinary jurisdiction of the Supreme Court of Nevada and the State Bar of Nevada. See Rule of Professional Conduct 5.5(e).").

Of course, absent such a specific federal statute or regulation, nonlawyers may not engage in such activities.

- Virginia UPL Op. 214 (2/27/09) (holding that a certified public accountant could not represent a party in a Virginia arbitration; "The individual in the present inquiry is neither an attorney licensed in another jurisdiction coming into Virginia to handle a matter for a client the attorney represents elsewhere nor is the person or entity who is a party to the arbitration the regular employer of this individual. Rather, this individual is a CPA, in Virginia, not a licensed attorney in any jurisdiction, who appears to be independently offering to provide to customers from the public, services related to arbitration, including representation, and charging a fee for those services and representation. Based on the Definition of the Practice of Law in the

Commonwealth of Virginia, in particular, subsection (1), and the decisions of the Committee in UPL Opinions 92, 200 and 206, the conduct of this CPA is the unauthorized practice of law.").

Several courts and bars have dealt with this issue.

- New Jersey LEO UPL 53 (5/16/16) ("Applying the law to an individual's specific circumstances generally is the 'practice of law.' A Medicaid advisor or Application Assistor may provide information on insurance programs and coverage options; help individuals complete the application or renewal; help them with gathering and providing required documentation; assist in counting income and assets; submit the application to the agency; and assist with communication between the agency and the individual. But the advisor may not provide legal advice on strategies to become eligible for Medicaid benefits, including advice on spending down resources, tax implications, guardianships, sale or transfer of assets, creation of trusts or service contracts, and the like.").

- Powell v. Unemployment Comp. Bd. of Review, 120 A.3d 315, 320, 320-21 (Pa. Commw. Ct. 2015) (holding that a Pennsylvania Unemployment Compensation Board of Review could not prevent a suspended lawyer from representing unemployed claimants, because non-lawyers may do so under a Pennsylvania statute; "Section 214 of the Unemployment Compensation Law, however, provides that '[a]ny party in any proceeding under this act before the department, a referee or the board may be represented by an attorney or other representative.' (Emphasis added.) Moreover, our Supreme Court in Harkness *[Harkness v. Unemployment Comp. Bd. of Review*, 920 A.2d 162 (Pa. 2007)] held that non-attorneys may represent an individual before a referee hearing, because such activity does not constitute the practice of law."; "Here, we are not confronted with the question of whether representing a party before an unemployment compensation referee constitutes the practice of law, but rather, we are presented with the question of whether the Board acted properly when it prohibited the suspended attorneys from representing Claimant at the hearing. Pursuant to Section 214 of the Law, Claimant had a statutory right to be represented by his designee at an unemployment compensation hearing. Our Supreme Court has held that the representative need not be an attorney, because representation before an unemployment referee does not constitute the practice of law. See Harkness. . . . Enforcement of the Disciplinary Rules, however, falls within the "exclusive" jurisdiction of the Supreme Court and the Disciplinary Board. Pa. R.D.E. 201(a). We note at least one instance where the Pennsylvania Supreme Court, responding to a petition of the Disciplinary Board, held a suspended attorney in contempt for willful violation of Disciplinary Rule 217(j) by representing claimants and employers in unemployment compensation

matters before the Board."; "The question in this case, however, is not whether the suspended attorneys—Mr. Bailey and Mr. Ostrowski—should be sanctioned as a matter of discipline by the Pennsylvania Supreme Court for violating Disciplinary Rule 217(j). The question is whether the Board or referee may enforce Disciplinary Rule 217(j) to deprive a claimant of his right to representation of his choice under Section 214 of the Law, which does not preclude a 'suspended attorney' from serving as a claimant representative. We hold that they cannot.; "Accordingly, the order of the Board is vacated, and the matter is remanded to the Board for a new hearing.").

- Illinois LEO 13-03 (1/2013) (holding that a nonlawyer could not represent a party to an arbitration under the Financial Industry Regulatory Authority ("FINRA") Code of Arbitration Procedure for Customer Disputes; "[W]hile we are not prepared to impose upon the attorney/arbitrator responsibility for preventing unauthorized practice, we believe that an arbitrator faced with such a situation should inform FINRA and, if necessary, notify the ARDC, the agency that has jurisdiction to investigate unauthorized practice pursuant to authority newly granted by Illinois Supreme Court Rule 752. It is not our view, however, that an attorney having taken such steps could be said to be assisting the unauthorized practice should he or she not withdraw as an arbitrator in the event that the steps taken do not result in the discontinuation of the nonlawyer representation.").

- Ohio UPL Advisory Op. 11-01 (10/7/11) ("In the federal arena, there are also several examples of permitted nonattorney assistance and representation. See 8 C.F.R. 292.1 (immigration representatives); Section 110, Title 11, U.S. Code (bankruptcy-petition preparers); 37 C.F.R. 1.31 and 11.5-11.9 (patent practitioners); and Section 406, Title 42, U.S. Code (Social Security hearing representatives). When federal law authorizes nonattorney practice, the Supremacy Clause requires state regulation of the unauthorized practice of law to 'yield' to federal provisions. Clause 2, Article VI, United States Constitution; *Sperry v. State ex rel. Florida Bar* (1963), 373 U.S. 379, 83 S. Ct. 1322, 10 L. Ed. 2d 428 (Florida could not enjoin conduct of nonattorney authorized to practice before the United States Patent Office).").

Starting about a decade ago, states began to create new professions – allowing limited legal-related services by those completing limited training.

- Robert Ambrogi, Who Says You Need A Law Degree To Practice Law?, Wash. Post, Mar. 15, 2015 ("Michelle Cummings never went to law school. Her formal college education ended in 1998, with a paralegal studies degree from Highline Community College in Des Moines, Washington. But this summer, Cummings could start taking on legal clients who need help filing for

divorce or child custody. Like a fully licensed attorney, she'll be able to open an office and set her own fees."; "Cummings is part of Washington state's ambitious experiment to revolutionize access to legal services, particularly among the poor. In the United States, 80 to 90 percent of low-income people with civil legal problems never receive help from a lawyer. This means that domestic violence victims might file for a restraining order alone. Couples who want to divorce might do it without counsel. In some states, parents who have lost custody of their children might fight that decision without any guidance."; "Columbia law professor Risa Kaufman has called this a 'human rights crisis.' And it's fueled by the sky-high price of legal help. In 2014, even lawyers with less than three years' experience billed an average of $255 an hour (though, of course, rates vary widely). Most younger lawyers, saddled with tens of thousands of dollars in law school debt, can't charge more affordable rates. And legal aid offices, meant to fill the gap, are shedding funding and services at an alarming rate."; "Washington state's answer is a new class of legal professionals called 'limited license legal technicians.' They are the nurse practitioners of the legal world. Rather than earning a pricey law degree, candidates take about a year of classes at a community college, then a licensing exam. Once they do, they can help clients prepare court documents and perform legal research, just as lawyers do. 'It will save time and heartache,' says Paula Littlewood, executive director of the Washington State Bar Association. 'It's groundbreaking.'"; "California, Oregon, Colorado and New Mexico say they may follow Washington's lead. The program, if it spreads, could transform how middle -- and lower-class Americans use the law.").

- Robert Ambrogi, Exam Results Released For Washington's First Class of Legal Technicians, Law Sites Blog, June 1, 2015 ("Of the nine candidates in Washington state who took the licensing exam to become the nation's first-ever limited license legal technicians (LLLTs), seven passed and will now have their names submitted to the Supreme Court of Washington for the court to issue an order granting their admission to practice." (http://www.lawsitesblog.com/2015/06/exam-results-released-for-washingtons-first-class-of-legal-technicians.html)).

- Andrew Denney, Report Cites Benefits of 'Navigator' Program, Suggests Expansion, N.Y. L.J., Feb. 24, 2015 ("Less than a year after the launch of a pilot program allowing non-lawyers to help unrepresented, low-income litigants, the program's supporters are calling for an expansion and changes to the law that would allow the non-lawyers to take on more responsibilities."; "According to a 'snapshot' report on the Navigator program, litigants who have received assistance and members of the Judiciary who work in courts where the program is active said that they generally found the program helpful and that it better prepared litigants for their cases.").

- Joel Stashenko, Nassau Bar Criticizes Enlisting Non-Lawyers to Represent Poor, N.Y. L.J., Sept. 30, 2013 ("Relying on non-attorneys to provide civil legal services to low-income New Yorkers -- an idea being explored by Chief Judge Jonathan Lippman -- is 'fraught with peril,' a Nassau County Bar Association committee has warned."; "The committee said it is too early to say that non-attorneys must be enlisted to fill the 'access to justice gap' because existing legal services providers and attorneys working pro bono cannot make up the shortfall.").

- Mark Dubois, Op-Ed., The Authorized Practice Of Law, Conn. L. Tribune, July 24, 2013 ("There is a fascinating dichotomy in thinking developing with regard to just who can offer legal services to the public. A few weeks ago, Governor Dannel Malloy signed a bill which raised the penalty for the unauthorized practice of law by non-lawyers to a felony."; "While lawyers had been pushing for several years to increase the penalty, they never made it across the finish line until the Chief State's Attorney joined the fray. He pointed out some really egregious cases where suspended lawyers or persons who were simply scammers had taken serious money for worthless legal services. He argued that even though there had clearly been conduct deserving criminal prosecution, under the then existing regime the penalty was so minimal that he could not justify devoting his limited prosecutorial resources to the effort. He was joined at the legislature by representatives of the Connecticut Bar Association who argued that real harm was being done to the public, there were few responding to the problem and increasing the jeopardy would have a deterrent effect."; "At the same time, some have been suggesting that Connecticut should consider allowing non-lawyers to provide legal services directly to the public. A recent Law Tribune editorial (Is Time Right For Non-Lawyer Legal Techs? May 31) pointed to a program being developed in Washington state which would license paralegals to provide legal services directly to the public. The Washington program includes minimum training and educational standards, a test and continuing legal education."; "A growing chorus is suggesting that in a world where many, if not most, of the litigants at some court sessions are not represented, some lawyering at a reasonable price would go a long way towards unclogging court dockets and guaranteeing that folks shut out of the legal aid system can have access to justice. For instance, in Massachusetts housing courts, I understand that paralegals have been engaging in limited representation and advocacy with the approval of the administrative judges. They apparently don't have rules that allow this, but have adopted a 'don't ask, don't tell' approach. Many tenants in Connecticut's housing courts are unrepresented, and the Massachusetts model might provide some needed help, but it is hard to envision starting a program which basically turns a blind eye to what is going on."; "Nevertheless, this all can be done. For instance, in immigration

courts, there is a very well designed program that allows advocacy by accredited representatives from non-profits, persons of repute, lay representatives and others. The bankruptcy courts allow non-lawyers to prepare petitions; the Department of Labor allows agents to advocate for employers; and the Internal Revenue Service allows 'registered representatives' to advocate for taxpayers."; "So how do we reconcile these seemingly contradictory efforts -- encouraging non-lawyer representation while at the same time raising the criminal penalties for doing so without authorization? Remember, the unauthorized practice of law regime does not mean that only lawyers can practice law. It simply means that the practice of law by non-lawyers must be 'authorized.' And the entire enterprise is not turf protection for lawyers but consumer protection for the public.").

- Christine Simmons, City Bar Eyes Nonlawyer 'Aides,' 'Technicians' to Help the Poor, N.Y. L.J., June 26, 2013 ("In England and Wales, nonlawyer courtroom aides called 'McKenzie Friends' can appear beside litigants in some courts to give moral support, take notes and provide other 'quiet' advice. In Washington state, nonlawyer 'legal technicians' can inform clients of document procedures and deadlines, perform legal research and review some documents. Now, a New York City Bar committee, recognizing the large unmet need for legal services for the poor, is proposing similar concepts. Specifically, the city bar's Committee on Professional Responsibility is recommending a role for nonlawyer courtroom aides in judicial and administrative hearings. The recommendations, released last week, come as state court officials are studying the feasibility of allowing nonattorneys to provide legal services to poor New Yorkers in simple civil matters. A separate committee named by Chief Judge Jonathan Lippman will focus on the creation of pilot programs across the state that would use nonlawyers to help poor clients in housing, elder law and consumer credit matters. . . . The committee also noted some nonlawyer assistance is already provided to litigants in several forums. In landlord-tenant cases, for instance, Housing Court help desks, court sponsored courses, student volunteers and guardians ad litem are available. The city bar committee looked to other jurisdictions for ideas. In some United Kingdom courts, a 'McKenzie friend' can offer discreet assistance in court to a litigant and sometimes is allowed to present evidence and argument as a lay advocate, the report said. In some cases, they can charge a fee. Anyone can serve as a 'McKenzie friend', including a family member, neighbor or trained volunteer. . . . Aides who are paid should be subject to formal regulation related to qualifications, disclosures, fee arrangement and standards of conduct, the report said. The city bar committee also recommended New York adopt some form of Washington state's 'legal technician' model for nonlawyer assistance outside judicial and administrative hearings. The Washington Supreme Court recently adopted a rule establishing a regime where legal technicians will be licensed to provide services in specific practice areas. According to the

report, legal technicians are allowed to obtain relevant information and explain it to their clients, inform clients about procedures and anticipated course of proceedings, provide certain approved materials, and select and complete some forms, among other tasks. The Washington rule holds legal technicians to the standard of care of a lawyer. The rule also imposes requirements such as completion of an American Bar Association-approved paralegal training program. The city bar report endorsed Washington state's set of mandatory disclosures in a written contract between the technician and the client.").

- Vess Mitev, Non-Lawyer Legal Malpractice?, N.Y. L.J., June 18, 2013 ("An exploratory study into whether non-lawyers should be providing services to those who cannot afford them should conclude that, much like taxation without representation, representation without accreditation is a bad idea. Beyond the obvious problems -- and there are many -- of assigning people without any formal legal training to help those facing real legal issues with significant and often immediate life impacts (such as housing evictions and Family Court proceedings) lurks the specter of the law of unintended consequences. Consider the sympathetic and well-intentioned advocate assigned to a Family Court proceeding who helps draft a petition to remove his client's significant other from the home, due to an alleged domestic abuse incident. An attorney signing or verifying a petition (or any other pleading or substantive court document) would have to certify that to the best of their knowledge, the statements contained in it are not false. This rule subjects frivolous filers to sanctions and/or to attorneys' fees and is intended to chill such filings. But a non-licensed advocate is not contemplated by this or any other Court rule; nor would such a person be impelled to do anything more than parrot the allegations of their client, or make false (even if good faith) statements to the Court, since they would not be subject to traditional disciplinary proceedings. They have no license to worry about being suspended; no disbarment proceeding to ultimately defend. Their own conscience would be their only compass. In such a heavily regulated industry, such a subset of advocates would require the disciplinary rules to be rewritten entirely. . . . In an age where many, many trained lawyers (especially young practitioners) are still looking for work months and years after graduation, allowing non-licensed, untrained advocates into the practice -- even if it is limited to certain areas -- would further undercut the quality of representation: even the greenest practitioner could, in a pinch, argue the peppercorn theory of contract law; a non-attorney, no matter how well-intentioned, nevertheless is unaware of it.").

- Memorandum from the Limited License Working Grp., Cal. State Bar, June 17, 2013 ("In March 2013, the Board Committee on Regulation, Admissions & Discipline Oversight created the Limited License Work Group

('Working Group') to explore the issue of licensing legal technicians and whether to create a limited license to practice law program in California. Legal Technicians are not fully licensed attorneys. They would be licensed to provide limited, discrete legal services to consumers in defined legal subject matter areas only." (available at http://board.calbar.ca.gov/docs/agendaItem/Public/agendaitem1000010723.pdf)).

- Order No. 25700-A-1005, at 4-5, 5-6, 8, In re Adoption of New APR 28 -- Ltd. Practice Rule for Ltd. License Legal Technicians, (Wash. June 14, 2012), http://sbmblog.typepad.com/files/wsc_limitedlicense.pdf (approving a new court rule allowing trained licensed legal technicians to provide certain limited and defined assistance to civil litigants, without being licensed lawyers; "Recognizing the difficulties that a ballooning population of unrepresented litigants has created, court managers, legal aid programs and others have embraced a range of strategies to provide greater levels of assistance to these unrepresented litigants. Innovations include the establishment of courthouse facilitators in most counties, establishment of courthouse-based self-help resource centers in some counties, establishment of neighborhood legal clinics and other volunteer-based advice and consultation programs, and the creation of a statewide legal aid self-help website."; "From the perspective of pro se litigants, the gap places many of these litigants at a substantial legal disadvantage and, for increasing numbers, forces them to seek help from unregulated, untrained, unsupervised 'practitioners.' We have a duty to ensure that the public can access affordable legal and law related services, and that they are not left to fall prey to the perils of the unregulated market place."; "Stand-alone limited license legal technicians are just what they are described to be -- persons who have been trained and authorized to provide technical help (selecting and completing forms, informing clients of applicable procedures and timelines, reviewing and explaining pleadings, identifying additional documents that may be needed, etc.) to clients with fairly simple legal law matters. Under the rule we adopt today, limited license legal technicians would not be able to represent clients in court or contact and negotiate with opposing parties on a client's behalf. For these reasons, the limited licensing of legal technicians is unlikely to have any appreciable impact on attorney practice."; "The Practice of Law Board and other proponents argue that the limited licensing of legal technicians will provide a substantially more affordable product than that which is available from attorneys, and that this will make legal help more accessible to the public. Opponents argue that it will be economically impossible for limited license legal technicians to deliver services at less cost than attorneys and thus, there is no market advantage to be achieved by creating this form of limited practitioner."; attaching new Rule APR, as adopted, which defines the requirements of being such a licensed legal technician and explains that: "the LLLT may undertake the following: 1) Obtain relevant facts, and

explain the relevancy of such information to the client; 2) Inform the client of applicable procedures, including deadlines, documents which must be filed, and the anticipated course of the legal proceeding; 3) Inform the client of applicable procedures for proper service of process and filing of legal documents; 4) Provide the client with self-help materials prepared by a Washington lawyer or approved by the Board, which contain information about relevant legal requirements, case law basis for the client's claim, and venue and jurisdiction requirements;5) Review documents or exhibits that the client has received from the opposing side, and explain them to the client; 6) Select and complete forms that have been approved by the State of Washington, either through a governmental agency or by the Administrative Office of the Courts or the content of which is specified by statute; federal forms; forms prepared by a Washington lawyer; or forms approved by the Board; and advise the client of the significance of the selected forms to the client's case; 7) Perform legal research and draft legal letters and ~~pleadings~~ documents beyond what is permitted in the previous paragraph, if the work is reviewed and approved by a Washington lawyer; 8) Advise a client as to the other documents that may be necessary to the client's case (such as exhibits, witness declarations, or party declarations), and explain how such additional documents or pleadings may affect the client's case; 9) Assist the client in obtaining necessary documents, such as birth, death, or marriage certificates." [Att. to Order at 4-5]; Rule, as adopted, also explains that a licensed legal technician may *not* undertake certain activities, including the following: "5) Represent a client in court proceedings, formal administrative adjudicative proceedings, or other formal dispute resolution process, unless permitted by GR 24; 6) Negotiate the client's legal rights or responsibilities, or communicate with another person the client's position or convey to the client the position of another party; unless permitted by GR 24(b)[;] 7) Provide services to a client in connection with a legal matter in another state, unless permitted by the laws of that state to perform such services for the client [;] 8) Represent or otherwise provide legal or law related services to a client, except as permitted by law, this rule or associated rules and regulations." [Att. to Order at 7]).

Best Answer

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

B 9/12

Exception for Corporate Employees

Hypothetical 10

A local real estate development company just hired you to handle most of its legal work. As you begin to analyze what assistance the company might need, you learn that company employees engage in several activities that have you worried.

(a) May nonlawyer company employees prepare legal documents (such as deeds and conveyances) for the company itself to use?

YES (PROBABLY)

(b) May nonlawyer company employees prepare legal documents (such as deeds) for signing by landowners with whom the company deals?

NO

(c) May nonlawyer company employees represent the company in small claims court -- specifying what amount of money customers owe the company?

YES (PROBABLY)

(d) May nonlawyer company employees represent the company in small claims court -- presenting arguments in favor of default judgments against customers who owe the company money?

MAYBE

(e) May nonlawyer company employees represent the company in arbitrations?

YES (PROBABLY)

Analysis

Because anyone can represent himself or herself (even in court), it can be difficult to determine what nonlawyer company employees can do when assisting their employer.

To the extent that a company is essentially representing itself, there should be no limits. However, a nonlawyer company employee assisting a company in handling legal matters is not actually representing himself or herself -- but instead representing a third party (the company).

(a) Most states' UPL statutes and regulations permit nonlawyers to prepare legal documents for use by their corporate employers.

In a sense, these states consider the corporations to simply be representing themselves. The Restatement explains this widespread (and acceptable) practice.

> A limitation on pro se representation . . . found in many jurisdictions is that a corporation cannot represent itself in litigation and must accordingly always be represented by counsel. The rule applies, apparently, only to appearances in litigated matters. Thus a nonlawyer officer of a corporation may permissibly draft legal documents, negotiate complex transactions, and perform other tasks for the employing organization, even if the task is typically performed by lawyers for organizations.

Restatement (Third) of Law Governing Lawyers § 4 cmt. e (2000) (emphasis added).[1]

Courts recognize this approach.[2]

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[1] Va. UPR 6-103(A)(2) ("A regular employee may prepare legal instruments for use by his employer for which no separate charge shall be made. However, such employee may not assist his employer in the unauthorized practice of law."); see also Va. UPC 6-5 ("An individual, if he chooses to do so, may draw or attempt to draw legal instruments for himself or affecting his property. A corporation acting through its employees may do the same with respect to its own property."); Va. UPR 6-101(A) ("A non-lawyer shall not undertake for compensation, direct or indirect, to advise another in any matter involving the application of legal principles to the ownership, use, disposition or encumbrance of real estate, except that, incident to his investigation of factual matters, he may give advice to his regular employer, other than in aid of his employer's unauthorized practice of law, or to a lawyer upon request by the lawyer therefor.").

[2] See, e.g., In re Reinstatement of Montgomery, 242 P.3d 528, 528, 529 (Okla. 2010) (approving reinstatement of a lawyer who, despite an argument that she had been practicing law while not actively licensed to practice in Oklahoma; explaining that the lawyer acted as a "senior contract negotiator" and as a "supervisor and senior manager in the software licensing department" of a company; "Evidence presented before the Professional Responsibility Tribunal showed that her job duties required her to draft and negotiate complex agreements. Her employment also required her to negotiate contract terms and

In these situations, the corporation is essentially representing itself in preparing documents, analyzing issues, etc. However, that fiction is fairly transparent. The employee preparing a legal document for her corporate employer is not acting on her own behalf. In fact, the employee performing the same services for her neighbor would be committing the unauthorized practice of law -- probably a crime in most states.

However, public policy reasons underlie courts' and bars' forgiving approach to this situation. A corporate employee providing legal services to her own employer does not generally harm the public. The employer usually can take care of itself if the employee does a bad job, and can discipline employees for misconduct or sloppiness.

The much more difficult situation involves corporate employees' similar activities on behalf of companies or individuals other than their employers.

(b) Most, if not all, states prohibit nonlawyer company employees from preparing documents for third parties. However, some company employees clearly assist customers.

> Controversy has surrounded many out-of-court activities such as advising on estate planning by bank trust officers, advising on estate planning by insurance agents, stock brokers, or benefit-plan and similar consultants, filling out or providing guidance on forms for property transactions by

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details with contract administrators, negotiators, and managers of other companies. She has managed a group of negotiators and managed contract assignments. She reviewed contracts to determine if they were in compliance with corporate business and legal policies, and also worked on contract language and helped with open issues. She conducted some legal research, but reported to attorney supervisors for guidance and for legal opinions on legal issues. The fully negotiated contracts would be sent to attorneys in the companies for approval. Montgomery's work involved following the policies of the company, leaving legal issues to be resolved by attorneys. Testimony presented at the hearing showed that Petitioner did not handle legal issues."; "Montgomery's work, from evidence presented before the PRT, is not what is considered the practice of law in Oklahoma. It was business oriented and many nonlawyers conducted these contract negotiations as well. All legal matters were handled by the legal departments of her employers. Therefore, Montgomery has shown by clear and convincing evidence that she has not engaged in unauthorized practice of law.").

> real-estate agents, title companies, and closing-service companies, and selling books or individual forms containing instructions on self-help legal services or accompanied by personal, nonlawyer assistance on filling them out in connection with legal procedures such as obtaining a marriage dissolution. The position of bar associations has traditionally been that nonlawyer provision of such services denies the person served the benefit of such legal measures as the attorney-client privilege, the benefits of such extraordinary duties as that of confidentiality of client information and the protection against conflicts of interest, and the protection of such measures as those regulating lawyer trust accounts and requiring lawyers to supervise nonlawyer personnel. Several jurisdiction recognize that many such services can be provided by nonlawyers without significant risk of incompetent service, that actual experience in several states with extensive nonlawyer provision of traditional legal services indicates no significant risk of harm to consumers of such services, that persons in need of legal services may be significantly aided in obtaining assistance at a much lower price than would be entailed by segregating out a portion of a transaction to be handled by a lawyer for a fee, and that many persons can ill afford, and most persons are at least inconvenienced by, the typically higher cost of lawyer services. In addition, traditional common-law and statutory consumer-protection measures offer significant protection to consumers of such nonlawyer services.

Restatement (Third) of Law Governing Lawyers § 4 cmt. c (2000) (emphasis added).[3]

The reporter's note explains the trend in favor of allowing such practices.

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[3] In re Dissolving Comm'n on Unauthorized Practice of Law, 242 P.3d 1282, 1283 (Mont. 2010) (dissolving the bar's Commission on the unauthorized practice of law, and explaining that the Attorney General will now handle any UPL matters; "We conclude that the array of persons and institutions that provide legal or legally-related services to members of the public are, literally, too numerous to list. To name but a very few, by way of example, these include bankers, realtors, vehicle sales and finance persons, mortgage companies, stock brokers, financial planners, insurance agents, health care providers, and accountants. Within the broad definition of § 37-61-201, MCA, it may be that some of these professions and businesses 'practice law' in one fashion or another in, for example, filling out legal forms, giving advice about 'what this or that means' in a form of contract, in estate and retirement planning, in obtaining informed consent, in buying and selling property, and in giving tax advice. Federal and state administrative agencies regulate many of these professions and businesses via rules and regulations; federal and state consumer protection laws and other statutory schemes may be implicated in the activities of these professions and fields; and individuals and non-human entities may be liable in actions in law and in equity for their conduct. Furthermore, what constitutes the practice of law, not to mention

> Courts are often divided over whether a particular area of nonlawyer practice is unauthorized, for example in the situation of banks, real estate agents, or similar nonlawyers filling in blanks in standard contract forms as a part of transactions in which they are otherwise involved, although in recent years courts have shown a pronounced inclination to hold that a particular activity by nonlawyers is in public interest and thus justified.

Restatement (Third) of Law Governing Lawyers § 4 reporter's note cmt. c (2000).

However, there are limits to this approach.

> Under traditional concepts of unauthorized practice, a lawyer employed by an organization may provide legal services only to the organization as an entity with respect to its own interests and not, for example, to customers of the entity with respect to their own legal matters.

Restatement (Third) of Law Governing Lawyers § 4 cmt. e (2000).[4]

(c) Many (if not most) states' UPL statutes and regulations permit a limited role for company employees appearing in court.

This is a key issue, because corporations generally cannot represent themselves in court.

States prohibit corporations' owners (even sole owners) from representing the entities they own.

- Bandler v. Cohen, Rosenthal & Kramer, LLP, 131 A.3d 733, 735 (Vt. 2015) (upholding a trial court's holding that a non-lawyer could not represent his wholly-owned corporation; "In its ruling, the trial court began with the statutory exception to the general rule that a corporation must appear through counsel.

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what practice is authorized and what is unauthorized is, by no means, clearly defined. Finally, we are also mindful of the movement towards nationalization and globalization of the practice of law, and with the action taken by federal authorities against state attempts to localize, monopolize, regulate, or restrict the interstate and international provision of legal services.").

[4] Campbell v. Asbury Auto., Inc., 381 S.W.3d 21 (Ark. 2011) (allowing a plaintiff to rely on an Arkansas deceptive trade practices act in suing an automobile dealer who engaged in the unauthorized practice of law and charged automobile purchasers a document preparation fee).

11A V.S.A. § 3.02(1). The statute provides that a corporation may appear through a non-attorney representative if: the corporation so authorizes, id. § 3.02(1)(A); the non-attorney representative 'demonstrates adequate legal knowledge and skills to represent the organization without unduly burdening the opposing party or the court,' id. § 3.02(1)(B); and the non-attorney representative 'shares a common interest with the corporation,' id. § 3.02(1)(C). Focusing on the second factor, the court explained, 'there are indeed serious concerns about Mr. Bandler's ability to present the Corporation's claims in this case.'").

- Richman Props., L.L.C. v. Medina Cnty. Bd. of Revision, 13 N.E.3d 1126, 1131, 1132, 1133 (Ohio 2014) (holding that a nonlawyer LLC member had improperly engaged in the unauthorized practice of law; "[T]he holding of Dayton Supply [Dayton Supply & Tool Co., Inc. v. Montgomery Cnty. Bd. of Revision, 856 N.E. 2d 926 (Ohio 2006)] authorized Bush [nonlawyer LLC member/president] to file a complalint in his capacity as president. Beyond that, we see no reason why the authorization of a member of a limited-liability company to file on behalf of the limited-liability company is any less valid, nor has the county contended that it is."; "We have noted that Bush's cross-examination does appear to have crossed the line at times into the unauthorized practice of law. The county's argument makes a long leap, however, in contending that this violation of Dayton Supply's precepts constitues reversible error on appeal."; "Quite simply, the county has cited no authority showing that when a nonlawyer's examination of a witness has been permitted over objection, the error is correctible through reversing the decision on appeal. To be sure, courts have struck or disregarded pleadings and petitions filed on behalf of corporate entities by nonlawyers, thereby subjecting the corporate party to the consequences of not having filed such documents. . . . But the effect of a nonlawyer's examination of a witness on the outcome of an administrative proceeding is not so clear."; "We hold only that the county in this case has failed to establish grounds for reversing the BTA's [Board of Tax Appeals] decision under its first proposition of law.").

- Jonak v. McDermott, 511 B.R. 586, 588-89, 595-96 (D. Minn. 2014) (entering an injunction that bar nonlawyers from engaging in the unauthorized practice of law; "Mr. Jonak, who is not an attorney, is the sole shareholder, president and operating principal of 3rd Millennium Systems, Inc., doing business as ALC. . . . ALC is not a law firm nor does it employ counsel admitted to practice in the United States District Court for the District of Minnesota."; "Among the services that ALC provided customers were legal services plans for various subject matters, including bankruptcy."; "Minnesota state law also prohibits the unauthorized practice of law. Minn. Stat. § 481.02, Subd. 1. The Bankruptcy Court found that in six of the 18 cases at issue, Mr. Jonak engaged in the unauthorized practice of law within the scope of Minn.

§ 481.02, Subd. 1, contrary to 11 U.S.C. § 110(k), and gave legal advice, in violation of 11 U.S.C. § 110(e)(2). . . . Although Mr. Jonak is not an attorney, the Bankruptcy Court concluded that he gave 'advice as to the bankruptcy process, the substantive law of bankruptcy, and the effect of both on those debtors' options in filing for bankruptcy.' (Id.) Appellants do not directly challenge this determination on appeal." (footnote omitted)).

- Premium Prods., Inc. v. Pro Performance Sports, LLC, 997 F. Supp. 2d 433, 436, 437 (E.D. Va. 2014) (disqualifying a lawyer under the witness advocate rule; noting that the lawyer represented the plaintiff, as well as serving as its sole owner, officer, and director; "The Court agrees that VRPC 3.7 does not cover lawyer-witness litigants, but the Court finds that Spiegel is not a lawyer-witness-litigant. Premium is the litigant in this case and Spiegel's representation of Premium implicates all of the concerns animating the witness-advocate rule. Because the facts presented fall closer to the witness-advocate scenario than the lawyer-witness-litigant scenario, the magistrate did not clearly err or rule contrary to law when he found that VRPC 3.7 disqualified Spiegel."; "Premium argues that any distinction between Premium and Spiegel is purely a legal construct and the Court should recognize that Spiegel has a right to pro se representation which he exercises in representing Premium. . . . This argument, however, is contrary to the well-established law that a corporation has no right to pro se representation. A corporation is an artificial entity and cannot act except through its agents. . . . In response, Premium suggests that this bedrock principle of law is inapplicable where the plaintiff is a small, closely-held corporation such as Premium. . . . Yet this argument is also contrary to well-established law. The proposition that a corporation has no right to pro se representation holds just as true for small, closely-held plaintiffs as for Fortune 500 plaintiffs."; relying on Virginia LEO 1498 (12/14/92)).

- Brougham Casket & Vault Co. v. DeLoach, 747 S.E.2d 707, 709 (Ga. Ct. App. 2013) (affirming a trial court's action of striking a company's responses to adversary's requests for admission, and deeming them admitted; "Brougham does not contest that its original responses to the requests for admission were defective because they were served on DeLoach by a non-lawyer. . . . Consequently, Brougham failed to properly 'serve[] upon the party requesting the admission a written answer or objection addressed to the matter' as required by OCGA § 9-11-36(a)(2), and the trial court was authorized to strike the defective responses and give them no legal effect.").

- Medlock v. Univ. Health Servs., Inc., 743 S.E.2d 830, 831 (S.C. 2013) (holding that a nonlawyer may represent a business entity in probate court; "A business entity may be represented by a non-attorney in civil magistrate court

proceedings, but it must be represented by an attorney in the circuit and appellate courts.").

- Chien v. Commonwealth Biotechnologies, Inc., 484 B.R. 657, 667 (E.D. Va. 2012) (holding in contempt of court an individual who repeatedly appeared in bankruptcy court on behalf of a corporation; "[T]he Court finds that the Bankruptcy Court's decision to find Chien in contempt and to order sanctions is appropriate. None of Chien's arguments regarding his purported rights to represent Fornova before the Bankruptcy Court are convincing. Chien had been made aware of his obligation to secure counsel to represent a corporation in federal court, by the Bankruptcy Court, by the District Court in Connecticut, and by this Court. Chien's refusal to comply with this rule interfered with the orderly operation of the Bankruptcy Court, and sanctions against Chien were appropriate. Chien's claim for compensation from CBI pursuant to 28 U.S.C. § 1343 is patently frivolous and entirely without merit. The order of the Bankruptcy Court is AFFIRMED.").

- Shenandoah Sales & Serv., Inc. v. Assessor of Jefferson Cnty., 724 S.E.2d 733, 737, 738, 738-39, 739, 741, 742 (W. Va. 2012) (finding unconstitutional a West Virginia statute allowing nonlawyers to represent corporations in court; "By way of background, it is a well-settled legal principle that a corporation must be represented by a lawyer in a court of record."; "Courts have offered a number of policy reasons why a corporation must be represented by a lawyer in a court of record. One court observed that, 'unlike lay agents of corporations, attorneys are subject to professional rules of conduct and thus amendable to disciplinary action by the court for violations of ethical standards.' . . . A lawyer purportedly has the legal expertise necessary to participate in litigation and other proceedings. Conversely, a non-lawyer corporate agent's lack of legal expertise could 'frustrate the continuity, clarity and adversity which the judicial process demands.'. . . The rule is also intended to preserve the corporation as a legal entity separate from its shareholders."; "A corporation is not a natural person. It is an artificial entity created by law. Being an artificial entity it cannot act *pro se*. It must act in all of its affairs through an agent or representative. Trial Court Rule 4.03 does not contain any provision allowing a corporation to be represented through an agent or representative. Rather, a corporation is required to be 'represented by a person admitted to practice before the Supreme Court of Appeals of West Virginia[.]'"; "Based on all of the foregoing, we conclude that the circuit court did not err when it ruled that Shenandoah was required to be represented by a lawyer in the circuit court."; "Mr. Tabb next argues that despite the general rule requiring a corporation to be represented by a lawyer in a trial court of record, W. Va. Code § 11-3-25(b) [2010] permits a corporation to be represented by a non-lawyer corporate agent when appealing a decision of the board of equalization and review.";

noting that a West Virginia lawyer allowed a tax applicant to appeal a tax assessment "'by his or her agent or attorney'" (citation omitted); finding that statute unconstitutional; "The West Virginia Constitution provides that this Court has 'the power to promulgate rules for all cases and proceedings, civil and criminal, for all of the courts of the State relating to writs, warrants, process, practice and procedure, which shall have the force of law.' W. Va. Const. art. 8, § 3. The power embodied in this constitutional provision extends to supervision of the practice of law."; "Based upon our review of our prior case law and our Constitution, we hold that the phrase 'by his or her agent' contained in W. Va. Code § 11-3-25(b) [2010], allowing a non-lawyer agent to appeal a ruling of the board of equalization and review to the circuit court and engage in activities which constitute the practice of law, is a legislative encroachment on this Court's exclusive authority to define, regulate and control the practice of law . . . ."; "We therefore hold that W. Va. Code § 11-3-25(b) is unconstitutional only insofar as the word 'agent' allows an applicant's non-lawyer representative to appeal a decision of the board of equalization and review to a circuit court."; "Mr. Tabb next argues that since Shenandoah is a closely-held corporation, of only two people, the general rule requiring a corporation to be represented by a lawyer in a trial court of record should be relaxed. We find nothing in our jurisprudence exempting a closely-held corporation from the general rule. A number of courts have considered this argument and concluded that closely-held corporations should adhere to the general rule requiring corporations to appear through licensed lawyers.").

- Modular Wood Sys., Inc. v. World Trade Grp., L.L.P., 77 Va. Cir. 403, 404-05 (Va. Cir. Ct. 2009) ("[T]he Valenti papers were not a responsive pleading because WTG, a business organization, could not file a pleading *pro se*. . . . WTG had to be represented by a lawyer authorized to practice law in Virginia. This requirement is found both in Rule 1A:4 of the Rules of the Supreme Court and in Part 6 of the Rules, which forbids the unauthorized practice of law. UPL Rule 1-101. UPC 1-3 provides that a corporation 'does not have the same right of appearance before a tribunal as an individual and may not be represented before a tribunal by its officers, employees, or agents who are not duly licensed to practice law in Virginia.'").

- Dutch Village Mall v. Pelletti, 256 P.3d 1251, 1252, 1253-54,, 1254 (Wash. Ct. App. 2011) (holding that the sole owner of a limited liability company could not represent the LLC in court; "A limited liability company (LLC) must be represented by a lawyer in order to litigate. This is simply an application of the general rule prohibiting laypersons from representing other persons or entities in court proceedings. Because a layperson does not have a lawyer's professional skills or ethical responsibilities, such representation imposes undue burdens on opposing parties and the courts. These considerations are just as important when the LLC has only one owner. We affirm an order

requiring the appellant LLC to obtain legal representation in order to pursue its claim of unpaid rent."; noting various purposes of the unauthorized practice of law principles; "[P]rotecting the interests of other persons who may have financial interests in the artificial entity is only one of the reasons for the common law rule. A major reason for prohibiting the conduct of litigation by a nonlawyer is that it creates burdens both for the represented party's adversaries and also for the court itself. . . . The elaborate and inappropriate claims pled by Lei [mall sole owner] in this case and his refusal to withdraw a moot and pointless motion for default demonstrate that sole ownership does not dispel these concerns."; "Another reason for prohibiting lay representation of a corporation is the inequity of allowing an individual 'to establish the protections of a corporation and then not require that he also face the burdens of incorporation. '" (citation omitted); "[T]o make an exception for single owner LLCs would invite threshold disputes over an LLC's claim to have but a single owner."), review denied, No. 86716-0 (Wash. Feb. 7, 2012); Investors Group I, Ltd. v. Knoxville's Cmty. Dev. Corp., No. E1999-00395-COA-R3-CV, 2001 Tenn. App. LEXIS 539, at *6-7 (Tenn. Ct. App. July 25, 2001) ("We hold that a Limited Partnership is an entity under Tennessee law, and that a general partner, who is not a licensed attorney, cannot sign and file a complaint on its behalf . . . . We therefore agree with the Chancellor that the complaint is void. The appearance of counsel 53 days after service of the motion to dismiss did not satisfy the requirement of promptness in curing the defect.").

The same principle generally applies to similar non-corporate entities.

- Hahn v. Novus Labs., LLC, 95 Va. Cir. 510, 511 (Washington 2017) (holding that a Tennessee lawyer could not represent a Virginia LLC in a Virginia court, although he was a member of the LLC; "In March of 2015, Plaintiff Jason Hahn filed a complaint against Novus Laboratories, LLC, asking in a declaratory judgment action for the Court to affirm that he has a membership interest in the LLC, and that he be given all of the rights of a member under the Virginia Limited Liability Company Act, including access to the LLC's records. Approximately one year later, in March of 2016, J. Douglas Fleenor, another one of the LLC members, entered the lawsuit with a Motion to Intervene as a plaintiff, which motion was granted. His pleadings asked for a declaration of his ownership interest, which was being denied and/or diminished by the LLC, and for injunctive and other incidental relief. Ultimately all of the present and former members who had not filed as a plaintiff, were joined as defendants."; "Jerry Fabus, Jr., who says he is licensed to practice law in Tennessee but not in Virginia, is one of the defendants in this case. He represented the LLC and one of its members, Tera W. Bowers Coulter, in a federal case in the Eastern District of Tennessee, commencing in 2013. It is alleged that in 2014, while still representing the LLC and one of its members in the federal case, Fabus

purchased membership interests in the Virginia LLC, became its general counsel with an annual salary, gave legal advice to its members, and drew legal documents for the LLC. It has been proven that despite not being licensed to practice law in Virginia, he filed an Answer and appeared in this action now pending in the Washington County Circuit Court, both for himself and for the LLC. When confronted in open court, Fabus argued that he was a member, owner and officer of the defendant Novus Laboratories, LLC, and therefore had a right to speak on behalf of the company, to file its Answer and to represent it in Court. By prior order, and pursuant to Virginia Supreme Court Rule 1A:4, and Kone v. Wilson et al, 272 Va. 59, 630 S.E. 2d 744 (2006), the Court declared the Answer of Novus Laboratories LLC to be null and void as it was not signed or filed by a lawyer licensed to practice law in Virginia. The Court formally advised Fabus in open court that not being licensed to practice law in Virginia, he could not represent the LLC. Fabus continues to represent himself, pro se. No appearance has since been made by the LLC.").

- Max Mitchell, Court Rules Trust Can't Litigate Without Lawyer, Legal Intelligencer Online, Apr. 22, 2014 ("A trust will follow the same rules as estates and corporations when it comes to determining whether an attorney is required to initiate or fight litigation, an Adams County Court of Common Pleas judge has ruled."; "Judge John D. Kuhn ruled in Straban Township v. Hanoverian Trust that the defendant trust must retain an attorney to fight Straban Township's lawsuit seeking an injunction to remove people from an estate the trust allegedly owns. Defendant Heywood Becker, a trustee of the Hanoverian Trust, had filed preliminary objections to the township's complaint, but the township argued that the trust could only be represented by an attorney."; "'Our research has not revealed the golden nugget of stare decisis that all legal researchers seek. Nevertheless, there is sufficient body of law which supports the township's position,' Kuhn said. 'The trustee here should be the one who has the duty to decide whether to prosecute, defend or settle litigation and may be the one who engages counsel. He is not, however, the one who can make legal argument on behalf of the trust.'").

- Marin v. Gilberg, Civ. A. V-07-62, 2008 U.S. Dist. LEXIS 53341, at *8 (S.D. Tex. July 10, 2013) ("Limited liability partnerships . . . cannot appear so se and must be represented by counsel.").

At least one state has shown some leniency in that situation. In 2012, the Illinois Supreme Court dealt with the UPL implications of a corporation president's pro se filing on behalf of the corporation. In Downtown Disposal Services, Inc. v. City of Chicago,

979 N.E.2d 50 (Ill. 2012), Downtown Disposal's president filled out, signed and then filed in Circuit Court four blank pro se complaints for administrative review of a default judgment entered against Downtown Disposal requiring it to pay costs and penalties in connection with violations of City ordinances relating to its dumpster. The City successfully moved to dismiss the complaint, arguing that

> because a nonattorney, Van Tholen, filed the complaints on behalf of Downtown Disposal, a corporation, they were null and void.

Id. at 52.

By that time, Downtown Disposal had hired a lawyer, who later filed an amended complaint to cure what the lawyer argued was a "technical defect." Id. The trial court granted the City's motion to dismiss, but the appellate court reversed. The Illinois Supreme Court acknowledged the difficulty of defining the practice of law.

> There is no mechanistic formula to define what is and what is not the practice of law. . . . Rather, we examine the character of the acts themselves to determine if the conduct is the practice of law . . . and each case is largely controlled by its own peculiar facts.
>
> Plaintiff contends that there was no unauthorized practice of law because Van Tholen merely filled in blanks on a simple form that did not require the use of any legal expertise. We disagree. It is not the simplicity of the form that is important but the fact that an appeal was pursued on behalf of a corporation by a nonattorney.

Id. at 53. However, the court found that corporations must be represented by a lawyer, which means that the corporation's president had engaged in the unauthorized practice of law.

> [B]ecause a nonattorney, Van Tholen, filed the complaints on behalf of Downtown Disposal, a corporation, they were null and void.
>
> . . .
>
> This rule arises from the fact a corporation is an artificial entity that must always act through agents and there may be questions as to whether a particular person is an appropriate representative. For example, while an officer of a corporation, *i.e.*, an individual such as Van Tholen, may believe review of an administrative decision is in the best interests of a company, it may, in fact, not be. The interests of the corporate officers and that of the corporation, a distinct legal entity, are separate.
>
> . . .
>
> Accordingly, when Van Tholen filed the complaints for administrative review, he engaged in the unauthorized practice of law. He was not an attorney representing the interests of the corporation and could not file for administrative review on behalf of Downtown Disposal.

Id. at 52, 54.

The court then turned to the effect of the corporation's president's unauthorized practice of law. The court noted the national debate over what it called the "Nullity Rule."

> Courts in this country, including this court, unanimously agree that a corporation must be represented by counsel in legal proceedings. However, courts disagree on the consequences the lack of representation has on actions taken by nonlawyers on behalf of a corporation. Some courts, including our appellate court, have held that such actions are a nullity and warrant dismissal, the entry of a default judgment against the corporation, or vacatur of any judgment rendered. The defect is deemed incurable and goes to the court's power to exercise subject matter jurisdiction.

> Other jurisdictions take the approach that actions by nonattorneys on behalf of a corporation are curable defects, allowing the corporation a reasonable time to obtain counsel and make any necessary amendments. These courts liberally construe the rules of civil procedure and emphasize substance over form to advance the policy favoring resolution of cases on the merits.

Id. at 54. Relying on Judge Posner's 2011 Seventh Circuit decision in In re IFC Credit Corp., 663 F.3d 315 (7th Cir. 2011), the court concluded that

> we agree with the Seventh Circuit that a *per se* nullity rule is unreasonable and that sanctions for violating the rule against the unauthorized practice of law "should be proportioned to the gravity of the violation's consequences."

Id. at 56-57. Thus, the court upheld the appellate court's reversal of the trial court's dismissal.

> We hold there is no automatic nullity rule. Instead, the circuit court should consider the circumstances of the case and the facts before it in determining whether dismissal is proper. The circuit court should consider, *inter alia*, whether the nonattorney's conduct is done without knowledge that the action was improper, whether the corporation acted diligently in correcting the mistake by obtaining counsel, whether the nonattorney's participation is minimal, and whether the participation results in prejudice to the opposing party. . . . The circuit court may properly dismiss an action where the nonlawyer's participation on behalf of the corporation is substantial, or the corporation does not take prompt action to correct the defect.

Id. at 57. The Supreme Court then offered a succinct conclusion.

> Based on the foregoing principles, we reject the City's contention that any act of legal representation undertaken by a nonattorney on behalf of a corporation renders the proceedings void *ab initio*. We hold that the lack of an attorney's signature on a complaint for administrative review filed on behalf of a corporation does not render the complaint null and void or mandate dismissal in all instances. In situations where a nonattorney signs a complaint for

> administrative review on behalf of a corporation, the trial court should afford the corporation an opportunity to retain counsel and amend the complaint if the facts so warrant.

Id. at 58.

The three dissenting Justices, including Illinois's Chief Justice, started their lengthy dissent with a blunt description of the majority's decision.

> Today, for the first time, the Supreme Court of Illinois has sanctioned the unauthorized practice of law by refusing to follow the nullity rule requiring dismissal of a complaint filed in circuit on behalf of a corporation by a lay person with no legal training of any kind. Effectively overruling an unbroken line of precedent dating back before the Civil War, it gives legal recognition to proceedings initiated by lay persons on behalf of third parties and concludes that whether such proceedings should be dismissed is now discretionary with the trial court.

Id. at 58. The dissent concluded with an equally blunt warning to corporations.

> While application of the nullity rule may seem harsh in some cases, this is not such a case. And in any event, the solution is simple, straightforward, and obvious in every case. If you are a corporation in need of relief from the courts, all you need do to avoid the problem encountered by Downtown Disposal here is hire a lawyer.

Id. at 73.

But most states allow corporate employees to play a limited role in certain (usually lower-level) courts in certain situations.

First, states sometimes permit nonlawyer corporate employees to represent their employer in certain types of courts. The Restatement explains this general rule.

> With respect to litigation, several jurisdictions except [sic] representation in certain tribunals, such as landlord-tenant and small-claims courts and in certain administrative proceedings . . . where incorporation (typically of a small

> owner-operated business) has little bearing on the prerogative of the person to provide self-representation.

Restatement (Third) of Law Governing Lawyers § 4 cmt. e (2000) (emphasis added).

However, corporations must carefully check the applicable rules. In 2011, the Georgia Supreme Court approved the Georgia Bar Committee's opinion that a nonlawyer corporate employee could not file an answer in a garnishment action.[5] However, the Georgia legislature quickly passed a statute permitting such activities by a nonlawyer corporate employee. Some have predicted a turf battle if the Georgia Supreme Court finds the new law unconstitutional (because the legislature has usurped the Supreme Court's power to define the practice of law).

Second, authorities have dealt with the permissible role of nonlawyer corporate employees in other types of tribunals. The general approach usually forbids such activity.

> A limitation on pro se representation . . . found in many jurisdictions is that a corporation cannot represent itself in litigation and must accordingly always be represented by counsel. The rule applies, apparently, only to appearances in litigated matters.

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[5] Georgia UPL Advisory Op. 2010-1 (9/12/11) ("A properly served garnishee is bound to file an answer with the appropriate court. If the answer is not filed, the garnishee faces a default judgment. The inescapable conclusion is that a garnishment action is a legal proceeding. That being the case, the Committee examines who is permitted to file an answer to a legal proceeding that is pending with a Georgia court."; "'Georgia's citizens, of course, have a constitutionally protected right of self-representation." In re UPL Advisory Opinion 2002-1, 277 Ga. 521, 522 n.3 (2004). A party to a legal action can also be represented by a duly licensed attorney at law. Ga. Const. (1983), Art. I, Sec. 1, Para. XII. As far as corporate self-representation, '[i]n this state, only a licensed attorney is authorized to represent a corporation in a proceeding in a court of record, including any proceeding that may be transferred to a court of record from a court not of record.' Eckles v. Atlanta Technology Group, 267 Ga. 801, 805 (1997). The Georgia Court of Appeals concluded 'that the rationale and holding of Eckles should, and does, apply to limited liability companies.' Winzer v. EHCA Dunwoody, LLC, 277 Ga. App 710, 713 (2006). See also Sterling, Winchester & Long, LLC v. Loyd, 280 Ga. App. 416, 417 (2006)."; "The Committee concludes that a nonlawyer who answers for a garnishee other than himself in a proceeding pending in a Georgia court of record is engaged in the unlicensed practice of law.").

Restatement (Third) of Law Governing Lawyers § 4 cmt. e (2000). However, even in such regular litigation settings, states frequently permit nonlawyer corporate employees to play a fairly limited role -- such as presenting facts rather than making legal arguments.

- Virginia Code § 16.1-88.03 (2015) ("(A) Any corporation, partnership, limited liability company, limited partnership, professional corporation, professional limited liability company, registered limited liability partnership, registered limited liability limited partnership or business trust, when the amount claimed in any civil action pursuant to subdivision (1) or (3) of § 16.1-77 does not exceed the jurisdictional amounts authorized in such subsections, exclusive of interest, may prepare, execute, file, and have served on other parties in any proceeding in a general district court a warrant in debt, motion for judgment, warrant in detinue, distress warrant, summons for unlawful detainer, counterclaim, crossclaim, suggestion for summons in garnishment, garnishment summons, writ of possession, writ of fieri facias, interpleader and civil appeal notice without the intervention of an attorney. Such papers may be signed by a corporate officer, a manager of a limited liability company, a general partner of any form of partnership or a trustee of any business trust, or such corporate officer, with the approval of the board of directors, or manager, general partner or trustee may authorize in writing an employee, a person licensed under the provisions of § 54.1-2106.1, a property manager, or a managing agent of a landlord as defined in § 55-248.4 to sign such papers as the agent of the business entity. However, this section shall not apply to an action under subdivision (1) or (3) of § 16.1-77 which was assigned to a corporation, partnership, limited liability company, limited partnership, professional corporation, professional limited liability company, registered limited liability partnership, registered limited liability limited partnership or business trust, or individual solely for the purpose of enforcing an obligation owed or right inuring to another."; "(B) Nothing in this section shall allow a nonlawyer to file a bill of particulars or grounds of defense or to argue motions, issue a subpoena, rule to show cause, or capias; file or interrogate at debtor interrogatories; or to file, issue or argue any other paper, pleading or proceeding not set forth in subsection A."; "(C) The provisions of § 8.01-271.1 shall apply to any pleading, motion or other paper filed or made pursuant to this section."; "(D) Parties not represented by counsel, and who have made an appearance in the case, shall promptly notify in writing the clerk of court wherein the litigation is pending, and any adverse party, of any change in the party's address necessary for accurate mailing or service of any pleadings or notices. In the absence of such notification, a mailing to or service upon a party at the most recent address contained in the court file of the case shall be deemed effective service or other notice.").

- Va. Sup. Ct. R. pt. 6, § I, UPR 1-101 ("(A) A non-lawyer, with or without compensation, shall not represent the interest of another before a tribunal, otherwise than in the presentation of facts, figures or factual conclusions, as distinguished from legal conclusions . . . . (B) A non-lawyer regularly employed on a salary basis by a corporation appearing on behalf of his employer before a tribunal shall not engage in activities involving the examination of witnesses, the preparation and filing of briefs or pleadings or the presenting of legal conclusions. (C) A non-lawyer regularly employed by a corporation or partnership may appear and file certain pleadings on behalf of his or her employer as authorized by Virginia Code § 16.1-88.03." (emphases added)); Va. Sup. Ct. R. pt. 6, § I, UPC 1-2 ("A non-lawyer may represent himself, but not the interest of another, before any tribunal. A non-lawyer regularly employed on a salary basis or one specially retained as an expert (whether as an independent contractor or an employee of another) may present facts, figures, or factual conclusions, as distinguished from legal conclusions, when such presentation does not involve the examination of witnesses or preparation of briefs or pleadings." (emphasis added)); Id. UPC 1-3 ("A corporation (other than a duly registered law corporation) does not have the same right of appearance before a tribunal as an individual and may not be represented before a tribunal by its officers, employees or agents who are not duly authorized or licensed to practice law in Virginia. A corporation can be represented only by a lawyer before a tribunal, with respect to matters involving legal conclusions, examination of witnesses or preparation of briefs or pleadings." (emphases added)).

Although these regulations focus on the substance of a nonlawyer's role in a tribunal, such nonlawyer employees obviously will tend to play such a role primarily in tribunals such as small claims courts -- where the company does not want to pay for a lawyer to appear for it. Nonlawyer company employees will normally appear as fact witnesses in other tribunals, in which the company is represented by a lawyer.

(d) States draw the line at different places, but most states would probably not permit nonlawyer company employees to essentially act as lawyers (as opposed to fact-presenters) in court.[6]

[6] Restatement (Third) of Law Governing Lawyers § 4 cmt. e (2000) ("A limitation on pro se representation . . . found in many jurisdictions is that a corporation cannot represent itself in litigation and

(e) Many, if not most, states would allow nonlawyer employees to represent their company in arbitrations.[7]

In contrast, non-employees (who are not lawyers) generally cannot represent a third party in arbitrations.[8]

Best Answer

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

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must accordingly always be represented by counsel. The rule applies, apparently, only to appearances in litigated matters.").

[7] Virginia UPL Op. 206 (2/10/04) (finding that a nonlawyer corporate officer could represent the corporation in a Virginia arbitration; "Based on this authority the Committee is of the opinion, in response to your first question, that it would not be the unauthorized practice of law for an officer of a corporation who is not a lawyer to represent the corporation in an arbitration proceeding in Virginia. The definition of the practice of law allows 'a regular employee acting for his employer' to provide legal advice and prepare legal documents for this employer. While the definition and Rule 1-101 prohibit a nonlawyer from representing the interests of or appearing on behalf of his employer or a corporation before 'a tribunal,' the definition of 'tribunal' in UPC 1-1 does not include an arbitration proceeding. It follows, therefore, that a non-attorney officer of a corporation can represent that corporation and provide legal advice to the corporation/employer within the context of an arbitration proceeding." (emphasis added, footnote omitted)).

[8] Virginia UPL Op. 214 (2/27/09) (holding that a certified public accountant could not represent a party in a Virginia arbitration; "The individual in the present inquiry is neither an attorney licensed in another jurisdiction coming into Virginia to handle a matter for a client the attorney represents elsewhere nor is the person or entity who is a party to the arbitration the regular employer of this individual. Rather, this individual is a CPA, in Virginia, not a licensed attorney in any jurisdiction, who appears to be independently offering to provide to customers from the public, services related to arbitration, including representation, and charging a fee for those services and representation. Based on the Definition of the Practice of Law in the Commonwealth of Virginia, in particular, subsection (1), and the decisions of the Committee in UPL Opinions 92, 200 and 206, the conduct of this CPA is the unauthorized practice of law.").

Paralegals: General Rules

Hypothetical 11

As your practice has grown, you have found that you need additional help in serving your clients. You realize that the clients would benefit from increasing the role of paralegals (because of their lower hourly rate), but you wonder about the UPL consequences.

(a) May you have a paralegal conduct the initial client interview with new clients?

NO (PROBABLY)

(b) May you have a paralegal undertake research about a legal issue and report the results directly to the client?

NO (PROBABLY)

(c) May you have a paralegal draft legal documents for your review?

YES

(d) May you have a paralegal discuss legal options with a client?

MAYBE

(e) May you have a paralegal supervise a real estate closing without a lawyer present?

MAYBE

Analysis

Introduction

Lawyers' reliance on paralegals implicates unauthorized practice of law and other ethics rules -- as well as statutes, regulations, and common law principles.

Lawyers obviously can -- and do -- rely on nonlawyer subordinates.

The ABA Model Rules acknowledge that lawyers may rely on paralegals when they practice law.

> The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work.

ABA Model Rule 5.5 cmt. [2].

However, the ABA Model Rules also explicitly indicate that:

> A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

ABA Model Rule 5.5(a) (emphasis added).

The Restatement also acknowledges that lawyers can rely on nonlawyers to help them practice law.

> For obvious reasons of convenience and better service to clients, lawyers and law firms are empowered to retain nonlawyer personnel to assist firm lawyers in providing legal services to clients. In the course of that work, a nonlawyer may conduct activities that, if conducted by that person alone in representing a client, would constitute unauthorized practice. Those activities are permissible and do not constitute unauthorized practice, so long as the responsible lawyer or law firm provides appropriate supervision . . . and so long as the nonlawyer is not permitted to own an interest in the law firm, split fees, or exercise management powers with respect to a law-practice aspect of the firm . . . .

Restatement (Third) of Law Governing Lawyers § 4 cmt. g (2000) (emphases added).

However, it can be difficult to precisely define the line between such nonlawyers' permissible and impermissible activities.

Source of Paralegals' Ethics Guidance

As with lawyers, each state takes a different approach to handling paralegals. In doing so, states rely on laws, ethics rules, legal ethics opinions and other regulations.

No state requires paralegals to be licensed. New Jersey rejected a license requirement in 1999, and Wisconsin rejected a mandatory regulation plan on April 7, 2008.

On the other hand, various states have enacted regulations defining the type of training and experience paralegals must possess before holding themselves out to the public as having some special recognition or skill.

For instance, in 2004 California enacted a law that defines the term "paralegal," describes the activities that paralegals can and cannot engage in, and sets educational qualifications for paralegals. Cal. [Bus. & Prof.] Code §§ 6450 et seq. (2004).

More recently, Florida has adopted amendments to its supreme court rules, establishing a Florida Registered Paralegal Program. The new program became effective March 1, 2008.[1]

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[1] Under this voluntary program, Florida paralegals may refer to themselves as "Florida Registered Paralegals" if they voluntarily register with the state bar, satisfy "certain minimum educational, certification, or work experience criteria" and "agree to abide by an established code of ethics."

To become an eligible Florida Registered Paralegal, paralegals must successfully complete the Paralegal Advanced Competency Exam offered by the National Federation of Paralegal Associations, complete the Certified Legal Assistant/Certified Paralegal examination offered by the National Association of Legal Assistants, or provide proof from a supervising lawyer that the paralegal had met the other work experience requirements for 5 out of the last 8 years.

To maintain status as a Florida Registered Paralegal, paralegals must complete a minimum of 30 hours of CLE every 3 years, 5 hours of which must be in ethics or professionalism. Paralegals may

Other states have taken the same approach. For instance, Texas, Ohio, and North Carolina have adopted voluntary certification programs.

Unlike mandatory licensing plans, this approach requires those wishing to call themselves "registered" (or "certified") paralegals to comply with certain minimum standards. This approach does not prohibit others from engaging in what amounts to paralegal activities, as long as they do not call themselves "registered" or "certified" paralegals.

The ABA has issued ethics guidelines for paralegals.[2] Paralegals may also look to ethics guidelines issued by several national voluntary associations.[3]

Paralegals' UPL Issues

Paralegals may not engage in the practice of law[4] -- an axiom that is easier to state than to apply.

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attend courses approved by the Florida Bar, the National Association of Legal Assistants or the National Federation of Paralegal Associations.

The Florida program also includes an elaborate process for punishing or suspending paralegals who fail to meet the requirements.

[2] Am. Bar Ass'n Standing Committee on Paralegals, ABA Model Guidelines for the Utilization of Paralegal Services (2004) ("ABA Model Guidelines for Paralegals").

[3] National Association of Legal Assistants, Model Standards and Guidelines for Utilization of Paralegals (2005) ("NALA Model Standards"); National Federation of Paralegal Associations, Model Code of Ethics and Prof'l Responsibility and Guidelines for Enforcement (1997) ("NFPA Model Code"); American Alliance of Paralegals, Inc., Code of Ethics ("AAPI Code").

[4] ABA Model Guidelines for Paralegals, cmt. to Guideline 2 ("[I]t is important to note that although the attorney has the primary obligation to not permit a nonlawyer to engage in the unauthorized practice of law, some states have concluded that a paralegal is not relieved from an independent obligation to refrain from illegal conduct and to work directly under an attorney's supervision. See In re Opinion No. 24 of the Committee on the Unauthorized Practice of Law, 607 A.2d 962, 969 (N.J. 1992) (a 'paralegal who recognizes that the attorney is not directly supervising his or her work or that such supervision is illusory because the attorney knows nothing about the field in which the paralegal is working must understand that he or she is engaged in the unauthorized practice of law'); Kentucky Supreme Court Rule 3.7 (stating that 'the paralegal does have an independent obligation to refrain from illegal conduct'). Additionally, paralegals must also familiarize themselves with the specific statutes governing the particular area of law with which they might come into contact while providing paralegal services. See, e.g., 11 U.S.C. § 110

Paralegals' duty to avoid unauthorized practice of law violations focuses on three issues: (1) how paralegals "hold themselves out"; (2) prohibited activities; and (3) permitted activities.

"Holding Out" Issues. Because paralegals work so closely with lawyers, they must be careful to avoid "holding themselves out" as lawyers -- either intentionally or unintentionally.

- ABA Model Guidelines for Paralegals, Guideline 4 ("A lawyer is responsible for taking reasonable measures to ensure that clients, courts, and other lawyers are aware that a paralegal, whose services are utilized by the lawyer in performing legal services, is not licensed to practice law.").

- ABA Model Guidelines for Paralegals, cmt. to Guideline 4 ("Since in most instances, a paralegal is not licensed as a lawyer, it is important that those with whom the paralegal communicates are aware of that fact. The National Federation of Paralegal Associations, Inc. ('NFPA'), Model Code of Professional Ethics and Responsibility and Guidelines for Enforcement, EC 1.7(a)-(c) requires paralegals to disclose their status. Likewise, NALA Canon 5 requires a paralegal to disclose his or her status at the outset of any professional relationship. While requiring the paralegal to make such disclosure is one way in which the lawyer's responsibility to third parties may be discharged, the Standing Committee is of the view that it is desirable to emphasize the lawyer's responsibility for the disclosure under Model Rule 5.3 (b) and (c). Lawyers may discharge that responsibility by direct communication with the client and third parties, or by requiring the paralegal to make the disclosure, by a written memorandum, or by some other means. Several state guidelines impose on the lawyer responsibility for instructing a paralegal whose services are utilized by the lawyer to disclose the paralegal's status in any dealings with a third party.").

- ABA Model Guidelines for Paralegals, cmt. to Guideline 4 ("The most common titles are 'paralegal' and 'legal assistant' although other titles may fulfill the dual purposes noted above. The titles 'paralegal' and 'legal

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(provisions governing nonlawyer preparers of bankruptcy petitions); In Re Moffett, 263 B.R. 805 (W.D. Ky. 2001) (nonlawyer bankruptcy petition preparer fined for advertising herself as 'paralegal' because that is prohibited by 11 U.S.C. § 110(f)(1)). Again, the lawyer must remember that any independent obligation a paralegal might have under state law to refrain from the unauthorized practice of law does not in any way diminish or vitiate the lawyer's obligation to properly delegate tasks and supervise the paralegal working for the lawyer.").

assistant' are sometimes coupled with a descriptor of the paralegal's status, e.g., 'senior paralegal' or 'paralegal coordinator,' or of the area of practice in which the paralegal works, e.g., 'litigation paralegal' or 'probate paralegal.' Titles that are commonly used to identify lawyers, such as 'associate' or 'counsel,' are misleading and inappropriate.").

- ABA Model Guidelines for Paralegals, cmt. to Guideline 4 ("Most state guidelines specifically endorse paralegals signing correspondence so long as their status as a paralegal is clearly indicated by an appropriate title. See ABA Informal Opinion 1367 (1976).").

- Rule Regulating the Florida Bar 20-7.1(a) ("A Florida Registered Paralegal shall disclose his or her status as a Florida Registered Paralegal at the outset of any professional relationship with a client, attorneys, a court or administrative agency or personnel thereof, and members of the general public.").

- NALA Model Standards, Guideline 1; NFPA Model Code, EC 1.7(b), (c); AAPI Code ¶ 4.

Prohibited Activities. States' analyses of prohibited activities by paralegals tend to focus on certain key prohibited activities, and specific types of interaction with a lawyer's clients that involve the greatest risk of engaging in the unauthorized practice of law.[5]

Paralegals should not engage in the following activities:

- **Providing legal advice**

  ABA Model Guidelines for Paralegals, Guideline 3 ("A lawyer may not delegate to a paralegal: (A) responsibility for establishing an attorney-client relationship[;] (B) responsibility for establishing the amount of a fee to be charged for a legal service[;] (C) responsibility for a legal opinion rendered to a client.").

  ABA Model Guidelines for Paralegals, cmt. to Guideline 3 ("Clients are entitled to their lawyers' professional judgment and opinion. Paralegals may, however, be authorized to communicate a lawyer's legal advice to a client so long as they do not interpret or expand on that advice. Typically, state

[5] See ABA Model Guidelines for Paralegals, Guideline 3; NALA Model Standards, Guideline 2; NFPA Model Code, EC-1.2(a), (b).

guidelines phrase this prohibition in terms of paralegals being forbidden from 'giving legal advice' or 'counseling clients about legal matters.'").

NALA Model Standards, Guideline 2 ("Paralegals should not . . . give legal opinions or advice; or represent a client before a court, unless authorized to do so by said court; nor engage in, encourage, or contribute to any act which could constitute the unauthorized practice [of] law.").

Rule Regulating the Florida Bar 20-7.1(d)(1) & (5) ("A Florida Registered Paralegal should not . . . give legal opinions or advice, or . . . act in matters involving professional legal judgment.").

- **Establishing a lawyer-client relationship**

  ABA Model Guidelines for Paralegals, Guideline 3 ("A lawyer may not delegate to a paralegal: (A) responsibility for establishing an attorney-client relationship[;] (B) responsibility for establishing the amount of a fee to be charged for a legal service[;] (C) responsibility for a legal opinion rendered to a client.").

  NALA Model Standards, Guideline 2 ("Paralegals should not . . . [e]stablish attorney-client relationships . . . nor engage in, encourage, or contribute to any act which could constitute the unauthorized practice [of] law.").

  Rule Regulating the Florida Bar 20-7.1(d)(1) ("A Florida Registered Paralegal should not . . . establish attorney-client relationships" or "accept cases.").

- **Making fee arrangements**

  ABA Model Guidelines for Paralegals, Guideline 3 ("A lawyer may not delegate to a paralegal: (A) responsibility for establishing an attorney-client relationship[;] (B) responsibility for establishing the amount of a fee to be charged for a legal service[;] (C) responsibility for a legal opinion rendered to a client.").

  ABA Model Guidelines for Paralegals, cmt. to Guideline 3 ("Fundamental to the lawyer-client relationship is the lawyer's agreement to undertake representation and the related fee arrangement. The Model Rules and most states require lawyers to make fee arrangements with their clients and to clearly communicate with their clients concerning the scope of the representation and the basis for the fees for which the client will be responsible. Model Rule 1.5 and Comments. Many state guidelines prohibit paralegals from 'setting fees' or 'accepting cases.' See, e.g., Pennsylvania Eth. Op. 98-75, 1994 Utah Eth. Op. 139. NALA Canon 3 states that a paralegal must not establish attorney-client relationships or set fees.").

NALA Model Standards, Guideline 2 ("Paralegals should not . . . set legal fees . . . .").

Rule Regulating the Florida Bar 20-7.1(d)(1) ("A Florida Registered Paralegal should not . . . set legal fees . . . .").

- **Maintaining a direct client relationship**

  ABA Model Guidelines for Paralegals, cmt. to Guideline 3 ("Model Rule 1.4 and most state codes require lawyers to communicate directly with their clients and to provide their clients information reasonably necessary to make informed decisions and to effectively participate in the representation. While delegation of legal tasks to nonlawyers may benefit clients by enabling their lawyers to render legal services more economically and efficiently, Model Rule 1.4 and Ethical Consideration 3-6 under the Model Code emphasize that delegation is proper only if the lawyer 'maintains a direct relationship with his client, supervises the delegated work and has complete professional responsibility for the work product.'").

- **Appearing before tribunals**

  ABA Model Guidelines for Paralegals, cmt. to Guideline 2 ("As a general matter, most state guidelines specify that paralegals may not appear before courts, administrative tribunals, or other adjudicatory bodies unless the procedural rules of the adjudicatory body authorize such appearances.").

  Rule Regulating the Florida Bar 20-7.1(d)(1) ("A Florida Registered Paralegal should not . . . represent a client before a court or other tribunal, unless authorized to do so by the court or tribunal.").

Permitted Activities. Defining the type of permitted activities in which paralegals may engage presents the same line-drawing difficulties.

The basic theme is the need for paralegals to act under the direct supervision of a lawyer.

- ABA Model Guidelines for Paralegals, Guideline 2 ("Provided the lawyer maintains responsibility for the work product, a lawyer may delegate to a paralegal any task normally performed by the lawyer except those tasks proscribed to a nonlawyer by statute, court rule, administrative rule or regulation, controlling authority, the applicable rule of professional conduct of the jurisdiction in which the lawyer practices, or these guidelines.").

National organizations have defined some permitted activities.

- See, e.g., NALA Model Standards, Guideline 5 ("Except as otherwise provided by statute, court rule or decision, administrative rule or regulation, or the attorney's rules of professional responsibility, and within the preceding parameters and proscriptions, a paralegal may perform any function delegated by an attorney, including, but not limited to the following: Conduct client interviews and maintain general contact with the client after the establishment of the attorney-client relationship, so long as the client is aware of the status and function of the paralegal, and the client contact is under the supervision of the attorney[; l]ocate and interview witnesses, so long as the witnesses are aware of the status and function of the legal assistant[; c]onduct investigations and statistical and documentary research for review by the attorney[; c]onduct legal research for review by the attorney[; d]raft legal documents for review by the attorney[; d]raft correspondence and pleadings for review by and signature of the attorney[; s]ummarize depositions, interrogatories and testimony for review by the attorney[; a]ttend executions of wills, real estate closings, depositions, court or administrative hearings and trials with the attorney[; a]uthor and sign letters providing the paralegal's status is clearly indicated and the correspondence does not contain independent legal opinions or legal advice.").

State bars take the same approach.

- New Jersey LEO 720 & UPL Op. 46 (3/23/11) ("The Committees find that the Rules of Professional Conduct do not prohibit paralegals from signing routine, non-substantive correspondence to clients, adverse attorneys, and courts, provided supervising attorneys are aware of the exact nature of the correspondence. As noted above, the correspondence must reflect the identity and non-attorney status of the paralegal and include the name of the responsible attorney in the matter.").

- Conn. law firm uses former restaurant drive-thru, Associated Press (Oct. 21, 2010) ("Legal service at one Connecticut firm can now be as easy to get as a hamburger and fries."; "The Kocian Law Group has opened a drive-through office in a building that once housed a former Kenny Rogers Roasters."; "Attorney Nick Kocian tells WVIT-TV that clients can use the drive-through at the law firm's Manchester, Conn., site to drop off and pick up documents."; "A paralegal works at the window, handing out documents and answering questions."; "Consultations and meetings with lawyers will still be scheduled for the office.").

- North Carolina LEO 13 (10/20/06) ("[I]f exigent circumstances require the signing of a pleading in the lawyer's absence, a lawyer may delegate this task to a paralegal or other nonlawyer staff only if 1) the signing of a lawyer's

signature by an agent of the lawyer does not violate any law, court order, local rule, or rule of civil procedure, 2) the responsible lawyer has provided the appropriate level of supervision under the circumstances, and 3) the signature clearly discloses that another has signed on the lawyer's behalf."; "A paralegal or paraprofessional may never sign and file court documents in her own name. To do so violates the statutes prohibiting the unauthorized practice of law.").

- North Carolina LEO 2002-9 (1/24/03) (superseding several older legal ethics opinions, and taking a fact-intensive approach to whether a lawyer must be present at a real estate closing, or whether the lawyer can allow a paralegal to conduct the closing; "When and how to communicate with clients in connection with the execution of the closing documents and the disbursement of the proceeds are decisions that should be within the sound legal discretion of the individual lawyer. Therefore, the requirement of the physical presence of the lawyer at the execution of the documents, as promulgated in Formal Ethics Opinions 99-13, 2001-4, and 2001-8, is hereby withdrawn. A nonlawyer supervised by the lawyer may oversee the execution of the closing documents and the disbursement of the proceeds even though the lawyer is not physically present. Moreover, the execution of the documents and the disbursement of the proceeds may be accomplished by mail, by e-mail, by other electronic means, or by some other procedure that would not require the lawyer and the parties to be physically present at one place and time. Whatever procedure is chosen for the execution of the documents, the lawyer must provide competent representation and adequate supervision of any nonlawyer providing assistance. Rule 1.1, Rule 5.3, and Rule 5.5." (footnote omitted); "In considering this matter, the State Bar received strong evidence that it is in the best interest of the consumer (the borrower) for the lawyer to be physically present at the execution of the documents. This ethics opinion should not be interpreted as implying that the State Bar disagrees with that evidence." (footnote omitted)).

- North Carolina LEO 2000-10 (7/27/01) ("[W]hen a lawyer has a conflicting commitment to appear in another court or when another legitimate conflict prohibits a lawyer's appearance in court for a client, the lawyer may send a nonlawyer employee to the court to inform the court of the situation. This is not assisting in the unauthorized practice of law. In response to information about a lawyer's availability, the court may, on its own motion, determine that a continuance or other action is appropriate." (footnote omitted); "A lawyer should rely on a nonlawyer to notify the court of a scheduling conflict only when necessary. Moreover, Rule 5.3 requires a lawyer who supervises a non-lawyer assistant to make reasonable efforts to ensure that the non-lawyer's conduct is compatible with the professional obligations of the lawyer. If a nonlawyer is present in court to provide information about the lawyer's

scheduling conflict, the duty of supervision includes insuring that the assistant complies with court rules on decorum and attire.").

- Virginia UPL Op. 191 (10/28/96; revised and reissued 4/15/98; approved by Supreme Court 9/29/98) (describing the permitted activities as follows: "[A] non-lawyer employee working under the direct supervision of a Virginia attorney may participate in gathering information from a client during an initial interview . . . provided that this involves nothing more than the gathering of factual data and the non-lawyer renders no legal advice.").

- Virginia UPL Op. 147 (4/19/91) (indicating that a "paralegal company" may gather necessary real estate documents, complete non-legal documents, and arrange for the necessary signatures and relaying of documents required for real estate closings).

- Virginia UPL Op. 129 (2/22/89) (indicating that paralegals employed by a non-profit organization may provide "services to and under the supervision of attorneys on behalf of the organization").

Some laws, rules or regulations specifically allow paralegals to engage in what otherwise would be the unauthorized practice of law: "jailhouse" legal advisors, in-house legal advice, etc.[6]

Sanctions for Paralegals

Paralegals who engage in the unauthorized practice of law are theoretically subject to criminal charges in most states.

Most sanctions involve injunctive or monetary relief -- rather than criminal punishment.

- Mont. Supreme Court Comm'n on Unauthorized Practice of Law v. O'Neil, 147 P.3d 200 (Mont. 2006) (holding that a paralegal violated Montana's UPL statutes by drafting pleadings, providing legal advice and appearing in court with customers), cert. denied, 549 U.S. 1282 (2007).

[6] ABA Model Guidelines for Paralegals, Guideline 2; NALA Model Standards, Guideline 3; NALA Code of Ethics and Prof'l Responsibility, Canon 2 (2007) ("NALA Ethics Code").

- State ex rel. Ind. State Bar Ass'n v. Diaz, 838 N.E.2d 433 (Ind. 2005) (enjoining a notary from assisting immigration clients, but allowing her to offer translations and other routine services).

- Dayton Bar Ass'n v. Addison, 837 N.E.2d 367 (Ohio 2005) (enjoining a paralegal from preparing wills or other documents, and fining him $10,000; noting that he had never been a lawyer and was engaged in the unauthorized practice of law).

- United States v. Johnson, 327 F.3d 554 (7th Cir. 2003) (recognizing a court's inherent power to punish UPL activities by an organization of paralegals called the National Legal Professional Associates, which improperly advertised for and provided legal services to prisoners).

- Sussman v. Grado, 746 N.Y.S.2d 548, 549, 552-53 (N.Y. Dist. Ct. 2002) (holding that an "independent paralegal" who was the president and sole shareholder of a "Consulting Group" had engaged in the unauthorized practice of law by preparing an order involving two bank accounts; finding that the legal assistant "crossed the line between filling out forms [which would have been acceptable] and engaging in the practice of law by rendering legal services" because she "tried to create a legal document without the required knowledge, skill or training"; awarding plaintiff $135.00 in damages, but referring the matter to the New York State Attorney General's Office for possible action against the paralegal).

Not surprisingly, most of these cases involve what could be called "storefront" paralegals -- those who have set up an operation without a lawyer's involvement.

Conclusion

(a) Most states would frown upon paralegals conducting (at least by themselves) an initial client interview.

(b)-(c) Paralegals can clearly conduct legal research and draft documents, as long as they are assisting the lawyer -- who takes the ultimate responsibility for the research and the document after reviewing the paralegal's work.

(d) States would not allow a paralegal to directly discuss legal options with a client if the paralegal had not first spoken with a lawyer about those legal options -- and thus was essentially acting as the lawyer's spokesperson.

(e) The issue of attending real estate closings without a lawyer typifies states' differing approaches to permissible paralegal activities.

The ABA Model Guidelines provide this as an example.

> Thus, some tasks that have been specifically prohibited in some states are expressly delegable in others. Compare[] Guideline 2, Connecticut Guidelines (permitting paralegal to attend real estate closings even though no supervising lawyer is present provided that the paralegal does not render opinion or judgment about execution of documents, changes in adjustments or price or other matters involving documents or funds) and The Florida Bar, Opinion 89-5 (November 1989) (permitting paralegal to handle real estate closing at which no supervising lawyer is present provided, among other things, that the paralegal will not give legal advice or make impromptu decisions that should be made by a lawyer) with Supreme Court of Georgia, Formal Advisory Opinion No. 86-5 (May 1989) (closing of real estate transactions constitutes the practice of law and it is ethically improper for a lawyer to permit a paralegal to close the transaction). It is thus incumbent on the lawyer to determine whether a particular task is properly delegable in the jurisdiction at issue.

ABA Model Guidelines for Paralegals, cmt. to Guideline 2 (emphases added).

In 2011, the Massachusetts Supreme Court found that paralegals could engage in such activities.

> "It is not easy to define the practice of law." . . . NREIS's [defendant's] preparation of settlement statements and other mortgage-related forms for its lender clients clearly does not constitute the unauthorized practice of law. . . . Filling out standard government forms for others is not necessarily the practice of law. . . . Neither reviewing documents to ensure

> valid execution nor delivering documents to the appropriate registry of deeds for recording constitutes the practice of law.

Real Estate Bar Ass'n for Mass., Inc. v. Nat'l Real Estate Info. Servs., 946 N.E.2d 665, 673 & 679 (Mass. 2011) (citation omitted).

To make matters more confusing, states' position can change from time to time.

- See, e.g., North Carolina LEO 2002-9 (1/24/03) (superseding several older legal ethics opinions, and taking a fact-intensive approach to whether a lawyer must be present at a real estate closing, or whether the lawyer can allow a paralegal to conduct the closing; "When and how to communicate with clients in connection with the execution of the closing documents and the disbursement of the proceeds are decisions that should be within the sound legal discretion of the individual lawyer. Therefore, the requirement of the physical presence of the lawyer at the execution of the documents, as promulgated in Formal Ethics Opinions 99-13, 2001-4, and 2001-8, is hereby withdrawn. A nonlawyer supervised by the lawyer may oversee the execution of the closing documents and the disbursement of the proceeds even though the lawyer is not physically present. Moreover, the execution of the documents and the disbursement of the proceeds may be accomplished by mail, by e-mail, by other electronic means, or by some other procedure that would not require the lawyer and the parties to be physically present at one place and time. Whatever procedure is chosen for the execution of the documents, the lawyer must provide competent representation and adequate supervision of any nonlawyer providing assistance. Rule 1.1, Rule 5.3, and Rule 5.5." (footnote omitted; emphasis added); "In considering this matter, the State Bar received strong evidence that it is in the best interest of the consumer (the borrower) for the lawyer to be physically present at the execution of the documents. This ethics opinion should not be interpreted as implying that the State Bar disagrees with that evidence." (footnote omitted)).

Best Answer

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

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Assisting Paralegals' UPL Violations

Hypothetical 12

One of your law school classmates decided not to join a law firm after graduation, but instead opened his own law firm. Over a recent lunch, he told you that he had just established another office in a city about 30 miles from where both of you practice. The only folks who work in that office are paralegals and secretaries, although your classmate visits the office every Friday afternoon to check on its operations.

Is your classmate risking sanctions by arranging for paralegals to operate in the other office?

YES

Analysis

While paralegals themselves face unauthorized practice of law risks by engaging in the practice of law, lawyers who assist them can face their own sanctions.

Lawyers must constantly assure that they are not themselves engaged in the unauthorized practice of law, or assisting anyone else in doing so.

The ABA Model Rules acknowledge that lawyers may rely on paralegals when they practice law.

> The definition of the practice of law is established by law and varies from one jurisdiction to another. Whatever the definition, limiting the practice of law to members of the bar protects the public against rendition of legal services by unqualified persons. This Rule does not prohibit a lawyer from employing the services of paraprofessionals and delegating functions to them, so long as the lawyer supervises the delegated work and retains responsibility for their work.

ABA Model Rule 5.5 cmt. [2].

However, the ABA Model Rules also explicitly indicate that:

> A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

ABA Model Rule 5.5(a) (emphasis added).

The Restatement takes the same approach.

> For obvious reasons of convenience and better service to clients, lawyers and law firms are empowered to retain nonlawyer personnel to assist firm lawyers in providing legal services to clients. In the course of that work, a nonlawyer may conduct activities that, if conducted by that person alone in representing a client, would constitute unauthorized practice. Those activities are permissible and do not constitute unauthorized practice, so long as the responsible lawyer or law firm provides appropriate supervision . . . , and so long as the nonlawyer is not permitted to own an interest in the law firm, split fees, or exercise management powers with respect to a law-practice aspect of the firm . . . .

Restatement (Third) of Law Governing Lawyers § 4 cmt. g (2000) (emphases added).

Not surprisingly, lawyers can face sanctions for misconduct by their nonlawyer colleagues.

The ABA Model Rules require that a law firm's partner

> shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the [nonlawyer's] conduct is compatible with the professional obligations of the lawyer.

ABA Model Rule 5.3(a) (emphasis added). The ABA Model Rules similarly require that a lawyer

> having direct supervisory authority over [a nonlawyer] make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.

ABA Model Rule 5.3(b) (emphasis added).

The ABA's paralegal guidelines[1] and state guidelines[2] take the same approach.

The ABA Model Rules also explain that a lawyer responsible for a nonlawyer's conduct may be punished for the nonlawyer's conduct that would be a violation of the rules if: (1) the lawyer orders or knowingly ratifies the conduct; or (2) if the lawyer directly supervisors the nonlawyer and "fails to take reasonable remedial action" when the lawyer knows or should have known of the conduct at the time "when its consequences can be avoided." ABA Model Rule 5.3(c).

The ABA has explicitly explained the risk lawyers run by not adequately supervising paralegals.

> While appropriate delegation of tasks is encouraged and a broad array of tasks is properly delegable to paralegals, improper delegation of tasks will often run afoul of a lawyer's obligations under applicable rules of professional conduct. A common consequence of the improper delegation of tasks is that the lawyer will have assisted the paralegal in the unauthorized 'practice of law' in violation of Rule 5.5 of the Model Rules, DR 3-101 of the Model Code, and the professional rules of most states.

ABA Model Guidelines for Paralegals, cmt. to Guideline 2.

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[1] Am. Bar Ass'n Standing Comm. on Paralegals, ABA Model Guidelines for the Utilization of Paralegal Services, Guideline 1 (2004) ("ABA Model Guidelines for Paralegals") ("A lawyer is responsible for all of the professional actions of a paralegal performing services at the lawyer's direction and should take reasonable measures to ensure that the paralegal's conduct is consistent with the lawyer's obligations under the rules of professional conduct of the jurisdiction in which the lawyer practices."); ABA Model Guidelines for Paralegals, cmt. to Guideline 1 ("[A] lawyer must give appropriate instruction to paralegals supervised by the lawyer about the rules governing the lawyer's professional conduct, and require paralegals to act in accordance with those rules. . . . Additionally, the lawyer must directly supervise paralegals employed by the lawyer to ensure that, in every circumstance, the paralegal is acting in a manner consistent with the lawyer's ethical and professional obligations.").

[2] Rule Regulating the Florida Bar 20-7.1(c) ("A Florida Registered Paralegal should understand the attorney's Rules of Professional Conduct and this code in order to avoid any action that would involve the attorney in a violation of the rules or give the appearance of professional impropriety. It is the obligation of the Florida Registered Paralegal to avoid conduct that would cause the lawyer to be unethical or even appear to be unethical, and loyalty to the lawyer is incumbent upon the Florida Registered Paralegal.").

Thus courts and bars have punished lawyers for failure to adequately supervise paralegals.

- State ex rel. Okla. Bar Ass'n v. Martin, 240 P.3d 690, 696, 698 (Okla. 2010) (issuing a public reprimand against a lawyer for inadequate supervision of a nonlawyer sharing his offices; "In May of 2006 respondent agreed to help Wingo [nonlawyer] by putting him on the law firm's payroll. According to their verbal arrangement, Wingo would call his business the Jeff Martin Research Center (JM Research Center or Center). Wingo was to operate it as a self-sustaining enterprise by earning service fees that were to be used to defray his business costs, including salaries and expenses. Wingo was to run the business as an employee and be responsible for all losses incurred by him. Respondent [lawyer] would be compensated by a percentage of the income generated. There was no agreement to share profits and losses as partners."; "Respondent admits that even though the Center was set up under his name, he neither did a background check on Wingo nor took any steps to find out what services, if any, Wingo was actually providing. Neither did respondent have any direct daily contact with Wingo's operations."; "Respondent's utter failure to supervise any of Wingo's work activities not only enabled Wingo to misrepresent respondent's individual involvement in the case but also to engage in the unauthorized practice of law by performing legal services in the form of legal research, the alleged preparation of a motion for post-conviction relief and of a petition for writ of certiorari to the United States Supreme Court without proper supervision by a licensed lawyer. Respondent's dereliction violated ORPC Rule 5.5(b), which provides that 'a lawyer shall not . . . assist a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.'").

- In re Hrones, 933 N.E.2d 622, 625, 628, 630 (Mass. 2010) (suspending for one year and one day a lawyer for helping a nonlawyer engage in the unauthorized practice of law; explaining that the lawyer (Hrones) allowed Porter ("a law school graduate who had not passed the bar examination") to essentially operate an independent business out of Hrones' office; "They agreed that the firm would enter into contingent fee arrangements with Porter's clients, and all fees and retainers would be paid to the firm. The respondent would then give Porter two-thirds of any fee collected and retain one-third. The respondent listed Porter on the firm's letterhead as a paralegal, and he permitted Porter to use a firm business card that identified him as a paralegal."; "The respondent's firm generally did not handle employment or other discrimination cases, and the respondent himself had little or no experience in discrimination cases. The respondent intended that Porter would operate a virtually independent discrimination law practice, without substantial supervision by the respondent or any other attorney at the

firm. No one in the office was assigned to, or did, supervise Porter's work."; explaining that in 1936 the court defined the practice of law as follows: "'directing and managing the enforcement of legal claims and the establishment of the legal rights of others, where it is necessary to form and to act upon opinions as to what those rights are and as to the legal methods which must be adopted to enforce them, the practice of giving or furnishing legal advice as to such rights and methods and the practice, as an occupation, of drafting documents by which such rights are created, modified, surrendered or secured.'" (quoting from In re Shoe Mfrs. Protective Ass'n, 3 N.E.2d 746, 748 (1936)); explaining that Hrones had allowed Porter to essentially create the attorney-client relationship with a prospective client, which fell within the definition of the practice of law; "The respondent's efforts to curb Porter's conduct, by holding Porter out as a paralegal, instructing Porter on fee agreements, requiring Porter to turn over all fee payments to the firm, and minimally reprimanding Porter when he was informed of Porter's missteps, are not sufficient to avoid a charge of assistance in the unauthorized practice of law."); see also Leigh Jones, Attorney Suspended for Assisting in Unauthorized Practice of Law, National Law Journal, Sept. 14, 2010 ("Hrones is a partner at Hrones & Garrity. In a much-publicized case, he represented Christian Karl Gerhartsreiter, who went by the name Clark Rockefeller, convicted in 2009 of abducting his 7-year-old daughter from a street in Boston and assaulting a social worker. The firm's Web site says that Hrones is a graduate of Harvard University and the University of Michigan Law School and earned a Fulbright Fellowship in 1969.").

- In re Guirard, 11 So. 3d 1017, 1022, 1027 (La. 2009) (disbarring lawyers for allowing their nonlawyer staff to practice law; explaining that the nonlawyers acted as "case managers" and received compensation based on the cases that they handled; "The committee commented that this is not a situation in which the case managers are paid a percentage of net profits at the end of the year on the general business of the law firm; rather, 'each nonlawyer receives a piece of the action if the case is [settled] by them. This is fee splitting and always has been.' Moreover, the committee found the arrangement creates a clear conflict of interest between the law firm (particularly the case managers) and the clients. The nonlawyer case manager is being paid on a successful settlement of a claim; if the file is turned over to litigation, the case manager receives nothing, or, at most, a discretionary percentage. Under these circumstances, the committee found the case manager has an 'overwhelming motive to settle a claim at any price' before losing control over the file."; "By allowing nonlawyers to practice law, respondents ran the risk of having cases settled improperly and proceedings later being declared nullities. By implementing the compensation plan at issue, the potential for conflict between the client's interests and the case managers' interests was also great. Further, by improperly paying their case managers and investigators bonuses for 'signing up' clients, the reputation of

the legal profession and the legal system has undoubtedly been marred. The board found the applicable baseline sanction is disbarment." (footnote omitted)).

- In re Garrett, 12 So. 3d 332, 333, 335-36, 344, 344-45 (La. 2009) (disbarring a lawyer for allowing his paralegal to play too substantial a role in cases that the lawyer's firm handled; "Respondent is a solo practitioner handling primarily plaintiff's personal injury cases. In July 1999, respondent hired Marcia Jordan to work in his office as a legal assistant. At the time he employed Ms. Jordan, respondent knew she had graduated from law school in 1996 and passed the Louisiana bar examination, but had not been admitted to the practice of law."; "Ms. Jordan testified that she always works under respondent's supervision, but she has the primary day-to-day responsibility for handling the 'J' files. She orders the accident report, maintains contact with the clients, responds to inquiries from third parties for additional information concerning the case, and does legal research. She drafts correspondence, pleadings, and discovery for respondent to review and sign. Ms. Jordan also participates in the taking of recorded statements of the client by an insurance adjuster." (emphases added); "We find the record, taken as a whole, supports the conclusion that respondent facilitated Ms. Jordan's unauthorized practice of law by allowing her to negotiate personal injury settlements on behalf of his clients and in representing clients during recorded statements taken by insurance companies. . . . [A] review of Ms. Jordan's earlier testimony suggests that she clearly testified that she was authorized by respondent to handle settlement negotiations independently so long as she stayed within a pre-determined 'high and low' range, and that she frequently participated in the taking of recorded client statements." (emphasis added); "Rule 5.5 of the Rules of Professional Conduct, which specifically defines the 'practice of law' to include 'appearing as a representative of the client at a deposition or other discovery matter' and 'negotiating or transacting any matter for or on behalf of a client with third parties.' Accordingly, respondent has facilitated the unauthorized practice of law by his assistant, Ms. Jordan, in violation of Rule 5.5(a)."; "Respondent has also committed misconduct by sharing his legal fees with Ms. Jordan. Ms. Jordan and respondent describe her compensation arrangement as 'complex' and 'convoluted,' but we find it simple: under their agreement, respondent and Ms. Jordan share a predetermined percentage of his legal fees as compensation for her work on the 'J files.' Such an arrangement clearly violates the letter and spirit of Rule 5.4(a) of the Rules of Professional Conduct, which provides that a lawyer 'shall not share legal fees with a nonlawyer' except under limited circumstances not relevant to this case." (emphasis added)).

- Mississippi Bar v. Thompson, 5 So. 3d 330 (Miss. 2008) (holding that a lawyer has violated Mississippi Rule 5.3, by failing to adequately supervise

the ex-inmate that she hired as a paralegal; explaining that the ex-inmate had apparently provided legal advice and prepared pleadings; citing other states sanctioning lawyers for failing to adequately supervise nonlawyer employees who had engaged in the unauthorized practice of law).

- Florida Bar v. Abrams, 919 So. 2d 425, 429, 430 (Fla. 2006) (suspending a lawyer for one year for allowing a paralegal to act on his behalf in dealing with an immigration matter, including handling all interaction with the clients, and preparing and filing pleadings on the clients' behalf; "In the present case, the record shows that even though Akbas worked as a paralegal at U.S. Entry, she actually was the person in control of the corporation's day-to-day operations. She met with the clients, conducted the client interviews, and made the decisions as to the appropriate course of action for the clients"; explaining that "Abrams did not merely fail to supervise Akbas [paralegal] in the transmission of legal advice, but rather he provided no legal advice whatsoever. Instead, Akbas conducted client intake and formulated and dispensed legal advice").

- Graham v. Dallas Indep. Sch. District, Civ. A. No. 3:04-CV-2461-B, 2006 U.S. Dist. LEXIS 13639, at *2 & n.2, *3, *5, *6 (N.D. Tex. Jan. 10, 2006) (assessing a motion to sanction a lawyer ("Layer") for essentially permitting a legal research firm run by a non-lawyer ("McIntyre") to prepare and file pleadings on behalf of the plaintiff in a lawsuit against the Dallas School District; noting that Layer (1) had filed "an incomprehensible and untimely" response brief to one defendant's motion to dismiss, which had relied on Texas procedure rules even though the case was pending in federal court; (2) had responded to defendants' motion to dismiss the plaintiff's complaint (in part because it was unclear whether the plaintiff was suing the defendant in "his official or individual capacity") by arguing that his client's complaint "clearly stated that Defendants were being sued jointly and severally"; (3) had moved for contempt against several of the defendants for failing to serve a copy of a pleading, but withdrew the motion several days later because his office had actually received the defendants' pleading and had "wrongfully filed [it] in another client's file" (internal quotations omitted); (4) had filed a "nonsensical brief" asking to strike one of the defendant's motions because it incorporated the brief in the motion rather than filing a separate brief -- although no local rule required a separate brief; (5) was not prepared for a hearing, and appeared "unable to grasp basic legal concepts in Defendants' motions or even those contained in his own briefing"; (6) had moved to withdraw as counsel, but the plaintiff opposed the motion because (among other things) Layer had allowed non-lawyer McIntyre to prepare and file all the legal papers -- and further noting that the plaintiff "asserted that McIntyre had sought sexual favors in return for legal representation, and she claimed to have an audiotape recording of McIntyre propositioning her for sex"; (7) had stunningly insisted at a later hearing that he had not signed or proofed any of

the filings in the case -- including the complaint -- "despite being [the plaintiff's] sole counsel of record"; (8) "when asked whether he had anything to do with preparing the responses to Defendants' motions to dismiss," had told the court "'I don't believe I did' and that 'I certainly didn't do any research'"; ordering Layer to pay defendants' attorney's fee and sending a copy of its sanction order to the Texas Bar).

- In re Mopsik, 902 So. 2d 991 (La. 2005) (suspending for sixty days a lawyer who had not adequately supervised a paralegal, and allowed her to essentially act as a lawyer).

- Mahoning County Bar Ass'n v. Lavelle, 836 N.E.2d 1214 (Ohio 2005) (suspending for eighteen months a lawyer whose employee had falsified documents).

- Florida Bar v. Barrett, 897 So. 2d 1269, 1271 (Fla. 2005) (disbarring a lawyer for engaging in the following practice: "Barrett was the senior partner and managing partner in the Tallahassee law firm of Barrett, Hoffman, and Hall, P.A. In approximately January 1993, Barrett hired Chad Everett Cooper, an ordained minister, as a 'paralegal.' Although Cooper had previously worked for a law firm in Quincy, Florida, Cooper's primary duty at Barrett's law firm was to bring in new clients. As Cooper testified, Barrett told him to 'do whatever you need to do to bring in some business' and 'go out and . . . get some clients.' Cooper was paid a salary averaging $ 20,000 and, in addition to his salary, yearly 'bonuses' which generally exceeded his yearly salary. In fact, Cooper testified that Barrett offered him $ 100,000 if he brought in a large case. To help Cooper bring in more personal injury clients to the law firm, Barrett devised a plan so that Cooper could access the emergency areas of a hospital and thus be able to solicit patients and their families. In order to gain such access, Barrett paid for Cooper to attend a hospital chaplain's course offered by Tallahassee Memorial Hospital."; explaining that the lawyer paid the paralegal a bonus of $200 for each client that the paralegal brought into the firm).

- In re Froelich, 838 A.2d 1117 (Del. 2003) (publicly reprimanding a lawyer for allowing an independent paralegal service to handle real estate settlements and the lawyer's escrow account without adequate supervision).

- In re Lester, 578 S.E.2d 7 (S.C. 2003) (publicly reprimanding a lawyer for allowing a paralegal to handle real estate closings without a lawyer present).

- People v. Milner, 35 P.3d 670 (Colo. 2001) (suspending for three years a lawyer whose paralegal provided advice to one of the lawyer's clients on domestic relations matters, and advised the client not to seek temporary custody of the client's children or speak with a government agency).

- In re Cuccia, 752 So. 2d 796 (La. 1999) (holding that a personal injury lawyer had not adequately supervised paralegals; also noting that the paralegal engaged in settlement negotiations with insurance companies and entered into binding settlements).

- In re Carlos, 227 B.R. 535 (Bankr. C.D. Cal. 1998) (finding that a law firm had assisted in the unauthorized practice of law by allowing a paralegal to negotiate a bankruptcy agreement with a debtor; acknowledging that the lawyer reviewed the agreement, but emphasizing that the lawyer had not been involved in any of the negotiations).

- In re Robinson, 495 S.E.2d 28 (Ga. 1998) (holding that Robinson had not adequately supervised paralegals, who had the sole interaction with the lawyer's clients and also arranged for the attorney-client relationship).

- Florida Bar v. American Senior Citizens Alliance, Inc., 689 So. 2d 255 (Fla. 1997) (finding that a lawyer had not adequately supervised paralegals, who contacted customers and sold them estate planning documents; noting that the paralegals obtained information from the clients and prepared trust and estate documents using standardized forms; acknowledging that the lawyer later reviewed the documents, but nevertheless finding inadequate supervision and the unauthorized practice of law).

- In re Hessinger & Assocs., 192 B.R. 211, 222, 223 (N.D. Cal. 1996) (holding that a bankruptcy lawyer had violated California ethics rules by failing to supervise several paralegals; providing as one example the following testimony: "Patricia Hoagland, another Hessinger paralegal, testified that she 'performed functions without proper legal supervision,' that the firm was 'organized similar to a production line, with little or no review by attorneys,' and that 'paralegal/credit specialists were required to produce at least two bankruptcy petitions each day to keep their job.' . . . Again, appellant has made no effort to specifically contradict this testimony." (emphasis added); rejecting the lawyer's defense that other lawyers used paralegals in the same fashion; "As a final point on this issue, the court notes that a persistent theme in appellant's position on the role of paralegals in its practice is the argument that 'everybody does it[';] that is, all large consumer bankruptcy firms rely on paralegals to perform a large amount of the work required for filing a bankruptcy petition, and in all such firms the paralegals do so with only minimal attorney supervision. This may well be true; it may also be true that, given sufficient training, paralegals are fully capable of competently handling most aspects of a consumer bankruptcy case. The court, however, is not in a position to decline to enforce the Rules of Professional Conduct merely because application of those rules results in attorneys being required to perform work which could be performed less expensively and more efficiently by nonlawyers. Nor is the court in a position to condone an unethical practice

merely because most consumer bankruptcy firms are engaging in it."; remanding for appropriate sanctions).

- Disciplinary Bd. v. Nassif (In re Nassif), 547 N.W.2d 541, 543 (N.D. 1996) (disbarring a lawyer for (among other things) not adequately supervising paralegals; "The record demonstrates an unacceptable lack of supervision by Nassif of his office staff. Nassif allowed untrained 'paralegals,' whom he deemed to be independent contractors and not his employees, to, in effect, practice law under his license. These paralegals were allowed to recruit and advise clients, negotiate fee agreements with clients, and perform legal work for clients, with little or no supervision by Nassif. One of these paralegals was held out to a client as a licensed attorney practicing with Nassif. Nassif routinely split fees with the non-lawyer paralegals, and candidly admitted cashing a retainer check from a client and giving half of the cash to his paralegal. Nassif testified he considered this a 'common sense formula' for compensation for work done." (emphases added)).

- People v. Fry, 875 P.2d 222 (Colo. 1994) (finding that a lawyer had engaged in improper supervision of a paralegal, who had met with and given legal advice to a bankruptcy client whom the lawyer had never met).

- Florida Bar v. Lawless, 640 So. 2d 1098 (Fla. 1994) (suspending a lawyer for ninety days for failing to supervise an independent contractor paralegal).

- Office of Disciplinary Council v. Ball, 618 N.E.2d 159 (Ohio 1993) (suspending a lawyer for six months for failing to supervise a paralegal who misappropriated trust account funds).

Some courts and bars are more forgiving.

- North Carolina LEO 2008-6 (7/18/08) (answering in the affirmative the following question: "May a lawyer hire a nonlawyer independent contractor to organize and speak at educational seminars at which the nonlawyer will present general information about wills, trust, and estates?"; explaining that "[t]he nonlawyer may not answer questions that require the exercise of independent legal judgment or the giving of specific legal advice. The hiring lawyer assumes the risk that the nonlawyer will cross the line between answering general informational questions and giving legal advice.").

- In re Cabibi, 922 So. 2d 490, 496 & n.11 (La. 2006) (dismissing charges against a lawyer who had allowed his daughter (a paralegal) to prepare a document under which the lawyer received a bequest; noting that the lawyer's daughter had not discussed the document with her father, and also noting that the person making the bequest was a long-time family friend; "no harm was caused as a result of the misconduct, which was unintentional and

attributable to the fact that respondent did not think of Mrs. Hirsch as a client, but only as a longtime family friend"; "Mrs. Hirsch [the client making the bequest to the lawyer] had executed four previous olographic wills leaving her property - in some cases her entire estate - to the Cabibi family.").

Best Answer

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

N 3/12

Paralegals: Attorney-Client Privilege Issues

Hypothetical 13

You are representing a client in contentious litigation, which has increasingly focused on your withholding of documents you claim to be protected by the attorney-client privilege. Your adversary just filed a motion arguing that the attorney-client privilege does not protect direct communications between your client and one of your paralegals -- because no lawyer participated in the communications.

May the attorney-client privilege protect communications between your client and your paralegal, in which no lawyer participated?

YES

Analysis

In most situations, the attorney-client privilege will cover direct communications between a client and a paralegal assisting a lawyer in providing legal advice to a client.[1]

Numerous courts have recognized that the attorney-client privilege can protect direct communications with paralegals in these circumstances.

- Southeastern Pa. Transp. Auth. v. CaremarkPCS Health, L.P., 254 F.R.D. 253, 257 (E.D. Pa. 2008) ("Communications with the subordinate of an attorney, such as a paralegal, are also protected by the attorney-client privilege so long as the subordinate is 'acting as the agent of a duly qualified attorney under circumstances that would otherwise be sufficient to invoke the privilege.'" (citation omitted)).

- Olkolski v. PT Inatai Golden Furniture Indus., Case No. 4:06-cv-4083 WDS, 2008 U.S. Dist. LEXIS 75230, at *5 (S.D. Ill. Sept. 29, 2008) ("Confidential communications made to representatives of the attorney such as paralegals, secretaries, file clerks, or investigators employed by the attorney are also covered by the privilege.").

[1] See, e.g., Restatement (Third) of Law Governing Lawyers § 70 cmt. g (2000) ("A lawyer may disclose privileged communications to other office lawyers and with appropriate nonlawyer staff -- secretaries, file clerks, computer operators, investigators, office managers, paralegal assistants, telecommunications personnel, and similar law-office assistants.").

- Payless Shoesource Worldwide, Inc. v. Target Corp., Civ. A. No. 05-4023-JAR, 2008 U.S. Dist. LEXIS 28878 (D. Kan. Apr. 8, 2008) (holding that a paralegal is treated like a lawyer for privilege and work product purposes).

- Wagoner v. Pfizer, Inc., Case No. 07-1229-JTM, 2008 U.S. Dist. LEXIS 24262, at *11-12 (D. Kan. Mar. 26, 2008) (finding that the privilege protected communications to and from a nonlawyer assisting a lawyer in conducting an investigation; noting that her "role was not unlike that of a paralegal, assisting in the gathering and organizing of information for an attorney").

- Barton v. Zimmer Inc., Cause No. 1:06-CV-208, 2008 U.S. Dist. LEXIS 1296, at *25 (N.D. Ind. Jan. 7, 2008) (holding that the privilege protected communications to and from an outside lawyer's paralegal and secretary "with respect to the seeking of legal advice").

- Jenkins v. Bartlett, 487 F.3d 482, 491 (7th Cir. 2007) (applying the privilege to communications to and from a lawyer's agent; finding that the protection "applies both to agents of the attorney, such as paralegals, investigators, secretaries and members of the office staff responsible for transmitting messages between the attorney and client, and to outside experts engaged 'to assist the attorney in providing legal services to the client,' such as accountants, interpreters or polygraph examiners." (citation omitted)), cert. denied, 552 U.S. 1039 (2007).

- Equity Residential v. Kendall Risk Mgmt., Inc., 246 F.R.D. 557, 566-67 (N.D. Ill. 2007) ("Several of the documents listed in Connecticut Specialty's [defendant] log contain communications from a paralegal relaying legal advice to a Connecticut Specialty employee. In addition, several documents include communications from an employee to a paralegal seeking legal advice, or discussing the legal advice sought. As a representative of the attorney, the attorney client privilege extends to a paralegal acting as a subordinate to the attorney. . . . Thus, these documents are also privileged, and the motion to compel this category of documents is denied.").

- Steele v. Lincoln Fin. Group, No. 05 C 7163, 2007 U.S. Dist. LEXIS 25587, at *8 (N.D. Ill. Apr. 3, 2007) (protecting as privileged e-mails to and from a paralegal in a corporate law department).

- Executive Risk Indem., Inc. v. Cigna Corp., 81 Pa. D. & C.4th 410, 423-24 (Pa. C.P. Phila. 2006) ("The protection of privilege has been provided to confidential communications by a client to investigators, paralegals, secretaries or other employees of the attorney when necessary to secure proper legal advice." (footnotes omitted)), remanded on other grounds, 976 A.2d 1170 (Pa. Super. Ct. 2009).

- Wal Mart Stores, Inc. v. Dickinson, 29 S.W.3d 796, 804-05 (Ky. 2000) (finding that the attorney-client privilege and work product doctrine applied with equal force to a lawyer's paralegal; "We believe that the privilege should apply with equal force to paralegals, and so hold. A reality of the practice of law today is that attorneys make extensive use of nonattorney personnel, such as paralegals, to assist them in rendering legal services. Obviously, in order for paralegals, investigators, secretaries and the like to effectively assist their attorney employers, they must have access to client confidences. If privileged information provided by a client to an attorney lost its privileged status solely on the ground that the attorney's support staff was privy to it, then the free flow of information between attorney and client would dry up, the cost of legal services would rise, and the quality of those same services would fall. . . . Likewise, and for the same reasons, we hold that attorney work product prepared by a paralegal is protected with equal force by CR 26.02(3) as is any trial preparation material prepared by an attorney in anticipation of litigation.").

If a paralegal assists a lawyer in providing legal advice, even documents created by the paralegal can deserve privilege protection.[2]

On the other hand, one New Jersey case provided a frightening example of what can happen when lawyers and paralegals are sloppy in their treatment of the attorney-client privilege (especially in a corporate law department setting). HPD Labs., Inc. v. Clorox Co., 202 F.R.D. 410 (D.N.J. 2001) (holding that the attorney-client privilege did not protect from disclosure communications between a long-time Clorox in-house paralegal and Clorox employees, because the employees were seeking the paralegal's own advice rather than working with the paralegal to obtain a lawyer's advice; noting

[2] Southeastern Pa. Transp. Auth. v. CaremarkPCS Health, L.P., 254 F.R.D. 253, 259-60 (E.D. Pa. 2008) (finding that the attorney-client privilege protected draft contract language prepared by a paralegal at a lawyer's direction, and circulated to company executives for their review and comment; "Ms. Hankins [Caremark's Senior Legal Counsel] asserts that she directed Ms. Kershaw [paralegal who acted as Ms. Hankins' subordinate] to 'convey legal advice by way of setting forth revised proposed contract language for consideration by the Caremark [] employees directly involved in the SEPTA contract negotiations, and to seek feedback from both business people and legal personnel regarding the proposed legal contract language.' . . . The fact that Ms. Kershaw authored the e-mail does not destroy the privilege because she was acting as the agent of Ms. Hankins under circumstances where the attorney-client privilege applies.").

that the paralegal did not copy in-house lawyers on her communications, and did not involve in-house lawyers in her meetings with Clorox employees; ordering the production of documents reflecting communications between the paralegal and Clorox employees).

No court seems to have followed this approach since 2001. Still, corporate law departments would be wise to assure that their paralegals involve in-house lawyers to a degree sufficient to avoid this horrible result.

Not surprisingly, paralegals deserve privilege protection as a lawyer's agent only if they are assisting the lawyer in providing legal advice.

- Willard v. Hobbs, No. 2:08CV00024 WRW/HDY, 2009 U.S. Dist. LEXIS 6134 (E.D. Ark. Jan. 26, 2009) (finding that the attorney-client privilege did not protect communications between a prisoner and a "paralegal" who was also the prisoner's spiritual advisor).

- State v. Ingraham, 966 P.2d 103, 121 (Mont. 1998) ("Windham testified in chambers that, although she worked for Gregory Ingraham as an independent contractor, she performed no paralegal services for Lloyd Ingraham. She also testified that she had done nothing to assist Gregory Ingraham in defending this case, and that to her knowledge, there was no file on this case at the Ingraham Law Firm. Our review of the pertinent testimony indicates that Ingraham's conversations with Windham were purely personal and not in the course of a professional relationship.").

- Volrie v. State, No. 13-05-667-CR, 2007 Tex. App. LEXIS 6574 (Tex. App. Aug. 16, 2007) (unpublished opinion); finding that a criminal defendant's conversations with a friend who acted as a paralegal did not deserve attorney-client privilege protection).

Best Answer

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

N 3/12

Paralegals: Work Product Issues

Hypothetical 14

In very contentious litigation you are handling for a client, the adversary claims that your paralegal cannot create protected "work product" because he is not a lawyer.

May your paralegal create documents protected by the work product doctrine?

YES

Analysis

Paralegals play a key role in assuring work product doctrine protection. Unlike the narrower attorney-client privilege (which protects only those communications to and from the client's agent necessary for the transmission of the information, or the lawyer's agent assisting a lawyer in providing legal advice), the work product doctrine can protect documents prepared by any client or lawyer "representative." Fed. R. Civ. P. 26(b)(3).

Establishing that the paralegal is acting as a client's or a lawyer's "representative" is essentially automatic.

- Kallas v. Carnival Corp., Case No.: 06-20115 CIV MORENO/TORRES, 2008 U.S. Dist. LEXIS 42299, at *22-23 (S.D. Fla. May 27, 2008) (assessing work product issues in a class action arising from the spread of Norovirus on a cruise; ultimately ordering the production of fact, but not opinion, work product; not ordering the production of the database created by paralegals who had called cruise line customers; "Documents that need not be produced include notations related to the survey made by interviewers other than the two affiants, and the entire printout of the Plaintiffs' Epi Info database beyond those portions that Plaintiffs intend to rely upon and have been produced. The entire database is not responsive to the document requests in question and, to the extent it is, it retains its work product protection. The underlying relevant data -- the names of the passengers and their symptoms -- has been produced. The database is in part a by product of the paralegals' work during the survey, but documents they relied upon in preparation or generated during the course of the survey are being produced.").

- Payless Shoesource Worldwide, Inc. v. Target Corp., Civ. A. No. 05-4023-JAR, 2008 U.S. Dist. LEXIS 28878 (D. Kan. Apr. 8, 2008) (holding that a paralegal is treated like a lawyer for privilege and work product purposes).

- Doyle v. First Federal Credit Union, No. C06-0049, 2007 U.S. Dist. LEXIS 30700, at *9 (N.D. Iowa Apr. 25, 2007) ("The Court concludes that the notes taken by the legal assistant, if any, constitute attorney work product . . . .").

- Fine v. Facet Aerospace Prods. Co., 133 F.R.D. 439, 445 (S.D.N.Y. 1990) ("[T]he work product of a paralegal is subject to Rule 26(b)(3), whether the paralegal is viewed as an extension of the attorney or as another representative of the party itself."; finding that a paralegal's notes on a document were properly redacted before the document was produced).

As with documents created by clients or lawyers themselves, the key issues with paralegals' documents are: (1) whether the paralegals created the document in reasonable anticipation of litigation; and (2) whether the paralegals were primarily motivated by that anticipated litigation.

Best Answer

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

N 3/12

Lawyers Whose Licenses Have Lapsed

Hypothetical 15

You have been involved in a high-stakes patent dispute, in which your adversary is represented by a "scorched-earth" lawyer. You just discovered that the other side's lawyer had let his bar license lapse two years ago -- and therefore has been acting without a license during the dispute.

(a) Has the other side's lawyer engaged in the unauthorized practice of law?

YES

(b) Can your client assert a cause of action against the other side's lawyer for the unauthorized practice of law?

MAYBE

Analysis

(a) Although it can be extremely difficult to define the practice of law, representing a third person in a patent dispute almost inevitably involves activities that every state would define as the practice of law.

Despite the difficulty of drawing lines between permissible and impermissible activities, the stakes can be remarkable high.

States generally prohibit the unauthorized practice of law ("UPL") in their criminal statutes. Some states consider it a misdemeanor. However, some states consider UPL a far more serious crime.

Not surprisingly, states treat harshly disbarred or suspended lawyers who illegally practice law.

- John Council, Suspended License Gets Lawyer Sanctioned Again, Texas Lawyer, Feb. 3, 2015 ("Last year, a federal judge blasted Charles Septowski

for practicing law with a suspended license, banning him from United States Bankruptcy Court for the Northern District of Texas for two years. And a state court judge recently sanctioned him $25,000 for doing the same thing."; "Gena Slaughter, judge of Dallas' 191st District Court, ordered the sanctions against Septowski for practicing law with a suspended license, filing numerous allegations without a basis in law, and frustrating the discovery process while asserting his suspension as the basis for delay in her January 29 final judgment in Eagle Transmission v. Happy Cars Auto Repairs."; "The order specifically found that Septowski's conduct included 'repeatedly frustrating the discovery process, and allowing for nonlawyers in his office effectively to continue his legal practice in this case while his law license was suspended, although asserting the suspension as the basis for delays and noncompliance,' according to the order.").

- Matt Fair, Pa. Atty Loses Appeal Of Unauthorized Practice Conviction, Law360, Aug. 28, 2014 ("A Pennsylvania appeals court on Tuesday upheld the conviction and sentencing of an attorney charged in Allegheny County for illegally continuing to represent two of his clients after he was disbarred in the state in January 2009."; "A three-judge Superior Court panel rejected arguments raised by Arnold Steinberg, who was disbarred on consent by the state Supreme Court for misappropriating funds he held on behalf of clients, claiming that Pennsylvania's statutes against the unauthorized practice of law (UPL) were too vague to pass constitutional muster."; "While Steinberg argued that the statute did not adequately define what constituted the practice of law, an Allegheny County trial court said in an August 2013 opinion that case law in the state provided ample clarity on the issue."; "On appeal, the Superior Court agreed."; "'Our review of the record supports the trial court's conclusion that appellant failed to meet his burden of establishing that the UPL statute is unconstitutionally vague,' the panel ruled. 'Appellant's supporting arguments, which are largely based on matters outside the record and therefore irrelevant, are inapposite. Thus, appellant's constitutional challenge fails.'"; "The opinion said that Steinberg continued to represent clients in two cases during the course of 2009 despite consenting to his disbarment in January of that year.").

- Mary Pat Gallagher, Lawyer Disbarred for Stealing Funds From a Comatose Client, N.J. L.J., Nov. 22, 2013 ("A lawyer disbarred in New York and serving time in a federal prison for trying to defraud the Federal Bureau of Investigation has now lost his New Jersey law license for stealing money from a client in a coma."; "The state Supreme Court on Wednesday disbarred Jeffrey Squitieri for knowing misappropriation of most of a $100,000 personal injury settlement he obtained for Guillermo Henao, a landscaper injured while blowing leaves in front of an apartment building.").

- In re Disciplinary Action against Grigsby, 815 N.W.2d 836, 842, 843, 844 (Minn. 2012) (extending a suspended lawyer's suspension for 60 days based on the lawyer's ghostwriting pleadings while he was not authorized to practice law; rejecting the lawyer's argument that under Rule 1.16 he was authorized to protect a client's interests upon termination of the representation; "[E]ven if Rule 1.16(d) could offer a defense in some other circumstances, it does not excuse Grigsby's conduct here. Simply put, Grigsby had alternatives, other than writing and filing a brief while suspended from the practice of law, which would have satisfied the requirement under Rule 1.16(d) to protect J.R.'s interests. Among the alternatives not pursued by Grigsby is correspondence informing J.R. that he was unable to find substitute counsel, and urging J.R. to find other counsel; advising the court of appeals of the circumstances and, potentially, seeking an extension of the time to file a brief or requesting other relief, or contacting the Director (anonymously if Grigsby wished) for the purpose of obtaining an advisory opinion regarding his options. Grigsby is essentially asserting a false dilemma and we reject his justifications for his actions. Simply put, surreptitiously writing J.R.'s appellate brief, signing J.R.'s name to it pro se, and filing it with the court of appeals was not the *only* action Grigsby could have taken to protect J.R.'s interests."; "Much of Grigsby's conduct was clearly unlawful. First, as we have just concluded, Grigsby unlawfully practiced law while suspended by drafting J.R.'s appellate brief. Moreover, it is difficult to envision any circumstances where it would be lawful for an attorney to sign a client's name to a court document; suffice it to say here that Grigsby presents no such circumstances and our prior decisions provide no support for the claims he advances. . . . Grigsby cites no authority, and we have found none, either in Minnesota or elsewhere, for the remarkable proposition that a lawyer could sign an appellate brief using the name of someone else. Simply put, J.R. could not give Grigsby authority to write and file the brief for him or to sign J.R.'s name to the brief. Thus, Grigsby exceeded his implied authority by practicing law while suspended and signing J.R.'s name to the brief, and the referee's conclusion that Grigsby violated Rule 1.2(a) was not clearly erroneous."; "Grigsby violated the Rules when he signed J.R.'s name to the brief because a lawyer may not sign another person's name to a court document, regardless of intent.").

States have also punished lawyers for practicing law after their licenses have lapsed. The Restatement discusses this issue.

> In general, only a lawyer who is in current compliance with applicable legal requirements in the admitting jurisdiction . . . for maintaining the lawyer's law license in a currently effective status is qualified to practice law there. Those conditions vary by jurisdiction and can be technical in nature. In some few jurisdictions, for example, maintenance of a

> valid license is conditioned on maintaining an office within the jurisdiction for the practice of law . . . . Many jurisdictions now require a minimum number of hours per year of qualifying continuing legal education.
>
> A lawyer who was once admitted to practice in a state violates the prohibition against unauthorized practice by continuing to practice law in the state notwithstanding disbarment or suspension, lapse of the lawyer's license to practice in the state (for example, for failure to pay mandatory bar dues or, as indicated above, to comply with applicable continuing-legal-education requirements), resignation, or assumption of nonactive status (as when the lawyer retires or moves to another state). Lapse can occur for failure to file an annual renewal application with self-certification of compliance with the indicated requirements. Any such unauthorized practice by a lawyer is a violation of the state's lawyer code and thus subjects the lawyer to discipline. If may also violate a statutory prohibition in the state against unauthorized practice of law. Such impermissible practice by a lawyer may also lead, among other remedies, to forfeiture of an otherwise valid claim for legal fees . . . . When lapse of license for such reasons is not directly related to continuing competence to practice, it does not by itself indicate either legal practice malpractice or incompetent representation in a criminal-defense representation.

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

Some states' punishment of such lawyers seems very harsh.

- In re Hall, 377 P.3d 1149, 1156-57, 1157 (Kan. 2016) (suspending for sixty days an inactive Kansas lawyer for having improperly been admitted pro hac vice to appear in Kansas court decades after abandoning his Kansas license; "In 1990, respondent went on inactive status in Kansas and then, in 1996, failed to pay the inactive fee. Due to his failure to pay the fee, this court ordered an administrative suspension of his license. In 2003 and 2009, respondent called the office of the Clerk of the Appellate Courts to learn what steps he could take to reinstate his license. But he failed to complete the necessary steps. Respondent's administrative suspension qualifies as a suspension for Rule 218(c)(1) purposes. See In re Thompson, 301 Kan. 428, 433, 343 P. 3d 108 (2015) (an administrative suspension was sufficient to constitute a violation of Kansas Supreme Court Rule 218 for failure to notify clients, opposing counsel, and the courts of a suspension)."; "Respondent

claims that despite his administrative suspension, he did not engage in the unauthorized practice of law because he was authorized through his pro hac vice admissions. In 2012, respondent submitted two applications to appear pro hac vice on behalf of two separate clients. On both applications, he failed to list his Kansas bar admittance, inform the court his license to practice law in Kansas was not in good standing, or inform the court his license in Kansas was on administrative suspension. Subsequently, respondent was admitted pro hac vice in both cases."; "The panel merely found respondent's pro hac vice admission invalid: 'Respondent obtained admission pro hac vice improperly as the respondent was not eligible for admission pro hac vice.' The Disciplinary Administrator correctly points out that, under Kansas Supreme Court Rule 116 (2015 Kan. Ct. R. Annot. 222), only out-of-state attorneys who are not admitted to practice in Kansas are eligible for pro hac vice admission. That rule states: 'An attorney not admitted to practice law in Kansas may be admitted on motion to practice law in a Kansas court or administrative tribunal – for a particular case only[.]' In the instant case, respondent was admitted to practice law in Kansas and therefore could not be admitted pro hac vice.").

- In re Heiser, Bar Dkt. No. 2012-D110, at 1, 2 (D.C. Office of Bar Counsel Nov. 8, 2013) ("We find that while you were employed by the Department of Justice ('DOJ') as an attorney, you permitted your Bar membership to lapse from November 30, 1990 until readmission on December 8, 2011. On November 13, 1989, you became an inactive member of the Ohio Bar, the only other Bar where you were a member. Therefore, you were not an active member of any Bar between November 30, 1990 and December 8, 2011, although you represented the United States in matters during that period and certified to the Department of Justice that you were an active attorney in the District of Columbia."; "You state that although you filled out a U.S. Postal Service change of address form when you moved in 1990, you did not independently notify the Bar of your change of address and you did not receive any notices from the Bar alerting you about your suspension. You state that your failure to pay dues was unintentional. You further state that the DOJ has had to notify the courts in only a few cases because you were in the Antitrust Division which does not have a large volume of cases."; "This letter constitutes an Informal Admonition for your violation of Rules 5.5(a) and 8.4(d) pursuant to D.C. Bar R. XI, §§3, 6, and 8 and is public when issued.").

- Charles Toutant, Suspension Sought for Lawyer Who Practiced for Years While Ineligible, N.J. L.J., Nov. 8, 2013 ("A lawyer who handled 48 litigation matters in New Jersey while ineligible to practice faces a one-year suspension and a perpetual ban on pro hac vice admission."; "According to the Disciplinary Review Board (DRB), Steven Feinstein was suspended from practicing in New Jersey in September 2005 after failing to pay the annual attorney assessment for the prior 12 years."; "Then, in 2007, he joined the

Cherry Hill office of Philadelphia's Zenstein, Gallant & Parlow, where he was assigned to represent New Jersey homeowners in claims against insurance companies. He later told ethics authorities that he hadn't paid his fees for several years at that time but wasn't sure of the status of his license."; "Upon contacting the court he learned he was suspended and was instructed to file a petition to reinstate his license. He says he was told he could be readmitted if he passed the New Jersey bar exam, which he did in February 2008. But the Committee on Character told him he could not be readmitted until he resolved a dispute with a credit card company concerning late payments."; "But while attempting to resolve the financial matters, he was still practicing law. In April 2010, he was about to try an insurance case before Superior Court Judge Jean McMaster in Gloucester County when the judge's court clerk asked Feinstein why he was not listed in the Lawyer's Diary and Manual. He responded that he wasn't sure why his name was not listed, adding that it must be a mistake. But when questioned by McMasters in chambers, he confessed that he was ineligible to practice. He asked the judge if he could be admitted pro hac vice to try the case, but she refused, the DRB said.").

- Zack Needles, Finding of Lawyer's Suspension Ends In Mistrial of Case, Legal Intelligencer, Nov. 5, 2013 ("A personal injury case ended in a mistrial eight days into trial when the judge discovered the plaintiff's attorney's license had been suspended for failing to pay his annual registration fee and submit the requisite paperwork."; "In DiSalvio v. Cream-O-Land Dairy, Philadelphia Court of Common Pleas Judge Lisa M. Rau issued an order October 29 declaring a mistrial because plaintiff[']s counsel, Steven M. Mezrow of Pansini & Mezrow in Philadelphia, 'did not disclose his administrative suspension to this court, opposing counsel or his clients at any point prior to or during the trial until this court raised the issue today.'"; "'This court first learned of Mr. Mezrow's suspension upon receiving notice on October 28, 2013, from the Office of the President Judge, of the list of those attorneys who are administratively suspended pursuant to the Supreme Court's order of September 18, 2013, pursuant to Rule 219, Pa. R.D.E., and confirmed his continued suspension by contacting the disciplinary board this morning prior to convening court,' Rau said in the order."; "Rau ordered Pansini & Mezrow to pay the defense's trial costs, excluding attorney fees."; "Rau said in the order that 'allowing an attorney unauthorized to practice law to represent the plaintiffs in this action contaminated the entirety of the trial and compromised the integrity of any verdict that might result.'").

- Amanda Bronstad, Disbarred Attorney Sentenced For Accepting Client Fees, Nat'l L.J., May 15, 2012 ("A disbarred California attorney who faced seven years in state prison for taking client fees has pleaded guilty to grand theft."; "Gerald Lionel Garcia-Barron of La Mirada, California, who was disbarred on January 29, 2011, was sentenced immediately on May 14 to 180 days in county jail plus three years of probation. As part of his plea deal, he agreed

to pay $7,200 in restitution to five victims."; "Garcia-Barron, 46, solicited clients and accepted $7,500 in retainer fees from July 2008 to January 2012, even though he had been declared ineligible to practice law by the State Bar of California starting in May 2010. The Los Angeles County, California, district attorney's office alleged he met with clients at coffee houses in Alhambra, a city just east of downtown Los Angeles."; "He initially was charged with 17 felony counts of grand theft of personal property; the unauthorized practice of law; and obtaining money, labor and property by false pretenses."; "Garcia-Barron was admitted to practice law in California in 1992. The bar deemed him ineligible for one month in July 2009 because he hadn't paid his bar dues, according to bar records. He was arrested on April 11 and initially pleaded not guilty.").

- Deiner v. Commonwealth, Record No. 0424-11-4, 2012 Va. App. LEXIS 109, at *2, *3-4, *6 & n.3, *6-7, *7, *8 (Va. Ct. App. Apr. 10, 2012) (not for publication) (affirming the criminal conviction of a lawyer for the unauthorized practice of law; "The defendant was admitted to practice law in the District of Columbia in 1984. The D.C. Bar suspended his license for non-payment of dues from December 3, 2005, until April 13, 2009, which encompassed the entire period of the crimes charged. The defendant was never licensed to practice law in Virginia."; "In 2006 through 2009, the defendant represented four families and their children who were seeking special education placements pursuant to Code § 22.1-214. Each of the parents sought an attorney to represent them before the school board and through any administrative or judicial appeals that became necessary. The parents signed 'retainer' agreements in which the defendant specified he was to represent them as an attorney."; "The defendant used letterhead and business cards giving a Virginia address and indentifying himself as an attorney at law. The defendant signed his emails and letters 'Howard D. Deiner, Esq.' His email address used the domain name of 'howarddeineresq.com.' When he appeared at a hearing or filed a brief, the defendant identified himself as 'counsel' for the party. In this case, he did file a complaint in the United States District Court for the Eastern District of Virginia as counsel for the complainant."; "The defendant also asserts the evidence was not sufficient to prove he had an intent to defraud because Code § 22.1-1-214 ["Code § 22.1-214(C) provides: 'The parents and the school division shall have the right to be represented by legal counsel or other representative before such hearing officer without being in violation of the provisions of § 54.1-3904.'"] permits representation by law advocates. He argues that since he could act as a lay advocate without being a licensed attorney, he did not have an intent to defraud."; "This argument disregards what the defendant actually did. The parties did not seek to employ a lay advocate, and the defendant did not represent himself to the parties as such. They each, clearly and explicitly, explained they wanted an attorney for services that only an attorney licensed in this Commonwealth could provide. They contracted and paid for such

services, and thought and expected that was what they were receiving."; "That the defendant intended to provide the services does not negate the fraud of presenting himself as an attorney at law when he knew that he was not licensed to practice law. The defendant perpetuated the fraud through his letterhead, email address, filings, retainer agreements, and by entering appearances as 'counsel' to the families. Indeed, the defendant conceded at trial that it was a fair inference from the facts to assume he was an attorney."; "This fraud was complete when the defendant falsely represented he was an attorney and the families paid him his legal fees. It was a false representation of an existing fact, not a promise of future performance of an existing fact, not a promise of future performance. How well the defendant performed services for the family does not alter the fact that he was not what he held himself out to be.").

- Tom Jackman, Fraud Gets Arlington Lawyer Year in Prison, Washington Post, Jan. 8, 2011, at B3 ("An Arlington County lawyer who defrauded parents of children with special needs was sentenced Friday to a year in prison by an Arlington Circuit Court judge. Howard D. Deiner, 54, specialized in representing parents who challenged local school boards' handling of their children. Four parents testified at Deiner's trial in October that Deiner had told them he was a lawyer and that he could appeal their cases to the courts if they lost at the schools' administrative level. But Deiner had allowed his D.C. bar license to lapse from January 2006 to April 2009, although he had been warned by the District and Virginia bars and the Arlington police, and he was not legally able to file court actions. Still, he did file a federal appeal on behalf of one family and forged another lawyer's signature on the pleading, that lawyer testified. And although he was not required to be a lawyer at the schools' administrative level, many parents said he simply didn't do a very good job for them -- or any job, in some cases -- and wouldn't return phone calls, e-mails or case files. Deiner was arrested in November 2009 on charges of felony fraud and misdemeanor practicing law without a license. He was never licensed in Virginia. An Arlington grand jury in July added three more fraud counts, and 'we could have brought multiple more complaints and cases of people who are similarly situated,' Arlington Assistant Commonwealth's Attorney R. Frances O'Brien said Friday.").

- People v. Harris, 915 N.E.2d 103, 106-07, 108, 110, 113 (Ill. App. Ct. 2009) ("Harris had been admitted to the patent bar until 1990, when his name was removed from the roster of registered patent attorneys and patent agents. The USPTO removed Harris from the roster because he failed to provide the USPTO with a current address and did not respond to a letter meant to ascertain whether he intended to remain on the register of patent attorneys."; "In arguing that the statute should be construed without jurisdictional limits, Harris further contends that the statute does not apply to law school graduates with legal experience. Harris asserts that law school graduates

have legal training and thus are not falsely representing themselves as attorneys."; "A plain reading of the statute shows that it is also meant to reach people like Harris, who are trained attorneys falsely representing their authority to practice law for the purposes of compensation. . . . The exception to the statute reveals the legislature's intent to have the statute reach both laypersons and trained attorneys because it excludes individuals who unintentionally fail to pay their attorney registration fees. . . . By choosing to exclude only those attorneys who unintentionally fail to pay their fees, the legislature included those attorneys who intentionally fail to pay registration fees. Therefore, we interpret the statute without jurisdictional limits; thus, a person who is properly authorized to practice law in some jurisdiction would not violate the statute."; "Our reading of the statute only requires Harris to have authorization to practice law from some jurisdiction to avoid conviction for falsely presenting himself as an attorney. Thus, we must decide whether the evidence established that Harris was authorized in any one of the other three jurisdictions in question: Michigan, Texas and Illinois."; upholding a conviction for "false personation [sic] of an attorney" and sentence of one year of probation and 100 hours of community service for a Class IV felony.), appeal denied, 924 N.E.2d 458 (Ill. 2010).

(b) States take different positions on the ability of a third person to pursue a civil cause of action for the unauthorized practice of law.

- Goldberg v. Merrill Lynch Credit Corp., 35 So. 3d 905, 906, 907 (Fla. 2010) (dismissing a class action against various financial institutions alleging that they engaged in the unauthorized practice of law by preparing various real estate documents; ultimately concluding that a third person can assert a private cause of action by the unauthorized practice of law only after a Florida court has found the alleged practice to amount to the unauthorized practice of law; initially explaining that the courts define the practice of law; "we agree with the Fourth District that the Florida Constitution requires this Court exclusively to make that determination; therefore, the cases should be dismissed"; explaining that the court must assess an activity before a third person can base a cause of action on that activity; "To state a cause of action for damages under any legal theory that arises from the unauthorized practice of law, we hold that the pleading must state that this Court has ruled that the specified conduct at issue constitutes the unauthorized practice of law. . . . Stated another way, a claimant must allege as an essential element of any cause of action premised on the unauthorized practice of law that this Court has ruled the activities are the unauthorized practice of law." (emphasis added); not addressing the substantive issue; "We do not address the merits of whether respondents' actions constitute the unauthorized practice of law because it was not addressed in the district court opinion. We only address

whether the class actions should go forward prior to a determination of the unauthorized practice of law being made by this Court.").

- Greenspan v. Third Fed. Sav. & Loan Ass'n, 912 N.E.2d 567, 568 (Ohio 2009) ("This appeal calls upon the court to determine whether a private cause of action existed for the unauthorized practice of law before R.C. 4705.07 was amended on September 15, 2004, to expressly allow a civil cause of action. Because courts generally did not recognize a common-law cause of action for the unauthorized practice of law prior to 2004, and because this court has exclusive jurisdiction over the unauthorized practice of law, we hold that no such cause of action existed." (emphases added)).

Of course, anyone damaged by someone's unauthorized practice of law can pursue other theories of recovery -- such as fraud.

Best Answer

The best answer to **(a)** is **YES**; the best answer to **(b)** is **MAYBE**. N 3/12

Disbarred Lawyers: General Rule

Hypothetical 16

As your law firm's partner in charge of young associates, you tried to help one young associate deal with a heartbreaking addiction to painkillers. Your efforts were unsuccessful, and the young associate eventually lost her license. She has now started to put her life together again, and you believe she deserves a second chance.

Can your firm employ your now-disbarred former associate as a paralegal?

MAYBE

Analysis

Disbarred or suspended lawyers obviously cannot practice law -- but courts and bars disagree about the permissibility of such disbarred lawyers' law-related activities (such as acting as a paralegal).

Punishment of Disbarred Lawyers Who Continue to Practice Law

Not surprisingly, courts severely punish lawyers who continue to practice law after they have been disbarred or otherwise suspended from the bar.

- In re Herzberg, N.Y.S.3d 9, 11 (N.Y. App. Div. 2018) (disbarring a lawyer who continued to practice law after his license was suspended; "The Committee now seeks an order, pursuant to Judiciary Law §§ 90(2) and 486, immediately disbarring respondent without further proceedings, for willfully engaging in the unauthorized practice of law and for continuing to hold himself out as a licensed New York attorney while this Court's suspension order was in effect, in violation of 22 NYCRR 1240.15 and Judiciary Law § 478. In addition, the Committee charges that respondent, in violation of this Court's suspension order, has failed to comply with the notification requirements of 22 NYCRR 1240.15(b) and has continued to use his escrow accounts.").

- Alex Wolf, NJ Atty Gets 1-Year Suspension For Unauthorized Practice, Law360, Jan. 10, 2017) ("An Irvington, N.J., attorney admitted to the state bar more than 40 years ago has received a two-year suspension for failing to cooperate with disciplinary authorities and practicing law while previously suspended for failing to return $800 to a client in accordance with a fee

arbitration ruling."; "In a Jan. 6 order, the Supreme Court of New Jersey ordered that Frank A. Vitterito be suspended for a period of two years in spite of a recommendation from the court's Disciplinary Review Board that he be barred from practicing law for just one year for committing several ethical violations."; "The instant charges against Vitterito stem from actions he took after being temporarily suspended in 2012 for failing to comply with a fee arbitration determination. The DRB found that after his 2012 suspension, Vitterito failed to pay a $500 sanction and failed to file a prescribed affidavit in order to vacate the suspension. Nevertheless, Vitterito continued to practice law while the suspension was in place, and represented at least three clients in various matters, the DRB said.")

- Kali Hays, Suspended Ohio Atty Disbarred After Being Taped Practicing, Law360, Mar. 9, 2016 ("The Ohio Supreme Court on Wednesday disbarred an attorney who was caught on video and audio representing a client in court proceedings weeks after he received an indefinite suspension from practicing law for misusing a $50,000 settlement he'd received on behalf of a jailed client."; "Through an investigation launched in 2014 by the Cleveland Metro Bar Association, the court found that Ohio attorney Mark R. Pryatel had clearly practiced law on at least three occasions in 2013 while representing a client in a probation violation matter. Pryatel's continued practice occurred less than two months after he'd been suspended indefinitely for depositing a $50,000 dollar settlement check for a jailed client into his personal account, deducting $29,000 in fees and then failing to remit the remainder to a client trust account."; "Throughout the current disciplinary process, Pryatel maintained that he had not practiced law after his suspension, but the bar association eventually received video and audio recordings of Pryatel doing just that. The recordings also showed Pryatel had never mentioned his suspension during the proceedings held at the Rocky River Municipal Court.").

- Fla. Bar v. Norkin, 183 So. 3d 1018, 1022 (Fla. 2015) (disbarring a lawyer who had continued to practice law after being suspended for earlier improper conduct; "The referee's conclusion that there was no genuine issue of material fact that Norkin continued to practice law after the effective date of his suspension was based in large part on Norkin's own response to the motion for summary judgment and his testimony at the hearing. The referee noted that in his sworn response, Norkin acknowledged that his suspension became effective on December 2, 2013, and that on January 6, 2014, he received a copy of a judgment and then sent an e-mail to opposing counsel in the case; and subsequently, he drafted for his client a motion for rehearing and a motion for sanctions. Further as noted by the Bar, in his testimony at the summary judgment hearing, Norkin admitted that he drafted documents and had multiple contacts with his client while suspended. The client also testified that he had multiple telephone contacts with Norkin, with most of the

conversations pertaining to his case. Accordingly, the referee was correct in concluding that there was no genuine issue of material fact and properly granted summary judgment in favor of the Bar with regard to the issues raised in the petition for contempt.").

- In re Jones, Case No. 13-33026-bjh-7, 2014 Bankr. LEXIS 101, at *1-2, *23, *24 (Bankr. N.D. Tex. Jan. 10, 2014) ("According to the U.S. Trustee, the Debtors paid Septowski $7,500 for representation in their bankruptcy case, but then filed their bankruptcy petition pro se and had their case dismissed for failure to file a routine document. While the Debtors' case was subsequently reinstated by virtue of a motion filed using Septowski's electronic case filer ('ECF') login and password, that motion to reinstate was filed while Septowski was suspended from the active practice of law by the State Bar of Texas."; "[T]he Court concludes that Septowski should be barred from practicing in the Bankruptcy Courts for the Northern District of Texas for a period of not less than 24 months from the date of the entry of this Memorandum Opinion and Order on the Court's docket in the Debtors' bankruptcy case."; "Given the Court's findings and conclusions, and the seriousness of the ethical breaches that have occurred here, the Court directs the U.S. Trustee to provide a copy of this Memorandum Opinion and Order to appropriate parties at the State Bar of Texas to consider what action, if any, is appropriate given Septowski's conduct and continued practice of law while suspended from that practice by the State Bar of Texas.").

- Martin Bricketto, Disbarred New Jersey Cops to Illegally Practicing Law, Law360, Aug. 20, 2013 ("A onetime New Jersey planning board attorney who was previously disbarred for providing official assistance to a developer in exchange for real estate favors pled guilty Monday to the unlawful practice of law, admitting he counseled a client facing state criminal charges."; "Appearing before Judge Mary Gibbons Whipple in Morris County Superior Court, John J. Montefusco Sr., 72, acknowledged meeting with a client subject to criminal charges in Sussex County and accepting money as retainer for legal services between December and April 24, according to Morris County Acting Prosecutor Fredric M. Knapp."; "Once the attorney for the Parsippany-Troy Hills Planning Board, Montefusco consented to disbarment in 2009 following a federal prosecution for mail fraud."; "Under a plea deal with Montefusco covering the present, third-degree charge, prosecutors will recommend a sentence of 180 days in the Morris County jail as well as probation, according to Knapp. The sentencing of the Parsippany, New Jersey, resident is scheduled for October 4 before Judge Stuart A. Minkowitz, Knapp said.").

- Leigh Jones, Attorney Disbarred For Posing As Former Colleague, Nat'l L. J., Aug. 30, 2012 ("The South Carolina Supreme Court has disbarred a lawyer who, while suspended from practice, posed as an attorney who had clerked at

the wrongdoer's former firm."; "William Boyd was stripped of his law license on August 29 after South Carolina's high court found that he had violated a multitude of ethics rules beginning in June 2010."; "Besides forging documents in the name of a dead woman and failing to file clients' court papers, Boyd assumed the identity of another lawyer, orchestrating a scam that included printing phony letterhead and appearing at a worker's compensation hearing under the assumed name, the court said."; "Among the ethics violations, the court found that Boyd 'polluted' the administration of justice, engaged in dishonesty and deceit, and brought the profession into disrepute. He admitted to the conduct and violations."; "'If anybody had done the things I did, they should be disbarred,' Boyd, 37, said in a telephone interview. 'I was abusing alcohol and drugs very heavily.' Boyd said that he has gone through addiction rehabilitation and has been drug- and alcohol-free for more than a year."; "Boyd said he is now a cabinetmaker. 'I like it. It's a lot less stressful,' he said.").

- Amanda Bronstad, Disbarred Attorney Continued to Practice, Prosecutors Say, Nat'l L.J., Apr. 17, 2012 ("A California attorney who was disbarred last year has pleaded not guilty to 17 felony counts of unlawfully taking $7,500 in client fees."; "Gerard Lionel Garcia-Barron of La Mirada, California, who was arrested on April 11, was charged with grand theft of personal property; the unauthorized practice of law; and obtaining money, labor or property by false pretenses, according to the Los Angeles County, California, district attorney's office. He entered his not guilty plea on April 13."; "According to prosecutors, Garcia-Barron took fees from seven people between July 2008 and January 2012. He allegedly met them at coffee houses in Alhambra, a city just east of downtown Los Angeles."; "Garcia-Barron was admitted to practice law in California in 1992. The State Bar of California deemed him ineligible for one month in July 2009 because he didn't pay his bar dues, according to bar records."; "In May 2010, he was pronounced ineligible again and later charged in the state bar court with 42 counts of professional misconduct against 14 clients, including failing to return unearned fees or client files, misappropriating $5,000 and engaging in the unauthorized practice of law. His acts allegedly involved clients in both civil and criminal matters. He was disbarred on January 29, 2011."; "If convicted, Garcia-Barron faces a maximum term of seven years in state prison.").

- Attorney Grievance Comm'n of Md. v. Brisbon, 31 A.3d 110, 118 (Md. Ct. App. Oct. 26, 2011) (finding that a lawyer who practiced in Maryland from 1977 and was indefinitely suspended from the practice of law in 2005 had violated Maryland law by continuing to provide immigration advice that amounted to the practice of law; "This court finds by clear and convincing evidence that the Respondent engaged in the unauthorized practice of law. In acting as an 'immigration consultant' for the Nkrumahs, the Respondent went far beyond 'purely mechanical type functions[.]'" (alteration in original;

citation omitted); "At the July 11, 2008 meeting, moreover, this unauthorized practice of law continued. The Respondent finalized which forms were needed to obtain Mr. Nkrumah's permanent resident status. She also prepared a form for an employment authorization for Mr. Nkrumah.").

- Tom Jackman, Lawyer Convicted of Fraud is Disbarred, Wash. Post, Aug. 11, 2011 ("An Arlington County lawyer who defrauded parents of children with special needs and who was sentenced to a year in jail in January has been disbarred by the bar of the District of Columbia."; "Howard D. Deiner, 55, began his career as a labor lawyer in the District. He later moved his practice to Arlington and began representing families of special needs children in disputes with school boards. But Deiner was never licensed to practice in Virginia, despite telling his clients that he was. The families also said he represented them poorly."; "Deiner was convicted by Arlington County Circuit Court Judge William T. Newman Jr. of four counts of felony fraud. He served three months of a one-year sentence and was released in April on a $5,000 appeal bond.").

- United States v. Holstein, 618 F.3d 610, 611 (7th Cir. 2010) (sentencing a defendant to prison for bankruptcy fraud and practicing law without a license; "After a bench trial, Judge Grady found Holstein guilty beyond a reasonable doubt on all counts and sentenced him to one year and one day in prison. Specifically, the Judge found that Holstein solicited clients, accepted fees, and hid from the clients his impending suspension and consequent inability to complete the representation; misrepresented to the bankruptcy court that the debtors were unrepresented by counsel; and made the misrepresentations to conceal that he was practicing without a license.").

- In re Miller, 238 P.3d 227, 236, 237 (Kan. 2010) (disbarring a lawyer who arranged for an independent contractor to essentially handle his legal practice during his earlier two-year suspension; "A suspended attorney is unable to undertake any further representation of a client after the effective date of the suspension order. . . . Obviously, then, the suspended attorney cannot hire an independent contractor to do the legal work which the suspended attorney is precluded from doing."; "Given the uncontroverted finding that Cowger was an independent contractor of the professional corporation, he would not be Miller's 'attorney-employer.' To the contrary, Miller was an employee of the professional corporation. Ordinarily, an independent contractor of a corporation would have no authority to supervise and direct the actions of the corporation's employees. Here, Cowger confirmed that his responsibilities were limited to his contractual obligation and that he had no corporate responsibilities. That left Miller working for the corporation without attorney supervision. A suspended attorney cannot function independently as a law clerk or paralegal; he or she must work for and be supervised by a licensed attorney who is ultimately responsible for the paralegal work.").

- Peter Vieth, UPL Charge Filed Against Ex-Lawyer in Virginia Beach, VLW Blog (Dec. 9, 2010), http://valawyersweekly.com/vlwblog/2010/12/09/upl-charge-filed-against-ex-lawyer-in-virginia-beach/ ("Former Virginia Beach attorney Philip A. Liebman has been charged with practicing law the week after his license was revoked by the Virginia State Bar."; "The criminal charge was returned among indictments from a Virginia Beach grand jury on Monday. A news release from the commonwealth's attorney's office said Liebman represented a client in general district court on Nov. 4. The week before, Liebman had voluntarily surrendered his license to practice law acknowledging charges of mishandling a slip and fall case and altering a proof of service form in a court file. The order of revocation was entered Oct. 25.").

- John Pacenti, 11th Circuit Bounces Attorney's Contempt Sentence Back to Florida Federal Judge, Daily Business Review, Oct. 9, 2009 ("When Fort Lauderdale, Fla., attorney Lee A. Cohn was caught representing a client after he was disbarred, he was ready to plead guilty to criminal contempt of court. What Cohn didn't expect was a ruling by U.S. District Judge William Zloch that the attorney had committed a Class A felony and was subject to a maximum sentence of life in prison." (emphasis added)).

- Nerri v. Adu-Gyamfi, 613 S.E.2d 429, 430 (Va. 2005) ("The trial court granted Vivian and Charles Adu-Gyamfi a non-suit in a proceeding in which their motion for judgment was signed by an attorney whose license to practice law in the Commonwealth had been administratively suspended by the Virginia State Bar. We will reverse the judgment of the trial court because an attorney whose license has been administratively suspended is not authorized to practice law and, thus, any pleadings filed by such attorney are invalid."; "[T]he status of an attorney during the time his or her license is administratively suspended is no different from that of an individual or an attorney who has never been licensed in Virginia -- neither is authorized to practice law in this Commonwealth and both are subject to prosecution for practicing law without a license.").

Permissible Law-Related Activities by Disbarred or Suspended Lawyers

Lawyers who have lost their ability to practice law might naturally seek a job in which they engage in law-related activities under a lawyer's supervision. After all, people who have never practiced law may permissibly do so.

At least one court has permitted such law-related activities.

- Powell v. Unemployment Comp. Bd. of Review, 128 A.3d 315, 320, 320-21, 321 (Pa. Commw. Ct. 2015) (holding that a Pennsylvania Unemployment Compensation Board of Review could not prevent a suspended lawyer from representing unemployed claimants, because non-lawyers may do so under a Pennsylvania statute; "Section 214 of the Unemployment Compensation Law, however, provides that '[a]ny party in any proceeding under this act before the department, a referee or the board may be represented by an attorney or other representative.' (Emphasis added.) Moreover, our Supreme Court in Harkness *[Harkness v. Unemployment Comp. Bd. of Review*, 920 A.2d 162 (Pa. 2007)] held that non-attorneys may represent an individual before a referee hearing, because such activity does not constitute the practice of law."; "Here, we are not confronted with the question of whether representing a party before an unemployment compensation referee constitutes the practice of law, but rather, we are presented with the question of whether the Board acted properly when it prohibited the suspended attorneys from representing Claimant at the hearing. Pursuant to Section 214 of the Law, Claimant had a statutory right to be represented by his designee at an unemployment compensation hearing. Our Supreme Court has held that the representative need not be an attorney, because representation before an unemployment referee does not constitute the practice of law. See Harkness. . . . Enforcement of the Disciplinary Rules, however, falls within the "exclusive" jurisdiction of the Supreme Court and the Disciplinary Board. Pa. R.D.E. 201(a). We note at least one instance where the Pennsylvania Supreme Court, responding to a petition of the Disciplinary Board, held a suspended attorney in contempt for willful violation of Disciplinary Rule 217(j) by representing claimants and employers in unemployment compensation matters before the Board."; "The question in this case, however, is not whether the suspended attorneys—Mr. Bailey and Mr. Ostrowski—should be sanctioned as a matter of discipline by the Pennsylvania Supreme Court for violating Disciplinary Rule 217(j). The question is whether the Board or referee may enforce Disciplinary Rule 217(j) to deprive a claimant of his right to representation of his choice under Section 214 of the Law, which does not preclude a 'suspended attorney' from serving as a claimant representative. We hold that they cannot."; "Accordingly, the order of the Board is vacated, and the matter is remanded to the Board for a new hearing.").

Yet there seems something vaguely troubling with a former lawyer who has lost the ability to practice law through some misconduct being able to engage in similar activities under the supposed supervision of a lawyer.

Surprisingly, the ABA Model Rules do not contain a specific provision dealing with this issue.

The Restatement assesses in part a disbarred lawyer's motivation for continuing in a law-related job.

> Either by rule, decisional law, or specific order, a jurisdiction may . . . prohibit a disbarred or suspended lawyer from functioning as a paralegal in a law firm . . . , even beyond the prohibition against practicing as a lawyer or holding oneself out as such. The concern is not only that a disbarred lawyer functioning as a paralegal will harm the interests of clients by performing services incompetently, but also that a lawyer who has committed a violation sufficiently serious to warrant substantial discipline and who as a result has been deprived of a law license and the income that it represents is in a position and may be motivated to use such a role as a subterfuge to continue law practice.

Restatement (Third) of Law Governing Lawyers § 3 cmt. d (2000) (emphases added).

Courts and bars disagree about the extent to which a disbarred lawyer can act as a paralegal or in some other law-related role. As one leading author has explained,

> Some courts allow suspended or disbarred lawyers to work as paralegals, if a lawyer admitted to practice engages in adequate supervision. However, many other jurisdictions do not allow a suspended or disbarred lawyer to engage in such work related to the practice of law, even though a paralegal (who also is not licensed to practice law) may lawfully engage in the same tasks.

Ronald D. Rotunda, Legal Ethics: The Lawyer's Deskbook on Professional Responsibility § 39-4.3, at 616 (West Group 2002) (footnotes omitted).

At first blush, it seems odd that any court or bar would prohibit a disbarred lawyer from acting as a paralegal. After all, there certainly would be no problem with someone who had never been a lawyer starting work as a paralegal. Some courts' and bars' hostile attitude toward such conduct might reflect a desire to severely punish lawyers

engaging in serious misconduct, or (more likely) a recognition that disbarred lawyers acting as paralegals inevitably will cross the vague line into the practice of law.

In any event, courts' and bars' rules governing a disbarred lawyer's permissible activity reflects a spectrum.

The American Bar Association Standing Committee on Client Protection's 2015 survey of unlicensed practice of law committees reported on the results of its survey.

> The survey also asked questions regarding the law-related activities of disbarred lawyers. Twenty-two responding jurisdictions permit disbarred lawyers to engage in law-related activities while disbarred. Usually the disbarred lawyer's conduct is regulated by court rules or case law that defines the supervision necessary for the disbarred lawyer working for a lawyer.

Am. Bar Ass'n Standing Comm. on Client Protection, 2012 Survey of Unlicensed Practice of Law Committees, at 2 (September 2015).

First, some courts permit such activity without much comment.

- In re Perrone, 899 A.2d 1108 (Pa. 2006) (allowing reinstatement of a disbarred lawyer who had performed paralegal work from home). Courts taking this attitude likewise permit lawyers to supervise such former disbarred lawyers without risking punishment themselves.

- Haye v. Ashcroft, Civ. A. No. 3:01 CV 414 (CFD), 2004 U.S. Dist. LEXIS 17288 (D. Conn. Aug. 27, 2004) (finding that a lawyer had not violated Rule 5.5 by hiring a disbarred lawyer as a paralegal, because the lawyer had properly supervised the disbarred lawyer).

Second, some bars permit disbarred lawyers to work in a law firm, as long as they do not work in specified law-related activities.

- In re Moncier, 569 F. Supp. 2d 725, 736-37 (E.D. Tenn. 2008) (setting forth with specificity district court's rules prohibiting certain activities by a suspended lawyer; "This memorandum provides a description of the general limitation on the activities of an attorney suspended from the practice of law before the federal court of the Eastern District of Tennessee. However, it is

not intended to be, nor could any such description ever be, comprehensive of the entire scope of activity in which a suspended attorney is prohibited from engaging. In evaluating whether a specific action is permissible, the core restriction is that a suspended attorney must refrain from exercising any of the powers, prerogatives, or privileges of a member of the bar of the Eastern District of Tennessee. This core restriction includes both a prohibition on practice before, or contact with, all federal courts in this district, and also a prohibition on any activities regarding any matter or potential matter, or case or potential case in federal court in the Eastern District of Tennessee. A suspended attorney is therefore prohibited from contact with counsel, parties, witnesses, potential witnesses, or other individuals regarding any matter or potential matter, or case or potential case in federal court in the Eastern District of Tennessee." (emphases added)).

- Philadelphia LEO 2007-3 (3/07) (permitting a suspended lawyer to work at his former law firm "doing exclusively computer related technology work and/or accounting/billing"; noting that the suspended lawyer would not perform any "legal or paralegal work or law related activities" and "would have absolutely no contact with clients").

Third, at least one state had adopted an incredibly intricate rule permitting disbarred or suspended lawyers to engage in some law-related activities, but with various notification and registration requirements.

- Ohio LEO 2008-7 (12/5/08) ("A lawyer or law firm may employ an attorney who is disqualified (disbarred or resigned with discipline pending) or suspended from the practice of law, but only in compliance with the conditions set forth in Gov.Bar R.V(8)(G) and (H). This governing bar rule imposes conditions upon both the employing lawyer or law firm and the employed disqualified or suspended lawyer. An employing lawyer or law firm must register the employment, contractual, or consulting relationship with the Office of Disciplinary Counsel on a form provided by that office and provide an affidavit that the employing or supervisory attorney has read and understands the limitations of the order of disbarment, suspension, or resignation with discipline pending. An employing lawyer or law firm must receive written confirmation from the Office of Disciplinary Counsel before commencing the employment relationship. An employing lawyer or law firm is required to provide written notice to every client on whose matters the disqualified or suspended attorney will perform work or provide services. A disqualified attorney is not permitted to enter an employment, contractual, or consulting relationship with a lawyer or law firm with which the disqualified attorney was associated at the time of the misconduct which resulted in the attorney's disbarment or resignation with discipline pending. A suspended attorney may

enter an employment, contractual, or consulting relationship with a law firm with which the suspended attorney was associated at the time of the misconduct resulting in the suspension. A disqualified or suspended attorney must have no direct client contact other than an observer at a meeting, hearing, or interaction between an attorney or client and must not receive, disburse, or otherwise handle client trust funds or property. A disqualified or suspended attorney does not violate the condition of no direct client contact by serving as a receptionist at a law firm provided that any communication with a client is limited to scheduling an appointment, taking a message, or transferring a question or call to the appropriate legal or non-legal staff, or other similar conduct. If a hiring lawyer or law firm limits the duties of a disqualified or suspended attorney to activities such as receptionist, mail room services, copying services, filing pleadings in court, or other similar conduct, the requirement of notification to clients would not be invoked since these activities do not directly involve performing work or providing services on a client matter. If a hiring lawyer or law firm expands the duties of a disqualified or suspended attorney to performing legal research and writing on client matters, the requirement of notification to the clients is invoked since the activity involves performing work or providing services on a client matter. A disqualified or suspended attorney must not engage in the practice of law in Ohio and must comply with the court's order of disbarment, resignation with discipline pending, or suspension. A judge or a lawyer who is concerned that a disqualified or suspended attorney is engaging in the practice of law should direct those concerns to the Office of Disciplinary Counsel." (emphases added)).

Fourth, one state follows an odd approach – essentially requiring such disbarred lawyers to keep out of sight.

- Hawaii Rule 5.5(c) ("A lawyer shall not: . . . allow any person who has been suspended or disbarred and who maintains a presence in an office where the practice of law is conducted by the lawyer to have any contact with the clients of the lawyer either in person, by telephone, or in writing or to have any contact with persons who have legal dealings with the office either in person, by telephone, or in writing.).

- Hawaii Rule 5.5 cmt. ("Paragraph (c) prohibits an attorney who employs or otherwise utilizes a lawyer who is suspended or disbarred, or who resigned in lieu of discipline, from allowing that lawyer to have any contact with the attorney's clients or others who have legal dealing with the attorney's office. In order to protect the public, strict prohibitions are essential to prevent permissible paralegal activities from crossing the line to giving legal advice, taking fees, or misleading clients and others who deal with the attorney's office.").

Fifth, some bars and states generally prohibit such activities.

- In re Castillo, 46 N.Y.S.3d 713, 714 (N.Y. App. Div. 2017) (holding that a suspended lawyer could not work as a paralegal or a clerk; "When an attorney is suspended from the practice of law, it is the duty of this Court to command said attorney 'to desist and refrain from the practice of law in any form, either as principal or as agent, clerk or employee of another' (Judiciary Law § 90 [2]) and to forbid him or her from, among other things, giving to another 'an opinion as to the law or its application, or of any advice in relation thereto' (Judiciary Law § 90 [2] [b]). Notwithstanding, respondent requests permission from this Court to engage in 25 specific duties and functions, all of which are traditionally performed by attorneys and necessarily involve the exercise of independent legal judgment on behalf of a particular client in a particular legal matter -- i.e., the very type of activities that, when engaged in by suspended or disbarred attorneys, have previously been found to constitute the unauthorized practice of law . . . .").

- Philadelphia LEO 2016-4 (6/2016) (holding that a disbarred lawyer cannot work as a "director of risk management" for a corporation; "The Inquirer is a disbarred attorney. The Inquirer has presented the Committee with a job description to review in order to determine whether it comports with Pennsylvania Rule of Disciplinary Enforcement 217(j) concerning the types of law-related activities that a 'formerly admitted attorney' may engage in during the period that the formerly admitted attorney is disbarred or suspended from the practice of law in Pennsylvania."; "The job description submitted by the Inquirer is entitled 'Director of Risk Management (Legal and Governmental Affairs).' The proposed Director of Risk Management would report directly to the General Counsel of the Company. The Inquirer raised concerns with certain components of the proposed job including 'assisting with the preparation of contracts, leases and other documents' and serving as the 'liaison between the Company and the outside attorneys in litigation matters.' Notably, as part of serving as the liaison between the Company and outside counsel, the Director of Risk Management would be 'the principal point of contact or assigned counsel, assist counsel in assembling materials to respond to discovery requests, and communicate the status of pending litigation' to senior staff."; "There is no question that the Inquirer, as a disbarred attorney, is considered a formerly admitted attorney under the Pennsylvania Rules of Disciplinary Enforcement and that this job – in its entirety – constitutes a law-related activity."; "For several reasons, the Committee concludes that, while the Inquirer may engage in certain activities contained in the proposed job description, the Inquirer cannot assume this position in its current form without potentially violating Pennsylvania Rule of Disciplinary Enforcement ('PA RDE') 217(j) given that certain activities could

constitute providing legal advice or opinion and certain communications with outside counsel go beyond mere ministerial activities.").

Sixth, some states have adopted very strict ethics rules prohibiting a law firm or lawyer from hiring in any capacity a disbarred lawyer if the lawyer was associated with the law firm at any time during or after the lawyer engaged in the wrongdoing that resulted in his or her disbarment.

- Virginia Rule 5.5(a)[1] ("A lawyer, law firm or professional corporation shall not employ in any capacity a lawyer whose license has been suspended or revoked for professional misconduct, during such period of suspension or revocation, if the disciplined lawyer was associated with such lawyer, law firm or professional corporation at any time on or after the date of the facts which resulted in suspension or revocation.").

- Peter Vieth, Virginia State Bar to Lawyer, Virginia Lawyers Weekly, Jan. 6, 2012 ("The Virginia State Bar (VSB) has ordered a Richmond lawyer to get rid of her assistant -- her husband, an ex-lawyer who was convicted of fraud and disbarred 20 years ago. Yvonne Cochran-Morton was given a public reprimand by a VSB disciplinary subcommittee for sloppy supervision of an employee and ordered to disassociate her law practice from Ivan L. Morton, her husband. If she fails to do so, Cochran-Morton will be hit with a one-year suspension. . . . The discipline panel found Cochran-Morton had violated disciplinary rules concerning non-lawyer assistants. Her public reprimand was coupled with a requirement that she prohibit Morton from having any access to her firm, her clients or the firm's records. Morton is not even allowed to visit his wife's firm, under the VSB's terms. If she did not agree to her husband's banishment, the VSB penalty would be a one-year suspension, according to the discipline panel's decision.").

[1] Virginia LEO 1852 (12/23/09) (explaining that under Virginia Rule 5.5, a law firm may not employ "in any capacity" a lawyer whose license was revoked or suspended for any misconduct if the lawyer was associated with the law firm while the lawyer engaged in the alleged misconduct, regardless of when the lawyer was convicted of a crime or the date the bar revoked or suspended the lawyer's license; noting that another law firm may employ the disciplined lawyer, but if the disciplined lawyer serves at that law firm "as a consultant, law clerk, or legal assistant" that law firm may not represent: (1) any client previously represented by the disciplined lawyer; or (2) any client represented by the disciplined lawyer's law firm on or after the date of the disciplined lawyer's wrongdoing at the former firm; concluding that the disciplined lawyer's former firm could not retain an "adjusting firm" to provide services to the law firm -- if the disciplined lawyer was the adjusting firm's chief executive officer; however, other law firms or companies can retain a company to provide non-legal services, even if the disciplined lawyer owns or is employed by the company).

- North Carolina LEO 98-7 (4/16/98) ("[A] law firm may employ a disbarred lawyer as a paralegal provided the firm accepts no new clients who were clients of the disbarred lawyer's former firm during the period of misconduct; however, a disbarred lawyer may not work as a paralegal at a firm where he was employed as a lawyer during the period of misconduct."; relying on North Carolina Rule 5.5(d); "When a disbarred lawyer is employed by another law firm, the disbarred lawyer may attract clients from his former practice to the hiring law firm. As a consequence, it may be difficult for the disbarred lawyer to avoid the unauthorized practice of law with respect to these former clients. More problematic, however, is the possibility that the hiring law firm may be in collusion with the disbarred lawyer to employ the disbarred lawyer in exchange for the disbarred lawyer's delivery of his former clients to the hiring firm. If so, the firm is showing disrespect for the decision of the DHC and is encouraging unauthorized practice by the disbarred lawyer."; "In the present situation, however, it is merely fortuitous that former clients of ABC Law Firm sought the legal services of XYZ Law Firm during the period prior to the employment of Former Attorney A as a paralegal. Therefore, provided all clients of XYZ Law Firm fully understand that the disbarred lawyer is not acting as an attorney but merely as a paralegal, and, provided further, that, after the employment of Former Attorney A, XYZ Law Firm accepts no new clients who were clients of ABC Law Firm during the period of Former Attorney A's misconduct, XYZ Law Firm may employ him as a paralegal. Care should also be taken to follow the recommendations in Comment [2] to Rule 5.5 relative to the supervision of a disbarred lawyer and related matters.").

Not surprisingly, lawyers otherwise permitted to hire a disbarred lawyer as a paralegal may themselves face punishment if they allow the disbarred lawyer to practice law, or otherwise fail to supervise him or her.

- Andrew Strickler, Ill. Atty Censured For Not Banning Disbarred Wife From Firm, Law360, Jan. 17, 2018 ("The Illinois Supreme Court has censured a lawyer for failing to prevent his disbarred wife from practicing in his office."; "Stanley Niew, a labor and employment lawyer in Oak Brook, Illinois, was formally charged last year with assisting an unlicensed attorney to practice law by allowing his wife, Kathleen, to use his firm's office months after she had been disbarred."; "She lost her law license in November 2013 after she was assused in mishandling approximately $2.34 million belonging to clients she had represented in a real estate deal, and was later hit with a federal prison sentence for her role in a fraudulent investment scheme, according to a 2016 complaint."; "Over the seven months following the disciplinary action, Stanley Niew allowed his wife to maintain an office in his suite, where she was 'physically present in the office four or five times per week,' the complaint

said."; "During that period, Kathleen Niew also met with clients, used the firm's email system, conducted meetings and directed a firm associate to do legal work, according to the complaint.").

- In re Sishodia, 60 N.Y.S.3d 153, 155-56 (N.Y. App. Div. 2017) (per curiam) (suspending a lawyer for two years because she ran a law firm based on orders from a suspended lawyer; "Based upon these facts, respondent makes several admissions of misconduct. Respondent admits that by acting on behalf of the Firm at Mr. Nihamin's direction while he was suspended, she aided a nonlawyer in the unauthorized practice of law and engaged in conduct prejudicial to the administration of justice (Rules of Professional Conduct [22 NYCRR 1200.0] rules 5.5[b]; 8.4[d]). She also admits that, by authorizing an affidavit, in her name, containing false statements to be filed with this Court, she knowingly made a false statement of fact to a tribunal, engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, and engaged in conduct prejudicial to the administration of justice (Rules of Professional Conduct [22 NYCRR 1200.0] rules 3.3[a][1]; 8.4[c], [d])." (alterations in original)).

- Andrew Strickler, Ga. Lawyer Who Hired Disbarred Atty As Paralegal Suspended, Law360, May 16, 2017 ("A Georgia lawyer recently ordered to take ethics and professionalism training after pressing a bogus case against U-Haul International Inc. was suspended Monday by the state Supreme Court for hiring a disbarred lawyer as a paralegal and abandoning a client."; "The unanimous six-month suspension decision for Michael Robert Johnson Sr. found the Atlanta-area attorney took a $2,500 deposit from a client with a civil records matter last year but handed the case over to the paralegal, a disbarred lawyer Johnson employed."; "In issuing the suspension, the court declined to accept a bar recommendation that the sanction be limited to a reprimand, saying Johnson's disciplinary record and the willful nature of his misconduct warranted tougher punishment."; "Johnson 'failed to personally do any work at all on the matter and instead allowed the disbarred attorney to have contact with the client in person, by telephone, and through written correspondence,' according to the decision. And after the client realized that Johnson and the paralegal had abandoned his case without doing any work and tried to fire the lawyer, Johnson also failed to refund the unearned fee."; "'Johnson (and his paralegal) ultimately abandoned the legal matter to the client's detriment,' the court said.").

- Martin Bricketto, NJ Supreme Court Suspends Name-Lending Lawyer, Law360, Jan. 14, 2016 ("An attorney who lent his name to a now-dissolved firm that handled mortgage modification and real estate work, in a move that enabled another lawyer to improperly practice law in New Jersey, was hit with a three-month suspension Wednesday by the state Supreme Court."; "Mark Edelstein had admitted that his partnership with Todd Ferentz &

Edelstein LLP was a legal fiction and that he lent his law license so a California attorney, Frederick Todd, could run a law firm in New Jersey, accordingly to case documents. Edelstein never handled any client matters with the firm, supervised staff or personally signed any documents, though he allowed the firm to use a stamp of his signature."; "The high court backed a suspension for Edelstein, a state bar member since 2007, following the New Jersey Disciplinary Review Board's November finding of clear evidence that Edelstein violated rules of professional conduct by letting the firm borrow his name and signature and by failing to ensure that nonlawyer staff adhered to ethical standards.").

- In re Thalasinos, 981 N.Y.S.2d 714, 715 (N.Y. App. Div. 2014) (suspending for one year a lawyer who assisted his suspended colleague in the unauthorized practice of law; "Respondent did not initially believe that assisting SA in immigration matters constituted aiding the unauthorized practice of law, and only became aware of this after he became the subject of a DDC investigation. SA was ineligible to practice before the United States Citizenship and Immigration Service (USCIS) and the Immigration Court because he was required to be an attorney in good standing 'of the bar of the highest court of any State . . . and is not under any order suspending . . . or otherwise restricting him in the practice of law.' (8 CFR 1001.1[f]; 1292.1[a][1])."; "Respondent assisted SA's office in Astoria, Queens. The office and all client files belonged to SA. Respondent was paid $400-500 per day for immigration-related appearances. Respondent would meet with SA the day prior to (or, in some cases, the day of) a proceeding and SA would instruct him as to what he must do at the proceeding. Respondent would not meet with the client until the actual day of the proceeding. Due to his lack of experience in immigration law, respondent allowed SA to make all legal (and non legal) decisions with respect to the cases. In addition, all letters and documents were prepared by SA. Respondent never executed retainer agreements with the clients, nor did he ever receive any payments from the clients. Respondent estimated that he appeared at 10-12 immigration hearings (before the USCIS) for SA during the three years.").

- Peter Vieth, Lawyer covered for suspended colleague, Virginia State Bar charges, Va. Laws. Wkly., May 20, 2014 ("An Ashland lawyer is in trouble with the Virginia State Bar [VSB] for allegedly helping to keep a law office going after its owner was suspended by the VSB."; "A disciplinary subcommittee charges that attorney William V. Riggenbach acted as cover in 2012 while Robert Smallenberg continued to practice law without a valid license. The arrangement left multiple clients with poor legal work and lost fees, the bar says."; "Riggenbach started work as an employee at Smallenberg's Metropolitan Law Center LLP in Ashland shortly after Smallenberg was suspended for three years in May 2012, according to the

VSB charges."; "Even though Riggenbach was the only lawyer at the office with a valid license at the time, he told the bar he thought Smallenberg was still licensed, the bar said. Riggenbach claimed he believed Smallenberg's suspension had been stayed by the state Supreme Court."; "In fact, the VSB charged, the court had denied the stay and Smallenberg was suspended. Nevertheless, Smallenberg continued to practice law and manage operations at the office, including management of the bank accounts, the bar said."; "By October, Riggenbach learned that Smallenberg was officially suspended and that the VSB was investigating the operations of the law office, the bar said."; "Based on advice from the VSB's Ethics Hotline, Riggenbach formed a new corporation with himself as sole owner and opened new bank accounts for that corporation."; "But changing the structure of the firm failed to change its practice, the bar said. The new corporation essentially continued the operation of Smallenberg's old practice, the Virginia State Bar said. Although Smallenberg was designated as a paralegal, he continued to manage the office and its bank accounts, the Virginia State Bar charged.").

- Kentucky Bar Ass'n v. Unnamed Attorney, 191 S.W.3d 640 (Ky. 2006) (privately reprimanding a lawyer who had hired a suspended lawyer as an independent contractor and allowed the suspended lawyer to attend client meetings and answer clients' questions).

- In re Comish, 889 So. 2d 236 (La. 2004) (suspending a lawyer for one year and one day, because the lawyer permitted a disbarred lawyer (acting as a paralegal) to engage in such activities as signing his name as a notary, depositing trust money into his own account, meeting with clients, communicating with adjusters, handling fees, negotiating settlements, etc. -- all without adequate supervision).

Best Answer

The best answer to this hypothetical is **MAYBE**. B 9/12

In-House Lawyers Whose Licenses Have Lapsed

Hypothetical 17

You just received a frantic call from a local publicly-traded company's chairman. The chairman tells you that the company's general counsel had resigned about six months ago. The company was in the midst of an important transaction at that time, and turned for legal advice to another board member who had practiced for many years at a large New York law firm. About three months ago, everyone learned why the general counsel had resigned -- because she had been involved in some questionable options backdating activities. The interim general counsel continued to advise the board as the scandal grew. Last month, the interim general counsel sheepishly advised the board that he had let his law license lapse several years ago -- it had never dawned on him to tell the board about this. The board continued to rely on his advice until yesterday -- when the chairman read an article about a similar situation in which a court found that a company could not claim attorney-client privilege protection for communications to and from an in-house lawyer not licensed in any state. The chairman wants your quick advice about the effect of this scenario.

(a) Will the attorney-client privilege protect communications to and from the interim general counsel before he advised the board that his law license had lapsed?

YES (PROBABLY)

(b) Will the attorney-client privilege protect communications to and from the interim general counsel after he advised the board that his law license had lapsed?

NO

Analysis

Introduction

Throughout the years, several companies and even law firms have learned to their surprise and horror that lawyers in their midst were not eligible to practice law. In some situations, the so-called "lawyers" had not even finished law school.

As states began to require in-house lawyers to register with the state bar of the jurisdiction in which they practiced, there was an upsurge in such reports. Several articles described these events.

> Companies expect their general counsel to pay attention to all the little details, but some legal chiefs have fallen behind in keeping their own affairs in order. A survey by Corporate Counsel of the Fortune 250 found eight General Counsels who are not properly licensed in the state in which they work.
>
> This group includes Vernon Baker II of ArvinMeritor Inc.; Michael DeBacker of Dana Corporation; Robert Sloan of Entergy Corporation; Siri Marshall of General Mills Inc.; Arthur Hipwell of Humana Inc.; Terrance Carlson of Medtronic Inc.; Todd DuChene of Solectron Corporation; and John Donofrio of Visteon Corporation.
>
> Of these eight, Hipwell has no license at all, while the rest don't have the special license required by their states for in-house lawyers who haven't taken the local bar exam.

Elizabeth Amon, General Counsels Forget One Detail – Their License, Corporate Counsel, Apr. 5, 2007. Several of those lawyers faced serious consequences.

- Hipwell v. Kentucky Bar Ass'n, 267 S.W.3d 682, 683 (Ky. 2008) (suspending for one year Humana's long-time general counsel, who acted as that company's Senior Vice-President and General Counsel, although he had not been admitted to the practice of law in Kentucky or any other jurisdiction since 1985. "On January 10, 1985, this court entered an order suspending Hipwell from the practice of law for nonpayment of bar dues. Despite this suspension, he continued to progress through the ranks at Humana. Hipwell was named Vice-President and Associate General Counsel of Humana in 1990. In 1992, Humana made him its Senior Vice-President and General Counsel, a capacity in which he would serve almost continuously until 2007. At no time between 1985 and the present was Hipwell admitted to the practice of law in Kentucky or any other jurisdiction. On March 7, 2007, the KBA's Inquiry Commission formally notified Hipwell of its investigation. Hipwell immediately stepped down as General Counsel of Humana but remained in his capacity as an executive." (footnote omitted); "In his motion, Hipwell admits he was aware that his license had been suspended but claims by way of mitigation that he did not believe performance of his duties as

General Counsel for Humana constituted the practice of law that would require a license. He points out that at no time did he appear in any court on behalf of Humana while under suspension. Likewise, Hipwell claims he did not draft legal documents or otherwise perform legal work for the 'general public.'"; "Hipwell admits his duties as Senior Vice-President and General Counsel included supervising the work of in-house attorneys, working with outside counsel, reviewing and approving reports from in-house and outside counsel. He also admits that he signed corporate documents for government agencies, including the Securities and Exchange Commission, in his capacity as General Counsel. Furthermore, the Humana corporate website stated that Hipwell's responsibilities included 'providing strategic legal direction . . . compliance with Securities and Exchange Commission and New York Stock Exchange requirements . . . [and] litigation management.' Clearly, these activities are within the ambit of the practice of law as contemplated by SCR 3.020 and, therefore, require appropriate licensure. While there are no allegations that Hipwell's unauthorized practice of law was undertaken for nefarious purposes or that it resulted in harm to the public or to Hipwell's employer, it is incumbent upon this Court to maintain the integrity of the profession by ensuring that those who hold themselves out to the public as attorneys are authorized to do so." (alteration in original)).

- In re Reinstatement of DeBacker, 184 P.3d 506, 511, 515, 516 (Okla. 2008) (reinstating after what amounted to a one-year suspension an in-house lawyer at Dana Corporation who had been engaged in the unauthorized practice of law for 27 years, after being suspended from the Kansas Bar for failure to pay dues; "Unlike a typical reinstatement case, this cause presents an attorney who has held himself out as licensed in Oklahoma for over 30 years and relied upon that license to practice law in another state, when in fact he had been suspended for all but three of those years."; "[W]e are mindful that while DeBacker was without a doubt negligent regarding his Oklahoma license, his oversight was not intentional. Furthermore, when notified of his neglectful behavior, he immediately self-suspended from the practice of law and reported himself to the Ohio Supreme Court. These factors reflect his moral character."; "Here, while working for the corporation, DeBacker never stepped foot in a courtroom to represent the corporation, nor does it appear the corporation was injured by the fact that he was not licensed. In addition to attending continuing legal education, DeBacker presented numerous letters recommending reinstatement from attorneys who have known DeBacker for many years and who had first hand knowledge of his legal skills, character, and competence. We are convinced that DeBacker has [met] his overall burden of proof by clear and convincing evidence that he should be reinstated. However, we are persuaded by previous cases that some form of discipline should be imposed for his misrepresentations and unauthorized practice of law. Considering that the misrepresentations were neglectful, but not intentional, and that he voluntarily withdrew from practicing

law on April 10, 2007, and self-reported to the Ohio Supreme Court, his reinstatement will be deferred until April 10, 2008, which results in a one-year suspension from the practice of law.").

Even after that newsworthy surge, companies have continued to face these embarrassing incidents.

- Disciplinary Counsel v. Maciak, 102 N.E.3d 485, 486-87, 487, 487-88, 492 (Ohio 2018) (suspending (but staying the suspension) the general counsel of the Midas Company's parent for the unauthorized practice of law; "On December 3, 2007, we suspended Maciak [General counsel of Midas's parent company] from the practice for his failure to register as an attorney for the 2007 to 2009 biennium. . . . We reinstated his license on January 24, 2008. . . . On December 23, 2009, we imposed a $320 sanction on Maciak for his failure to complete the requisite hours of continuing legal education ('CLE') required . . . , to timely file his reporting transcript, and to timely bring himself into compliance. . . . And on December 29, 2011, we fined Maciak an additional $680 and suspended his license for his failure to complete the requisite hours of CLE, to timely file his final reporting transcript, and to comply with prior sanction issued by the CLE commission. . . . That suspension remained in effect until November 25, 2015."; "On September 8, 2016, relator, disciplinary counsel, charged Maciak with multiple acts of misconduct arising from his employment as general counsel of corporations in Texas and Florida. The charges include allegations that Maciak engaged in the unauthorized practice of law ('UPL') in Texas and Florida, violated the terms of his 2011 Ohio CLE suspension, and made false statements to relator."; "The board adopted the panel's findings of fact and conclusions of law but recommended that we suspend Maciak from the practice of law for two years, with the entire suspension stayed on conditions. Relator objects and urges us not only to reject the panel's dismissal of two alleged violations but also to impose an unstayed suspension from the practice of law. For the reasons that follow, we overrule relator's objections, adopt the board's findings of fact and conclusions of law, and suspend Maciak from the practice of law for two years, with the entire suspension stayed on the conditions recommended by the board."; "In February 2015, Maciak received a letter from Jeffrey Picker, counsel for the Unauthorized Practice of Law Department of the Florida Bar, regarding a complaint filed by a former TBC employee. Picker informed Maciak that in order to serve as general counsel of a business organization in Florida, one must either be a member of the Florida Bar or certified as Authorized House Counsel ('AHC'). Picker noted that Maciak was neither admitted to nor certified by the Florida Bar and asked Maciak how he proposed to resolve his UPL. He also advised Maciak that he was not permitted to hold himself out as a lawyer in Florida, practice law, or represent TBC in the resolution of a legal matter until he obtained the proper

licensure or certification." (footnote omitted); "Over the next several months, Picker and Maciak communicated by e-mail, letter, and telephone. Maciak maintained that the primary focus of his job was what he considered to be business matters, but he did not dispute that he periodically provided legal advice and counsel to TBC. At Picker's insistence, Maciak deleted the title of general counsel from his biography on TBC's website and agreed to submit an application for AHC certification – though he did not alter his activities. After the Supreme Court of Florida granted Maciak AHC certification in December 2015, the Florida Bar closed its investigation into his UPL."; "At the panel hearing, Maciak testified that his responsibilities at TCB included reorganizing executive departments, developing budgets, supervising human resources, and implementing new procedures for dealing with outside counsel. Following his promotion to senior vice president and general counsel, the majority of his time was devoted to what he termed 'nonlegal functions.' But his resume stated that he also oversaw in-house attorneys who actively managed litigation for the company, that he was '[h]ired to rebuild a legal team, reduce expenses, and garner confidence with the Board of Directors,' and that he led 'a team of 7 legal professionals, 30 human resources associates, and 5 contract administrators.'" (alteration in original); "We by no means condone Maciak's nearly seven-year failure to keep abreast of his continuing obligation to participate in at least 24 hours of CLE for every biennial compliance period, to request credit for those activities, and to review his CLE transcript for accuracy. . . . Nor do we condone his failure to familiarize himself with the Rules for the Government of the Bar of Ohio and their counterparts in the other states in which he served as in-house corporate counsel. Nonetheless, given the specific and narrow facts of Maciak's proven misconduct, the substantial evidence of his good character and remorse, and the affirmative steps he has taken to prevent similar violations in the future, we overrule relator's objection and agree that a two-year suspension, stayed in its entirety upon the conditions recommended by the board, is the appropriate sanction in this case."; "Accordingly, Brian Allen Maciak is suspended from the practice of law in Ohio for two years, with the suspension stayed in its entirety on the conditions that he remain in full compliance with his CLE and attorney-registration obligations and engage in no further misconduct. If Maciak fails to comply with the conditions of the stay, the stay will be lifted, and he will serve the entire two-year suspension. Costs are taxed to Maciak.").Emma Cueto, Former Senior LG Atty Reprimanded Over Ineligibility In NJ, Law360, May 5, 2017 ("The Supreme Court of New Jersey has reprimanded a former senior in-house counsel at LG Electronics USA Inc. for practicing law while ineligible after he failed to pay annual fees to the state."; "The New Jersey high court ordered Wednesday that Christopher Welgos be reprimanded and the reprimand be permanently added to his file after Welgos admitted he was practicing law while ineligible during his time as counsel for LG, which he attributed to an honest mistake regarding state fees."; "Welgos' infraction was originally discovered in 2015

after an attorney involved in a pension dispute with LG in Illinois filed a grievance against him, claiming Welgos had yet to send documents he'd promised. While looking into the issue, which was later resolved, an investigator from the District Ethics Committee realized that Welgos was currently ineligible in New Jersey."; "Welgos contends that the problem was a simple oversight on his part. Prior to working at LG, he said, his firm paid all annual fees on his behalf, and it didn't occur to him that as in-house counsel he would now be responsible for handling the fees himself."; "'I was at one of my son's baseball games,' he told Law360, 'and I was talking to a woman who had recently gone into private practice and mentioned she'd recently realized she was ineligible due to fees.'" The conversation caused him to check up on his own status and pay off his balance."; "Welgos' record reflects that he was ineligible from September 2009 but was reinstated in August 2014, then disqualified and reinstated again several more times between 2014 and 2016. Welgos explained that he had forgotten to update his address in the state system and wasn't receiving the annual bills."; "The recommendation from the Disciplinary Review Board states that Welgos admitted to investigators that he had practiced law without a license, but that he also maintained he did not appear in court while ineligible and rectified the situation as soon as he realized it was an issue."; "The board noted in its recommendation that under the circumstance it would normally only recommend Welgos be admonished, but said his failure to cooperate with the investigation into his eligibility prompted it to recommend a reprimand with one member voting for censure. The board's recommendation notes that Welgos did not respond to multiple requests by the investigator and the DEC.").

- Disciplinary Counsel v. Troller, 6 N.E.3d 1138, 1139 (Ohio 2014) (suspending for two years (with six months stayed) a lawyer who acted as a chief legal officer for a corporation after suspension of his license; "[T]he panel found that by continuing to perform his job duties as the chief legal officer for Clopay Corporation, Troller continued to practice law for six years after his license was suspended by this court. . . . We agree that Troller committed the charged misconduct and adopt the sanction recommended by the board.").

In 2015, this remarkable phenomenon reached a crescendo – a well-known company's Yale Law School-educated general counsel was found to never have been licensed to practice law.

- Frank Runyeon and John Koblin, General Counsel For Al Jazeera America Appears To Be Unlicensed, N.Y. Times, Nov. 08, 2015, at B3 ("David W. Harleston, an executive who serves as general counsel for the media company Al Jazeera America, has had a busy year."; "He has helped

> oversee lawsuits against DirecTV and Al Gore, who sold his Current TV network to the company. There are wrongful-termination cases brought by former employees who accuse the news channel of fostering a sexist and anti-Semitic environment. Earlier this year, he dealt with the departure of the company's chief executive, who stepped down after employees complained about what they described as a culture of fear."; "But according to court officials, there are no records that indicate Mr. Harleston is licensed to practice law in New York State, where Al Jazeera America has its headquarters. He has also not been admitted in any other jurisdiction, according to research by The New York Times."; "After an inquiry from The Times, Al Jazeera America said on Sunday that it had suspended Mr. Harleston and hired the law firm Skadden, Arps, Slate, Meagher & Flom to conduct an investigation."; "After graduating from Harvard College and Yale Law School, Mr. Harleston was a clerk for Judge Stephen Reinhardt of the United States Court of Appeals for the Ninth Circuit and then practiced at Simpson Thacher & Bartlett from 1985 to 1989. Mr. Harleston 'litigated extensively' for the firm, according to his corporate profile on Al Jazeera's website. (Mr. Harleston's brother, Jeffrey, is general counsel at Universal Music Group. He is a licensed lawyer in California, according to state records.)"; "A Simpson Thacher spokeswoman declined to comment."; "After Simpson Thacher, Mr. Harleston worked for a year as counsel for Sony Music Entertainment, and then worked as president of Def Jam Recordings, the rap music label that Russell Simmons helped found. Over the next 20 years, Mr. Harleston went on to serve as an internal lawyer for several media organizations, and in 2005 joined Current, which was later acquired by Al Jazeera." (emphases added)).).

These incidents did more than embarrass the delinquent in-house lawyers, they theoretically jeopardized the corporations' attorney-client privilege.

For instance, in 2010, Gucci discovered that its "director of legal affairs" was not an active member of any bar.

> An embarrassed Gucci America, Inc. has fired its director of legal affairs after discovering during a lawsuit that he wasn't properly licensed to practice law.
>
> . . . .
>
> Moss graduated from the Fordham University School of Law and then passed the California bar in 1993. But he went on inactive status three years later to avoid paying the

> periodic bar fees. An attorney on inactive status also is not required to obtain continuing education credits.
>
> In mid-2002, two of Gucci's outside counsel at Patton Boggs in Washington, D.C., referred Moss to the then-chief financial officer of Secaucus, New Jersey-based Gucci. The two, George Borababy and Timothy Chorba, testified they were just doing a favor for an old friend, Moss' father. They also testified that they never said Moss was a lawyer, and Gucci never asked them.
>
> At first Moss analyzed real estate financials for Gucci. But he quickly started handling some legal affairs, including submitting court papers in a bankruptcy proceeding in federal court in late 2002.
>
> In 2003, Gucci gave him the title of in-house counsel and had him report directly to the president of the company, who testified that she believed he was a lawyer. Moss represented the company in legal proceedings, filed documents with the United States Trademark Office, and worked with outside counsel.
>
> Gucci was so pleased with his legal work, that in 2008 it promoted him to vice president and director of legal and real estate.
>
> Along the way, no one bothered to ask Moss if he was properly licensed, and he didn't tell anyone about his inactive status.

Sue Reisinger, He's Been Sacked, Corporate Counsel, Apr. 7, 2010. The status of the Gucci in-house lawyer was complicated. He had not kept up his California license, and therefore was considered an "inactive" member of the California Bar. While some states explicitly prohibit "inactive" members of their bar from practicing law, the issue was not as clear in California.

The court ultimately found that the attorney-client privilege did not protect communications to and from this in-house "lawyer." Gucci Am., Inc. v. Guess?, Inc., No. 09 Civ. 4373 (SAS) (JLL), 2010 U.S. Dist. LEXIS 65871 (S.D.N.Y. June 29, 2010).

In January 2011, well-respected Southern District of New York Judge Shira Scheindlin reversed the magistrate judge's conclusion.[1] After explaining that the Gucci lawyer was "not unreasonable" in assuming that he could practice elsewhere while on "inactive" status in California, Judge Scheindlin pointed to Gucci's reliance on the "reasonable belief" standard. Notably, Judge Scheindlin also described as "wrongly decided"[2] a 2000 Southern District of New York opinion, refusing to apply the "reasonable belief" to corporations, and instead requiring them to engage in some minimal due diligence.[3] Judge Scheindlin ultimately concluded that "[a]pplying the reasonable belief test rather than the discredited due diligence requirement, there can

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1 Gucci Am., Inc. v. Guess?, Inc., No. 09 Civ. 4373 (SAS) (JLL), 2011 U.S. Dist. LEXIS 15, at *19 (S.D.N.Y. Jan. 3, 2011) ("Nowhere in the federal law of privilege have I located a due diligence requirement that applies to corporations as distinct from individuals.").

2 Id.

3 Id.; see Financial Techs. Int'l, Inc. v. Smith, No. 99 Civ. 9351 (GEL) (RLE), 2000 U.S. Dist. LEXIS 18220, at *19-20 (S.D.N.Y. Dec. 18, 2000) (holding that the attorney-client privilege did not protect communications with a company's "legal counsel" who had graduated from law school and passed the bar exam but who had never actually been admitted to the Bar; "While an investigation of this magnitude, though not time consuming, could prove onerous for an individual seeking legal advice, it is not unduly burdensome for a corporation, familiar with these types of employment practices, to conduct investigations to determine whether a potential employee's credentials are commensurate with the corporation's needs. It is not unduly burdensome to require a corporation to determine whether their general counsel, or other individuals in their employ, are licensed to perform the functions for which they have been hired. . . . For these[] reasons, the Court concludes that, even if New York would apply the reasonable belief exception to individuals, corporations would have to make sure their attorneys are in fact attorneys.").

be no real dispute that Gucci has proven that it had a reasonable belief that [the in-house lawyer] was an attorney."[4]

More recently, another court reached the same reassuring result in the case of another well-known company's delinquent general counsel.

- Walter v. Freeway Foods, Inc. (In re Freeway Foods of Greensboro, Inc.), Case No. 10-11282, AP Case No. 10-02057, 2014 Bankr. LEXIS 1823, at *4-5, *7, *9 n.3 (Bankr. M.D.N.C. Apr. 24, 2014) (finding that communications to and from the general counsel of Waffle House deserved privilege protection, although he did not have an active license; "The facts concerning Waller [Waffle House's general counsel since 2001] and his role with Waffle House can be gleaned from depositions taken and affidavits filed in this case. Waller's legal services to Waffle House have been delivered in Georgia, where Waller resides and where Waffle House is incorporated. Waller holds an inactive license to practice law in the State of Illinois. He holds no active license to practice law. An outside attorney referred Waller to Waffle House's CEO, Walter G. Ehmer, who interviewed Waller. At the time of the interview, Ehmer understood Waller to have then been the General Counsel of Midway Airlines Corporation. Waffle House's Chairman, Joe W. Rogers, Jr., hired Waller to serve as Waffle House's general counsel. Both Ehmer and Rogers believed Waller to be an attorney; both have viewed their communications with Waller as privileged. In addition, certain outside counsel who performed legal work for Waffle House understood Waller to be both an attorney and Waffle House's general counsel. For some time, Waller's law school diploma and bar certificate were displayed in his office cubicle."; "In North Carolina, 'when the 'client' reasonably believes that he is dealing with an attorney, the [attorney-client] privilege should be accorded' even if the client is mistaken." (citation omitted); "Even were it certain that Waller was not an attorney, it is not clear whether he could be said to have been engaged in the unauthorized practice of law. See State v. Pledger, 257 N.C. 634, 127 S.E.2d 337, 339-40 (N.C. 1962) ('A person who, in the course of his employment by a corporation, prepares a legal document in connection with a business transaction in which the corporation has a primary interest, the corporation being authorized by law and its charter to transact such business, does not violate the statute [prohibiting the unauthorized practice of law, N.C. Gen. Stat. Ann. § 84-4], for his act in so doing is the act of the corporation in the furtherance of its own business.").

[4] Gucci Am., Inc. v. Guess?, Inc., No. 09 Civ. 4373 (SAS) (JLL), 2011 U.S. Dist. LEXIS 15, at *22-23 (S.D.N.Y. Jan. 3, 2011).

(a) Almost without exception, courts protect as privileged communications between clients and anyone the client believes to be a lawyer (as long as the communications meet the other privilege criteria).

> Communications to a person who falsely poses as a lawyer are privileged, so long as the confiding client reasonably believes that the imposter is a lawyer. Although local practice by a lawyer admitted elsewhere or by an imposter may constitute unauthorized practice of law, depriving the client of the privilege is an inappropriate sanction. Clients should be protected in dealing with legal advisors in good faith and not be exposed to the uncertainties of choices-of-law questions.

Restatement (Third) of Law Governing Lawyers § 72 cmt. e (2000).

A number of courts have taken this approach.

- Miller v. IBM, No. C 02-2118 MJJ (MEJ), 2006 U.S. Dist. LEXIS 22381, at *14-15, *16, *16-17 (N.D. Cal. Apr. 14, 2006) (assessing communications between plaintiff and Victor Paddock, whom plaintiff claimed was acting as a lawyer; "Here, IBM has raised serious doubt as to whether Mr. Paddock was an attorney working for Miller or BCC. Mr. Paddock was at no time since at least January 1, 1999 -- i.e., during the time he was providing advice to BCC -- an active member of the bar. If Mr. Paddock were providing legal advice while an inactive member of the bar, this raises serious ethical issues, not only for the Court, but for the State Bar of California as well. Moreover, Mr. Paddock testified that he was not providing legal advice to BCC or Miller. When asked whether he represented to Miller that he was acting as BCC's attorney, Mr. Paddock stated: 'I wouldn't affirmatively have said to him that I was acting as a lawyer. I did not understand that I was being hired to represent him.'"; nevertheless noting that Paddock had submitted invoices "for legal services" (which he attributed to "'using his old letterhead'" due to "'inadvertence and mistake'"); "Despite Mr. Paddock's declaration to the contrary, it is clear that the legal service invoices do not use old letterhead and he billed for legal services despite being an inactive member of the State Bar. Given the evidence now before it, the Court finds that Miller could have reasonably believed that Mr. Paddock was acting as a lawyer and the attorney-client privilege applies as to communications between Miller and Mr. Paddock. . . . Despite Mr. Paddock's testimony otherwise, it is clear that a person billed for legal services could reasonably believe that an attorney-client relationship exists."; ordering the plaintiff to produce a privilege log).

- United States v. Mullen & Co., 776 F. Supp. 620, 621 (D. Mass. 1991) ("[T]he attorney-client privilege may apply to confidential communications made to an accountant when the client is under the mistaken, but reasonable, belief that the professional from whom legal advice is sought is in fact an attorney.").

In 2000, the Southern District of New York applied a different rule for corporations.[5] As explained above, in 2011 the Southern District of New York rejected this earlier opinion.[6]

To be sure, that decision involved someone who had never been admitted to practice law anywhere -- but the decision nevertheless remains a worrisome precedent.

(b) The analysis changes once the client knows that the lawyer is not authorized to practice law.

- Louis Vuitton Malletier v. Dooney & Bourke, Inc., No. 04 Civ. 5316 (RMB) (MHD), 2006 U.S. Dist. LEXIS 87096, at *55, *56-57, *57, *58 (S.D.N.Y. Nov. 29, 2006) (addressing a privilege claim involving communication to and from an executive based in France and an executive based in the United States, both of whom had legal training, but were not members of any bar; explaining that "[b]oth sides agree that American, rather than French, law governs the privilege. . . . Were it otherwise, the answer would be straightforward, since it is conceded that under French law these communications are not protected by any privilege."; "The most obvious difficulty for LV's privilege claim is that neither Ms. Moulle-Berteaux nor Mr. Barbault are members of any bar (French or American), and they

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[5] Financial Techs. Int'l, Inc. v. Smith, No. 99 Civ. 9351 (GEL) (RLE), 2000 U.S. Dist. LEXIS 18220, at *19-20 (S.D.N.Y. Dec. 18, 2000) (holding that the attorney-client privilege did not protect communications with a company's "legal counsel" who had graduated from law school and passed the bar exam but who had never actually been admitted to the Bar; "While an investigation of this magnitude, though not time consuming, could prove onerous for an individual seeking legal advice, it is not unduly burdensome for a corporation, familiar with these types of employment practices, to conduct investigations to determine whether a potential employee's credentials are commensurate with the corporation's needs. It is not unduly burdensome to require a corporation to determine whether their general counsel, or other individuals in their employ, are licensed to perform the functions for which they have been hired. . . . For these[] reasons, the Court concludes that, even if New York would apply the reasonable belief exception to individuals, corporations would have to make sure their attorneys are in fact attorneys.").

[6] Gucci Am., Inc. v. Guess?, Inc., No. 09 Civ. 4373 (SAS) (JLL), 2011 U.S. Dist. LEXIS 15, at *19 (S.D.N.Y. Jan. 3, 2011) ("Nowhere in the federal law of privilege have I located a due diligence requirement that applies to corporations as distinct from individuals.").

> apparently have never been. . . . American courts have, with some consistency, held that the attorney-client privilege does not apply to communications with a law school graduate unless he or she is admitted to practice at the bar of a state or federal court (or possibly a foreign court), . . . thus leaving in serious question the availability of a privilege in this case. . . . To overcome this obstacle, LV notes that both Ms. Moulle-Berteaux and Mr. Barbault have full -- and indeed advanced -- legal training, and carry out the responsibilities of an in-house attorney that are the equivalent of what American in-house lawyers do."; rejecting plaintiff's argument that the two executives should be treated like lawyers; "Plaintiff offers no compelling reason for deviating from the consistent line of authority that holds to the contrary. Moreover, it would seem that there is particularly little reason to do so here when the law under which Ms. Moulle-Berteaux and Mr. Barbault were practicing -- French and American, respectively -- did not protect their communications with their client."; "Given the fact that communications of Ms. Moulle-Berteaux that are at issue apparently took place in France and the absence of any indication in the record that the participants in the communications nonetheless expected that they would be protected, the justification for an equivalence analysis is far less compelling since there is no reason to believe that there was any expectation by the participants that confidentiality could be maintained in the face of French law. As for Mr. Barbault, he was practicing in the United States, and hence was directly subject to American law, which gives no protection to the communications of an unlicensed attorney."; finding that the privilege did not apply).

- Dabney v. Investment Corp. of Am., 82 F.R.D. 464, 465 (E.D. Pa. 1979) (finding that the attorney-client privilege did not cover communications with someone who was a law student and eventually a law school graduate but not yet a member of any bar; noting that the corporate client's president was aware of this status, and that the law student/graduate was not "acting as the agent or associate of any duly licensed attorney").

In 2007, a Connecticut court dealt with this scenario.[7] In that case, the court explained that

[7] Freeman v. Indian Spring Land Co., No. FSTCV054002991S, 2007 Conn. Super. LEXIS 48, at *4, *9, *9-10 (Conn. Super. Ct. Jan. 8, 2007) (unreported decision) (assessing privilege issues involved in a former in-house lawyer's wrongful termination claim; addressing plaintiff's motion to compel production of protected documents from his former employer; focusing on the company's claim of privilege for communications to and from Gregg Stone, one of its directors, a Harvard Law School graduate and former member of the Massachusetts Bar; noting that the defendant company's president retained Stone on or about June 7, 2004 to assist the company in negotiating with the plaintiff; pointing to the company president's affidavit that he thought the company needed legal advice dealing with the plaintiff; also noting that Stone was a co-trustee of a trust that owned shares in the company, and was ultimately elected

> [c]laims of attorney-client privilege are not necessarily precluded by the fact that Mr. Stone [the director who stepped in for the former general counsel] was not an attorney. 'The privilege depends on the client's belief that he or she is consulting a lawyer for professional advice. It is sufficient if the client reasonably believes that the person consulted is an attorney, even if in fact the person is not.' . . . The court finds . . . , based on the Proxmire affidavit, that ISLCO did have a reasonable belief prior to August 11, 2004 that Mr. Stone was an attorney because of his having graduated from law school and having practiced law in Massachusetts.

Freeman v. Indian Spring Land Co., No. FSTCV054002991S, 2007 Conn. Super. LEXIS 48, at *9-10 (Conn. Super. Ct. Jan. 8, 2007).

However, the court reached a different conclusion for communication after the board learned that the interim general counsel was not authorized to practice law.

> [The company] could not have reasonably believed that Gregg Stone was an attorney after the August 11, 2004 board meeting. . . . Any documents created after the board meeting of August 11, 2004 claimed to be attorney-client

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director of the company on August 11, 2004; "Mr. Stone's [company director and former lawyer] status as an attorney is crucial to the claim of work product and significant as to the claim of attorney-client privilege. The lack of involvement of counsel negates a claim that reports were the product of a party's attorney. To be covered by the work product rule an attorney's work '. . . . must have formed an essential step in the procurement of the data which the opponent seeks and the attorney must have performed duties normally attended to by attorneys.'" (citation omitted); noting that the director sent an e-mail on August 2, 2004, to plaintiff's lawyer revealing that he was not a member of the Bar, and similarly reported to the company's Board at an August 18, 2004, meeting that he was no longer a member of the Bar; noting that the defendant company's president retained Stone on or about June 7, 2004, to assist the company in negotiating with the plaintiff; pointing to the company's president's affidavit that he thought the company needed legal advice dealing with the plaintiff; also noting that Stone was a co-trustee of a trust that owned shares in the company, and was ultimately elected a director of the company on August 11, 2004; noting that "[c]laims of attorney-client privilege are not necessarily precluded by the fact that Mr. Stone was not an attorney. 'The privilege depends on the client's belief that he or she is consulting a lawyer for professional advice. It is sufficient if the client reasonably believes that the person consulted is an attorney, even if in fact the person is not.'" (citation omitted); concluding that the defendant's officers and directors "could not have reasonably believed that Gregg Stone was an attorney after the August 11, 2004 board meeting. . . . Any documents created after the board meeting of August 11, 2004 claimed to be attorney-client privileged because of the involvement of Gregg Stone must be produced. The court finds, however, based on the Proxmire affidavit, that ISLCO did have a reasonable belief prior to August 11, 2004 that Mr. Stone was an attorney because of his having graduated from law school and having practiced law in Massachusetts.").

> privileged because of the involvement of Gregg Stone must be produced.

Id. at *9.

It might seem odd that the privilege would evaporate the moment that the client (in this case the other board members acting for the corporation) learned that the person from whom they were receiving legal advice was not licensed as a lawyer anywhere, but any other approach would unduly expand what society recognizes as a very narrow privilege.

Even if a court takes an unforgiving view, the corporation can advance a number of arguments that might protect communications with such a corporate employee.

First, the employee can act as a "client." This might protect communications between him or her and any outside lawyers advising the company. Second, the employee might be considered another in-house lawyer's or even an outside lawyer's "agent" for purposes of providing legal advice to the corporation. For example, the privilege clearly protects paralegals assisting an in-house lawyer -- so the involvement of another lawyer (in-house or outside) authorized to practice law might allow the unlicensed lawyer to essentially "piggyback" on that work.

The communications most in jeopardy under either of these approaches involve direct communications between the employee and other company employees. In those situations, the employee's status as a "client" would not boost any privilege argument, and it also would be very difficult to use the agency principles discussed above.

Best Answer

The best answer to **(a)** is **PROBABLY YES**; the best answer to **(b)** is **NO**. N 3/12

Representing Corporate Affiliates

Hypothetical 18

You recently attended an ethics program that warned about the dangers of in-house lawyers representing entities or people other than their client/employers. An obvious question came to mind as you walked out of the seminar.

As an in-house lawyer, may you represent a corporate affiliate of your client/employer?

YES

Analysis

Courts and bars generally permit in-house lawyers to represent their client/employer's affiliates.

This rule clearly applies to wholly-owned subsidiaries. As the percentage of ownership dwindles, presumably the permissibility of the behavior disappears -- although partially owned subsidiaries might fall under the definition of corporate "affiliates" or "related" entities.[1]

General Rules

The ABA Model Rules contain a surprisingly worrisome provision in an unexpected place.

- ABA Rule 1.0 cmt. [3] ("With respect to the law department of an organization, including the government, there is ordinarily no question that the members of the department constitute a firm within the meaning of the Rules of Professional Conduct. There can be uncertainty, however, as to the identity of the client. For example, it may not be clear whether the law department of a corporation represents a subsidiary or an affiliated corporation, as well as the corporation by which the members of the department are directly

[1] In-house lawyers practicing continuously in a state where they are not licensed also face limitations on their ability to represent their client/employer's corporate affiliates -- such a practice implicates a subset of the unauthorized practice of law rules called "multijurisdictional practice."

> employed. A similar question can arise concerning an unincorporated association and its local affiliates." (emphasis added)).

In fact, the ABA Model Rules do not explicitly address the permissibility of in-house lawyers representing a client/employer's corporate affiliates (other than in the multijurisdictional practice rule).[2]

The ABA addressed the issue of in-house lawyers representing corporate affiliates in ABA Informal Op. 973 (8/26/67).

In what was among the first analyses of the propriety of an in-house lawyer representing those other than the immediate client/employer, the ABA addressed the following question:

> May an attorney employed by a corporation render legal services to a subsidiary thereof or to other corporations interrelated therewith through interlocking directorates without direct lawyer client relationship with said subsidiaries or interrelated corporations, and without additional consideration from said sources?

ABA Informal Op. 973 (8/26/67). The ABA concluded that "there is no real problem" with such representation as long as "there is substantial identity of underlying ownership of both the employer corporation and the other corporation for which the staff attorney of the employer is requested to perform legal services." The ABA explained that "substantial identity of underlying ownership" exists

> in such situations as where the other corporation is a wholly owned subsidiary of the employer, or the employer is a wholly owned subsidiary of the other corporation, or the stock of both the employer and the other corporation is owned by substantially the same shareholders in substantially the same proportions.

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[2] ABA Model Rule 5.5(d)(1).

Id.

The ABA indicated that under those circumstances "we would as a matter of reality and practicality ignore, for purposes of ethical considerations, the separate legal identities of the employer and the other corporation," so that there "would in substance be only one 'client' involved." Id. (emphasis added).

The ABA warned such lawyers not to allow what the ABA calls their "basic client" to direct their judgment while representing the related entities. The ABA's reference to a "basic client" seems to recognize that there are several "clients" involved -- which is inconsistent with its earlier conclusion that "in substance" there is only one "client." The ABA nevertheless concluded that the in-house lawyer could provide legal advice to the other entities.

In discussing the lawyer's salary, the ABA explained that the payment of anything more than the "precise cost" of the lawyer's services by those related corporations would be impermissible.

The ABA suggested an alternative if the corporation did not require the lawyer's full time services -- adding the lawyer to the payroll of the other corporation on a part time basis.

The Restatement takes a similarly broad view.

> Under traditional concepts of unauthorized practice, a lawyer employed by an organization may provide legal services only to the organization as an entity with respect to its own interests and not, for example, to customers of the entity with respect to their own legal matters. Included within the powers of a lawyer retained by an organization . . . should be the capacity to perform legal services for all entities within the same organizational family.

Restatement (Third) of Law Governing Lawyers § 4 cmt. e (2000) (emphasis added).

Most states' legal ethics opinions have tended to follow the ABA's and the Restatement's lead in taking a very liberal approach to such representations.

- Virginia LEO 1838 (5/10/07) (indicating that in-house lawyers can provide legal services to their employer's sister corporation, as long as the lawyers provide "independent professional judgment" on behalf of the sister company "free of any interference or direction" from the lawyer's employer, and as long as the lawyers do not share the sister company's confidences with their employer; the Bar explaining (1) that "discharging this duty of confidentiality to [the sister corporation] may require [the lawyers] to work off-site, at a physically separate office, rather than on the premises of [their employer]"; (2) that the lawyers must be conscious of possible conflicts between their clients, and should address conflicts "with a letter of representation that outlines who the lawyer would continue to represent, if either, in the event of a conflict"; (3) that the lawyers' employer can charge and collect legal fees from the sister corporation for the lawyers' work, as long as the amount is a simple reimbursement, and the employer does not earn any "direct or indirect profit for legal services provided").

- Texas LEO 512 (6/1995) (an in-house lawyer for a corporation may perform legal services for joint ventures "in corporate and partnership form, with other corporations," even if the in-house lawyer's employer is only a minority owner of the joint venture).

- Philadelphia LEO 93-1 (4/1993) (an in-house lawyer for a "medical management services company" may perform legal services for separately incorporated clinics, which all have "common shareholders, with the major shareholder of the Corporation being a shareholder in most of the clinics," as long as the in-house lawyer avoids conflicts).

- Virginia UPL Op. 69 (12/3/84) (holding that an in-house lawyer may represent a client/employer "and its affiliates" in court).

- Tennessee LEO 84-F-80 (10/17/84) (in-house lawyers may represent the client/employer's subsidiaries and related partnerships).

- Tennessee LEO 83-F-52 (8/12/83) (an in-house lawyer employed by a limited partnership may represent related partnerships and corporations, even those not under the "structural umbrella" of the corporation which is a general partner and majority interest holder of the in-house lawyer's direct employer, but "which are owned, at least in part, by the principals or some of the principals in the firms" related to the partnerships and corporations, as long

as: the cost of the services are appropriately shared; the in-house lawyer's "direct employer" does not direct the in-house lawyer's judgment while representing other entities; and the lawyer avoids conflicts).

- Massachusetts LEO 83-9 (6/21/83) (in-house lawyers may represent a direct employer's subsidiary and "affiliates"; as long as the lawyers avoid conflicts, they may even represent affiliates if there is "a departure from . . . commonality of ownership interest" with the direct employer; lawyers must avoid having their judgment directed by the direct employer, and should advise both the "primary employer" and the other represented entities that the lawyer may not keep secret from one what is learned from others; also explaining that "[a] pro rata share of the cost of an attorney's services may be allocated to the affiliated corporation, but an attorney's fees separately charged may not be paid to the corporation").

- Dallas LEO 1982-3 (7/16/82) (in-house lawyers may perform services for a "related group" of corporations, because "affiliated or related corporations, in effect, may be regarded as a single entity" for conflicts purposes).

- Texas LEO 343 (9/1968) (corporations wholly owned and 50% owned by an in-house lawyer's direct employer are "for all practical purposes only one client," so that "it makes no difference which corporation is the general employer of the lawyer"; lawyers must be aware of possible conflicts if they represent "related corporations, which do not technically involve a parent, subsidiary or controlled corporation," but even in those situations "the possibility of the lawyer aiding his general corporate employer in the unauthorized practice of law . . . is more imaginary than real," because the in-house lawyer's employer "is merely providing a convenient means whereby the lawyer's services can be made available to the related corporations as they have need for such services").

Interestingly, one state has adopted a statute explicitly permitting such a practice by in-house lawyers.

> Nothing in this section shall prohibit an attorney retained by a corporation, whether or not the attorney is also a salaried employee of the corporation, from representing the corporation or an affiliate, or from representing an officer, director, or employee of the corporation or an affiliate in any matter arising in connection with the course and scope of the employment of the officer, director, or employee.

N.C. Gen. Stat. § 84-5(b) (emphasis added).

Only one legal ethics opinion seemed to be critical of such a practice, and even that opinion did not prohibit the practice.

- Wisconsin LEO E-89-8 (1989) (explaining that "[a]lthough dual representation of a house counsel's employer and entities affiliated with the employer may be possible under some circumstances, it would seem generally ill advised unless the ownership interest in the respective entities were identical" (emphasis added)).

Ethics Issues Implicated by In-House Lawyers' Representation of Affiliates

Not surprisingly, in-house lawyers' representation of their client/employer's affiliates involves a number of ethics issues.

A 2017 Illinois legal ethics opinion recommended that in-house lawyers treat their employer and its affiliates as separate clients – a surprising suggestion that few if any in-house lawyers seem to follow.

- Illinois LEO 17-05 (5/2017) (analyzing the loyalty (conflicts) and confidentiality implications of parent company's in-house lawyer's dealings with corporate subsidiaries of the lawyer's client/employer; recommending: (1) that lawyer treat subsidiaries as separate clients for loyalty/conflicts purposes, including even obtaining consents or prospective consents in the event of any "competing interests"; and (2) also treat subsidiaries as separate clients for confidentiality purposes, including even analyzing how confidential information will be shared among the corporate affiliates; "For the in-house lawyer, there is no one size fits all test for identifying the client. It may change depending on the circumstances of the representation. Is it the single corporate parent (whose interests may be considered to preempt the interests of any subsidiary, or in any case, be able to provide informed consent to any conflict waiver or disclosure of confidential information)? Or is it the legally distinct individual subsidiaries? Recognizing subsidiaries as separate clients seems to be acknowledged in the IRPC noted above, particularly IRPC 1.13. For practical purposes, treating subsidiaries as distinct clients would seem the better practice if for no other purpose than to focus the in-house lawyer's attention on identifying and addressing problematic legal and ethical issues."; "With respect to conflicts of interests, when an in-house lawyers is called upon to provide legal services to a related corporate entity that is not the lawyer's direct employer, the lawyer must be careful to recognize the potential for competing interests. . . . As with any representation, the in-house lawyer must consider and, if applicable,

> apply IRPC 1.7. Although impacted by client identification, the interests of intra-family corporate entities may or may not be considered aligned. If the interests are determined to conflict, an in-house lawyer can consider a number of actions to address and resolve the conflict. First and foremost is to obtain, if possible, the subsidiary's and parent's consent to the representation as permitted by IRPC 1.7(b). Counsel may also consider obtaining advance conflict waivers, limiting the scope of the representation to eliminate the potential conflict, or retaining outside counsel."; "Perhaps even thornier issues than conflicts arise with respect to confidentiality under IRPC Rule 1.6. Virginia State Bar Opinion 1838 provides that an in-house lawyer must maintain a subsidiary's confidences unless the subsidiary consents to disclosure. In most corporate contexts, maintaining this confidentiality from the corporate parent, and perhaps other subsidiaries, is likely unworkable and doesn't reflect the work of an in-house legal department. . . . Attempting to maintain confidentiality between related corporate entities, but particularly between a subsidiary and a parent, tends to disregard corporate ownership and hierarchy. . . . In these situations, as with conflicts of interest, a prudent course for the in-house lawyer may be to memorialize in writing how confidential information will be treated, obtain advance consent for disclosure, or retain outside counsel.").

Other bars have also dealt with several ethics issues.

Conflicts. Such a practice can result in conflicts of interest issues if adversity develops between the in-house lawyers' clients.

- Virginia LEO 1838 (5/10/07) (indicating that in-house lawyers can provide legal services to their employer's sister corporation, as long as the lawyers provide "independent professional judgment" on behalf of the sister company "free of any interference or direction" from the lawyer's employer, and as long as the lawyers do not share the sister company's confidences with their employer; the Bar explaining (1) that "discharging this duty of confidentiality to [the sister corporation] may require [the lawyers] to work off site, at a physically separate office, rather than on the premises of [their employer]"; (2) that the lawyers must be conscious of possible conflicts between their clients, and should address conflicts "with a letter of representation that outlines who the lawyer would continue to represent, if either, in the event of a conflict"; (3) that the lawyers' employer can charge and collect legal fees from the sister corporation for the lawyers' work, as long as the amount is a simple reimbursement, and the employer does not earn any "direct or indirect profit for legal services provided").

- Texas LEO 512 (6/1995) (holding that in-house lawyers may represent joint ventures in which their corporate employer is only a minority owner, as long

as the lawyers avoid conflicts; explaining that the "potential conflict does not arise by virtue of the extent of control or ownership that the corporation has in the joint venture, or because the corporation charges or does not charge an amount for providing the in-house lawyer. It is the simultaneous representation of the joint venture and the corporation that presents the potential for conflict . . . ."; "It is only when a potential or actual conflict develops into an impermissible conflict that the lawyer should withdraw.").

- ABA LEO 392 (4/24/95) (finding that corporations may not profit from "renting" their in-house lawyers to others, but that in-house lawyers may receive compensation above the corporation's costs without violating the ethics rules, as long as the lawyers "are in a position to give conflict-free representation to their other clients" and do not allow the corporate employer to interfere with their judgment).

- Massachusetts LEO 83-9 (6/21/83) (allowing in-house lawyers to represent companies "affiliated" with their client/employer, but recognizing that conflicts rules must be obeyed; also noting "the clients' consent to the representation after such disclosure is a prerequisite to multiple representation by the attorney").

These states' warning that lawyers representing multiple members of a corporate family must avoid conflicts seems somewhat inconsistent with the basic principle upon which the liberal approach rests -- that the lawyer is really representing just one "client."

Fees. A number of state bars have dealt with the ethics implications of an in-house lawyer's client/employer charging for the lawyer's services provided to others. The analysis takes one of several approaches.

First, some opinions have adopted a per se rule finding improper any arrangement under which the client/employer corporation receives any fee for the lawyer's services -- because the arrangement violates either the UPL or the fee-sharing rules.

These harsh opinions do not directly discuss in-house lawyers' representation of a client/employer's corporate affiliates, but would seem to apply if interpreted literally.

- Wisconsin LEO E-89-8 (1989) ("Wisconsin for-profit business entities may not engage in the practice of law . . . [so] full-time house counsel may not participate in any arrangement under which his or her employer charges for his or her legal services.").

Second, a number of opinions found that a client/employer corporation's profiting from the in-house lawyer's services would violate the UPL or fee-sharing rules. Unlike the per se approach discussed above, these opinions allow the corporation to receive fees that equal the corporation's cost (presumably covering the in-house lawyer's salary, overhead, etc.).

- Virginia LEO 1838 (5/10/07) (indicating that in-house lawyers can provide legal services to their employer's sister corporation, as long as the lawyers provide "independent professional judgment" on behalf of the sister company "free of any interference or direction" from the lawyer's employer, and as long as the lawyers do not share the sister company's confidences with their employer; the Bar explaining (1) that "discharging this duty of confidentiality to [the sister corporation] may require [the lawyers] to work off site, at a physically separate office, rather than on the premises of [their employer]"; (2) that the lawyers must be conscious of possible conflicts between their clients, and should address conflicts "with a letter of representation that outlines who the lawyer would continue to represent, if either, in the event of a conflict"; (3) that the lawyers' employer can charge and collect legal fees from the sister corporation for the lawyers' work, as long as the amount is a simple reimbursement, and the employer does not earn any "direct or indirect profit for legal services provided" (emphasis added)).

- Texas LEO 531 (12/1999) ("the corporation may not charge wholly-owned subsidiaries 'market-based fees' for the legal services rendered by the corporation's in-house counsel. To permit the corporation to recover anything other than its 'costs' (even if those costs were later reimbursed to the subsidiary by means of a rebate) would permit the corporation to profit financially from the legal services provided by its in-house counsel and thereby engage in the unauthorized practice of law").

- Texas LEO 512 (6/1995) (concluding that a lawyer employed by a corporation may provide legal services to such related entities as a joint venture in which the corporate employer is a minority owner, as long as "any reimbursement by the joint venture or the other venturers for the compensation paid by the corporation to the lawyer is calculated in good faith to pay no more than the

full costs to the corporation of the portion of the lawyer's time that is devoted to services for the joint venture" (emphasis added)).

- ABA LEO 392 (4/24/95) (analyzing a corporation's "rent" of its in-house lawyer to perform legal work for "other clients"; concluding that "while a corporation should be free to require its lawyers to reimburse its costs of employing in-house counsel when the lawyers do work for others, or to be made whole for the costs it actually incurred in a case when its lawyers are awarded fees by a court, a corporation may not reap profits from the work of its in-house attorneys" (emphasis added); explaining that "[i]t is permissible for the in-house lawyers, rather than the corporation, to receive a reasonable fee beyond the amount the lawyers cost the corporation" as long as the lawyers do not let the corporation guide their professional judgment).

- Virginia UPL Op. 69 (12/3/84) (a Virginia licensed in-house lawyer may represent a bank, its affiliates and "second-tier" affiliates in judicial proceedings; the in-house lawyer and staff may prepare loan documents on behalf of the bank and affiliates, and collect a fee from the customers for the preparation -- as long as the fee "bears a reasonable relationship to the legal expense associated with the transaction").

- ABA Informal Op. 973 (8/26/67) (warning that any compensation to the client/employer risks having a nonlawyer direct the lawyer's services; "[t]echnically, we believe that reimbursement by the other corporation to the employer of the precise cost to it of supplying the lawyers' services would not constitute exploitation of his professional services in this limited monetary sense. However, payment of anything more would, and precise calculation of exact cost to the employer may not be practical."; concluding that the corporation charging for an in-house lawyer's services performed "for other corporations not owned by substantially the same interests as his own employer . . . very probably result[s] in violations" of the UPL prohibition and the rule prohibiting lawyers from having their professional guidance directed by nonlawyers).

Third, one legal ethics opinion seems to have permitted an internal corporate allocation of costs, but not a direct charge by the corporate client/employer (this opinion does not make much sense, and seems to emphasize form over substance).

- Massachusetts LEO 83-9 (6/21/83) (permitting in-house lawyers to represent corporations affiliated with their client/employer; explaining that "[a] pro rata share of the cost of an attorney's services may be allocated to the affiliated corporation, but an attorney's fees separately charged may not be paid to the corporation").

Thus, legal ethics opinions differ about whether corporations may charge for (or profit) from services that their in-house lawyers provide to others. The plurality of opinion seems to permit charges, but not profits.

Whatever the formulation, this issue probably will not present a great impediment to most corporations, most of which would probably be willing to forego any profits (or even reimbursement) in order to shield their in-house lawyers from possible UPL charges (and save the corporation from the leverage that those charges might give an adversary).

Nonlawyers' Direction. A small number of legal ethics opinions have dealt with the possible ethics violation involving a nonlawyer (the corporate employer) directing a lawyer's judgment.

These opinions have warned lawyers to avoid the problem, rather than finding an inevitable violation.

- ABA LEO 392 (4/24/95) (noting that a corporation's profiting from "renting" its in-house lawyers to others would "encourage greater interference with the professional judgment of a lawyer than would occur if the corporation simply were to receive reimbursement of costs"; explaining that lawyers may receive compensation beyond the corporation's costs without violating the ethics rules, "[s]o long as the lawyers do not permit any interference by the corporate employer with their professional judgment").

- Massachusetts LEO 83-9 (6/21/83) (finding that in-house lawyers may represent corporate "affiliates" of their employers, but warning that the lawyers may not permit "the entity which employs or pays the attorney to render legal services for another to direct or regulate the attorney's professional judgment in rendering such legal services").

Confidentiality. A number of legal ethics opinions have dealt with the confidentiality implications of in-house lawyers providing legal services to those other than their direct client/employers.

- Virginia LEO 1838 (5/10/07) (indicating that in-house lawyers can provide legal services to their employer's sister corporation, as long as the lawyers provide "independent professional judgment" on behalf of the sister company "free of any interference or direction" from the lawyer's employer, and as long as the lawyers do not share the sister company's confidences with their employer; the Bar explaining (1) that "discharging this duty of confidentiality to [the sister corporation] may require [the lawyers] to work off site, at a physically separate office, rather than on the premises of [their employer]"; (2) that the lawyers must be conscious of possible conflicts between their clients, and should address conflicts "with a letter of representation that outlines who the lawyer would continue to represent, if either, in the event of a conflict"; (3) that the lawyers' employer can charge and collect legal fees from the sister corporation for the lawyers' work, as long as the amount is a simple reimbursement, and the employer does not earn any "direct or indirect profit for legal services provided" (emphasis added)).

- Massachusetts LEO 83-9 (6/21/83) ("[W]hen representing a company other than his or her primary employer, the attorney and his or her employer should understand that the confidences and secrets of the affiliate may not, without the affiliate's consent after full disclosure, be revealed by the attorney to, or used for the benefit of, the employer. When representing an affiliate and the employer, both clients should be advised that their respective confidences and secrets gained by the attorney in the course of the representation may not be withheld from the other, unless the clients make some other arrangement." (emphasis added)).

As with the conflicts analysis, these opinions recognize that the in-house lawyers are representing multiple clients.

Best Practices. While most analyses of in-house lawyers providing legal services to those other than their client/employer analyze hypothetical situations, a few legal ethics opinions offer advice about how to structure a representation so that it avoids any ethics violations.

The very first ABA analysis of this issue suggested one solution, and a later state legal ethics opinion echoed the ABA's thoughts.

- ABA Informal Op. 973 (8/26/67) (allowing in-house lawyers to provide legal services to affiliated corporations if there "is substantial identity of underlying ownership" of the affiliated corporation and the client/employer; finding

various ethics prohibitions on in-house lawyers providing legal services to affiliated corporations "not owned by substantially the same interests as his own employer," but noting that "such of the other corporations as desire to have his services available on a regular basis could place him on their own payrolls on a part-time basis, with perhaps a corresponding reduction in his salary from his basic regular employer, or he could be retained and compensated directly and separately by any corporation other than his employer for each service he performs for such other corporation and his employer could make a pro rata reduction in his salary for the period involved, based upon the amount of his time devoted to the affairs of the other corporation rather than to his employer's business" (emphases added)).

- Washington Advisory Op. 1594 (1995) (finding that nothing in the Washington State ethics rules "prohibit a lawyer from being part-time, in-house corporate counsel for more than one client").

Other states would presumably recognize this solution too, because most (if not all) states permit lawyers to work for more than one employer -- although the lawyer must obviously avoid conflicts problems, etc. However, lawyers choosing this solution must be licensed by the state in which they hope to set up a separate practice -- to avoid violating multijurisdictional prohibitions.

Best Answer

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

N 3/12

Representing Company Employees

Hypothetical 19

After several years in private practice, you joined a local company's law department as Associate General Counsel. You mostly handle labor and employment matters for your client/employer. You are trying to reduce the cost of outside counsel, and you are wondering if you can represent both your client/employer and its executives or other employees jointly sued in employment discrimination or other employment cases.

May in-house lawyers represent their client/employer's executives or other employees?

YES (PROBABLY)

Analysis

In-house lawyer's representation of their client/employer's employees can implicate a number of ethics principles.

The most basic issue is whether an in-house lawyer may do so without violating the applicable unauthorized practice of law rules. If such a lawyer is not fully licensed in the state where he or she practices, such a representation might also implicate multijurisdictional practice principles.

To the extent that an in-house lawyer may undertake such a joint representation, the lawyer must also analyze all of the ethics issues implicated by joint representations (conflicts of interest, confidentiality, etc.).

Although not limited to (or even discussing) in-house lawyers, ABA Model Rule 1.13 specifically acknowledges such joint representations.

> A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual

> representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

ABA Model Rule 1.13(g).

Interestingly, one state has adopted a statute explicitly permitting such joint representations by in-house lawyers.

> Nothing in this section shall prohibit an attorney retained by a corporation, whether or not the attorney is also a salaried employee of the corporation, from representing the corporation or an affiliate, or from representing an officer, director, or employee of the corporation or an affiliate in any matter arising in connection with the course and scope of the employment of the officer, director, or employee.

N. C. Gen. Stat. § 84-5(b) (emphasis added).

There appear to have been only a handful of legal ethics opinions on this issue.

- Missouri Informal LEO 950016 (undated) (in-house lawyers may defend both "the corporation and individual employees"; the corporation may indemnify the in-house lawyer for malpractice related to the representations).
- Wisconsin LEO E-89-8 (1989) (although in-house counsel would be "well advised" to represent only the corporate employer, as long as in-house counsel avoid conflict, they "may represent other persons or entities, whether they or the legal matters in question are related to the employer-business").
- Philadelphia LEO 87-25 (11/1987) (holding that an in-house lawyer for a school district may represent the school district and a school principal, as long as the lawyer is not later adverse to the previously represented principal).

One state permitted in-house counsel to provide a limited representation of corporate officers and employees.

- Alabama LEO 1986-52 (5/26/86) (an in-house lawyer "may advise other employees of [the corporation] if the advice involves legal problems of [the corporation], but may not practice law individually for the other employees").

Thus, the few states to have dealt with the issue have permitted in-house lawyers to represent their client/employer's employees. Significantly, the opinions generally limit the permissible representation to company-related matters. For instance, an in-house lawyer can represent an employee in a discrimination case, but presumably not in a divorce action.

States that take a more narrow view might require in-house lawyers to essentially establish a separate law practice (although perhaps not requiring a separate physical location) to undertake representations of employees. For instance, an old Virginia UPL opinion seemed to require an in-house lawyer wishing to represent a company employee to establish an entirely separate practice.[1] Since then, the Virginia Bar has dramatically softened the requirement for a separate practice (in the context of handling pro bono work, but certainly applicable in the case of an in-house lawyer's representation of company employees as well).[2]

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[1] Virginia UPL Op. 167 (3/5/93) (holding that an in-house lawyer may not provide legal services to the president/owner/CEO of the corporation employing the in-house lawyer, and that "the attorney may only render legal services to the CEO if the attorney is a bar member who maintains a practice separate from his employment with the corporation" (emphasis added)).

[2] Virginia UPL Op. 211 (12/5/06) ("In UPL Opinion 167 the Committee concluded that 'the attorney may only render legal service to the CEO if the attorney is a bar member who maintains a practice separate from this employment with the corporation.' . . . The issue raised in this request is whether a Virginia licensed corporate counsel providing pro bono legal services through an independent entity satisfies the 'practice separate from' his employment requirement. The requirement in UPL opinion 167 of a separate law practice was similarly expressed in Richmond Ass['n] of Credit Men, [167 Va. 327, 189 S.E. 153 (1937)] to ensure that the lay corporate entity was not holding out to provide, or was not providing, legal services and that the attorney would maintain his/her independence in representing a client, free from any influence or control by the corporate entity. In the inquiry presented, the Virginia-licensed corporate counsel would provide pro bono legal representation through a community-based legal services entity. As described, the entity and the work would be completely separate from the corporate employer, the corporate employer would not be offering the legal services nor would the corporate employer have any control over the entity or the legal representation. The corporate employer would, however, allow the attorney access to administrative support and time off to work with this service. This scenario is distinguishable from those presented in UPL Opinions 57 and 167 in both of which opinions the situation involved a corporate counsel providing representation to clients other than the corporate entity directly from his position as corporate counsel and under the auspices of the corporate entity. As

As mentioned above, most bar analyses of such joint representations arise in the context of multijurisdictional practice rules -- because the in-house lawyer is not fully licensed where he or she is practicing, and wishes to represent such employees.

Best Answer

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

N 3/12

described, this scenario provides that the attorney would be offering his/her legal services through 'a practice separate from [his/her] employment with the corporation.' This satisfies the 'separate practice' requirement of UPL opinion 167 and the attorney participating in this program would not be engaged in the unauthorized practice of law.").

Representing Company Customers

Hypothetical 20

You serve as the general counsel (and only lawyer) at a local company which provides software services to local businesses under contract with the federal government. Many of your customers have trouble dealing with the federal government (both in connection with using your software and generally). Over lunch, you and your company's CEO have discussed what you can do to help these customers.

(a) May you represent your client/employer's customers in their dealings with the federal government in other matters unrelated to your company's software?

NO (PROBABLY)

(b) May you represent your client/employer's customers in their dealings with the federal government related to your company's software?

NO (PROBABLY)

Analysis

(a)-(b) Some in-house lawyers may wish to represent such completely independent entities or individuals as their client/employer's customers.

At the extreme, such a practice seems to amount to the clearly impermissible practice of law by a lay corporation -- such as an in-house lawyer employed by a grocery store setting up a desk in the fruit aisle and preparing wills for customers who wander by.

General Rules

The ABA discussed the generic issue of in-house lawyers providing legal services to "third persons" in ABA LEO 392 (4/24/95).

Although not specifically discussing in-house lawyers working for their corporate employer's customers, the ABA indicated that it "has been asked whether it is proper for such a corporation to 'rent' its in-house lawyers to perform legal works for other clients" and earn a profit when doing so. The ABA concluded that the corporation may not earn a profit, but that "[i]t is permissible for the in-house lawyers, rather than the corporation, to receive a reasonable fee beyond the amount the lawyers cost the corporation" as long as the lawyers avoid conflicts and interference by the corporation with their independent professional judgment. ABA LEO 392 (4/24/95).

Despite the ABA Model Rules' silence on this issue, the Restatement contains a fairly strict prohibition on in-house lawyers representing their client/employer's customers.

> Under traditional concepts of unauthorized practice, a lawyer employed by an organization may provide legal services only to the organization as an entity with respect to its own interests and not, for example, to customers of the entity with respect to their own legal matters.

Restatement (Third) of Law Governing Lawyers § 4 cmt. e (2000) (emphasis added).

Interestingly, one particular type of extraneous representation has received special attention -- an insurance company's in-house lawyers' representation of that company's insureds.

- Golden v. State Farm Mut. Auto. Ins. Co., 745 F.3d 252, 254 (7th Cir. 2014) (holding that State Farm was not obligated to disclose that its in-house counsel might represent the insured; "In October 2009, Golden was sued as the result of a collision she had been in earlier that year. She was represented in the suit by Patrick J. Murphy, who worked in the corporate law department of State Farm. At the outset, Murphy fully and accurately disclosed to Golden his status as a State Farm employee. Specifically, Golden received a letter from Murphy explaining that he was an attorney 'working as a full time employee of State Farm,' advising her that he had an

ethical obligation to ensure that neither his 'professional judgment' nor the quality of his legal service would be 'compromised by any guidelines or other directives that might be issued by State Farm.'").

- Bowers v. State Farm Mut. Auto. Ins. Agency, 932 N.E.2d 607, 610 (Ill App. Ct. 2010) (allowing an insurance company's in-house lawyer to represent insureds according to an Illinois statute; "Section 5 plainly states that a corporation may employ an attorney in any litigation in which the corporation may be interested by reason of the issuance of any policy of insurance. Accordingly, it is lawful for insurance carriers such as State Farm to employ attorneys or a law firm to defend their policyholders.").

Perhaps because of the political power of the insurance industry, this type of representation seems to have been more widely accepted than the analogous representations described above. [1]

States take varying approaches to the permissibility of in-house lawyers representing their client/employer's customers. Most states prohibit such activity.

- New York LEO 1081 (01/08/2016) ("Lawyers employed by a debt management company under the direction of a nonlawyer managing director may not provide legal services to the company's customers. If the services are legal services, the inquirers may be aiding a nonlawyer in the practice of law, allowing a nonlawyer to interfere with their independent professional judgment, sharing legal fees with nonlawyers, and providing incompetent representation to clients, and they may have personal conflicts of interest. If the services are not legal services and the clients do not believe they are legal services, then the only applicable ethical rules would be those that apply even where the lawyer does not have an attorney-client relationship, such as the prohibition against conduct involving dishonesty.").

- Scharrer v. Fundamental Administrative Svcs., 176 So. 3d 1273, 1276, 1279 (Fla. 2015) (rejecting a Florida Bar opinion on whether a lawyer's actions in Florida constituted the unauthorized practice of law, because the bar opinion was not specific enough; "The Standing Committee consolidated these questions into a single issue: 'Whether a nonlawyer company engages in the unlicensed practice of law in Florida when the nonlawyer company or its in-

[1] Virginia LEO 598 (6/1/85) (an in-house lawyer for an insurance company may represent an insured, but must remember that the insured is the client; among other things, the insured's lawyer may not reveal information acquired from the insured that would allow the carrier to deny coverage; approved by the Virginia Supreme Court on Mar. 8, 1985, effective June 1, 1985).

house counsel, who is not licensed to practice law in Florida, controls, directs, and manages Florida litigation on behalf of the nonlawyer company's third-party customers when the control, direction, and management is directed to a member of The Florida Bar who is representing the customer in the litigation?' The proposed advisory opinion answers this question in the negative, finding that, generally speaking, it does not constitute the unlicensed practice of law for a nonlawyer company or its in-house counsel (who is not licensed in Florida) to control, direct, and manage Florida litigation on behalf of the nonlawyer company's third party customers when the control, direction, and management is directed to a member of The Florida Bar who is representing the customer in litigation. However, the Standing Committee also concluded that, while generally such conduct is not the unlicensed practice of law, there are circumstances where the opposite may be true, and the activity of the nonlawyer company or its in-house counsel could constitute unlicensed practice. The answer would be dependent on the level of involvement of the Florida lawyer versus the level of involvement of the nonlawyer."; "Petitioners, FAS [defendant] and Zack [in-house lawyer for FAS], and other individuals and organizations have submitted briefs in opposition to the Standing Committee's proposed advisory opinion, raising a number of procedural and substantive concerns. However, as discussed below, because we conclude that the advisory opinion does not properly address the specified conduct at issue, as contemplated in our decision in Goldberg [Goldberg v. Merrill Lynch Credit Corp., 35 So. 3d 905 (Fla. 2010)], we disapprove the advisory opinion without prejudice."; [W]e disapprove the advisory opinion; however, our decision is without prejudice to Petitioners submitting a revised petition for an advisory opinion, and to the Standing Committee conducting further proceedings consistent with our opinion in this case.").

- Illinois LEO 14-03 (5/2014) (analyzing the following situation: "The lawyer is a staff attorney with a financial services company. The company plans to advertise that it can help individuals who were denied social security disability benefits with their appeal. The company then plans to have staff attorneys (who are on salary with the company) handle the individual's social security disability claims."; "Given the high likelihood that compromises will be necessary, it is not reasonable for the lawyer to believe that his representation of the customers who seek social security appeals would not be materially limited or adversely affected by his employment with the financial services company, and vice versa."; in a footnote, noting as follows: "While the Committee recognizes that 20 CFR 416.1505 of the Social Security Act permits claimants to be represented by lawyers and nonlawyers, the designation of the lawyer by the financial services company to represent customer claimants still obligates the lawyer to abide by the Rules of Professional Conduct. We decline to opine on whether the financial services company would be engaged in the unauthorized practice of law in light of the provisions of the Social Security Act."; "With certain exceptions, it is unlawful

for a corporation to practice law in Illinois or to render legal services; and the corporation cannot avoid this prohibition by providing the legal services through an employee who is licensed to practice law. . . . In providing legal services on behalf of the financial services company, the lawyer may be at risk of assisting his employer in the unauthorized practice of law which is contrary to Rule 5.5 (a)."; "A similar situation was addressed in ISBA Advisory Opinion No. 97-03 (September 1997), where a lawyer employed by a 'management services organization' was asked to provide legal services to the customers of the organization. The Committee was of the opinion that since it would be unlawful for the 'management services organization' to provide legal services under the Illinois Corporation Practice of Law Prohibition Act, 705 ILCS 220/1; the lawyer employed by the organization would be in violation of Rule 5.5, if he provided legal services to its customers."; "Further, there are ethics opinions from other jurisdictions that have also concluded that such representation as contemplated in this inquiry would be professionally improper. See e.g., Maine Ethics Opinion 180 (2002) (lawyer who is a salaried employee of a private nonprofit credit counseling corporation may not represent corporation's bankruptcy clients); New Jersey Ethics Opinion 716, 25 Law Man. Prof. Conduct 472 (2009) (lawyer may not provide legal services to customers of for profit loan modification company); and Florida Bar Association Ethics Alert (revised 2011) (lawyer employed as in-house counsel for nonlawyer company that provides foreclosure-related services to distressed homeowners may not provide legal services to company's customers)."; "The second issue raised in this inquiry is whether the arrangement constitutes fee-sharing with a nonlawyer. Sharing fees with a nonlawyer is expressly prohibited by Rule 5.4(a), unless the situation falls within one of the exceptions; none of which apply to the instant case. It would be immaterial that the lawyer was not paid directly from the legal fees paid by the social security claimants. The Committee agrees with the reasoning in the Maine Ethics Opinion 180 cited above which concluded that: 'Applying the Bar Rule to the facts, the Commission believes that there is little, if any substantive difference between a lawyer sharing a fee with a non-lawyer and as here, a lawyer being paid a salary by a non-lawyer in order to provide legal representation to fee paying clients of the non-lawyer.'"; "Accordingly, the arrangement between the lawyer and the financial services company in relation to the lawyer's representation of the social security appeal claimants would constitute fee sharing in violation of Rule 5.4(a).").).

- Washington LEO 2169 (2008) (holding that an in-house lawyer could not represent customers of the lawyer's employer/client; ultimately reaching this conclusion based on a fee-split rule, and therefore implying that the practice would not violate the UPL rules; explaining the factual background: "The inquirer is general counsel to a duly licensed real estate brokerage that syndicates houses for sale in Washington on the internet. The inquirer wants to provide limited-scope legal representation services to the customers of the brokerage. The services would be limited to answering miscellaneous legal

questions relevant to the home selling process. The customer would receive a disclosure about the limited scope of the representation and relevant conflicts of interest information stating that the inquirer is also general counsel to the brokerage. Further, the customer would be advised that if conflicts of interest were to arise between them and the brokerage, the inquirer would immediately cease representation of either party and each would need to secure separate counsel. Customer questions within the limited-scope would be answered by the inquirer and, if the [sic] outside the limited-scope, the customer would be advised to seek outside counsel. The customer would not be charged any extra or special fees for the limited-scope representation because it would be part of the total services provided by the brokerage. The inquirer would be paid a straight salary for his legal work, regardless of if the services were as general counsel only or included limited-scope representation of the customers."; explaining that the in-house lawyer would be violating the fee-split rules by engaging in the conduct).

- Georgia LEO 99-2 (10/18/99) (finding that a real estate lending institution's in-house lawyer may not provide legal services to the institution's customers "which are in any way related to the existing relationship between the institution and its customer" because "[s]uch conduct would . . . constitute an impermissible conflict of interest").

- Kansas LEO 97-03 (7/9/97) (prohibiting a computer company's provision of legal services to its customers through its in-house lawyers if the services are designed to assist in the sale of software providing essentially legal advice, although presumably allowing such representations otherwise).

- North Carolina RPC 201 (1/13/95) (explaining that an in-house lawyer cannot represent the lawyer's employer's customers; "Attorney A may only provide legal services to customers of Real Estate Company who are referred to him by Real Estate Company, but he may not share his legal fees with Real Estate Company nor may he pay Real Estate Company anything for recommending his services. See Rule 2.3(c), which prohibits a lawyer from giving anything of value to someone for recommending his services, and Rule 3.2, which prohibits the sharing of fees with nonlawyers. Moreover, <u>if Attorney A is employed by Real Estate Company as in-house counsel and, as such, is providing legal services to the customers of Real Estate Company, it would be a violation of G.S. §84-5 which forbids corporations to engage in the practice of law</u>." (emphasis added)).

- Texas LEO 498 (3/1994) (prohibiting in-house lawyers from providing legal services to the corporation's customers, if the corporation receives some payment, but presumably permitting the representations otherwise).

- Virginia UPL Op. 167 (3/5/93) (citing an earlier UPL opinion "which concluded that, since a lay corporation cannot practice law, no lay corporation may provide legal services to its customers").

- Ohio LEO 92-17 (10/15/92) ("[a] corporation's lawyer may not provide private legal representation to the corporation's clients on matters relating to issues on which the corporation has worked" (emphases added); such an arrangement "improperly compensates the corporation for a recommendation of professional employment" and carries other risks as well; although some of the ethical dangers may be avoided, "it would be impossible to comply with disciplinary rules regarding recommendation of professional employment"; noting that states disagree about this issue).

- Virginia UPL Op. 160 (10/15/92) (explaining that a lawyer acting as "the de facto" in-house lawyer for a construction company and also acting as an engineer for the construction company can provide legal services to and prepare legal instruments for the employer, but not for the employer's customers; "[T]he Committee is of the opinion that it would constitute the unauthorized practice of law for the in-house counsel to provide legal services, including the completion of standard industry contract forms, to the various owners/clients of the architectural/engineering firm since those owners/clients are not the 'regular employer' of the in-house counsel and since the architectural/engineering firm, as a lay firm, is not authorized to provide legal services." (emphases added); also explaining that even a non-lawyer can prepare contracts for the employer, although not for any of the employer's clients; "[S]ince bar membership is not a requisite for an individual to advise or prepare documents for his regular employer, the Committee is of the opinion that it would not constitute the unauthorized practice of law for non-lawyer employees to prepare standard industry construction contracts for the firm, although preparation of such documents for clients of the firm would not be permissible.").

- Philadelphia LEO 89-1 (3/1989) (expressing "substantial concern" with a consulting firm's provision of legal services by the firm's in-house counsel to the firm's clients (because of the possibility of fee-sharing, a non-lawyer's direction of legal services, and conflicts), but not totally prohibiting such representations).

- Tennessee LEO 84-F-74 (6/13/84) (repeating the holding of Tennessee LEO 83-F-44).

- District of Columbia LEO 135 (4/17/84) (in-house counsel may represent a corporate employer's client as long as no non-lawyer earns a profit, and as long as no non-lawyer exercises control over the representation).

- Virginia UPL Op. 57 (3/1/84) (in-house lawyers for a financial corporation may not provide legal services to the company's customers; explaining that the corporation billed the customers for the legal services, but apparently finding the representation improper even without such billing).

- Tennessee LEO 83-F-44 (4/14/83) ("[a]ny participation by corporate counsel in performing legal services to corporate customers is in violation of [the ethics Code] which prohibits a lawyer from aiding a non-lawyer in the unauthorized practice of law" (emphasis added)).

- Iowa LEO 80-46 (11/7/80) ("[n]o legal services should be provided [by an in-house lawyer] specifically to third persons, namely, customers of that employer" (emphases added)).

One 2009 Pennsylvania LEO inexplicably permitted an in-house lawyer to represent non-clients on both sides of a transaction in which the lawyer's client/employer was involved.

- Pennsylvania LEO 2009-003 (1/26/09) (explaining that an in-house lawyer for a real estate developer may represent buyers and sellers of real estate in transactions in which the developer is involved; "Your employer has already given permission for you to be retained by individuals who would participate in these real estate transactions. Your participation would not be directly prohibited, at out [sic] the outset, but we believe that, prior to retention, you should obtain informed consent from your clients, pursuant to Rule 1.7(b)(4), for reasons presented in example [7] of the comments. You should inform your potential clients that although these transactions normally proceed uneventfully, there is a potential for conflict of interest in the event that the transaction fails and there are conflicting claims to the sum on deposit that your client initially provided or to which your client became entitled."; "In the event that such a conflict would arise in connection with the transaction, that conflict could not be resolved by consent, on the part of either your employer or your client, because the transaction becomes a prohibited representation as discussed in the comments in Rule 1.7. [Y]ou would be unable to continue representation of either party, your employer or your client, and you therefore would be required to withdraw from any and all representation. . . . You informed me that your employer is willing to have you withdraw from representing that party, in the event of such a conflict, and your client would also be required to permit such withdrawal in the even[t] that the projected conflict actually arises."; inexplicably not dealing with the unauthorized practice of law issue).

Ethics Issues Implicated by In-House Lawyers' Representation of Customers

In-house lawyers representing their client/employer's customers (where permitted by their bars) must wrestle with many of the same ethics issues confronting in-house lawyers representing corporate affiliates or corporate employees.

Fees. A number of state bars have dealt with the ethics implications of an in-house lawyer's client/employer charging for the lawyer's services provided to others. The analysis takes one of several approaches.

First, one opinion adopted a per se rule finding improper any arrangement under which the client/employer corporation receives any fee for the lawyer's services -- because the arrangement violates either the UPL or the fee-sharing rules.

- Texas LEO 498 (3/1994) ("In situations where a lawyer is employed by a corporation that is not a professional corporation and provides legal services to customers of the corporation, a major constraint imposed on the lawyer by the Texas Disciplinary Rules of Professional Conduct is that the corporation must not receive payment for the lawyer's services. If payment were received by the corporation, the arrangement would amount to an agreement by the lawyer to share legal fees with a nonlawyer (the corporation) in violation of Rule 5.04(a)" (emphases added)).

Second, one state found that a client/employer corporation's profiting from the in-house lawyer's services would violate the UPL or fee-sharing rules. Unlike the per se approach discussed above, this opinion would allow the corporation to receive fees that equal the corporation's cost (presumably covering the in-house lawyer's salary, overhead, etc.).

- Massachusetts LEO 84-1 (1984) ("[a] charge by a bank to a mortgagor of a fee for legal services rendered to the bank by its staff attorney that exceeds the cost to it of those services involves a prohibited sharing of legal fees with a non-lawyer"; explaining that the arrangement would be improper "if the bank charged the mortgagor more for the staff attorney's services than the actual, pro rata cost to the bank of those services, including overhead").

Third, a number of bars have dealt with the issue of fee splitting.

- Kansas LEO 97-03 (7/9/97) (finding that "the corporate attorney [who] gives legal advice to corporate customers" is not engaged in unethical fee splitting if "there is no direct or indirect charge by the corporation for that advice"; explaining, however, that if the cost of that legal advice is recouped by the corporation through the sale of its products, "this pass-through is an indirect violation" of the fee-split rules).

- Ohio LEO 92-17 (10/16/92) (explaining that any fee sharing concern "could be overcome by a corporate lawyer billing the corporate client directly for private legal services. In so doing, there would not be a sharing of legal fees with the corporation and thus, there would be no violation of the rule prohibiting division of fees with a non-lawyer."; nevertheless ultimately concluding that a corporation's in-house lawyer may not provide legal advice to the corporation's clients on "matters relating to issues on which the corporation has worked").

- Philadelphia LEO 89-1 (3/1989) (expressing "substantial concern" with a corporation's in-house lawyer providing legal services to the corporation's clients; explaining that impermissible fee-sharing would occur because "the lawyer's duties will include giving legal advice to clients of the consulting firm, and, presumably, a fee will be paid for that service," meaning that these fees become revenues of the firm and are distributed to non-lawyer personnel in violation of the fee-split rules).

Payment for Recommendation. One state indicated that in-house lawyers providing legal services to the corporate client/employer's customers inevitably violates the ethics rule barring lawyers from rewarding those who recommend him or her (the rule prohibiting lawyers from making cash payments to ambulance drivers to recommend the lawyers to accident victims, etc.). That opinion found such an ethics violation essentially unavoidable.

- Ohio LEO 92-17 (10/16/92) ("A corporation's lawyer may not provide private legal representation to the corporation's clients on matters relating to issues on which the corporation has worked . . . [because] it would be impossible to comply with disciplinary rules regarding recommendation of professional employment. A corporation's attorney available to privately represent the corporation's clients adds value to the corporate services and thus improperly

compensates the corporation for a recommendation of professional employment.").

Conclusion

Most states prohibit in-house lawyers from representing their client/employers' customers. This approach makes sense in the abstract, because otherwise an in-house lawyer for a retail operation could represent the retail operation's customers -- essentially allowing the retail client/employer to become a law firm.

Best Answer

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

N 3/12

Representing Pro Bono Clients

Hypothetical 21

You have become quite active in your local bar association, and the other members welcome both your insights as an in-house lawyer and some of the corporate support you can arrange for several worthwhile projects. Among other things, your client/employer has opened its offices in the evening for various "no bills nights" as part of your local bar's push to increase pro bono representation of indigents.

As an in-house lawyer, may you represent local indigent people pro bono?

YES (PROBABLY)

Analysis

Limits on in-house lawyers' ability to represent third parties have hampered states' efforts to encourage pro bono activities.

Not surprisingly, bars seem to stretch the rules in order to permit in-house lawyers to perform laudable pro bono services.

In-house lawyers can provide very valuable pro bono work. The ABA Model Rule for Registration of In-House Counsel explicitly permits pro bono activity.

> Notwithstanding the provisions of paragraph B above, a lawyer registered under this section is authorized to provide pro bono legal services through an established not-for-profit bar association, pro bono program or legal services program or through such organization(s) specifically authorized in this jurisdiction.

Am. Bar Ass'n Section of Legal Education & Admissions to the Bar, Report to the House of Delegates, § C (Aug. 2008).

The influential Association of Corporate Counsel has urged states to allow in-house lawyers' pro bono work even if they are not fully licensed in a state.

- Letter from Ass'n of Corporate Counsel to Clerk of Supreme Court of Ariz. (May 21, 2013), http://www.acc.com/advocacy/upload/ACC-Arizona-pro-bono-letter-May-2013.pdf (urging Arizona to allow pro bono work by in-house lawyers registered in Arizona but not fully licensed there; "Arizona has a historic opportunity to recognize more fully the sophistication, the experience, and the capacity that all of Arizona's in-house lawyers have to help the enormous number of Arizona residents who need legal services but cannot afford to pay. The Supreme Court of Arizona is considering whether to permanently amend Supreme Court Rule 38(e) to make it easier for registered Arizona in-house lawyers whose law licenses come from elsewhere to provide pro bono assistance. On behalf of the Association of Corporate Counsel and our Arizona Chapter, we are writing to support the proposal. Indeed, we urge this Court to go even further in removing rules that hinder the ability of registered in-house counsel to provide pro bono legal services." (footnote omitted); "First, the proposal would still require affected in-house lawyers to work 'in association' with an approved legal services organization that employs an Arizona-licensed lawyer. . . . By requiring registered in-house counsel to work in association with an approved legal services organization, the proposal would wrongly imply that the covered in-house lawyers -- whose employees hire them because they are smart and effective and experienced -- are second-class counsel."; "Second, while the proposal is not clear on this, it does not explicitly allow lawyers practicing under Rule 38(e)(1)(B) to do away with the *pro hac vice* process when representing pro bono clients in the state courts."; "[W]e request that, in addition to the proposed changes to Rule 38(e)(3), this Court take the additional steps of eliminating the association and *pro hac vice* requirements.")

Commentators have also encouraged states to permit such in-house lawyers to handle pro bono work.

- Esther Lardent, Do Our Ethics Rules Impair Access to Justice?, Nat'l L.J., May 30, 2013 ("In an era of lawyer mobility, advances in technology and the growth of multijurisdictional clients and practice, the current state-by-state admission and regulation of lawyers seems dated. While framed in the context of client protection, these rules seem far more grounded in lessening competition for clients. The fact that admission and practice requirements in many states limit not only commercial practice but also the ability to undertake pro bono at a time when it is desperately needed is particularly troubling. In the in-house context, for example, current rules in many jurisdictions are either silent or impose unnecessary limitations on the abililty of in-house lawyers licensed and in good standing in one state but working for their corporate client in another to undertake pro bono work. The problem is not limited to in-house counsel. Regional, national and global law firms and

public interest groups handling multijurisdictional pro bono matters also experience difficulties. While pro bono vice is seen as a solution, it is a cumbersome and inefficient approach if our goal is to promote and grow pro bono service.").

- Veta T. Richardson, Empower In-House Counsel to Serve States that bar pro bono work by company lawyers admitted elsewhere should amend the rules to permit it, Nat'l L.J., May 13, 2013 ("The gap between the need for legal services and the services available for low-income individuals in the United States continues to widen, with more than 80 percent of the civil legal needs of low-income people going unmet."; "ACC urged the Illinois Supreme Court to open up the state's practice laws to eliminate unnecessary restrictions on the types of pro bono work that in-house lawyers with out-of-state licenses can engage in. On April 8, the court amended the rules. The expanded opportunities will allow in-house lawyers to show the importance of pro bono work to them. Colorado and Virginia amended their practice rules in 2006 and 2011, respectively, but without the unnecessary restrictions. Colorado allows and encourages certified in-house counsel to provide voluntary pro bono services to indigent persons and organizations serving them, subject to Colorado's professional-conduct rules. Virginia also allows and encourages registered in-house counsel to provide voluntary pro bono services, subject to professional-conduct and court rules. . . . The good news is that there is a budget-neutral action that states can take to begin to answer the unmet need: States with practice rules that serve as barriers to in-house counsel pro bono (such as California, Florida, Georgia, New Jersey, Ohio and the District of Columbia) should amend their rules to allow in-house counsel to represent, pro bono, underserved individuals and nonprofit organizations, free from unnecessary restrictions. Doing so will ensure that the private bar is fully supporting the role it can play in addressing the crisis in legal services, and will also afford in-house counsel the opportunity to efficiently provide pro bono assistance to communities in need.").

Not surprisingly, most states encourage pro bono work generally, and have tried to find a way that in-house lawyers may engage in such worthwhile activity even if they are not fully licensed in the state. On the other hand, the concept of a limited practice for such in-house lawyers focuses, among other things, on the lack of any danger that members of the public might be harmed by the in-house lawyer's lack of familiarity with the local law. This tension is reflected in states' approach to the issue.

Some states permit in-house lawyers practicing under a limited registration scheme to provide pro bono services. Other states have limited the ability of such in-house lawyers to engage in pro bono services.

For instance, until 2011 the Virginia Rules required such in-house lawyers engaging in pro bono work to work under a fully-admitted Virginia lawyer's supervision. Not surprisingly, that restriction caused an outrage. On April 15, 2011, the Virginia Supreme Court amended the provision, deleting the requirement that such in-house lawyers act under the direct supervision of a Virginia lawyer. Virginia Sup. Ct. R. 1A:5(g), (h).

New York state's approach to this issue also provides an interesting insight into some of these tensions. The New York State Bar Association recommended that such in-house lawyers be permitted to engage in pro bono services. However, the New York courts rejected that recommendation, so in-house lawyers practicing in New York under the limited registration process may not provide pro bono services. N.Y.C.R.R. § 522.1 (3/25/11).

Not surprisingly, lawyers quickly but gently pushed back, encouraging the New York Court of Appeals to allow such pro bono work.

- Christine Simmons, Pro Bono Rule on In-House Counsel Gains Support, N.Y. L.J., Nov. 5, 2013 ("In-house counsel groups and nearly 40 chief legal officers from corporate law departments are endorsing a proposed rule that would allow in-house counsel who are not licensed in New York to represent pro bono clients."; "Under the proposed rule, registered in-house counsel could appear before any tribunal or court in the state, without the need to seek pro hac vice admission, associate with a legal services provider or work under the supervision of a New York-licensed attorney. They would remain prohibited from making appearances other than in pro bono matters."; "The Association of Corporate Counsel [ACC], the ACC's three chapters in the state and 38 New York chief legal officers wrote a combined letter in support of the rule,

which was proposed by the Advisory Committee on Pro Bono Service by In-House Counsel. Chief legal officers from Anheuser-Busch InBev; Cushman & Wakefield; JPMorgan Chase & Co.; MetLife Inc.; and Viacom were among those endorsing the change."; "In their public comment, the groups said current state rules prevent many corporate counsel from fully engaging in pro bono services."; "'New York's in-house attorneys are smart, experienced, responsible, and zealous, no matter where they received their law licenses,' the letter said. 'The pending amendment simply recognizes that all of New York's in-house lawyers should be able to serve pro bono clients with the same excellence that they already serve their employers.'").

Their efforts eventually bore fruit, and the New York Court of Appeals amended the in-house registration rule to allow such pro bono work.

- Tania Karas, New Rule to Expand Roster of In-House Pro Bono Lawyers, N.Y. L.J., Dec. 3, 2013, at 1 ("In-house counsel for New York corporations who are not licensed to practice in the state will now be permitted to represent clients pro bono, Chief Judge Jonathan Lippman announced Monday. The rule change will take effect tomorrow."; "The addition of in-house lawyers to the pro bono roster is the latest in a series of initiatives by the chief judge to help bridge the 'justice gap' in New York by delivering lowcost [sic] or free civil legal services to those who can't afford an attorney. Only about 20 percent of New York residents' civil legal services needs were met last year, Lippman said."; "An advisory committee on pro bono services by in-house counsel, which is chaired by Court of Appeals Judge Victoria Graffeo, proposed the reforms . . . . The new rule was approved on November 15."; "Though there is no figure on how many additional lawyers will sign up for pro bono, Lippman put the number in the 'thousands.' Between 5,000 and 10,000 in-house counsel are based in New York, Lippman said, and many have been unable to perform pro bono work until now."; "New York is the fourth state to lessen its restrictions on in-house counsel taking on pro bono clients, following Colorado, Virginia and Illinois.")

The District of Columbia courts followed suit a year later.

- Zoe Tillman, D.C. Expands Pro Bono Practice Rule to In-House Lawyers, Legal Times, July 17, 2014 ("Legal services lawyers in D.C. are hoping a recent change in the local practice rules will bump up pro bono involvement by corporate in-house lawyers."; "On Wednesday, the D.C. Court of Appeals adopted a rule allowing in-house lawyers in Washington who aren't members of the D.C. Bar to perform pro bono work. Those in-house lawyers must be a member in 'good standing' with the highest court of another state or territory; have no history of suspension or being disbarred; work under the supervision of an active D.C. Bar member; and be assigned or referred by a local legal-

services group."; "'It allows us to bring in a new category of lawyers to help low-income people in D.C. who can't afford a lawyer,' said Jim Sandman, president of the Legal Services Corporation and chairman of the D.C. Bar Pro Bono Committee."; "There are an estimated 500 in-house lawyers working in Washington, according to proponents of the new rule. It's unknown how many of those attorneys are already members of the D.C. Bar, but Sandman said he believed many, if not a majority, are not."; "The new rule mirrors a similar pro bono exception carved out for lawyers working for the federal government who aren't members of the D.C. Bar. D.C. Court of Appeals Chief Judge Eric Washington said in an email Thursday that the purpose of the new rule was to allow local in-house counsel to join with other D.C. attorneys 'to help close the justice gap here in Washington.'"; "Lawyers understand that the practice of law is a privilege, not a right, and that with that privilege comes responsibility,' Washington said. 'Those responsibilities include working to improve access to justice for all.'"; "Sandman said getting more corporate lawyers involved in pro bono would also spur law firms to step up. Corporate legal departments 'have a leveraging effect on the private bar,' he said. 'Law firms pay attention to what clients care about.'"; "There are at least 20 states with rules explicitly allowing nonlocally barred in-house lawyers to do pro bono work, according to a survey this year by Corporate Pro Bono, a partnership between the Pro Bono Institute and Association of Corporate Counsel."; "States vary in how broad they make practice exceptions for in-house lawyers who aren't members of the local bar. The pro bono rule adopted in D.C. places more restrictions than some states that don't require supervision by a bar member or an affiliation with a legal-services organization."; "Amar Sarwal, vice president and chief legal strategist of the Association of Corporate Counsel, said there's been a push nationwide over the past six years to expand pro bono practice rules to in-house lawyers.")

The ABA's and others' charts available on the Internet can provide useful guidance on this issue.

Best Answer

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

N 3/12

Prohibition on Sharing Fees with Law Firm Nonlawyer Employees

Hypothetical 22

Your law firm recently hired a new marketing director, who has proven remarkably successful in expanding your firm's healthcare practice. The firm's Executive Committee has suggested a new compensation package for the marketing director, which would include a salary, benefits, and an incentive bonus based on a percentage of the increased revenues received by the firm from new healthcare clients that the marketing director attracts to the firm through her efforts.

May your firm pay an incentive bonus to the marketing director based on a percentage of the increased revenues received by the firm from new healthcare clients that the marketing director attracts to the firm through her efforts?

NO (PROBABLY)

Analysis

For many years bars and (to a lesser extent) courts have dealt with lawyers' temptation to reward nonlawyers based on such nonlawyers' financial contribution to the lawyer's success, either on a case-by-case basis or with an overall profit-sharing arrangement. This issue presaged the debate over multidisciplinary practice ("MDP") and alternative law practice structures ("ALPS").

Prohibition on Fee-Splitting with Nonlawyers

The analysis of such arrangements starts with a basic principle that has always been part of the profession's ethics rules.

> A lawyer or law firm shall not share legal fees with a nonlawyer . . . .

ABA Model Rule 5.4(a)(1). The two comments to that rule point to the past, but without really explaining much about the rationale for the prohibition.

> The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. . . .
>
> This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another.

ABA Model Rule 5.4 cmts. [1] & [2].

At first blush, this rule would seem to prohibit lawyers from employing nonlawyers. After all, most law firms derive all or nearly all of their revenue from legal fees.

- Office of Lawyer Regulation v. Weigel (In re Weigel), 817 N.W.2d 835, 844 (Wis. 2012) (holding that the lawyer did not violate the ethics rules by paying paralegals a percentage of gross recoveries in cases on which they had worked explaining the context: "As a practical matter, of course, a law firm's profits result almost entirely from legal fees. So, in a sense, even paying nonlawyer employees a salary could, technically, be viewed as a sharing of fees, because fees are the firm's source of revenue. See, e.g., Ethics Opinion 322 (D.C. Bar, Feb. 16, 2004).").

- Philadelphia LEO 2004-3 (6/2004) ("Clearly, any law firm profits are obtained from legal fees, and thus in its simplest sense, any compensation plan by definition is based on a share of fees paid by clients."); District of Columbia LEO 322 (2/16/04) ("in a sense, even paying nonlawyer employees a salary could be viewed as a sharing of fees, since fees are the firm's source of revenue").

Sharing any of those receipts with a nonlawyer would seem to violate this flat prohibition on fee-splitting with nonlawyers. But of course all law firms safely do that.

Thus, lawyers can obviously employ and pay nonlawyers. Bars have addressed what law firm can call such nonlawyers. In 2015, the Philadelphia Bar approved law firms' calling nonlawyer "officers" or "directors."

- Philadelphia LEO 2014-8 (1/2015) (explaining that law firms could call a nonlawyer staff member an "officer" or "director"; answering the following questions: "May the individuals in these positions serve on the governing

bodies of the firms in an ex-officio, but voting capacity?"; "No."; "May they do so if they are not permitted to vote on any matter related to the provision of legal services, professional legal judgment or the evaluation of legal judgments?"; "Yes, as long as any voting by these non-lawyers is limited to administrative matters such as leases, purchasing, travel expenses, finances or any of the many similar types of issues that the administrative officers and directors are retained by the law firms to handle."; "Does the answer change if the firm has its principal place of business in Pennsylvania but has an office in Texas?"; "No. Pennsylvania Rule of Professional Conduct 8.5(b)(2) provides that the rules of the jurisdiction in which the predominant effect of the conduct is felt is the jurisdiction whose rules govern a lawyer's conduct (except for conduct occurring in connection with a matter pending before a tribunal, which is governed by the rules where the tribunal is located). Here, the large law firms are based in Pennsylvania and have the majority of their senior administrative personnel located in Pennsylvania, so the predominant effect of the conduct is in Pennsylvania."; "Can Pennsylvania firms use titles for non-lawyer employees that include the word 'Officer' or 'Director' in the job title?"; "Yes, as long as those employees do not control the lawyers' professional activities and do not own any portion of the firm. They must be important to the effective management of the firm, may only support the business administration of the firm, and may not interact substantively with clients. They must mislead no one about their status within the firm.").

But later that year, the Texas Bar condemned such use -- repeating its earlier position.

- Texas LEO 642 (Revised 09/2015) (analyzing the following questions: "1. May a for-profit Texas law firm include the terms 'officer,' 'principal,' or 'director' in the job titles of the firm's non-lawyer employees?'"; "2. May a for-profit Texas law firm pay or agree to pay specified bonuses to non-lawyer employees contingent upon the firm's achieving a specified amount of revenue or profit?"; "Under the Texas Disciplinary Rules of Professional Conduct, a for-profit Texas law firm may not assign to a non-lawyer employee a job title that, because of the title's generally accepted meaning, indicates that the employee's authority includes exercise of control over the firm's legal practice. If a title is assigned to a non-lawyer employee that is unclear as to whether the employee is authorized to exercise control over the for-profit Texas law firm's practice of law, the firm must take such additional steps as are necessary in the circumstances to make clear to all concerned that the scope of the employee's authority does not in fact extend to the exercise of control over the practice of law by lawyers in the firm."; "The Texas Disciplinary Rule of Professional Conduct prohibit a for-profit Texas law firm from paying or agreeing to pay specified bonuses to non-lawyer employees contingent upon the firm's achieving a specified level of revenue or profit. A for-profit Texas law firm may, however, consider its revenue, expenses, and

profit in determining whether to pay bonuses to non-lawyer employees and the amount of such bonuses.").

- Texas LEO 642 (5/2014) ("A Texas law firm employs non-lawyer professionals to manage the firm's business, including its marketing, advertising, IT services, and search-engine optimization. The firm plans to give these employees the titles 'chief executive officer' and 'chief technology officer' and to identify them as 'principals' in the law firm. In addition to paying salaries to these employees, the firm intends to pay them specified bonuses if the firm achieves a designated amount of revenue or profit."; "Under the Texas Disciplinary Rules of Professional Conduct, a Texas law firm may not use 'officer' or 'principal' in the job titles for non-lawyer employees of the firm."; "The Texas Disciplinary Rules of Professional Conduct also prohibit a Texas law firm from paying or agreeing to pay specified bonuses to non-lawyer employees contingent upon the firm's achieving a specified level of revenue or profit. A Texas law firm may, however, consider its revenue, expenses, and profit in determining whether to pay bonuses to non-lawyer employees and the amount of such bonuses.").

The ethics rules have had to acknowledge that the prohibition only applies to the direct sharing of fees as the law firm receives them, not the sharing of net income that the law firm ultimately earns after paying expenses such as rent, telephone bills, etc.

Law Firm Profit-Sharing Plans

The ethics rules' prohibition on fee-sharing with nonlawyers contains a number of explicit exceptions -- including the sharing of fees with a lawyer's estate, payment of the purchase price for a law firm, and the ability to share court-awarded fees with a nonprofit organization. In addition, ABA Model Rule 5.4(a)(3) indicates that

> a lawyer or law firm may include nonlawyer employees in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement.

ABA Model Rule 5.4(a)(3).

Thus, bars universally permit nonlawyer law firm employees to share in a law firm's overall profits.

- New York LEO 917 (3/27/12) ("Sharing of profits with a nonlawyer employee must be based on the total profitability of the firm or department within a law firm and may not be based on the fee resulting from a single case."; "A law firm may ethically pay a bonus to a nonlawyer employee engaged in marketing based on the number of clients obtained through advertising provided the amount paid is not calculated with respect to the clients. The law firm may not pay a fee for the referral or recommendation of a specific client.").

- New York LEO 887 (11/15/11) ("A lawyer or law firm may have a non-lawyer marketer who engages in only that advertising and solicitation in which the lawyer or law firm could engage. The lawyer or law firm may have a profit-sharing plan that pays bonus compensation to the non-lawyer marketer based on overall profits of the firm or on a percentage of the employee's base salary. However, the bonus compensation may not be based on referrals of particular matters and may not be based on the profitability of the firm or the department for which the employee markets if such profits are substantially related to the employee's marketing efforts.").

- Georgia LEO 05-4, adopted by Georgia Supreme Court, 642 S.E.2d 686, 686, 687 (Ga. 2007) (concurring with the Georgia Bar's Formal Advisory Opinion Board's approval of a law firm's payment to a non-lawyer employee of "a monthly bonus from the gross proceeds of the lawyer's firm"; "We agree with the board that under current Georgia Rule of Professional Conduct 5.4, the payment of a monthly bonus by a lawyer to nonlawyer employees based on the gross receipts of his or her law office in addition to the nonlawyer employees' regular monthly salary is permissible; and that it is ethically proper to compensate nonlawyer employees pursuant to a plan that is based in whole or in part on a profit-sharing arrangement."; explaining that in 2000 Georgia changed its ethics rules to "enlarge[] the circumstances under which a lawyer or law firm may share legal fees with a nonlawyer," because the new rule permits a lawyer or law firm to include nonlawyers in a "compensation plan, even though based in whole or in part on a profit-sharing arrangement"; noting that under the old ethics rules a lawyer could share fees with a non-lawyer only as part of a retirement plan, while the new ethics rules allow lawyers to share legal fees with non-lawyers as part of a "'compensation or retirement plan'" (citation omitted)).

- Pennsylvania LEO 98-75 (12/4/98) ("Rule 5.4(a)(3) permits nonlawyers to share in a compensation or retirement plan, even though the plan is based in whole or in part on a profit-sharing arrangement. Thus, for example, it would be proper to compensate a law firm administrator on the basis of a fixed salary plus a percentage of the firm's net profits; he could similarly participate in a profit-sharing retirement plan.").

- Kansas LEO 95-09 (10/25/95) ("It is a reasonable process to base an employee's bonus on the success of the firm overall. It is the case by case, collection by collection-based bonus that we opine is impermissible here. The frequency of such bonuses is not a consideration, so long as the bonus or other salary consideration is not based upon a fee-by-fee, case-by-case formula, but rather relies on the net profit of the firm formula.").

- N.Y. County Law. Ass'n LEO 687 (11/11/91) ("A lawyer may employ a tax accountant to work with clients in accounting and tax matters and may pay such an employee a bonus over and above the employee's salary, as long as the bonus is not based on the billings of the accountant but rather is a fixed amount, a percentage of the employee's salary or is based on the profits of the firm.").

The issue becomes much more complicated when law firms seek to include nonlawyer employees in profit-sharing arrangements based on a subset of the firm's overall profits. The ABA seems to endorse this approach.

> Likewise, a lawyer engaged in a particularly profitable specialty of legal practice is not prohibited from compensating the paralegal who aids materially in that practice more handsomely than the compensation generally awarded to paralegals in that geographic area who work in law practices that are less lucrative.

ABA Model Guidelines for Utilization of Paralegal Services, cmt. to Guideline 9 (2004) ("ABA Model Guidelines for Paralegals"). Thus, some courts and bars have permitted law firms to reward nonlawyers with a percentage of profit earned by the group of lawyers with whom the nonlawyer worked.

- Office of Lawyer Regulation v. Weigel (In re Weigel), 817 N.W.2d 835, 843-44, 845, 846 (Wis. 2012) (holding that the lawyer did not violate the ethics rules by paying paralegals a percentage of gross recoveries in cases on which they had worked; explaining the context: "In addition to her base pay, the paralegal receives two forms of bonus: (1) thirty cents per thousand dollars (three-tenths of one percent) of the gross recoveries from personal injury cases she worked on; and (2) a quarterly bonus consisting of $1,500 plus $250 per thousand (25 percent) of the difference between a weekly average (computed quarterly, over 13 weeks) of gross recoveries from personal injury cases she worked on and her weekly goal of $127,500 per

week."; "As a practical matter, of course, a law firm's profits result almost entirely from legal fees. So, in a sense, even paying nonlawyer employees a salary could, technically, be viewed as a sharing of fees, because fees are the firm's source of revenue. See, e.g., Ethics Opinion 322 (D.C. Bar, Feb. 16, 2004)."; "The ethical issues arise when the nonlawyer's compensation is tied too directly to specific clients, cases or work performed by the nonlawyer such that the professional independence of the lawyer is compromised."; "A review of ethics decisions from other jurisdictions indicates that 'the line between the prohibited sharing of legal fees with a nonlawyer and a permissible compensation plan based on profit-sharing is not clearly demarcated.' See Ethics Opinion 322 (D.C. Bar, Feb. 16, 2004)."; "Generally, bonuses are deemed permissible where the bonus is not tied to fees generated from a particular case or class of cases from a specific client."; "By contrast, a Florida ethics committee concluded that '[b]onuses to non-lawyer employees cannot be calculated as a percentage of the firm's fees or of the gross recovery in cases on which the non-lawyer worked.' See Florida Ethics Opinion 89-4."; "The OLR contends the bonus arrangement in this case is problematic in several respects. It involves the splitting of revenues and the OLR contends 'that it has nothing to do with profits such that it does not fall within the profit-sharing safe harbor.' The OLR notes the paralegal is entitled to a bonus if she meets certain goals -- whether or not the firm was profitable -- and that the payment to the nonlawyer, although computed on the basis of a client's gross recovery, comes out of the contingent fee earned by the firm. The OLR explains that if the distribution of the client's gross recovery is viewed as a pie chart, and if the firm is entitled to a one-third percentage of the gross recovery, which is typical in contingency cases, the nonlawyer gets an approximate one percent slice of the fee, off the top, before expenses, prior to any computation of 'profit,' that is, total revenues less total expenses on a firm--wide basis." (footnote omitted); "We do not perceive a material ethical distinction between profit-sharing and revenue-sharing for purposes of this bonus calculation. The ethical considerations are the same."; "The potential ethical concern here stems from the fact that the employee's bonus is based upon net profits of a specific law practice area, rather than upon the net profits of the law firm's entire practice."; "Based on the evidence presented we find no indication that the paralegal would be interfering with the lawyer's independent judgment. We emphasize that the law firm has a general duty, and the paralegal's lawyer-supervisor has a specific duty, to ensure that the paralegal's conduct is compatible with the ethical obligations of lawyers. However, we conclude that the rule, as drafted, does not preclude the bonus structure described in this case. Accordingly, we dismiss the third count of the complaint related to the bonus structure used to compensate certain paralegals.").

- Connecticut LEO 93-1 (1/27/93) (approving a law firm's compensation arrangement under which a part-time paralegal receives a weekly salary and

"periodic bonuses" amounting to $40.00 for "every set of Chapter 7 or Chapter 13 bankruptcy schedules drafted" and "$5.00 per hour for every billable hour recorded by the paralegal on client work other than Chapter 7 and Chapter 13 debtor clients" (internal citation and quotations omitted)).

- Michigan LEO RI-143 (8/25/92) (approving a law firm's compensation arrangement under which paralegals working in the law firm's "sports and entertainment law practice area" would receive compensation based on "a percentage of the firm's net profits derived from the sports and entertainment law practice area"; concluding that Michigan's rule allowing nonlawyers to participate in a profit-sharing arrangement was not limited to calculations based on "net profits of the law firm's entire practice" rather than "net profits of a law practice area" (emphasis added); noting that "the result might be different if the compensation plan were based on the fees generated from a particular case or a particular client, rather than net profits of the law practice area of the firm").

Nonlawyer Employee Compensation Based on the Particular Matter

In stark contrast to the permissibility of basing nonlawyers' compensation on overall firm profits, nearly every bar has condemned a law firm's compensation of nonlawyers based on particular matters or (more commonly) cases that the nonlawyer works on, or brings to the firm.

The latter prohibition also implicates most states' "running and capping" statutes, which prohibit law firms from rewarding ambulance drivers, hospital workers, etc. who steer accident victims or patients to the lawyer. The prohibition also implicates an advertising rule which parallels the statutory restrictions:

> A lawyer shall not give anything of value to a person for recommending the lawyer's services . . . .

ABA Model Rule 7.2(b). That rule has a number of exceptions -- such as paying the "reasonable costs" of advertisements, participation in a qualified legal service plan or referral service, paying the purchase price for a law firm, and non-exclusive referral arrangements with nonlawyers (which are disclosed to the client). Id. But the general

prohibition on lawyers paying nonlawyers to recommend them has deep roots in the ethics rules, and have always been strictly enforced in the case of such abusive tactics as slipping money to an ambulance driver for recommending a law firm to an accident victim.

Thus, basing a nonlawyer's compensation on a particular matter or case violates several basic principles. The ABA Model Guidelines for Paralegals specifically prohibit such an arrangement.

- ABA Model Guidelines for Paralegals, cmt. to Guideline 9 ("In addition to the prohibition on fee splitting, a lawyer also may not provide direct or indirect remuneration to a paralegal for referring legal matters to the lawyer.").

- ABA Model Guidelines for Paralegals, cmt. to Guideline 9 ("There is no general prohibition against a lawyer who enjoys a particularly profitable period recognizing the contribution of the paralegal to that profitability with a discretionary bonus so long as the bonus is based on the overall success of the firm and not the fees generated from any particular case.").

Most states traditionally prohibited such compensation arrangements.

- Philadelphia LEO 2010-12 (10/2010) (analyzing the following situation: "Physicians employ a consulting firm that monitors police reports and then contacts injured persons to see if they need medical treatment. The consulting firm through an investigator will also obtain relevant photographs and statements from the injured. The representative of the consulting firm inquires as to whether the injured person has an attorney. If not, the representative will obtain an executed fee agreement and forward the relevant documents to different attorneys on a revolving basis. The assigned attorney is then required to pay a flat fee to the consulting firm."; finding the arrangement unethical for various reasons; "The Committee has a grave concern regarding the payment by the attorney of the fee to the consulting firm. Clearly, fee splitting with a non-attorney is prohibited by Rule 5.4. While the inquiry tries to couch the payment to the consulting firm for the file as payment for 'investigative services,' that a flat fee is paid and that non-legal services were provided do not standing alone make the payment permissible. Other factors which would affect that determination include the amount of the payment, the amount of time spent by the investigator, and whether the flat fee is in any way dependent upon the size of the possible recovery in the case. The payment should be reasonably related to the value of the services

provided. If not, it can easily be seen as a subterfuge to avoid the prohibition against fee sharing with a non-lawyer.").

- Bolen v. Crowe (In re Holmes), 304 B.R. 292, 295-96, 297-98 (N.D. Miss. 2004) ("There is no dispute that Crowe paid his non-attorney staff $ 5.00 bonuses each time one of the following events occurred: a. When the clients paid at least $ 300.00 and executed a retainer agreement[;] b. When the clients completed and returned their bankruptcy questionnaires[;] c. When the clients signed the living wills/durable powers of attorney. Excepting the total amount of bonuses actually paid, the factual circumstances relevant to this question are undisputed. The question is, therefore, whether Crowe's practice of paying bonuses for the aforementioned events constitutes an impermissible 'fee-splitting' or 'fee-sharing' arrangement proscribed by § 504 of the Bankruptcy Code, Rule 2016(b) of the Federal Rules of Bankruptcy Procedure, and Rule 5.4(a) of the Mississippi Rules of Professional Conduct."; "The court is of the opinion that Crowe has indeed shared compensation with his non-lawyer staff. This practice is not identical to the payment of salaries. Rather, it is a payment to motivate and encourage specific events. The arrangement conveys a pecuniary interest to the non-lawyer employee that is directly dependent on a decision that the client is called upon to make. This practice violates § 504(a) of the Bankruptcy Code in addition to Rule 5.4(a) of the Mississippi Rules of Professional Conduct.").

- District of Columbia LEO 322 (2/16/04) (reviewing legal ethics opinions from other states, and concluding that the opinions nationwide "generally stand for the proposition that paying a percentage of firm net profits to nonlawyer employees is permissible, whereas paying a percentage of a fee in an identifiable case or series of cases is not").

- Doe v. Condon, 532 S.E.2d 879, 880, 883 (S.C. 2000) ("We further hold that a proposed fee arrangement which compensates non-lawyer employees based upon the number and volume of cases the non-lawyer employee handles for an attorney violates the ethical rules against fee-splitting with non-lawyer employees. Rule 5.4 of the Rules of Professional Conduct, Rule 407, SCACR."'; adopting a referee's findings; "Petitioner's law firm intends to compensate him based upon the volume and types of cases he 'handles.' A paralegal, of course, may not 'handle' any case. This fee arrangement directly violates Rule 5.4 of the Rules of Professional conduct, SCACR 407. . . . This compensation proposal arrangement coupled with Petitioner's desire to market the law firm's services via the educational seminars and meet individually with clients creates a situation ripe for abuse. Indeed, the proposal by Petitioner presents the very evil Rule 5.4 was designed to avoid. Accordingly, I find Petitioner's proposed compensation plan violates both the letter and the spirit of Rule 5.4 prohibiting fee splitting with non-attorneys." (footnote omitted)).

- Trotter v. Nelson, 684 N.E.2d 1150, 1155 (Ind. 1997) ("a profit-sharing plan with a nonlawyer may not be tied to the receipt of a particular legal fee," although it may be based on the firm's overall net profits and business performance).

- North Carolina LEO RPC 147 (1/15/93) (ruling as unethical a proposed compensation plan under which real estate paralegals would receive bonuses "calculated on the firm's net income from the real estate closings which the legal assistant has worked on," even if the bonuses were discretionary and the calculations were used for "guidance only"; "[i]t is apparent from the inquiry that the paralegal's bonuses would be calculated based upon a percentage of the income the firm derives from legal matters on which the paralegal has worked" -- which violates the fee-split rules).

- State Bar of Texas v. Faubion, 821 S.W.2d 203, 207-08 (Tex. App. 1991) (condemning an arrangement under which a paralegal/investigator was paid a percentage of gross fees calculated based upon the paralegal's time involvement in a particular case; explaining that bonuses do not constitute improper fee-splitting if the bonuses are not based on a percentage of the firm's profits or legal fees).

As with bars' difficulty of drawing the line between permissible and impermissible profit sharing based on practice areas, bars have had to draw similar lines in this context.

- Florida LEO 02-1 (1/11/02) (prohibiting a lawyer from paying paralegals and other nonlawyer employees "based on the number of hours the non-lawyer employee has worked on a case for a particular client"; explaining that a lawyer "may pay the firm's legal assistant a bonus, but that bonus cannot be based in any way upon a percentage of fees generated by the legal assistant or the firm and cannot be based upon generating clients for the firm. Bonuses to non-lawyer employees cannot be calculated as a percentage of the firm's fees or of the gross recovery in cases on which the non-lawyer worked."; concluding that "the inquiring attorney may pay the legal assistant a bonus based on the legal assistant's extraordinary efforts on a particular case or over a specific period of time. While the number of hours the legal assistant works on a particular case or over a specific period of time is one of several factors that can be considered in determining a bonus for the legal assistant, it is not the sole factor to be considered. . . . A bonus which is solely calculated on the number of hours incurred by the legal assistant on the matter is tantamount to a finding that every single hour incurred was an 'extraordinary effort[,'] and such a finding is very unlikely to be true. Therefore, unless every single hour incurred by the legal assistant was a truly extraordinary effort, it would be impermissible for the inquiring attorney to pay a bonus to his legal assistant calculated in the manner the inquiring attorney

has proposed. However, the number of hours incurred by the legal assistant on the particular matter or over a specified time period may be considered by the lawyer as one of the factors in determining the legal assistant's bonus." (emphasis added)).

- South Carolina Advisory Op. 97-02 (3/1997) (approving a law firm's compensation arrangement under which paralegals receive monthly or semi-annual payments "calculated as a percentage of the amount that the paralegal has billed to clients for services rendered"; contrasting this arrangement with an impermissible plan under which "the bonus is based on a percentage of a particular fee earned").

Interesting, courts disagree about whether a nonlawyer employee who has been promised compensation under an ethically impermissible arrangement can sue to enforce the arrangement. Not surprisingly, one court refused to ascertain such a claim, based on the arrangement's violation of public policy.

- Trotter v. Nelson, 684 N.E.2d 1150, 1151, 1152, 1155 (Ind. 1997) (analyzing an arrangement under which a non-lawyer employed by a lawyer sued the lawyer for his failure to pay her "money for referring clients" to the lawyer; explaining that Nelson "began her employment in what was essentially a clerical capacity," but acknowledging that "her duties and responsibilities enlarged over time"; "The question which we must answer is whether a referral fee agreement between an attorney and a non-attorney employee is against public policy and, therefore, unenforceable. We earlier granted transfer and now hold that the alleged agreement is against public policy and is unenforceable." (footnote omitted; emphasis added); "Nelson initiated this suit because she believed that Trotter had not fully compensated her for the work that she had done. One of her allegations is that she and Trotter had an agreement, beginning in early 1987, whereby she was to receive five percent of any fees which resulted from a personal injury or worker's compensation case that she had a role in referring to Trotter. There is no written recording between the parties as to the alleged agreement."; "[A] profit-sharing plan with a nonlawyer may not be tied to the receipt of a particular legal fee. However, an attorney may fashion a profit-sharing plan for his or her nonlawyer employees so long as the measure of compensation 'relates to the net profits and business performance of the firm, and not to the receipt of particular fees.' ABA Comm. On Ethics and Professional Responsibility, Informal Op. 1440 (1979). . . . The agreement as alleged by Nelson is not based upon a percentage of the overall profits of the law office, nor is it intended to provide an incentive and reward for input which led to the greater overall efficiency and productivity of the law office. These are elements that

> are necessary for a profit-sharing plan to be permissible under Rule 5.4(a)(3)."; ultimately concluding that the alleged agreement was contrary to public policy and therefore unenforceable; noting "that Nelson is not entirely precluded from being remunerated for the work she believes she has done; she is precluded only to the extent that she relies upon the enforceability of the alleged referral fee agreement."; also explaining that the lawyer might have committed a "gross violation" of the ethics rules by entering into a contract "which he knew to be unenforceable").

In contrast, at least one court has permitted such a lawsuit.

- Patterson v. Law Office of Lauri J. Goldstein, P.A., 980 So. 2d 1234, 1237-38 (Fla. Dist. Ct. App. 2008) (allowing a paralegal to sue a law firm to enforce a lawyer's verbal agreement to pay the paralegal a percentage of fees earned in cases on which the paralegal worked; finding that the agreement violated the ethics rules, but nevertheless allowing the paralegal to enforce it; "In the instant case, Patterson [paralegal], who is not a member of the Florida Bar, is (a) not regulated by the Rules Regulating the Florida Bar and (b) did not have knowledge that Goldstein was breaking the Rules. We therefore find that Patterson was an innocent party and not in pari delicto to this fee-sharing agreement. We conclude that the agreement is enforceable by Patterson, who was not in pari delicto, notwithstanding the fact that it implicates Rule 4-5.4(a)(4). While we recognize generally that the Rules of Professional Conduct of the Rules Regulating the Florida Bar promote the public interest, we find that the public interest is not advanced if an attorney is permitted to promise a bonus arrangement that violates the fee-sharing rule, and then invoke the Rules as a shield from liability under that arrangement. We specifically limit our holding to the factual circumstances of this case involving an employment relationship between an attorney and a paralegal. This opinion is not to be construed to apply to a proscribed referral fee arrangement, which is distinguishable because it raises a separate set of policy considerations." (emphasis added)).

Amidst all of the debate about the permissibility of compensating nonlawyers based on a law firm's overall success or particular income from a practice area or specific case, it is obvious that law firms can reward nonlawyers for doing a good job.

> A lawyer may not split legal fees with a paralegal nor pay a paralegal for the referral of legal business. A lawyer may compensate a paralegal based on the quantity and quality of the paralegal's work and the value of that work to a law practice, but the paralegal's compensation may not be

> contingent, by advance agreement, upon the outcome of a particular case or class of cases.

ABA Model Guidelines for Paralegals, Guideline 9. No one would question this principle. To some extent, the firm's freedom to reward hardworking and successful nonlawyers might tend to moot the vigorous debate about the permissibility of splitting fees. With a wink and a nod, a law firm presumably can reward nonlawyers for a "good year" or "extra effort," while sub silentio compensating the nonlawyer for hard work on a particular case, bringing a lucrative new client to the firm, etc. In essence, the issue becomes one of form over substance for the law firm.

* * *

Several bars have dealt with law firms' compensation of administrators or marketing directors based on increased revenues.

In 1990, an Arizona legal ethics opinion approved such an arrangement with a marketing director.

- Arizona LEO 90-14 (10/17/90) ("A law firm that pays a non-lawyer incentive compensation which is measured by a percentage of increased revenues is not in violation of the Arizona Rules of Professional Conduct." (emphasis added); "[T]he American Bar Association Committee on Ethics and Professional Responsibility, when faced with facts similar to those here opined that such a compensation scheme did not violate the Model Code. A.B.A. Informal Opinion 1440 (August 12, 1979)."; "That Opinion responded to an inquiry of a law firm which employed a non-lawyer administrator to manage the firm's nonprofessional business matters. The firm proposed to pay the administrator a fixed annual salary supplemented by a percentage of the firm's net profits. This compensation scheme was designed to encourage the administrator to increase the firm's operating efficiency and productivity. The A.B.A. Committee concluded that this proposal did not violate DR 3-102 because the compensation related to the net profits and business performance of the firm and not to any particular legal fees."; "[T]he Massachusetts Bar Committee concluded that it was not ethically proper for a law firm to compensate a non-lawyer employee based on a percentage of the firm's profits. . . . Apparently, the Massachusetts Bar Committee disagreed

> with the distinction made in Informal Opinion 1440 between sharing legal fees and sharing a law firm's revenues."; "Both of the above argument[s] rest on the assumption that the marketing director has no influence over any lawyer's exercise of professional judgment. If this assumption is incorrect, the firm's proposal violates the ethical policy behind ER 5.4."; noting that three members of the Committee dissented from the majority opinion).

It is always dangerous to look to Arizona for guidance on issues of this sort, because it takes a quirky approach to the unauthorized practice of law and fee-sharing issues.

The majority view would almost surely go the other way. For instance, in 2004 the Philadelphia Bar condemned a similar arrangement.

- Philadelphia LEO 2004-3 (6/2004) ("Clearly, any law firm 'profits' are obtained from legal fees, and thus in its simplest sense, any 'compensation plan' by definition is based on a share of fees paid by clients."; "[A] share of firm-wide 'net profits' by a non-lawyer employee, tied to the total of firm profits, and not the gross proceeds of fees from cases brought in by the non-lawyer employee, nor tied to limited types of cases would not be prohibited."; "<u>On the other hand, if the bonus plan by design is limited to a percentage of the profits generated from the fees earned just on cases referred by the Marketing Director, then the compensation plan would actually be a sophisticated fee sharing arrangement and hence prohibited.</u> As the firm grows and different matters are referred through various sources, the profit sharing plan must be based on all the profit from all the cases handled by the firm. If for some reason none of the case[s] referred by the Marketing Director produced any profit, but the firm was profitable because of other referral sources in other matters, the Marketing Director would still have to be entitled to his 20% of all the firm profits in order for the plan to be considered in compliance with Rule [5.4(a)(3)]." (emphasis added)).

In 2009, the Delaware Bar addressed the following proposed compensation package for a law firm marketing professional.

> The Firm would provide the Marketing Professional with a compensation package that the Firm hopes will conform with the prohibition against fee sharing contained in Rule 5.4 of the Delaware Lawyers' Rules of Professional Conduct (hereinafter "DLRPC").The compensation package would consist of three components: (i) salary, (ii) benefits, and (iii) incentive bonuses. The amount of incentive bonuses

> would be determined by a formula that would include the following four factors:
>
> 1. Increase in the Firm's total revenues;
>
> 2. Increase in revenues received by the Firm from existing clients;
>
> 3. Revenues received by the Firm from new clients;
>
> 4. Percentage of revenues received by the Firm from the new clients through the efforts of the Marketing Professional.

Delaware LEO 2009-01 (2/2/09). The Delaware Bar pointed to a number of other state bar opinions.[1] Concluding that

> compensation of a nonlawyer based upon a formula using a percent of total revenues, increased revenues generally, increased revenues from new clients, and revenues of new clients received by the efforts of the Marketing Professional, would be violative of DLRPC 5.4(a) and 7.2(b).

[1] Delaware LEO 2009-1 (2/2/09) (finding unethical a law firm's arrangement with a "Marketing Professional" that would provide incentive bonuses based on increases in the firm's revenues, and a "[p]ercentage of revenues received by the Firm from the new clients through the efforts of the Marketing Professional"; "This Committee is of the opinion that the method of compensation cannot be dependent upon a percentage of the fees of the firm, whether such fees are based upon total revenues, revenues from existing clients, revenues from new clients, or new clients generated by the marketing professional."; "Other opinions that would similarly prohibit payment to a nonlawyer employee, based upon a percentage of fees, include: Florida Bar Association Ethics, Opinion 89-4 (Nonlawyer marketing director cannot be paid commissions representing a percentage of fees generated from business he has brought to the firm.); Committee on Ethics of the Maryland State Bar Association, Opinion 92-1) (Personal injury lawyer cannot award bonus to nonlawyer who generates fees.); New York County Lawyers' Association Committee on Professional Ethics, Opinion No. 687 (Law firm may employ tax accountant, provided compensation or bonus is not calculated upon the billings; however, such compensation or bonus may be based upon profits, a fixed amount, or a percentage of salary.); New York County Lawyers' Association Committee on Professional Ethics, Opinion No. 720. (A lawyer may use nonlawyer consultant to prepare advertising, provided he complies with the rules on advertising; but compensation may not be tied to success or failure of the solicitation; and compensation may not be on a contingent basis.)"; "In conclusion, compensation of a nonlawyer based upon a formula using a percent of total revenues, increased revenues generally, increased revenues from new clients, and revenues of new clients received by the efforts of the Marketing Professional, would be violative of DLRPC 5.4(a) and 7.2(b).").

Delaware LEO 2009-01 (2/2/09). Thus, the majority of bars would prohibit such a financial arrangement with any law firm nonlawyer employee, including marketing professionals.

Best Answer

The best answer to this hypothetical is **PROBABLY NO**. N 3/12

Law Firms Allowing Ownership Interest by Nonlawyers Who Assist the Law Firm in Providing Legal Services (The D.C. and the Abandoned ABA 20/20 Commission Model)

Hypothetical 23

Your law firm has enjoyed phenomenal financial success after hiring a nonlawyer executive director about five years ago. Both the firm's revenues and profits have increased tenfold during his tenure, and your executive committee wants to explore ways that you can keep the executive director on board and let him share in the firm's great success.

May you allow the executive director to become a partial owner of the law firm?

NO (EXCEPT IN WASHINGTON, D.C.)

Analysis

As with the flat prohibition on lawyers sharing their fees with nonlawyers, the ethics rules have traditionally prohibited lawyers partnering with nonlawyers.[1] The 1908 ABA Canons of Professional Ethics did not explicitly forbid such arrangements, but in 1928 the ABA adopted an explicit prohibition.

> In the formation of partnerships for the practice of law, no person should be admitted or held out as a practitioner or member who is not a member of the legal profession duly authorized to practice, and amenable to professional discipline. . . .

[1] In re Nesbitt, 754 S.E.2d 363, 364 (Ga. 2014) (disbarring a lawyer who had allowed nonlawyers to have ownership interest in his law firm; "The special master found that Nesbitt agreed with a married couple who were friends and clients, but who were not lawyers, to form the Nesbitt Law Firm, LLC. The clients contributed funds for the establishment and running of the law firm, one client was the firm's chief financial officer, and both clients were involved in the day-to-day business operations of the firm. No documents memorialized the parties' agreement regarding the partnership, and although the clients expected to share in the profits of the firm, they did not receive any profits or any repayment of the approximately $12,000 to $15,000 they expended on behalf of the firm. The firm ultimately went out of business.").

> Partnerships between lawyers and members of other professions or nonprofessional persons should not be formed or permitted where any part of the partnership's employment consists of the practice of law.

ABA Canon of Professional Ethics 33 (1908; amended July 26, 1928). That principle has appeared in every ABA ethics formulation since then.

The current ABA Model Rules articulate a prohibition on nonlawyer partners in a simple but largely unexplained directive.

> A lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

ABA Model Rule 5.4(b). The two comments to that rule point to the past, but without really explaining much about the rationale for the prohibition.

> The provisions of this Rule express traditional limitations on sharing fees. These limitations are to protect the lawyer's professional independence of judgment. . . .
>
> This Rule also expresses traditional limitations on permitting a third party to direct or regulate the lawyer's professional judgment in rendering legal services to another.

ABA Model Rule 5.4 cmts. [1] & [2].

In the late 1980s two jurisdictions considered allowing nonlawyer law firm partners. A 2000 law review article described the debate, and the result.

> In 1988, both the District of Columbia bar and North Dakota bar proposed that their respective versions of Model Rule 5.4 be modified to allow lawyers and non-lawyers to hold ownership interests in a law firm. The District of Columbia bar sought to change the rule in order to allow non-lawyers to contribute to the legal services provided to clients. This proposal was in part a reaction to the non-law divisions of lobbying, real estate, and investment banking that some District of Columbia law firms had begun to develop as subsidiaries. The North Dakota rule sought to

> allow lawyers and non-lawyers to offer combined services. Ultimately, after much debate and controversy, the District of Columbia rule passed, but the North Dakota rule was withdrawn by the state supreme court.

John S. Dzienkowski & Robert J. Peroni, Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century, 69 Fordham L. Rev. 83, 98-99, (Oct. 2000) (footnotes omitted).

District of Columbia Rule 5.4

Under District of Columbia Rule 5.4(b),[2]

> [a] lawyer may practice law in a partnership or other form of organization in which a financial interest is held or managerial authority is exercised by an individual nonlawyer who performs professional services which assist the organization in providing legal services to clients, but only if:
>
> (1) The partnership or organization has as its sole purpose providing legal services to clients;
>
> (2) All persons having such managerial authority or holding a financial interest undertake to abide by these Rules of Professional Conduct;
>
> (3) The lawyers who have a financial interest or managerial authority in the partnership or organization undertake to be responsible for the nonlawyer participants to the same extent as if nonlawyer participants were lawyers under Rule 5.1 . . . .

D.C. Rule 5.4(b). A comment explains the purpose of this approach.

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[2] District of Columbia LEO 233 (1/26/93) ("The Rules of Professional Conduct adopted in the District of Columbia, effective January 1, 1991, contain a version of Rule 5.4 that, like the Kutak Commission proposal, reflects a more liberal approach to the subject of fee-sharing and association of nonlawyers in the legal practice. Rule 5.4(a), the general ban on fee-sharing, contains not only the traditional exceptions for payments to a deceased lawyer's estate and inclusion of nonlawyer employees in a retirement plan based on profit-sharing, but also, in Rule 5.4(a)(4) and 5.4(b), an exception permitting the sharing of fees in partnerships or other organizations in which nonlawyers have an interest, provided that certain safeguards are observed.").

> As the introductory portion of paragraph (b) makes clear, the purpose of liberalizing the Rules regarding the possession of a financial interest or the exercise of management authority by a nonlawyer is to permit nonlawyer professionals to work with lawyers in the delivery of legal services without being relegated to the role of an employee. For example, the rule permits economists to work in a firm with antitrust or public utility practitioners, psychologists or psychiatric social workers to work with family law practitioners to assist in counseling clients, nonlawyer lobbyists to work with lawyers who perform legislative services, certified public accountants to work in conjunction with tax lawyers or others who use accountants' services in performing legal services, and professional managers to serve as office managers, executive directors, or in similar positions. In all of these situations, the professionals may be given financial interests or managerial responsibility, so long as all of the requirements of paragraph (c) are met [which prohibits a lawyer from permitting any person who pays the lawyer to represent a client from directing the lawyer's professional judgment].

D.C. Rule 5.4(b) cmt. [7]. The next comment explains the limited nature of the D.C. approach.

> Paragraph (b) does not permit an individual or entity to acquire all or any part of the ownership of a law partnership or other form of law practice organization for investment or other purposes. It thus does not permit a corporation, an investment banking firm, an investor, or any other person or entity to entitle itself to all or any portion of the income or profits of a law firm or other similar organization. Since such an investor would not be an individual performing professional services within the law firm or other organization, the requirements of paragraph (b) would not be met.

D.C. Rule 5.4(b) cmt. [8].

It is unclear exactly how many D.C.-based law firms have nonlawyer partners, but it has never been very many.

As a practical matter, no large multistate firm has ever taken advantage of this D.C. rule for several reasons. First, the traditional approach of the other 50 U.S. jurisdictions forbids lawyers in those jurisdictions from sharing their fees with nonlawyer partners anywhere -- which effectively prohibits even internal law firm arrangements in which a D.C. law office nonlawyer partner receives compensation under a firm partnership agreement. Second, the traditional fee split prohibition also prevents other law firms from splitting their fees with such a D.C. firm. The ABA Model Rules and every state's ethics rules permit a "division of a fee between lawyers who are not in the same firm," under certain conditions. ABA Model Rule 1.5(e). This type of fee split most commonly takes place among plaintiff's law firms agreeing to divide up a contingent fee -- because most transactional lawyers and defense litigators simply charge their hourly rate for their work, rather than split another law firm's fees. In any event, a law firm practicing anywhere but D.C. which wishes to split fees with a D.C. firm with a nonlawyer partner traditionally runs afoul of ABA Rule 5.4(a)'s prohibition on sharing legal fees with a nonlawyer. Thus, D.C. firms with nonlawyer partners cannot have offices anywhere else, and traditionally could not share the fees of law firms based anywhere else.

Most bars traditionally condemned non-DC lawyers' involvement with DC lawyers practicing in firms partially owned by nonlawyers.[3]

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[3] As early as 1994, Virginia took a more lenient approach. Virginia LEO 1584 (4/11/1994) ("A Virginia lawyer may enter into a partnership with a non-lawyer in the District of Columbia, because its ethics rules permit such partnerships (Virginia's DR 1-102(B) acts "as a conflicts of rules provision" allowing the more permissive DC rule to apply). Although the partnership (through a Virginia lawyer) may conduct activities in DC benefiting Virginia clients, it may not engage in the practice of law in Virginia, and the Virginia lawyer may not conduct any of the lawyer's practice in Virginia through the partnership. [Rule 8.5(a) now indicates that Virginia lawyers must comply with the Rules regardless of where they practice,

- New York LEO 1038 (12/6/14) (explaining that a D.C. law firm partially owned by nonlawyers could not establish a New York subsidiary, because such ownership arrangements would violate the New York ethics rules; "A law firm based in Washington, D.C. includes a nonlawyer partner, which is permitted by the D.C. Rules of Professional Conduct. The firm is interested in associating with a New York-admitted lawyer, who is also licensed in D.C., to handle New York cases, staff an office in New York and have a primarily New York-based practice. The firm is contemplating having the New York lawyer join the firm as a partner or forming a 'wholly-owned subsidiary law firm' in New York to be 'independently managed/operated' by the New York lawyer. We understand the term 'subsidiary law firm' to mean a firm whose partnership interests are owned entirely by the D.C. firm."; "Two of our prior opinions interpreting Rule 8.5(b) -- N.Y. State 911 (2012) and N.Y. State 889 (2011) -- help to frame our conclusion."; "In N.Y. State 911, a New York lawyer proposed to establish the New York office of a UK law firm that, as permitted by English law, included UK nonlawyers in ownership and supervisory positions. We concluded that New York Rule 5.4 prohibited the association because '[e]ven if the lawyers in question are also licensed in the UK, the predominant effect of their conduct, in practicing law from a New York office on behalf of New York clients, would be in New York.'"; "Similarly, in N.Y. State 889, we were asked whether a lawyer licensed in New York and D.C. could practice in a D.C. firm with a nonlawyer member. Because the lawyer principally practiced in D.C. and received a majority of revenue from D.C. cases and matters, we concluded that Rule 5.4 did not prohibit the proposed arrangement, even if the lawyer undertook 'occasional litigation in New York.'"; "A New York-based lawyer practicing primarily in New York may not join a D.C. firm that includes a nonlawyer partner. The lawyer is also prohibited from practicing in a firm organized as a wholly-owned subsidiary of that D.C. firm.").

- Maryland LEO 2013-07 (2013) ("The following question has arisen: May a Maryland attorney whose conduct occurs in Maryland, whose conduct has a predominant effect in Maryland or who is handling a matter before a tribunal in Maryland, practice with or in a District of Columbia professional corporation or other District of Columbia association authorized to practice law for profit when the District of Columbia firm includes a non-lawyer who owns an interest in the firm or a non-lawyer lawyer who serves as corporate director or officer thereof or occupies a position of similar responsibility. The short answer is no. The Maryland Rules of Professional Conduct specifically prohibit lawyers from sharing legal fees with non-lawyers or practicing law with or in a firm in which a nonlawyer owns an interest.").

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and Rule 8.5(b) now provides a "choice of law" rule for lawyers licensed in more than one jurisdiction.] [Approved by the Supreme Court of Virginia 11/2/16].).

Abandoned ABA 20/20 Proposal

On December 2, 2011, the ABA Commission on Ethics 20/20 issued a Discussion Draft of a revised Rule 5.4 that would provide essentially the same approach as the D.C. Model, but with several additional restrictions not found in District of Columbia Rule 5.4. Proposed ABA Model Rule 5.4(b) would have provided that

> A lawyer may practice law in a law firm in which individual nonlawyers in that firm hold a financial interest, but only if:
>
> (1) the firm's sole purpose is providing legal services to clients;
>
> (2) the nonlawyers provide services that assist the lawyer or law firm in providing legal services to clients;
>
> (3) the nonlawyers state in writing that they have read and understand the Rules of Professional Conduct and agree in writing to undertake to conform their conduct to the Rules;
>
> (4) the lawyer partners in the law firm are responsible for these nonlawyers to the same extent as if the nonlawyers were lawyers under Rule 5.1;
>
> (5) the nonlawyers have no power to direct or control the professional judgment of a lawyer, and the financial and voting interests in the firm of any nonlawyer are less than the financial and voting interest of the individual lawyer or lawyers respectively holding the greatest financial and voting interests in the firm, the aggregate financial and voting interests of the nonlawyers does not exceed [25%] of the firm total, and the aggregate of the financial and voting interests of all lawyers in the firm is equal to or greater than the percentage of voting interests required to take any action or for any approval;
>
> (6) the lawyer partners in the firm make reasonable efforts to establish that each nonlawyer with a financial interest in the firm is of good character, supported by evidence of the nonlawyer's integrity and professionalism in

> the practice of his or her profession, trade or occupation, and maintain records of such inquiry and its results; and
>
> (7) compliance with the foregoing conditions is set forth in writing.

ABA Comm'n on Ethics 20/20, Draft Resolution [ABA Model Rule 5.4], 1:34-64 (Dec. 2, 2011).

The accompanying Report described the proposal's modest approach, and its inclusion of additional protections beyond those in the D.C. model.

> The Resolution thus proposes a modest liberalization of the current Model Rule 5.4 prohibitions, but takes an approach that is more restrictive than even the limited form of nonlawyer ownership permitted under the version of Rule 5.4 the District of Columbia has had in place for over twenty years. The Commission's Alternative Law Practice Structures Working Group identified this stricter version of the District of Columbia rule as a potential option in its April 2011 Issues Paper Concerning Alternative Business Structures. The additional protections contained in the Resolution over and above those in the District of Columbia version of Rule 5.4 are designed to ensure the continued professional independence of lawyers in law firms, and to resolve any potential conflicts between the professional obligations of lawyers and any nonlawyer owners. For example, the Resolution's character and fitness requirement for nonlawyer owners reinforces the primacy of public protection and the high standards of integrity expected of lawyers and law firms. At the same time, the proposed amendments to Model Rule 5.4 would permit lawyers and law firms that so desired to consider adopting alternative legal practice structures that might enable them to innovate in order to provide more, better, or less expensive legal services.

ABA Comm'n on Ethics 20/20, Discussion Draft for Comment (Alternative Law Practice Structures), Report at 2-3 (Dec. 2, 2011) (footnote omitted). The Report also provided a general justification for this proposed approach.

> Lawyers who believe that a law firm owned solely by lawyers is the best and most efficient structure for providing legal services would, of course, be free to continue providing services as they always have. But in the absence of empirical evidence from the District of Columbia or elsewhere that lawyers cannot meet their professional obligations in any firm that has even a single nonlawyer owner, there is no clear justification for protecting lawyers in traditional law firms from having to compete with lawyers who believe that the kind of alternative law practice structures the Resolution would permit can improve client service, as long as the ethical values and protections at the heart of the U.S. legal profession's traditions are preserved.

Id. at 3.

In several places, the Report explicitly indicated that under proposed Rule 5.5(b) "the firm cannot be a multidisciplinary practice." Id. at 2. In fact, the Commission even came up with a new name for the type of structure it proposed to permit: "Alternative Law Practice Structures," called "ALPS." The ABA Commission abandoned its proposal on April 16, 2012.

Several state bars condemned the proposal, and repeated their traditional approach.

- New York City LEO 2017-4 ("Many not-for-profit legal services organizations work closely with non-lawyer professionals, such as social workers, who are employed by community-based agencies that assist and advocate for low-income individuals. Some legal services organizations make their lawyers available to provide legal advice for the benefit of such individuals. One way this may occur is that a non-lawyer professional, acting as agent for the individual, reaches out to a legal services lawyer for short-term limited legal advice, e.g., advice on how the individual should respond to particular questions in applying for Medicaid. It is important for the lawyer and the caseworker, at the outset of their interaction, to have a shared understanding of their respective roles and responsibilities vis-à-vis the individual. The lawyer's involvement may consist of a single telephone conversation with the non-lawyer, who communicates with the lawyer on the individual's behalf. Such an interaction may give rise to an attorney-client relationship between the lawyer and the individual. If it does, the lawyer must comply with ethical

requirements to avoid conflicts of interest, obtain informed consent to a reasonable limited scope representation, and provide competent services. The lawyer's provision of short-term limited legal services is subject to Rule 6.5, which relaxes the otherwise applicable conflict of interest rules. Under Rule 6.5, the legal services lawyer need not conduct an organization-wide conflict check; instead, she is ethically conflicted only if she personally has actual knowledge of a conflict.").

- New York LEO 1038 (12/6/14) (explaining that a D.C. law firm partially owned by nonlawyers could not establish a New York subsidiary, because such ownership arrangements would violate the New York ethics rules; "A law firm based in Washington, D.C. includes a nonlawyer partner, which is permitted by the D.C. Rules of Professional Conduct. The firm is interested in associating with a New York-admitted lawyer, who is also licensed in D.C., to handle New York cases, staff an office in New York and have a primarily New York-based practice. The firm is contemplating having the New York lawyer join the firm as a partner or forming a 'wholly-owned subsidiary law firm' in New York to be 'independently managed/operated' by the New York lawyer. We understand the term 'subsidiary law firm' to mean a firm whose partnership interests are owned entirely by the D.C. firm."; "Two of our prior opinions interpreting Rule 8.5(b) -- N.Y. State 911 (2012) and N.Y. State 889 (2011) -- help to frame our conclusion."; "In N.Y. State 911, a New York lawyer proposed to establish the New York office of a UK law firm that, as permitted by English law, included UK nonlawyers in ownership and supervisory positions. We concluded that New York Rule 5.4 prohibited the association because '[e]ven if the lawyers in question are also licensed in the UK, the predominant effect of their conduct, in practicing law from a New York office on behalf of New York clients, would be in New York.'"; "Similarly, in N.Y. State 889, we were asked whether a lawyer licensed in New York and D.C. could practice in a D.C. firm with a nonlawyer member. Because the lawyer principally practiced in D.C. and received a majority of revenue from D.C. cases and matters, we concluded that Rule 5.4 did not prohibit the proposed arrangement, even if the lawyer undertook 'occasional litigation in New York.'"; "A New York-based lawyer practicing primarily in New York may not join a D.C. firm that includes a nonlawyer partner. The lawyer is also prohibited from practicing in a firm organized as a wholly-owned subsidiary of that D.C. firm.").

- Maryland LEO 2013-07 (2013) ("The following question has arisen: May a Maryland attorney whose conduct occurs in Maryland, whose conduct has a predominant effect in Maryland or who is handling a matter before a tribunal in Maryland, practice with or in a District of Columbia professional corporation or other District of Columbia association authorized to practice law for profit when the District of Columbia firm includes a non-lawyer who owns an

interest in the firm or a non-lawyer lawyer who serves as corporate director or officer thereof or occupies a position of similar responsibility. The short answer is no. The Maryland Rules of Professional Conduct specifically prohibit lawyers from sharing legal fees with non-lawyers or practicing law with or in a firm in which a nonlawyer owns an interest.").

- John E. Thies, The Battle Against Non-Lawyer Involvement in Legal Practice, Ill. Bar J. (Jan. 2013) ("At the Annual Meeting of the American Bar Association (ABA) last August, the Illinois State Bar Association (ISBA) joined with a number of state bar associations and others across the country to challenge certain proposals coming from the ABA's Commission on Ethics 20/20. If put into practice, these proposals would result in greater non-lawyer involvement in the practice of law (and contravene ABA policy)."; "With the unanimous support of our Board of Governors, the ISBA's 'challenge' took the form of a resolution we offered in the ABA House of Delegates calling upon the House to reaffirm the following ABA policy: 'The sharing of legal fees with non-lawyers and the ownership or control of the practice of law by non-lawyers are inconsistent with the core values of the legal profession. The law governing lawyers that prohibits lawyers from sharing legal fees with non-lawyers and from directly or indirectly transferring to non-lawyers ownership or control over entities practicing law should not be revised.'"; "The House ultimately postponed our resolution on procedural grounds. However, this did not take place until after much debate (within and beyond the House) making clear to the commission that permissive non-lawyer ownership and fee-splitting proposals would not be well received by the House. (The commission asked for comments on the draft proposals and it received them!)"; "The good news is that the commission reported in September that it would not move forward with the intra-firm fee-splitting proposal. And then, most recently, the commission announced in October that it would not recommend the inter-firm fee-splitting proposal to the House, instead referring it to the ABA's Standing Committee on Ethics and Professional Responsibility. This last announcement said the commission's decision was due to its conclusion that this issue was actually 'narrow and technical,' not 'worthy of debate and consideration in the [ABA] House [of Delegates],' and not 'capable of making a difference for the profession.'").

Despite the ABA's retreat, the trend is clearly in favor loosening the traditional restrictions:

- Mara Leventhal, Fee-Sharing Issues For NY Lawyers Got More Complicated, Law360, Sept. 27, 2013 ("Rule 5.4 of the New York Rules of Professional Conduct is based on, and generally tracks, Rule 5.4 of the Model Rules of Professional Conduct. Both versions of the rule provide that '[a] lawyer or law

firm shall not share legal fees with a nonlawyer.'"; "Both versions provide that '[a] lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.' And both prohibit a lawyer from practicing with or in the form of an entity authorized to practice law for profit if a nonlawyer owns an interest in the entity, serves as a member, director or officer of the entity or in another similar position of responsibility, or otherwise 'has the right to direct or control the professional judgment of a lawyer.'"; "But recent and conflicting guidance provided by the New York State Bar Association (NYSBA) Committee on Professional Ethics -- in Opinion 889 (Nov. 15, 2011) and Opinion 911 (Mar. 14, 2012) -- and the American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility -- in Opinion 464 (Aug. 19, 2013) -- suggests that the similarities between New York Rule 5.4 and Model Rule 5.4 may end there, at least with respect to the appropriate method for determining whether fee sharing between a New York lawyer and an out-of-state lawyer or partnership with nonlawyers comports with the rules.").

- ABA LEO 464 (8/19/13) ("A lawyer may ethically share fees with another lawyer who is authorized to participate in the matter and share fees, even if that other lawyer practices in a law firm (in jurisdictions like the District of Columbia and the United Kingdom) owned in part by nonlawyers. Model Rule 5.4(a) generally prohibits fee-sharing with a nonlawyer, although it contains an exception "for firm compensation and retirement plans [which] depends on whether the profits being shared are 'tied to particular clients or particular matters.'" (citation omitted); "[A] division of a legal fee by a lawyer or law firm in a Model Rules jurisdiction with a lawyer or law firm in another jurisdiction that permits the sharing of legal fees with nonlawyers does not violate Model Rule 5.4(a) simply because a nonlawyer could ultimately receive some portion of the fee under the applicable law of the other jurisdiction."; Among other things, "there is no reason to believe that the nonlawyer in the [other jurisdiction] might actually influence the independent professional judgment of the lawyer in the Model Rules jurisdiction, who practices in a different firm, in a different jurisdiction.").

- New York LEO 889 (11/15/11) ("A lawyer who principally practices in a jurisdiction that allows partnership with a non-lawyer, and who is also admitted in New York, may ordinarily conduct New York litigation even if in a partnership that includes a non-lawyer who would benefit from the resulting fees; although the New York rules generally prohibit such arrangements, in this case the governing ethical provisions would be those of the other jurisdiction."; "Forming the District of Columbia partnership does not clearly have its predominant effect in New York just because the partnership may undertake some New York litigation work. Under the circumstances presented, neither does it clearly have a predominant effect in New York for

the partnership to distribute its fees according to the general terms of the partnership agreement, even though this may include occasional fees from New York litigation."; "Accordingly, while the proposed distribution of legal fees may have to comply with relevant ethical rules in the District of Columbia, it is not subject to New York Rule 5.4. A contrary result, applying the New York Rules more broadly than their intended reach, could result in undue burdens for lawyers admitted in New York, but legitimately practicing in the District of Columbia through a partnership that includes a non-lawyer, who wish to participate in the occasional New York litigation matter."; "Our conclusion as to choice of law is premised on the particular facts of the inquiry. These include that the lawyer and the law firm, now and in the foreseeable future, have their principal place of business in the District of Columbia and that the bulk of their revenue is derived from matters unrelated to the State of New York. Different facts could lead to a different result. For example, if a major portion of the revenue of the lawyer or the law firm were derived from the practice of law in the State of New York, then, depending on the particular facts, Rule 8.5 could make applicable the prohibition of New York Rule 5.4. Certainly if the partnership were created for the very purpose of litigation in New York, establishing it in the District of Columbia would be ineffective to circumvent the New York rules on fee sharing."; noting that bars have taken different positions on this issue; "Other jurisdictions have reached varying conclusions as to the choice of law that governs such situations. *Compare* Philadelphia Opinion 2010-7 (opining that a Pennsylvania lawyer could share fees with a non-Pennsylvania lawyer in the District of Columbia even though the DC firm had a non-lawyer partner) *with* ABA 91-360 (opining that lawyer practicing in a jurisdiction forbidding partnerships with non-lawyers would be subject to that prohibition even if a member of a DC firm), *followed in* Virginia Opinion 1584 (1994). It should be noted, however, that the ABA and Virginia opinions were based on codes without choice of law provisions similar to the current Rule 8.5 in New York. We believe that the Philadelphia opinion is the more instructive precedent, and for the reasons stated above, we believe the New York choice of law rules support a similar conclusion.").

- Philadelphia LEO 2010-7 (9/2010) (holding that a Pennsylvania lawyer may enter into a fee sharing agreement with a Washington, D.C. law firm that has a nonlawyer partner, even though such an arrangement is not permitted in Pennsylvania; "[T]he Pennsylvania Rules do not permit fee sharing with nonlawyers while the DC RPC do. Conversely the DC RPC impose additional requirements to those of the Pennsylvania Rules in order for a fee to be divided between lawyers. Notwithstanding these differences, this Committee has repeatedly concluded that a Pennsylvania lawyer may share a fee with a non-Pennsylvania lawyer in accordance with Rule 1.5 regardless of a prohibition or limitation thereon by the Rules of Professional Conduct of the state in which the receiving lawyer practices. . . . It is the Committee's opinion that although the DC firm might under some arrangement ultimately share

profits with a non-lawyer pursuant to the DC RPC, the propriety of this fee-sharing arrangement under the PA RPC is not vitiated. The D.C. Firm is a duly constituted law firm under the DC RPC and therefore fee sharing in accordance with Rule 1.5 is appropriate.").

Best Answer

The best answer to this hypothetical is **NO (EXCEPT IN WASHINGTON, D.C.)**.

B 9/12

Multidisciplinary Practice (MDP)

Hypothetical 24

Because your firm has offices in a number of state capitals, you have hired several lobbyists to provide lobbying and related services to clients retaining the firm for legal services, as well as clients who require only lobbying services (and not any legal services). You wonder to what extent you can integrate the very successful lobbyists' practice into the law firm's legal practice.

(a) May lobbyists employees of the law firm provide lobbying services to clients who also receive legal services from the firm?

YES

(b) May lobbyists employees of the law firm provide lobbying services to law firm clients who do not receive legal services from the firm?

YES

(c) May lobbyists offer their services through a wholly owned subsidiary of the law firm?

YES

(d) May lobbyists become partial owners of the law firm?

NO

Analysis

Law firms have always been able to offer law-related services, but traditionally every jurisdiction has forbidden nonlawyers providing such services from sharing fees with the lawyers with whom they practice, or acquiring an ownership interest in the law firm.

(a)-(b) Lawyers Providing Non-Legal Services

Determining whether a lawyer may ethically sell non-legal services to clients involves a number of issues.

General Principles. Lawyers wishing to sell non-legal services to their clients must confront at least three potentially difficult situations.

First, lawyers face an inherent conflict in recommending themselves rather than a competitor -- a lawyer's fiduciary duty may require the lawyer to recommend that the client use another service provider better suited to the client's need.

Second, in some situations, the lawyer's duty as an advocate might conflict with the lawyer's parallel duty that arises in the lawyer's other role. For instance, a lawyer/accountant might face internally inconsistent duties when dealing with some accounting issue.

Third, communications between a client and a lawyer providing non-legal services might not be (and probably would not be) protected by the attorney-client privilege -- which only covers communications when the lawyer acts as a legal advisor.

ABA Debate Over Ancillary Services. Several years ago, the ABA engaged in a vigorous debate about lawyers selling non-legal services.[1]

In what amounted to a precursor to the even more contentious debate about multidisciplinary practice,[2] the ABA finally settled on a fairly bland rule governing lawyers' sale of non-legal services.[3]

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[1] Historically, the ABA has permitted lawyers to sell non-legal services to their clients. ABA Informal Op. 1497 (3/1/83) (a lawyer/doctor may practice law and medicine from the same office and serve the same person as both lawyer and doctor).

> (a) A lawyer shall be subject to the Rules of Professional Conduct with respect to the provision of law-related services…if the law-related services are provided:
>
> (1) by the lawyer in circumstances that are not distinct from the lawyer's provision of legal services to clients; or
>
> (2) in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist;
>
> (b) The term "law-related services" denotes services that might reasonably be performed in conjunction with and in substance are related to the provision of legal services, and

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[2] Undoubtedly prompted by the practice of accounting firms gobbling up European law firms (and worries that ultimately all American lawyers would end up working for accountants), the ABA established a Commission on Multidisciplinary Practice to study possible changes in the ethics rules so that lawyers would partner with (and share their fees with) nonlawyers under certain circumstances.

After many months of hearings, careful deliberations, intense analysis and a wide-ranging effort to obtain a consensus, the Commission presented its MDP proposal to the ABA House of Delegates on August 10, 1999. The House of Delegates sent the Commission back to the drawing board -- by a vote of 304 to 98.

After nearly a year of re-work and re-analysis, the Commission presented a softened MDP proposal to the House of Delegates on July 11, 2000. By a vote of 314 to 106, the ABA not only rejected the Commission's recommendations, it officially disbanded the Commission.

Nearly every state engaged in its own debate about MDPs, with many states (including Virginia) following essentially the same pattern as the ABA -- state bar elected bodies rejecting recommendations by special task forces that almost always favored some form of MDPs.

For instance, the Joint Virginia State Bar and Virginia Bar Association Commission on Multidisciplinary Practice met nearly every month for two years before sending its proposed MDP changes to the Virginia State Bar Council (the elected body that decides such issues). On June 14, 2002, the Virginia State Bar Council rejected the recommendation of the Joint Commission by a vote of 60 to 4.

The demise of Arthur Andersen and other Enron-related events seem to have ended the MDP debate for now.

[3] A comment to ABA Model Rule 5.7 provides examples of the non-legal services that lawyers might provide:

> [T]itle insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical or environmental consulting.

ABA Model Rule 5.7 cmt. [9].

> that are not prohibited as unauthorized practice of law when provided by a nonlawyer.

ABA Model Rule 5.7.

A comment to ABA Model Rule 5.7 confirms that the rule

> applies to the provision of law-related services by a lawyer even when the lawyer does not provide any legal services to the person for whom the law-related services are performed and whether the law-related services are performed through a law firm or a separate entity.

ABA Model Rule 5.7 cmt. [2].

Comment [8] requires that lawyers providing such non-legal services through a separate entity assure that "nonlawyer employees in the distinct entity that the lawyer controls compl[y] in all respects with the Rules of Professional Conduct."

Thus, lawyers cannot avoid the ethics rules if they sell non-legal services to their clients in connection with legal services, or if the lawyer has not carefully explained the inapplicability of the conflicts rules.

Of course, the ABA Model Rules warn that

> a lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed financial interest.

ABA Model Rule 1.7 cmt. [10].

In a 2004 legal ethics opinion, the ABA dealt with lawyers posting bail bond for their clients -- declining to adopt a per se prohibition, but warning lawyers to be careful when doing so. ABA LEO 432 (1/14/04) (although some states totally prohibit lawyers from posting bail bonds for their clients, such conduct is sometimes permissible as long as clients consent after full disclosure. Lawyer should recognize that (1) there is a

possibility of conflicts because someone posting a bail bond has a financial incentive to apprehend a fugitive client or otherwise assure that the client appears in court; (2) some states consider the posting of bail bonds a form of impermissible financial assistance to a client; and (3) obtaining the necessary consent from a client would be extremely difficult if the client is incarcerated; posting such bail bonds is more likely to be permissible if there is an immaterial amount of money at stake, or if there is a family or friendship relationship between the lawyer and client).

Restatement. The Restatement acknowledges that lawyers can sell law-related services.

> Ancillary business activities of lawyers can be conducted consistent with the Section and with other applicable requirements. A lawyer may, for example, operate a real-estate agency, insurance agency, title-insurance company, consulting enterprise, or similar business, along with a law practice. So long as each enterprise bills separately and so long as the ancillary enterprise does not engage in the practice of law, involvement of both the lawyer's law practice and the lawyer's ancillary business enterprise in the same matter does not constitute impermissible fee-splitting with a nonlawyer, even if nonlawyers have ownership interests or exercise management powers in the ancillary enterprise.

Restatement (Third) of Law Governing Lawyers § 10 cmt. g (2000). Not surprisingly, the Restatement then warns lawyers that they must be very careful when doing so, and also mandates various disclosures.

> However, a lawyer's dual practice of law and the ancillary enterprise must be conducted in accordance with applicable legal restrictions, including those of the lawyer codes. Among other things, the lawyer's self-interest in promoting the enterprise must not distort the lawyer's judgment in the provision of legal services to a client, including in making recommendations of the lawyer's own ancillary service. To avoid misleading the client, a lawyer must reveal the lawyer's

> interest in the ancillary enterprise when it should be reasonably apparent that the client would wish to or should assess that information in determining whether to engage the services of the other business. The lawyer must also, of course, avoid representing a client (or do so only with informed client consent) in a matter in which the ancillary enterprise has an adverse interest of such a kind that it would materially and adversely affect the lawyers' representation of the client . . . . The lawyer must also disclose to the client, unless the client is already sufficiently aware, that the client will not have a client-lawyer relationship with the ancillary business and the significance of that fact. Other disclosures may be required in the course of the matter. For example, when circumstances indicate the need to do so to protect an important interest of the client, the lawyer must disclose to the client that the client's communications with personnel of the ancillary enterprise -- unlike communications with personnel in the lawyer's law office . . . -- are not protected under the attorney-client privilege. If relevant, the lawyer should also disclose to the client that the ancillary business is not subject to conflict-of-interest rules . . . similar to those applicable to law practice.

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

Finally, the Restatement mirrors ABA Model Rule 5.7 in advising lawyers that they might well be governed by all of the ethics rules applicable to the provision of legal services.

> A lawyer's provision of services to a client through an ancillary business may in some circumstances constitute the rendition of legal services under an applicable lawyer code. As a consequence, the possibly more stringent requirements of the code may control the provision of the ancillary services, such as with respect to the reasonableness of fee charges . . . or confidentiality obligations . . . . When those services are distinct and the client understands the significance of the distinction, the ancillary service should not be considered as the rendition of legal services. When those conditions are not met, the lawyer is subject to the lawyer code with respect to all services provided. Whether the services are distinct depends on the client's reasonably apparent understanding concerning such considerations as

> the nature of the respective ancillary-business and legal services, the physical location at which the services are provided, and the identities and affiliations of lawyer and nonlawyer personnel working on the matter.

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

Thus, the Restatement takes the same essentially liberal approach as the ABA Model Rules.

State Bars' Approach. Despite these inherent difficulties, state bars generally have accepted the notion of lawyers selling non-legal services to their clients.

For instance, the Virginia Bar has repeatedly dealt with this issue. In a surprisingly large number of legal ethics opinions, the Virginia Bar has allowed lawyers to act in the following roles in providing non-legal services to their law clients: consultant;[4] certified public accountant;[5] stockbroker;[6] insurance salesperson;[7] real

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[4] Virginia LEO 1658 (12/6/95) (a law firm may establish a non-legal consulting firm (to provide human resource advice) and share common directors, use similar logos and letterheads, share overhead expenses (such as secretarial support, library resources and lobby space), engage in joint marketing and refer clients to each other, as long as: the public would not be confused by any advertising; the joint marketing does not result in any misperceptions; the firms avoid sharing any confidential client information; the firms do not split fees or pay one another a referral fee; the firms advise their clients of other available referral options; the firms adopt "adequate conflicts screening procedures"; any lawyers involved in the consulting firm "comply at all times with applicable rules of the Code of Professional Responsibility, whether or not the attorney is acting in a professional capacity as a lawyer"); Virginia LEO 1318 (2/1/90) (a lawyer may practice law and operate a consulting firm out of the same office as long as the activities are kept separate and clients consent after full disclosure; the lawyer may send out one bill for both services as long as the bill fully discloses the separate services).

[5] Virginia LEO 1163 (11/16/88) (a lawyer who is also a CPA may perform both legal and accounting services as long as the client consents after full disclosure).

[6] Virginia LEO 430 (10/16/81) (a lawyer/stockbroker may send out announcements describing both roles, but must advise clients that the attorney-client privilege would not cover communications if the lawyer is acting as a stockbroker).

[7] Virginia LEO 1754 (5/17/01) (a lawyer who also sells insurance may recommend that a legal client purchase insurance from the lawyer, with the lawyer receiving part of the commission on the sale of the insurance policy, as long as there is full disclosure and consent (under Rule 1.8) and the lawyer's judgment is not affected by the conflict); Virginia LEO 1612 (9/21/94) (a lawyer who also sells insurance may represent plaintiffs against insurance companies or their insureds for which the lawyer has written insurance policies, as long as the client consents; in fact, the lawyer may pursue such cases even if the

estate salesperson;[8] title insurance seller;[9] mediator;[10] registered agent;[11] escheater;[12] escrow agent;[13] financial planner.[14]

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lawyer wrote the policy for the defendant insured; [the Bar did not discuss the possibility that as an insurance agent the lawyer might have acquired confidential information about the defendant]); Virginia LEO 1311 (11/21/89) (a lawyer wishes to sell insurance to other law firms representing a client's adversaries; the clients must consent to this arrangement); Virginia LEO 869 (12/19/86) (a lawyer employed by a law firm may also be employed as a part-time life insurance agent).

[8] Virginia LEO 1131 (9/1988) (a law firm may invest in a realty corporation and continue to represent clients of the corporation if the clients consent after full disclosure); Virginia LEO 627 (11/13/84) (a lawyer who is a full time real estate broker may represent the broker but may not represent other parties to the transaction).

[9] Virginia LEO 1152 (11/16/88) (a lawyer may arrange for title insurance for a client through a company of which the lawyer is part owner, as long as the client consents). [This LEO was further explained in LEO 1564.]; Virginia LEO 1097 (7/11/88) (a lawyer may issue title binders on behalf of a client as long as the client consents after full disclosure); Virginia LEO 1072 (5/31/88) (a lawyer may obtain title insurance for clients through a company in which the lawyer has an interest as long as the client consents after full disclosure. [This LEO was further explained in LEO 1564.]).

[10] Virginia LEO 1759 (2/4/02) (a lawyer who owns a mediation company is "of counsel" to a law firm in which his/her spouse is a partner; after mediation of a domestic dispute, one of the parties asks an associate in the law firm to file for divorce on behalf of that party; the Bar holds that lawyers/mediators may not represent either party after they handle a mediation, even with the clients' consent (overruling earlier LEOs 1684, 590, 544, and 511); because this specific disqualification applies only to the lawyer/mediator, an associate in the firm would not be disqualified based on the mediator's disqualification; however, the lawyer/mediator's duty of confidentiality arising from the mediation also disqualifies that lawyer, and is imputed to the firm to which the lawyer/mediator is "of counsel" (although client consent can cure this conflict); if there were no connection between the lawyer/mediator and the law firm, lawyers practicing in the firm would not be disqualified from representing the party in the divorce as a result of the spousal relationship to the mediator); Virginia LEO 1368 (12/12/90) (lawyers may be shareholders of a corporation providing mediation and arbitration services, but the lawyers must comply with the ethics code).

[11] Virginia LEO 961 (9/3/87) (a lawyer representing a client sued by a construction company for which the lawyer formerly did legal work and for which the lawyer continues to serve as registered agent may continue the representation but must first resign as registered agent (citing "an appearance of impropriety").

[12] Virginia LEO 863 (4/1/87) (a lawyer who has acted as an escheator may not later represent a party in litigation over property sold in the estate sale, because there is a "strong possibility" that the lawyer would be a witness).

[13] Virginia LEO 1482 (10/19/92) (acting as a lawyer and escrow agent is not per se unethical); Virginia LEO 466 (9/20/82) (a lawyer serving as escrow agent may receive the income from investments made as payment for services as escrow agent, as long as the client consents); Virginia LEO 372 (5/15/80) (a lawyer representing a purchaser in a real estate transaction may act as joint escrow agent if the purchaser and seller consent).

[14] Virginia LEO 563 (4/10/84) (as long as the client consents, a lawyer acting as a financial adviser may receive a fee from the third party who markets the investments); Virginia LEO 473 (9/20/82) (a lawyer having a relationship with a finance company may refer a client to the company, but only after full disclosure; the lawyer may not refer the debtor to the company if the lawyer represented the creditor).

Other states take a similarly broad approach.

- Arizona LEO 05-01 (5/2005) (analyzing an Arizona rule that deals with the ability of lawyers to share in the fees of other professionals to whom they refer clients; "Under ER 5.7, adopted in December 2003, a lawyer who operates a separate investment advisory business may refer non-clients to an investment advisory firm that pays a referral fee to the lawyer, so long as the lawyer takes reasonable steps to assure that the non-clients understand they are not receiving legal services and they do not have the protections of a lawyer-client relationship. A lawyer who provides such services to former clients must also comply with the confidentiality requirements and other obligations under ER 1.9, and should take particular care to assure that the former clients understand they do not have a lawyer-client relationship with respect to the investment transactions. A lawyer may not refer a current client to such a program, however, unless the lawyer meets the 'heavy burden' of showing compliance with ER 1.7 and 1.8(a)."; ultimately concluding that a lawyer may accept a referral fee from an investment advisory firm to which the lawyer referred clients of the lawyer's separate investment-related services firm; noting that "[t]he lawyer would not provide investment-related services in the same matter in which the lawyer provides legal services. The lawyer also would disclose in writing to the customers that the investment services are not legal services and the protections of the client-lawyer relationship do not apply."; "Also, a lawyer who provides investment advisory services must satisfy ERs 7.1 through 7.3 and maintain separation between the law practice and the lawyer's investment advisory business so that they do not appear to be related.").

- Utah LEO 04-05 (12/2/04) ("It is not per se unethical for a lawyer to refer a client to a cooperative organization created by the lawyer to provide non-legal services and for the lawyer to participate in the organization's profit sharing. If the lawyer complies with the following, then the arrangement is permissible: (1) objectively concludes that any identifiable conflicts between the lawyer and the cooperative organization would not materially affect the representation of that client; (2) affirms in writing to the client that the referral will not compromise the client's interests in any way; (3) fairly concludes that the services provided by the cooperative organization are being provided at fair and reasonable fees; (4) discloses that the lawyer will receive a share of profits from the cooperative organization; (5) advises the client to seek independent counsel as to the referral; and (6) secures the client's consent.").

- Oklahoma LEO 316 (12/14/01) ("While the safest and least onerous course of conduct would be for a lawyer to avoid possible conflicts of interest and ethical violations by not entering into business transactions with a client beyond the attorney-client relationship, total avoidance of such transactions is not demanded by the ethics rules or by the vast majority of case law and

ethics interpreting them. Under the current Oklahoma Rules of Professional Conduct, a lawyer may enter into a business transaction with a client if: (1) the terms of the transaction and the lawyer's interest therein (including compensation) are fair and reasonable to the client, (2) the terms of the transaction and the lawyer's interest therein are fully disclosed in an understandable manner to the client in writing, (3) the client is advised to, and given a reasonable opportunity to, seek independent counsel in the transaction, and (4) thereafter, the client consents to the transaction in writing. If these requirements are satisfied, the client's interests can be adequately protected. If the lawyer complies with the applicable Rules of Professional Conduct and other laws (such as insurance or securities licensure, registration and disclosure requirements), a lawyer who provides legal services to a client in estate planning or trust matters may also provide non-legal, but ancillary, products or services to their law clients, either directly or through an affiliated entity. Because the 'fair and reasonable to the client' standard is both objective and fact-specific in nature, no absolute 'safe harbor' exists. However, as the provision of coordinating legal and non-legal services evolves, Oklahoma lawyers who provide law-related services to their clients can minimize the risk of alleged ethics violations by carefully reviewing the applicable Rules of Professional Conduct and fully documenting their compliance with these requirements in order to respond to any subsequent questions regarding their professional conduct.").

- North Carolina LEO 2001-9 (10/19/01) (holding that a lawyer may recommend the purchase of financial products from a client of the lawyer, but may not receive a commission for the sale of such products; "Rule 1.8(b), however, does not prevent an attorney from providing law-related services to a legal client, so long as the attorney fully discloses his self-interest in the referral and the referral is in the best interest of the client. 2000 Formal Ethics Opinion 9 was not intended and does not create an exception to Rule 1.8(b). That opinion allows an attorney to provide accounting services to his legal clients. Nothing in the opinion specifically permits an attorney/CPA, who holds an appropriate license, to sell securities or other products to a client and profit from the sale. An attorney may, however, provide accounting, financial planning, or other law-related services to a client and charge a fee for rendering those services. An attorney may also provide financial products to the client, but may not profit from the sale of those products by charging either an additional fee or a commission.").

- North Carolina LEO 2000-9 (1/18/01) (analyzing the following question about a lawyer who also acts as a CPA: "Attorney may decide to join an existing accounting practice as a CPA. If so, may Attorney operate a separate legal practice within his office in the accounting firm?"; answering as follows: "Yes, this arrangement is not distinct from the arrangement allowed in RPC 201 in which a lawyer/real estate agent operated a separate law practice within the

offices of a real estate brokerage. Nevertheless, such an arrangement presents serious obstacles to the fulfillment of a lawyer's professional responsibility. Preserving the confidentiality of client information and records is virtually impossible in such a setting. Client information must be isolated and concealed from all of the employees of the CPA firm. See Rule 1.6. In addition, Attorney must avoid conflicts of interest between the interests of his legal clients and the interests of the clients of the CPA firm. See Rules 1.7 and 1.9. There may be no sharing of legal fees with the CPA firm in violation of Rule 5.4(a) which prohibits a lawyer from sharing legal fees with a non-lawyer. Finally, Attorney must maintain a separate trust account for the funds of his law clients pursuant to Rule 1.15 et seq."; also analyzing the question of whether the lawyer may "offer legal services to his accounting clients and vice versa"; answering as follows: "Yes, if there is full disclosure of the lawyer's self-interest in making the referral and Attorney reasonably believes that he is exercising independent professional judgment on behalf of his legal clients in making such a referral. However, direct solicitation of legal clients is prohibited under Rule 7.3 although it may be permitted by the regulations for certified public accountants. Rule 7.3(a) does permit a lawyer to engage in in-person or telephone solicitation of professional employment if the lawyer has a 'prior professional relationship' with a prospective client. If a prior professional relationship was established with a client of the accounting firm, Attorney may call or visit that person to solicit legal business."; also holding that the lawyer may share a telephone number with the accounting firm with whom the lawyer also works).

- New York LEO 731 (7/27/00) (allowing lawyers to engage in businesses other than the practice of law, as long as they do not violate any ethical or legal rules; concluding, however, that a lawyer may not compensate employees for soliciting clients to engage the services of a title insurance agency in which the lawyer has an ownership interest).

- North Carolina LEO 99-6 (7/23/99) (analyzing the following question: "May a North Carolina lawyer own all or part of a title insurance agency that writes title policies on North Carolina property?"; providing the response: "Yes, provided the lawyer does not give a title opinion to the title insurance company for which the title agency issues policies. See RPC 185.").

- New York LEO 711 (1/7/98) (finding an inherent conflict in a lawyer selling long-term care insurance to clients that the lawyer represents in estate planning).

- Philadelphia LEO 97-11 (10/1997) (allowing lawyers to own businesses providing non-legal services, as long as there is disclosure to clients and informed consent).

- Florida LEO 94-6 (4/30/95) (allowing a law firm to operate an ancillary business within the firm, as long as it conforms with all of the ethics Rules; "A law firm may operate a mediation department within the firm. The mediation practice must be conducted in conformity with the Rules of Professional Conduct. Consequently, nonlawyers employed by the firm's mediation department may not have an ownership interest in the firm or its mediation department, the attorney advertising rules will apply to any advertising by the mediation department, and the mediation department may not use a proposed trade name because that trade name is not the name under which the firm practices.").

- Illinois LEO 92-5 (10/23/92) (permitting a lawyer to affiliate with a nonlawyer mediator in a mediation business, as long as the lawyer complies with applicable ethics rules; "There is no prohibition against lawyer engaging in divorce mediation business with a non-lawyer and operating the business from the law office where lawyer does not represent either party in the underlying divorce.").

- Florida LEO 88-15 (10/1/88) (allowing lawyers to practice law and engage in another profession from the same office, as long as the lawyer preserves client confidences, refrains from prohibited solicitation and does not impermissibly share legal fees).

- Florida LEO 79-3 (1979) (recognizing that in 1979 Florida eliminated an earlier prohibition on a lawyer practicing law and engaging in another profession from the same office).

Other states take a more stringent approach.

Among other things, some bars express concern about lawyers' preservation of client confidences, sharing fees with nonlawyers, or violating the prohibition on providing a benefit to a third party in return for that third party's recommendation of the lawyer.

- New York LEO 1135 (10/10/17) (holding that a lawyer who was also acting as an accountant could not make telephone calls offering accounting services integrated into the lawyer's legal practice; "Rule 7.3 prohibits a lawyer who is also a certified public accountant from offering by telephone unsolicited tax-related services to persons with whom the lawyer lacks any pre-existing relationship when the tax-related services are not distinct from legal services and offered by the lawyer as part of the lawyer's integrated practice."; "The inquiring attorney is licensed in New York as both a lawyer

and a certified public accountant. The inquirer plans to open a solo practice offering a range of state and local tax services, and to offer these services, both legal and accounting, as an integrated operation."; "According to the inquirer, the vast majority of the services to be offered are those that either a lawyer or an accountant may legally perform. Each of these professions, for instance, may handle a tax audit defense or certain administrative matters before tax authorities. Limits exist, however: For instance, an accountant may not represent a person in court proceedings, which only a lawyer may do, and a lawyer may not conduct an audit of a company's financial statements, which, we are told only an accountant may do."; "Here, the identity of the service provider, the substance of the services to be provided, the prospective recipient of the services, and the manner or means in which the lawyer wants to offer the services substantially overlap. In such circumstances, we read Rule 5.7(a)(1) to mean that the lawyer's accounting services are not distinct from those of the lawyer's legal services. As Comment [1] under Rule 5.7 explains, 'The recipient of the nonlegal services may expect, for example, that the protection of client confidences and secrets, prohibitions against representation of persons with conflicting interests, and obligations of a lawyer to maintain professional independence apply to the provisions of nonlegal services when that may not be the case. The risk of confusion is especially acute when the lawyer renders both legal and nonlegal services with respect to the same matter.' Accordingly, we believe that all the Rules apply to the inquirer's conduct even when the inquirer is offering tax services that an accountant as well as a lawyer may properly perform."; "This includes the Rules' prohibition on the unsolicited in-person contact with potential clients. Rule 7.3(b) defines 'solicitation' as 'any advertisement on behalf of a lawyer or law firm that is directed to, or targeted at, a specific recipient or group of recipients, or their family members or legal representatives, the primary purpose of which is the retention of the lawyer or law firm, and a significant motive for which is pecuniary gain.' Rule 7.3(a)(1) prohibits any 'solicitation' by 'in-person or telephone contact,' with limited exceptions inapplicable here. Comment [9] to Rule 7.3 explains that, 'in-person solicitation, which has historically been disfavored by the bar because it poses serious dangers to potential clients,' among them 'the risk that a lawyer, who is trained in the arts of advocacy and persuasion, may pressure a potential client to hire the lawyer without adequate consideration,' a risk equally present 'in telephone contact or in real-time or interactive computer-accessed communication.'").

- New Jersey LEO 730 (12/10/15) ("In this Joint Opinion, the Advisory Committee on Professional Ethics and Committee on the Unauthorized Practice of Law find that lawyers may provide lobbying and government services in a non-legal setting but they cannot hold themselves out as lawyers, may not provide legal services, and must take measures to assure that their customers are aware that there is no lawyer-client relationship and

the company does not afford the protections of a law firm. The lawyers should not be designated as 'Esquire' or 'Esq.'"; "This Joint Opinion should not be read as an implicit adoption of *Model Rule of Professional Conduct* 5.7 or as a grant of permission to lawyers to operate any non-legal law-related business free from application of the New Jersey *Rules of Professional Conduct* or other pertinent *Court Rules* governing the practice of law. The Committees recognize that lobbying and government affairs companies in New Jersey have a longstanding tradition of employing the services of both lawyers and non-lawyers, and there have been no reports of harm suffered by customers of those companies. Hence, this Opinion merely permits lawyers to associate with non-lawyers in lobbying and government affairs services companies, outside a law firm, provided the company communicate to their customers that they do not provide legal services or offer the protections of a lawyer-client relationship and the lawyers do not hold themselves out as acting in the capacity of lawyers.").

- New York LEO 1068 (8/10/15) (analyzing an arrangement under which a lawyer agreed with a non-lawyer's "claims recovery firm" to pursue anti-trust claims -- because such non-lawyer professionals are not on the list of N.Y. Comp. Codes R. & Regs § 1205.3 -- professions with which lawyers may engage in multidisciplinary practice arrangements -- which covers architecture, certified public accountancy, professional engineering, land surveying, and certified social work; "A lawyer may not join with a claims recovery firm in an agreement to offer legal services to the public to be performed by the lawyer and by the claims recovery firm if it is to be done on a systematic and continuing basis, because claims recovery firms are not on the Appellate Division list of approved nonlegal professionals within the meaning of Rule 5.8. Even if the relationship is a 'non-exclusive reciprocal referral agreement' within the meaning of Rule 5.8(c), the lawyer must ensure that the relationship does not interfere with the lawyer's independent professional judgment, does not involve improper solicitation of clients, does not involve aiding in the unauthorized practice of law, and does not involve the improper sharing of legal fees. The lawyer may share in a contingent fee paid by client to lawyer and nonlawyer but only if (i) the nonlawyer provides substantial assistance in the proceedings (i.e. does not merely sign up clients and pass them on to the lawyer), (ii) the nonlawyer's compensation is commensurate with the nonlawyer's services, and (iii) the lawyer's fee is also commensurate with the lawyer's services (i.e. is not reduced so that the reduction is in effect a referral fee to the nonlawyer).").

- Connecticut Informal LEO 15-03 (2/18/15) (explaining that lawyers may also act as real estate agents in the same transaction, under certain conditions; "The interests of the seller and the seller's lawyer acting as the seller's real estate agent are generally aligned as both are committed to completing the sale. Therefore, absent unusual circumstances, a lawyer may occupy a dual

role of the seller's real estate agent and attorney so long as the lawyer is in compliance with Rule 1.8."; "It is therefore the opinion of the Committee that the attorney may offer free or discounted legal services, which should be in a written fee agreement, so long as the attorney is in compliance with Rule 1.5."; "It is the opinion of the Committee that advertising a discounted fee is permissible. However, the lawyer should state in any such advertisement that the discounted fee is based on the lawyer's usual fee for the same or similar legal services. The lawyer cannot state or imply a comparison of her discounted legal fees to those of another lawyer's fees 'unless presented with such specificity as would lead a reasonable person to conclude the comparison can be substantiated.'" (citation omitted)).

- Nevada LEO 52 (8/18/14) (explaining that although Nevada was among the sixteen states which did not adopt ABA Model Rule 5.7, Nevada lawyers acting as lobbyists nevertheless would have to undertake the same process of disclosure and consent to avoid being bound by the lawyer ethics rules; "[A] lawyer seeking to exempt ancillary services from the NRPC [Nevada ethics rules] must have the informed, preferably written, consent of the client specifically acknowledging, among other things, that: the lawyer is not acting as a lawyer; the services rendered will not be measured against the standard of care expected of a lawyer; the NRPC, including its provisions for confidentiality, conflicts, reasonableness of fees, etc., does not apply; there is no attorney-client privilege applicable; and, there is no legal malpractice insurance coverage for the services. All of this has to be done within the overlay of Rule 1.8."; "Legislative lobbying is a sufficiently law-related service that the Rules of Professional Conduct govern the lawyer's services. This is so even though a lay person performing exactly the same services is free from the restrictions imposed upon a lawyer-lobbyist by the Rules.").

- New York City LEO 2014-1 (01/2014) ("A New York lawyer must consider a wide range of ethical issues before entering into a business relationship with a non-legal organization. A New York lawyer is contemplating an arrangement with a non-legal organization based in another state, where: (1) the New York lawyer would review forms prepared by the non-legal organization on behalf of its customers to determine whether they comply with certain applicable legal requirements; and (2) the non-legal organization would pay the lawyer a percentage of the fees paid by the customers to the non-legal organization, pursuant to a pre-determined fee schedule."; "Rule 5.4(a) prohibits a lawyer or law firm from sharing legal fees with a nonlawyer except in three instances, none of which is applicable here. Rule 5.4(a) reflects 'traditional limitations on sharing fees' with nonlawyers. Rule 5.4, cmt. [1]. The purpose of the fee-sharing prohibition is to remove incentives for nonlawyers to interfere with the professional judgment of lawyers in legal matters, and to remove incentives for nonlawyers to engage in other objectionable conduct. See Simon, at 1137 [Roy D. Simon, Simon's New

York Rules of Professional Conduct Annotated (West 2013)] (footnote omitted)."; "When analyzing Rule 5.4(a), a relevant consideration is whether the persons seeking citizenship are paying the NLO more, less or exactly the same for the Lawyer's Legal Review as they would pay if they were paying for the Lawyer's services directly. See NYSBA Ethics Op. 942 (2012) (discussing the differential between the amount paid by the client to a non-legal firm and the amount paid by a non-legal firm to the attorney). If the NLO obtains a financial benefit by including the Lawyer's legal fees in its overall charges (i.e., if the NLO charges the client more for legal services than it pays the Lawyer), then the arrangement could constitute impermissible fee splitting. See id. It should be noted that a disciplinary authority would likely view the proposed payment arrangement as having the indicia of fee-splitting and, thus, would likely subject it to close scrutiny." (footnote omitted)).

- Douglas S. Malan, Barbershop-Law Office Combination On Cusp Of 'Hybrid Business' Trend, Conn. L. Tribune, July 12, 2013 ("Donald E. Howard II sees his new business venture as a natural combination: Everybody needs to get their hair cut and lots of people like to talk about their troubles at the barbershop."; "So the New Britain attorney decided to open Legal Cuts, a legal-themed barbershop on West Main Street that also happens to be home to Howard's law office, which is in the back of the building. He's been open since early April and caters to people with all types of legal issues."; "'I thought it was the perfect marriage,' said Howard. 'People could feel comfortable in this environment and feel they can trust the lawyer. I want to make sure legal services are available to these people' who may be intimidated by walking into a traditional law office."; "Howard said he got the idea for Legal Cuts from a television show after seeing a California lawyer who offers legal services in a coffeehouse that is aptly named the Legal Grind. Howard decided on a barbershop because he took courses to become a licensed barber in Chicago and then cut hair during his undergraduate and graduate school days at Mississippi State University."; "Howard is adamant about running Legal Cuts just like a law office. Barbers aren't allowed to offer any legal advice and they must conduct themselves professionally in and out of the workplace, Howard said."; "'I want people to know this isn't an average barbershop,' he said.").

- New York LEO 930 (8/8/12) ("A lawyer may not enter into a contractual arrangement with an insurance agency whereby the agency would offer its customers both legal and nonlegal services, even if the agency and lawyer are separately paid and do not share in each other's fees."; "The proposed arrangement here is a species of multidisciplinary practice, in this instance implicating Rule 5.8 as a business relationship between a lawyer and a third-party non-lawyer service provider. The proposed conduct consists of an exclusive contractual arrangement between a lawyer and non-legal professional service provider offering to the public, on a systematic and

ongoing basis, both legal services (by the inquiring lawyer) and services by a non-legal professional service provider (an insurance agency). The proposed arrangement contemplates that the agency and the lawyer will regularly offer to the agency's clients the service of drafting SPDs and reviewing them for compatibility with ERISA and other applicable laws."; "That the lawyer and the agency instead intend separately to bill for the services does not alter this conclusion. The focus of our attention is the arrangement between the lawyer and the non-lawyer service provider, and the continuing and systematic offer of their services to the public. The inquirer and the insurance agency are engaged in what amounts to a joint venture to provide a service for the public. This falls squarely within the ambit of multidisciplinary practice governed by Rule 5.8(a).").

- New York LEO 845 (10/14/10) ("A lawyer who is also a real estate broker may ethically offer to share her broker's commission with attorneys who refer buyers or sellers to her if either (a) the referring lawyer is not representing the buyer or seller in the real estate transaction, or (b) the referring lawyer is representing the buyer or seller in the real estate transaction but remits or credits the referral fee to the client and obtains the client's informed consent to the potential conflict arising from the referral fee."; "This Committee has often opined that a lawyer cannot act as a lawyer in the same transaction in which a lawyer acts a real estate broker because of the possible conflict between the client's interest and the lawyer's own personal interest."; "In N.Y. State 682 (1996), we noted that our prior opinions have allowed an attorney to receive a referral fee from providers of non-legal services or products for referring clients if (a) the client consents after full disclosure, (b) the legal fee and the referral fee together do not constitute an excessive fee for legal services, and (c) the attorney remits the referral fee to the client if the client so requests. In these opinions, the referral concerned a product or service that was 'fairly uniform among providers' and either was (1) 'required in an objectively determinable quantity incident to the legal service performed by the attorney' (e.g., a mortgage and title insurance in connection with a real estate transaction), or (2) was 'unconnected with any particular legal services' (e.g. certificates of deposit)."; "We think the present situation -- real estate brokerage -- falls somewhere in between 'fairly uniform' products and services like title insurance and certificates of deposit (where receiving a referral fee in connection with client work is routinely consentable as long as the referral fee is remitted to the client), on the one hand, and highly variable products and services like life insurance and investment advice (where receiving a referral fee is nonconsentable even if the referral fee is remitted to the client), on the other hand. While the quality of real estate brokerage services varies among providers, the services are 'required in an objectively determinable quantity incident to the legal services performed by the attorney' because a client typically employs only one broker per transaction, commissions are relatively standard, and the size of the broker's commission depends on the price of the

home the client purchases. Moreover, although a referral fee give the lawyer a financial incentive to refer a client to that particular broker even if the fee is passed on to the client, clients are generally aware that they have many real estate brokers to choose from, and clients are generally capable of evaluating different brokers.").

- Florida Bar v. Glueck, 985 So. 2d 1052 (Fla. 2008) (disbarring a lawyer for creating a joint business with an immigration consulting firm, which involved sharing offices and an employee; noting that the lawyer had not kept separate track of money paid to him and to the consulting firm).

- Arizona LEO 05-01 (5/2005) ("[T]he inquiring attorney, who operates a separate investment advisory business, is not ethically prohibited from referring non-clients to a third-party investment advisory firm and accepting a referral fee from the firm. The inquiring attorney may also refer current clients to an investment advisory firm and accept a referral fee if the lawyer complies with ER 1.6, ER 1.7 and ER 1.8(a). Finally, the inquiring attorney must comply with ERs 7.1 through 7.3 and take special care to keep separate the provision of legal and non-legal services to avoid public confusion.").

- Pennsylvania LEO 2003-16 (1/04) ("The inquirer asks whether it is permissible for an attorney practicing in Pennsylvania to sell life insurance or securities and financial products to his or her clients and/or non-clients, and if so, under what circumstances. Inquirer asks whether it is necessary for the entity selling the life insurance and/or securities and financial products to be separately incorporated."; "Rule 5.7 thus does provide that it is permissible for a lawyer to provide nonlegal services to his clients or non-clients. As the Comment to Rule 5.7 states, lawyers have for many years been providing their clients with nonlegal services such as title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax return preparation, and patent, medical and environmental consulting."; explaining that all of the ethics rules apply to lawyers providing law-related services to clients unless they explicitly advise the client that the protections to not apply; "Thus, if a lawyer makes it clear in writing to the recipient of the nonlegal services that those services are not legal in nature and therefore are not covered by the protections afforded an attorney-client relationship, the lawyer will not have to comply with the Rules of Professional Conduct in providing those ancillary nonlegal services. Note, however, that under Rule 5.7(a), where the legal and nonlegal services are truly indistinguishable, the Rules of Professional Conduct will apply to the provision of the nonlegal services, regardless of disclosures made by the attorney to the recipient of the services."; advising lawyers that they should make such an explicit disclosure even if the entity providing the law related services is separate from the law firm; noting that a "significant minority Committee dissent takes the position

that a lawyer providing law related services does not have to comply with the requirements of Rule 1.8; "[S]ince Rule 5.7 allows those services to be treated as a separate outside business relationship, without the safeguards of the Rules as they apply to the attorney-client relationship, Rule 1.8 thus must apply on the other side of that relationship, i.e. the existing attorney-client relationship. Doing business with a client causes a conflict that needs to be disclosed and waived as in any circumstance where an attorney is doing business with a client. The dissent notes that this position is consistent with the Comment to Pennsylvania Rule of Professional Conduct 5.7.").

- New Jersey LEO 688 (3/13/00) (holding that the ethics rules prohibited a law firm from establishing a separate limited liability company to provide title reports for the firm's foreclosure clients; citing a number of its earlier decisions prohibiting lawyers "who own[ed] controlling interests in title companies, or title abstract companies which act as agents for title companies, from referring clients to those companies"; explaining that earlier decisions "are grounded in the premise that there is an inherent conflict between the title insurer and the real estate purchaser. On the one hand, the title insurer seeks to limit its liability, while on the other, the purchaser would want to expand it."; finding that general prohibition inapplicable because the proposed arrangement did not involve the purchase of title insurance; nevertheless barring the proposed arrangement -- relying on more general principles; citing an earlier opinion in which it labeled "inherently coercive" any arrangement in which a lawyer refers clients to another service provider owned by the client; noting that in an earlier opinion, the Advisory Committee imposed several disclosure consent requirements, and warned that lawyers must keep their law practice totally separate from such other service-providing subsidiaries; analyzing how these principles applied to the proposed ownership of a title abstract company by the lawyers making the inquiry, indicating that it had "serious doubt" that the arrangement would satisfy the "requirement of a physically distinct location" for the subsidiary (the inquiry indicated that the title abstract company "would have office space within the law firm's offices, although it would have a separate sign to identify it"); raising what the Advisory Committee called the "more serious concern" that the title abstract company intended to limit its liability to $1,000 for each report; noting that there apparently would be no title insurance in the proposed arrangement, explaining that "by interposing a separate entity and expressed disclaimer, the [attorneys will] have facially limited the liability they might have otherwise had to their clients, if they had performed the same services as part of their law practice"; refusing to allow the arrangement because of the "confusion in the minds of their clients" caused by the "similarity of the services performed and proximity of their offices" -- compounded by the limitation on liability).

- Illinois LEO 98-03 (1/1999) (holding that a law firm may provide non-legal services such as finding promoters for products, as long as the lawyer

complies with Rules 1.7 and 1.8, and as long as the client is separately represented in entering into the arrangement).

- New York LEO 711 (1/7/98) ("[W]e conclude that a lawyer is categorically forbidden from selling long-term care insurance to clients whom the lawyer represents in estate planning. For purposes of our analysis, long-term care insurance has many of the same characteristics as life insurance (e.g., a wide array of insurance products sold by various companies at different prices, and threshold questions of whether long-term care insurance products are the most appropriate or economical way to satisfy the client's needs). Furthermore, when a lawyer advises a client in estate-planning matters, central objects of the representation include how best to satisfy the financial needs of the client and of those for whom the client wishes to or is obliged to provide; how to conserve the client's assets in the event of various contingencies; and how to provide for various health-related contingencies (such as by means of a health care proxy or living will). Thus, advice about the purchase of long-term care insurance is not likely to be 'merely tangential' to the representation, but central to it. This conflict cannot be cured by disclosure and client consent.").

- Utah LEO 146a (4/28/95) ("A lawyer who is employed for an insurance firm or who works as an insurance agent is restricted from soliciting legal services from insurance customers under Rule 7.3.").

- South Carolina LEO 93-05 (1993) ("A law firm that provides legal services to retirement plans may own interest in and refer clients to an ancillary business that provides services to retirement plans if the services provided do not constitute the unauthorized practice of law and the law firm complies with the provisions of Rules 1.7 and 1.8. If the services rendered by the business entity constitute the unauthorized practice of law, the attorneys or law firm may not assist that unauthorized law practice by referring clients to the entity. A lawyer may not give anything of value in return for a referral for legal services. Therefore, a law firm that provides value to an ancillary business entity and its employees in the form of capital, management, advice, employee compensation and client referrals may not enter into an agreement providing referrals for legal services from the ancillary business. . . . In the present situation, a law firm proposes to help organize and participate in an ancillary business that will provide referrals to the law firm for legal services. The law firm's role in providing capital for the ancillary business, management advice, compensation to the business' employees, and referrals to the business constitute value to the ancillary business in return, in part, for referrals to the law firm. The proposed relationship therefore violates Rule 7.2(c).").

Interestingly, the Philadelphia Bar has dealt with the application of these principles to in-house lawyers participating in business as well as legal matters. The Philadelphia Bar generally indicates that in-house lawyers providing business services to their clients do not fall within Rule 1.8.

- Philadelphia LEO 2008-8 (10/2008) (addressing the privilege and ethics implications of an in-house lawyer participating in business as well as legal matters; initially finding that Rule 1.8 does not apply to the in-house lawyer receiving a salary from the company for the business role; "[U]nless the inquirer is acquiring some partnership interest in the company, or is otherwise being compensated with nonmonetary property, the provisions of Rule 1.8(a) do not apply."; acknowledging that Rule 5.7 might apply to the in-house lawyer's provision of nonlegal services, but that presumably both the lawyer and the company will want the lawyer to provide all of the ethics-based duties to the corporation; warning the in-house lawyer that the attorney-client privilege will not protect communications relating primarily to business matters; and concluding that "[i]t will be prudent for the inquirer to disclose to the client now the potential issues, in writing, because that may help the company's constituents to decide how they wish to proceed. The disclosure should encourage the client to seek the advice of independent counsel regarding the advisability of having its general counsel serve in a nonlegal role as well.").

(c) <u>Law Firm Subsidiaries</u>

Although law firms may provide non-legal services through law firm employees, many law firms have chosen to use a different organizational arrangement -- establishing a wholly owned subsidiary to provide non-legal service. This allows the law firm to more carefully analyze the profitability of such services.

The existence of a separate organization providing such services adds to the complexity of the lawyers' ethics duties. In essence, the law firm and its non-legal subsidiaries must (1) treat the institutions as separate, for confidentiality purposes (meaning that each institution's clients' confidences can be shared with the other only with the clients' consent); (2) usually treat the institutions as the same for conflicts

purposes (meaning that neither institution can work on matters adverse to the other institution's clients, without their consent or the application of some other exception); (3) advise all of the institutions' clients (who are considering or who engage the services of both) of the separate nature and the related nature of the institutions; (4) advise subsidiaries' clients that communications with its employees generally will not deserve attorney-client privilege protection.

As complicated as this sounds, most states permit law firms to provide non-legal services through a separate wholly owned institution.

- Virginia LEO 1819 (9/19/05) (explaining that a lawyer who co-owns (with other non-lawyers) a lobbying firm must comply with certain ethics rules (such as the prohibition on criminal or wrongful conduct), although not rules that apply only when a lawyer is "representing a client," such as the ex parte contact rule; noting that this lawyer's references to his expertise as a lawyer, etc. could create confusion about whether he is providing legal advice -- lawyers providing such services have "an affirmative duty to clarify the boundaries of the business relationship," including whether any legal services are included; warning that lawyers not clarifying their role could find themselves bound by the confidentiality and conflicts rules governing lawyers representing clients -- although a lawyer providing legal services through a lobbying firm could be guilty of a misdemeanor for unauthorized practice of law; explaining that if this lawyer was simultaneously engaged in a law practice, the lawyer's "responsibilities to . . . a third person" (client of the lobbying firm) might prevent the lawyer from representing clients adverse to lobbying firm clients (a disqualification which would be imputed to all lawyers in the lawyer's law firm); confirming that the warning that the ethics rules governing conflicts do not apply to a lawyer/lobbyist's pure lobbying work; providing an example: a lawyer who is acting only as a lobbyist can lobby against a former lobbying client for whom the lawyer previously lobbied; concluding that if the lawyer must follow the conflicts rules because a lobbying client reasonably believes that the lawyer is supplying legal advice (and thus must comply with the conflicts rules), the individual lawyer's disqualification would not be imputed to the entire lobbying firm (because it is not a law firm)).

- North Carolina LEO 2000-9 (1/18/01) (allowing lawyers to provide legal services and other services from the same office, as long as there is full

disclosure to clients who use both services, and the lawyer maintains the confidentiality of the clients' information).

- New York LEO 731 (7/27/00) (allowing lawyers to engage in businesses other than the practice of law, as long as they do not violate any ethical or legal rules; concluding, however, that a lawyer may not compensate employees for soliciting clients to engage the services of a title insurance agency in which the lawyer has an ownership interest).

- New York LEO 711 (1/7/98) (finding an inherent conflict in a lawyer selling long-term care insurance to clients that the lawyer represents in estate planning).

- Virginia LEO 1658 (12/6/95) (explaining that a law firm may establish a non-legal consulting firm (to provide human resource advice) and share common directors, use similar logos and letterheads, share overhead expenses (such as secretarial support, library resources and lobby space), engage in joint marketing and refer clients to each other, as long as: the public would not be confused by any advertising; the joint marketing does not result in any misperceptions; the firms avoid sharing any confidential client information; the firms do not split fees or pay one another a referral fee; the firms advise their clients of other available referral options; the firms adopt "adequate conflicts screening procedures"; any lawyers involved in the consulting firm "comply at all times with applicable rules of the Code of Professional Responsibility, whether or not the attorney is acting in a professional capacity as a lawyer.").

- Florida LEO 94-6 (4/30/95) (allowing a law firm to operate an ancillary business within the firm, as long as it conforms with all of the Rules of Professional Conduct, does not give non-lawyers any ownership interest in the law firm, follows all of the advertising rules governing lawyers, and does not use a trade name that is different from the name under which the law firm practices).

- Illinois LEO 92-5 (10/23/92) (permitting a lawyer to affiliate with a non-lawyer mediator in a mediation business, as long as the lawyer complies with applicable ethics rules).

- Florida LEO 88-15 (10/1/88) (allowing lawyers to practice law and engage in another profession from the same office, as long as the lawyer preserves client confidences, refrains from prohibited solicitation, and does not impermissibly share legal fees);

- Florida LEO 79-3 (1979) (recognizing that in 1979 Florida eliminated an earlier prohibition on a lawyer practicing law and engaging in another profession from the same office).

Two 2017 cases highlight the risk that law firms providing non-legal services might be disqualified under traditional conflicts of interest rules.

- United States ex rel. Luke v. Healthsouth Corp., Case No. 2:13-cv-01319-APG-VCF, 2017 U.S. Dist. LEXIS 186894, at *2-3, *3-4, *10-11, *11, *12-13 (D. Nev. Nov. 10, 2017) (disqualifying Troutman Sanders from representing a doctor in a False Claims Act action against Healthsouth, because Troutman lawyers based in Georgia had lobbied on Healthsouth's behalf [applying the concurrent conflicts rules because Troutman had simultaneously lobbied for Healthsouth and been adverse to it in the Nevada litigation for a time] behalf; explaining the factual background; "In August 2017, the defendants moved to disqualify the Troutman firm from representing Luke because in early 2017, defendant Healthsouth Corporation hired two Troutman attorneys, Peter Robinson and Robb Willis, to provide lobbying services for Healthsouth in Georgia. . . . As part of that arrangement [after the Nevada case had begun], Healthsouth provided confidential information to Robinson and Willis. . . . According to Healthsouth Executive Vice President John Patrick Darby, Healthsouth would not have entered into the lobbying agreement had it known that Troutman had already filed suit against Healthsouth on Luke's behalf in Nevada."; "The lobbying agreement is between Healthsouth and Troutman Sanders Strategies, a limited liability company wholly owned by the Troutman law firm. ECF No. 66-3 at 3. The agreement identifies those who will lobby on Healthsouth's behalf, including attorneys Robinson and Willis. Id. at 3. The agreement states that Strategies may receive support from attorneys at the Troutman law firm with Healthsouth's approval and, if that occurs, Healthsouth would have to enter into a separate agreement for services with the Troutman firm. Id. The agreement states that Strategies would not be providing legal services to Healthsouth and '[a]ccordingly, [Healthsouth] will not have an attorney-client relationship with [Strategies] and its employees with regards to the services that [Strategies] will provide related to the agreement.' Id. at 4. The agreement has a 'conflict of interest' section which states that Strategies will not lobby positions that would be in conflict with Strategies' obligations under the agreement. Id. It also states Strategies 'is not providing legal services as part of this agreement.' Id. However, it does not state that the Troutman law firm may represent someone suing Healthsouth." (alterations in original); applying Nevada's conflicts of interest rules, rather than the Georgia conflicts rules – although Troutman's lobbyists for Healthsouth were based in Georgia; "Rule 1.10(a)'s imputed disqualification rule refers back to Nevada's Rules for conflicts. Under Nevada's Rules, a lawyer cannot concurrently represent adverse clients without the clients' informed consent. Regardless of how Georgia would define the relationship between the Troutman lawyers and Healthsouth, if Robinson [Lawyer] or Willis attempted to represent Luke against Healthsouth in Nevada, the Nevada Rules of Professional Conduct

would not allow it. See State Bar of Nev. Standing Comm. on Ethics and Professional Responsibility Formal Opinion No. 52 (concluding a lawyer (or a subsidiary of a law firm) who provides lobbying services is subject to Nevada Rule of Professional Conduct 1.7). Because Robinson and Willis are disqualified, so is the entire Troutman firm. Nev. R. Prof. Conduct 1.10(a)."; "This does not mean the court is applying the Nevada Rules to the lawyers in Georgia who had no reason to expect this result. Rather, the court is applying the Nevada Rules to the lawyers who appeared in Nevada in this case. Because the Nevada Rules apply to these lawyers, it was incumbent on them to avoid a disqualifying condition under those Rules. Strategies conducted a conflicts check before accepting the lobbying agreement in Georgia. ECF No. 92 at 17. The Troutman lawyers thus were aware of the possibility that by accepting the lobbying agreement, the Nevada representation could be jeopardized, even if Georgia would allow it. The Troutman lawyers could have attempted to obtain Healthsouth's informed consent or they could have declined the lobbying agreement. But what they could not do under Nevada law was concurrently provide law-related services to Healthsouth in Georgia and represent Luke suing Healthsouth in Nevada."; "The public may view with suspicion a multi-state law firm that accepts a lobbying agreement in one state while representing someone suing the lobbying client in another state without obtaining informed consent. Weighing the competing interests, disqualification is the proper result. I therefore overrule the objections to Magistrate Judge Ferenbach's disqualification ruling. The Troutman firm is disqualified from representing Luke in this action.").

- First NBC Bank v. Murex, LLC, 259 F. Supp. 3d 38, 40. 40-41. 41, 43, 49, 49-50, 50, 58-59, 59, 61, 62, 65, 66, 67 (S.D.N.Y. 2017) (disqualifying Holland & Knight for providing legal advice to one client adverse to another client; noting that the law firm's work for the first client began as law-related but non-legal work, but eventually morphed into legal advice; "This decision resolves a motion to disqualify counsel. Defendant Murex, LLC ('Murex') moves to disqualify the law firm Holland & Knight LLP ('H&K'), which, on behalf of plaintiff First NBC Bank ('FNBC') brought this 13-count lawsuit, claiming that Murex sold FNBC bogus receivables, and accusing Murex of, inter alia, breach of contract, breach of fiduciary duty, fraud, tortious interference with contract, and racketeering."; "Murex's motion to disqualify is based on the fact that Murex was an H&K client: At the time that H&K's litigators in Atlanta were readying to sue it, Murex alleges, its Washington, D.C., office was separately representing Murex in regulatory work. H&K's representation of Murex began as a lobbying representation, but, Murex contends, it grew to include legal services, triggering an attorney-client relationship and the canons of professional responsibility. Most notably, Murex contends, H&K helped Murex defend itself against an enforcement action that the Environmental Protection Agency ('EPA') had threatened.

When eventually notified that H&K also represented FNBC and wished to sue Murex on FNBC's behalf, Murex refused to consent. Murex thus argues that H&K engaged in an unconsented-to concurrent representation of a client (Murex) and a party with interests adverse to it (FNBC), prima facie improper under professional canons. Murex argues that allowing H&K to represent FNBC in this lawsuit would give rise to an actual and apparent conflict of loyalties and taint this lawsuit. H&K, backed by FNBC, opposes the disqualification motion."; "For the reasons that follow, the Court grants the motion to disqualify."; "The engagement letter between H&K and Murex, signed by McAdams and by Murex's president, Robert Wright, provides, in pertinent part: . . . 'In addition, please be aware that the services for which you have engaged Holland & Knight are "law-related services" and not "legal services." In other words, the firm will not be acting as your lawyers in this matter but rather in a lobbying capacity utilizing nonlawyer personnel. As such, the protections which accompany an attorney-client relationship do not apply. For example, while the firm will keep your information confidential, the specific rules governing lawyers and client confidential information do not apply. Further, the firm's lawyers would not be prohibited from providing legal services to clients in unrelated legal matters that are adverse to you. While conflicts of interest rules applicable to lawyers would not apply, we, of course, would not undertake lobbying services for another client adverse to the matter on which you have engaged our services.'"; "In mid-March 2016, Murex, 'generally satisfied' with H&K's work, sought to expand H&K's engagement 'beyond what H&K could reasonably provide given the $10,000 monthly fee cap.'. . . Murex asked McAdams and H&K partner Kaufman to prepare a legal work budget for research, analysis, and work related to the EPA's renewable fuel standard (the 'RFS legal work')."; "Around the same time, attorneys for H&K asked that Murex sign a conflict waiver that would allow H&K to concurrently represent FNBC against Murex in the claims, that, ultimately, FNBC brought in this lawsuit, related to allegedly fraudulent receivables."; "Bartel emailed McAdams and declined to sign the conflict waiver."; "The Court has little doubt that, had H&K's ensuing services to Murex been confined to those described in the Engagement Agreement, Murex could not credibly claim that H&K had provided it legal services, formed an attorney-client relationship with it, or took on a conflicting engagement in breach of canons of professional responsibility. The codes of conduct applicable to the District of Columbia, where H&K's EPA-related work for Murex was centered, identify lobbying as a distinct discipline from the practice of law."; "Engagement Agreement with Murex thus was correct to recite that, when a client engages a lobbyist as such, the client does not obtain the benefits of an attorney-client relationship, including the conflict rules governing attorneys."; "The 'words on the page' of the Engagement Agreement, on which H&K relies for its claim that its performed only lobbying services, do not, however, describe the reality of H&K's ensuing work for Murex. H&K's representation of Murex was an example of 'mission creep,' in

which the scope of a firm's work for its client grew beyond that described in its engagement agreement without any corresponding modification of that agreement or open acknowledgment between the firm and its client that the representation in fact had overrun the written agreement."; "From the outset, in fact, H&K's work for Murex materially exceeded the scope of work described in the Engagement Agreement."; "The issue then is whether this work constituted legal or lobbying services. . . . [A]s to McAdam's efforts on Murex's behalf that were occasioned by the EPA Notice, the question is easily answered: This was legal work."; "McAdams performed, over a five-week period spanning late January through early March 2016, the quintessential legal services of drafting and editing affirmative defenses for it to submit to the EPA to try to fend off an adverse action, counseling Murex as the application of agency regulations to the company's historical facts, and advising it as to strategy as to its submissions. McAdams also reviewed confidential materials and information of his client."; "And H&K had no other legal help in this endeavor: No lawyer outside the firm assisted Murex to defend itself before the EPA."; "On the facts here, however, H&K cannot use the waiver provision in its agreement with Murex as a shield. The agreement simply did not cover the legal services that H&K came to provide Murex. It did not describe H&K's services to Murex as including the defense of the threatened enforcement action. And it described the firm's services to Murex as lobbying only, as proved inaccurate. Unhelpfully, the agreement's broadly worded advance waiver provision also did not identify the FNBC matter as one in which the firm sought to reserve the right to be adverse to Murex. Under these circumstances, the advance waiver agreement that H&K sought and received from its non-lawyer contacts at Murex fell well short of embodying informed client consent."; "Contrary to its suggestion, H&K was not, at all, powerless to prevent this situation. To 'protect itself,' H&K need only have declined the assignment of defending Murex against the threatened enforcement action. Nothing obliged H&K to accept that project. Alternatively, before taking on Murex's defense before the EPA, H&K could have amended the Engagement Agreement to accurately describe the firm's work for Murex and – assuming informed client consent – to provide for an advance waiver as to other matters, such as the FNBC litigation. H&K did not do so before undertaking Murex's defense. And, when H&K, after its defense of Murex began, finally alerted to its dual representations and sought a waiver from Murex of the conflict with the FNBC representation, Murex refused to consent to H&K's suing it."; "The predicament in which H&K finds itself, in which it faces the consequences from a conflict perspective of having taken on work outside the Engagement Agreement, was therefore of its own making."; "The Court . . . rejects as hyperbole H&K's claim that an adverse ruling here would leave law firms without 'protect[ion]' where an employee receives 'an unexpected, unsolicited email' asking the firm to take on a new project. The answer is for firms to have systems, cultures, and informed personnel that assure that decisions as to client matter intake and

> expansion are made collaboratively, consultatively, and carefully with due regard for the conflict consequences." (second alteration in original)).

(d) Multidisciplinary Practice (MDP)

The legal profession's debate over what is called multidisciplinary practice has for decades pitted those taking a traditional view of the profession against those seeking a more market-driven approach. In an MDP, a lawyer engages in the practice of law in an institution other than a law firm, and in situations other than in those in which the lawyer acts as a legal advisor to his or her client/employer (as with in-house lawyers, labor union lawyers, government lawyers, etc.). MDPs involve lawyers splitting their fees with nonlawyers, and can involve law firms partially owned by nonlawyers other than those assisting the lawyer in providing legal advice.

Traditional Prohibition on Lawyers Partnering with Nonlawyers. Since 1928, the ABA ethics rules have forbidden lawyers from partnering with nonlawyers (or splitting their fees with nonlawyers).[15]

Under current ABA Model Rule 5.4(b),

> [a] lawyer shall not form a partnership with a nonlawyer if any of the activities of the partnership consist of the practice of law.

ABA Model Rule 5.4(b). Another rule prohibits lawyers from sharing fees with nonlawyers. ABA Model Rule 5.4(a) ("[a] lawyer or law firm shall not share legal fees with a nonlawyer").

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[15] ABA Canon of Professional Ethics 33 (1908) ("In the formation of partnerships for the practice of law, no person should be admitted or held out as a practitioner or member who is not a member of the legal profession duly authorized to practice, and amenable to professional discipline. . . . Partnerships between lawyers and members of other professions or nonprofessional persons should not be formed or permitted where any part of the partnership's employment consists of the practice of law.").

Developments in the 1980s and the 1990s. In the 1980s and 1990s, the legal profession considered and then rejected the concept of MDPs.

First, the Kutak Commission which eventually resulted in the 1983 ABA Model Rules of Professional Conduct recommended a rule that would have allowed MDPs, but the ABA soundly rejected that proposal.

The ABA Commission on Ethics 20/20 Working Group on Alternative Business Structures Report described this event in 2011.

> Between 1977 and 1983, the Commission on Evaluation of Professional Standards (Kutak Commission) developed the Model Rules of Professional Conduct. The Kutak Commission carefully considered the issue of lawyers partnering with nonlawyers and initially proposed that such partnerships should be permitted as long as certain safeguards were employed. The 1982 draft of Model Rule 5.4 provided as follows:
>
> Professional Independence of a Firm
>
> > A lawyer may be employed by an organization in which a financial interest is held or managerial authority is exercised by a nonlawyer, or by a lawyer acting in a capacity other than that of representing clients, such as a business corporation, insurance company, legal services organization or government agency, but only if the terms of the relationship provide in writing that:
> >
> > (a) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship;
> >
> > (b) information relating to representation of a client is protected as required by Rule 1.6;
> >
> > (c) the arrangement does not involve advertising or personal contract with prospective clients prohibited by Rules 7.2 and 7.3; and

> (d) the arrangement does not result in charging a fee that violates Rule 1.5.
>
> The House of Delegates rejected this proposed version of Model Rule 5.4. A revised version of Model Rule 5.4 was subsequently adopted in 1983 and has remained largely intact, except for relatively minor subsequent amendments that have not affected the basic prohibition on lawyer/nonlawyer partnerships and sharing of fees.

Memorandum from ABA Comm'n on Ethics 20/20 Working Group on Alternative Bus. Structures to ABA Entities et al. Re: For Comment: Issues Paper Concerning Alternative Business Structures, at 4-5 (Apr. 5, 2011) ("April 2011 Issues Paper Concerning Alternative Business Structures").

Second, later in the 1980s two jurisdictions considered and one adopted rules that would not have allowed a pure form of MDP, but permitted partial ownership of a law firm by a nonlawyer assisting a lawyer in providing legal services. A 2000 law review article discussed that issue.

> In 1988, both the District of Columbia bar and North Dakota bar proposed that their respective versions of Model Rule 5.4 be modified to allow lawyers and non-lawyers to hold ownership interests in a law firm. The District of Columbia bar sought to change the rule in order to allow non-lawyers to contribute to the legal services provided to clients. This proposal was in part a reaction to the non-law division of lobbying, real estate, and investment banking that some District of Columbia law firms had begun to develop as subsidiaries. The North Dakota rule sought to allow lawyers and non-lawyers to offer combined services. Ultimately, after much debate and controversy, the District of Columbia rule passed, but the North Dakota rule was withdrawn by the state supreme court.

John S. Dzienkowski & Robert J. Peroni, Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in

the Twenty-First Century, 69 Fordham L. Rev. 83, 98-99 (Oct. 2000) (footnotes omitted). This District of Columbia rules change has not prompted many law firms to allow such nonlawyer ownership, because law firms with offices in other states would violate the rules of those other states, and other law firms traditionally could not split their fees with a D.C. firm whose owners included nonlawyers.

Third, the late 1980s and the 1990s saw a tremendous increase in the number of lawyers joining accounting firms as "consultants." These lawyers could not practice law while working at accounting firms, so they took the position that they were practicing "tax" or providing other non-legal services to the accounting firm's clients.

Several law review articles have articulated the type of skepticism that has always pervaded this arrangement.

> The Big Five accounting firms have argued that they are not engaged in the practice of law, but instead are engaged in tax consulting, something somehow different than tax law practice even though it involves interpretation and application of tax law. This argument appears to have no substance.

John S. Dzienkowski & Robert J. Peroni, Multidisciplinary Practice and the American Legal Profession: A Market Approach to Regulating the Delivery of Legal Services in the Twenty-First Century, 69 Fordham L. Rev. 83, 107 (Oct. 2000) (emphasis added). Another law review article written at about the same time used the term "civil disobedience" when describing such lawyer's behavior.

> Many in the U.S. legal community have expressed strong beliefs that lawyers at the Big 5 are engaging in "civil disobedience" whenever they provide legal services because of the current ban on practicing law in a multidisciplinary setting. Critics label such practice "civil disobedience" because they believe that lawyers, acting under the guise of

> consultants, violate unauthorized practice of law ("UPL") statutes, which are included in the statutory scheme of every state. Attorneys at the Big 5 deny that they are practicing law, but instead insist that they merely provide consulting services in areas such as tax, real estate transactions, regulatory compliance, and pre-trial preparation. Although the work of these "consultants" mirrors legal services, the consultants provide their clients with a disclaimer stating that their work does not constitute a valid legal opinion.

Stuart S. Prince, Comment, The Bar Strikes Back: The ABA's Misguided Quash of the MDP Rebellion, 50 Am. U. L. Rev. 245, 255-56 (Oct. 2000) (footnotes omitted).

It was probably an increased number of lawyers working for accounting firms (and accounting firms' increasingly aggressive forays in consulting services) that prompted the ABA's late 1990s consideration of MDPs.

These developments triggered a widespread and intense debate among the legal profession about the wisdom of MDPs.

It was easy to envision the type of lawyer and nonlawyers who might find it useful (and beneficial to their clients) to practice together. Some examples include:

- Litigation lawyers and accountants or jury consultants.
- Patent lawyers and engineers.
- Environmental lawyers and biologists, hydrologists, urban land planners or civil engineers.
- Construction lawyers and architects, engineers, surveyors or landscape architects.
- Criminal lawyers and psychiatrists.
- Family law lawyers and accountants, financial planners, marriage counselors, child psychologists or mediators.
- Elder law lawyers and financial planners, insurance agents, geriatric care managers, social workers or grief counselors.

However, lawyers working with these other professionals would have to be wary of certain issues, including:

- Loyalty (which might require any of the law firm's legal and non-legal clients to be considered law firm clients for conflicts of interest purposes).
- Differing duties of confidentiality (for instance, social workers might have a duty to report child abuse, which lawyers might not have).
- The application of the attorney-client privilege to communications with, or in the presence of or shared with these other professionals.
- Possible temptation or even pressure on lawyers to engage in unethical practices.

ABA Consideration of MDPs. Undoubtedly prompted by the practice of accounting firms gobbling up European law firms (and worries that ultimately all American lawyers would end up working for accountants), in the late 1990s the ABA established a Commission on Multidisciplinary Practice to study possible changes in the ethics rules so that lawyers would partner with (and share their fees with) nonlawyers under certain circumstances.

After many months of hearings, careful deliberations, intense analysis and a wide-ranging effort to obtain a consensus, the Commission presented its MDP proposal to the ABA House of Delegates on August 10, 1999.

The ABA recommended a new Rule 5.8, which would have permitted lawyers to practice in MDPs under certain very limited circumstances.

> RULE 5.8 RESPONSIBILITIES OF A LAWYER IN A MULTIDISCIPLINARY PRACTICE FIRM
>
> (a) A lawyer shall not share legal fees with a nonlawyer or form a partnership or other entity with a nonlawyer if any of the activities of the partnership or other entity consist of the practice of law except that a lawyer in an MDP controlled by

lawyers may do so, subject to the present provisions limiting the holding of equity investments in any entity or organization providing legal services. A lawyer in an MDP not controlled by lawyers may do so, subject to the conditions set forth in paragraphs (c)(1)-(5), and subject to the present provisions limiting the holding of equity investments in any entity or organization providing legal services.

(b) A lawyer in an MDP remains subject to all the Model Rules of Professional Conduct, unless this Rule provides otherwise.

(c) A lawyer may practice in an MDP in which lawyers do not own a controlling interest only if the MDP provides the highest court with the authority to regulate the legal profession in each jurisdiction in which the MDP is engaged in the delivery of legal services written undertakings signed by the chief executive officer (or similar official) and the board of directors (or similar body) that:

> (1) it will not directly or indirectly interfere with a lawyer's exercise of independent professional judgment on behalf of a client;
>
> (2) it will establish, maintain and enforce procedures designed to protect a lawyer's exercise of independent professional judgment on behalf of a client from interference by the MDP, any member of the MDP, or any person or entity associated with the MDP;
>
> (3) it will establish, maintain and enforce procedures to protect a lawyer's professional obligation to segregate client funds;
>
> (4) its members will abide by the rules of professional conduct when they are engaged in the delivery of legal services to a client of the MDP;
>
> (5) it will respect the unique role of the lawyer in society as an officer of the legal system, a representative of clients and a public citizen having special responsibility for the administration of justice. This statement should acknowledge that lawyers in an

> MDP have the same special obligation to render voluntary pro bono publico legal service as lawyers practicing solo or in law firms;
>
> (6) it will annually review the procedures established in subsection (2) and amend them as needed to ensure their effectiveness; and annually certify its compliance with subsections (1)-(6) and provide a copy of the certification to each lawyer in the MDP;
>
> (7) it will annually file a signed and verified copy of the certificate described in subsection (6) with the highest court with the authority to regulate the legal profession in each jurisdiction in which the MDP is engaged in the delivery of legal services, along with information identifying each lawyer who has been a member of the MDP during the reporting period, the jurisdiction in which the principal office of each such lawyer is located, and the jurisdiction(s) in which those lawyers are licensed to practice law;
>
> (8) it will permit the highest court with the authority to regulate the professional conduct of lawyers in each jurisdiction in which the MDP is engaged in the delivery of legal services to review and conduct an administrative audit of the MDP, as each such authority deems appropriate, to determine and assure compliance with subsections (1)-(7); and
>
> (9) it will bear the cost of the administrative audit of MDPs described in subparagraph (8) through the payment of a reasonable annual certification fee.
>
> (d) An MDP that fails to comply with its written undertaking shall be subject to withdrawal of its permission to deliver legal services or to other appropriate remedial measures ordered by the court.

Am. Bar Ass'n Comm'n on Multidisciplinary Practice, Report to the House of Delegates, Appendix A (Aug. 10, 1999). The Commission also recommended other changes, such as a new provision in the Model Rules allowing lawyers to split their fees with nonlawyers under certain circumstances, etc.

The Commission's proposal did not fare well. The House of Delegates sent the Commission back to the drawing board -- by a vote of 304 to 98.

After nearly a year of re-work and re-analysis, the Commission presented a softened MDP proposal to the House of Delegates on July 11, 2000.

The new Recommendation essentially focused on some basic principles that the Commission undoubtedly hoped would pass muster after the House of Delegates' overwhelming rejection of the Commission's more specific proposals.

> 1. Lawyers should be permitted to share fees and join with nonlawyer professionals in a practice that delivers both legal and nonlegal professional services (Multidisciplinary Practice), provided that the lawyers have the control and authority necessary to assure lawyer independence in the rendering of legal services. "Nonlawyer professionals" means members of recognized professions or other disciplines that are governed by ethical standards.
>
> 2. This Recommendation must be implemented in a manner that protects the public and preserves the core values of the legal profession, including competence, independence of professional judgment, protection of confidential client information, loyalty to the client through the avoidance of conflicts of interest, and pro bono publico obligations.
>
> 3. Regulatory authorities should enforce existing rules and adopt such additional enforcement procedures as are needed to implement these principles and to protect the public interest.
>
> 4. The prohibition on nonlawyers delivering legal services and the obligations of all lawyers to observe the rules of professional conduct should not be altered.
>
> 5. Passive investment in a Multidisciplinary Practice should not be permitted.

Am. Bar Ass'n Comm'n on Multidisciplinary Practice, Report to the House of Delegates (July 11, 2000).

The Commission's newer and more bland proposal did not fare well either. By a vote of 314 to 106, the ABA not only rejected the Commission's recommendations, it officially disbanded the Commission.

A 2000 law review article describes this meeting.

> Unlike the contentious meeting in 1999, the House of Delegates at the 2000 meeting did not even debate the Commission's proposal. Instead the delegates voted by a 3-to-1 margin for a resolution that preserves the ABA's ban on fee sharing, effectively ending any chances of changing the Model Rules to permit MDPs. In fact, the House of Delegates did not even vote on the MDP Commission's proposal that was submitted in Atlanta and instead voted to disband the two-year old Commission.

Stuart S. Prince, Comment, The Bar Strikes Back: The ABA's Misguided Quash of the MDP Rebellion, 50 Am. U. L. Rev. 245, 253 (Oct. 2000) (footnotes omitted). Somewhat ironically, the ABA indicated that the Commission was "discharged with the Association's gratitude for the Commission's hard work and with commendation for its substantial contributions to the profession." Katherine L. Harrison, Comment, Multidisciplinary Practices: Changing the Global View of the Legal Profession, 21 U. Pa. Int'l Econ. L. 879, 896 n.65 (Winter 2000).

Another law review article written about the same time described the effect of the ABA's rejection of its Commission's proposal on what was then an ongoing state-by-state debate about MDPs.

> Perhaps adding insult to injury, the ABA also resolved to discharge the MDP Commission. MDP supporters found this result especially unfortunate considering the great number of state committees studying the issue that had either not completed their reports, or had not yet "taken action" on such reports. Indeed, according to the MDP Commission, as of July 6, 2000, 23 states (with 377,670

> resident, active lawyers) had not yet finished their reports on the subject, and 10 states (with 134,579 resident, active lawyers) had received completed reports, but had taken no action.

Michael W. Price, Comment, A New Millennium's Resolution: The ABA Continues Its Regrettable Ban on Multidisciplinary Practice, 37 Hous. L. Rev. 1495, 1509 (Winter 2000) (footnotes omitted).

State MDP Proposals. By the time the ABA considered and then rejected MDPs, nearly every state had already established its own Commission to study MDPs. Many states specifically rejected MDPs, much as the ABA ultimately did.

Other states were far more liberal, and would have allowed MDPs with varying degree of restrictions. For instance, the Joint Virginia State Bar and Virginia Bar Association Commission on Multidisciplinary Practice met nearly every month for two years before sending its proposed MDP changes to the Virginia State Bar Council (the elected body that decides such issues). On June 14, 2002, the Virginia State Bar Council rejected the recommendation of the Joint Commission by a vote of 60 to 4.

No state ultimately moved in the direction of the proposed ABA changes.

MDPs in Other Countries. The April 5, 2011, Issues Paper Concerning Alternative Business Structure issued by the ABA Commission on Ethics 20/20 Working Group on Alternative Business Structures described the permissibility of MDP structures in several foreign jurisdictions, including Australia, Ontario, British Columbia, Quebec, England, Wales, Scotland and several European countries. Interestingly, the report concludes that "MDPs also are permitted in Germany, the Netherlands (but not with

accountants), and in Brussels (only with accountants, but there must be separate billing)." April 2011 Issues Paper Concerning Alternative Business Structures at 16.

ABA Ethics 20/20 Commission

The April 2011 Issues Paper Concerning Alternative Business Structures issued by the ABA Commission on Ethics 20/20 Working Group on Alternative Business Structures specifically disclaimed any intent to allow multidisciplinary practice. Its report specifically indicated as much, and the Commission even came up with a new name for what it has asked the profession to consider permitting: Alternative Law Practice Structures ("ALPS").

Best Answer

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

N 3/12

Law Firms Allowing Ownership Interest by Nonlawyers Other than Those Assisting the Law Firm in Providing Legal Services

Hypothetical 25

You have kept up with legal developments in the United Kingdom, because you recently merged with a London law firm. You have read that UK law firms may sell stock to raise equity. You wonder whether the same structure would work in the United States.

Should U.S. law firms be allowed to raise equity by selling stock?

MAYBE

Analysis

Several foreign countries with legal traditions similar to America's have over the past several years permitted law firms to raise outside equity.

The April 2011 Issues Paper Concerning Alternative Business Structures issued by the ABA Commission on Ethics 20/20 Working Group on Alternative Business Structures described several countries' rules permitting outside equity investment in law firms. Australia and the UK have recently moved in that direction. As the ABA Commission described it, New Zealand allows such investment, but "nonlawyers may only own non-voting shares," and "[o]nly lawyers actively involved in providing incorporated firm's regulative services can be directors." Memorandum from ABA Comm'n on Ethics 20/20 Working Group on Alternative Bus. Structures to ABA Entities et al. Re: For Comment: Issues Paper Concerning Alternative Business Structures, at 16 (Apr. 5, 2011).

A November 2011 article described the status of these overseas developments.

> New rules in the U.K. that take effect later this year will allow law firms to take money from outside investors and join forces with nonlawyers. Part of a three-year overhaul of the country's legal industry, the move is meant to create one-stop shops where clients can go for both legal help and other advisory services, like engineering, information technology and financial consulting.
>
> Those changes, along with reforms in Australia that have allowed law firms to go public since 2007, are ratcheting up calls for reform in the United States and raising questions about whether a similar move is right for the American legal industry.
>
> . . . .
>
> At least three U.S. firms with London offices have moved to take advantage of England's new operating structures, most recently DLA Piper, which has invested in LawVest, a British company that expects to launch a multiservice law firm next year.

Liz Hoffman, United Kingdom Firm Ownership Shift Amplifies Calls for Reform in United States, Law360, Nov. 9, 2011.

So far, the UK approach has not spawned any obvious ethics problems for UK lawyers. In 2014, New York approved New York-licensed lawyers practicing in such UK firms.

- New York LEO 1041 (12/10/14) (holding that a New York lawyer practicing in the UK may work for a law firm partially owned by nonlawyers, because that ownership structure was acceptable in the UK; "A New York lawyer who practices principally in a foreign country but is not admitted to practice in that country may, without violating the New York Rules of Professional Conduct, (A) engage in lawful conduct that does not require licensing in the foreign country but would constitute the practice of law in New York, and (B) practice in the foreign country in partnership or association with an entity that includes a non-lawyer as a supervisor or owner; provided in each case that such practice is permitted under the laws and rules of foreign country and the 'predominant effect' of the lawyer's practice is not in New York.").

Similar efforts to move in that direction in the US have failed.

- Capital Associated Indus., Inc. v. Stein, 283 F, Supp. 3d 374, 378, 378-79 (M.D.N.C. 2017) (dismissing a case alleging the unconstitutionality of a North Carolina law ignoring the practice of law by companies other than law firms; "In its Complaint, CAI describes itself as a tax-exempt, 'non-profit employers' association' comprised of approximately 1,080 employers throughout North Carolina that 'associate[ ] . . . to promote industrial development and progress.' (ECF No. 1 ¶¶ 6, 17.) CAI members pay annual membership dues to CAI to receive 'efficient, low-cost human resources-related information, advice, data, education, legislative advocacy, and other benefits and services pertaining to each member's human resources, compliance, and day-to-day management needs.' (Id. ¶ 17.) In addition to its current offerings, CAI wishes to provide 'employment-related legal advice and services to its members through licensed North Carolina attorneys' that it employs, as part of the dues its members currently pay. (ECF No. 105-1 ¶¶ 34, 44.) For a separate fee of $195 per hour, CAI also wishes to offer its members other legal services that would include drafting employment, separation, and non-compete agreements, reviewing employment policies and handbooks, and representation 'in charges before the Equal Employment Opportunity Commission.' (Id. ¶ 44.) The legal services that CAI wishes to offer would not include providing legal assistance with matters related to litigation or 'extremely specialized areas of workplace law' including, for example, '[t]ax matters that relate to workplace and employee needs.' (ECF No. 106-1 at 64-67.)" (alterations in original); "In April of 2013, CAI requested from the State Bar an opinion as to whether CAI's proposed plan to provide legal advice and services to its members would constitute the unauthorized practice of law. (ECF Nos. 42 ¶¶ 7-9; 42-1.) On May 28, 2013, the State Bar issued a proposed ethics decision, which notified CAI that its plan would amount to the unauthorized practice of law because of CAI's status as a corporation not authorized to practice law."; "On January 23, 2015, CAI filed this lawsuit, seeking declaratory relief and requesting that State Prosecutors be enjoined from enforcing the UPL Statutes against CAI. (ECF No. 1.) CAI alleged that the enforcement of the UPL Statutes, as applied to CAI, would violate (1) its right to substantive due process under the Fourteenth Amendment to the Constitution, (id. ¶¶ 45-53); (2) its right of association under the First Amendment, (id. ¶¶ 54-63); (3) its right to free speech under the First Amendment on the grounds that the UPL Statutes operate as content-based restrictions and prevent CAI from speaking because it is a corporation, (id. ¶¶ 64-72); (4) its right to due process under the Fourteenth Amendment on the ground that the UPL Statutes are vague, (id. ¶¶ 73-82); (5) its right to free speech on the ground that the UPL Statutes prohibit CAI from advertising its proposed legal services, (id. ¶¶ 83-91); and (6) the Monopoly Clause of the North Carolina Constitution, (id. ¶¶ 92-99). On February 16, 2015, CAI sought a preliminary injunction, requesting that

the Court enjoin State Prosecutors from taking any action that would interfere with CAI offering or delivering legal advice and services to its members through CAI attorneys licensed to practice law. (ECF No. 19 at 1.) State Prosecutors moved to dismiss CAI's claims. (ECF No. 10.)").

- Jacoby & Meyers, LLP v. Presiding Justices of First, Second, Third & Fourth Dep'ts of N.Y. Supreme Court, Appellate Div., 118 F. Supp. 3d 584, 568, 576, 578 (S.D.N.Y. 2015) (upholding the constitutionality of New York's prohibition on non-lawyer owners of law firms; "J&M claims, broadly speaking, that New York Rule 5.4 and the various other provisions of New York law here at issue unconstitutionally restrict the core First Amendment protections of free speech and association."; "J&M's argument at best is unpersuasive. At worst, it makes a mockery of the First Amendment. It lacks logical coherence. At times, it misstates the law, misconstrues Supreme Court precedent, and misunderstands critical distinctions in First Amendment jurisprudence. In the end, the theory on which it depends -- and on which it bases the proposed transaction -- falls outside even the most expansive reading of the First Amendment."; "There is no question that the New York law challenged here survive rational basis review, which requires courts to uphold legislation 'if any reasonably conceivable state of facts could demonstrate that the statute is rationally related to a legitimate government purpose.' For one thing, statutes come with a 'strong presumption of rationality,' and J&M has not met its burden of alleging facts that, if proved, would show 'that no set of circumstances exists under which the Act would be valid.'" (citations omitted); "J&M argues also that the New York laws prohibiting non-lawyer equity investment in law firms violate the dormant Commerce Clause because they (1) 'substantially dampen' the flow of 'capital, goods, services, lawyers, and employees across state lines,' thereby burdening interstate commerce in a way that is 'clearly excessive' relative 'to any putative local benefit [the laws] might otherwise advance,' and (2) 'reach across state lines' to bar non-New York law firms from accepting non-lawyer equity investors in such a way that they 'constitute[] extraterritorial regulation.' This argument relies on a fundamental misunderstanding of the dormant Commerce Clause." (internal citation omitted); "J&M's contends finally that the New York laws banning non-lawyer equity investment in law firms violate the Fourteenth Amendment, first by 'abridg[ing] a fundamental right under Substantive Due Process' and, second, by denying J&M 'the equal protection of the laws in violation of the Equal Protection Clause.' J&M's equal protection argument appears predicated on the idea that the restrictions on outside ownership that apply to lawyers do not apply to other 'similarly situations' professionals, such as investment bankers, rendering those restrictions 'arbitrary and capricious' and, ultimately, unconstitutional. Both of these arguments are frivolous." (internal citation omitted)).

If the experience in other countries does not involve any abusive or improper tactics, one could reasonably expect these efforts to continue in the United States.

Best Answer

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

N 3/12