Communications with judicial tribunals or an administrative panel can impact the outcome a case or controversy. The ethical rules governing these communications are complex – with whom may you communicate, when and in what form – and can easily lead to ethical pitfalls. Attorneys must zealously represent their clients, but to what extent can they remain silent about unfavorable facts or not disclose certain elements of adverse law, including unpublished case law? What standards of knowledge under the ethics rules must attorneys satisfy in their communications with tribunals? And when do communications with or a relationship with the judge trigger judicial disqualification? This program will answer these and other questions, and provide you with a real world guide to the ethical pitfalls of communications with judicial and administrative tribunals.

- Ethics of communicating with judicial and administrative law tribunals
- Ethical duty to disclose unfavorable facts v. duty not to misstate material facts
- Disclosure of adverse law, including unpublished case law
- Knowledge standard of attorneys litigating before a tribunal
- Ex parte communications with the courts
- Judicial disqualification based on relationships with litigants or lawyers, or past employment of judge

**Speaker:**

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ETHICS AND TRIBUNALS: ATTORNEY DUTIES WHEN COMMUNICATING WITH THE COURTS AND GOVERNMENTAL AGENCIES

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.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Hypo No.</th>
<th>Subject</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><strong>Dealing with Tribunals: Disclosing Unfavorable Facts and Law</strong></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>Disclosing Unfavorable Facts</td>
<td>1</td>
</tr>
<tr>
<td>2</td>
<td>Prosecutors’ Duty to Disclose Unfavorable Facts</td>
<td>10</td>
</tr>
<tr>
<td>3</td>
<td>Disclosing Directly Adverse Law: General Rules</td>
<td>13</td>
</tr>
<tr>
<td>4</td>
<td>Disclosure Obligation: Knowledge Standard</td>
<td>29</td>
</tr>
<tr>
<td>5</td>
<td>Disclosing Unpublished Case Law</td>
<td>31</td>
</tr>
<tr>
<td>6</td>
<td>Disclosing Statutory Law and Affirmative Defenses</td>
<td>43</td>
</tr>
<tr>
<td>7</td>
<td>Timing of Disclosure Obligation</td>
<td>46</td>
</tr>
<tr>
<td></td>
<td><strong>Dealing with Tribunals: Conduct</strong></td>
<td></td>
</tr>
<tr>
<td>8</td>
<td>Ex Parte Communications with the Court</td>
<td>48</td>
</tr>
<tr>
<td>9</td>
<td>Courtroom Behavior</td>
<td>54</td>
</tr>
<tr>
<td>10</td>
<td>Deposition Behavior</td>
<td>57</td>
</tr>
<tr>
<td></td>
<td><strong>Judicial Conflicts of Interest</strong></td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>Judges’ Disqualification Based on Personal Relationships with Litigants</td>
<td>60</td>
</tr>
<tr>
<td>12</td>
<td>Judges’ Disqualification Based on Personal Relationships with Lawyers</td>
<td>64</td>
</tr>
</tbody>
</table>
Disclosing Unfavorable Facts

Hypothetical 1

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

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

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

NO (PROBABLY)

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

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

YES

Analysis

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

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

A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of
material fact or law previously made to the tribunal by the lawyer.

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

A comment provides some additional explanation.

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

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

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

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

[i]n the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Taking even a broader approach (not limited to acting "in the course of representing a client"), Rule 8.4 indicates that it is "professional misconduct" for a lawyer to
engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . [o]r engage in conduct that is prejudicial to the administration of justice.

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

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

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

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

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

Still, some courts have sanctioned lawyers for remaining silent.

- In re Alcorn, 41 P.3d 600, 603, 609 (Ariz. 2002) (assessing a situation in which a plaintiff's lawyer pursuing a malpractice case against a hospital and
a doctor faced a difficult situation after the hospital obtained summary judgment; condemning the lawyer's secret arrangement with the doctor that the plaintiff would proceed against the doctor (who agreed not to object to any cross-examination by the plaintiff's lawyer), but under which the plaintiff would voluntarily dismiss his claim against the doctor at the close of the plaintiffs' case; noting that "[t]he purpose of the agreement, as we understand it, was to 'educate' the trial judge as to the Hospital's culpability so he could use this background in deciding whether to reconsider his grant of summary judgment to the Hospital"; noting that the plaintiff's trial against the doctor took ten days over a two- or three-week period; calling the trial a "charade" that was "patently illegitimate"; suspending the lawyer from the practice of law for six months).

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

- **Nat'l Airlines, Inc. v. Shea, 292 S.E.2d 308, 310-311 (Va. 1982)** (assessing a situation in which a plaintiff's lawyer did not advise the court that the defendant airline's lawyer thought that the case was being held in abeyance; explaining that the plaintiff's lawyer did not respond to the defendant's lawyer expressing this understanding, did not advise the court of the understanding, and instead obtained a default judgment and levied on the airline's property; holding that the plaintiff's lawyer "had a duty to be above-board with the court
and fair with opposing counsel"; also noting that the plaintiff's lawyer "failed to call the court's attention to the applicability of the Warsaw Convention, which he knew to be adverse to his clients' position"; setting aside the default judgment "on the ground of fraud upon the court").

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

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

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

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

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

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

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

The Restatement takes the same approach.

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


An ex parte proceeding is an exception to the customary methods of bilateral presentation in the adversary system. A potential for abuse is inherent in applying to a tribunal in absence of an adversary. That potential is partially redressed by special obligations on a lawyer presenting a matter ex parte.

Subsection (1) prohibits ex parte presentation of evidence the advocate believes is false. Subsection (2) is affirmative, requiring disclosure of all material and relevant facts known to the lawyer that will enable the tribunal to make an informed decision. Relevance is determined by an objective standard.

To the extent the rule of this Section requires a lawyer to disclose confidential client information, disclosure is required by law within the meaning of § 62. On the other hand, the rule of this Section does not require the disclosure of privileged evidence.

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

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

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

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

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

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

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

_id._

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

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

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

**Best Answer**

The best answer to (a) is PROBABLY NO; the best answer to (b) is YES.
Prosecutors' Duty to Disclose Unfavorable Facts

Hypothetical 2

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

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

YES

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

YES (PROBABLY)

Analysis

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

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

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

A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent
persons. The extent of mandated remedial action is a matter of debate and varies in different jurisdictions. Many jurisdictions have adopted the ABA Standards of Criminal Justice Relating to the Prosecution Function, which are the product of prolonged and careful deliberation by lawyers experienced in both criminal prosecution and defense. Competent representation of the sovereignty may require a prosecutor to undertake some procedural and remedial measures as a matter of obligation. Applicable law may require other measures by the prosecutor and knowing disregard to those obligations or a systematic abuse of prosecutorial discretion could constitute a violation of Rule 8.4.


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

When a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant did not commit an offense of which the defendant was convicted, the prosecutor shall:

(1) promptly disclose that evidence to an appropriate court or authority, and

(2) if the conviction was obtained in the prosecutor's jurisdiction,

(i) promptly disclose that evidence to the defendant unless a court authorizes delay, and
(ii) undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.

. . . When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant
did not commit, the prosecutor shall seek to remedy the conviction.

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

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

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


Best Answer

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

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

Hypothetical 3

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

Must you advise the trial court of the following decisions:

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

YES

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

YES (PROBABLY)

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

NO (PROBABLY)

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

NO (PROBABLY)

Analysis

Introduction

As in so many other areas, determining a lawyer's duty to advise tribunals of adverse authority involves two competing principles: (1) a lawyer’s duty to act as a
diligent advocate for the client, forcing the adversary's lawyer to find any holes, weaknesses, contrary arguments, or adverse case law that would support the adversary's case; and (2) the institutional integrity of the judicial process, and the desire to avoid courts' adoption of erroneous legal principles.

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

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

**ABA Approach**

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

¹ Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346 (Fed. Cir. 2003) (affirming a Rule 11 sanction against a lawyer who violated the disclosure obligation); Tyler v. State, 47 P.3d 1095 (Alaska Ct. App. 2001) (denying a petition for rehearing of a rule fining lawyer for violating the rule); In re Thonet, 733 N.E.2d 932 (Ind. 2000) (issuing a public reprimand against a lawyer who violated a disclosure obligation); United States v. Crumpton, 23 F. Supp. 2d 1218, 1219 (D. Colo. 1998) (finding that a lawyer violated the Colorado ethics rules requiring such disclosure; "I find that it was inappropriate for Crumpton's counsel to file her motion and not mention contrary legal authority that was decided by a Judge of this Court when the existence of such authority was readily available to counsel. Counsel in legal proceedings before this Court are officers of the court and must always be honest, forthright and candid in all of their dealings with the Court. To do otherwise, demeans the court as an institution and undermines the unrelenting goal of this Court to administer justice."); Dilallo v. Riding Safely, Inc., 687 So. 2d 353, 355 (Fla. Dist. Ct. App. 1997) (reversing summary judgment granted by the trial court in favor of the lawyer who had not disclosed adverse authority, and remanding); Massey v. Prince George's County, 907 F. Supp. 138, 143 (S.D. Md. 1995) (issuing a show cause order against a lawyer who violated the disclosure obligation; "[T]he Court will direct defense counsel to show cause to the Court in writing within thirty (30) days why citation to the Kopf case was omitted from his Motion for Summary Judgment, oral argument, and indeed from any pleading or communication to date."); Dorso Trailer Sales, Inc. v. Am. Body & Trailer, Inc., 464 N.W.2d 551 (Minn. Ct. App. 1990) (vacating a judgment in favor of the lawyer who had violated his disclosure obligation, and remanding), aff'd in part and rev'd in part on other grounds, 482 N.W.2d 771 (Minn. 1992); Jorgenson v. County of Volusia, 846 F.2d 1350 (11th Cir. 1988) (upholding Rule 11 sanctions).
The original 1908 Canons contained a fairly narrow duty of candor to tribunals. In essence, the old Canon simply required lawyers not to lie about case law.

The conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness.

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

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

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

Is it the duty of a lawyer appearing in a pending case to advise the court of decisions adverse to his client's contentions that are known to him and unknown to his adversary?

... ...

We are of the opinion that this Canon requires the lawyer to disclose such decisions to the court. He may, of course, after doing so, challenge the soundness of the decisions or present reasons which he believes would warrant the court in not following them in the pending case.
ABA LEO 146 (7/17/35) (emphasis added). The ABA did not explain the reach of this duty, but certainly did not limit the disclosure obligation to controlling case law or even to controlling jurisdictions.

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

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

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

We would not confine the Opinion [LEO 146] to "controlling authorities," -- i.e., those decisive of the pending case -- but, in accordance with the tests hereafter suggested, would apply it to a decision directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case.

Of course, if the court should ask if there are any adverse decisions, the lawyer should make such frank disclosure as the questions seems [sic] to warrant. Close cases can obviously be suggested, particularly in the case of decisions from other states where there is no local case in point . . . . A case of doubt should obviously be resolved in favor of the disclosure, or by a statement disclaiming the discussion of all conflicting decisions.
Canon 22 should be interpreted sensibly, to preclude the obvious impropriety at which the Canon is aimed. In a case involving a right angle collision or a vested or contingent remainder, there would seem to be no necessity whatever of citing even all of the relevant decisions in the jurisdiction, much less from other states or by inferior courts. Where the question is a new or novel one, such as the constitutionality or construction of a statute, on which there is a dearth of authority, the lawyer’s duty may be broader. The test in every case should be: Is the decision which opposing counsel has overlooked one which the court should clearly consider in deciding the case? Would a reasonable judge properly feel that a lawyer who advanced, as the law, a proposition adverse to the undisclosed decision, was lacking in candor and fairness to him? Might the judge consider himself misled by an implied representation that the lawyer knew of no adverse authority?

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

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

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

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


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\(^2\) ABA Model Code of Prof’l Responsibility DR 7-106(B)(1) (1980) ("In presenting a matter to a tribunal, a lawyer shall disclose: (1) Legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel."")
Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(2), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction that has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case.


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

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

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

[T]he recent case is clearly "legal authority in the controlling jurisdiction" and, indeed, is even controlling of the trial court until such time as its own appellate court speaks to the issue. Under one interpretation of the decision, it is clearly "directly adverse to the position of the client." And it involves the "construction of a statute on which there is a dearth of authority."

. . .

While there conceivably might be circumstances in which a lawyer might be justified in not drawing the court's attention to the new authority until a later time in the proceedings, here no delay can be sanctioned. The issue is potentially dispositive of the entire litigation. His duty as an officer of the court to assist in the efficient and fair administration of justice compels plaintiff's lawyer to make the disclosure immediately.

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

Restatement Approach

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

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


The Restatement explains what the term "directly adverse" means in this context.
A lawyer need not cite all relevant and adverse legal authority; citation of principal or representative "directly adverse" legal authorities suffices. In determining what authority is "directly adverse," a lawyer must follow the jurisprudence of the court before which the legal argument is being made. In most jurisdictions, such legal authority includes all decisions with holdings directly on point, but it does not include dicta.


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

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

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

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

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

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

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

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

Id. cmt. c.

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

Finally, a comment describes the various remedies available to courts hearing cases in which a lawyer falls short of this duty.
Professional discipline . . . may be imposed for violating the rule of this Section. A lawyer may also be susceptible to procedural sanctions . . . , such as striking the offending brief, revoking the lawyer's right to appear before the tribunal, or vacating a judgment based on misunderstanding of the law. Failure to comply with this Section may constitute evidence relevant to a charge of abuse of process.

Id. cmt. e.

**State Ethics Rules**

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

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

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

**Case Law**

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

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

The Rule serves two purposes. First, courts must rely on counsel to supply the correct legal arguments to prevent erroneous decisions in litigated cases. . . . Second, revealing adverse precedent does not damage the lawyer-client relationship because the law does not "belong" to a client, as privileged factual information does. . . . Counsel remains free to argue that the case is distinguishable or wrongly decided.

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

The ABA explained that this Opinion [ABA LEO 280 (6/18/1949)] Opinion was not confined to authorities that were decisive of the pending case (i.e., binding precedent), but also applied to any "decision directly adverse to any proposition of law on which the lawyer expressly relies, which would reasonably be considered important by the judge sitting on the case." . . . We note that the Pennsylvania Bar Association's Pennsylvania Ethics Handbook § 7.3h1 (April 2000 ed.), opines that for a case to be "controlling," the opinion must be written by a court superior to the court hearing the matter, although it otherwise adopts the test set forth in the ABA Formal Opinion.

Because both the Pennsylvania and ABA standards are premised upon what "would reasonably be considered important by the judge," we briefly explain why we prefer the ABA's interpretation. The reason for disclosing binding precedent is obvious: we are required to apply the law as interpreted by higher courts. Although counsel might legitimately argue that he was not required to disclose persuasive precedent such as Hittle under Pennsylvania's
interpretation of Rule 3.3, informing the court of case law that is directly on-point is also highly desirable.

. . . .

In sum, the court is aware of the limitations on the duty of disclosure as interpreted by the Pennsylvania Bar Association. However, at least as applied to cases such as the one before the court, it would seem that the ABA position is by far the better reasoned one. Certainly, ABA Formal Opinion 280 comports more closely with this judge's expectation of candor to the tribunal.

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

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

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

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

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

The court rejected what it called the lawyer's "rather self-serving assertion" that he did not have to cite one of the cases because a party in that case had filed a petition for certiorari with the United States Supreme Court. Id. The court's opinion also reveals (if one reads between the lines) that the lawyer seems to have been taken aback by the court's question at oral argument about the missing cases.
At oral arguments, counsel for RWS # 1 acknowledged that he should have cited the Scioto Water decision in RWS # 1's opening brief, and explained that his principal reason for not doing so was that he was disappointed and surprised by the result in that case. While the court is sympathetic with counsel's disappointment, such disappointment should not have prevented counsel from citing relevant authority. Counsel was given the opportunity at oral arguments in this case to explain his differences with the Sixth Circuit Court of Appeals and the U.S. District Court for the Southern District of Ohio in Scioto Water, and he ably did so. However, the point remains that counsel could, and this court believes should, have seized the opportunity to argue the defects counsel perceives in these decisions by including those decisions in RWS # 1's opening brief.

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

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

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

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

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

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

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

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


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

For instance, the Federal Circuit affirmed the United States Court of International Trade's reprimand of a Department of Justice lawyer for "misquoting and failing to quote fully from two judicial opinions." Precision Specialty Metals, Inc. v. United States, 315 F.3d 1346, 1347 (Fed. Cir. 2003). In that case, the DOJ lawyer had omitted several sentences from decisions she quoted. The Federal Circuit found that the lawyer's omission provided a misleading view of the decisions. In addition, she failed to state "emphasis added" for the quoted material in bold face, although she had so stated about the bold face
portions of the quotation from McAllister in the text. This difference would lead a reader to assume that the emphasis in Justice Thomas' dissent was provided by him, not by her.

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

The Federal Circuit also rejected the DOJ lawyer's argument that an early United States Supreme Court statement was dictum and therefore not covered by her disclosure obligation -- noting that a 1960 Second Circuit case and Justice Thomas's dissent "believed that the statement was sufficiently important to quote it . . . and to cite it." Id. at 1356.

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

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

Best Answer

The best answer to (a) is YES; the best answer to (b) is PROBABLY YES; the best answer to (c) is PROBABLY NO; the best answer to (d) is PROBABLY NO.
Disclosure Obligation: Knowledge Standard

Hypothetical 4

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

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

NO (PROBABLY)

Analysis

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


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


Appellee’s counsel conceded to this court that he had not checked the effective date of the statute when arguing for summary judgment. We note that the Rules of Professional Conduct of the Florida Bar require candor toward the tribunal, and a duty of competence. Rule 4-1.1 and Rule 4-3.3(3) imply a duty to know and disclose to the court adverse legal authority. We construe these rules to also require an attorney to provide full information to the trial court such that the court has all necessary information to determine the issue presented to it.
Id. at 355 (emphasis added) (reversing the trial court's grant of summary judgment in favor of the lawyer who had not disclosed the statute's effective date, and remanding).

**Best Answer**

The best answer to this hypothetical is **PROBABLY NO**.
Disclosing Unpublished Case Law

Hypothetical 5

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

Must you advise the trial court of the following decisions:

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

YES (PROBABLY)

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

NO (PROBABLY)

Analysis

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

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

The Restatement contains a comment dealing with this issue.

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


(emphases added).

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

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


(emphases added; footnotes omitted).
Another article pointed out the ironic timing of the Judicial Conference’s recommendation.

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

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

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

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


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

[i]t is ethically improper for a lawyer to cite to a court an unpublished opinion of that court or of another court where the forum court has a specific rule prohibiting any reference in briefs to an opinion that has been marked, by the issuing court, "not for publication."
ABA LEO 386R (8/6/94; revised 10/15/95). The ABA noted that as of that time (1994) several states (including Indiana, Kansas, Wisconsin, and Arkansas) prohibited lawyers from citing unpublished cases. In closing, the ABA explained that -- not surprisingly -- lawyers’ ethics duties had to mirror the tribunal’s rules about unpublished cases.

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

Id.

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

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

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

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

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

1. Take all necessary steps to make their unpublished decisions available through print or electronic publications, publicly accessible media sites, CD-ROMs, and/or Internet Websites; and

2. Permit citation to relevant unpublished opinions.


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

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

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

- States that did not issue unpublished opinions or did not prohibit citation of unpublished opinions (Connecticut, Mississippi, New York, and North Dakota).

- States allowing citation of unpublished opinions as "precedent" (Delaware, Ohio, Texas, Utah, and West Virginia).

- States allowing citation for "persuasive value" (Alaska, Iowa, Kansas, Michigan, New Mexico, Tennessee, Vermont, Wyoming, Virginia, Minnesota, New Jersey, and Georgia).

- States (25 as of that time) prohibiting citation of any unpublished opinion.

- States too close to call (Hawaii, Illinois, Maine, Oklahoma, and Oregon).

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

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

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

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

No-citation rules put attorneys in a double bind: If appellate counsel conscientiously abides by the duty of candor to the tribunal, the attorney risks the imposition of sanctions by that very court for citing opinions designated as "unpublished," in violation of the rules of the court and the ethical rules requiring attorneys to follow them. On the other hand, if appellate counsel abides by local rules that prohibit or disfavor the citation of "unpublished" opinions, the attorney risks the imposition of sanctions for violating the ethical duty of candor, the requirements of Fed. R. Civ. P. 11, the obligations on appellate counsel set forth in Fed. R. App. P. 46, and the duty to competently represent the client. *Id.* at 79 (footnote omitted).

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

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


New Federal Rule of Appellate Procedure 32.1 had some effect, but did not end the debate.
One article described the continuing issue.

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


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

For instance, on January 6, 2009, the Wisconsin Supreme Court changed its rules (effective July 1, 2009) to allow lawyers to cite some but not all unpublished opinions.
An unpublished opinion issued on or after July 1, 2009, that is authored by a member of a three-judge panel or by a single judge under s. 752.31(2) may be cited for its persuasive value. A per curiam opinion, memorandum opinion, summary disposition order, or other order is not authored opinion for purposes of this subsection. Because an unpublished opinion cited for its persuasive value is not precedent, it is not binding on any court of this state. A court need not distinguish or otherwise discuss an unpublished opinion and a party has no duty to research or cite it.

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

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

Id. Judicial Council Note, 2008. Interestingly, the court indicated that it will convene a committee that will identify data to be gathered and measured regarding the citation of unpublished opinions and explain how the data should be evaluated. Prior to the effective date of this rule amendment, the committee and CCAP staff will identify methods to measure the impact of the rule amendment and establish a process to compile the data and make effective use of the court’s data keeping system. The data shall be presented to the court in the fall of 2011.

Id.

One of the Wisconsin Supreme Court justices dissented -- noting that ”[t]his court has faced three previous petitions to amend the current citation rule” and that ”[n]o
sufficient problem has been identified to warrant the change." In re Amendment of Wis. Stat. § 809.23, Sup. Ct. Order No. 08-02 (Wis. Jan. 6, 2009) (Bradley, J., dissenting).

The dissenting justice indicated that she "continue[d] to believe that the potential increased cost and time outweigh any benefits gained." Id.

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

For federal circuits with unpublished opinions issued after January 1, 2007, and for all other jurisdictions which have banned no-citation rules, attorneys may now cite to unpublished opinions. But does this mean that attorneys must cite to unpublished opinions if those opinions are directly adverse?

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

Shenoa L. Payne, The Ethical Conundrums of Unpublished Opinions, 44 Willamette L. Rev. 723, 757 (Summer 2008) (emphases added). Although this article erroneously concluded that the disclosure obligation applied to controlling authority (as opposed to authority from the controlling jurisdiction), it accurately described lawyers' continuing difficulty in assessing their ethics obligations.
Recent decisions have also highlighted the confusing state of the ethics rules governing lawyers in states that continue to limit citation of published opinions.

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


In that case, the court also noted that New Jersey courts "have recognized that the decision of one trial court is not binding on another." **Id.** at 957. Relying both on this principle and on an earlier decision's status as "unpublished," the court concluded that a lawyer litigating a case before the court did not have a duty to bring the earlier decision to the court's attention.

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

Id. at 968.

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

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

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

**Best Answer**

The best answer to (a) is **PROBABLY YES**; the best answer to (b) is **PROBABLY NO**.
Disclosing Statutory Law and Affirmative Defenses

Hypothetical 6

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

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

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

YES

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

NO (PROBABLY)

Analysis

This analysis begins with ABA Model Rule 3.3.

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

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

The Restatement explicitly indicates that

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


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

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

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

Although a statute of limitations would seem to be "legal authority" that is "directly adverse to the position of the client," the ABA and every other bar have indicated that lawyers may ethically file time-barred claims. See, e.g., ABA LEO 387 (9/26/94) ("We
conclude that it is generally not a violation . . . to file a time-barred lawsuit, so long as this does not violate the law of the relevant jurisdiction. The running of the period provided for enforcement of the civil claim creates an affirmative defense which must be asserted by the opposing party . . . . [W]e do not believe it is unethical for a lawyer to file suit to a time-barred claim.”); Oregon LEO 2005-21 (8/05); North Carolina LEO 2003-13 (1/16/04); Pennsylvania LEO 96-80 (6/24/96). Although several courts have disagreed with this analysis, as a matter of ethics it seems clear that lawyers may file a knowingly time-barred claim.

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

**Best Answer**

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

Hypothetical 7

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

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

MAYBE

Analysis

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

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

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

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

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

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

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

**Best Answer**

The best answer to this hypothetical is **MAYBE**.
Ex Parte Communications with the Court

Hypothetical 8

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

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

**NO**

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

**MAYBE**

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

**MAYBE**

Analysis

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

Lawyers’ Ethics Rules

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

The old ABA Code prohibited only ex parte communications "as to the merits of the cause."\(^1\)

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\(^1\) ABA Model Code of Prof'l Responsibility DR 7-110 (B) (1980) ("In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except: (1) -In the course of official proceedings in the cause. (2) -In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer. (3) -Orally upon adequate notice to opposing
The ABA Model Rules take a broader approach, indicating that lawyers may not communicate ex parte with such a person [including judges and other officials] during the proceeding unless authorized to do so by law or court order.

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

The Restatement takes the same basic approach.

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


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

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

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

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

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

A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties or their lawyers, concerning a pending or impending matter, except as follows:

(1) When circumstances require it, ex parte communication for scheduling, administrative, or emergency purposes, which does not address substantive matters, is permitted, provided:

(a) the judge reasonably believes that no party will gain a procedural, substantive, or tactical advantage as a result of the ex parte communication; and

(b) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication, and gives the parties an opportunity to respond.

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

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

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

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

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

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

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

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

8 See, e.g., Illinois LEO 94-7 (9/1994) (“It is improper for a lawyer to engage in or to respond to ex parte communications from a judge concerning the drafting of an order or judgment without giving prompt notice to opposing counsel.”); Michigan LEO RI-195 (3/7/94) (“A lawyer may not draft findings of fact and conclusions of law in a matter when contacted ex parte by the presiding judge to do so. If the lawyer cannot persuade the judge to correct the ex parte contact, the lawyer may have a duty to report the judge's conduct to the Judicial Tenure Commission.”).
(b) As explained above, some judicial codes allow judges and lawyers to communicate ex parte about scheduling issues, as long as the communications meet the requirements of those ethics rules (which normally include disclosure by the judge to all of the parties).  

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

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

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

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

10 ABA Model Code of Judicial Conduct, Rule 2.9(B) (2007) ("If a judge inadvertently receives an unauthorized ex parte communication bearing upon the substance of a matter, the judge shall make provision promptly to notify the parties of the substance of the communication and provide the parties with an opportunity to respond.").
explained that a lawyer does not have a duty to provide a copy to other parties of an impermissible ex parte communication by the client to the court.\footnote{Philadelphia LEO 98-12 (6/1998) (explaining a lawyer's duty upon learning that the client had communicated about the merits of her case to the judge; finding that the lawyer seeking the opinion also intended to withdraw as counsel for the client; holding that "[y]our obligation at this point is to contact your client immediately, explain the potential adverse consequences of her conduct, and advise her not to make any more ex parte contacts with the judge. You are not required to disclose the client's letter and its enclosures to opposing counsel, and indeed your obligation to maintain your client's confidences under Rule 1.6 would prevent you from doing so."); also explaining that "[y]our final concern is correcting the misrepresentations contained in your client's letter to the court, where she misquoted you and misrepresented the circumstances of how she became your client. Since you may not communicate ex parte with the judge, you must consider whether airing the misrepresentations in the letter may harm your client and provide an opportunity for opposing counsel to obtain confidential attorney-client information. Rule 1.6 requires that you protect this confidential information, and Rule 1.7 does not allow you to place your interests, in clearing your reputation before the Court, ahead of your client's interests."}.

**Best Answer**

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

Hypothetical 9

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

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

NO

Analysis

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

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

- People v. Simac, 641 N.E.2d 416, 421-22, 422 (Ill. 1994) (finding the lawyer in criminal contempt and fining him $100; noting that no party moved to exclude witnesses, but also explaining that the lawyer did not correct the court's misidentification of the person sitting with the lawyer; "We find that appellant's conduct clearly reveals that his intent was not merely to test the State's identification testimony. Rather, we find that appellant intended to cause a misidentification, thereby misleading not only the State and its witness but also the court itself. Appellant commissioned a clerical employee from his office to sit with him at the defendant's customary place at the counsel's table. Appellant's employee resembled the defendant in important identification characteristics. Moreover, both the substitute and the defendant wore glasses and were similarly dressed. Under these circumstances, we find that appellant calculated to cause a..."
misidentification. . . . [A]ppellant responded in the negative to the clerk's direct inquiry as to whether his defendant would be sworn. Appellant responded negatively even though, at the same time, he obviously anticipated that the substitute would eventually testify as a witness concerning the misidentification. Clearly, appellant was aware that the only inference the court could draw from the totality of these circumstances was that the person sitting next to appellant at counsel's table was the defendant and that the defendant was not going to testify at trial. Most revealing of appellant's intent to deceive, however, was appellant's failure to correct the court and the record upon the court's erroneous statement for the record that the witness had identified the defendant. As this point, as an officer of the court, appellant had a responsibility to the court and the integrity of the proceedings to correct the court and the record. When the court made the erroneous statement for the record, appellant clearly knew that the court was laboring wider a misconception as to the identity of the defendant, yet he took no action to correct the court's mistaken impression. If appellant had not calculated to cause such a misconception, he would have taken some action to clarify the defendant's identity."

"Appellant could have easily achieved this purpose without resorting to deceptive and misleading practices. Many alternative methods are available to an attorney to test identification testimony. These available alternatives include conducting an in-court lineup, having defendant sit in the gallery without placing a substitute at counsel's table, or placing more than one person at counsel's table. It is readily apparent, therefore, that appellant could have achieved his goal as an advocate without misleading or deceiving the court, the State, and the witness and thereby remained within the bounds of his responsibilities as an officer of the court.

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

• Miskovsky v. State, 586 P.2d 1104, 1108 (Okla. Crim. App. 1978) (finding the lawyer in "direct contempt" and imposing a $100 fine; "His actions indicated a disrespectful attitude for the judicial process, in that he felt it necessary to resort to deception and misrepresentation to protect his client's interests.").
Although courts sometimes condemn the entire tactic as inherently deceitful, they usually can point to the lawyer's specific misdeeds. For instance, one party or the other usually moves for witnesses to be excluded from the courtroom -- which presumably would require the imposter to leave the courtroom. In other situations, the court's introductory statement to the jury mistakenly identifies the person sitting next to the lawyer as the lawyer’s client -- which the lawyer does not correct.

**Best Answer**

The best answer to this hypothetical is NO.
Deposition Behavior

Hypothetical 10

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

Does your tactic violate the ethics rules?

MAYBE

Analysis

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

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

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

During the proceeding, which was attended by respondent's [lawyer accused of wrongdoing] and relator's [legal assistant]
legal counsel, respondent conspicuously placed nine audio cassette tapes in front of her former legal assistant. By suggestively labeling the tapes and referring to them during questioning, respondent implied that she had recorded conversations with the legal assistant that could impeach and personally embarrass the legal assistant. Respondent also intermittently cautioned the legal assistant to answer truthfully or risk perjuring herself.

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

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

Id. at 1120 (emphases added). The Ohio Supreme Court noted that Statzer argues that wide latitude was imperative during that proceeding to draw honest testimony from a theretofore untrustworthy witness and that use of the audio cassette tapes was merely a tactic intended to achieve this legitimate end.

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

We recognize that the discovery process, particularly the pursuit of information through deposition, cannot be overly restricted if it is to remain effective. We must draw the line, however, when an attorney engages in subterfuge that intimidates a witness. While respondent's primary purpose during the legal assistant's deposition may have been to elicit the truth, her tactic also tricked the legal assistant into thinking that the revelation of embarrassing confidences was at stake.
Throughout these proceedings, respondent has asserted that her "bluff" worked. Regardless, the success of her tactic is not at issue, and respondent cannot, with any degree of certainty, assert that her witness would not have testified truthfully in the absence of her subterfuge. Further, while such deception may induce truthful testimony, it is just as likely to elicit lies if a witness believes that lies will offer security from the false threat. Respondent's deceitful tactic intimidated her witness by creating the false impression that respondent possessed compromising personal information that she could offer as evidence. For these reasons, we agree that respondent violated DR 1-102(A)(4) and 7-106(C)(1).

Id. at 1122-23 (emphases added).

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

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

**Best Answer**

The best answer to this hypothetical is **MAYBE**.
Judges' Disqualification Based on Personal Relationships with Litigants

**Hypothetical 11**

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

If you become a judge, may you:

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

**YES**

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

**YES**

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

**YES**

**Analysis**

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

Every judicial code tries to balance: (1) the desirability of judges’ involvement in their communities; and (2) the need to assure both the reality and perception of judges’ evenhandedness and independence. Judges cannot lead a monastic life, but must
never appear to favor their friends, engage in discriminatory behavior or use their
prestige to gain some improper benefit.

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

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

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

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

Conduct for United States Judges, Canon 4 (2009).¹

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

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

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


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


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

Most attempts to disqualify judges based on such relationships fail.

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

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

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


**Best Answer**

The best answer to (a) is YES; the best answer to (b) is YES; the best answer to (c) is YES.
Judges' Disqualification Based on Personal Relationships with Lawyers

**Hypothetical 12**

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

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

**MAYBE**

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

**NO (WITHOUT CONSENT)**

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

**MAYBE**

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

**NO (PROBABLY) (WITHOUT CONSENT)**

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

**MAYBE**

**Analysis**

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

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

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

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

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


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

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


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

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

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

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

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

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


Thus, judges must disqualify themselves if a close relative appears as a lawyer before the judge, but absent actual "bias or prejudice" the judge may remain in the case if all of the parties consent to that arrangement (using the prescribed procedure).
(c) The issue here is whether a brother-in-law is a "person within the third
degree of relationship" to the judge or the judge's spouse. The ABA Model Judicial
Code defines that relationship.

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


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

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

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


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

The fact that a lawyer in a proceeding is affiliated with a law
firm with which a relative of the judge is affiliated does not of
itself disqualify the judge. However, if "the judge's
impartiality might reasonably be questioned" under Canon
3C(1), or the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1)(d)(iii), the judge's disqualification is required.


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

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


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

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

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

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


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

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

Thus, some courts take a per se approach.
A federal judge must disqualify himself from consideration of a case if a person within the third degree of relationship "[i]s acting as a lawyer in the proceeding."

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

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

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

- A lawyer from a law firm employing the judge's daughter appears before the judge.\(^2\)

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

• A lawyer from a law firm employing the judge's wife appears before the judge.  

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

• A lawyer from a law firm employing the judge's relative appears before the judge.  

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3 Id.; Fla. Judicial Ethics Advisory Comm. Op. 2003-18 (10/31/03) (analyzing the following situation: "Whether a judge is obligated to disclose and disqualify himself or herself when the law firm employing the judge's niece as a legal intern appears before the judge."; responding as follows: "Whether a judge is obligated to disclose and disqualify himself or herself when a law firm appears before the judge that has employed the judge's brother as an expert witness in a different matter not pending before the judge."; pointing to an earlier opinion which "stated that a judge should not sit on any case involving the law firm in which one of the judge's nephews was a partner, and another nephew was an associate.").

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

5 Fla. Judicial Ethics Advisory Comm. Op. 2007-16 (10/8/07) (holding that a judge has to disclose to litigants that the judge's son-in-law was employed by a litigant's law firm as a law clerk, but would not be automatically disqualified from handling the case; "Issues of disqualification, arising out of the employment of a judge's relative by a law firm, have been the subject of numerous opinions by this Committee. In the distant past, this Committee opined that disqualification was not required when the judge's son was employed by a law firm as summer help in a non-legal capacity or when the judge's son-in-law was a law clerk."; "The more recent trend of opinions has required disqualification in almost all cases in which a relative of the [judge's] spouse is employed by a law firm. The recent opinions are a clear departure from the above referenced opinions. For example, this Committee's most recent opinion recommended disqualification when the judge's spouse is employed by a law firm as a paralegal. Fla. JEAC Op. 07-14. Other examples are JEAC Opinion 82-17 that required disqualification when the judge's son, who was not yet a member of the Florida Bar, was working with a law firm; JEAC Opinion 92-8 that required disqualification in cases involving a law firm in which the wife works (without specifying the nature of the employment); and Florida JEAC Opinion 03-18 that required disqualification in cases involving a law firm employing the judge's niece, a second year law student, as a summer intern. The
A lawyer from a law firm employing the judge's cousins appears before the judge.\(^6\)

A lawyer appears before the judge from a United States Attorney's office that employs the judge's child.\(^7\)

As explained above, a judge considering that she is not required to disqualify herself under the "bias and prejudice" standard can handle the issue by disclosing the relationship and letting the litigants and their lawyers decide whether to insist that the facts of JEAC Opinion 03-18 are very similar to the current inquiry, and if this Committee followed the rationale of that opinion, disqualification would be required.; "This Committee is now of the opinion that the trend toward bright line requiring disqualification in all cases involving the employment of a judge's relative by a law firm may be misplaced.; "Even though disqualification is not required under the facts of this inquiry, the Judge should disclose to the parties the relationship that the son-in-law has with the law firm."); North Carolina LEO 1 (10/21/05) (assessing the following situation: "Law Firm hires Attorney A, who is married to District Court Judge B. Attorney A is also the daughter of Senior Resident Superior Court Judge C. Judges B and C are in the same judicial district and the lawyers in Law Firm regularly appear before judges in this district, including Judges B and C.; holding as follows: "While Attorney A may not personally appear before Judges B and C without consent from all parties involved in the matter, a member of Attorney A's firm is not disqualified. See CPR 225 (lawyer permitted to appear before judge who is his brother with consent from all parties to the matter). A previous ethics opinion held that the personal disqualification of a lawyer from practicing before a family member ordinarily is not imputed to the other members of the lawyer's firm. CPRs 226 and 367. Nonetheless, a judge may determine independently that he must recuse himself if his impartiality may be reasonably questioned by reason of financial interests or some other special circumstances. Canon III D of the Code of Judicial Conduct; see also 97 Formal Ethics Opinion 1.); Comm. on Codes of Conduct [for United States Judges] Advisory Op. 58 (7/10/98) (analyzing to what extent a judge's relative has an "interest" that could be substantially affected by the outcome of a proceedings outcome; "The Committee concludes that an equity partner in a law firm generally has 'an interest that could be substantially affected by the outcome of the proceeding' in all cases where the law firm represents a party before the court.").

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

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

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

**Best Answer**

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