

LAWYER COMMUNICATIONS AND MARKETING: AN ETHICS PRIMER

Hypotheticals and Analyses*

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Possible Sanctions

Hypothetical 1

Your state bar recently adopted new marketing rules. You are trying to convince your partner to take the changes seriously. One partner has argued that your law firm's risks are fairly low, because inappropriate lawyer marketing at most brings a "slap on the wrist."

Can inappropriate lawyer marketing result in:

(a) Greater likelihood of malpractice liability?

YES

(b) Disqualification?

YES

(c) Suspension of the lawyer conducting the marketing?

YES

(d) Claims against the lawyer under state consumer protection laws?

YES

(e) Discipline for violating state and federal laws governing spam faxes?

YES

(f) Criminal charges?

YES

(g) Suits against the lawyer for intentional interference with the relationship between another lawyer and her client?

YES

Analysis

The vast majority of lawyer marketing issues arise in the fairly benign context of bars disapproving lawyer marketing in advance, or bars informally asking lawyers to alter their marketing. But lawyers can sometimes face far more severe punishment.

(a) The Restatement explains that a lawyer who touts his or her competence or diligence might be held to that higher standard, which presumably would apply in a malpractice case.

A lawyer's representations or disclaimers and qualifications may constitute circumstances affecting what a client is entitled to expect from the lawyer. Thus, a lawyer who represents to a client that the lawyer has greater competence or will exercise greater diligence than that normally demonstrated by lawyers in good standing undertaking similar matters is held to that higher standard, on which such a client is entitled to rely. See Restatement Second, Torts § 299A, Comment d. Likewise, a lawyer must 'exercise any special skill that he has.' Restatement Second, Agency § 379(1). A representation may be made directly, for example when a lawyer claims to be an expert or specialist in a given field through an advertisement or listing or by an assertion of specialization on a letterhead. The representation may be on behalf of the lawyer in question or of a law firm in which the lawyer practices.

Restatement (Third) of Law Governing Lawyers § 52 cmt. d (2000). (emphasis added).

(b) In some situations, lawyers might face disqualification because they engaged in improper marketing tactics.

- Samuel Howard, Arent Fox, Elliott Greenleaf Tossed From UBP Ch. 11, Law360 (Nov. 5, 2010), <http://www.law360.com/bankruptcy/articles/207257> (disqualifying the law firm of Arent Fox from representing a bankruptcy creditor's committee, because the law firm had solicited creditors to serve on the committee through an intermediary in China).

(c) Lawyers violating ethics marketing rules can face ethics sanctions.

- In re Ravith, 919 N.Y.S.2d 141 (N.Y. Sup. Ct. 2011) (suspending for three months a lawyer who directed her paralegal to solicit clients).

- In re Sinowski, 720 S.E.2d 597, 597-98, 598 (Ga. 2011) (disbarring two lawyers for using "runners"; "The State Bar alleged that in their practice Respondents utilized 'runners' (non-lawyers who recruit, recommend or direct people to the services of a given lawyer in return for a fee or other compensation from the lawyer)."; "The Review Panel adopted the special master's findings of fact, and Respondents' admissions, that from April 1995 through April 1999 they paid runners to secure clients for them and paid non-lawyers compensation for referrals. They kept a record of those payments in a 'Runner Book.' Although Respondents and the State Bar disagree on the amount and volume of the runner activity, Respondents admit to payments to 46 runners (the State Bar contends it was 54) or \$276,025 (as opposed to the State Bar's assertion of \$399,733) in 1,376 separate cases (versus the State Bar's assertions of 2,441 cases").
- Neely v. Comm'n for Lawyer Discipline, 196 S.W.3d 174 (Tex. App. 2006) (affirming a three-year suspension for a misleading class action announcement; finding that the lawyer could not rely on the First Amendment to prevent discipline).

In contrast, most courts do not recognize private causes of action for ethics rules violations.

- Rose v. Winters, Yonker & Rousselle, P.S.C., 391 S.W.3d 871, 873, 874, 874-75 (Ky. Ct. App. 2012) (holding that clients could not pursue a private cause of action against their lawyer under the ethics rule requiring lawyers to forfeit any fees they earn in cases they obtained through improper solicitation; "[T]here were no allegations made in the complaint that the Appellees were negligent in handling the Appellants' personal injury claims or in negotiating the settlements. Instead, the Appellants' claims are based on violations of the Kentucky Supreme Court Rules of Professional Conduct. We are unaware of any authority supporting this type of cause of action."; "If a lawyer illegally or unethically solicited a client for which compensation is paid or payable, all fees arising from such transaction shall be deemed waived and forfeited and shall be returned to the client. **A civil action for recovery of such fees may be brought in a court of competent jurisdiction.**" (citation omitted); "As correctly noted by the trial court, the language of SCR 3.130(7.10) appears to presuppose that the appropriate disciplinary agency must first determine whether the lawyer illegally or unethical solicited a potential client in violation of SCR 3.130(7.09). Only after making the determination of unethical or illegal solicitation by the appropriate disciplinary agency does the rule make provision for forfeiture of fees under SCR 3.130(7.10). Therefore, we conclude that, while the rule provides for a cause of action to recover fees, it does not provide a cause of action to determine whether a solicitation in this case was illegal or unethical.").

(d) Lawyers can face liability under various state consumer product laws.

- McLeod v. Gyr, No. 05-12-01607-CV, 2014 Texas App. LEXIS 4843, at *2, *2-3, *3 n.1 (Tex. App. May 5, 2014) (finding that a client could file a deceptive trade practice in breach of fiduciary duty action against a lawyer, who had falsely claimed experience and expertise in immigration law; "McLeod [lawyer] told Gyr [client] he 'specialized in immigration matters . . . and handled immigration matters . . . including the [N-400] application to become naturalized United States citizens.'" (emphasis added); "McLeod completed the N-400 application and submitted it in March or April 2010. It was rejected. McLeod submitted the application three more times, and each time it was rejected. Each time the application was rejected, Gyr received a letter notice of rejection from the government. The date of the last rejection notice was August 27, 2010. Each time Gyr received a rejection notice, he asked McLeod for an explanation. Gyr said he could not remember everything McLeod told him about why the applications were rejected. 'He told me so many excuses.' Sometimes McLeod said '[t]hey're stupid people over there,' but it was 'always somebody else's fault.' Gyr said McLeod told him 'he's specialist' and Gyr 'believed him, you know.' Gyr paid McLeod \$23,000 for his services in connection with the N-400 application matter."; (footnote omitted) explaining some of the lawyer's errors; "In at least one of the submissions, McLeod checked 'No' to the following questions: 'Do you support the Constitution and form of government of the United States?'; 'Are you willing to take the full Oath of Allegiance to the United States?'; and 'If the law requires it, are you willing to bear arms on behalf of the United States?' The application also contained the wrong date of birth for Gyr and left out a digit in Gyr's alien number. Gyr testified that he signed a blank application, including the portion that stated in bold, 'NOTE: Do not complete Parts 13 and 14 until a USCIS Officer instructs you to do so.'" (emphases added)).
- Crowe v. Tull, 126 P.3d 196 (Colo. 2006) (holding that a law firm could be sued under the Colorado Consumer Protection Act for allegedly broadcasting false advertisements on television).

(e) In 2013, the Seventh Circuit upheld a judgment of over \$4 million against a lawyer who sent unsolicited faxes.

- Ira Holtzman, C.P.A., & Assocs. v. Turza, 728 F.3d 682, 683, 684 (7th Cir. 2013) (affirming a judgment over \$4,000,000 against a lawyer who sent unsolicited faxes to potential clients; "Believing that CPAs would find his services attractive, attorney Gregory Turza sent more than 200 of them occasional fax sheets containing business advice. The faxes produced more business -- but not for Turza. He became the defendant in this suit under the Telephone Consumer Protection Act of 1991, 47 U.S.C. §227, which prohibits any person from sending unsolicited fax advertisements."; "Even when the Act permits fax ads -- as it does to persons who have consented to receive them, or to those who have established business relations with the sender -- the fax must tell the recipient how to stop receiving future messages. . . .

Turza's faxes did not contain opt-out information, so if they are properly understood as advertising then they violate the Act whether or not the recipients were among Turza's clients."; "The court earlier had certified a class of the faxes recipients. . . . The court ordered Turza to pay \$500 in statutory damages for each of 8,430 faxes. The total comes to \$4,215,000.").

(f) In extreme situations, lawyers may even be criminally charged for marketing violations.

- Angela Morris, Lawyers Turn Themselves in After Rare Barratry Indictments, Tex. Lawyer, June 10, 2014 ("Two attorneys surrendered to San Antonio authorities and were arrested after a grand jury indicted them for barratry. The criminal defense lawyer representing Paul Andrews and Keith Gould said the two attorneys 'absolutely' deny the criminal allegations. Both Andrews and Gould also have denied similar allegations lodged in a civil barratry lawsuit -- a lawsuit filed in 2011 by a woman whom the indictment names as one of the barratry victims; Andrews and Gould's lawyer said she is their former employee. Andrews and Gould both face three counts of barratry, a third-degree felony that carries a sentence of two to 10 years of imprisonment and a fine up to \$10,000. The two true bills of indictment, which are identical, allege that the lawyers paid or offered to pay money to three people to solicit cases from potential clients. One of those people was Maryann Uribe, the plaintiff who sued Andrews and Gould for civil barratry, among other things, in an ongoing suit in Corpus Christi.").
- Marilyn Tennesen, Texas state rep. named 'Freshman of the Year' jailed on barratry charges, Se. Tex. Record, Apr. 25, 2012 ("A state representative who was named the Democrats' 'Freshman of the Year' spent some time in jail Tuesday night. State Representative Ron Reynolds (District 27), a managing partner at Brown, Brown and Reynolds Law Firm, is accused of illegally soliciting legal cases. Reynolds, 38, whose district includes Fort Bend County, was arrested Tuesday. He posted a \$5,000 bond and was released after midnight Wednesday. He will make his first court appearance Thursday. According to Fox 26 in Houston, another Houston attorney, Marcela Halmagean, filed a complaint against Reynolds that led to his arrest. The complaint alleges Reynolds used an individual to solicit Halmagean as a client when she was involved in an auto crash. Texas law prohibits soliciting a client for legal services, and just last year, the Texas Legislature passed a statute that makes barratry a civil as well as criminal infraction, allowing civil suits to be filed. Reynolds, a former municipal court judge, past president of the Houston Lawyers Association and an adjunct professor at Texas Southern University was named 'Freshman of the Year' in 2011 by the House Democratic Caucus.").
- Daniel Wise, Two More Lawyers Plead Guilty in Decade-Old 'Runner' Investigation, N.Y. L.J., July 31, 2009 ("Two Brooklyn lawyers on Thursday

agreed to give up their law licenses in a case where they were accused of providing cover to a suspended lawyer, allowing him to continue practicing for 19 months."; "David Resnick and Serge Binder were the 13th and 14th attorneys ensnared in an investigation that began in 1999 when a 'runner' first came under scrutiny for bribing hospital employees. The bribes were an attempt to gain access to accident victims whose no-fault cases were then steered to attorneys for as much as \$500."; "The two lawyers, who practiced together at Resnick & Binder in Coney Island, N.Y., waived indictment Thursday and pleaded guilty to one count each of filing false city and state tax returns in 2006."; "Under the plea deal, both attorneys agreed to pay \$65,000 in restitution and were sentenced to five years probation."; "With Thursday's plea agreements, the Manhattan district attorney's office has recovered \$1.9 million in fines and restitution from the 14 lawyers netted in the probe."; "Resnick and Binder will automatically lose their law licenses because they pleaded guilty to a violation of Tax Law §1804(b), a class E felony.").

(g) Some courts recognize that a lawyer's successful marketing might trigger a claim against the lawyer for intentional interference with another lawyer's attorney-client relationship.

One California court allowed such a claim to proceed.

- Tishgart v. Feder, No. A1112752006 Cal. App. Unpub. LEXIS 3692, at *13-14, *14 (Cal. Ct. App. Apr. 28, 2006) (holding that a lawyer could be sued for interfering with the relationship between another lawyer and a former client who fired the other lawyer and hired the defendant lawyer; rejecting the defendant lawyer's "reliance on cases holding that a client has an unfettered right to hire and fire counsel of his or her choosing"; "Trisirikul's [client] right to terminate her contract with Tishgart [fired lawyer] is legally irrelevant to Tishgart's rights against a third party for alleged interference with his attorney-client relationship."; reversing summary judgment for the defendant lawyer and remanding to determine if the defendant lawyer's interference was the cause of the client's termination of the former lawyer).

Most courts find that such conduct does not amount to a tort.

- Dunn, McCormack & MacPherson v. Connolly, 708 S.E.2d 867, 869, 871 (Va. 2011) (holding that a third party could not be sued for tortiously interfering with a terminable-at-will attorney-client relationship; explaining that under Virginia law a defendant in a tortious interference case must prove that the defendant used "improper methods"; explaining that the Supreme Court "will not extend the scope of the tort to include actions solely motivated by spite, ill-will and malice").

- Nostrame v. Santiago, 22 A.3d 20, 25 (N.J. 2011) (holding that a lawyer whose client terminated the relationship and hired another lawyer could not assert a tortious interference claim; "Under the plain terms of section 768(1) of the Restatement [Restatement (Second) of Torts (1979)], Mazie Slater's alleged inducement of Santiago to discharge plaintiff as her attorney in the medical malpractice action did not constitute a tortious interference with contract. The contract between plaintiff and Santiago 'concern[ed] a matter involved in the competition between [Mazie Slater] and [plaintiff],' id. § 768(1)(a), because both Mazie Slater and plaintiff are attorneys who represent clients in medical malpractice actions. Plaintiff's complaint does not allege that Mazie Slater employed any 'wrongful means,' such as fraud or defamation, see id. § 768 cmt. e, to induce Santiago to discharge him, id. § 768(1)(b), or that Santiago's discharge of him and retention to Mazie Slater would 'create or continue an unlawful restraint of trade,' id. § 768(1)(c). Moreover, it is undisputed that Mazie Slater's 'purpose' in allegedly inducing Santiago to discharge plaintiff was 'at least in part to advance [its] interest in competing with [plaintiff.]" Id. § 768(1)(d). Therefore, we conclude that under section 768 of the Restatement, plaintiff's complaint does not state a cause of action against Mazie Slater for tortious interference with contract.").
- Kreizinger v. Schlesinger, 925 So. 2d 431 (Fla. Dist. Ct. App. 2006) (holding that a lawyer retained by a client who had terminated her old lawyer could not be liable for intentional interference; noting that the client had initiated the contact with the new lawyer).

Best Answer

The best answer to **(a)** is **YES**; the best answer to **(b)** is **YES**; the best answer to **(c)** is **YES**; the best answer to **(d)** is **YES**; the best answer to **(e)** is **YES**; the best answer to **(f)** is **YES**; the best answer to **(g)** is **YES**.

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Constitutional Standard

Hypothetical 2

You practice in a state which recently revised its ethics rules. Among other things, the new rules severely restrict lawyer marketing. You and your partners realize that your state's bar might challenge some of your firm's marketing under these new rules, and you want to know what standard will apply if the bar takes such action.

If the state bar challenges your law firm's marketing, will it have to prove that any clients or potential clients have been or might be harmed?

NO (PROBABLY)

Analysis

Lawyer marketing involves a complex mixture of ethics rules, common law and statutory regulation of advertising, and constitutional principles.

Introduction

While it might be legitimately argued that the First Amendment was intended only to protect political speech, the United States Supreme Court has extended at least limited First Amendment protection to commercial speech. Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

The current standard for judging a state's restriction of commercial speech comes from Central Hudson Gas & Electric Corp. v. Public Service Commission, 447 U.S. 557, 565 (1980). As the Supreme Court explained in that case, expression that proposes a lawful activity and is not misleading may be limited if the government can establish a substantial interest, and if the regulation directly advances that substantial governmental interest and is not more extensive to serve that interest.

The Supreme Court began to apply First Amendment considerations to lawyer advertising in Bates v. State Bar of Arizona, 433 U.S. 350 (1977). The Supreme Court held that lawyer advertising could be regulated, but not completely prohibited. In rejecting the idea of a total ban on lawyer advertising (which many states had previously imposed), the Supreme Court recognized that professional advertising poses special risks of deception because consumers are unlikely to be as capable of judging the accuracy of a professional's advertisement.

The United States Supreme Court has not addressed lawyer advertising very many times since Bates. In In re R.M.J., 455 U.S. 191 (1982), Zauderer v. Office of Disciplinary Council, 471 U.S. 626 (1985), and Shapero v. Kentucky Bar Association, 486 U.S. 466 (1988), the Supreme Court overturned discipline of lawyers who engaged in direct mail marketing or print advertising. On the other hand, the Supreme Court upheld a thirty-day restriction on lawyers sending direct mail advertisements to families of accident victims. Fla. Bar v. Went For It, Inc., 515 U.S. 618 (1995).

As explained below, one approach to lawyer advertising is to require more disclosure -- requiring various disclaimers to accompany advertisements. Some courts have upheld state rules requiring such disclaimers, while other courts have found that states have gone too far in requiring disclaimers.

As might be expected, the United States Supreme Court has given states more leeway in limiting in-person solicitation, which the Court reasons is much more susceptible to abuse than advertisements or direct mail. Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978).

In 2012, the Second Circuit articulated the tension reflected in the ethics rules' marketing provisions.

Efforts by states or bar associations to restrict lawyer advertising, particularly ads asserting accreditation in specialized areas of law, inevitably create some tension between legitimate concerns to protect the public from misleading claims and guild mentality maneuvers to stifle legitimate competition in the market for legal services.

Hayes v. N.Y. Attorney Grievance Comm., 672 F.3d 158, 164 (2d Cir. 2012).

In what might be a trend, a number of courts in the last few years have invalidated as unconstitutional portions of states' ethics rules.

- Hayes v. N.Y. Attorney Grievance Comm., 672 F.3d 158, 167, 168 (2d Cir. 2012) (finding unconstitutional New York ethics Rule 7.4, which required a "prominently made" disclaimer for any lawyer advertising himself or herself as a "certified specialist"; concluding that New York had not presented evidence supporting the requirement that the disclaimer (1) explain that "[c]ertification is not a requirement for the practice of law" and (2) explain that certification "does not necessarily indicate greater competence than other attorneys experienced in this field of law"; also concluding that the "prominently made" requirement was void for vagueness.).
- Public Citizen Inc. v. La. Attorney Disciplinary Bd., 632 F.3d 212, 218, 218-19, 220, 220-21, 221-223, 224 & 227 (5th Cir. 2011) (holding that some of Louisiana's marketing rules pass constitutional muster, while some do not; describing as "necessarily false and deceptive" any lawyer advertisements that promise results, so finding it unnecessary to apply the Central Hudson standard to one Louisiana rule; "Rule 7.2(c)(1)(E) bars communications that 'promise[] results.' The district court found that '[t]he plain text of th[is] Rule prohibits only communications that are inherently misleading and untruthful.' Public Citizen, Inc. v. La. Att'y Discipline Bd., 642 F. Supp. 2d 539, 553-54 (E.D. La. 2009). This court arrives at the same conclusion. A promise that a party will prevail in a future case is necessarily false and deceptive. No attorney can guarantee future results. Because these communications are necessarily misleading, LADB may freely regulate them and Rule 7.2(c)(1)(E) is not an unconstitutional restriction on commercial speech."; in applying the Central Hudson standard to other rules, concluding that the Louisiana Bar had adequately identified two government interests; "[T]he court holds that LADB has asserted at least two substantial government interests: protecting the public from unethical and potentially misleading lawyer advertising and preserving the ethical integrity of the legal profession."; in contrast, finding that "an interest in preserving attorneys' dignity in their communications with

the public is not substantial."; explaining the "narrowly drawn to materially advance the asserted substantial interests" prong of Central Hudson: "To show that a regulation materially advances a substantial interest, LADB must 'demonstrate[] that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.' . . . It may do so with empirical data, studies, and anecdotal evidence. . . . The evidence on which it relies need not 'exist pre-enactment.' . . . It may also 'pertain[] to different locales altogether.' . . . This requirement may also be satisfied with 'history, consensus, and simple common sense.'" (citation omitted); ultimately finding unconstitutional Louisiana's rules (1) completely banning marketing "containing a reference or testimonial to past successes or results obtained", (2) banning marketing that includes "the portrayal of a judge or jury", and (3) requiring that any disclaimer use the same font size as the largest print size used in a written advertisement, be included in both written and oral form in any television advertisement, and be spoken at the same speed as the rest of the advertisement; in contrast, finding constitutional Louisiana's ban on (1) marketing that "'utilize[] a nickname, moniker, motto or trade name that states or implies an ability to obtain results in a matter'" and (2) marketing that includes "'a portrayal of a client by a non-client without disclaimer . . . or the depiction of any events or scenes or pictures that are not actual or authentic without disclaimer.'" (citations omitted)).

- Harrell v. Fla. Bar, 915 F. Supp. 2d 1285, 1291, 1297, 1299, 1300, 1291, 1309, 1310 & 1307 (M.D. Fla. 2011) (assessing the constitutionality of several Florida marketing rules on their face and as applied; finding (1) not unconstitutionally vague on its face the prohibition on "statements describing or characterizing the quality of the lawyer's services"; (2) not unconstitutionally vague on its face the rule prohibiting communications which "promise results"; (3) unconstitutionally vague on its face the prohibition on "manipulative" features in advertisements; (4) unconstitutionally vague on its face the rule requiring that advertisements should provide only "useful, factual information"; (5) unconstitutional as applied the prohibition on "statements describing or characterizing the quality of the lawyer's services," to the extent that it would prohibit Harrell from using the advertising phrase "Don't settle for less than you deserve" (noting that the Florida Bar did not present any evidence that the phrase actually misled or deceived anyone and did not "articulate any basis for believing that [the phrase] could potentially mislead the public or erode the public's confidence in the legal profession"); (6) unconstitutional as applied the prohibition on any background sounds other than instrumental music (finding that the Florida Bar did not present any evidence that "prohibiting the type of innocuous non-instrumental background sounds as those proposed by Harrell here ["noises caused by his dogs, by gym equipment and by other activities in his law firm"] will protect the public from being misled or prevent the denigration of the legal profession"))).
- Harrell v. Fla. Bar, 608 F.3d 1241, 1255, 1270, 1271 (11th Cir. 2010) (finding that a Florida lawyer could challenge a number of Florida marketing ethics

rules on "void-for-vagueness" grounds; "Harrell has made an adequate threshold showing that five of the rules -- those prohibiting advertisements that are 'manipulative,' Rules 4-7.2(c)(3) & 4-7.5(b)(1)(A), 'promise[] results,' Rule 4-7.2(c)(1)(G), 'characteriz[e] the quality of the lawyer's services,' Rule 4-7.2(c)(2), or provide anything other than 'useful, factual information,' Rule 4-7.1, cmt. -- seem to apply to his proposed advertisements, but fail to provide meaningful standards and thus chill his speech."; in contrast, upholding the constitutionality of Florida's pre-filing requirement; "Under the Florida Bar's previous compliance regime, a lawyer was not required to submit a television or radio advertisement for review until he filed it. . . . But a review of advertisements filed with the Bar revealed that nearly half of all television and radio advertisements in the years leading up to the revised regime had been found not to comply with the Rules."; "[W]e face only a twenty-day delay, and we can see no pressing need for immediate dissemination of broadcast advertisements. . . . And even as to an unusually time-sensitive advertisement, we think that a twenty-day delay represents a constitutionally acceptable burden under the circumstances. . . . In short, Rule 4-7.7(a)(1)(A) does not amount to an unconstitutional imposition on protected commercial speech under the First Amendment.").

- Alexander v. Cahill, 598 F.3d 79 (2d Cir. 2010) (in an opinion filed by Circuit Judge Guido Calabresi, upholding the constitutionality of New York State's 30-day moratorium on direct marketing in wrongful death or personal injury situations, but finding unconstitutional other provisions of New York's marketing rules, including bans on testimonials, portrayals of judges, irrelevant techniques such as gimmicky depictions, nicknames, and trade names).

Of course, some limits on marketing survive constitutional challenge.

- Dwyer v. Cappell, 951 F. Supp. 2d 670, 674 n.4 (D.N.J. 2013) (holding that a state bar could constitutionally prohibit lawyers from using in their advertisements complimentary quotations from judges, without including the entire judicial opinion in the advertisement; "States can justify regulations and show that the harms it seeks to avoid are real through surveys, 'anecdotes, history, consensus, or simple common sense.' Florida Bar v. Went For It, Inc., 515 U.S. 618, 628 . . . (1995); Edenfield v. Fane, 507 U.S. 761, 771 . . . (1993). The Supreme Court has rejected the argument that concrete evidence or empirical data of deception is necessary where the deceptive nature of the speech at issue is obvious or self-evident. . . . The State Judiciary Committee argues that the misleading nature of the targeted speech is self-evident, and relies on common sense and the Commentary attached to Guideline 3 which finds that the speech at issue is inherently misleading because without context, it suggests judicial endorsement of an attorney.").
- Public Citizen Inc. v. La. Attorney Disciplinary Bd., 632 F.3d 212, 218, 217 (5th Cir. 2011) (holding that some of Louisiana's marketing rules pass

constitutional muster, while some do not; describing as "necessarily false and deceptive" any lawyer advertisements that promise results, so finding it unnecessary to apply the Central Hudson standard to one Louisiana rule; finding constitutional Louisiana's ban on (1) marketing that "'utilize[] a nickname, moniker, motto or trade name that states or implies an ability to obtain results in a matter'" and (2) marketing that includes "'a portrayal of a client by a non-client without disclaimer . . . or the depiction of any events or scenes or pictures that are not actual or authentic without disclaimer.'" (citations omitted)).

- Harrell v. Fla. Bar, 608 F.3d 1241, 1270, 1271 (11th Cir. 2010) (finding that a Florida lawyer could challenge a number of Florida marketing ethics rules on "void-for-vagueness" grounds (as well as ripeness grounds); upholding the constitutionality of Florida's pre-filing requirement; "Under the Florida Bar's previous compliance regime, a lawyer was not required to submit a television or radio advertisement for review until he filed it. . . . But a review of advertisements filed with the Bar revealed that nearly half of all television and radio advertisements in the years leading up to the revised regime had been found not to comply with the Rules."; "[W]e face only a twenty-day delay, and we can see no pressing need for immediate dissemination of broadcast advertisements. . . . And even as to an unusually time-sensitive advertisement, we think that a twenty-day delay represents a constitutionally acceptable burden under the circumstances. . . . In short, Rule 4-7.7(a)(1)(A) does not amount to an unconstitutional imposition on protected commercial speech under the First Amendment.").
- Bergman v. District of Columbia, 986 A.2d 1208, 1211, 1212, 1217 (D.C. Cir. 2010) (upholding the constitutionality of a Washington, D.C., law; explaining that "[t]he Act makes it unlawful for 'practitioner[s]' to solicit business from 'a client, patient, or customer within 21 days of a motor vehicle accident with the intent to seek benefits under a contract of insurance or to assert a claim against an insured, a governmental entity, or an insurer on behalf of any person arising out of the accident.' D.C. Code § 22-3225.14 (a)(1)."; "The Act contains several exemptions from this twenty-one day prohibition. It permits immediate solicitation of legal business from accident victims through the mail, and the proscription against in-person solicitation does not apply if there is a preexisting relationship between the practitioner and the person solicited, or if the contact is initiated by the 'potential client, patient, or customer.' D.C. Code § 22-3225.14 (a)(2)."; analyzing the D.C. law under commercial speech guidelines; concluding that "[w]e are satisfied that the Act addresses a substantial governmental interest, namely, the protection of consumers from unsolicited and often distressing one-on-one intrusions upon their privacy, effected for the purpose of securing their business in the immediate aftermath of an automobile accident, a time when many of them are likely to be in physical or emotional distress or in vulnerable circumstances."; noting that the United States Supreme Court upheld a thirty-day prohibition on direct mail

solicitation of accident victims in Florida Bar v. Went For It, Inc., 515 U.S. 618, 620 (1995)).

The Federal Trade Commission has increasingly involved itself in state bar issues, normally opposing what it considers to be overly restrictive advertising regulations.

- Jenna Greene, Federal Trade Commission Urges Tennessee Court to Ease Off Lawyer Advertising Restrictions, Nat'l L.J., Jan. 25, 2013 ("The Federal Trade Commission is urging the Tennessee Supreme Court not to adopt sweeping new restrictions on attorney advertising, calling the proposed new rules unnecessarily broad and not in the best interest of consumers."; "Tennessee is considering proposals that would ban the use of actors playing the role of clients, prohibit ads narrated by well-known spokespeople (here's looking at you, William Shatner) and forbid certain background sounds."; "Also on the table: a rule that would limit the images in ads to gavels, scales of justice, the Statue of Liberty, flags, eagles, courthouses, columns, law books or photos of attorneys ('against a plain, single-colored background or unadorned set of law books.'). Specifically forbidden: talking dogs and space aliens."; "In addition, one proposal calls for ads to be pre-screened by a review committee of the Board of Professional Responsibility, and would ban firms without a 'bona fide' office in Tennessee from advertising.").

Standard for Judging Lawyer Marketing

Courts have vigorously debated the standard for judging lawyer marketing.

This debate arises in large part because clients and would-be clients normally do not complain about lawyer marketing. Instead, the complaints almost always come from other lawyers or zealous regulators. Thus, courts frequently must determine whether those challenging a lawyer's marketing must establish actual client or prospective client confusion or harm.

Marketing that is Inherently Misleading. Relying on United States Supreme Court precedent, courts initially determine if some statements protected by the commercial speech doctrine are "inherently misleading." If so, the court can uphold a ban on such speech without applying the Central Hudson analysis.

- Public Citizen Inc. v. La. Attorney Disciplinary Bd., 632 F.3d 212, 218-19 (5th Cir. 2011) (upholding, without applying the Central Hudson standard, one Louisiana rule; "Rule 7.2(c)(1)(E) bars communications that 'promise[] results.' The district court found that '[t]he plain text of th[is] Rule prohibits only communications that are inherently misleading and untruthful.' Public Citizen, Inc. v. La. Att'y Discipline Bd., 642 F. Supp. 2d 539, 553-54 (E.D. La. 2009). This court arrives at the same conclusion. A promise that a party will prevail in a future case is necessarily false and deceptive. No attorney can guarantee future results. Because these communications are necessarily misleading, LADB may freely regulate them and Rule 7.2(c)(1)(E) is not an unconstitutional restriction on commercial speech.").

Not coincidentally, bars frequently seem to challenge lawyer marketing that easily fits into the "inherently misleading" category.

For instance, In re Shapiro, 780 N.Y.S.2d 680 (N.Y. App. Div. 2004), the bar targeted a lawyer for several marketing steps. One step involved an obviously inappropriate direct communication.

The letter sent by respondent states, in pertinent part, "We are holding a letter containing valuable information regarding your legal rights . . . When you are well enough to exercise such judgment, please call me." We conclude that the letter, sent to a comatose patient in the intensive care unit of a hospital three days after her automobile collided with a train, was a solicitation of legal employment sent at a time when respondent, who acknowledged that he had read newspaper articles reporting the accident and the condition of the victim, knew or reasonably should have known that the recipient was unable to exercise reasonable judgment in retaining counsel. Despite language in the letter acknowledging the likelihood that the recipient was then unable to exercise reasonable judgment in retaining counsel, we are not persuaded by the explanation of respondent that he sent his letter to a stranger under these circumstances in order to educate her regarding her legal rights.

Id. at 682-83 (emphasis added). The bar also justifiably challenged one of the lawyer's television advertisements.

We also agree with the finding of the Referee that the television commercials aired by the respondent contained false and misleading statements. The commercials depicted

respondent as an experienced, aggressive personal injury lawyer who was prepared to take and had taken personal action on behalf of clients. The evidence presented at the hearing, however, supports the finding of the Referee that respondent has not been actively engaged in the practice of law in this state since 1995. Respondent has conceded that he has continuously resided in the State of Florida since 1991. The daily operations of the Rochester firm of Shapiro and Shapiro have been entrusted to one or two attorneys and several paralegals. Respondent's role has been limited to acting as spokesperson, providing funding and responding to questions. In contrast to the image of respondent depicted in the commercials, respondent has never tried a case to its conclusion and has conducted approximately 10 depositions.

Id. at 684 (emphases added).

In Farrin v. Thigpen, 173 F. Supp. 2d 427 (M.D.N.C. 2001), the bar challenged a widely broadcast television advertisement that two North Carolina lawyers had used. The advertisement showed a "Strategy Session" in which well-dressed lawyers obviously representing an insurance company discuss their defense of a personal injury case -- including the suggestion that "[w]e could try to deny it or delay, see if they'll crack." Id. at 434. When one of the lawyers in the advertisement asks which law firm represents the plaintiff, another lawyer names the plaintiff's firm.

The pace of the remainder of the vignette speeds up. A loud, metallic gong sounds immediately after the name of the firm is stated. Upon hearing the name, while the gong is sounding, the senior man's expression changes dramatically. His eyebrows shoot up and his eyes widen and shift from downward toward the junior man. The court finds that the senior man's expression would be characterized by a reasonable person as dismayed or alarmed. The camera returns to the junior man's face, while the senior man exclaims the name of the firm as a question, "Lewis and Daggett?" The junior man nods, his mouth in a grim line. The vignette ends with the camera back on the senior man's face as he says, "Let's settle this one." His mouth is also set into a grim line, and he looks away from the junior man and downward.

Id. at 435 (emphases added; footnote omitted). The advertisement then features well-known actor Robert Vaughn recommending that listeners call the named law firm.¹

One of the lawyers using this advertisement had aired the ad in the Raleigh/Durham television market 8,500 times on six channels. Well into its opinion (in footnote 13), the court mentioned that

Plaintiffs' own evidence [showed] that neither Farrin nor any attorney in his firm has ever tried a case, with the exception of sitting as second chair in one trial in which the opposing party prevailed.

Id. at 446 n.13 (emphasis added).

Not surprisingly, the court found the statement "inherently misleading," and thus capable of restriction without any additional evidence. The court explained its reasoning

Plaintiffs argue that the State Bar failed to sustain its burden of proof because it did not submit any evidence that actual consumers had either complained about the "Strategy Session" ad or been harmed by it. The case law, however, plainly states that such evidence is only required where the ad at issue contains a truthful statement that is nonetheless misleading and is not required where the ad is inherently misleading."

...

¹ This Robert Vaughn advertisement has faced bar criticism in several states, and for several reasons. For instance, another bar condemned this ad because it amounted to an improper celebrity endorsement. In re Keller, 792 N.E.2d 865, 870 (Ind. 2003) ("In the advertisements, Vaughn tells viewers, 'the insurance companies know the name Keller & Keller,' 'tell the insurance companies you mean business. Tell them you've called Keller & Keller,' and, finally, 'they go after your rights piece by piece by piece until you get every dollar you deserve.' The purpose of these statements is to reinforce the notion established in the 'Strategy Session' advertisement that the name Keller & Keller alone achieves results. In advising that the respondents 'go after your rights piece by piece by piece' until every possible dollar is recovered, Vaughn clearly is supporting the respondents and their ability to secure a positive result for the client, and even implies by these statements that, based on past successes, this is the respondents' usual outcome. Vaughn clearly implies that Keller & Keller can provide the services that the viewers need. He is not just encouraging the public to seek legal assistance, he is endorsing their contact with the firm of Keller & Keller because of their reputation. There is a distinction between simply suggesting that viewers call Keller & Keller, and suggesting that viewers who call Keller & Keller will obtain a favorable outcome. Because of Vaughn's endorsement of the respondent's services, we find the respondents violated Prof.Cond.R. 7.1(d)(3).").

The "Strategy Session" does not contain a truthful statement that is being challenged as misleading; rather, it consists of a fictional meeting of insurance adjusters whose dialogue leads to a decision to settle the case after learning the identity of the plaintiff's attorneys. The court finds that the State Bar was not required to conduct a public survey to determine that the "Strategy Session" is misleading because the ad contains a self-evident message. Plaintiffs argue that the ad's message varies depending on the eye of the beholder, which would essentially allow advertisers to depict any fictional scene so long as the script itself made no false explicit claim about the lawyer. However, the court is not required to employ a stricter evidentiary standard when dealing with a fictional vignette than required by the Supreme Court in dealing with a factually true statement. Thus, the court need not consider extrinsic evidence to determine whether the ad is misleading.

Id. at 437-38 (emphases added).

In In re Zang, 741 P.2d 267 (Ariz. 1987), the Arizona Supreme Court similarly dealt with print advertisements that included the following statements

"We're the [or 'a'] personal injury law firm:

<*> with the medical experience to understand complicated injuries

<*> with investigators to find witnesses and hidden evidence

<*> with computers for speed, accuracy and research

...

Detailed Preparation

is part of Zang & Whitmer, Chtd. because: the better your case is prepared for trial, the more likely your case will settle out of court without delay or hassles. (emphasis added)

...

Medicine and Law

are combined at Zang & Whitmer, Chtd. because: to prove serious injury and future suffering, your lawyer must have

the knowledge to make complicated medical facts clear for the jury.

...

Licensed Investigators

are part of Zang & Whitmer, Chtd. because: an investigator searches out witnesses, examines evidence at the accident cene [sic], and discovers the facts essential for victory in the courtroom.

...

The television advertisements also were very dramatic. They featured an authoritative-sounding narrator and either frenetic or peaceful music as a backdrop for pictures of an automobile accident, a worried couple in a hospital waiting room, or a father kissing his daughter goodbye, apparently for the last time. Each of the television advertisements ended with a climactic scene showing Mr. Zang arguing before a jury in a courtroom, with the viewer visually located behind the jury box.

Id. at 273-74 (emphasis added). The court later noted that the

Committee and the Commission found that respondents' advertisements were false and misleading because they did not accurately portray respondents' practice. Zang & Whitmer was formed in 1979. From that time until the advertisements at issue appeared in 1982 and 1983, no attorney at Zang & Whitmer had tried a personal injury case to a conclusion. . . . Zang and Whitmer personally started only one trial, but a mistrial was declared after the first witness testified.

Id. at 275 (emphasis added). Not surprisingly, the court upheld the bar's three-day suspension of the lawyer.

Perhaps the bar "cherry picked" these types of cases to bring, but some lawyers are so egregious that any bar could satisfy the "inherently misleading" standard. Id.

It can be difficult to determine if a lawyer's marketing violates this standard and therefore deserves what amounts to summary rejection. In 2011, the New York Times

ran a story about advertisements broadcast by the well-known Jacoby & Meyers plaintiffs' law firm -- noting that the law firm settled 97 percent of its cases, but ran an advertisement emphasizing that "winning is everything."

- Andrew Adam Newman, Winning Is Everything, Or So Says a Law Firm, N.Y. Times, Oct. 20, 2011, at B6 ("Now a new campaign by Jacoby & Meyers, a law firm with offices in New York and throughout the United States, is taking the unconventional approach of eschewing lawyers and employing humor. 'Remember that guy?' begins one text-only commercial. 'Who came in second in the last New York Marathon? Neither do we. Winning is everything.'"; "'They say,' begins yet another ad. 'It doesn't matter if you win or lose. As long as you tried your best. They probably weren't rear-ended by a truck. Jacoby & Meyers. Winning serious injury lawsuits since 1972.'"; "Andrew Finkelstein, the managing partner of Jacoby & Meyers, said the firm settled 97 percent of its cases before or during a trial, and that of the 3 percent decided with a verdict at trial, it wins about three out of four cases. On that basis, Allan Ripp, a New York publicist who represents many law firms, said he thought the new Jacoby & Meyers ads 'have a very clever concept, but it's more sizzle than steak.' Even when settlements are hefty, the firm has not in the technical sense won those cases, especially considering that defendants often stipulate in settlements that they admit no wrongdoing, Mr. Ripp said."; "In response, Mr. Finkelstein said that his firm's reputation for winning trials was what prompted insurance companies to offer sizeable settlements, and that accepting such offers rather than going to trial 'ultimately is our clients' decision, not our decision.' So, he continued, 'when clients walk away and accept a settlement and they are happy with it, they feel that they've won -- it's a win in their eyes.'"; "One agency doing a brisker-than-anticipated business with lawyers is the Levinson Tractenberg Group in Manhattan. In 2010, the agency introduced a campaign for the New York law firm of Trolman, Glaser & Lichtman that also used humor. 'It's like I had this huge, really sharp machete chopping down on me every time I tried to move,' says an actress in one of the commercials. 'It was the worst paper cut I ever had -- they made that paper way too sharp.' The television commercials, which close with the tagline, 'There are some cases even we can't win,' have been viewed more than 200,000 times on YouTube.").

Marketing that is Not Inherently Misleading. In contrast to inherently misleading statements that courts can judge without any further analysis (and without any evidentiary support from a state bar), marketing statements that are only capable of a deceptive or other improper interpretation require a far more subtle analysis -- and evidentiary support by the state agency seeking to prohibit the marketing statements.

For instance, in Public Citizen Inc. v. Louisiana Attorney Disciplinary Board, 632 F.3d 212 (5th Cir. 2011), the Fifth Circuit analyzed several Louisiana ethics rules limiting lawyer marketing -- finding unconstitutional some of the restrictions, but upholding other restrictions.

The Fifth Circuit noted that the Louisiana Bar had conducted a survey of 600 Louisiana residents, held various meetings around the state to discuss the proposed restrictions, undertook a web survey of Louisiana lawyers and sponsored various "focus group discussions." Id. at 216. The Fifth Circuit held that the Louisiana Bar had a "heavy" burden of proof in restricting commercial speech such as that covered by the Louisiana rules, and that the Bar could not carry its burden of proof "by mere speculation or conjecture." Id. at 218 (citations omitted).

In analyzing the Central Hudson standard, the Fifth Circuit found that Louisiana pointed to two legitimate "substantial government interests."

[T]he court holds that LADB has asserted at least two substantial government interests: protecting the public from unethical and potentially misleading lawyer advertising and preserving the ethical integrity of the legal profession.

Id. at 220. The Fifth Circuit rejected another government interest relied upon by the Louisiana Bar.

[A]n interest in preserving attorneys' dignity in their communications with the public is not substantial.

Id.

In analyzing the "narrowly drawn to materially advance the asserted interests" Central Hudson standard, the Fifth Circuit described the Louisiana Bar's burden.

To show that a regulation materially advances a substantial interest, LADB must "demonstrate[] that the harms it recites are real and that its restriction will in fact alleviate them to a

material degree." It may do so with empirical data, studies, and anecdotal evidence. . . . The evidence on which it relies need not "exist pre-enactment." . . . It may also "pertain[] to different locales altogether." . . . This requirement may also be satisfied with "history, consensus, and simple common sense."

Id. at 220-21 (citations omitted).

The Fifth Circuit ultimately found unconstitutional Louisiana's total ban on marketing statements "containing a reference or testimony to past successes or results obtained."² The court found unconvincing the bar's argument in favor of the ban.

Even if, as LADB argues, the prohibited speech has the potential for fostering unrealistic expectations in consumers, the First Amendment does not tolerate speech restrictions that are based only on a "fear that people would make bad decisions if given truthful information." . . . To the extent that Rule 7.2(c)(1)(D) prevents attorneys from presenting "truthful, non-deceptive information proposing a lawful commercial transaction," it violates the First Amendment.

Id. at 222 (citation omitted).

The Fifth Circuit pointed to but ultimately rejected the Louisiana Bar's reliance on surveys to support the Louisiana rule's ban on statements "of opinion or quality and . . . [those] of objective facts that may support an inference of quality." Id. at 221 (citation omitted).

LADB bears the burden to show that the unverifiable statements prohibited by Rule 7.2(c)(1)(D) are so likely to be misleading that it may prohibit them. To do so, LADB relies on selected responses from the two Louisiana surveys: (1) 83% of the interviewed public did not agree "client testimonials in lawyer advertisements are completely truthful"; (2) 26% agreed that lawyers endorsed by a testimonial have more influence on Louisiana courts;

² Public Citizen, 632 F.3d at 221 (citation omitted). As the Fifth Circuit explained it, "[a] statement that a lawyer has tried 50 cases to a verdict, obtained a \$1 million settlement, or procured a settlement for 90% of his clients, for example, are objective, verifiable facts regarding the attorney's past professional work." Id.

- (3) 40% believe that lawyers are, generally, "dishonest"; and
- (4) 61% believe that Louisiana lawyer advertisements are "less truthful" than advertisements for other items or services.

Id. at 222. The Fifth Circuit found the survey results insufficient to support the ban.

These responses are either too general to provide sufficient support for the rule's prohibition or too specific to do so. The general responses indicate that the public has a poor perception of lawyers and lawyer advertisements. However, they fail to point to any specific harms or to how they will be alleviated by a ban on testimonials or references to past results. . . . The more specific survey responses provide information regarding client testimonials, but do not shed light on the rule's prohibition of only those testimonials specifically discussing the attorney's past results or of all mere "references" to past results in unsolicited advertisements. They might be read to show that a majority of the Louisiana public may be unswayed by testimonials -- perhaps demonstrating that they are a poor advertising choice -- but not that banning only those testimonials that relate to past results will "ensur[e] the accuracy of commercial information in the marketplace" or is required to uphold ethical standards in the profession. . . . Only a minority of survey respondents agreed that attorneys employing testimonials in their advertisements have greater influence on the courts, and the ambiguity of the question posed to them leaves open the possibility that they were expressing a belief that these attorneys could obtain better results, not a belief that they would do so improperly.

Id. at 222-23.

The Fifth Circuit likewise found the Louisiana Bar survey results insufficient to support a very specific rule requiring certain font size for disclaimers in written advertisements, and a requirement that televised advertisements include both a written disclaimer and a slowly-spoken oral disclaimer.

The record is devoid of evidence that Rule 7.2(c)(10)'s font size, speed of speech, and spoken/written provisions are "reasonably related" to LADB's substantial interests in preventing consumer deception and preserving the ethical standards of the legal profession. . . . The objected-to

restrictions in Rule 7.2(c)(10) effectively rule out the ability of Louisiana lawyers to employ short advertisements of any kind. Accordingly, we hold that they are overly burdensome and violate the First Amendment.

Id. at 229.

In contrast, the court found that the Louisiana survey's results supported the constitutionality of a ban on statements that "include[] a portrayal of a client by a non-client without disclaimer . . . or the depiction of any events or scenes or pictures that are not actual or authentic without disclaimer." Id. at 227 (citation omitted).

Interestingly, the Fifth Circuit acknowledged that the Second Circuit had very recently found unconstitutional a New York ethics rule prohibiting use of "a nickname, moniker, motto or trade name that states or implies an ability to obtain results in a matter" (id. at 226, quoting Alexander v. Cahill, 598 F.3d 79 (2d Cir. 2010), cert. denied, 131 S. Ct. 820 (2010)) -- but found that the Second Circuit's finding of unconstitutionality was based on the New York Bar's failure to present enough supporting evidence.

The Fifth Circuit found that Louisiana had presented sufficient evidence to support the identical ban in Louisiana.

The court is satisfied that there is reliable and specific evidence on the record sufficient to support the restriction imposed by Rule 7.2(c)(1)(L). First, the survey and focus group responses consistently reveal that the advertisements containing these mottos misled the public, improperly promised results, and implied that the advertising lawyers could manipulate Louisiana courts. Second, they present the perceptions of a significant number of people from each of the two pools of respondents. One-half of each survey was directed at the use of mottos and nicknames in attorney advertisements. Participants were either shown existing attorney advertisements making use of mottos or asked whether they recognized specific mottos. Finally, the questions asked about the shown or recognized advertisements were not abstract or hypothetical. They targeted the specific elements of commercial speech

implicated by this rule and sought and received the reactions of the public and Bar Members to that type of speech. The result is evidence that directly pertains to and supports the restriction set forth in Rule 7.2(c)(1)(L). The court holds that LADB has met its burden to show that this rule will advance its substantial interest in preventing consumer confusion.

Id. at 225 (footnote omitted).

In 2010, the Second Circuit declared unconstitutional various portions of New York's marketing rules, including bans on testimonials; portrayals of judges; irrelevant techniques such as gimmicky depictions; nicknames; and trade names.³

³ Alexander v. Cahill, 598 F.3d 79, 83-84, 90, 92, 93, 94, 94-95, 95, 102, 103 (2d Cir. 2010) (in an opinion filed by Circuit Judge Guido Calabresi, upholding the constitutionality of New York State's 30-day moratorium on direct marketing in wrongful death or personal injury situations, but finding unconstitutional other provisions of New York's marketing rules, including bans on testimonials, portrayals of judges, irrelevant techniques such as gimmicky depictions, nicknames, and trade names; explaining that "[p]rior to the adoption of New York's new attorney advertising rules, the firm's commercials often contained jingles and special effects, including wisps of smoke and blue electrical currents surrounding the firm's name. Firm advertisements also featured dramatizations, comical scenes, and special effects -- for instance, depicting Alexander and his partner as giants towering above local buildings, running to a client's house so quickly they appear as blurs, and providing legal assistance to space aliens."; applying the Central Hudson standard (Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980)) in assessing nearly all of the New York state marketing rules at issue -- other than the rule prohibiting misleading marketing of a law firm that does not exist; "At oral argument, the Attorney General, representing the Defendants, suggested a narrower interpretation of this regulation. He asked that we construe this language as applying only to situations in which lawyers from different firms give the misleading impression that they are from the same firm (i.e., 'The Dream Team'). . . . We accept this interpretation. So read, this portion of § 1200.50(c)(3) addresses only attorney advertising techniques that are actually misleading (as to the existence or membership of the firm), and such advertising is not entitled to First Amendment protection."; quoting a 1991 article by then-professor Calabresi analyzing the Central Hudson standard; emphasizing that "[d]efendants have not submitted any statistical or anecdotal evidence of consumer problems with or complaints of the sort they seek to prohibit. Nor have they specifically identified any studies from other jurisdictions on which the state relied in implementing the amendments."; finding unconstitutional New York State's ban on testimonials; "Nor does consensus or common sense support the conclusion that client testimonials are inherently misleading. Testimonials may, for example, mislead if they suggest that past results indicate future performance -- but not all testimonials will do so, especially if they include a disclaimer. The District Court properly concluded that Defendants failed to satisfy this prong of Central Hudson with respect to client testimonials."; also finding unconstitutional New York State's ban on portrayal of judges in marketing materials; "We believe the Task Force Report fails to support Defendants' prohibition on portrayals of judges and conclude that Defendants have not met their burden with respect to the wholesale prohibition of portrayals of judges. This prohibition consequently must fall." (footnote omitted); also finding unconstitutional New York State's ban on "irrelevant advertising components"; "Defendants have introduced no evidence that the sorts of irrelevant advertising components proscribed by subsection 1200.50(c)(5) are, in fact, misleading and so subject to proscription."; "[T]he sorts of gimmicks that this rule appears designed to reach -- such as Alexander & Catalano's wisps of smoke, blue electrical currents, and special effects -- do not actually seem likely to mislead. It is true that Alexander and his partner are not giants towering above local buildings; they cannot run to a client's house so quickly they appear as blurs; and they do not actually

The Second Circuit repeatedly noted the absence of any evidence supporting the New York ethics rules. As the court explained,

Defendants have not submitted any statistical or anecdotal evidence of consumer problems with or complaints of the sort they seek to prohibit. Nor have they specifically identified any studies from other jurisdictions on which the state relied in implementing the amendments.

Alexander v. Cahill, 598 F.3d 79, 92 (2d Cir. 2010).

Later in its opinion, the Second Circuit found that New York's ban on nicknames and trade names was unconstitutional.

There is a dearth of evidence in the present record supporting the need for § 1200.50(c)(7)'s prohibition on names that imply an ability to get results when the names are akin to, and no more than, the kind of puffery that is commonly seen, and expected, in commercial advertisements generally. Defendants have once again failed to provide evidence that consumers have, in fact, been misled by the sorts of names and promotional devices targeted by § 1200.50(c)(7), and so have failed to meet their burden for sustaining this prohibition under Central Hudson.

provide legal assistance to space aliens. But given the prevalence of these and other kinds of special effects in advertising and entertainment, we cannot seriously believe -- purely as a matter of 'common sense' -- that ordinary individuals are likely to be misled into thinking that these advertisements depict true characteristics."; also finding unconstitutional New York State's ban on nicknames and trade names; "[T]he Task Force Report did not recommend outright prohibition of all such trade names or mottos -- it simply acknowledged that such names are often misleading. Defendants' rule, by contrast, goes further and prohibits such descriptors -- including, according to the Attorney General, Alexander & Catalano's own 'Heavy Hitters' motto -- even when they are not actually misleading. The Task Force Report therefore fails to support Defendants' considerably broader rule."; "There is a dearth of evidence in the present record supporting the need for § 1200.50(c)(7)'s prohibition on names that imply an ability to get results when the names are akin to, and no more than, the kind of puffery that is commonly seen, and expected, in commercial advertisements generally. Defendants have once again failed to provide evidence that consumers have, in fact, been misled by the sorts of names and promotional devices targeted by § 1200.50(c)(7), and so have failed to meet their burden for sustaining this prohibition under Central Hudson"; ultimately upholding the constitutionality of New York State's 30-day moratorium on certain direct marketing in wrongful death and personal injury cases; "[W]e conclude that ads targeting certain accident victims that are sent by television, radio, newspapers, or the Internet are more similar to direct-mail solicitations, which can properly be prohibited within a limited time frame, than to 'an untargeted letter mailed to society at large,' which 'involves no willful or knowing affront to or invasion of the tranquility of bereaved or injured individuals and simply does not cause the same kind of reputational harm to the profession' as direct mail solicitations." (citation omitted); "Moreover, we do not find constitutional fault with the 30-day time period during which attorneys may not solicit potential clients in a targeted fashion.").

Id. at 95. In April 2011, New York changed its marketing rules to comply with this opinion.

The Eleventh Circuit also dealt with this issue, several years ago.

In Mason v. Florida Bar, 208 F.3d 952 (11th Cir. 2000), the court analyzed a lawyer's advertisement of his "AV" Martindale-Hubbell rating.

Mason, a criminal defense attorney practicing in Orlando, Florida, submitted a proof of his yellow pages advertisement to the Bar for an ethics advisory opinion. In pertinent part, the advertisement states that Mason is "'AV' Rated, the Highest Rating [in the] Martindale-Hubbell National Law Directory." The Bar issued an opinion that the advertisement violated Rule 4-7.2(j) which provides: "Self-Laudatory Statements. A lawyer shall not make statements that are merely self-laudatory or statements describing or characterizing the quality of the lawyer's services in advertisements and written communication. . . ." The Bar notified Mason that his advertisement must include a "full explanation as to the meaning of the [Martindale-Hubbell] AV rating and how the publication chooses the participating attorneys." The Bar further indicated that the explanation must state "that the ratings and participation are based on 'exclusively on . . . opinions expressed by . . . confidential sources' and that these publications do not undertake to rate all Florida attorneys." (internal quotations and ellipses in original).

Id. at 954 (footnotes omitted). The court pointed to the bar's fairly meager effort to show some harm or confusion.

In support of its position, the Bar offered the affidavit and testimony of the Bar's director of advertising and ethics, Ms. Tarbert, and portions of the 1998 Martindale-Hubbell Law Directory. Ms. Tarbert did not testify to any anecdotal accounts of actual harm to members of the general public misled by characterizations of Martindale-Hubbell's rating system, nor did the district court make a factual finding that any person had been misled or deceived by Mason's ad or a similar ad. Ms. Tarbert merely offered the Bar's "simple common sense" to support its view that application of Rule 4-7.2(j) targeted an identifiable harm and furthered substantial state interests in a direct and material manner.

...

Moreover, the Bar presented no studies, nor empirical evidence of any sort to suggest that Mason's statement would mislead the unsophisticated public. While empirical data supporting the existence of an identifiable harm is not a sine qua non for a finding of constitutionality, the Supreme Court has not accepted "common sense" alone to prove the existence of a concrete, non-speculative harm.

Id. at 957 (emphasis added). The court ultimately rejected the bar's challenge to Mason's reliance on the Martindale-Hubbell rating.

The Bar has the burden in this case of producing concrete evidence that Mason's use of the words "'AV' Rated, the Highest Rating" threatened to mislead the public. The Bar's inferences from the Introduction to Martindale-Hubbell are mere speculation, and Ms. Tarbert's testimony reveals that the Bar's concerns consist of unsupported conjecture. This court is unwilling to sustain restrictions on constitutionally protected speech based on a record so bare as the one relied upon by the Bar here.

Id. at 958 (emphasis added).

In some situations, courts acknowledge that state bars have presented evidence supporting restrictions -- but reject the studies' methodologies.

- In re Anonymous Member of S.C. Bar, 684 S.E.2d 560, 561, 565 (S.C. 2009) (analyzing the following television advertisement: "'It's not your fault you were hurt on the job, but I know you're afraid to file a job injury claim. You're afraid your boss won't believe you're really hurt - or worse, that you'll be fired. We'll protect you against these threats - these accusations - and work to protect your job. I'm not an actor, I'm a lawyer. I'm -[Anonymous]. Call me and we'll get you the benefits you deserve. The [Law] Firm.'"; rejecting a study undertaken by the bar that supposedly showed the ad to be misleading; "At the outset, there is no evidence that any member of the public was misled when Respondent aired his television advertisement. Moreover, we find the results of the Market Search study are suspect and do not definitively establish that the advertisement was misleading." (emphasis added); "The sample group was smaller than normally used for such a study and, in turn, may not have been statistically reliable. The study had a 20% margin of error. The participants were shown a total of five attorney advertisements, of which two were produced by Respondent. This undoubtedly focused the participants' attention more keenly on the Respondent's advertisements."

Respondent's advertisement was the only one of the five that referenced anything regarding a client's job. The questionnaires were also worded in a way that elicited the desired response from participants. (emphasis added); ultimately holding that the bar had failed to establish by "clear and convincing evidence" that the advertisement violated the ethics rules).

In analyzing whether marketing statements are "inherently misleading," some bars have turned to experts.

For instance, in North Carolina State Bar v. Culbertson, 627 S.E.2d 644 (N.C. Ct. App. 2006), the court analyzed the following lawyer marketing:

The complaint alleged defendant's law office letterhead contained an asterisk beside his name. Below defendant's name is printed another asterisk and the phrase. "Published in Federal Reports, 3d Series" surrounded by parentheses. The complaint also alleged defendant is described on the firm's website as "also one of the elite percentage of attorneys to be published in Federal Law Reports - the large law books that contain the controlling caselaw [sic] of the United States."

Id. at 646 (emphases added).

The court explained that

Where the possibility of public deception is self-evident, the DHC [North Carolina State Bar Disciplinary Hearing Commission] is not required to survey the public to determine whether the communication has a tendency to mislead.

Id. at 648 (emphasis added). In an effort to argue that the challenged statements fell within this category, the bar presented both survey results and expert testimony.

At the DHC hearing, defendant introduced evidence of a detailed survey conducted by a Wake Forest University political science professor that asked members of the general public whether the phrase, "Published in Federal Reports, 3d" on an attorney's letterhead was misleading. Defendant also introduced a study performed by a Duke University English and anthropology professor which analyzed how the general public would interpret the word, "publish." Defendant argues the DHC failed to consider this

evidence of whether the public would actually be misled by the language and erred in relying on its judgment to determine whether this language was false or misleading.

Id. (emphasis added). The court found that the bar had carried its burden of showing that the statements were "inherently misleading," and thus could restrict them.

Because defendant's statements are inherently misleading, the DHC was not required to consider extrinsic evidence of whether the public was actually misled. . . . Substantial evidence in the record supports DHC's conclusion that defendant's statements published on his letterhead and website asserting he is "Published in the Federal Law Reports" are false or misleading.

Id. at 650 (emphasis added).

Effect of Required Disclaimers

In every area of commercial speech restrictions, courts have debated the effect of governmental rules that require additional disclosure (such as a disclaimer) rather than prohibit the challenged speech.

Not surprisingly, this debate also appears in the case law dealing with lawyer marketing.

For instance, one court explained that

The fact that the regulation requires disclosure rather than prohibition tends to make it less objectionable under the First Amendment.

Walker v. Bd. of Prof'l Responsibility, 38 S.W.3d 540, 545 (Tenn. 2001). Later, the court reiterated that "the Board's burden is lower than it would be had it prohibited Walker from advertising truthful information." Id. at 546. The Court ultimately affirmed the Tennessee Bar's conclusion that a divorce lawyer's advertisement must include a disclaimer explaining that the lawyer was not certified as a specialist in divorce law.

On the other hand, the Eleventh Circuit found unconstitutional the Florida Bar's restriction on a lawyer's truthful advertisement about his Martindale-Hubbell rating. The court rejected the Florida Bar's argument that a disclaimer requirement lessened its burden of proof.

The Bar argues that its restriction on Mason's speech should be upheld because it has not insisted upon an outright ban on speech, but merely requires the use of a disclaimer. But given the glaring omissions in the record of identifiable harm, we see little merit in this argument. . . . Even partial restrictions on commercial speech must be supported by a showing of some identifiable harm. Accordingly, we hold that the Bar is not relieved of its burden to identify a genuine threat of danger simply because it requires a disclaimer, rather than a complete ban on Mason's speech.

Mason v. Fla. Bar, 208 F.3d 952, 958 (11th Cir. 2000) (emphasis added).

Not surprisingly, lawyers cannot avoid bar restrictions on their intentionally misleading marketing by adding their own fleeting disclosures in the marketing.

For instance, the North Carolina federal court which upheld the bar's restriction on a lawyer's deceptive television advertisement (which implied that insurance defense lawyers would be likely to settle a case once they knew that the lawyer was representing a plaintiff) was not affected by what the lawyer pointed to as a disclaimer in the television advertisement that "no specific results implied." Farrin v. Thigpen, 173 F. Supp. 2d 427 (M.D.N.C. 2001).

[T]he existence of a disclaimer stating that no specific result was implied by the vignette does nothing to prevent the conclusion that the ad is inherently misleading. It would defeat the purpose of Rule 7.1 and other advertising regulations if the advertiser could employ deceptive and misleading methods so long as the ad included a disclaimer of what was portrayed.

Id. at 445.

Best Answer

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

b 7/14

Reach of State Ethics Rules: General Approach

Hypothetical 3

Your firm's chairman just asked you to supervise your firm's marketing efforts in a southern state. Although you do not have an office in that state, several of your Charlotte office partners hold licenses in the state. Your first question is the application of the state's ethics rules to your marketing efforts.

- (a) Will the state's ethics rules apply to a print advertisement placed in that state's main business magazine?

YES

- (b) Will the state's ethics rules apply to a print advertisement placed in American Lawyer magazine, which is sold in the state?

MAYBE

Analysis

- (a) Not surprisingly, states clearly can regulate lawyer marketing specifically targeting the state's citizens.

Perhaps the clearest example involves a lawyer who is physically present in the state, but not admitted to practice there.

- Gould v. Fla. Bar, 259 F. App'x 208, 210, 211 (11th Cir. 2007) (assessing advertisements by a New York lawyer who moved to Florida and advertised that he could provide legal services for "NEW YORK LEGAL MATTERS ONLY" or his practice was "LIMITED TO FEDERAL ADMINISTRATIVE LAW"; holding that Florida could ban the advertisement because the lawyer "who is not admitted to the Florida Bar, does not have the authority to practice New York law in Florida," meaning that the advertisement was for unlawful activity and could be stopped by the Bar; rejecting the lawyer's argument that Florida could not prevent him from practicing "federal administrative law" or advertising that he practices such law; acknowledging that federal law preempts any efforts by Florida to prevent lawyers from representing persons "before an agency," but finding that provision inapplicable; "The Florida Bar responds that it is unlawful for Gould, who is not licensed to practice law in Florida, to engage in a general 'federal administrative practice' in Florida and that, under Central Hudson, the Florida Bar is entitled to regulate an

advertisement for those services because the advertisement concerns unlawful activity. The words 'federal administrative law' apply to a broad range of legal issues, and are not limited to the representation of persons before federal agencies. Issues of federal administrative law arise in state and federal courts, as well as before federal agencies."; granting summary judgment to the Florida Bar prohibiting the advertisements), cert. denied, 553 U.S. 1032 (2008).

The same basic rule applies to lawyers who personally solicit in the state, or send direct mail to the state's residents. Some states' ethics rules specifically explain their marketing rules' reach.

- Florida Rule 4-7.11(b) ("This subchapter applies to lawyers, whether or not admitted to practice in Florida or other jurisdictions, who advertise that the lawyer provides legal services in Florida or who target advertisements for legal employment at Florida residents. The term 'lawyer' as used in subchapter 4-7 includes 1 or more lawyers or a law firm. This rule does not permit the unlicensed practice of law or advertising that the lawyer provides legal services that the lawyer is not authorized to provide in Florida.").
- New York Rule 7.3(i) ("The provisions of this Rule shall apply to a lawyer or members of a law firm not admitted to practice in this State who shall solicit retention by residents of this State.").
- South Carolina Rule 418(b) ("Any advertising or solicitation by an unlicensed lawyer shall comply with Rules 7.1 through 7.5 of the Rules of Professional Conduct contained in Rule 407, SCACR, when the advertising or solicitation is: (1) [a]n in-person contact with a potential client which occurs in South Carolina; (2) [a] telephone communication (to include a facsimile [or] other electronic transmission) to a potential client at a telephone number in South Carolina; (3) [a] letter or other document sent to a potential client through the U.S. mail or a private carrier to an address in South Carolina; (4) [a]n advertisement on a radio or television station located in South Carolina; (5) [a]n advertisement in a South Carolina a [sic] newspaper or any other publication which is primarily distributed in South Carolina; or (6) [a]ny other form of advertising or solicitation which is specifically targeted at potential clients in South Carolina." (emphases added)).

States' ethics opinions often take the same approach.

- Illinois LEO 14-04 (5/2014) (finding an out-of-state lawyer marketing to Illinois potential clients must follow the Illinois marketing rules; "Lawyer A is licensed to practice law only in a state other than Illinois. He claims extensive experience in representing plaintiffs in mass disaster tort litigation. From his office in the state of licensure, he mails packets of material advertising his law

firm's personal injury litigation services, with letters of solicitation, to persons who were injured in major disasters in Illinois and other states. When representing claimants in a state other than his state of licensure, he retains local counsel. No Illinois resident has responded to his mailings."; "Whether or not advertising in Illinois constitutes a 'continuous and systematic presence' such that the lawyer's practice is no longer 'temporary' within the meaning of Rule 5.5(c) and constitutes the unauthorized practice of law is a question that has not been addressed, nor does the Committee express an opinion on that issue herein. In addition, not having reviewed the solicitation at issue, the Committee does not have enough information to opine on whether it specifically would likely constitute the unauthorized practice of law. . . . Even if A's solicitation letters do not constitute the practice of law within Illinois, they must meet the requirements imposed on legal advertisements set forth in Rules 7.1-7.5 of the Illinois Rules of Professional Conduct.").

- South Carolina LEO 12-09 (6/20/12) ("An out of state law firm may advertise on billboards in South Carolina and include pictures of firm members not licensed in South Carolina, provided the billboard meets all South Carolina advertising regulations.").
- North Carolina LEO 2005-10 (1/20/06) ("Cyberlawyers have no control over their target audience or where their marketing information will be viewed. Lawyers who appear to be soliciting clients from other states may be asking for trouble. See South Carolina Appellate Court Rule 418, 'Advertising and Solicitation by Unlicensed Lawyers' (May 12, 1999) (requiring lawyers who are not licensed to practice law in South Carolina but who seek potential clients there to comply with the advertising and solicitation rules that govern South Carolina lawyers).").
- California LEO 2001-155 (2001) ("The concerns and requirements described above apply to the activities of Attorney A in California, and apply equally to foreign attorneys in California in their 'communications' in California about their availability to provide legal services in California for pecuniary gain." (footnote omitted); "We do not address in this opinion the issue of what state's advertising rules will apply to a lawyer who is licensed in more than one state. ABA Model Rule 8.5(b)(2)(ii) suggests a choice-of-laws rule for disciplinary purposes when lawyers are licensed in more than one state. Despite the possible arguments that arise from choice-of-law concepts, the most prudent course for any attorney licensed in more than one jurisdiction is to comply with the advertising rules of each jurisdiction.").

State court decisions generally take the same basic approach.

- In re Van Son, 742 S.E.2d 660, 661 (S.C. 2013) (proposing a five-year ban on a suspended California lawyer from advertising or soliciting clients in South Carolina; "Respondent sent letters to South Carolina residents notifying them

they were potential plaintiffs in a 'national lawsuit' that respondent's office had recently filed, and urging them to contact that office to avoid being 'excluded as a plaintiff.'"; finding that the letters violated various direct mail provisions of the South Carolina ethics rules).

- In re Parilman, 947 N.E.2d 915 (Ind. 2011) (holding that Indiana can punish an Arizona lawyer for broadcasting radio advertisements from an Indiana radio station that violate the Indiana ethics rules; ultimately barring the lawyer from practicing law in Indiana, seeking temporary admission into Indiana, or soliciting clients in Indiana).
- In re Coale, 775 N.E.2d 1079 (Ind. 2002) (barring out-of-state lawyers from practicing in Indiana as a sanction for mailing impermissible self-laudatory claims to potential personal injury clients in Indiana), cert. denied, 537 U.S. 1160 (2003).
- In re Murgatroyd, 741 N.E.2d 719, 721 (Ind. 2001) ("By directing the solicitations to the prospective clients, the respondents communicated to those persons that they were available to act in a representative capacity for them in Indiana courts to address loss or injury associated with the plane crash. As such, they held themselves out to the public as lawyers in this state when neither was admitted to practice here. Those acts constituted professional legal activity in this state subject to our regulatory authority." (emphases added) (footnote omitted)),

Some states take a more aggressive approach. For instance, an Arizona legal ethics opinion indicates (at least on its face) that a law firm must comply with Arizona's ethics rules if it has even one lawyer admitted in Arizona -- regardless of where the advertisement will appear.

If a law firm has offices in many states, must the firm comply with Arizona ethics rules if the firm either has an office in Arizona or attorneys admitted to practice in Arizona? Yes. Pursuant to ER 8.5, if you are a member of the State Bar of Arizona, you must follow the Arizona Model Rules of Professional Conduct, even if your advertisement will appear, electronically, both inside and outside of the state.

Arizona LEO 97-04 (4/1997) (emphases added).

Thus, every state feels entitled to police marketing that targets that state's citizens. The more aggressive states articulate a greater power (including the authority

to police the law firm's marketing if any of the firm's lawyers hold a license in that state), but appear not to exercise that self-proclaimed authority.

(b) State bars' approach to national magazines provides an interesting example of articulated but unexercised power.

The general rules discussed above would theoretically allow states to punish their lawyers for unethical advertisements appearing in national magazines sold in the state. For instance, Arizona's aggressive approach (discussed above) would certainly apply to a national magazine.

Other states are somewhat more modest. For instance, South Carolina Rule 418(b)(5) applies South Carolina's ethics rules to a newspaper or other publication "which is primarily distributed in South Carolina." (emphasis added).

Even then, it would be incongruous for a South Carolina lawyer to face punishment for an unethical print advertisement published in a South Carolina magazine, but be immune from sanctions for publishing the identical advertisement in a national magazine sold throughout South Carolina.

Perhaps because state bars have too much to do anyway, no single state seems to care much about advertisements appearing in national magazines.

Best Answer

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

b 7/14

Reach of State Ethics Rules: Websites

Hypothetical 4

As your law firm's partner chiefly responsible for ethics issues, you field questions and complaints from state bars. You just received calls from two state bars. Each of the bars complained about several statements on your firm's website. Your firm has a two-lawyer office in the capital of one of the states whose bar has complained about your website, and one of your 500 lawyers is licensed in the other state whose bar has complained.

- (a) Must your firm website comply with the marketing rules of the state in which you have a two-lawyer office?

YES (PROBABLY)

- (b) Must your firm website comply with the marketing rules of the state whose bar members include one of your lawyers?

MAYBE

Analysis

State bars have always been able to punish foreign lawyers who commit some ethics breach (including marketing violations) in that state. Of course, the punishment necessarily consists of barring the foreign lawyer from practicing in that state -- along with perhaps reporting the lawyer to his or her home state.

Law firm websites present far more interesting issues.

Law firms' websites sometimes become an issue in courts' analysis of jurisdiction. Not surprisingly, the fact that an out-of-state would-be client can access a law firm's website in the would-be client's state normally does not by itself justify that state exercising jurisdiction over the law firm.

- Zimmer, Inc. v. Elk & Elk, Cause No. 3:11-CV-63 RM, 2011 U.S. Dist. LEXIS 123334, at *5, *6 (N.D. Ind. Oct. 24, 2011) (holding that an Ohio law firm's website did not establish jurisdiction of the law firm in Indiana; "Zimmer's

claims against Elk & Elk relate to television advertisements distributed by, and a website maintained by, Elk & Elk that Zimmer claims include false, misleading, and defamatory statements about Zimmer knee replacement products."; "Elk & Elk presented an affidavit from the firm's managing partner reporting that the firm has no offices in Indiana, doesn't contract to do business in Indiana, doesn't derive any significant portion of its revenues from Indiana, and has no attorneys who represent clients in Indiana. . . . While Zimmer claims general jurisdiction over Elk & Elk exists because one of the firm's attorneys is licensed to practice in this court and the firm's website lists a 2010 Indiana settlement award, a single Indiana settlement and a lone attorney's admission to the bar of this court, even coupled with an internet website, are insufficient to establish general jurisdiction.").

The first ethics issue is whether law firm websites must comply with marketing rules at all. Most bars now hold that websites amount to a form of advertising, and therefore must comply with advertising rules.

(a) Although the answer is not without doubt, it would seem that the bar of a state in which a law firm has an office may exercise jurisdiction over that firm's website.

- Pennsylvania LEO 96-17, 1996 WL 928126, at *3 (5/3/96) ("I do not believe there is any question that a web site created and maintained by a Pennsylvania law firm is subject to the applicable provisions of Pennsylvania Rules of Professional Conduct. Whether other jurisdictions may impose their rules governing lawyer advertising is an open question.").

In fairly typical fashion, Iowa has taken an aggressive approach. In Iowa LEO 96-14 (12/12/96), an out-of-state firm with an Iowa office asked whether its website home page could explain that its "non-Iowa home page is separate from any Iowa home page" and "disclaims offering services in Iowa." In fact, the firm's proposed home page would contain the following more detailed disclaimer.

This _____ home page and web site do not contain information about, and are not intended to promote or sell services relating to, legal services which are available in Iowa or which relate to Iowa law; nor does this home page and web site contain information about the Des Moines office of _____.

Id. The law firm obviously was hoping to avoid application of Iowa's goofy marketing rules to anything but its Iowa office home page on the firm's website.

Not surprisingly, the Iowa Bar rejected the poor law firm's efforts.

It is the opinion of the board that if an out-of-state based law firm advertises that it has a branch office in Iowa or that certain firm members are licensed to practice in Iowa, it is a solicitation for Iowa legal representation and all copy, however communicated, must conform with all the requirements of the Iowa Code of Professional Responsibility for Lawyers.

Id. (emphases added).

Inexplicably, the Iowa Bar held that the law firm's disclaimer made matters worse, not better.

Further, it is the opinion of the board that communicating any information about Iowa or Iowa legal representation such as, but not limited to, the disclaimer you propose only operates to emphasize an Iowa advertisement and would be improper. Further, it is the opinion of the board that the proposed, "If the Des Moines office has a web site at all, the Iowa home page would have a separate web site which would not refer to the web site for other _____ offices, but would list the cities where these offices are located. These separate web sites will not have hyper-text links," would not be improper, provided all required disclosures are published, and the restrictions in DR 2-101 and DR 2-105 are complied with.

Id. (emphasis added). Thus, the law firm could not avoid Iowa's marketing ethics rules unless it had an entirely separate website for its Iowa office, with no links to the firm's website describing non-Iowa offices.

(b) Only a few states have addressed a bar's attempt to police websites of firms which do not have an office in that state.

As explained above, the Iowa Bar has indicated that an out-of-state law firm must comply with the Iowa ethics requirements if the law firm advertises that it has a branch office in Iowa or that it has Iowa lawyers in the firm. Iowa LEO 96-14 (12/12/96).

The Arizona Bar has also indicated that it may exercise jurisdiction over a firm's website simply because one of the firm's lawyers is licensed in that state.

[I]f you are a member of the State Bar of Arizona, you must follow the Arizona Model Rules of Professional Conduct, even if your advertisement will appear, electronically, both inside and outside of the state.

Arizona LEO 97-04 (4/1997). This approach apparently has not been tested in court, so it is unclear whether state bars may freely exercise jurisdiction to that extent.

If state bars may exercise jurisdiction over a firm's website with the only nexus being one lawyer's bar membership in that state, one would expect that there would soon be a "least common denominator" effect, and that most large law firms would have to comply with the most restrictive state's advertising regulations.

- California LEO 2001-155 (2001) (warning California lawyers that other states might regulate their websites).
- West Virginia LEO 98-03 (10/16/98) ("If a web site promotes a West Virginia law firm, for example, it does not matter where [the] web site is maintained. If the firm is a multistate firm, it must adhere to the most restrictive standards among those jurisdictions.").

Best Answer

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

b 7/14

Prohibition on False Statements

Hypothetical 5

In checking out some of your competitors' websites, you notice one especially interesting website. A local lawyer boasts that he is "published in Federal Reports," and describes himself as "one of the elite percentage of attorneys to be published in Federal Law Reports -- the large law books that contain the controlling case law of the United States." As you read the rest of the website, you realize that the lawyer had simply acted as counsel of record in a case that resulted in a published opinion. You wonder whether his website statement violates your state's prohibition on false advertising.

Does the lawyer's website reference to being published in the Federal Reports violate your state's prohibition on false advertisements?

YES

Analysis

Not surprisingly, every state's ethics rules prohibit false statements.

The main issue is whether the bar's disciplinary regulators must establish that any client or would-be client was misled by a statement, or whether the regulators can simply argue that a statement is "inherently misleading" and thus sanctionable.

In many situations, state bar regulators have a fairly easy time punishing lawyers for false statements.

- Tom Huddleston, Jr., Ex-Paul Hastings Partner Out Over Faked Credentials, AmLaw Daily, Oct. 4, 2013 ("D. Thomas O'Riordan, a former London-based Paul Hastings litigation partner, has left the firm following his suspension from the bar by a United Kingdom regulator that determined he had falsified his resumé, a firm spokesman confirmed Friday."; "Among O'Riordan's exaggerations were claims that he held multiple degrees from Oxford University and a master's degree from Harvard University, and that he was a member of both the New York and Irish Bars, according to Monday's ruling. In fact, O'Riordan -- who became a member of the Bar of England and Wales in 1993 -- studied law at the University of East Anglia (though Monday's ruling said he lied about receiving first-class honors from that school) and took his Bar Finals at Inns of Court School of Law, according to a cached profile on the Paul Hastings website that has been removed.").

- In re Wells, 709 S.E.2d 644, 646, 646-47 (S.C. 2011) (issuing a public reprimand to a South Carolina lawyer whose advertisements include numerous false statements; "Respondent's website contained a page entitled 'Consumer Protection and Product Liability Lawyer.' The page claimed that the firm has 'a history of winning [product liability] cases' and that it employs 'defective products liability lawyers' who 'understand how to deal with both corporations and insurance companies and have a history of winning cases for our clients.' On another page on the website, Respondent stated that 'At Coastal Law, our . . . product recall lawyers understand what is required in filing a medical injuries claim for manufacturer negligence in producing a hazardous drug or product leading to a dangerous product recall. We can aggressively pursue your legal rights against negligent corporations that may have introduced a product that damaged your health.' Neither Respondent nor any lawyer in his law firm had ever handled a products liability matter."; "In terms of the firm's office locations, some of Respondent's telephone book advertisements stated that the firm had office in Georgia and Florida. At the time, Respondent had a referral arrangement with firms located in those states and had plans to merge his firm with another South Carolina lawyer, who had offices in Georgia and Florida. Respondent's firm, however, never actually operated in those states."; "With respect to the foreign language ability of the firm's employees, Respondent's advertising materials included the phrase 'We Speak Spanish' written in Spanish. None of the lawyers in the firm spoke Spanish. Only part of the time when these advertisements were published did the firm employ a staff member who spoke Spanish. The inclusion of 'We Speak Spanish' in Respondent's advertising, particularly at times when no one in the office spoke Spanish, was misleading as it implied that the firm employed Spanish-speaking attorneys.").
- Office of Lawyer Regulation v. Hupy (In re Hupy), 799 N.W.2d 732, 736 (Wis. 2011) (publicly reprimanding a lawyer who sent out inaccurate marketing critical of a competitor; "Count 1 of the OLR's complaint relates to a postcard that Attorney Hupy began to include in those direct mail packages beginning in December 2003. The postcard was entitled 'Beware: You will Probably Get a Letter from a Law Firm Whose Senior Partner Went to Prison on November 28, 2003.'"; holding that the statement was inaccurate and therefore unethical).
- Feldman & Pinto, P.C. v. Seithel, Civ. A. No. 11-5400, 2011 U.S. Dist. LEXIS 147655, at *30-31, *31, *32, *33-34 (E.D. Pa. Dec. 22, 2011) (granting a law firm's motion for preliminary injunction to restrain a former lawyer from improperly recruiting the plaintiff's law firm's employees; also concluding that the former lawyer made false statements in marketing materials; "[B]ased on these facts alone, it is also evident that Seithel's [former lawyer] statement that she had a leadership role in the various drug litigation matters was false for at least some of these cases. A person that took part in zero of twenty-five depositions, or who had absolutely no contact with certain clients, can hardly be said to have a leadership role in a litigation."; "Seithel stated

that she had an 'experienced team in place with over twenty years of combined experience.' However, Seithel's 'team' consisted of one attorney with ten years of experience, a paralegal with ten years of experience, an administrative assistant, and a 'couple of interns.' The Court agrees with the Plaintiff's expert witness, Thomas Wilkinson ('Wilkinson'), that the unsophisticated client would assume that Seithel referred to twenty years of combined attorney experience, rather than twenty years of combined attorney and non-attorney experience."; "[T]he Court agrees with Plaintiff that Seithel's representation that she 'left the firm of Feldman & Pinto' was misleading, because it suggests that the separation was voluntary."; "It was also misleading for Seithel to have indicated in her letters, sent on July 7, 9, and 12, 2011, that she was now practicing under the law firm of Seithel Law, LLC, when in fact, the Articles of Organization for Seithel Law, LLC were not filed with the Secretary of State for South Carolina until July 20, 2011. . . . [T]he Court agrees with Wilkinson's testimony that omitting the fact that Seithel was not licensed to practice in Pennsylvania was also a misrepresentation that potentially misled the clients who received her letter.").

- Neely v. Comm'n for Lawyer Discipline, 196 S.W.3d 174, 185 (Tex. App. 2006) (suspending for nine months a lawyer making false claims about a class action, which implied "that a class had already been certified and that members of that class would be eligible for damage recovery").
- Unnamed Attorney v. Ky. Bar Ass'n, 143 S.W.3d 600, 601 (Ky. 2004) (privately reprimanding a Kentucky lawyer who advertised various office locations in Kentucky in telephone directories, which were "neither staffed by a lawyer or any legal support staff" and in fact were not actual offices; "Movant and the KBA [Kentucky Bar Association] agree that no client has ever expressed any confusion or misunderstanding concerning the location of Movant's Kentucky law offices. But by stating addresses in Movant's telephone directory advertisements for which no actual offices existed, Movant's communication is misleading, a misrepresentation, and a violation of SCR 3.130-7.15(1).").
- State ex rel. Okla. Bar Ass'n v. Mothershed, 66 P.3d 420, 422 (Okla. 2003) (disbarring a lawyer who had the following background: "Respondent is a member of the Oklahoma Bar Association. He was licensed to practice law by the Supreme Court of the State of Oklahoma in 1968. At all times pertinent hereto, Respondent was a resident of the state of Arizona. Respondent sat for the Arizona Bar Exam three times, unsuccessfully, in February 1996, July 1996 and February 1997. He has never been licensed to practice law in the state of Arizona."; finding that the lawyer had improperly identified himself as admitted to the Arizona Bar; "In February 1998, the Respondent filed pleadings in the Superior Court of Arizona, Maricopa County in Bonney v. Bedore, et al., CV-98-01771. Again Respondent identified himself as 'Attorney for the Plaintiff,' but failed to indicate he was not licensed to practice law in Arizona. The pleadings indicated Respondent's State Bar

Number was 006472, but did not state that this was his Oklahoma Bar Number. Respondent's stationary displayed an Arizona address and 'Attorney at Law' but did not specify he was licensed to practice law in Oklahoma, not in Arizona.").

- Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Bjorklund, 617 N.W.2d 4, 8, 8-9 (Iowa 2000) (issuing a public reprimand of a lawyer who advertised that he had published a book; "Praetorian [publisher] published the book in the latter part of 1998, but did not sell any copies"; "In the same letter to the Board, Bjorklund indicated the telephone number listed in the advertisement was a direct line to the publisher. The area code and prefix of the telephone number listed in the advertisement, however, covered the Coralville area. Except for the last two digits, it was the same number as the fax number for Bjorklund's office."; "Although the ad may be a veiled attempt to market the sale of a book, it contains a claim attributable to a lawyer which violates our disciplinary rules on advertising. The ad prominently displays Bjorklund's name and occupation as an attorney at law following the question 'Have you been caught drinking and driving?' and the exclamation 'I can help!' It does not offer the book for sale or necessarily promote the book as the source of help, but mainly refers to the book as a means to validate the ability of Bjorklund to help.").

This hypothetical comes from a North Carolina case, in which a North Carolina court affirmed an admonition against the lawyer for publishing what the court considered an inherently misleading advertisement.

- N.C. State Bar v. Culbertson, 627 S.E.2d 644, 647 (N.C. App. Ct.) (affirming an admonition issued against a lawyer who advertised on his letterhead and website that he is "published in Federal Reports" and describing himself as "one of the elite percentage of attorneys to be published in Federal Law Reports -- the large law books that contain the controlling caselaw [sic] of the United States" (emphasis omitted); finding the advertisements inherently misleading), review denied, 633 S.E.2d 819 (N.C. 2006).

On the other hand, courts sometimes analyze whether a reasonable person seeing or hearing a lawyer advertisement would take statements as intending to convey verifiable facts. In 2010, the Second Circuit found that some gimmicks lawyers used in their marketing would not mislead anyone because they would not be perceived as conveying actual facts.

- Alexander v. Cahill, 598 F.3d 79, 93, 94 (2d Cir. 2010) (in an opinion filed by Circuit Judge Guido Calabresi, upholding the constitutionality of New York State's 30-day moratorium on direct marketing in wrongful death or personal injury situations, but finding unconstitutional other provisions of New York's marketing rules, including bans on testimonials, portrayals of judges, irrelevant techniques such as gimmicky depictions, nicknames, and trade names; among other things, finding unconstitutional New York State's ban on "irrelevant advertising components"; "Defendants have introduced no evidence that the sorts of irrelevant advertising components proscribed by subsection 1200.50(c)(5) are, in fact, misleading and so subject to proscription."; "[T]he sorts of gimmicks that this rule appears designed to reach -- such as Alexander & Catalano's wisps of smoke, blue electrical currents, and special effects -- do not actually seem likely to mislead. It is true that Alexander and his partner are not giants towering above local buildings; they cannot run to a client's house so quickly they appear as blurs; and they do not actually provide legal assistance to space aliens. But given the prevalence of these and other kinds of special effects in advertising and entertainment, we cannot seriously believe -- purely as a matter of 'common sense' -- that ordinary individuals are likely to be misled into thinking that these advertisements depict true characteristics." (emphases added)).

Similarly, some courts point to state bars' or private plaintiffs' failure to prove that anyone would be misled by lawyer marketing.

- Brian Mahoney, LegalZoom Can't Score Quick False Ad Win Against Rival, Law360, Oct. 18, 2013 ("A California federal judge on Thursday declined to grant summary judgment to LegalZoom.com Inc. in its suit accusing rival Rocket Lawyer Incorporated of violating competition laws through false marketing, saying a reasonable jury could conclude that the advertisements in question are not literally false."; "United States District Judge Gary Allen Feess said genuine issues of fact remain as to whether Rocket Lawyer misleads consumers through its use of the word 'free' in advertising, even though some of its services require fees or membership."; "Judge Feess said Rocket Lawyer doesn't display all of its offer terms in the online advertisements that sparked the suit, but that did not necessarily mean the ads were false under federal statutes."; "Although defendant's advertisements do not enumerate all of the terms of its offer in its short online advertisements, a jury could reasonably conclude that the advertisements, when considered in context, are not literally false within the meaning of § 43(a),' the opinion said."; "LegalZoom announced in November that it was suing the rival legal document services company. The company claims Rocket Lawyer's advertisements violate not only established industry rules, but also breach Federal Trade Commission guidelines that impose clear limitations on the use of the word 'free' in advertising and marketing materials."; "This is a straightforward case about false advertising by an

online company that purports to provide 'free' online legal products,' LegalZoom's motion for summary judgment had said. 'Given Rocket Lawyer's use of false factual statements in its online advertisements, Rocket Lawyer has engaged in false advertising and unfair competition in violation of the Lanham Act and California Professions and Business Code, and an award of summary judgment on these claims for Legal Zoom is appropriate.'"; "But Judge Feess said Thursday that the terms of Rocket Lawyer's free trial may be sufficiently disclosed and that the case should go forward.").

- In re Anonymous Member of S.C. Bar, 684 S.E.2d 560, 561, 565 (S.C. 2009) (analyzing the following television advertisement: "'It's not your fault you were hurt on the job, but I know you're afraid to file a job injury claim. You're afraid your boss won't believe you're really hurt - or worse, that you'll be fired. We'll protect you against these threats - these accusations - and work to protect your job. I'm not an actor, I'm a lawyer. I'm -[Anonymous]. Call me and we'll get you the benefits you deserve. The [Law] Firm.'"; rejecting a study undertaken by the bar that supposedly showed the ad to be misleading; "At the outset, there is no evidence that any member of the public was misled when Respondent aired his television advertisement. Moreover, we find the results of the Market Search study are suspect and do not definitively establish that the advertisement was misleading."; "The sample group was smaller than normally used for such a study and, in turn, may not have been statistically reliable. The study had a 20% margin of error. The participants were shown a total of five attorney advertisements, of which two were produced by Respondent. This undoubtedly focused the participants' attention more keenly on the Respondent's advertisements. Respondent's advertisement was the only one of the five that referenced anything regarding a client's job. The questionnaires were also worded in a way that elicited the desired response from participants."; ultimately holding that the bar had failed to establish by "clear and convincing evidence" that the advertisement violated the ethics rules).

In some situations, allegations of falsity seem motivated by general hostility to lawyer marketing.

- Bibeka Shrestha, Insurance Agents Take New York Firm To Task Over Sandy Advertisements, Law360, Jan. 17, 2013 ("A New York group for insurance agents said Wednesday it has lodged an ethics complaint against the law firm Jacoby & Meyers LLP for running 'offensive' advertisements after Superstorm Sandy blaming agents for policyholders' difficulties in winning business interruption coverage."; "The Professional Insurance Agents of New York (PIA) told a state court disciplinary committee that the firm's ad violates professional conduct rules against false, deceptive or misleading advertisements. According to the PIA's complaint, Jacoby's ad says, 'If your business lost business due to the storm your insurance policy should cover it. If it doesn't, your agent made an error. We'll work to correct it.'"; "Matthew

Guilbault, the director of government and industry affairs for PIA of New York, New Jersey, Connecticut and New Hampshire, said the ad demonstrates a fundamental lack of understanding about business interruption coverage and makes scapegoats out of insurance agents.").

Best Answer

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

b 7/14

Self-Laudatory and Unverifiable Claims

Hypothetical 6

Your firm's executive committee members have become increasingly frustrated by what they perceive to be your law firm's main competitors' aggressive marketing techniques. The committee asked you to assess the ethical propriety of some statements in your competitors' print advertisements.

Do generally applicable ethics standards allow your competitors to include the following statements (or images) in their print advertisements:

- (a) The firm's real estate department is "one of the best" in the area?

NO

- (b) The firm has an anti-trust department that is "second to none" in providing anti-trust advice?

NO

- (c) The law firm is "a premier personal injury law firm" in its city?

MAYBE

- (d) The law firm is a "full service firm"?

MAYBE

- (e) The law firm's lawyers are "committed" to obtain a successful result for their clients?

NO (PROBABLY)

- (f) The law firm provides "quality legal services"?

NO (PROBABLY)

(g) The law firm has "30 years of experience" (which represents the combined legal experience of the firm's lawyers)?

NO

(h) The law firm will be a "passionate and aggressive advocate"?

NO

(i) The motto: "Don't settle for less than you deserve"?

MAYBE

(j) The phrase: "Let us take care of you"?

MAYBE

(k) The slogan: "People make mistakes. I help fix them."?

MAYBE

(l) A close-up image of a tiger's eyes?

YES (PROBABLY)

(m) An image of a wizard?

YES (PROBABLY)

(n) The lawyer's membership in the Florida Bar (if the lawyer is a member of the Florida Bar)?

YES (PROBABLY)

Analysis

(a)-(n) As state bars have struggled with applying constitutional standards to lawyer marketing, courts have tended to take one of two general directions. Some states have followed the ABA Model Rules in moving away from micromanagement of

lawyer marketing's substance, and evolved toward a much more general prohibition on false and misleading statements. Other states have taken exactly the opposite approach -- adopting detailed and often ludicrous restrictions.

ABA Model Rules

The ABA Model Rules now take a fairly simple and generic approach to lawyer marketing.

A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

ABA Model Rule. 7.1. A comment acknowledges that a lawyer's truthful marketing statement might nevertheless be misleading.

Truthful statements that are misleading are also prohibited by this Rule. A truthful statement is misleading if it omits a fact necessary to make the lawyer's communication considered as a whole not materially misleading. A truthful statement is also misleading if there is a substantial likelihood that it will lead a reasonable person to formulate a specific conclusion about the lawyer or the lawyer's services for which there is no reasonable factual foundation.

ABA Model Rule 7.1 cmt. [2].

The next comment addresses various types of substantive statements that are the subject of some states' micromanagement (discussed below).

An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of

other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

ABA Model Rule 7.1 cmt. [3].

This approach recognizes that consumers of legal services are not stupid. One well-known and insightful commentator articulated this concept.

Historically, through a slew of ethics opinions and court challenges, nobody has ever been able to show any data that suggest people have been harmed by lawyer advertising -- accurate, misleading or otherwise. The concept that a loud and splashy TV ad for a personal injury firm, a law firm-sponsored "divorce seminar" at the Holiday Inn, or simply a brand-identity print ad in an industry publication involves varying degrees of trickery is simply unsubstantiated. And the underlying anti-advertising critics at many state levels are simply attorneys who just do not like it -- and get on a small committee that can do something about it. Such is the way that law firms and the bars that regulate them operate.

Listen -- (some) lawyers are smart people. We specialize (a word you better not use in your lawyer advertising . . . lots of words are violations) in the art of finding loopholes in laws, statutes and cases. The result is that the controls do not work anyway. Those harmed are often the average Joe or Joan Attorney just trying to promote his or her practice. A review of rules and opinions shows that those on the regulating committees are often out of touch and far removed from the realities of business development. Even in traditional advertising circles, trying to make sense of Facebook, Twitter, blogs and search engines can be a challenge. For old-tyme practitioners, it is just ridiculous. The opinions often show a lack of understanding. They are still stuck on Yellow Pages advertising (now that is archaic). The results are often laughable. Marketing methods continue to evolve -- these folks are way behind the curve.

What exactly am I advocating here? Let ambulance-chasing lawyers run amok? Isn't that the real image and concern

behind these arcane rules? Open the floodgates with distasteful and unprofessional billboards, Web sites and commercials? No — just let law firms market the way nearly every other business does. There are state and federal regulations that address consumer fraud and misleading claims. Let them deal with it. Many lawyers and law firms are trying to survive and prosper. The very people who should be helping them should start thinking about not being obstacles to their ability to earn a living. (Some) people are smart. They know the difference between a commercial and the news. I think they can figure it out.

Micah U. Buchdahl, Editorial, Archaic Rules Hobble Attorneys, Nat'l L.J., Sept. 7, 2009 (emphases added). To a certain degree, this debate mirrors the national discourse about the role of government and the ability of people to make their own decisions.

Some states are moving in this direction. For instance, on January 1, 2010, Illinois adopted new ethics rules that take this bottom-line approach. See, e.g., Illinois Rule 7.1.

States' Micromanagement Approach

In stark contrast to the ABA Model Rules approach (which some states have followed), other states continue to engage in a remarkable campaign of micromanaging lawyer marketing.

Some of the state restrictions specifically prohibit particular phrases that the bars claim cannot be objectively verified, or which seem excessively self-laudatory.

- Florida Rule 4-7.13 cmt. ("Another example of the implied existence of a nonexistent fact is a statement in an advertisement that a lawyer is a founding member of a legal organization when the lawyer has just begun practicing law. Such a statement falsely implies that the lawyer has been practicing law longer than the lawyer actually has.").
- South Carolina Rule 7.1 cmt. [4] ("Paragraph (e) precludes the use of nicknames, such as the 'Heavy Hitter' or 'The Strong Arm,' that suggest the lawyer or law firm has an ability to obtain favorable results for a client in any matter. A significant possibility exists that such nicknames will be used to

mislead the public as to the results that can be obtained or create an unsubstantiated comparison with the services provided by other lawyers. See also Rule 8.4(f) for the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.").

- Tennessee LEO 2004-F-149 (9/17/04) (providing general guidance about what type of claims in lawyer advertising would violate the Tennessee ethics rules; "[L]awyers' advertisements shall not contain subjective, particularly self-imposed, characterizations or descriptions of the lawyer, the quality of legal services offered by the lawyer, the level of fees charged, or any comparison of one lawyer's or law firm's quality with the quality of other lawyers' services which cannot be factually substantiated. Thus, in the absence of factual substantiation, a lawyer shall not advertise that he or she (or his or her law firm) is 'No. 1', 'the best', 'one of the best', 'better', 'top', 'excellent', 'qualified', 'highly qualified', 'experienced', 'most experienced', 'reputable', 'efficient', 'preferred', or that the lawyer's or law firm's fees are the lowest. Such terms may be likely to create unjustified expectations about results to be obtained by the lawyer. These characterizations (and many others too numerous to list) are necessarily relative and ambiguous terms comparing lawyer services and inherently misleading in the absence of factual substantiation."; pointing to a Pennsylvania federal district court case forbidding use of terms "such as 'experienced', 'expert', 'highly qualified', or 'competent'" (emphases added)).
- In re Wamsley, 725 N.E.2d 75, 75-76, 76, 77 (Ind. 2000) ("Respondent Vaughn A. Wamsley's advertisement for his legal practice, prominent on the back cover of the 1997 Indianapolis telephone directory, proclaimed, 'Best Possible Settlement . . . Least Amount of Time.' That statement and others included in the advertisement represented misleading, deceptive, self-laudatory, and unfair claims and thus violated the Rules of Professional Conduct for Attorneys at Law. For that, we find today that the respondent should be publicly admonished."; noting the following advertisement statements: "'Best Possible Settlement . . . Least Amount of Time.'" "'My reputation, experience, and integrity result in most of our cases being settled without filing a complaint or lengthy trial.'" and "'I have helped thousands who have been seriously hurt or lost a loved one.'"; "By claiming that he could obtain the best possible settlement in the least amount of time, the respondent likely created an unjustified expectation of such a result in any case the respondent agreed to handle. See Prof.Cond.R. 7.1(c)(3). As such, the statement is misleading, deceptive, self-laudatory, and unfair and thus violated Prof.Cond.R. 7.1(b). That statement, along with the respondent's assertion that his reputation, experience, and integrity result in most cases being settled without the filing of a complaint or a lengthy trial, also constitutes an opinion of and contains implications as to the quality of the respondent's legal services and is thus prohibited by Prof.Cond.R. 7.1(d)(4). Finally, by stating that he has helped thousands who have been seriously hurt or who have lost a loved one, the respondent offered statistical data or other

information based on past performance and an implicit prediction of future success, statements that when appearing in lawyer advertising are prohibited by Prof.Cond.R. 7.1(d)(2)."

Various states taking this approach have at one time or another condemned the following phrases:

- "[Q]uality legal services."¹
- "[O]ne of the best."²
- "[C]ompetent" and "intelligent."³
- "[P]roven and highly successful record."⁴
- "[P]remier" firm in a city.⁵
- Lawyers can help "when others cannot."⁶

¹ District of Columbia LEO 117 (12/14/82).

² Florida Rule 4-7.13 cmt. ("The prohibition against comparisons that cannot be factually substantiated would preclude a lawyer from representing that the lawyer or the lawyer's law firm is 'the best,' or 'one of the best,' in a field of law.").

³ Pennsylvania LEO 93-183B (11/30/93) (prohibiting use of the terms: "intelligent"; "aggressive"; "competent"; "committed"; "skilled"; "sympathetic"; "caring").

⁴ Nassau County LEO 86-39 (9/11/86) (prohibiting use in advertisements of the following phrases because they are incapable of objective verification: "often result in quick, practical and favorable resolutions"; "proven and highly successful record").

⁵ In re Anonymous, 689 N.E.2d 442, 443, 444 (Ind. 1997) (issuing a private reprimand for a yellow page advertisement; "We now find that the respondents placed the following advertisement in the Yellow Pages of 26 regional telephone directories for 1993-94: '[The respondents' firm] has quickly become recognized as [a] premier personal injury law firm. With 30 years trial experience and a support network to rival that of a larger city firm, [the firm] offers the track record and resources you need to win a settlement. Don't take chances with your case, put the team of [the firm] to work for you.'"; "The advertisements were clearly self laudatory. Furthermore, by stating in their advertisement that the respondents 'offer[ed] the track record and resources you need to win a settlement,' the respondents' message was likely to create the unjustified expectation that similar results could be obtained in every claim or case they were hired to handle, without reference to the specific factual and legal circumstances of the particular claims or cases. A person unfamiliar with personal injury litigation might understand the advertisement to promise that any claim or case handled by the respondents would result in a favorable settlement. We conclude that the advertisement was misleading, deceptive, and self laudatory and thus violative of Prof. Cond. R. 7.1(b)."; "By describing themselves the 'premier' personal injury law firm in their area, the respondents offered an opinion as to the quality of the services they render, implying that their legal services are better than [sic] those provided by other area practitioners.").

⁶ District of Columbia LEO 249 (7/19/94) (holding that an advertisement claiming that a lawyer can help a client "when others cannot" violates the ethics rules because it is incapable of substantiation).

- "[P]ut our 30 years of experience to work with you" (which represents the combined experience of the law firm's lawyers).⁷
- "[P]assionate and aggressive advocate."⁸

A number of law firms use the phrase "full service law firm." Some bars prohibit use of this term,⁹ while one state court decision allowed the term's use.¹⁰

Some states taking this approach include restrictions on the format or even the sound effects that lawyers may use -- apparently believing that they have some substantive effect.

- Florida Rule 4-7.15 cmt. ("Although some illustrations are permissible, an advertisement that contains an image, sound or dramatization that is unduly manipulative is not. For example, a dramatization or illustration of a car accident occurring in which graphic injuries are displayed is not permissible. A depiction of a child being taken from a crying mother is not permissible because it seeks to evoke an emotional response and is unrelated to conveying useful information to the prospective client regarding hiring a lawyer. Likewise, a dramatization of an insurance adjuster persuading an accident victim to sign a settlement is unduly manipulative, because it is likely

⁷ North Carolina LEO 2004-7 (7/16/04) (addressing the following question: "An advertisement for Jones, Smith & Johnson, PA, contains the statement, 'Put our 30 years of experience to work for you.' The law firm employs a number of lawyers. Although the combined legal experience of these lawyers is 30 years, no single lawyer with the firm has practiced law for more than ten years. Is this statement in an advertisement allowed under the Rules of Professional conduct?"; answering as follows: "No. Rule 7.1 prohibits false and misleading communications about a lawyer or a lawyer's services. A communication is false or misleading if it omits [sic] a fact necessary to make the statement considered as a whole not materially misleading. Rule 7.1(a). To comply with the rule, the Jones, Smith & Johnson advertisement must state the 'combined legal experience' of the lawyers with the firm is 30 years.").

⁸ *In re PRB Docket No. 2002.093*, 868 A.2d 709, 709-10, 710, 712 (Vt. 2005) (privately admonishing a lawyer who used the term "INJURY EXPERTS" and "WE ARE THE EXPERTS IN [certain areas of law]" in yellow page advertisements; finding that use of the term "experts" violated the Vermont ethics rules "by placing an advertisement that implicitly compared his firm's services with those provided by other lawyers in a way that can not be 'factually substantiated.' The panel noted that the phrase 'the experts' was 'an implicit statement of superiority' as compared with other firms, and had a 'serious potential to mislead the consumer, since there is no objective way to verify the claim.'"; pointing to an Ohio case prohibiting lawyers from using the phrase "'passionate and aggressive advocate'").

⁹ Nassau County LEO 93-10 (3/31/93) (prohibiting use of the term "full service law firm" because the term is too ambiguous to refer to a fact or facts that can be measured and verified); *Accord* Philadelphia LEO 98-11 (6/98) (prohibiting use of the term "The Everything Lawyers"); Alabama LEO 88-56 (9/11/88) (prohibiting use of the term "complete legal services" because the term might mislead or create unjustified expectations).

¹⁰ *In re Appeal of Hughes & Coleman*, 60 S.W.3d 540, 545 (Ky. 2001) (allowing a law firm to use the phrase "a full service business law firm").

to convince a viewer to hire the advertiser solely on the basis of the manipulative advertisement.").

For instance, Iowa formerly required that any television or radio advertisement articulate information "only by a single nondramatic voice, not that of the lawyer, and with no other background sound."¹¹

States taking this approach thus try to manage everything from substance to sound effects.

Although perhaps it is not a trend, three circuits have overturned (or allowed challenges to) several states' micromanagement approach.

- Public Citizen Inc. v. La. Attorney Disciplinary Bd., 632 F.3d 212, 221 & 223 (5th Cir. 2011) (finding that some of Louisiana's ethics rules pass constitutional muster, while some do not; ultimately finding unconstitutional Louisiana's total rules (1) completely banning marketing "containing a reference or testimonial to past successes or results obtained" and (2) banning marketing that includes "the portrayal of a judge or a jury"; also finding unconstitutional (3) Louisiana's requirement that any disclaimer use the same font size as the largest print size used in a written advertisement, and include in both written and oral form in any television advertisement, and be spoken at the same speed as the rest of the advertisement).
- Alexander v. Cahill, 598 F.3d 79 (2d Cir. 2010) (in an opinion filed by Circuit Judge Guido Calabresi, finding unconstitutional certain provisions of New York's marketing rules, including bans on testimonials, portrayals of judges, irrelevant techniques such as gimmicky depictions, nicknames, and trade names.).

The Eleventh Circuit also allowed challenges to Florida's incredibly detailed marketing rules -- discussed immediately below.

Florida

Florida stands alone in its controversial history of micromanaging lawyer marketing, and the nearly constant constitutional litigation challenging Florida marketing

¹¹ Iowa Rule 32:7.2(e).

rules. Florida adopted dramatic changes in its marketing rules on May 1, 2013 -- after several constitutional challenges.

Before Florida's 2013 adoption of new rules, some of Florida's rules seemed ridiculously overbroad.

- Former Florida Rule 4-7.2 cmt. ("Although this rule permits lawyers to list the jurisdictions and court to which they are admitted, it also would be misleading for a lawyer who does not list other jurisdictions or courts to state that the lawyer is a member of The Florida Bar. Standing by itself, that otherwise truthful statement implies falsely that the lawyer possesses a qualification not common to virtually all lawyers practicing in Florida." (emphasis added)).
- Former Florida Rule 4-7.5(b)(1)(C) (prohibiting "any background sound other than instrumental music.").

Not surprisingly, Florida's intrusive approach to lawyer marketing resulted in numerous (and unintentionally humorous) analyses of various lawyer marketing.

For instance, a Florida court issued a public reprimand of two Florida lawyers who used the image of a pit bull in their advertisement -- citing various studies about the violent nature of pit bulls, and predicting that allowing Florida lawyers to use a pit bull image would result in other lawyers using "images of sharks, wolves, crocodiles and piranhas."¹²

¹² *Florida Bar v. Pape*, 918 So. 2d 240, 243, 244, 245, 247 (Fla. 2005) (issuing a public reprimand against two Florida lawyers who used a television commercial with an image of a pit bull, and using the term "pit bull" as part of their firm's phone number: 1-800-PIT-BULL; acknowledging that a bar referee found that the advertisement was not misleading, after finding that "pit bulls are perceived as 'loyal, persistent, tenacious, and aggressive,'" which the referee found to be admirable qualities in a lawyer; rejecting the referee's finding and instead holding that the advertisement violates the Florida ethics rule "which prohibits the use of statements describing or characterizing the quality of the lawyer's services"; pointing to an earlier opinion holding that a law firm's advertisement stating "'When the Best is Simply Essential'" violated the Florida ethics rules "because it was self-laudatory and purported to describe the quality of the lawyer's services"; also finding that the advertisement violated the Florida ethics rule requiring that any "visual or verbal depictions" be "objectively relevant" and not "'deceptive, misleading or manipulative"; referring to the comment in the Florida Rules indicating that "'a drawing of a fist, to suggest the lawyer's ability to achieve results, will be barred'" (citation & emphasis omitted); finding that the referee's characterization of pit bulls ignores the "darker side of the qualities often also associated with pit bulls: malevolence, viciousness, and unpredictability"; referring to various newspaper articles about pit bulls killing people; also noting that the "dog, which is wearing a spiked collar, directly faces the viewer

In 2010, the Eleventh Circuit allowed challenges to many of Florida's detailed rules -- in an opinion that highlighted both the inconsistency and the arguable foolishness of the Florida Bar's approach to lawyer marketing. Harrell v. Fla. Bar, 608 F.3d 1241 (11th Cir. 2010).¹³

and is shown alone, with no indication that it is fulfilling its traditional role as 'man's best friend'; citing studies published by the Journal of the American Veterinary Medical Association indicating that "pit bulls caused the greatest number of dog-bite-related fatalities between 1979 and 1998"; also pointing to ordinances in Miami - Dade County which render it illegal to own a pit bull; predicting that "[w]ere we to approve the referee's finding, images of sharks, wolves, crocodiles and piranhas could follow"; specifically holding that the prohibition on the advertisement did not violate the First Amendment).

¹³ Harrell v. Fla. Bar, 608 F.3d 1241, 1253, 1255, 1249, 1250, 1251, 1250, 1255-56, 1250, 1256, 1250, 1256, 1270, 1271 (11th Cir. 2010) (finding that a Florida lawyer could challenge a number of Florida marketing ethics rules on "void-for-vagueness" grounds (as well as ripeness grounds); "Harrell has made an adequate threshold showing that five of the rules -- those prohibiting advertisements that are 'manipulative,' Rules 4-7.2(c)(3) & 4-7.5(b)(1)(A), 'promise[] results,' Rule 4-7.2(c)(1)(G), 'characteriz[e] the quality of the lawyer's services,' Rule 4-7.2(c)(2), or provide anything other than 'useful, factual information,' Rule 4-7.1, cmt. -- seem to apply to his proposed advertisements, but fail to provide meaningful standards and thus chill his speech."; explaining that the Florida Bar has on several occasions changed its rules on marketing, including adding a prohibition on advertisements that essentially promise results, and the requirement of pre-screening (both in 2004); explaining that in 2002 the Florida Bar indicated that the lawyer could not use the advertising slogan "Don't settle for anything less," but suggested that he use the term "Don't settle for less than you deserve" -- but then later prohibited that phrase as well; "Five years after it had authorized the slogan, however, the Bar informed Harrell that 'Don't settle for less than you deserve' improperly characterized the quality of his firm's services and therefore was prohibited under Rule 4-7.2(c)(2). . . . Harrell appealed to the Standing Committee, reminding it that the Bar had itself suggested the slogan several years earlier, but, by letter dated November 28, 2007, the Standing Committee affirmed the decision of the Ethics and Advertising Department, noting that the Committee had previously rejected, 'Do not settle for anything less' and similar slogans." (internal citation omitted); explaining the bar's inconsistent indications to Florida lawyers about such matters as (1) the use of prohibition on "any background sound other than instrumental music."; "[W]hile the Bar has predictably invoked this rule to prohibit the sound of honking horns, traffic, the sound of squealing breaks, and other potentially inflammatory auditory references to accident scenes, it has also applied the rule to seemingly innocuous sounds such as the 'sounds of kids playing with [a] bouncing ball; [the] sound of a computer turning off' [the] sound of a light switch turning off[;] [the] [s]ound of a seagull in the background[;] . . . [and] [the] [s]ound of a telephone ringing that interrupts an attorney speaking in a television advertisement."; also explaining the bar's inconsistent indications to Florida lawyers about such matters as (2) prohibition on "manipulative" advertisements; "On the subject of manipulation, for example, the Standing Committee held that a close-up image of a tiger's eyes . . . and a claim to have the 'strength of a lion in court,' . . . were manipulative, whereas the Board held that an image of two panthers was not manipulative. Conversely, the Standing Committee noted that a photograph of a man looking out of a window, representing victims of drunken driving collisions, was not manipulative, . . . while the Board held that an image of an elderly person looking out of a nursing home window, suggesting nursing home neglect, was manipulative The Ethics and Advertising Department, for its part, said that an image of a fortune teller was 'deceptive, misleading, or manipulative,' . . . and the Standing Committee similarly held that an image of a wizard violated the applicable rule, . . . but the Board ultimately concluded that the image of the wizard was not 'deceptive, misleading, or manipulative."; further explaining the bar's inconsistent indications to Florida lawyers about such matters as (3) prohibition on "characterizing the quality of the lawyer's services; "[I]n applying Rule 4-7.2(c)(2) against characterizing the quality of the lawyer's services, the Standing Committee held that the phrases

Whatever group wishing to challenge the constitutionality of Florida's rule certainly picked the right plaintiff. When plaintiff Harrell approached the Florida Bar in 2002, the Bar indicated that he could not use his proposed advertising slogan: "Don't settle for anything less." The Bar itself suggested that he use the following slogan: "Don't settle for less than you deserve." However,

[f]ive years after it had authorized the slogan . . . , the Bar informed Harrell that "Don't settle for less than you deserve" and improperly characterized the quality of his firm's services and therefore is prohibited under Rule 4-7.2(c)(2). . . . Harrell appealed to the Standing Committee, reminding it that the Bar had itself suggested the slogan several years earlier, but, by letter dated November 28, 2007, the Standing Committee affirmed the decision of the Ethics and Advertising Department, noting that the Committee had previously rejected "Do not settle for anything less" and similar slogans.

'When who you choose matters most' and 'MAKE THE RIGHT CHOICE!' violated the rule, . . . but that the phrase 'Choosing the right person to guide you through the criminal justice system may be your most important decision. Choose wisely' did not."; also explaining the bar's inconsistent indications to Florida lawyers about such matters as (4) a prohibition on statements that "promise[] results"; "[I]n applying the rule against statements that 'promise[] results,' Rule 4-7.2(c)(1)(G), the Standing Committee held that a claim to 'fight . . . insurance companies' impermissibly offered such a promise . . . but the Board of Governors decided that a claim to 'stand up' to insurance companies did not The Standing Committee also found that the phrase 'let us take care of you' impermissibly promises results . . . but wrote in its advertising handbook that the phrase 'An Attorney Who Cares For Your Rights!' did not The Committee held that the slogan 'People make mistakes. I help fix them' promised results, but that 'People make mistakes. I help them,' did not The Standing Committee further found that the phrase 'We'll help you get a positive perspective on your case and get your defense off on the right foot quickly' promised results . . . whereas the Board independently determined that there was no such promise in the phrase 'If an accident has put your dreams on hold we are here to help you get back on track,' Finally, the Standing Committee ruled that the phrase 'your lawyer's knowledge of the law and talents in the courtroom can mean the difference between a criminal conviction and your freedom' violated the rule . . . but the Board found that the phrase 'the lawyer you choose can help make the difference between a substantial award and a meager settlement' did not."; upholding the constitutionality of Florida's pre-filing requirement; "Under the Florida Bar's previous compliance regime, a lawyer was not required to submit a television or radio advertisement for review until he filed it. . . . But a review of advertisements filed with the Bar revealed that nearly half of all television and radio advertisements in the years leading up to the revised regime had been found not to comply with the Rules."; "[W]e face only a twenty-day delay, and we can see no pressing need for immediate dissemination of broadcast advertisements. . . . And even as to an unusually time-sensitive advertisement, we think that a twenty-day delay represents a constitutionally acceptable burden under the circumstances. . . . In short, Rule 4-7.7(a)(1)(A) does not amount to an unconstitutional imposition on protected commercial speech under the First Amendment.").

Id. at 1249 (emphasis added). Thus, poor Harrell had undoubtedly invested considerable sums in marketing a slogan that the Florida Bar itself had suggested, but which five years later it found to be unethical.

The Eleventh Circuit ultimately found that Harrell could challenge a number of the specific Florida rules. In its detailed analysis, the Eleventh Circuit noted the Florida Bar's often-inexplicable interpretation and enforcement of the rules.

For instance, the Eleventh Circuit noted that the Florida Bar took the following positions when enforcing the rule prohibiting "characterizing the quality of the lawyer's services":

- "[T]he Standing Committee held that the phrases 'When who you choose matters most' and 'MAKE THE RIGHT CHOICE!' violated the rule . . . but that the phrase 'Choosing the right person to guide you through the criminal justice system may be your most important decision. Choose wisely' did not."

Id. at 1256.

The Eleventh Circuit also noted the Florida Bar's various positions when enforcing the rule prohibiting "promis[ing] results."

- "[I]n applying the rule against statements that 'promise[] results,' Rule 4-7.2(c)(1)(G), the Standing Committee held that a claim to 'fight . . . insurance companies' impermissibly offered such a promise, . . . but the Board of Governors decided that a claim to 'stand up' to insurance companies did not."
- "The Standing Committee also found that the phrase 'let us take care of you' impermissibly promised results . . . but wrote in its advertising handbook that the phrase 'An Attorney Who Cares For Your Rights!' did not."
- "The Committee held that the slogan 'People make mistakes. I help fix them' promised results, but that 'People make mistakes. I help them,' did not."
- "The Standing Committee further found that the phrase 'We'll help you get a positive perspective on your case and get your defense off on the right foot quickly' promised results, . . . whereas the Board independently determined that there was no such promise in the phrase 'If an accident has put your dreams on hold we are here to help you get back on track.,'"

- [T]he Standing Committee ruled that the phrase 'your lawyer's knowledge of the law and talents in the courtroom can mean the difference between a criminal conviction and your freedom' violated the rule, . . . but the Board found that the phrase 'the lawyer you choose can help make the difference between a substantial award and a meager settlement' did not." (internal citation omitted).

Id. at 1256.

The Eleventh Circuit noted the same sort of inconsistency in the Florida Bar's enforcement of the ban on pictures that were allegedly manipulative:

- "[T]he Standing Committee held that a close-up image of a tiger's eyes . . . and a claim to have the "strength of a lion in court," . . . were manipulative, whereas the Board held that an image of two panthers was not manipulative."
- "[T]he Standing Committee noted that a photograph of a man looking out of a window, representing victims of drunken driving collisions, was not manipulative, . . . while the Board held that an image of an elderly person looking out of a nursing home window, suggesting nursing home neglect , was manipulative."
- "The Ethics and Advertising Department, for its part, said that an image of a fortune teller was 'deceptive, misleading, or manipulative,' . . . and the Standing Committee similarly held that an image of a wizard violated the applicable rule, . . . but the Board ultimately concluded that the image of the wizard was not 'deceptive, misleading, or manipulative.'"

Id. at 1255-56.

The Eleventh Circuit also made the Florida Bar look silly when describing its enforcement of the ban on any background noise other than instrumental music in television advertisements.

- "[W]hile the Bar has predictably invoked this rule to prohibit the sound of honking horns, traffic, the sound of squealing breaks, and other potentially inflammatory auditory references to accident scenes, it has also applied the rule to seemingly innocuous sounds such as the 'sounds of kids playing with [a] bouncing ball; [the] sound of a computer turning off; [the] sound of a light switch turning off[;] [the] [s]ound of a seagull in the background[;] . . .

[and] [the] [s]ound of a telephone ringing that interrupts an attorney speaking in a television advertisement.'" (internal citation omitted).¹⁴

Id. at 1251.

On remand, the Middle District of Florida carefully analyzed the Florida rules on their face and as applied, and found some of them unconstitutional while upholding other provisions.

- Harrell v. Fla. Bar, 915 F. Supp. 2d 1285, 1291, 1297, 1299, 1300, 1291, 1309, 1310 & 1307 (M.D. Fla. 2011) (assessing the constitutionality of several Florida marketing rules on their face and as applied; finding (1) not unconstitutionally vague on its face the prohibition on "statements describing or characterizing the quality of the lawyer's services"; (2) not unconstitutionally vague on its face the rule prohibiting communications which "promise results"; (3) unconstitutionally vague on its face the prohibition on "manipulative" features in advertisements; (4) unconstitutionally vague on its face the rule requiring that advertisements should provide only "useful, factual information"; (5) unconstitutional as applied the prohibition on "statements describing or characterizing the quality of the lawyer's services," to the extent that it would prohibit Harrell from using the advertising phrase "Don't settle for less than you deserve" (noting that the Florida Bar did not present any evidence that the phrase actually misled or deceived anyone and did not "articulate any basis for believing that [the phrase] could potentially mislead the public or erode the public's confidence in the legal profession"); (6) unconstitutional as applied the prohibition on any background sounds other than instrumental music (finding that the Florida Bar did not present any evidence that "prohibiting the type of innocuous non-instrumental background sounds as those proposed by Harrell here ["noises caused by his dogs, by gym equipment and by other activities in his law firm"] will protect the public from being misled or prevent the denigration of the legal profession"))).

Florida's 2013 Rules take a more gentle and subjective approach.

- Florida Rule 4-7.15(a) ("A lawyer may not engage in unduly manipulative or intrusive advertisements. An advertisement is unduly manipulative if it . . . uses an image, sound, video or dramatization in a manner that is designed to solicit legal employment by appealing to a prospective client's emotions rather than to a rational evaluation of a lawyer's suitability to represent the prospective client").

¹⁴ Harrell v. Fla. Bar, 608 F.3d 1241, 1251 (11th Cir. 2010).

- Florida Rule 4-7.15 cmt. ("Although some illustrations are permissible, an advertisement that contains an image, sound or dramatization that is unduly manipulative is not. For example, a dramatization or illustration of a car accident occurring in which graphic injuries are displayed is not permissible. A depiction of a child being taken from a crying mother is not permissible because it seeks to evoke an emotional response and is unrelated to conveying useful information to the prospective client regarding hiring a lawyer. Likewise, a dramatization of an insurance adjuster persuading an accident victim to sign a settlement is unduly manipulative, because it is likely to convince a viewer to hire the advertiser solely on the basis of the manipulative advertisement.").

Time will tell if Florida's new 2013 rules will pass constitutional muster.

Best Answer

The best answer to **(a)** is **NO**; the best answer to **(b)** is **NO**; the best answer to **(c)** is **MAYBE**; the best answer to **(d)** is **MAYBE**; the best answer to **(e)** is **PROBABLY NO**; the best answer to **(f)** is **PROBABLY NO**; the best answer to **(g)** is **NO**; the best answer to **(h)** is **NO**; the best answer to **(i)** is **MAYBE**; the best answer to **(j)** is **MAYBE**; the best answer to **(k)** is **MAYBE**; the best answer to **(l)** is **PROBABLY YES**; the best answer to **(m)** is **PROBABLY YES**; the best answer to **(n)** is **PROBABLY YES**.

b 7/14

Depictions

Hypothetical 7

You were just appointed to the thankless task of supervising your law firm's television and print advertisements. As in previous years, your firm's marketing folks have prepared proposed story boards, pictures and copy. They have asked for your input about the ethical propriety of the following components of a new advertising campaign that your firm's chairman has already endorsed.

May your advertising campaign include the following:

- (a) A fictionalized depiction of a client conference (using real firm lawyers and real clients)?

MAYBE

- (b) A fictionalized depiction of a client conference (using actors, but with a disclaimer explaining that the depiction is fictionalized and the people are actors)?

MAYBE

- (c) Pictures of people on your website who appear from the context to be your lawyers, but who are actually paid models?

MAYBE

Analysis

This hypothetical deals with the context of lawyer advertising -- the rules governing depictions.

(a)-(b) Not surprisingly, states' approach to this type of marketing mirror their general approach to marketing. Some states follow the generic ABA Model Rules approach, which simply prohibits false and misleading statements.

Other state ethics rules permit depictions as long as they are accompanied by an appropriate disclaimer.

- Florida Rule 4-7.13(b)(6) ("Examples of Deceptive and Inherently Misleading Advertisements. Deceptive or inherently misleading advertisements include, but are not limited to advertisements that contain. . . a dramatization of an actual or fictitious event unless the dramatization contains the following prominently displayed notice: 'DRAMATIZATION. NOT AN ACTUAL EVENT.' When an advertisement includes an actor purporting to be engaged in a particular profession or occupation, the advertisement must include the following prominently displayed notice: 'ACTOR. NOT ACTUAL [. . . .]'").
- New York Rule 7.1(c)(2) ("An advertisement shall not . . . include the portrayal of a fictitious law firm, the use of a fictitious name to refer to lawyers not associated together in a law firm, or otherwise imply that lawyers are associated in a law firm if that is not the case"); New York Rule 7.1(c)(3) ("An advertisement shall not . . . use actors to portray a judge, the lawyer, members of the law firm, or clients, or utilize depictions of fictionalized events or scenes without disclosure of same").
- North Carolina Rule 7.1(b) ("A communication by a lawyer that contains a dramatization depicting a fictional situation is misleading unless it complies with paragraph (a) above and contains a conspicuous written or oral statement, at the beginning and the end of the communication, explaining that the communication contains a dramatization and does not depict actual events or real persons.").
- Pennsylvania Rule 7.2(g) ("An advertisement or public communication shall not contain a portrayal of a client by a non-client; the re-enactment of any events or scenes; or, pictures or persons, which are not actual or authentic, without a disclosure that such depiction is a dramatization.").

In January 2011, the Fifth Circuit upheld Louisiana's rule prohibiting marketing communications that "include[] a portrayal of a client by a non-client without disclaimer . . . or the depiction of any events or scenes or pictures that are not actual or authentic without disclaimer." Public Citizen Inc. v. La. Attorney Disciplinary Bd., 632 F.3d 212, 227 (5th Cir. 2011).

The Utah Bar generally approved what sounds like an interesting advertisement.

An acceptable fictional vignette should be labeled as "fictional" or should be clearly identifiable as fictional, as with lawyers portrayed as giants towering over the town, counseling a space alien about an insurance matter, and "running as fast as blurs to reach a client in distress." . . . A fictional vignette can convey such a message about a lawyer

or law firm so long as the message itself is not misleading or likely to create unjustified expectations. A clearly identified fictional sketch in which a fictional party or opposing counsel shows frustration to learn that the opposing party has retained Firm X would be acceptable. The only limits are that these vignettes should be identified as fictional and ultimately must not lead a reasonable person to form an unjustified expectation. Obviously which fictional portrayals will be appropriate and which deemed misleading may depend, to some extent, on the facts about the lawyer and the contents of the vignette."; "Testimonials or dramatizations may be false or misleading if there is a substantial likelihood that a reasonable person will reach a conclusion for which there is no factual foundation or will form an unjustified expectation regarding the lawyer or the services to be rendered. The inclusion of appropriate disclaimer or qualifying language may prevent testimonials or dramatizations from being false or misleading.

Utah LEO 09-01 (2/23/09) (emphases added).

The Utah lawyer might have been using some generic nationally-circulated advertisements, because in March 2010, the Second Circuit overturned New York's efforts to stop an ad that seems strikingly similar.

- Alexander v. Cahill, 598 F.3d 79, 93, 94 (2d Cir. 2010) (in an opinion filed by Circuit Judge Guido Calabresi, upholding the constitutionality of New York State's 30-day moratorium on direct marketing in wrongful death or personal injury situations, but finding unconstitutional other provisions of New York's marketing rules, including bans on testimonials, portrayals of judge, irrelevant techniques such as gimmicky depictions, nicknames, and trade names; among other things, finding unconstitutional New York State's ban on "irrelevant advertising components"; "Defendants have introduced no evidence that the sorts of irrelevant advertising components proscribed by subsection 1200.50(c)(5) are, in fact, misleading and so subject to proscription."; "[T]he sorts of gimmicks that this rule appears designed to reach -- such as Alexander & Catalano's wisps of smoke, blue electrical currents, and special effects -- do not actually seem likely to mislead. It is true that Alexander and his partner are not giants towering above local buildings; they cannot run to a client's house so quickly they appear as blurs; and they do not actually provide legal assistance to space aliens. But given the prevalence of these and other kinds of special effects in advertising and entertainment, we cannot seriously believe -- purely as a matter of 'common sense' -- that ordinary individuals are likely to be misled into thinking that these advertisements depict true characteristics." (emphasis added)).

(c) Law firms may want to use stock photographs on their websites and other advertising, for a number of reasons. First, the models may be more attractive than lawyers in the law firm. Second, using stock photos could avoid the necessity of law firms having to redo their ads if one of the pictured lawyers leaves the firm.

At least one bar has explicitly indicated that law firms normally may use stock photos.

- North Carolina LEO 2010-9 (7/23/10) (holding that lawyers may advertise using stock photographs; stating that "a stock photograph may be included in legal advertisement without a dramatization disclaimer" unless "in the context of the advertisement or marketing document, the stock photograph creates a material misrepresentation of fact.").

An early 2009 Law Technology News article discussed this issue. The article started with a reference to Holland & Knight's use of models in their website.

The images of several well-groomed, professional-looking people permeate the pages on the Web site of the Holland & Knight law firm. But would-be clients should not seek to speak with any of those people about their legal needs when contemplating whether to hire the Tampa, Fla.-based firm.

All of those good-looking folks shown on virtually all of the Web site's main pages -- blacks and whites, males and females, younger people and gray-haired ones -- are paid models. Not one is a lawyer with the firm.

Bud Newman, [Do Model Web Faces Misrepresent Law Firms?](#) Law Technology News [Special to the Florida Business Reviews], Jan. 5, 2009. The article quoted a Florida Bar regulator as indicating that the bar has never received a complaint about Holland & Knight's use of models, and that the bar has never dealt with it.

The article included a Holland & Knight spokesman's facially implausible explanation for the firm's use of stock photos.

Holland & Knight chief marketing officer Bruce Alltop also was unavailable for an interview on why the firm uses so many paid models on its Web site. However, in response to a question from the [Daily Business Review](#), he issued a statement saying the practice is about to end.

"Holland & Knight is in the process of redesigning the firm's marketing materials," Alltop said in the statement. "The look and feel of our Web site will be compatible with the new marketing materials, which will not incorporate the use of models as a design element. When our existing Web site was redesigned in 2007, firm management decided to use models rather than our own lawyers so as not to divert our lawyers' time from serving our clients."

Holland & Knight spokeswoman Susan Bass added that the firm's new Web site -- sans models -- is expected to debut in the first quarter of this year.

Id. (emphasis added)

As humorous as this situation might seem, there could be serious implications for using models rather than firm lawyers. Perhaps most obviously, an all-white and all-male law firm could not use a false and misleading advertisement showing a diverse roster.

In 2010, the Colorado Bar sanctioned a lawyer for falsely claiming that it was a diverse law firm, in an effort to obtain DuPont's legal business.

- People v. Shepherd, Case No. 10PDJ033, slip op. at 3, 4, 4-5, 5, 8 (Colo. Mar. 18, 2010) [Stipulation, Agreement & Affidavit Containing Respondent's Conditional Admission of Misconduct] ("In approximately 2000, respondent and others started the law firm of Kamlet, Shepherd & Reichert, LLP (hereinafter referred to as 'KSR')."; "Respondent wanted to get the KSR firm qualified for the E.I. duPont de Nemours and Company ('DuPont') Diverse Legal Supplier Program. Only law firms with 50% equity ownership by minorities and/or women qualified for the program."; "On December 6, 2007, respondent sent an e-mail to two individuals in the DuPont Legal Department stating in pertinent part: 'With regard to our firm's diversity, we have a total of eight equity partners, three of whom are African American, and two of whom are women which correlates to 62% of equity partners within the firm being minority and/or women. Of the three minority equity partners, two are African American males, one is an African American female and our collective ownership interest is approximately 43%. Additionally, we have two women equity partners whose collective equity ownership interest is 5.5%. Total equity interest of our minority and women partners is 48.5% of the firm. We are very proud of the fact that we have the strong diversity in the equity ownership of the firm and believe that our diversity aligns with the spirit and motivation

of the creation of DuPont's diverse legal supplier network and we believe that we would be an excellent firm to be added to DuPont's list to represent the Rocky Mountain Region."; "This e-mail contained false statements and/or misrepresentations. In December of 2007, respondent was the only African-American equity partner at the firm. There were two other African-American partners who did not have an equity stake. In December of 2007, there was only one woman equity partner (she resigned in January of 2008). As of December 31, 2007, there were a total of eight equity partners; therefore, only 25% of the equity partners were minorities and/or women. Respondent and the one woman equity partner owned a combined total of 30.1% of the firm's equity."; "As of the end of 2007, KSR had not qualified for DuPont's program."; "On January 7, 2008, respondent sent an individual in the DuPont Legal Department an e-mail stating in part: 'You asked that I contact you after I thought our firm met DuPont's criteria for inclusion on its Diverse Outside Counsel list. I believe that our firm now meets your criteria and would love to have the opportunity to coordinate a visit to come and meet with you and your team sometime in February.'"; "The January 7 e-mail contains a false statement and/ or misrepresentation. KSR did not qualify for inclusion in DuPont's Diverse Legal Supplier Program and respondent knew KSR did not qualify at the time he sent this e-mail."; "On February 19, 2008, an individual in the DuPont Legal Department sent respondent an e-mail welcoming him and his firm to DuPont's Diverse Legal Supplier Program."; "KSR did not actually do legal work for DuPont until November 2008. At that time, DuPont included the KSR firm on a request for proposal. After respondent was told he won the bid, he said someone left the firm and, at least temporarily, they were under the definition for a minority-owned firm. This statement was false or misleading, as a person leaving the KSR firm was not the cause of KSR not meeting DuPont's definition for a minority owned firm; rather, KSR had never met the requirements for a minority-owned firm."; "An individual in the DuPont Legal Department told respondent if it was only temporary, it was not a problem. DuPont still used the KSR firm for the work."; "On March 28, 2009, KSR sent an individual in the DuPont Legal Department a letter, signed on behalf of KSR by respondent and another firm partner. The letter stated in part: 'We are writing to request that Kamlet Shepherd & Reichert, LLP be removed from the DuPont Diverse Legal Supplier program. We do not believe our firm meets DuPont's requirements for a minority-owned or women-owned law firm. As we understand those standards, we should never have been qualified or listed as a diverse legal supplier.'"; "DuPont has stated it was not harmed. In fact, they kept the work at KSR after the receipt of the March 28, 2009 letter."; "Based on the foregoing, the parties hereto recommend that a public censure be imposed upon the respondent. The respondent consents to the imposition of discipline of a public

censure. The parties request that the Presiding Disciplinary Judge order that the effective date of such discipline be immediate.").

Best Answer

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

b 7/14

Testimonials and Endorsements

Hypothetical 8

Your firm's marketing folks have recommended the use of testimonials and endorsements as a way to generate some new business.

May your advertising campaign include the following:

- (a) A client testimonial (from a real client) saying that your law firm is "one of the best" that your client ever employed?

NO

- (b) A client testimonial (from a real client) saying that your firm's lawyers always returned the client's phone call quickly?

MAYBE

- (c) A reference to your being a client's "preferred" law firm?

MAYBE

- (d) An endorsement by a well-known local sports figure?

MAYBE

- (e) Quotations from a newspaper article praising your law firm?

MAYBE

Analysis

This hypothetical deals with the context of lawyer advertising -- the rules governing client testimonials and endorsements.

(a)-(b) Most bars permit lawyers to mention the names of their clients in advertisements, as long as the clients consent.

- Ohio LEO 2000-6 (12/1/00) ("It is proper for a law firm to list a client's name with a client's consent in public communication, such as a law firm Web Site. . . . As a matter of courtesy and confidentiality, a lawyer should not publicly list a client's name without client consent.").

New York requires that lawyers obtain their clients' written consent to use of the clients' name.¹

State ethics rules governing client testimonials tend to take one of several positions.²

First, some states permit truthful testimonials.³ Of course, even states permitting client testimonials would prohibit testimonials from clients that include statements prohibited if made by the lawyers or the law firm. For example, because an advertisement's use of the word "best" might amount to a prohibited unverifiable and misleading comparison of the lawyer's services with other lawyers' services (ABA Model Rule 7.1 Comment [3]), an advertisement probably cannot put those words in a client's testimonial.

In 2010, the Second Circuit overturned New York's ban on testimonials.

- Alexander v. Cahill, 598 F.3d 79, 92 (2d Cir. 2010) (in an opinion filed by Circuit Judge Guido Calabresi, upholding the constitutionality of New York State's 30-day moratorium on direct marketing in wrongful death or personal injury situations, but finding unconstitutional other provisions of New York's marketing rules, including bans on testimonials, portrayals of judges, irrelevant techniques such as gimmicky depictions, nicknames, and trade

¹ New York Rule 7.1(b)(2) ("[A]n advertisement may include information as to . . . names of clients regularly represented, provided that the client has given prior written consent.").

² Joan C. Rogers, Some Jurisdictions' Professional Conduct Rules for Lawyers Forbid or Limit Use of Client Testimonials, 21 ABA/BNA Law. Manual on Prof. Conduct [Current Reports] 65 (Feb. 9, 2005) (noting that Arkansas, Florida, Indiana, Nevada, New Mexico, South Carolina and Wyoming totally forbid testimonials; California, Missouri, Oregon, Pennsylvania, South Dakota and Wisconsin permit testimonials as long as they also contain disclaimers).

³ In re Enforcement of DR 2-101(A)(3), 821 N.E.2d 574 (Ohio 2005) (unpublished opinion) (suspending enforcement of an Ohio rule that banned client testimonials; see Joan C. Rogers, Facing Federal Suit, Ohio Supreme Court Freezes Rule Against Client Testimonials, 21 ABA/BNA Law. Manual on Prof. Conduct [Current Reports] 64 (Feb. 9, 2005)).

names; finding unconstitutional New York State's ban on testimonials; "Nor does consensus or common sense support the conclusion that client testimonials are inherently misleading. Testimonials may, for example, mislead if they suggest that past results indicate future performance -- but not all testimonials will do so, especially if they include a disclaimer. The District Court properly concluded that Defendants failed to satisfy this prong of Central Hudson with respect to client testimonials.").

Second, some states permit testimonials, but impose specific restrictions.

- Florida Rule 4-7.13(b)(8) ("Examples of Deceptive and Inherently Misleading Advertisements. Deceptive or inherently misleading advertisements include, but are not limited to advertisements that contain. . . a testimonial: (A) regarding matters on which the person making the testimonial is unqualified to evaluate; (B) that is not the actual experience of the person making the testimonial; (C) that is not representative of what clients of that lawyer or law firm generally experience; (D) that has been written or drafted by the lawyer; (E) in exchange for which the person making the testimonial has been given something of value; or (F) that does not include the disclaimer that the prospective client may not obtain the same or similar results").
- Utah LEO 09-01 (2/23/09) ("It is legitimate to require such additional language when it is necessary to prevent the advertisement as a whole from being materially misleading or likely to create unjustified expectations. In our view when using testimonials to advertise prior accomplishments it is wise (and may be necessary depending upon the context) to include such qualifying language. Similarly, a 'testimonial' should be given by the real person involved (e.g. a former client), unless the portrayal expressly states otherwise (e.g. an actor dramatizing a former client's letter of thanks) in order to avoid its being misleading.").

Third, some state bars take an odd middle position -- prohibiting client testimonials about specific successes or the quality of the lawyer's work, but allowing what are called "soft testimonials" about the lawyer's general attitude, prompt return of telephone calls, etc.

- Connecticut LEO 01-07 (5/21/01) (prohibiting an advertisement that contains a quotation from a client that the lawyer "seemed more knowledgeable about our matters" because it had applied a comparison with other lawyers; but allowing the following client quotations in advertisements: "Appointment was helpfully scheduled at my home, since I have difficulty accessing your facility (wheelchair)."; "Very knowledgeable, informative as well."; "Service was excellent."; "I did not feel rushed. Mr. _____ was very patient."; "We were very impressed and pleased with the commitment to service."; "Very

thoughtful. Always accommodating."; " My experience was one of courtesy and most importantly no rushing of explanations or directions, and I found myself at ease at all times."; " _____ made me feel comfortable and like we knew one another for years.").

- Philadelphia LEO 91-17 (3/1992) (prohibiting television or radio advertisements from including a client testimonial that the lawyer reached a "good" result, but allowing such "soft endorsements" as testimonials that the lawyer: "returned my telephone calls"; "appeared concerned"; "has given me a sympathetic ear"; "proceeded on a prompt basis").

Fourth, in a variation of this middle position, some states permit "soft testimonials" without a disclaimer, but require a disclaimer for more "hard" testimonials.

- North Carolina LEO 2012-1 (7/20/12) ("Testimonials that discuss characteristics of a lawyer's client service may be used in lawyer advertising without the use of a disclaimer. Testimonials that refer generally to results may be used so long as the testimonial is accompanied by an appropriate disclaimer. The reference to specific dollar amounts in client testimonials is prohibited."; "A distinction can be drawn between 'hard' and 'soft' testimonials. A 'hard' testimonial goes to the outcome of a case or matter. A 'soft' testimonial does not go to the outcome of the case or matter, but rather focuses on shared values or characteristics of the lawyer's client service."; "The Ethics Committee has concluded that a lawyer may incorporate 'soft' client endorsements in their advertising materials without violating Rule 7.1. See 2007 FEO 4. A lawyer may use client testimonials stating that a lawyer handled a case efficiently, always acted in a professional matter, was considerate of the client's particular needs, etc. Examples of other soft endorsements include: []'The lawyer was very knowledgeable.'[:] 'The service provided by the law firm was excellent.'[:] 'The attorney was very patient.'[:] 'We were very impressed and pleased with the commitment to service.'[:] 'My experience was one of courtesy and I found myself at ease at all times.'"; "'Hard' testimonials, or testimonials that indicate a particular favorable result in a case, have the potential to mislead a potential client to form an unjustified expectation that the same results can be obtained on his or her behalf. Examples of such statements include: []'The charges against me were dropped/dismissed.'[:] 'My medical bills were covered/paid.'[:] 'I was able to get Social Security/workers' compensation benefits.'[:] 'My lawyer settled my case for '\$500,000.'"; "We similarly conclude that a lawyer may include in marketing materials client testimonials that refer generally to the outcome of a specific matter, so long as the testimonials are accompanied by an appropriate and effective disclaimer. The reference to specific dollar amounts in client testimonials is prohibited."; "The disclaimer must comply with the requirements set out in Rule 7.1(b) pertaining to communications containing dramatizations. Pursuant to Rule 7.1(b), the disclaimer may be oral or written.").

(c) States disagree about whether law firms can boast that they are client's "preferred" firm. The Ohio Bar has prohibited such a reference on a client website.

- Ohio LEO 2004-7 (8/6/04) ("A law firm may be identified on a business client's Web site, but may not be referred to as the company's preferred attorneys. Communication to the public of a law firm's name and logo on a business client's Web site is acceptable because it is not a false, fraudulent, misleading, deceptive, self-laudatory, or unfair statement. Communication to the public through the company Web site that a law firm is the company's "preferred attorneys" is misleading. Whether it is proper for a business client to list a law firm in the company's brochure and in press releases will depend upon the context and the content. A lawyer must be vigilant that any such communication does not imply that the company and law firm are in business together. A lawyer or law firm may not request a client to promote the law firm on its Web site and may not compensate the client for the publicity. If a lawyer is aware that a law firm client Web site is using the law firm name or its lawyers' names inappropriately or making improper statements or references to the lawyers or law firm, the lawyers should counsel the client and withdraw [from representation] if the Web site remains objectionable.").

The Philadelphia Bar has permitted such a designation.

- Philadelphia LEO 2007-13 (12/2007) (generally permitting lawyers to be included on a "preferred" lawyer list prepared by a non-profit educational institution; also generally permitting the lawyer to purchase "booth space" at "housing fairs" sponsored by the institution).

(d) States also disagree about the ethics propriety of celebrity endorsement.

First, some states flatly prohibit such endorsements.

- Pennsylvania Rule 7.2(d) ("No advertisement or public communication shall contain an endorsement by a celebrity or public figure.").
- Philadelphia LEO 2008-1 (2/2008) (holding that a lawyer may not include pictures on his website of himself "and celebrity friends from the sports, entertainment and political fields"; explaining that such pictures would violate the prohibition on endorsements by a celebrity or public figure, although there is no caption under the pictures; "The usage of the photographs in the manner described would violate this provision in that the clear intent of their use is to imply either that the prominent persons depicted have endorsed the usage of the lawyers' services, and/or that the inquirer's association with prominent figures enables him to achieve better results than lawyers not associated with such persons."; also noting that the use of such pictures might violate Rule 1.6 if the person had not consented to their use).

Second, some states allow such endorsements -- if they include a disclaimer.

As a result of the Second Circuit opinion in Alexander v. Cahill, 598 F.3d 79 (2d Cir. 2010), New York changed its ethics rules so that they now allow "a testimonial or endorsement from a client with respect to a matter still pending" as long as "the client gives informed consent confirmed in writing." New York Rule 7.1(e)(4). For matters that are not "still pending," presumably client testimonials or endorsements must meet the general standards of all content-based rules but no longer need the client's written consent.

Interestingly, New York formerly took an interesting position -- allowing celebrity endorsements as long as they are not paid.

- New York LEO 792 (2/14/06) (A "[l]awyer may advertise on TV or radio using a testimonial by a celebrity client so long as the testimonial is not false, deceptive or misleading and otherwise satisfies the record-keeping requirements for any radio and TV advertising. However, the lawyer may not compensate or give anything of value to the celebrity client for the testimonial, including compensation for the celebrity's time and services in making it.").

Not surprisingly, bars are much more hostile to lawyers using judges' favorable comments in marketing efforts.

In 2013, a New Jersey court held that the state bar could prohibit lawyers from using such favorable judicial comments unless they included the entire judicial opinion.

- Dwyer v. Cappell, 951 F. Supp. 2d 670, 673-74, 674-75, 675 nn.5 & 6 (D.N.J. 2013) (holding that a state bar could constitutionally prohibit lawyers from using in their advertisements complimentary quotations from judges, without including the entire judicial opinion in the advertisement; "The parties agree that the speech at issue in this case is commercial speech, which is protectable under the First Amendment if it is lawful and not misleading. There are no material facts in dispute. The core of the parties' dispute is the legal issue of whether Guideline 3 is most appropriately characterized as a 'restriction' on speech, or whether it instead is a regulatory requirement of 'additional disclosure.' This characterization affects the Court's analysis of the constitutionality of Guideline 3. Plaintiffs characterize Guideline 3 as a ban on

speech -- specifically judicial quotations -- while the State Judiciary Committee characterizes Guideline 3 as a regulation requiring additional disclosure -- specifically a full judicial opinion -- in order to provide context to a consumer about a judge's discussion of an attorney's legal abilities. . . . The Court agrees with the State Judiciary Committee that Guideline 3 is not a ban on speech but is instead a disclosure requirement, because it requires full disclosure of a judicial opinion. It allows publication of all the content sought to be published within a judicial quotation, albeit within its full context. Because the Court finds that Guideline 3 is a disclosure requirement, to be constitutional it must pass the reasonableness test outlined in Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio, 471 U.S. 626, 651 . . . (1985)." (footnote omitted); "A judicial quotation's potential to mislead a consumer is self-evident. Without the surrounding context of a full opinion, judicial quotations relating to an attorney's abilities could easily be misconstrued as improper judicial endorsement of an attorney, thereby threatening the integrity of the judicial system." (footnote omitted); "Plaintiffs analogize the speech at issue to client testimonials regarding an attorney's legal abilities, which Plaintiffs indicate are currently permitted under New Jersey law if accompanied by disclaimers. However, client testimonials are distinguishable from the judicial quotations at issue here. Client testimonials are voluntary, but a judge's evaluation of an attorney's abilities in the context of attorney's fees, for example, is a necessary part of a court's determination. Also, client testimonials are not barred by ethics rules, while perceived judicial endorsements are improper."; "Even if Guideline 3 were to be subjected to the intermediate scrutiny test outlined in Central Hudson [Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.], 447 U.S. 557 (1980)], (which would apply only if Guideline 3 were deemed a restriction on speech), the regulation would still be constitutional. Guideline 3 directly advances a substantial governmental interest in preventing the perception of judicial impropriety that would result from consumers thinking that a judge endorsed an attorney, and it is no more extensive than necessary to serve that interest.").

(e) Surprisingly, lawyers' reliance on complimentary newspaper articles seems not to have generated many ethics opinions.

One state held that a lawyer could not avoid the restriction on mentioning case results in advertisements by quoting a newspaper article about a case result.

Connecticut LEO 88-3 (2/25/88) (prohibiting advertisement that contains a news article about a specific jury award in a personal injury case).

The Florida Bar found that a lawyer using 17-year-old newspaper articles would have to comply with the Florida marketing rules -- because the lawyer "adopted the articles as contents and made them into advertising copy."

- Florida Bar v. Gold, 937 So. 2d 652, 654-55, 657 (Fla. 2006) (assessing a lawyer's brochure that "consists of a few paragraphs of introductory text and a copy of three newspaper articles discussing Gold and his firm and his practice in defense of traffic and DUI cases. Two of the articles appear to have been published in The Miami Herald and the third appears to have been published in the Fort Lauderdale Sun-Sentinel."; noting that the newspaper articles appear to be at least 17 years old; "[W]e have never held that republication or circulation of news articles in direct mail solicitations completely insulates a lawyer from prosecution for ethical misconduct under the Bar's advertising rules. In this instance, for example, it is apparent that by taking the articles and including them in a direct mail solicitation for legal representation, Gold adopted the articles' contents and made them into advertising copy. In this way, the articles' contents became subject to the strictures of the Bar's advertising rules." (footnote omitted); overturning a finding in favor of the lawyer, and remanding).

Best Answer

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

b 7/14

Law Firm Names

Hypothetical 9

As part of a total revamping of your firm's marketing focus, you have decided to choose a new name for your law firm. You are considering a number of possibilities, but you want to assure that you comply with the ethics rules.

- (a) May a law firm's name include the name of a retired partner who is still alive, but in a nursing home?

YES

- (b) May a law firm's name include the name of a retired partner who lives in Florida and occasionally drafts or revises wills for her friends?

NO

- (c) May a law firm's name include the name of a former partner who is now a state senator?

NO

- (d) May a law firm's name include the name of a former partner who was practicing at the firm when he was suspended from the practice of law?

NO (PROBABLY)

- (e) May a law firm's name include the phrase "and Associates" if the lawyer practices by herself?

NO

- (f) May a law firm composed of two lawyer named Keaton start a law firm with the name "Keaton & Keaton" -- when two other lawyers with the same name have been using that name for nearly 40 years in a city 100 miles away?

YES

- (g) May the two sons of the founders of the "Suisman Shapiro" law firm leave their fathers' firm and start their own firm -- using the name "Suisman Shapiro"?

NO (PROBABLY)

- (h) May two law firms include the name of the same practicing lawyer in their names?

MAYBE

- (i) May lawyers practice under the name of Smith, Jones & Doe, P.C. -- if Jones and Doe are not shareholders, and do not share in the firm's profits and expenses?

MAYBE

- (j) May a law firm's name include the name of a lawyer who is only "of counsel" to the firm?

MAYBE

Analysis

Determining which lawyers' names can be included in a firm name seems easy at first blush, but there are a number of considerations.

While partnership and contractual requirements might provide some limits, the bottom-line ethics principle is to avoid giving the public a false impression when using a firm name, which would violate the prohibition on false statements.¹

(a) The ABA² and state bars³ permit the inclusion in a law firm's name of a lawyer who is retired from the practice of law. It may be necessary that the retired partner have practiced law at the law firm until retirement.

¹ ABA Model Rule 7.5(a) ("A lawyer shall not use a firm name, letterhead or other professional designation that violates [Model] Rule 7.1."). See, e.g., *In re Foos*, 770 N.E.2d 335, 336 (Ind. 2002) (holding that lawyers employed full time by an insurance firm may not use the name "Conover & Foos, Litigation Section of the Warrior Insurance Group, Inc.," because it misleadingly implies that the lawyers work for an independent law firm; explaining that even a detailed disclaimer to the contrary would not cure the violation).

Similarly, it is permissible to use a deceased partner's name in the firm name.⁴

Of course, this actually makes the law firm name a trade name.

The North Carolina Bar has stated this general rule, and also indicated that the law firm must make additional disclosures if the firm includes a deceased or retired partner on its letterhead.

- North Carolina LEO 2006-20 (7/13/07) (explaining that a law firm could not continue to use the name of a member in its name if the member left the firm and practiced elsewhere; "Rule 7.5 permits a law firm to continue to use a lawyer's surname if he retires from the practice of law or after his death, so long as the lawyer was a member of the firm immediately preceding his retirement or death. Subsequent communications listing the former member's name on the law firm letterhead, however, should clarify that the former member is deceased or retired so as not to mislead the public. If Attorney Doe leaves the PC and begins engaging in the private practice of law, the PC could not continue to use Attorney Doe's surname because it would be misleading pursuant to Rule 7.1. . . . Any agreement between Attorney Doe and the PC must reflect this restriction and may not violate Rule 5.6(a) of the Rules of Professional Conduct." (emphases added); also explaining that the same rule applied to the law firm's use of the former member's likeness; "The agreement may grant to the PC the right to use Attorney Doe's likeness while he practices with the PC but not if he ceases to practice with the PC. As long as Attorney Doe practices with the PC, there is probably no danger that the use of his likeness will mislead, deceive, or confuse the public. However, if Attorney Doe ceases to practice with PC (whether by retirement, departure, or

² ABA LEO 85-1511 (3/26/85) (a law firm may include the name of a retired partner in its name).

³ North Carolina Rule 7.5 cmt. [1] ("The name of a retired partner may be used in the name of a law firm only if the partner has ceased the practice of law."); Illinois LEO 03-02 (1/2004) (finding that a law firm may continue to use the name of a retired lawyer who has stopped practicing law); Virginia LEO 1706 (11/21/97) (a law firm may continue to use a deceased or retired partner's name in its title; declining to indicate whether a lawyer who has only been an independent contractor of a firm may continue to use the firm's name after all of the firm's partners retire (calling the question a "legal issue"), the Bar refers to a Maryland LEO indicating that such use would be improper; as long as the lawyer was a "successor in interest" to the firm, the lawyer could continue to use a deceased partner's name in the firm name).

⁴ Florida Rule 4-7.21 cmt. ("It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm."); Illinois Rule 7.5 cmt. [1] ("It may be observed that any firm name including the name of a deceased partner is, strictly speaking, a trade name. The use of such names to designate law firms has proven a useful means of identification. However, it is misleading to use the name of a lawyer not associated with the firm or a predecessor of the firm, or the name of a nonlawyer."); Virginia LEO 1704 (9/12/97) (a law firm's name may include the names of deceased partners).

death), the PC's use of his likeness will be inherently misleading and confusing to the public, in violation of Rule 7.1, because of the specific fact that Attorney Doe, while the sole shareholder in the firm, invested substantial resources to make his likeness synonymous with the PC. Therefore, after Attorney Doe's departure from the PC, a disclaimer on the PC's advertisements and marketing communications would be insufficient to overcome the public perception that Attorney Doe's services are still available through the PC. This opinion does not prohibit generally the accurate and nondeceptive use of the likeness of a retired or deceased member of a firm in marketing or advertising, as long as the likeness includes a clear statement of the attorney's status so as not to imply ongoing involvement with the firm." (footnotes omitted)).

Lawyers have litigated against each other over use of the late Johnnie Cochran's name. In 2013, a district judge granted a preliminary injunction against a Los Angeles lawyer who used the Cochran name in advertising.

- Amanda Bronstad, Former Partner Ordered To Stop Using Cochran Firm's Name, Nat'l L.J., Mar. 4, 2013 ("A federal judge has ordered the former managing partner of The Cochran Firm's office in Los Angeles to stop using the Cochran name in advertising his legal services."; "United States District Judge James Otero in Los Angeles on February 26 granted a preliminary injunction against Randy McMurray, who managed The Cochran Firm Los Angeles from 2007 to 2012. Since then, according to the firm, McMurray has been advertising his legal services under the name The Cochran Law Group."; "By March 29, McMurray must stop using the word 'Cochran' in advertising his legal services; on letterhead, business cards or press releases; and in any email address, domain name or social media site, Otero wrote."; "The Cochran Firm, whose primary office is in Dothan, Alabama, was founded in 1998 by the late Johnnie Cochran Jr., who famously won acquittal for O.J. Simpson in his 1994 double-murder trial. Cochran died in 2005 after being diagnosed with brain cancer. The firm now advertises a Los Angeles office with seven attorneys."; "According to Otero's order, Cochran obtained a trademark in 2005 for his name from the United States Patent and Trademark Office. The firm later obtained the trademark from Cochran's estate."; "McMurray, who joined the firm in 2000 when it was called Cochran, Cherry, Givens, Smith & Steward, agreed that his office would provide compensation to the firm in exchange for administrative, marketing and technical support services and use of the Cochran name. With the approval of The Cochran Firm, he formed The Cochran Firm Los Angeles in 2007 with partners Brian Dunn and Joseph Barrett. But, according to the firm, a formal partnership and licensing agreement was never finalized and, by late 2011, The Cochran Firm and McMurray were at odds.").

Two months later, the Ninth Circuit reversed the preliminary injunction, because it was too broad.

- Cochran Firm, P.C. v. Cochran Firm L.A., LLP, No. 13-55502, 2014 U.S. App. LEXIS 8605, at *4-5, *5-6 (9th Cir. May 7, 2014) ("The structure of Appellee's business is important in assessing whether Appellee has unclean hands. Specifically, Appellee may be misusing the trademark to deceive the public into believing it is a single, national firm, when in fact it is a network of separate partnerships. Because the record before us does not provide sufficient information about the relationships both between Appellee and the local offices, or between Appellee and the public, we remand to the district court to determine whether Appellee has unclean hands in its use of the Cochran Firm trademark. The district court shall keep the preliminary injunction in place while it examines this issue."; "Here, however, the injunction is worded so broadly that it forbids McMurray from truthfully representing himself as one of the late Johnnie Cochran's law partners. For example, Paragraphs 1, 2, and 5 of the injunction prohibit McMurray from revealing that past affiliation in a curriculum vitae or biographical statement on his firm's website. Although the injunction carves out an exception for at least some representations that McMurray 'was a former attorney with the Cochran Law Firm,' that exception is not broad enough to cover representations that McMurray was not only a former attorney at the firm, but also was held out to the public as a partner of Johnnie Cochran. 'The district court was required to tailor the injunction so as to burden no more protected speech than necessary.' . . . We direct it to do so on remand.").

(b) Bars generally hold that it would mislead the public for a law firm name to include the name of a lawyer who practicing law elsewhere or engaging in some other business.⁵

- Cecil & Geiser, LLP v. Plymale, 2012-Ohio-5861, at ¶¶ 20, 27 (Ohio Ct. App. 2012) (analyzing an agreement under which an Ohio lawyer stopped practicing in Ohio after entering into an agreement that allowed his law firm to continue using his name; explaining that the lawyer eventually returned to Ohio and started to practice law again, but that the law firm refused to stop using his name; noting that "[i]n today's financial world, even lawyers who intend to retire may find that a return to the practice of law is mandated by financial reality."; finding the agreement unenforceable because it restricted the lawyer's practice and violated the prohibition on a law firm using an inaccurate name; "The applicability of this rule also hinges upon the idea that

⁵ Virginia LEO 277 (12/15/75) (a law firm may not use the name of a lawyer who has stopped practicing law and is now engaged in a business).

Plymale retired from the practice of law. As discussed earlier, he did not. He at most discontinued practicing in the state of Ohio for a period of time, but continued practicing law in Florida as in-house counsel for a business.").

- North Carolina LEO 2006-20 (7/13/07) ("Rule 7.5 permits a law firm to continue to use a lawyer's surname if he retires from the practice of law or after his death, so long as the lawyer was a member of the firm immediately preceding his retirement or death. Subsequent communications listing the former member's name on law firm letterhead, however, should clarify that the former member is deceased or retired so as not to mislead the public. If Attorney Doe leaves the PC and begins engaging in the private practice of law, the PC could not continue to use Attorney Doe's surname because it would be misleading pursuant to Rule 7.1. See Rule 7.5(a), cmt. [1]. Any agreement between Attorney Doe and the PC must reflect this restriction and may not violate Rule 5.6(a) of the Rules of Professional Conduct."; "[I]f Attorney Doe ceases to practice with PC (whether by retirement, departure, or death), the PC's use of his likeness will be inherently misleading and confusing to the public, in violation of Rule 7.1, because of the specific fact that Attorney Doe, while the sole shareholder in the firm, invested substantial resources to make his likeness synonymous with the PC. Therefore, after Attorney Doe's departure from the PC, a disclaimer on the PC's advertisements and marketing communications would be insufficient to overcome the public perception that Attorney Doe's services are still available through the PC. This opinion does not prohibit generally the accurate and nondeceptive use of the likeness of a retired or deceased member of a firm in marketing or advertising, as long as the likeness includes a clear statement of the attorney's status so as not to imply ongoing involvement with the firm." (footnotes omitted)).
- Florida LEO 00-1 (4/30/00) (a law firm may continue to use the name of a retired partner who is "of counsel" to the firm; but affirming an earlier LEO that prohibited a law firm from continued use of a retired partner's name in the law firm name if the retired partner was "of counsel" to the firm but continuing to practice law in an adjacent independent office, because the retired partner was not making his services available exclusively to the law firm's clients).
- District of Columbia LEO 273 (9/17/97) (analyzing the ethics rules governing lawyers' withdraw from one firm and joining another firm; "Where a lawyer has departed one firm to practice elsewhere, it would plainly be misleading for the law firm to continue to use that lawyer's name in written materials used for external communications.").
- D.C. LEO 273 (9/17/97) ("Where a lawyer has departed one firm to practice elsewhere, it would plainly be misleading for the law firm to continue to use that lawyer's name in written materials used for external communications.").

(c) ABA Model Rule 7.5(c) indicates that "the name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm." State rules take the same approach.

- Florida Rule 4-7.21(e) ("The name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.").
- Georgia Rule 7.5(c) ("The name of a lawyer holding public office shall not be used in the name of a law firm, or in communications on its behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm.").
- New York Rule 7.5(b) ("A lawyer who assumes a judicial, legislative or public executive or administrative post or office shall not permit the lawyer's name to remain in the name of a law firm or to be used in professional notices of the firm during any significant period in which the lawyer is not actively and regularly practicing law as a member of the firm and, during such period, other members of the firm shall not use the lawyer's name in the firm name or in professional notices of the firm.").

Thus, it is impermissible for a law firm's name to include the name of a Congressman who is precluded from the practice of law,⁶ or a lawyer/legislator who is not actively practicing in the firm.⁷

(d) Not surprisingly, one state has indicated that a law firm's name cannot include the name of a suspended lawyer, because it is inherently misleading.⁸

(e) Numerous bars have prohibited lawyers from using the phrase "and Associates" unless the lawyer in fact has other lawyers involved in her firm.

⁶ Virginia LEO 1034 (2/9/88) (it is improper to list a Congressman, who is precluded from the practice of law, as "of counsel" to a law firm).

⁷ Virginia LEO 206 (5/28/70) (a law firm's name may not include the name of a lawyer/legislator who is not actively practicing in the firm).

⁸ Rhode Island LEO 2001-07 (10/18/01).

- Florida Rule 4-7.21 cmt. ("A sole practitioner may not use the term 'and Associates' as part of the firm name, because it is misleading where the law firm employs no associates in violation of rule 4-7.13. See Fla. Bar v. Fetterman, 439 So. 2d 835 (Fla. 1983). Similarly, a sole practitioner's use of 'group' or 'team' implies that more than one lawyer is employed in the advertised firm and is therefore misleading.").
- North Carolina Rule 7.5 cmt. [1] ("It is also misleading to use a designation such as 'Smith and Associates' for a solo practice.").
- Peter Vieth, Solo suspended after use of "Associates" in firm name, 25 VLW 859, Jan. 10, 2011 ("A Virginia Beach lawyer whose advertising made his solo practice look like a multi-lawyer firm has had his license suspended by a three-judge panel in Virginia Beach Circuit Court. The advertising issue was just one of the transgressions charged against Jason M. Head, who was suspended for 30 days, but the judges' decision adds new force to the VSB's regulation of lawyer advertising. One of the examples of ethical misconduct cited in the panel's Dec. 10 order was the use of the name 'Jason Head & Associates, PLC' when Head practiced and operated his firm as a solo practitioner. The panel found that Head used the phrase 'Attorneys at Law' in various communications and posted video on his website that portrayed a non-attorney as an attorney within Head's firm. The order also noted Head was responsible for the repeated use of the plural terms 'our,' 'we,' 'lawyers,' and 'attorneys' in the description of his firm. Head was found to have made false statements that the firm had three locations and decades of experience. The judges determined such communications contained false and misleading information in violation of Rules 7.1 and 7.5 of the Virginia Rules of Professional Conduct. 'We consider "and associates" to refer to lawyers in the firm,' explained VSV Assistant Ethics Counsel Leslie A.T. Haley, who was not involved in prosecuting Head. 'This has been applied for years and has been cited in our legal ethics opinions,' Haley said. 'We have issued numerous letters to firms across the state.' Haley pointed to LEO 1532, which interprets the term 'associates' in law firm titles as referring to lawyer employees.").
- Utah LEO 09-01 (2/23/09) ("[A] Utah lawyer cannot have a firm name 'and Associates' unless there are at least two lawyer associates.").
- Disciplinary Counsel v. McCord, 905 N.E.2d 1182, 1187 (Ohio 2009) (indefinitely suspending a lawyer for various acts of wrongdoing, including deceptive use of various names for his law firm; "Under this count, relator claims that respondent improperly held himself out as a member of entities named 'McCord, Pryor & Associates,' 'McCord, Pryor & Associates Co., L.P.A.,' and 'McCord & Associates.' Respondent's actions related to these purported entities raise three questions: (1) Was respondent ever a law partner with David E. Pryor? (2) Did respondent act inappropriately in forming an entity named 'McCord, Pryor & Associates Co., L.P.A.'? and (3) Did

respondent have any associates that would justify using the term 'and associates' in firm names?"; finding that McCord had never been a partner of Pryor, and had never employed true "associates").

- Minnesota LEO 20 (6/18/09) ("[T]he use of the word 'Associates' in a law firm name, letterhead or other professional designation -- such as 'Doe Associate' -- is false and misleading if there are not at least two licensed attorneys practicing law with the firm. Similarly, the use of the phrase '& Associates' in a firm name, letterhead or other professional designation -- such as 'Doe & Associates' -- is false and misleading if there are not at least three licensed attorneys practicing law with the firm."; "Whether or not a law firm name using the word 'Associates' or the phrase '& Associates' is false and misleading will depend on the particular facts and circumstances of each case. For example, there may be circumstances where three attorneys with a law firm name such as 'Doe & Associates' may lose one of the firm's attorneys. In that event, if another attorney joins the firm within a reasonable period of time thereafter, or if the firm reasonably and objectively anticipates another attorney joining the firm within a reasonable period of time, it is not false or misleading for the firm to continue using '& Associates' in its name during the interim period. If neither circumstance exists, the continued use of '& Associates' would be considered false and misleading. In addition, there may be circumstances where one or more of the attorneys practicing with a firm may be working part-time. As long as the requisite minimum number of attorneys, part-time or otherwise, regularly and actively practice with the firm, the use of 'Associates' or '& Associates' would not be considered false or misleading.").
- Ohio LEO 2006-2 (2/10/06) ("It is proper for a solo practitioner to name his or her law firm 'The X Law Group' when 'X' is the solo practitioner's surname and 'X' employs one or more attorney [sic] as associates. 'Group' and 'Law Group' are not considered misleading or a trade name when used in naming a law firm comprised of more than one attorney. 'Group' or 'Law Group' should not be used in a law firm name to refer to paralegals, other non-attorney personnel, office sharing attorneys, or 'of counsel' attorneys.").
- District of Columbia LEO 332 (10/18/05) ("A lawyer who opens a solo practice may conduct his or her business under any trade name that does not constitute a false or misleading communication about the lawyer or the lawyer's services. The use of the word 'firm' in the firm name does not inherently constitute a misleading representation about a solo practitioner. A solo practitioner must take care, however, to insure that clients and potential clients are not misled as to the nature of his or her practice."; "It is useful to reiterate that, as we said in Opinion No. 189 (decided under the former Code of Professional Responsibility), a solo practitioner may not practice under the name 'John Doe & Associate' for the use of the word 'associates' would naturally be read to necessarily imply the existence of other legal staff in the practice. See D.C. Ethics Op. 189 (1988). This prohibition remains in effect

today under Rule 7.5(d) of the Rules of Professional Conduct. Cf. Disciplinary Counsel v. Furth, 754 N.E.2d 219 (Ohio 2001) (solo practitioner may not practice under his name followed by 'Associates, Attorneys and Counselors at Law'); cf., Medina County Bar Ass'n v. Grieselhuber, 678 N.E.2d 535 (Ohio 1977) (solo practitioner may not style his firm 'and Affiliates' or hold himself out as 'Body Injury Legal Centers'). Similarly a solo lawyer using the title 'Senior Attorney and Director of Services' misleads because the lawyer implies the existence of other staff. Oklahoma Bar Ass'n v. Leigh, 914 P.2s 611 (Okla. 1996).").

- In re Schneider, 710 N.E.2d 178, 179, 180 (Ind. 1999) ("The letterhead denoted his law practice as 'Professional Services Group' and listed five additional members, two designated as attorneys and three as CPAs. None were actually employees of the respondent's law practice."; "In this case, the respondent held himself out as part of a group including other attorneys, although his law practice had no employees other than himself. Referring to his practice as part of a group created a false impression that the other attorneys were associated with respondent in the practice of law. The respondent argues that the letterhead and trade name accurately reflect the dual nature of his practice and therefore is not misleading. Even though the respondent provided both legal and accounting services, he did not practice law as part of a legal entity comprised of the persons listed on his letterhead. He testified that he practices law as a sole proprietor, with no employees. There was no 'group,' only the respondent.").

One interesting article noted that Justice Sotomayor might have improperly used that term when in private practice.

On Page 143 of her Senate Judiciary Committee questionnaire, she said she "practiced alone" in a side legal business from 1983 to 1986 "as a consultant to family and friends." During that time, she also was serving as a prosecutor and then as a member of a larger law firm. Judge Sotomayor listed the name of the solo practice as Sotomayor and Associates.

Advertising a solo practice as if it has more than one lawyer is actually banned by bar associations in all 50 states. Judge Sotomayor appears to have violated this minor but clear rule of legal ethics for four years.

Sotomayor's ethical oversight: Who were the 'associates' in her legal consulting business?, Washington Times, June 24, 2009, at A20.

- (f) This question comes from a 2006 Indiana case.

The Indiana Supreme Court recognized both law firms' names as legitimate, and refused to enjoin one law firm's efforts to block the other law firm from using the same name.

- Keaton & Keaton v. Keaton, 842 N.E.2d 816, 821 (Ind. 2006) (analyzing a situation in which two lawyers named Keaton established a firm in 1971 in Rushville, Indiana, while two other lawyers also named Keaton formed a firm in 2002 in Fort Wayne, Indiana; noting the one law firm called itself "Keaton and Keaton" while the other law firm used the name "Keaton & Keaton"; acknowledging that consumers occasionally confused the two firms, even though Rushville is 100 miles from Fort Wayne; "Law firms with the same or similar names are abundant, and there is no evidence that the Rushville P.C. has any name recognition in Fort Wayne over 100 miles from Rushville. To the extent the Rushville P.C. has demonstrated a secondary meaning in its locale, we agree with the trial court that the three instances of alleged name confusion designated by the Rushville P.C. in its motion for summary judgment are insufficient as a matter of law to establish actionable infringement."; denying one firm's efforts to stop the other law firm from using its name).

(g) Disputes about the use of a deceased lawyer's name can involve ethics, contract and statutory issues.

Not surprisingly, bars sometimes deal with law firm lawyers (or even independent contractors) who wish to continue using the name of a law firm that has dissolved.

- Virginia LEO 1706 (11/21/97) (an independent contractor who was never a partner in a law firm may use the law firm's name if the independent contractor is a "bona fide successor" of the law firm, which is a legal issue rather than an ethics issue; determining whether the independent contractor must obtain the consent from anyone to use the law firm's name is a legal issue; as long as the firm's letterhead explains that one of the named partners is deceased, it would not be misleading for a sole practitioner to practice under a law firm name containing two names.).
- Virginia LEO 1704 (9/12/97) (A lawyer from a dissolving law firm may (1) continue to use the name of that law firm during the winding-up of the law firm's affairs; and (2) simultaneously practice under another law firm name -- which includes the original law firm's partners' name and his or her name (suggesting but not requiring the letterhead mention that two of the partners in the law firm's name are deceased.).

In 2009, the South Carolina Supreme Court refused to enjoin a law firm from using a deceased partner's name -- noting that the lawyer had approved such a use, and rejecting the lawyer's widow's claim that her deceased husband "visited her in a dream" and advised her that he would "not mind" if the law firm stopped using his name.

- Gignilliat v. Gignilliat, Savitz & Bettis, L.L.P., 684 S.E. 2d 756, 757 n.1, 762 n.6 (S.C. 2009) (holding that the widow of a law firm's founder cannot sue the law firm for improper use her late husband's name in the law firm; noting that the founder had expressed a desire that his name continue to be included in the firm's name, but that "Ms. Gignilliat testified that her deceased husband visited her in a dream and said that he did not mind if GSB discontinued the use of his name. Nonetheless, this ghostly visit is not a revocation of consent." (emphasis added); "This Court takes judicial notice of the custom and practice in this state of law firms continuing to use the names of deceased members in their firm names. Heretofore, the basis has been the taking for granted that the deceased partner would consent. Hereafter, it is presumed, unless proven otherwise, that the deceased partner consented to the continued use of his or her name in the partnership's name.").

This question comes from a 2006 Connecticut case. The District of Connecticut found that the "Suisman Shapiro" name had acquired a "secondary meaning" under the Lanham Act, and enjoined the founders' sons from using the same name in their new law firm.

- Suisman, Shapiro, Wool, Brennan, Gray & Greenberg, P.C. v. Suisman, Civ. A. No. 3:04-CV-745 (JCH), 2006 U.S. Dist. LEXIS 8075, at *15-17, *16, *44 (D. Conn. Feb. 15, 2006) (analyzing a situation in which sons of the founding named partners of a law firm left that firm and started their own firm using the accurate name "Suisman Shapiro"; concluding that the title "Suisman Shapiro" has acquired a "secondary meaning" under the Lanham Act, even though the law firm founded by the two lawyers' fathers and continuing to practice obviously included other names beside those two names; taking "judicial notice of the custom, at least in Connecticut, of identifying law firms by the first two names in a firm's title when the firm's name includes several individual names"; acknowledging that the firm which the two lawyers left had provided the testimony that two callers had been confused by the new firm's name; permanently enjoining the two lawyers from using the name "Suisman Shapiro" or "any combination of Suisman followed by Shapiro joined by any connective such as ampersand, colon, slash mark, comma or symbol, or a

spelling such as 'and"; also awarding attorneys fees to the law firm that sued the two lawyers who had left it).

More recently, another court addressed the intersection of the ethics rules and the Lanham Act.

- Hullverson v. Hullverson, No. 4:12-CV-00144-JAR, 2012 U.S. Dist. LEXIS 170990, at *6-7, *10, *13-14 (E.D. Mo. Dec. 3, 2012) (addressing a lawyer's lawsuit against several of his family members, alleging that their continued use in advertising of the names of two family members who are now inactive members of the Missouri bar violated the ethics rules and the Lanham Act; dismissing the claims based on the violation of the ethics rules; "Plaintiff's repeated references to the Missouri Rules of Professional Conduct are insufficient to form the basis of a civil cause of action. . . . Moreover, the Court finds such references immaterial to his Lanham Act claims. Accordingly, Plaintiff's allegations concerning purported violations of the Missouri Rules of Professional Conduct will be dismissed. Further, any references to the Missouri Rules of Professional Conduct will be stricken as immaterial from any Lanham Act Claim."; refusing to dismiss the Lanham Act claim based on trademark infringement and unfair competition; "In his Complaint, Plaintiff alleges ownership of the trademark 'Hullverson & Hullverson' and that he has obtained a federal registration for his trademark. . . . Plaintiff further alleges that given the similarity in the names Plaintiff James E. Hullverson, Jr., and Defendants John E. Hullverson, Thomas C. Hullverson, and 'The Hullverson Law Firm,' there is a substantial risk that people will confuse Plaintiff, who practices law in Missouri, with all of the Hullverson defendants."; also refusing to dismiss the Lanham Act claim based on false and misleading advertising; "In his Complaint, Plaintiff alleges that from 2000 to present, Defendants have represented that John and Thomas Hullverson are attorneys in the Hullverson Law Firm when in fact they are 'inactive' and unauthorized to practice law in Missouri. Plaintiff sets out the evolution of Defendants' advertising with illustrations year-by[-]year showing that John and Thomas Hullverson's names continue to appear prominently on the signage at Defendants' business office, The Hullverson Law Firm, P.C., 1010 Market St., Suite 1480, St. Louis, Missouri, as well as in telephone directories and on the firm's website despite the fact that John and Thomas Hullverson are no longer practicing law in Missouri.").

(h) The District of Columbia Bar has issued a number of opinions dealing with the possibility of the same lawyer's name appearing in two different law firm names.

In District of Columbia LEO 277 (11/19/97), the District of Columbia Bar explained that "[e]thics opinions, in the District of Columbia and elsewhere, have long

recognized that it is permissible for law firms to use trade names that include the names of deceased or retired partners."

The bar further explained that "[t]o fall under the 'trade name' exception, however, the use of the deceased or retired partner's name must be permitted under the law applicable to one's property value in the commercial use of his or her name. Such use could, depending on the circumstances, be governed by common law or partnership or corporate law." Id.

The bar also held that a law firm's name could not include the name of a lawyer practicing elsewhere. "It is, however, misleading (and therefore a violation of Rule 7.5(a)) to include in a firm name the name of a lawyer practicing elsewhere. Under such circumstances, according to the Rule, the possible identifying value of the firm name as a trade name yields to the greater possibility that the public will be misled by retention of the departed lawyer's name in the firm name." Id.

Several years later, however, the District of Columbia Bar indicated that the same lawyer's name could appear in two different law firm's names.

A lawyer may have an "of counsel" relationship with one firm and be a partner in a different firm, so long as the lawyer's "of counsel" association with the first firm is regular and continuing and the lawyer is generally available personally to render legal services to that firm's clients; and the two firms are treated as one for conflicts of interest purposes. When a former partner continues to render legal services to the firm's clients, that firm may retain the former partner's name in the firm name, even though the former partner also practices in a new firm with a name that also includes his name.

District of Columbia LEO 338 (10/2006) (emphasis added). After repeating the general rule that lawyers may practice in more than one law firm, the District of Columbia Bar

concluded that as a corollary of this general rule the law firms can all use the same lawyer's name in their name.

[T]he question is whether including a former partner's name in the old firm name, as well as in the new firm's name will mislead the public. We conclude that if the lawyer has a regular and continuing association with both firms and will be generally available personally to render legal services at each firm that bears his name, using his name in the names of both firms is consistent with D.C. Rule 7.5(a). If, instead, he were to practice with only one of the firms, including his name in both could mislead the public. Under these circumstances, however, while using X's name in both firm names may be unusual, it would not be misleading, so long as he maintains a regular and continuing association with both firms and is generally available personally to render services at each firm. We caution, however, that X must take special care to ensure that each client to whom he renders legal services understands which firm will be delivering legal services and responsible for the client's legal matter.

Id. (emphasis added).

(i) The Illinois Bar dealt with this issue in 2004. In Illinois LEO 03-02 (1/2004), the Illinois Bar addressed the following scenario.

Lawyer Smith has practiced law for many years with lawyers Jones and Doe under the name of Smith, Jones & Doe, P.C. Smith is the only shareholder. Neither Jones nor Doe is a shareholder in the firm: they do not share in profits or expenses of the firm. Smith assumed that incorporation took his firm out of the ethical requirement relating to holding oneself out as a partnership.

Id. Surprisingly, the Illinois Bar prohibited use of that name.

[U]se of the law firm name Smith, Jones & Doe, P.C. when Jones and Doe are not shareholders, principals or other equity holders therein is misleading to the public. A client who hires Smith, Jones & Doe, P.C. could be under the misunderstanding that Jones and Doe may be held jointly and severally liable for professional malpractice committed by the firm, or that the firm is in compliance with Supreme Court Rule 722, when that is not in fact the case.

Accordingly, in order to comply with Rules 7.1 and 7.5(d), either the names Jones and Doe must be removed from the law firm name or they must be made shareholders or given an equity interest in the professional corporation.

Id.

(j) An "of counsel" relationship requires that the "of counsel" lawyer have a continuing close relationship with the law firm, which does not constitute only a referral arrangement or similar marketing scheme. However, such lawyers obviously are not full-time partners in the firm.

The difficulty of analyzing all the effects of "of counsel" relationships (including the implications for purposes of law firm names) has become more difficult recently.

The "of counsel" designation formerly was limited to semi-retired partners. However, law firms now use that designation for part-time associates, folks who are valuable enough to stay at the firm, but not eligible for full-time partnership positions, etc.

Another complicating factor is the ability of a lawyer with an "of counsel" relationship with one firm to have a similar relationship with another firm -- which also complicates law firm name issues.

Over twenty years ago, the ABA issued an ethics opinion indicating that a law firm may keep the name of an "of counsel" lawyer in the law firm name if the lawyer had been active at the firm before taking that designation -- but could not add the name if the "of counsel" lawyer had just joined the firm.

- ABA LEO 90-357 (5/10/90) (explaining that a law firm cannot use a lawyer's name in the law firm name if he has a new "of counsel" relationship with a law firm, but may do so if a retired partner of the firm has such a relationship with the firm; "The Committee believes that in the case of a new or recent firm affiliation there is no escaping an implication that a name in the new firm name implies that the lawyer is a partner in the firm, with fully shared responsibility for its work. On the other hand, the Committee also believes that there is not a similar misleading implication in the use of a retired

partner's name in the firm name, while the same partner is of counsel, where the firm name is long-established and well-recognized.").

Since the ABA issued that opinion, states have taken differing approaches to this issue. For instance, in 2007 the District of Columbia Bar indicated that a lawyer having an "of counsel" relationship with more than one firm may have his or her name included in both law firms' names.

- District of Columbia LEO 338 (2/07) ("A lawyer may have an 'of counsel' relationship with one firm and be a partner in a different firm, so long as the lawyer's 'of counsel' association with the first firm is regular and continuing and the lawyer is generally available personally to render legal services to that firm's clients; and the two firms are treated as one for conflicts of interest purposes. When a former partner continues to render legal services to the firm's clients, that firm may retain the former partner's name in the firm name, even though the former partner also practices in a new firm with a name that also includes his name."; three members of the committee dissented).

In 2008, the Ohio Bar essentially took the ABA approach, but with an even more explicit requirement -- that an "of counsel" lawyer whose name appears in the law firm name must have been a named partner or shareholder before assuming the "of counsel" status.

- Ohio LEO 2008-1 (2/8/08) ("A lawyer in a law firm may be 'of counsel' to another law firm if the requisite continuing relationship exists between the lawyer and the law firm. The requisite continuing relationship is other than as a partner or associate or its equivalent and is more than a mere forwarder or receiver of legal business, more than a one-time advisor/consultant relationship, and more than a one-case relationship. The 'of counsel' relationship is continuing, close, regular, and personal. A lawyer who enters an 'of counsel' relationship must be aware of the accompanying ethical implications. A lawyer who serves as 'of counsel' must have an active license to practice law. A law firm may continue to include in the firm name the name of a lawyer who was already a name partner or name shareholder but who becomes 'of counsel' to the law firm. A law firm may not include in the firm name the name of an 'of counsel' lawyer who was not already a name partner or name shareholder of the law firm. The listing of an out-of-state lawyer as 'of counsel' to an Ohio law firm must include the jurisdictional limitation of the 'of counsel' lawyer on the letterhead. An 'of counsel' lawyer is considered a lawyer in the same firm for purposes of division of fees under Rule 1.5(e); therefore, the restrictions on division of fees with a lawyer not in the same firm

do not apply to a lawyer who is properly designated as 'of counsel.' A lawyer may serve as 'of counsel' to more than one law firm. Conflicts of interest are attributed in an 'of counsel' relationship. 'Of counsel' relationships may be entered into between Ohio lawyers and law firms and out-of-state lawyers and law firms.").

In 2010, the Nebraska Bar took essentially the same approach, but added the prohibition on a law firm using an "of counsel" lawyer's name in the firm name if the lawyer had withdrawn from the firm to practice elsewhere.

- Nebraska LEO No. 10-04 (2010) (analyzing the following situation: "An attorney retired from the practice of law approximately three years ago. At that time, he was one or two partners in a limited liability partnership law firm. The remaining partner in the firm purchased the majority of his interest in the partnership; however[,] the retiring partner retains a 0.01% interest in the partnership. The last name of the retired partner continues to be part of the firm name and the retired partner is listed on the firm's letterhead and in advertisements as 'of counsel.' Since his retirement, the attorney has conducted no legal business and his status with the Nebraska State Bar Association is characterized as 'regular inactive.'"; explaining the "of counsel" relationship; "The ABA Ethics Committee, which formerly had limited 'of counsel' designations to no more than two firms, has more recently taken the position that there is no formal numerical limit that need be placed on 'of counsel' relationships. The committee warned, however, that as a practical matter, 'of counsel' designations will be circumscribed both by the requirement that each relationship be close and continuing and by the effect of imputed disqualification that extends among all lawyers and firms connected by the 'of counsel' relationship. ABA Formal Ethics Op. 90-357 (1990)."; "The more traditional view is that a lawyer may be 'of counsel' to only one firm at a time. See Iowa Ethics Ops. 82-19 (1982) and 87-9 (1987). Texas limits 'of counsel' affiliations to two firms. Texas Ethics Op. 402 (1982). However, most states now follow the ABA's view rather than the traditional view."; noting that "[v]arious types of practitioners have been deemed acceptable for 'of counsel' affiliation, including the following: sole practitioner -- Connecticut Informal Ethics Op. 99-31 (1999)[;] retired lawyer -- Florida Ethics Op. 00-1 (2000)[;] retired judge -- New York County Ethics Op. 727 (1999)[;] withdrawing partner or associate -- Pennsylvania Informal Ethics Op. 7-81 (1997)[;] part-time practitioner -- South Carolina Ethics Op. 98-31 (1998)[;] lawyer in another firm -- Missouri Informal Ethics Op. 980143[;] non-practicing government official or law professor - Iowa Ethics Op. 87-12 (1987)[;] spouse -- Maine Ethics Op. 142 (1994)."; ultimately concluding that a law firm's "name" may include the name of a retired partner, but may not do so if the retired partner is practicing law elsewhere -- even if the retired partner is still "of counsel" to the firm; "If a named partner of a firm merely withdraws from the firm to practice elsewhere, there is general agreement

that continued use of that attorney's name in the firm name is misleading and therefore impermissible under Model Rule 7.1 However, if the named partner who withdraws to practice elsewhere maintains an affiliation with the former firm in an 'of counsel' capacity, there is a split of opinion on whether the firm name can retain the attorney's name."; "Some ethics committees have concluded that a firm name cannot retain the name of a former partner who withdraws to practice elsewhere even if the attorney remains affiliated with the former firm as 'of counsel.' See Rhode Island Ethics Op. 94-65 (1994); Florida Ethics Ops. 71-49 (1971) and 00-1 (2000). Both the Rhode Island and Florida committees concluded that a named partner who withdraws from a law firm to practice elsewhere but remains 'of counsel' to the firm may not continue to include his name in the firm name because such inclusion connotes a partnership and is misleading to the public."; "Other committees have allowed a firm name to retain the name of a partner who withdrew to actively practice elsewhere but became 'of counsel' to the former firm. See South Carolina Ethics Op. 98-31 (1998); New York City Ethics Op. 1995-9 (1995); Vermont Ethics Op. 83-07."; ultimately concluding that "[a]n attorney may be listed as 'of counsel' on a law firm's letterhead and in advertising, as long as the attorney has on-going regular contact with the members of the firm for purposes of providing consultation and advice. In Nebraska, there is no numerical limit on the number of 'of counsel' designations for attorneys as long as each relationship with a law firm exists pursuant to active involvement such that it meets the required definition. An 'of counsel' designation may only be utilized when the attorney's responsibilities in that role are factually correct."; "A firm name may retain the name of a retired partner or principal of the firm. If the retired partner assumes 'of counsel' status to the firm, the firm name may continue to retain the attorney's name. If the retired partner resumes the practice of law outside and apart from the firm, continued use of the attorney's name in the former firm's name is misleading to the public and therefore prohibited. This is true even if the attorney becomes 'of counsel' to the former firm after resuming practice. Use of an 'of counsel' attorney's name in a firm name must be limited to the circumstance in which a named partner or principal has retired from active practice and assumed 'of counsel' status to the firm that bears the attorney's name.").

Best Answer

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

Law Firm Trade Names and Telephone Numbers

Hypothetical 10

In an effort to improve your firm's recognition in your community, you want to start using a trade name that is likely to draw the attention of the increasing number of clients that select lawyers over the internet. You also want to start using a snazzy 800 number.

May you use the following names for your law firm:

- (a) "The West End Law Firm"?

MAYBE

- (b) "The Best West End Corporate Law Firm"?

NO (PROBABLY)

May you use the following 800 numbers for your law firm:

- (c) 1-800-HURT-BAD?

YES (PROBABLY)

- (d) 1-800-2WIN-BIG?

NO (PROBABLY)

- (e) 1-800-GET-CASH?

NO (PROBABLY)

Analysis

(a) The ABA Model Rules allow a lawyer to use a trade name in private practice "if it does not imply a connection with a government agency or with a public or

charitable legal services organization and is not otherwise in violation of Rule 7.1," which prohibits false or misleading communications. ABA Model Rule 7.5(a).

States take one of two basic approaches to law firms' use of trade names.

First, some states flatly prohibit trade names.

- Ohio LEO 2010-1 (2/5/10) ("It is improper for a lawyer to name a law firm the lawyer's surname followed by the words Intellectual Property or the initials IP. The use of an area of practice or specialization in a law firm name constitutes a trade name. Prof. Cond. Rule 7.5(a), Gov. Bar. R. III(2), and Prof. Cond. Rule 7.4 do not authorize the inclusion of an area of practice or specialization in a law firm name and Prof. Cond. Rule 7.5 specifically does not allow a trade name.").
- Rodgers v. Comm'n for Lawyer Discipline, 151 S.W.3d 602, 611, 610, 611 (Tex. App. 2004) (suspending for two years a lawyer using the trade name "Accidental Injury Hotline" in the yellow pages; noting that a Texas ethics rule "prohibits a lawyer's use of three types of names: (1) a trade name; (2) a name that is misleading as to the lawyer's identity; or (3) a firm name with names other than those of the lawyers in the firm"; also noting that the yellow page advertisement did not include necessary disclosures and disclaimers; "Rule 7.01(e) provides that '[a] lawyer shall not advertise in the public media or seek professional employment by written communication under a trade or fictitious name.' Id. 7.01(e). Rodgers contends that the trade name rule prohibits only the use of deceptive trade names and that rule 7.01(a) defines trade name as 'a name that is misleading as to . . . identity.'"; "We reject Rodgers's interpretation of rule 7.01(a)."; "We have previously defined a 'trade name' as 'a designation that is adopted and used by a person either to designate a good he markets, a service he renders, or a business he conducts.'" . . . Moreover, comment 1 to rule 7.01 notes that 'trade names are inherently misleading.'"; "Thus, we conclude that to be prohibited under rule 7.01 a trade name does not have to be facially deceptive."), review denied, No. 05-0017, 2005 Tex. LEXIS 243 (Tex. Mar. 11, 2005) (unpublished opinion).
- Arizona LEO 01-05 (3/2001) (citing Arizona ER 7.5(a) for the proposition that "[a] trade name may not be used by a lawyer in private practice").

The Texas ban on trade names carries such weight that in 2013 the Texas Bar responded to a lawyer's inquiry about whether another lawyer's use of a trade name was so serious that it required reporting to the Texas Bar.

- Texas LEO 632 (7/2013) ("The Texas Disciplinary Rules of Professional Conduct do not require a Texas lawyer to report to the appropriate disciplinary authority another Texas lawyer's use of a trade name that is based on the name of the city where the second lawyer practices even though use of such trade name is prohibited by the Texas Disciplinary Rules. A report concerning another lawyer's use of a trade name that is prohibited under the Texas Disciplinary Rules would be required only if the Texas lawyer who considered making such a report concluded that in the particular circumstances the other lawyer's use of the trade name raised a substantial question as to such lawyer's honesty, truthworthiness or fitness as a lawyer in other respects.").

In 2002, the District of Nevada held that a state's total ban on trade names violated the constitution. In Michel v. Bare, 230 F. Supp. 2d 1147, 1148 (D. Nev. 2002), the court analyzed the following Nevada ethics rule:

Rule 199. Firm names and letterhead.

1. A lawyer shall not use a firm name, letterhead, or other professional designation that violates Rule 195. The firm name shall contain the names of one or more living, retired, or deceased members of the law firm. No trade names shall be used other than those utilized by non-profit legal services organizations; however, phrases such as "the law offices of" or "and associates" shall be permissible.

The court pointed to the state bar's executive director's affidavit, which the bar submitted to the court in support of that rule.

[T]he Commission's concerns over the "nominal presence" of law firms in the state, the proliferation of "storefront" operations in Nevada, and the overriding notion that Nevada citizens should be informed and aware of the identity of their counsel. Also in the trade name context, the Commission was concerned about the public's potential confusion between licensed attorneys operating under trade names and non-lawyers who use trade names to prey upon the public and as a shield for the unauthorized practice of law.

Id. at 1152-53 (internal citation omitted). The court rejected this worry, and ultimately held that Nevada's total prohibition on trade names violated the constitution's guarantee of free speech and equal protection.

More recently, the Fifth Circuit allowed a lawyer to challenge a Texas statutory prohibition on advertisements using the words "Texas workers' compensation."

- Gibson v. Tex. Dep't of Ins., 700 F.3d 227, 232, 237-38 (5th Cir. 2012) (finding that a lawyer could proceed in a challenge to a Texas law's prohibition on any advertisement using the words "Texas Workers' Compensation"; "John Gibson is an attorney who represents plaintiffs in workers' compensation claims and contested cases in Texas. Pursuant to this practice, Gibson maintains a website under the domain name of 'texasworkerscomplaw.com' in which he discusses matters related to Texas workers' compensation law. He also uses the website to advertise and disseminate information about his law practice."; "On February 7, 2011, Gibson received a cease and desist letter from the Texas Department of Insurance, Division of Workers' Compensation ('DWC'), requesting that he no longer use the above-stated domain name."; "Because Texas has made no serious attempt to justify this regulation as narrowly tailored to a substantial state interest, the district court's order dismissing Gibson's as-applied challenge was in error, and this case is remanded to allow Texas the opportunity to develop additional factual findings to support the statute's constitutionality.").

Second, some states prohibit only inherently deceptive trade names.

- Florida Rule 4-7.21 cmt. ("Subdivision (a) precludes use in a law firm name of terms that imply that the firm is something other than a private law firm. Three examples of such terms are 'academy,' 'institute' and 'center.' Subdivision (b) precludes use of a trade or fictitious name suggesting that the firm is named for a person when in fact such a person does not exist or is not associated with the firm. An example of such an improper name is 'A. Aaron Able.' Although not prohibited per se, the terms 'legal clinic' and 'legal services' would be misleading if used by a law firm that did not devote its practice to providing routine legal services at prices below those prevailing in the community for like services.").
- Georgia Rule 7.5(e) ("A trade name may be used by a lawyer in private practice if: (1) the trade name includes the name of at least one of the lawyers practicing under said name. A law firm name consisting solely of the name or names of deceased or retired members of the firm does not have to include the name of an active member of the firm; and (2) the trade name does not imply a connection with a government entity, with a public or charitable legal services organization or any other organization, association or institution or entity, unless there is, in fact, a connection.").
- Michael Booth, Law Firms Can Adopt Trade Names That Don't Mislead, N.J. L.J., Mar. 14, 2013 ("Law firms no longer have to be known by an alphabet soup of partners' names, but they can't call themselves 'alpha' firms either.";

"That's the nub of Thursday's long-awaited New Jersey Supreme Court ruling that law firms can adopt trade names as long as they don't include misleading, comparative or superlative terms."; "Thus, the Pennsylvania-based Alpha Center for Divorce Mediation, which operates three offices in New Jersey, has to drop the 'alpha' -- which suggests priority or primacy -- but can otherwise use its trade name, with the moniker of a New Jersey partner appended.": "Examples of proper nomenclature: 'Millburn Tax Law Associates, John Smith, Esq.' or 'Millburn Personal Injury Group, John Smith, Esq.'"; "But forget about using 'Best Tax Lawyers' or 'Tax Fixers.'"; "The unanimous court said it was directing amendment of Rule of Professional Conduct (RPC) 7.5 to bring New Jersey into conformity with at least 40 other states that permit trade names with no apparent catastrophic effects."; "On balance, we have become convinced that trade names need not be forbidden in New Jersey and that we should align our law firms' naming options more in keeping with our sister states' recognition that use of trade names can be incorporated in the profession without harm to the public," Justice Jaynee LaVecchia wrote for the court."; "Amended RPC 7.5 will allow a law firm name that 'describes the nature of the firm's legal practice in terms that are accurate, descriptive, and informative, but not misleading, comparative, or suggestive of the ability to obtain results.' The trade name must be accompanied by the name of the managing attorney."; "Additionally, a firm that includes the phrase 'legal services' in its name must inform clients that it is not affiliated with any governmental, quasi-governmental or nonprofit provider, such as Legal Services of New Jersey. And the phrase 'Legal Aid' is prohibited outright.").

- North Carolina LEO 2004-9 (10/21/04) (prohibiting a lawyer from using the name "North Star Law Office"; explaining that various North Carolina laws "require the official name of a professional corporation or a professional limited liability company to contain the surname of one or more of its shareholders or members (or the surname of one or more lawyers who owned an interest in an immediate predecessor law firm) and prohibit the official name from containing any other name, word, or character with limited exceptions"; also prohibiting the law firm from registering the name "North Star Law Office" as a trade name for the law firm, although the firm used a lawyer's name in the Articles of Incorporation and Organization; explaining that the use of trade names is permissible generally, but that this trade name would be misleading; noting that "the location of the law firm in the North Star Building, implies that North Star Financial Group and Attorney A's firm are affiliated. Clients who are referred by the financial planning company to the law firm for legal services associated with their financial plan may erroneously conclude that they do not have a right to legal counsel of their choice but must use the services of Attorney A. Moreover, clients who use the services of the North Star Financial Group may not understand that the services that they receive from the financial planning company do not carry with them the protections afforded by the client-lawyer relationship such as confidentiality and the prohibitions on conflicts of interest.").

- California LEO 2004-167 (2004) (prohibiting a law firm from using the trade name "Worker's Compensation Relief Center," because it implies a relationship with a governmental agency; explaining that a lawyer might be able to use such a trade name by including a prominent disclaimer such as "A Private Law Firm" after the name).
- Maryland LEO 2004-09 (2/26/04) (explaining that a law firm may not use the trade name "USA LAW INC." because it might imply some connection to a public agency).
- Maryland LEO 2004-10 (2/26/04) (prohibiting a lawyer from using the trade name "Consumer Legal Services P.C." because the consumer might believe that the law firm is affiliated "with a public or charitable legal services organization").
- Utah LEO 01-07 (8/29/01) (indicating that a law firm could use the trade names "Legal Center for the Wrongfully Accused" and "Legal Center for Victims of Domestic Violence" -- as long as the law firm used the same trade names in all pertinent matters; explaining that "[s]elective use of the trade names in question, however, opens the door to abuses that could intentionally or unintentionally mislead others. By using the name 'Legal Center for the Wrongfully Accused' only in limited situations where the law firm deems it 'appropriate,' the law firm affirmatively represents that some of its clients are 'wrongfully accused,' while others are not.").
- Virginia Rule 7.5(a) ("A trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency or with a public or charitable legal services organization and is not otherwise in violation of Rule 7.1.").
- Virginia Adver. Op. A-0103 (5/26/93) (allowing the use of a corporate, trade, or fictitious name as long as the lawyer actually practices under that name).
- Virginia LEO 937 (6/18/87) (a professional corporation may practice law under a fictitious name).
- Virginia LEO 935 (6/11/87) (a law firm may call itself "Accident Adjustment Service, PC" or "Attorney's Accident Adjustment Service, PC.").

A January 2011 Fifth Circuit decision overturning some of Louisiana's lawyer marketing rules upheld Louisiana's prohibition on lawyer marketing communications "utilizing a nickname, moniker, motto or trade name that states or implies an ability to

obtain results in a matter." Public Citizen Inc. v. La. Attorney Disciplinary Bd., 632 F.3d 212, 224 (5th Cir. 2011) (citation omitted).

- Public Citizen Inc. v. La. Attorney Disciplinary Bd., 632 F.3d 212, 225 (5th Cir. 2011) (pointing to satisfactory evidence supporting the prohibition; "The court is satisfied that there is reliable and specific evidence on the record sufficient to support the restriction imposed by Rule 7.2(c)(1)(L). First, the survey and focus group responses consistently reveal that the advertisements containing these mottos misled the public, improperly promised results, and implied that the advertising lawyers could manipulate Louisiana courts. Second, they present the perceptions of a significant number of people from each of the two pools of respondents. One-half of each survey was directed at the use of mottos and nicknames in attorney advertisements. Participants were either shown existing attorney advertisements making use of mottos or asked whether they recognized specific mottos. Finally, the questions asked about the shown or recognized advertisements were not abstract or hypothetical. They targeted the specific elements of commercial speech implicated by this rule and sought and received the reactions of the public and Bar Members to that type of speech. The result is evidence that directly pertains to and supports the restriction set forth in Rule 7.2(c)(1)(L). The court holds that LADB has met its burden to show that this rule will advance its substantial interest in preventing consumer confusion." (footnote omitted); also noting that the Louisiana rule does not completely prohibit all nicknames or mottos, and therefore represents a constitutional "narrowly drawn" restriction).

In the Public Citizen decision, the Fifth Circuit acknowledged that just one year earlier the Second Circuit had found New York's similar prohibition unconstitutional.

- Alexander v. Cahill, 598 F.3d 79, 94-95, 95 (2d Cir.) ("[T]he Task Force Report did not recommend outright prohibition of all such trade names or mottos -- it simply acknowledged that such names are often misleading. Defendants' rule, by contrast, goes further and prohibits such descriptors -- including, according to the Attorney General, Alexander & Catalano's own 'Heavy Hitters' motto -- even when they are not actually misleading. The Task Force Report therefore fails to support Defendants' considerably broader rule."; "There is a dearth of evidence in the present record supporting the need for § 1200.6(c)(7)'s prohibition on names that imply an ability to get results when the names are akin to, and no more than, the kind of puffery that is commonly seen, and expected, in commercial advertisements generally. Defendants have once again failed to provide evidence that consumers have, in fact, been misled by the sorts of names and promotional devices targeted by § 1200.6(c)(7), and so have failed to meet their burden for sustaining this prohibition under Central Hudson [Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n], 447 U.S. 557 (1980).", cert. denied, 131 S. Ct. 820 (2010).

However, the Fifth Circuit found that the Louisiana Bar had presented adequate evidentiary support for its prohibition, while the New York Bar apparently had not presented similarly convincing evidence to the Second Circuit. Public Citizen, 632 F.3d at 226.

Interestingly, trademark law can also affect the analysis of law firm mottos.

- Zack Needles, Pitt & Associates Sued by Lundy Law Over Firm Slogan, Legal Intelligencer, Mar. 14, 2013 ("Philadelphia personal injury firm Lundy Law has sued fellow Philadelphia personal injury firm Larry Pitt & Associates, claiming the Pitt firm's 'Remember This Number' slogan is too close to Lundy Law's 'Remember This Name' slogan."; "In a memorandum in support of its motion for preliminary injunction filed March 4 in the United States District Court for the Eastern District of Pennsylvania, Lundy Law argued that Pitt & Associates' slogan is 'likely to confuse, deceive and mislead consumers.'"; "In a separate complaint also filed March 4, Lundy Law alleged trademark infringement, unfair competition and false designation of origin under the federal Lanham Act."; "Lundy Law said in its memorandum that it has used 'Remember This Name' in its advertising since May 2011 and became aware this past January that Pitt & Associates had begun using the slogan 'Remember This Number.'"; "'Lundy Law's use of 'Remember This Name' is, for example, used exclusively and extensively on the outside and extensively on the inside of transit buses, subway and commuter rail cars . . . and Pitt specifically used 'Remember This Number' on posters . . . on the inside of buses, subway and commuter rail cars in the same size, configuration and location,' Lundy Law said in its memorandum."; "Lundy Law alleged in its memorandum that Pitt & Associates' advertising campaign 'was specifically designed to and has likely caused the public to believe, contrary to fact, that Pitt's business activities and services offered under the name and mark 'Remember This Number' are sponsored, licensed and/or otherwise approved by, or in some way connected or affiliated with Lundy Law.'").

(b) For obvious reasons, a law firm's name may violate some other ethics rules -- including the rules governing unverifiable comparisons between the lawyers in that firm and lawyers in other firms. ABA Model Rule 7.1 cmt. [3].

It is unlikely that any bar would approve a law firm name that contains the word "best."

(c)-(e) The New York ethics rules contain a comment explicitly discussing 1-800 numbers.

Some lawyers and firms may instead (or in addition) wish to use telephone numbers that contain a domain name, nickname, moniker, or motto. A lawyer or law firm may use such telephone numbers as long as they do not violate any Rules, including those governing domain names. For example, a personal injury law firm may use the numbers 1-800-ACCIDENT, 1-800-HURT-BAD, or 1-800-INJURY-LAW, but may not use the numbers 1-800-WINNERS, 1-800-2WIN-BIG, or 1-800-GET-CASH. (Phone numbers with more letters than the number of digits in a phone number are acceptable as long as the words do not violate a Rule.) See Rule 7.1, Comment [12].

New York Rule 7.5 cmt. [4].

Best Answer

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

b 7/14

Law Firm Associations and Other Relationships

Hypothetical 11

As the managing partner of a medium-sized firm, you have read all the articles about the difficulties of medium-sized firms surviving in the next decade. Over the last six months, you have spoken with a number of managing partners of similar firms, and you have just unveiled your plans for a network of medium-sized firms throughout the Southeast. You envision sharing library resources, certain computer hardware, and other non-confidential materials.

You see the main benefit as being able to claim that you are "affiliated" with other law firms that combined would have over 300 lawyers. However, you do not plan to actually merge with the other firms. Instead, you intend to remain independent in the selection and representation of clients -- although you expect there to be some joint clients and multiple referrals among members of the group.

- (a) May you indicate on your website and in other places that you are "affiliated" with the other law firms in the group?

MAYBE

- (b) Will your firm be able to take cases against clients represented by the other firms in the group?

MAYBE

- (c) Will such an arrangement render your firm potentially liable for the malpractice of the other firms in the group?

YES (PROBABLY)

Analysis

This hypothetical highlights the risks inherent in law firms' increasing willingness to establish relationships with other law firms.

As one would expect, lawyers who share offices and hold themselves out as partners risk a judicial finding that the malpractice of one will render the other liable.¹

This hypothetical involved a more attenuated relationship among the lawyers.

(a) The ABA has addressed this issue in two LEOs.

In 1984, the ABA indicated that firms could use words like "associated" and "affiliated" as long as the firms treated themselves as the same firm for conflicts of interest and confidentiality purposes. ABA LEO 351 (10/20/84). However, ten years later, the ABA indicated that using words like "affiliated," "associated," "correspondent," and "network" violate the anti-fraud provision of ABA Model Rule 7.1 -- unless the firms make a full and meaningful explanation of the terms to any prospective clients (in the retainer letter or elsewhere). ABA LEO 388 (12/5/94).

States' approach to the use of these terms reflects the ABA's increasing skepticism.

Some states permit law firms to use the terms, as long as they provide sufficient explanation.

- Philadelphia LEO 2006-3 (6/2006) (holding that two law firms may form a partnership with each other while maintaining their separate operations, but requiring them to treat the two firms as one for conflicts purposes; obtain client consent to disclose confidential information to the other firm; and advise clients of any fee-sharing; insist that their lawyers disclose their affiliation on letterhead and elsewhere).
- Virginia LEO 1813 (3/16/05) (explaining that law firms may use the term "affiliated" or "associated" in describing their relationship, as long as one firm is "closely associated or connected with the other lawyer or firm in an ongoing and regular relationship."; explaining that the terms are analogous to the "of

¹ See, e.g., *Estate of Holmes v. Ludeman*, No. L-00-1204, 2001 Ohio App. LEXIS 4501, at *8 (Ohio Ct. App. Oct. 5, 2001) (denying a summary judgment motion by a lawyer sued for malpractice as a result of the misappropriation of an estate's funds by a lawyer with whom the defendant shared an office; noting such facts as the defendant's indication on an insurance application that he and the wrong-doer were "partners").

counsel" relationship, which "must be close and regular, continuing and semi-permanent, and not merely that of a forwarder-receiver of legal business."; holding that it may be necessary for the law firms to use "[m]ore descriptive language" if the relationship between them involves one firm's limited availability to handle certain types of matters, or availability to handle matters in another state; also explaining that law firms using these terms must also ordinarily handle conflicts as if they were one single firm).

Some states have gone even further, and completely prohibited use of the term "associated" or "affiliated."

- New Jersey LEO 694 (11/3/03) (prohibiting two law firms from using the term "affiliated" because it is misleading; forbidding the two firms from entering into an agreement for mandatory referrals; explaining that reciprocal fee sharing would be unethical absent client consent; noting that the sharing of facilities by the two firms might create confidentiality problems).
- New York City LEO 82-28 (undated) (reiterating that "the listing of the office of a separate law firm on a letterhead or in an announcement as an 'associated,' 'affiliated,' 'correspondent,' or 'foreign' office is misleading and a violation of the Code of Professional Responsibility"; holding that the terms are misleading when used in connection with a foreign law firm that is not authorized to practice law in New York, even if it they are accompanied by a detailed explanation or disclaimer about the lack of a partnership relationship and the inability of the other firm to practice law in New York).
- New York City LEO 81-78 (undated) ("The designation 'associated' is misleading. . . . The designation is not recognized by the Code of Professional Responsibility. . . . It conveys no precise meaning. It tells the public and other lawyers nothing about the relationship between the two firms or the respected divisions of responsibility").
- New York City LEO 81-72 (undated) ("The listing of 'affiliated' or 'corresponding' lawyer is improper, because such listings do not convey a sufficiently precise description of the lawyer's relationship to the listing lawyer or law firm and thus are misleading"). The Florida Bar also takes this position. These bars only allow use of the terms "partner," "associate," and "of counsel."

(b) The court in Mustang Enterprises, Inc. v. Plug-In Storage Systems, Inc., 874 F. Supp. 881 (N.D. Ill. 1995), disqualified the plaintiff's law firm because it listed itself as "affiliated" with a law firm that performed work for the defendant.

Whatever benefits Hill Firm [the plaintiff's firm] and Bachman Firm [defendant's patent counsel] may view themselves as deriving from holding each other out as an "affiliated firm," the price that must be paid for deriving those benefits is the inability of either firm to litigate against clients of the other firm under circumstances such as those presented here.

Id. at 890. Under this approach (which probably represents the correct analysis), law firms which advertise themselves as "affiliated" probably will be deemed to be the same firm for conflicts purposes. For this reason, law firms that cooperate in some informal way generally require their participants to include disclaimers whenever the law firms mention their membership in the group.

(c) In addition to the ethics risks mentioned above, law firms identifying other firms as their "affiliates" also risk being considered the same firm for malpractice purposes.

In Johnson v. Shaines & McEachern, P.A., 835 F. Supp. 685, 688 (D.N.H. 1993), a number of lawyers created a "law group" that jointly marketed to and serviced clients, although each firm in the group maintained "its separate legal practices, including separate clients." Each firm advertised the other firms as "affiliated offices." Id. at 690. A disgruntled client of one firm sued another "affiliated office." That firm moved for summary judgment, claiming that the client was never a "joint" client -- but rather an individual client of the firm that had committed the alleged malpractice. Id. at 688. However, the court denied the summary judgment motion.

Such a frightening scenario leads most law firm groups to insist that their members include strict disclaimers whenever they mention their membership in the group.

Best Answer

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

b 7/14

Use of Individual Titles

Hypothetical 12

As your law firm has grown from about 90 to 900 lawyers, several issues have arisen about what titles lawyers may use when referring to themselves in marketing materials and elsewhere. Coincidentally, several issues involving titles arose this morning.

- (a) May a retired judge joining your firm refer to herself as a "retired judge" on letterhead and business cards?

NO (PROBABLY)

- (b) May one of your lawyers who deals frequently with university professors refer to himself as "Dr." (like every other lawyer at your firm, this lawyer received a juris doctor degree)?

MAYBE

One of your firm's associates just read a newspaper article about the use of titles, and asked your opinion about two recent incidents.

- (c) May a disbarred lawyer use the title "JD" or "Esquire" after his or her name?

NO (PROBABLY)

- (d) May a nonlawyer use the term "Esq." after his or her name?

NO (PROBABLY)

Analysis

As in other areas, states take differing positions on lawyers' use of titles.

- (a) The rules governing the use of titles such as "judge" implicate the prohibition on misleading prospective clients into thinking that the lawyer has some special advantage or power over the judicial process.

Some states prohibit former judges from using their title in formal communications such as law firm names, letterheads, or business cards.

- Michigan LEO RI-327 (9/21/01) (prohibiting a former judge from practicing law using the title "Honorable XXX Doe and Associates").
- Ohio LEO 93-8 (10/15/93) (indicating that a retired judge may include in announcement cards and law directory listings a "factual statement of prior judicial positions held," but may not use the following terms on business cards: "Judge"; "Honorable"; "Former Judge").
- Illinois LEO 92-10 (1/22/93) (a former judge now practicing as a lawyer may not refer to himself as "judge" in "business negotiations or professional conversations," and may not include the term "Retired Judge" on business cards).

Some states generally allow the use of titles on letterhead and business cards, but often with specific restrictions.

- Florida Rule 4-7.13(b)(10) ("Examples of Deceptive and Inherently Misleading Advertisements. Deceptive or inherently misleading advertisements include, but are not limited to advertisements that contain. . . a judicial, executive, or legislative branch title, unless accompanied by clear modifiers and placed subsequent to the person's name in reference to a current, former or retired judicial, executive, or legislative branch official currently engaged in the practice of law. For example, a former judge may not state 'Judge Doe (retired)' or 'Judge Doe, former circuit judge.' She may state 'Jane Doe, Florida Bar member, former circuit judge' or 'Jane Doe, retired circuit judge. . . .").

Beyond that basic rule, there are a number of subtleties that make the analysis more difficult.

For instance, the ABA has indicated that retired judges can use the title if they will be engaged in a profession or business other than practicing law. In ABA LEO 391, the ABA indicated that a former judge should not use the title "Judge" when acting as an expert witness or otherwise in the courtroom or "in connection with legal proceedings." The ABA also concluded that

it is improper for a former judge who returns to the practice of law to refer to himself, or encourage others to refer to him, by any title that refers to his former judicial status.

ABA LEO 391 (4/24/95) (emphasis added). The ABA explained that:

We believe that the use of the title "Judge" in legal communications and pleadings, as well as on a law office nameplate or letterhead, is misleading insofar as it is likely to create an unjustified expectation about the results a lawyer can achieve and to exaggerate the influence the lawyer may be able to wield. In fact, there appears to be no reason for such use of the title other than to create such an expectation or to gain an unfair advantage over an opponent. Moreover, the use of judicial honorifics to refer to a lawyer may in fact give his client an unfair advantage over his opponents, particularly in the courtroom before a jury. . . . This Committee joins the majority view among these opinions in concluding that former judges should be barred from using an honorific once they return to the practice of law.

Id. On the other hand, the ABA permitted former judges to explain their former job.

In reaching this conclusion, the Committee emphasizes that it is perfectly proper for a former judge to inform potential clients of his prior judicial experience. For example, if the former judge is seeking to offer his services as an arbitrator, mediator, or similar neutral, roles often undertaken by former judges in the area of private alternative dispute resolution, the ex-judge would certainly be free to describe his judicial experience. So long as the description is accurate, and does not convey an implication of special influence, its use will be consistent with the prohibitions discussed in this opinion.

Id.

(b) Law graduates formerly obtained a bachelor's degree in law ("LLB"), but starting several decades ago began receiving a "juris doctor" ("JD") degree. Some have attributed this change to the more lenient treatment of "doctors" in the military draft process, or the more favorable rank and pay given to military officers or government employees who had a "doctorate."

In any event, the term can be confusing. A July 27, 2011, New York Times article used the following paragraph to describe University of California at Berkeley law professor Goodwin Liu, who had been nominated by Governor Brown to the California Supreme Court after Lui failed to gain the United States Senate approval for a seat on the Ninth Circuit Court of Appeals.

Mr. Lui, 40, a Taiwanese-American, was born in Georgia and largely raised in California. He has degrees from Stanford (a bachelor's), Oxford (a master's) and Yale (a doctorate).

Jesse McKinley, After Defeat by Filibuster, A California Justice Pick, N.Y. Times, July 27, 2011, at A-12. Lui was a Yale Law School graduate, and had a Yale "JD," not a Yale Ph.D.

Ironically, in 2012 Yale Law School announced a program that would entitle graduates to a Ph.D. in law.

Yale Law School has a reputation for turning out graduates who go on to become law professors. By the school's own accounting, about ten percent of professors currently teaching in US law schools have Yale law degrees. The school hopes to increase that number with a new PhD program in law, aimed at law school graduates who want to pursue careers in teaching and research.

Dean Robert Post '77JD says the program -- the first of its kind -- reflects the need to "bring legal scholarship back to law." The program, which will begin in the fall of 2013, will offer free tuition and a living stipend. Students will spend two years taking coursework and exams and a third and final year on a dissertation.

Neena Satija, That's *Doctor Lawyer*, thank you, Yale Alumni Magazine, Sept./Oct. 2012, at 20.

States disagree about whether lawyers with a juris doctor degree may call themselves "Dr." in marketing materials.

Until its 2013 changes, Florida allowed use of the title, with a disclaimer.

- Former Florida Rule 4-7.2 cmt. ("Another example of a misleading omission is an advertisement for a law firm that states that all the firm's lawyers are juris doctors but does not disclose that a juris doctorate is a law degree rather than a medical degree of some sort and that virtually any law firm in the United States can make the same claim.").

North Carolina generally prohibits lawyers from using the term, except in academic communities.

- North Carolina LEO 2007-5 (4/20/07) (explaining that "RPC 5 prohibits a lawyer from referring to himself as holding a doctorate or using the title 'doctor' to refer to himself."; "[I]n academic communities, including community colleges and other post-secondary school institutions of higher education, where individuals with doctoral and other advanced degrees comparable to the juris doctor degree are routinely and traditionally referred to as 'doctor,' it is not misleading and not inappropriate for a person holding a juris doctor degree to refer to himself or herself as 'doctor.' The use of the designation 'doctor,' however, is specifically limited: a lawyer may use the designation only when working or otherwise participating in a function associated with a post-secondary school institution of higher education. In all other contexts, a lawyer may not refer to himself or herself as 'doctor.'").

Texas formerly prohibited use of the term, but abandoned the prohibition in 2004 (although keeping some limited restrictions).

- Texas LEO 550 (5/2004) (abandoning a prohibition on lawyers referring to themselves as "Dr."; "The Committee is of the opinion that under the Rules the use of the title "Dr.," "Doctor," "J.D." or "Doctor of Jurisprudence" is not, in itself, prohibited as constituting a false or misleading communication. The Committee recognizes that other professions, such as educators, economists and social scientists, traditionally use [the] title "Dr." in their professional names to denote a level of advanced education and not to imply formal medical training. There is no reason in these circumstances to prohibit lawyers with a Juris Doctor or Doctor of Jurisprudence degree from indicating the advanced level of their education. However, while use of the title alone is generally permitted, the context in which the title is used may cause use of the title to be a false or misleading communication. For example, a lawyer otherwise qualified to use the title of "Dr." who advertises as "Dr. John Doe" in a public advertisement for legal services in connection with medical malpractice or other areas involving specialized medical issues may be making a misleading statement as to the lawyer's qualifications and may be creating an unjustified expectation about results the lawyer can achieve. Unless accompanied by an appropriate, prominent statement of qualifications

and disclaimers, such use of the title "Dr." could readily mislead prospective clients and thus violate the Rules.).

(c) In 2011, the National Law Journal described the fate of a disbarred lawyer using the phrase "JD" after his name.

- Leigh Jones, Federal Judge Bars Law Grad From Using 'J.D.' After His Name, Nat'l L.J., Jan. 19, 2011 (addressing a Columbia Law School graduate's insistence in using "J.D." after his name; explaining the factual background: "A 1984 Columbia Law School graduate, Brown was disbarred from practicing law in New York in 1992 and was convicted of 44 felonies related to the unauthorized practice of law."; reiterating an earlier decision prohibiting the disbarred lawyer's use of the term "J.D."; "[Judge] Gaughan stood by her decision last month that said Brown's use of 'J.D.' after his name was akin to using the 'Esq.' designation."; "The same reasoning should be applied to the use of the terms "Juris Doctor" or "J.D." the judge wrote."; "In 2009, the Supreme Court of Ohio sanctioned Brown \$50,000 for the unauthorized practice of law. It also ordered him to stop using 'Esq.,' 'Esquire,' 'Juris Doctor' or 'J.D.' after his name. Last year, Brown filed a lawsuit against Ohio's high court in the United States District Court in the Northern District of Ohio alleging that the 'J.D.' restriction, which designates a juris doctor degree but not admission to practice, violated his constitutional rights, including his First Amendment and due process rights."; "Gaughan dismissed the action last month, relying on a decision in a previous disciplinary matter, which allowed the defendant in that case to continue using 'J.D.' because there was no evidence that the designation mislead anyone."; "The judge concluded that Brown apparently intended to use 'J.D.' for illegal conduct."; "He has used the term to [convince] others, including a federal judge and city prosecutor, that he was an attorney," the judge wrote. 'Any other purported legal use of these terms is inconsequential compared to his past conduct.'").

(d) A 2012 California case prohibited a nonlawyer from using the term "Esq." after his name -- and also prohibited the lawyer from using the phrase "Law Offices of John N. Huerlin" on the basis that he was representing himself.

- In re Heurlin, Case No. 09-O-10774, slip op. at 12, 12-13 (Cal. Bar Court Aug. 7, 2012) (not for publication) ("Heurlin maintains that he was entitled to include the sobriquets 'attorney' and 'Esq.' and to refer to the 'Law Offices of John N. Heurlin' because he was representing himself. He is incorrect. We acknowledge that 'any person may represent himself, and his own interests, at law and in legal proceedings Even so, Heurlin was not entitled to give the false impression that he had the present ability to practice law while he was on suspension, which the totality of evidence establishes."; "Heurlin

further argues that the word 'Esquire' has many meanings, including that of property owner and subscriber to the magazine Esquire. This argument is unconvincing because we do not focus on a single usage of a particular word when determining UPL. Instead, we consider the context of the words and the general course of conduct. . . . Here, Heurlin affixed the label 'Esq.' next to his name and included references to himself as 'attorney' and 'Law Offices of John M. Heurlin' in pleadings and correspondence to opposing counsel.").

Best Answer

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

b 7/14

Areas of Practice

Hypothetical 13

You currently act as your firm's partner in charge of marketing. You have always thought that clients tend to hire individual lawyers because of their specific expertise and experience, rather than retain a law firm because of its general reputation. You and your marketing director want to highlight your firm's lawyers' areas of practice and expertise.

Assuming that these phrases are accurate, may you use the following phrases in your marketing materials:

- (a) "Limits her practice to domestic relations matters"?

YES

- (b) "Specializes in anti-trust issues"?

MAYBE

- (c) "Certified specialist in patent law"?

YES

- (d) "Certified by the Texas Supreme Court as a trial lawyer"?

MAYBE

Analysis

As in most areas, most states have a core consensus rule governing lawyer descriptions of practice, but on the margins take widely varying approaches.

- (a) Most states allow lawyers to provide accurate information about limitations in their practice.

(b) At least one state specifically prohibits use of the word "specialize."

Rhode Island LEO 93-31 (5/12/93) (prohibiting use of the phrase: "Specializing in Personal Injury" on a lawyer's business card).

Courts have also dealt with these issues.

In Walker v. Board of Professional Responsibility, 38 S.W.3d 540 (Tenn. 2001), the Tennessee Supreme Court examined the following scenario:

In February 1995, Walker placed an advertisement for divorce services in the Chattanooga News Free Press TV Magazine. The ad was published over the week of February 12 through 18, 1995 and states in its entirety: "DIVORCE, BOTH PARTIES SIGN, \$ 125 + COST, NO EXTRA CHARGES, Ted Walker, [address & telephone number]." On March 29, 1995, the Board's Disciplinary Counsel filed a complaint against Walker alleging that this advertisement listed divorce as a specific area of practice but did not include the disclaimer required by DR 2-101(C) of the Code of Professional Responsibility.

Id. at 542. The Disciplinary Board reprimanded Walker because he had not included a disclaimer indicating that he had not been certified by the Tennessee Commission on Continuing Legal Education and Specialization. The appellate court upheld a private reprimand.

The regulation before us requires that whenever a lawyer advertises his services in a particular area of law for which certification is available in Tennessee, he must disclose in the ad whether he is certified. DR 2-101(C). Since Walker was not certified as a civil trial specialist (which then covered the area of divorce law) yet he specifically mentioned divorce law in his ads, the disciplinary rule mandates that his ads include the following language: "Not certified as a civil trial specialist by the Tennessee Commission on Continuing Legal Education and Specialization." DR 2-101(C)(3). This regulation does not prohibit or limit speech; instead it requires more speech by way of an explanatory disclaimer.

Id. at 545.

In In re Robbins, 469 S.E.2d 191 (Ga. 1996), the Supreme Court of Georgia upheld a public reprimand against a lawyer for describing himself as a "specialist."

Robbins, the sole shareholder of William N. Robbins, Attorney at Law, P.C., prepared and published a newsletter entitled Legal Beagle, copies of which were mailed to Robbins' former clients, as well as his and his employees' family and friends. An edition of the newsletter, announcing the return of a former attorney, stated, in part: "WELCOME TO Joe Maniscalco -- Joe is an attorney who has returned to the firm with a specialty in personal injury and litigation."

The newsletter further stated: DON'T FORGET, we specialize in automobile accidents, motorcycle accidents, bicycle accidents, medical malpractice, workers' compensation and social security cases. Be sure to tell your friends about this. We appreciate referrals from our clients.

Robbins has significant experience in handling the types of cases listed in the newsletter, and practices only in those areas.

Id. at 192-93.

On the other hand, the Supreme Court of Kentucky reversed the bar's disapproval of a television advertisement using the phrase "injury lawyers."

The fundamental predicate of the decision by the Advertising Commission was that the phrase "injury lawyers" implies that the lawyers are specialists in representing injured people. Certainly reasonable minds can differ when considering such an implication. As argued by Hughes & Coleman, they are lawyers who can and do handle injury cases. The ads consequently contain truthful information and the Board and Commission do not challenge such an assertion.

.....

None of the ads use any form of the prohibited phrases such as "certified", "specialist", "expert", or "authority" at any time or in any manner. We are persuaded that they fall into the category of otherwise permitted comments such as "international lawyers", "corporate attorneys", "litigation attorneys", "bankruptcy-debtor-creditor rights attorneys" and "a full service business law firm."

In re Appeal of Hughes & Coleman, 60 S.W.3d 540, 544, 544-45 (Ky. 2001) (emphases added). The Kentucky Supreme Court held that the bar "paints with too broad a brush." Id. at 545.

(c) As in so many other areas, states differ in their approaches to lawyers claiming certification as specialists.

The ABA Model Rules simplified its approach several years ago. ABA Model Rule 7.4(d) now prohibits lawyers from claiming that they are certified as a specialist unless the certifying organizations is clearly identified in the communication, and has itself been approved by an appropriate "state authority" or accredited by the ABA. ABA Model Rule 7.4(d).¹

A 2012 Second Circuit case describes the enormous variation in states' approach.

[Forty-eight] states have rules that permit lawyers to identify themselves as specialists. The rules of 32 of these states are similar to the ABA's model rule, although some of these require state board or state court approval of the certifying body. Many of the states that have not adopted the Model Rule require any claim of specialization to be accompanied by various forms of disclaimers, such as a statement that the state does not certify lawyers as specialists. Two of the 48 states, Minnesota and Missouri, permit identification of a lawyer as a specialist even in the absence of certification, but require disclosure that there has been no certification by an organization accredited by a state board or court. One state, West Virginia, prohibits lawyers from identifying themselves as specialists except for patent attorneys and proctors in admiralty. One state, Maryland, prohibits identification as a specialist with no exceptions. Michigan and Mississippi have no rules concerning communications about lawyer specialization.

¹ As in the earlier versions of the ABA Model Rules, lawyers may communicate that they do or do not practice in particular areas of law, and may use designations such as "patent attorney" or "admiralty" where truthful. ABA Model Rule 7.4(a)-(c).

Hayes v. N.Y. Attorney Grievance Comm., 672 F.3d 158, 163-64 (2d Cir. 2012)

(footnotes omitted).²

Most states have specific rules governing advertisements that explicitly or implicitly claim that the lawyer "specializes" or is "certified" in a certain specialty.

- Florida Rule 4-7.14(a)(4) ("Potentially Misleading Advertisements. Potentially misleading advertisements include, but are not limited to . . . a statement that a lawyer is board certified, a specialist, an expert, or other variations of those terms unless: (A) the lawyer has been certified under the Florida Certification Plan as set forth in chapter 6, Rules Regulating the Florida Bar and the advertisement includes the area of certification and that The Florida Bar is the certifying organization; (B) the lawyer has been certified by an organization whose specialty certification program has been accredited by the American Bar Association or The Florida Bar as provided elsewhere in these rules. A lawyer certified by a specialty certification program accredited by the American Bar Association but not The Florida Bar must include the statement 'Not Certified as a Specialist by The Florida Bar' in reference to the specialization or certification. All such advertisements must include the area of certification and the name of the certifying organization; or (C) the lawyer has been certified by another state bar if the state bar program grants certification on the basis of standards reasonably comparable to the standards of the Florida Certification Plan set forth in chapter 6 of these rules and the advertisement includes the area of certification and the name of the certifying organization. In the absence of such certification, a lawyer may communicate the fact that the lawyer limits his or her practice to 1 or more fields of law.").
- Florida Rule 4-7.14 cmt. ("This rule permits a lawyer or law firm to indicate areas of practice in communications about the lawyer's or law firm's services, provided the advertising lawyer or law firm actually practices in those areas of law at the time the advertisement is disseminated. If a lawyer practices only in certain fields, or will not accept matters except in such fields, the lawyer is permitted to indicate that. A lawyer who is not certified by The Florida Bar, by another state bar with comparable standards, or an organization accredited by the American Bar Association or The Florida Bar may not be described to the public as a 'specialist,' 'specializing,' 'certified,' 'board certified,' being an

² Hayes v. N.Y. Attorney Grievance Comm., 672 F.3d 158, 167, 167-68, 170 (2d Cir. 2012) (finding unconstitutional New York ethics Rule 7.4, which required a "prominently made" disclaimer for any lawyer advertising himself or herself as a "certified specialist"; concluding that New York had not presented evidence supporting the requirement that the disclaimer explain: (1) that "[c]ertification is not a requirement for the practice of law"; and (2) that certification "does not necessarily indicate greater competence than other attorneys experienced in this field of law"; also concluding that the "prominently made" requirement was void for vagueness).

- 'expert,' having 'expertise,' or any variation of similar import. A lawyer may indicate that the lawyer concentrates in, focuses on, or limits the lawyer's practice to particular areas of practice as long as the statements are true.").
- Florida Rule 4-7.14 cmt. ("Certification is specific to individual lawyers; a law firm cannot be certified, and cannot claim specialization or expertise in an area of practice per subdivision (c) of rule 6-3.4. Therefore, an advertisement may not state that a law firm is certified, has expertise in, or specializes in any area of practice. A lawyer can only state or imply that the lawyer is 'certified,' a 'specialist,' or an 'expert' in the actual area(s) of practice in which the lawyer is certified. A lawyer who is board certified in civil trial law, may so state that, but may not state that the lawyer is certified, an expert in, or specializes in personal injury. Similarly, a lawyer who is board certified in marital and family law may not state that the lawyer specializes in divorce.").
 - Georgia Rule 7.4 ("A lawyer who is a specialist in a particular field of law by experience, specialized training or education, or is certified by a recognized and bona fide professional entity, may communicate such specialty or certification so long as the statement is not false or misleading.").
 - Georgia Rule 7.4 cmt. [2] ("A lawyer may truthfully communicate the fact that the lawyer is a specialist or is certified in a particular field of law by experience or as a result of having been certified as a 'specialist' by successfully completing a particular program of legal specialization. An example of a proper use of the term would be 'Certified as a Civil Trial Specialist by XYZ Institute' provided such was in fact the case, such statement would not be false or misleading and provided further that the Civil Trial Specialist program of XYZ Institute is a recognized and bona fide professional entity.").
 - Illinois prohibits lawyers from using terms like "certified," "specialist," "expert," or other similar terms, unless (1) they are referring to "certificates, awards or recognitions"; and (2) they include a disclaimer that the Illinois Supreme Court does not recognize the certifications of specialties. Illinois Rule 7.4(b) and (c).
 - Illinois Rule 7.4(c) ("Except when identifying certificates, awards or recognitions issued to him or her by an agency or organization, a lawyer may not use the terms 'certified,' 'specialist,' 'expert,' or any other, similar terms to describe his qualifications as a lawyer or his qualifications in any subspecialty of the law. If such terms are used to identify any certificates, awards or recognitions issued by any agency, governmental or private, or by any group, organization or association, the reference must meet the following requirements: (1) the reference must be truthful and verifiable and may not be misleading in violation of Rule 7.1; (2) the reference must state that the Supreme Court of Illinois does not recognize certifications of specialties in the

practice of law and that the certificate, award or recognition is not a requirement to practice law in Illinois.").

- Maryland prohibits lawyers from publicly holding themselves out as specialists. Maryland Rule 7.4.
- North Carolina prohibits lawyers from communicating that they are certified specialists, unless the certification comes from the North Carolina State Bar, or the communication mentions a certifying organization that is approved by the North Carolina State Bar or by the ABA. North Carolina Rule 7.4(b)(1)-(3).
- North Carolina Rule 7.4 cmt. [2] ("A lawyer may, however, describe his or her practice without using the term 'specialize' in any manner which is truthful and not misleading. This rule specifically permits a lawyer to indicate areas of practice in communications about the lawyer's services. If a lawyer practices only in certain fields, or will not accept matters except in a specified field or fields, the lawyer is permitted to so indicate. The lawyer may, for instance, indicate a 'concentration' or an 'interest' or a 'limitation.'").
- Pennsylvania prohibits lawyers from communicating that they are certified specialists, unless the certified organization is approved by the Pennsylvania Supreme Court or the lawyer is engaged as a patent or admiralty lawyer. Pennsylvania Rule 7.4(a), (b).
- South Carolina Rule 7.4(b) ("A lawyer who is not certified as a specialist but who concentrates in, limits his or her practice to, or wishes to announce a willingness to accept cases in a particular field may so advertise or publicly state in any manner otherwise permitted by these rules. To avoid confusing or misleading the public and to protect the objectives of the South Carolina certified specialization program, any such advertisement or statements shall be strictly factual and shall not contain any form of the words 'certified,' 'specialist,' 'expert,' or 'authority' except as permitted by Rule 7.4(d).").
- Virginia Rule 7.4 ("Lawyers may state, announce or hold themselves out as limiting their practice in a particular area or field of law so long as the communication of such limitation of practice is in accordance with the standards of this Rule, Rule 7.1, Rule 7.2, and Rule 7.3, as appropriate. A lawyer shall not state or imply that the lawyer has been recognized or certified as a specialist in a particular field of law except as follows: (a) A lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation 'Patent Attorney' or a substantially similar designation; (b) A lawyer engaged in Admiralty practice may use as a designation 'Admiralty,' 'Proctor in Admiralty' or a substantially similar designation; (c) A lawyer who has been certified by the Supreme Court of Virginia as a specialist in some capacity may use the designation of being so certified, e.g., 'certified mediator' or a substantially similar designation; (d) A

lawyer may communicate the fact that the lawyer has been certified as a specialist in a field of law by a named organization, provided that the communication clearly states that there is no procedure in the Commonwealth of Virginia for approving certifying organizations.").

State bars' legal ethics opinions provide additional explanation.

- Illinois LEO 03-05 (1/2004) ("An associate attorney with Firm A and is also a Certified Trust Financial Advisor (CTFA), having received that accreditation from the Institute of Certified Bankers (ICB). Rule 7.4(c) limits the use of certifications as they relate to 'qualifications as a lawyer,' or 'qualifications in any subspecialty of the law'; "With respect to the prohibition against listing subspecialties of the law in Rule 7.4, the committee opines that CTFA does not fall within this prohibition because CTFA certification is neither a subspecialty of the law nor does it describe a qualification as a lawyer.").
- Illinois LEO 03-03 (1/2004) ("A lawyer may list the certification 'Capital Litigation Trial Bar' on letterhead without the disclaimer that 'the Supreme Court of Illinois does not recognize certifications of specialties in the practice of law.'").
- Illinois LEO 96-08 (5/16/97) ("It is not misleading for a law firm to hold itself out as concentrating its practice in intellectual property law despite the fact that it does not do patent work. However, it may not hold itself out as 'specializing' in any field of practice."; "In the present instance, the firm holds itself out as concentrating (see later discussion regarding 'specializing') in the field of intellectual property law. This appears appropriate, despite the fact that it does not do patent work. The term 'intellectual property law' is broader than the practice of patent law, and encompasses several practice areas including patent law, copyright law, trademark law, trade secrets, licensing, etc. The fact that a lawyer may practice in one or more, but not all of these areas, does not render his holding himself out as concentrating his practice in intellectual property law as false or misleading. Thus, we believe that the present designation of the firm as concentrating in intellectual property law is not misleading under Rule 7.1(a), and is appropriate under Rule 7.4(a). However, the firm's holding itself out as 'specializing' in any given area of practice is improper. Rule 7.4(c) provides: Except when identifying certificates, awards or recognitions issued to him by an agency or organization, a lawyer may not use the terms 'certified,' 'specialist,' or 'expert,' or any other, similar terms to describe his qualifications as a lawyer or his qualification in any subspecialty of the law.").

As with other rules, courts have overturned state bar restrictions on lawyers' marketing of their certifications.

Several years ago, New York adopted a rule that required two disclaimers if lawyers wanted to market their certifications.

- New York Rule 7.4(c)(1) ("A lawyer may state that the lawyer has been recognized or certified as a specialist only as follows: . . . A lawyer who is certified as a specialist in a particular area of law or law practice by a private organization approved for that purpose by the American Bar Association may state the fact of certification if, in conjunction therewith, the certifying organization is identified and the following statement is prominently made: 'The [name of the private certifying organization] is not affiliated with any governmental authority.'").

In 2012, the Second Circuit found this rule unconstitutional. First, it found that the "prominently made" requirement was void for vagueness.

Although the uncertainties as to how the prominence requirement will be enforced could be alleviated if the Grievance Committee would give pre-enforcement guidance to inquiring attorneys, such guidance was not available to Hayes. The former principal counsel to the Grievance Committee was asked at trial, '[I]s there a way that you would assist the attorney if there were not a grievance file pending?' He replied, 'The short answer is, no.' He added that the Committee did not provide advisory opinions because, in part, 'it would probably take up most of our work.'

Hayes v. N.Y. Attorney Grievance Comm., 672 F.3d 158, 170 (2d Cir. 2012). The

Second Circuit then found unconstitutional the requirement that a disclaimer explains that "certification is not a requirement for the practice of law."

The statement that certification is not a requirement for the practice of law is more questionable. . . . Although trial testimony is not required, the proponents of a restriction must either advance an interest that is self-evident or put something in the record to make the required 'demonstrat[ion].' No such demonstration is present in the record before us. And the alleged harm is surely not self-evident. It is difficult to imagine that any significant portion of the public observing the thousands of lawyers practicing in New York without certification believe that all of them are acting unlawfully.

Id. at 167-68 (alteration in original).

The Second Circuit also found unconstitutional the requirement that the marketing be accompanied by a disclaimer explaining that certification "does not necessary indicate greater competence than other attorneys experienced in this field of law."

Although the assertion might be technically accurate, depending on how "competence" and "experienced in the field" are understood, the assertion has a capacity to create misconceptions at least as likely and as serious as that sought to be avoided by the first assertion. Some members of the public, reading this third assertion, might easily think that a certified attorney has no greater qualifications than other attorneys with some (unspecified) degree of experience in the designated area of practice. In fact, the qualifications of an attorney certified as a civil trial specialist by the NBTA include having been lead counsel in at least 5 trials and having "actively participated" in at least 100 contested matters involving the taking of testimony, passing an extensive examination, participating in at least 45 hours of CLE, and devoting at least 30 percent of the lawyer's practice to the specialized field. . . . These qualifications may reasonably be considered by the certifying body to provide some assurance of "competence" greater than that of lawyers meeting only the criterion of having some experience in the field, and a contrary assertion has a clear potential to mislead. Such a requirement does not serve a substantial state interest, is far more intrusive than necessary, and is entirely unsupported by the record. As such, it cannot survive First Amendment scrutiny.

Id. at 168.

Lawyers upset at falling short of the requirements for certification sometimes seek relief through litigation. In early 2011, the Eleventh Circuit rejected a disgruntled Florida lawyer's due process allegation.

- Doe v. Fla. Bar, 630 F.3d 1336, 1337-38, 1338, 1339-40, 1344 (11th Cir. 2011) (affirming the dismissal for lack of subject matter jurisdiction of a Florida lawyer's due process lawsuit complaining of the Florida Bar's denial of her status as a board-certified marital and family law "specialist"; starting its

analysis with a reference to a Gilbert and Sullivan operetta; "This case reminds us of the observation of the Grand Inquisitor in Gilbert and Sullivan's *The Gondoliers*. Upon finding that all ranks of commoners and servants have been promoted to the nobility, he protests that there is a need for distinction, explaining that: 'When everyone is somebody, then no one's anybody.' The same is true of a state bar's certification process. If every attorney who practices in an area is certified in it, then no one is anybody in that field. The easier it is to be certified, the less that certification means." (footnote omitted); explaining that Zisser [plaintiff] had been certified as a specialist several times before, but that in Florida that status expires after five years, and that Zisser's efforts to be recertified were unsuccessful -- due mostly to peer review criticism based (in part) on her "'tendency to over litigate [her] cases'" (internal citation omitted); not explicitly noting the irony, but pointing out that Zisser (1) appealed the initial denial to the Florida Bar, (2) re-filed an entirely new application the next year, (3) notified the Florida Bar "of her intention to submit additional documentation," (4) "requested and was granted an extension of time to prepare a rebuttal," (5) sent the Florida Bar committee a "nine-page letter that contested the peer review findings and also provided the names of additional lawyers and judges for the Committee to contact," (6) sent in other information over the course of the next several months, (7) "requested an opportunity to appear before the Board to challenge its decision." (8) submitted "extensive documentation" before the hearing, including a "'Motion to Remand' her application to the Committee for reconsideration," (9) sent a "nine-page 'Memorandum of Law'" challenging the denial, (10) appeared at the Board hearing accompanied by counsel, (11) filed "two more internal appeals with the Board, first to the Certification Plan Appeals Committee and then to the Bar's Board of Governors itself," (12) filed a twenty-five page petition with the Florida Supreme Court (which included thirty-seven appendices), (13) filed a lawsuit in federal district court, (14) participated in a bench trial before that court, and (15) appealed the district court's judgment to the Eleventh Circuit; ultimately relying on the Rooker-Feldman doctrine in ruling that federal courts do not have subject matter jurisdiction over a final state court decision absent some federal constitutional issue; finding that Zisser's due process claims had no merit, because Zisser could practice law without a certification as a specialist, and that failure to be certified is not "stigmatizing").

(d) States vary widely in their rules governing specific references to particular certifications (see above).

Best Answer

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

b 7/14

Use of Terms Like "Expert" and "Authority"

Hypothetical 14

The firm's chairman has asked you to review your lawyers' website biographies to make sure they comply with applicable ethics rules.

- (a) Can one of your lawyers call herself an "expert" in securitization transactions?

NO (PROBABLY)

- (b) Can one of your lawyers describe himself as an "authority" in the ethics rules?

NO (PROBABLY)

- (c) Can one of your lawyers who handles all or most of a corporate client's work call herself the company's "General Counsel" in marketing material?

MAYBE

Analysis

Several states have adopted specific prohibitions on lawyers using certain words when describing themselves in marketing materials.

- (a) Several states have prohibited lawyers from calling themselves "experts."

- Fla. Bar v. Doane, 43 So. 3d 640, 640 (Fla. 2010) (enjoining respondent lawyer from "the use of the term 'Expert' or 'Experts' in all legal advertisements and any trade name.").
- In re Anonymous Member of S.C. Bar, 687 S.E.2d 41, 46 (S.C. 2009) ("Respondent's use of the words, as outlined in the report of the Hearing Panel, clearly violated Rule 7.4(b), which expressly prohibits use of 'any form' of the words 'expert' and 'specialist.'").
- In re PRB Dkt. No. 2002.093, 868 A.2d 709, 710, 712 (Vt. 2005) (privately admonishing a lawyer who used the term "'INJURY EXPERTS'" and "'WE ARE THE EXPERTS IN [certain areas of law]'" in yellow page advertisements; finding that use of the term "experts" violated the Vermont ethics rules "by placing an advertisement that implicitly compared his firm's services with those provided by other lawyers in a way that can not be 'factually substantiated.' The panel noted that the phrase 'the experts' was

'an implicit statement of superiority' as compared with other firms, and had a 'serious potential to mislead the consumer, since there is no objective way to verify the claim.'"; pointing to an Ohio case prohibiting lawyers from using the phrase "'passionate and aggressive advocate'").

- Ohio LEO 2005-6 (8/8/05) (holding that Ohio lawyers may not engage in a television station's "Ask the Expert" television program; finding that the term "expert" as applying to a lawyer was improper; allowing lawyers to participate in the program if the word "expert" was removed).

Florida prohibits lawyers from using the term "expert" unless they are certified.

- Florida Rule 4-7.14(a)(4) ("Potentially Misleading Advertisements. Potentially misleading advertisements include, but are not limited to . . . a statement that a lawyer is board certified, a specialist, an expert, or other variations of those terms unless: (A) the lawyer has been certified under the Florida Certification Plan as set forth in chapter 6, Rules Regulating the Florida Bar and the advertisement includes the area of certification and that The Florida Bar is the certifying organization; (B) the lawyer has been certified by an organization whose specialty certification program has been accredited by the American Bar Association or The Florida Bar as provided elsewhere in these rules. A lawyer certified by a specialty certification program accredited by the American Bar Association but not The Florida Bar must include the statement 'Not Certified as a Specialist by The Florida Bar' in reference to the specialization or certification. All such advertisements must include the area of certification and the name of the certifying organization; or (C) the lawyer has been certified by another state bar if the state bar program grants certification on the basis of standards reasonably comparable to the standards of the Florida Certification Plan set forth in chapter 6 of these rules and the advertisement includes the area of certification and the name of the certifying organization. In the absence of such certification, a lawyer may communicate the fact that the lawyer limits his or her practice to 1 or more fields of law.").

(b) At least one state has specifically prohibited lawyers from using the word "authority" when describing themselves. South Carolina Rule 7.4(b)(advertisements "shall not contain any form of the words 'certified,' 'specialist,' 'expert,' or 'authority'").

Other states permit lawyers to use words like "expert" and "expertise" if the claims can be "factually substantiated." Virginia LEO 1750 (revised 12/18/08).

(c) At least some states have indicated that a lawyer may use the term "General Counsel" in these circumstances.

- New York Rule 7.5(a)(4) ("A lawyer or law firm may be designated as 'General Counsel' or by similar professional reference on stationery of a client if the lawyer or the firm devotes a substantial amount of professional time in the representation of that client.").
- Ohio LEO 2009-5 (6/12/09) ("A lawyer or law firm may be listed as 'General Counsel' or similar reference on the letterhead of a client organization and may use the designation in signing correspondence written on behalf of the client organization if the lawyer or law firm represents the client organization in all or most of the client's legal matters, devotes a substantial amount of professional time to the client organization, and is given the title by the client organization. A lawyer's or law firm's designation as 'General Counsel' on the letterhead of a client organization and use of the designation in signing correspondence written on behalf of the client organization is proper under Prof. Cond. Rules 7.5 and 7.1, provided the communication is truthful -- not false or misleading or nonverifiable.").

Best Answer

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

b 7/14

Inclusion in Honorary Lists Such as "Best Lawyers in America" and "Super Lawyers"

Hypothetical 15

You have been trying to improve your firm's marketing efforts, and have asked each of your firm's lawyers to send you their individual honors and recognitions to include in various marketing brochures. Now you have to decide which honors to include in the brochures.

- (a) May your marketing brochure indicate that one of your lawyers has an "AV" listing by Martindale-Hubbell?

YES

- (b) May your marketing brochure indicate that one of your lawyers has been listed in "The Best Lawyers in America" and "Super Lawyers" for the last two years?

YES

- (c) May your marketing brochure indicate that one of your lawyers was listed in "The Best Lawyers in America" in 1998 (but not since then)?

YES (WITH AN EXPLANATION)

- (d) May your marketing brochure indicate that one of your lawyers is listed as a "Super-Duper Lawyer" by the North Reston Litigator Lunch Bunch (composed of eight lawyers)?

NO

- (e) May your marketing brochure indicate that one of your lawyers received a "Life Time Achievement" Award from your law firm's public finance group?

MAYBE

Analysis

The recent increase in various honorary lawyer lists have generated debate among bars about what honors lawyers may legitimately mention in their marketing.

The difficulty comes from determining the legitimacy of the group honoring the lawyer, and the completeness of the lawyer's reference to that honor.

(a) For many years, Martindale-Hubbell provided the main (if not the only) rating system for lawyers. Courts have therefore recognized lawyers' ability to boast of a high Martindale-Hubbell "AV" rating. See, e.g., Mason v. Fla. Bar, 208 F.3d 952 (11th Cir. 2000).

As in other areas of lawyer marketing, the use of new technology has had an impact. One state bar has held that a list of specializations in Martindale-Hubbell did not have to be accompanied by a required disclaimer while Martindale-Hubbell was in print form only (and thus primarily directed to lawyers), but did have to be accompanied by the disclaimer now that Martindale-Hubbell is available on-line (and thus available to the general public). Tennessee LEO 99-F-144 (6/14/99).

The changing face of Martindale-Hubbell's web-rating prompted the Connecticut Bar to issue a legal ethics opinion in 2012 -- in which the Bar indicated that lawyers could not induce their clients to provide a false review of the lawyer, or reward the client for a good review. The Bar also indicated that any review or entry written by the lawyer would have to satisfy Connecticut's marketing rules.

- Conn. Informal Op. 2012-03 (4/25/12) ("The requestor asks whether participation in Martindale-Hubbell's Martindale.com client rating system is ethical. Specifically, the requestor asks whether it is ethical for a lawyer to (1) direct clients to the client rating portion of Martindale.com's website to rate the requestor; and (2) permit client ratings to appear in the lawyer's Martindale Hubbell listing. In the Committee's opinion, for the reasons that follow, the answer to each question is a qualified 'yes.'"; "There is nothing in Rules 7.1 or 7.2 or any other Rule of Professional Conduct that prohibits a lawyer from directing a client to the client rating portion of Martindale.com provided the lawyer does not: (1) instruct or suggest to the client that the client's review contain any information that would be 'false or misleading' under Rule 7.1 because doing so would violate Rule 8.4(1) which provides, in

part, that a lawyer may not 'violate or attempt to violate the Rules of Professional Conduct . . . through the acts of another'; or (2) give something of value to the client in exchange for submitting a review, because doing so would, if the client recommends the lawyer, violate Rule 7.2(c)." (footnote omitted); "The Committee is of the view that any portion of the lawyer's Martindale.com listing that the lawyer drafts or edits is advertising by the lawyer. By drafting or editing a portion of one's listing, the lawyer takes responsibility for that content and must abide by Rules 7.1 and 7.2."; "The Committee does not view it as the lawyer's responsibility to scour the internet to ensure that all client comments comply with Rules 7.1 and 7.2 or to take action to ensure that comments that do not comply with those rules are removed or edited. Obligations under Rule 7.1 and 7.2 arise only when the lawyer has a hand in creating, shaping or publishing online client reviews.").

(b) Bars have struggled with new lawyer lists that have sprung up in recent years -- especially "The Best Lawyers in America" and "Super Lawyers."

The obvious question is whether these lists represent legitimate peer honors, or haphazard collections of names put together largely to sell advertising space, plaques, etc. to those lucky enough to be picked.

At least two courts have struggled with this issue. In Allen, Allen, Allen & Allen v. Williams, 254 F. Supp. 2d 614 (E.D. Va. 2003), a well-known plaintiffs' personal injury law firm successfully sought a preliminary injunction barring the Virginia State Bar from enforcing a prohibition on the law firm's use of the following phrase in its marketing (which followed an accurate reference to three of the firm's lawyers receiving "The Best Lawyers in America" honors):

"[C]all the lawyers other lawyers have called the best. Allen, Allen, Allen and Allen. The strength of family. The best in personal injury."

Id. at 618. Not surprisingly, the complaint about the advertisement came from "five competitors of the Allen firm." Id. at 619. Despite the Virginia Bar's efforts to show that it did not immediately intend to enforce its ban on such language, the court entered a preliminary injunction.

The Virginia Bar ultimately resolved its disputes with the Allen firm, and issued an advertising opinion allowing references to individual lawyers' inclusion in "The Best Lawyers in America" list -- but prohibiting the law firm from bragging about itself, and also requiring additional disclosure if the lawyer has been "de-listed" by such publication. Virginia Adver. Op. A-0114 (8/26/05) ("Lawyers may advertise the fact that they are listed in a publication such as The Best Lawyers in America."; noting the process under which the list is compiled; also noting that "[t]here is no financial benefit or quid pro quo of any kind between the listed lawyer and the publisher of The Best Lawyers in America"; also noting that the "publication enjoys respect from bar leaders and can be found in most law school libraries, and in numerous city, county and court libraries and libraries maintained by private law firms"; warning that "[i]f, for whatever reason, a lawyer is de-listed by a publication such as The Best Lawyers in America, the statements or claims in the advertisement must accurately state the year(s) and/or edition(s) in which the lawyer was listed"; holding that a lawyer rated as "A.V." in Martindale-Hubble "may properly include the descriptive characterization that 'A.V.' represents 'the highest rating' that particular service assigns"; warning that lawyers must be careful how they use their inclusion in The Best Lawyers in America list; "For example, as noted above, although an attorney may properly characterize inclusion in the reference work The Best Lawyers in America by stating that he or she is among those lawyers 'whom other lawyers have called the best,' an attorney may not properly characterize their inclusion with such statements as 'since I am included in the book, that means that I am in fact the best lawyer in America.' Attorneys must also use care in crafting language for advertising so as not to impute the credentials bestowed upon

individual attorneys to the entire firm. For example, a law firm cannot make statements or claims that imply or suggest that the law firm has been rated 'the best' in a practice area simply because some lawyers in the firm have been included in the publication The Best Lawyers in America. Such a statement or claim is also prohibited because The Best Lawyers in America only rates and lists individual lawyers, not law firms.").

Thus, the Virginia Bar pointed to the fact that "The Best Lawyers in America" publication "enjoys respect from bar leaders." The Virginia Bar did not explain how it could distinguish between a legitimate group like "The Best Lawyers in America" and an illegitimate group which could not be given the same respect.

Several years later, New Jersey wrestled with the same basic issue. The New Jersey Bar originally prohibited lawyers from listing their inclusion in "The Best Lawyers in America" list -- or even participating in the selection process. The New Jersey Supreme Court relied on constitutional principles to reject the bar's prohibition.¹

Like the Virginia Bar, the New Jersey Supreme Court limited its conclusion to honors conferred by "a legitimate professional organization with verifiable criteria that

¹ In re Op. 39 of Comm. on Attorney Adver., 961 A.2d 722, 725, 729, 728 (N.J. 2008) (rejecting an earlier conclusion by the New Jersey Committee on Attorney Advertising that New Jersey lawyers could not advertise that they were selected for lists of lawyers such as the Best Lawyers in America; agreeing with the Special Master that such advertisement should be judged as commercial speech; "In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." (citation omitted); listing various "components" of acceptable advertising, such as "[t]he advertisement must state the year of inclusion in the listing as well as the specialty for which the lawyer was listed"; noting the Special Master's Report concluded that "state bans on truthful, fact-based claims in lawful professional advertising could be ruled unconstitutional when the state fails to establish that the regulated claims are actually or inherently misleading and would thus be unprotected by the First Amendment commercial speech doctrine. Clearly, mere consumer unfamiliarity with a privately [] conferred honor or designation does not establish that advertising such honor or designation is actually or inherently misleading so long as the honor or designation is actually issued by a legitimate professional organization with verifiable criteria that are available to consumers."; recommending that New Jersey redraft its lawyer advertising rules to reflect the court's conclusions).

are available to consumers" -- but did not carefully define how to make such a determination. The New Jersey Bar eventually amended its rules to allow such marketing under certain conditions (discussed below).

More recently, states have taken one of several basic approaches.

First, some bars permit lawyers to boast about their inclusion on such lists.

- Illinois Rule 7.4(c)(1)-(2) ("Except when identifying certificates, awards or recognitions issued to him or her by an agency or organization, a lawyer may not use the terms 'certified,' 'specialist,' 'expert,' or any other, similar terms to describe his qualifications as a lawyer or his qualifications in any subspecialty of the law. If such terms are used to identify any certificates, awards or recognitions issued by any agency, governmental or private, or by any group, organization or association, the reference must meet the following requirements: (1) the reference must be truthful and verifiable and may not be misleading in violation of Rule 7.1; (2) the reference must state that the Supreme Court of Illinois does not recognize certifications of specialties in the practice of law and that the certificate, award or recognition is not a requirement to practice law in Illinois.").
- Iowa LEO 07-09 (10/30/07) (holding that the peer review process undertaken by Best Lawyers in America and by Super Lawyers satisfies Iowa's standards for such ratings, and allowing Iowa lawyers to include in their marketing and advertisements their inclusion on such lists).
- Tennessee LEO 2006-A841 (9/21/06) (not for publication) ("[L]aw firms and lawyers are permitted to advertise the facts that certain lawyers have been selected by and listed within the above publications, as long as the lawyers do not go further and refer to themselves subjectively as "super" or "the best" on the basis of such designations contained within these publications.").

Second, at least one state has allowed lawyers to boast of their inclusion, but "recommended" that the lawyer also explain the criteria used by the organization.

- Michigan LEO RI-341 (6/8/07) (holding that Michigan lawyers may advertise their designation as a "Super Lawyer"; explaining the factors used to determine legitimacy of an organization whose selection of the lawyer can be advertised by the lawyer; "We agree with these opinions that pertain to publications that rate or certify lawyers, all of which place some importance on the presence of certain factors or conditions. These are: 1. The rating or certifying organization has made inquiry into the lawyer's qualifications, and considered those qualifications in selecting the lawyer for inclusion. 2. The rating or certification is issued discriminately. In the case of Super Lawyers,

listing is limited to the top 5% of lawyers in the state measured by a selection system uniformly applied. 3. The rating or certification is not issued for a price; it may not be bought or conditioned on purchase of a book, plaque or other goods. 4. The rating or certifying organization provides a basis on which a consumer can reasonably determine how much value to place in the listing or certification. 5. The basis of selection should be verifiable. That is, if peer review is claimed, it should be verifiable that it was conducted. This factor does not preclude subjective evaluation of the information about the lawyer by the rating or certifying organization. It is recommended by some that the lawyer include in his advertising a reference where the reader can ascertain the standards for inclusion. 6. The lawyer may state truthfully that he is listed in the specific publication (e.g., '2006 Super Lawyer, Super Lawyers Magazine'), and that he is thus included among those whom other lawyers have called the best; but may not state that because he is so listed, he is the best, or super. 7. If the lawyer is delisted, he must limit his claim to listing to the editions or years of the listing."; explaining that an organization need not use a peer review process; "Other bar opinions have noted the existence of peer review in the process of selection, but we cannot say that is a required factor in advertising listing in a publication. Peer review would permit a statement that the lawyer has been considered as a 'super lawyer' by other lawyers, but is not essential to advertising a listing in a publication that has satisfied the research and evaluation criteria expressed."; expanding the reasoning to other similar designations; "[W]e conclude a lawyer who is listed as a 'Super Lawyer' in that publication may refer to such designation in advertising that otherwise complies with MRPC 7.1. However, we believe that such a limited opinion would not adequately provide guidance to the bar. Accordingly, the opinion we express herein applies to listings and certifications that meet the conditions expressed, which would include (by example and not limitation) Martindale Hubbell, Who's Who, Best Lawyers and Chambers, as well as Super Lawyers.").

Michigan's LEO provides perhaps the best example of how a bar should determine the legitimacy of the entity preparing the lawyer list.

Third, New Jersey (whose experience is discussed above) allows lawyers to tout their inclusion on such lists -- as long as the "standard or methodology" is available to public inspection.

- New Jersey Rule 7.1(a)(3) (defining as "false and misleading" a statement which "compares the lawyer's services with other lawyers' services, unless (i) the name of the comparing organization is stated, (ii) the basis for the comparison can be substantiated, and (iii) the communication includes the following disclaimer in a readily discernable manner: 'No aspect of this advertisement has been approved by the Supreme Court of New Jersey'");

explaining in an Official Comment adopted on November 2, 2009, that "[a] truthful communication that the lawyer has received an honor or accolade is not misleading or impermissibly comparative for purposes of this Rule if: (1) the conferrer has made inquiry into the attorney's fitness; (2) the conferrer does not issue such an honor or accolade for a price; and (3) a truthful, plain language description of the standard or methodology upon which the honor or accolade is based is available for inspection either as part of the communication itself or by reference to a convenient, publicly available source" [N.J. Supreme Court Clerk Mark Neary, Notice to the Bar, Supreme Court Adopts Amendments and Official Comment to RPC 7.1 (N.J. Nov. 2, 2009), <http://www.judiciary.state.nj.us/notices/2009/n091104g.pdf>].

Fourth, New York allows lawyers to advertise their inclusion in such lists, as long as the lists are "bona fide" and the lawyer includes a disclaimer.

An advertisement may include information regarding bona fide professional ratings by referring to the rating service and how it has rated the lawyer, provided that the advertisement contains the "past results" disclaimer as required under paragraphs (d) and (e). However, a rating is not "bona fide" unless it is unbiased and nondiscriminatory. Thus, it must evaluate lawyers based on objective criteria or legitimate peer review in a manner unbiased by the rating service's economic interests (such as payment to the rating service by the rated lawyer) and not subject to improper influence by lawyers who are being evaluated. Further, the rating service must fairly consider all lawyers within the pool of those who are purported to be covered. For example, a rating service that purports to evaluate all lawyers practicing in a particular geographic area or in a particular area of practice or of a particular age must apply its criteria to all lawyers within that geographic area, practice area, or age group.

New York Rule 7.1 cmt. [13].

Fifth, several bars have required (not just recommended) that a lawyer's reference to inclusion on such a list explain the criteria.

- Pennsylvania LEO 2005-125 (9/2/05) ("You have inquired on your law firm's behalf whether a proposed form of advertisement featuring four of your law firm's lawyers complies with the Pennsylvania Rules of Professional Conduct. The advertisement refers to the "Super Lawyers" designation published under the auspices of Law & Politics and Philadelphia Magazine. The proposed form of written advertisement consists of four paragraphs, with some background on the law firm and a quotation from a named partner noting that

it is "an honor" to have received the Super Lawyers designation. With respect to the background information concerning the designation, the advertisement explains that those lawyers so designated were named after a legal publication mailed over 36,000 ballots to Pennsylvania lawyers who have been in practice for at least five years. The ballots asked the lawyers to name the best lawyers they had personally observed in action. A blue ribbon panel was then formed to review each individual lawyer's reputation and professional record. Super Lawyers were then chosen from this group").

- Philadelphia LEO 2004-10 (12/2004) ("It is the opinion of the Committee that, although an attorney advertisement may state that an attorney has been designated a 'Super Lawyer,' it may only do so when the advertisement contains sufficiently detailed information about that process and criteria for the reader to whom the advertisement is directed, to determine the manner and context within which the designation was made. Blanket statements that do not provide accurate and sufficient contextual information concerning ratings or other similar appellations do not comply with the Rules of Professional Conduct, currently and as amended January 1, 2005.").

Thus the trend has clearly been in favor of permitting lawyers to market their inclusion on the best-known lawyer lists.

(c) Several state bar rules and opinions (including the more recent opinions) have required lawyers to explicitly provide additional information about their inclusion on a lawyer list -- such as the area of law and the years of inclusion.

- Florida Rule 4-7.14(a)(3) ("Potentially Misleading Advertisements. Potentially misleading advertisements include, but are not limited to . . . references to a lawyer's membership in, or recognition by, an entity that purports to base such membership or recognition on a lawyer's ability or skill, unless the entity conferring such membership or recognition is generally recognized within the legal profession as being a bona fide organization that makes its selections based upon objective and uniformly applied criteria, and that includes among its members or those recognized a reasonable cross-section of the legal community the entity purports to cover").
- Florida Rule 4-7.14 cmt. ("Awards, honors and ratings are not subjective statements characterizing a lawyer's skills, experience, reputation or record. Instead, they are statements of objectively verifiable facts from which an inference of quality may be drawn. It is therefore permissible under the rule for a lawyer to list bona fide awards, honors and recognitions using the name or title of the actual award and the date it was given. If the award was given in the same year that the advertisement is disseminated or the advertisement references a rating that is current at the time the advertisement is

disseminated, the year of the award or rating is not required. For example, the following statements are permissible: 'John Doe is AV rated by Martindale-Hubbell. This rating is Martindale-Hubbell's highest rating.' 'Jane Smith was named a 2008 Florida Super Lawyer by Super Lawyers Magazine.'").

- North Carolina LEO 2010-11 (1/21/11) (holding that lawyers may include on their letterhead membership in professional groups with a "self-laudatory name," but only if a disclaimer also appears on the letterhead).
- North Carolina LEO 2009-16 (7/23/10) ("[A] lawyer may only advertise his membership or participation in an organization with a self-laudatory name or designation if the following conditions are satisfied: (1) the organization has strict, objective standards for admission that are verifiable and would be recognized by a reasonable lawyer as establishing a legitimate basis for determining whether the lawyer has the knowledge, skill, experience, or expertise indicated by the designated membership; (2) the standards for membership are explained in the advertisement or information on how to obtain the membership standards is provided in the advertisement; (3) the organization has no financial interest in promoting the particular lawyer; and (4) the organization charges the lawyer only reasonable membership fees. The opinion also provides that when the membership information may create unjustified expectations, such as the expectation that a lawyer obtains a million dollar verdict in every case, a disclaimer must be included in the advertisement.").
- Alaska LEO 2009-2 (5/5/09) ("A lawyer does not act unethically in advertising his or her selection or ranking in a commercial publication, including Super Lawyers and Best Lawyers of America, so long as the complete context is provided -- meaning that the lawyer's advertising must state accurately the publication by which he or she was ranked, the year of the ranking, and the field of the ranking, if one was specified. . . . A lawyer's mentioning his or her ranking or selection by a professional publication does not violate Rule 7.2, so long as the lawyer did not pay to be selected. Super Lawyers, Best Lawyers IN America, Chambers, and Martindale-Hubbell do not charge a lawyer to be ranked. They may charge a lawyer to be listed or to advertise in the publication, and paying for such a listing or advertisement is not prohibited." (emphasis added)).
- Delaware LEO 2008-2 (2/29/08) ("It is permissible for a lawyer to advertise that she has been designated a 'Super Lawyer' or 'Best Lawyer' as long as the lawyer states the year and particular specialty or area of practice of the designation and the advertising otherwise remains within the bounds of Rules 7.1, 7.2 and 7.3." (emphasis added)).
- North Carolina LEO 2007-14 (1/25/08) ("The Ethics Committee therefore concludes that an advertisement that states that a lawyer is included in a list

in North Carolina Super Lawyers, or in a similar listing in another publication, is not misleading or deceptive provided the relevant conditions from 2003 FEO 3 are satisfied; to wit: (1) the publication has strict, objective standards for inclusion in the listing that are verifiable and would be recognized by a reasonable lawyer as establishing a legitimate basis for determining whether the lawyer has the knowledge, skill, experience, or expertise indicated by the listing; (2) the standards for inclusion are explained in the advertisement or information on how to obtain the standards is provided in the advertisement (referral to the publication's website is adequate if the standards are published therein); and (3) no compensation is paid by the lawyer, or the lawyer's firm, for inclusion in the listing."; "In addition, the advertisement must make clear that the lawyer is included in a listing that appears in a publication which is identified (by using a distinctive typeface or italics) and may not simply state that the lawyer is a 'Super Lawyer.' A statement that the lawyer is a 'Super Lawyer,' without more, implies superiority to other lawyers and is an unsubstantiated comparison prohibited by Rule 7.1(a). Finally, since a new listing is included in each annual edition of the Super Lawyers supplement and magazine (and, it is presumed, in other similar publications), the advertisement must indicate the year in which the lawyer was included in the list.").

(d) Every state presumably would prohibit lawyers from referring in their marketing to inclusion on the list of an obviously illegitimate group.

(e) No bar seems to have dealt with lawyers' mention of honors given by their own law firms. Bars presumably would permit such references for lawyers working at well-known firms, but might well balk at similar marketing by less well-known law firms.

Best Answer

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

b 7/14

Past Successes

Hypothetical 16

You have enjoyed a successful and varied career as a commercial litigator. Your firm's new marketing director wants to highlight your experience both in firm brochures and on your firm's website.

May you do the following as part of your firm's marketing efforts (assuming that the descriptions are accurate):

- (a) Describe one of your cases (in which you represented a plaintiff) as resulting in the "largest verdict in the history of the state"?

YES (PROBABLY)

- (b) Describe some of your successful jury trial results?

YES (PROBABLY)

- (c) List all of your litigation wins and litigation losses?

YES (PROBABLY)

- (d) Link to judicial decisions in a number of cases in which you were successful?

YES (PROBABLY)

Analysis

States generally frown on any marketing that describes past successes.

Bars' analyses of such advertisements are interesting, because they discuss the ways in which a completely accurate statement about some case result nevertheless may mislead potential clients. The bars reason that such admittedly truthful advertisements might mislead potential clients because the large judgment might have actually fallen short of a pre-trial settlement offer from the adversary, the judgment was

obtained against a defendant who cannot pay it, etc. In addition, the bars worry that potential clients might expect the same results in their cases, even though the factual context could be dramatically different from the advertised cases.

In contrast, the ABA Model Rules deleted ABA Model Rule 7.1(b), which prohibited statements that are "likely to create an unjustified expectation about results the lawyer can achieve." In its place, the ABA Model Rules now contain Comment 3, which explains that

[a]n advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. . . . The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

ABA Model Rule 7.1 cmt. [3] (emphasis added).

Thus, the ABA has moved away from a total prohibition on lawyers describing their past successes. This softening of the ABA's position might ultimately be reflected in state bars' approach, but for now most bars continue to take a very strict view of advertisements that describe a lawyer's past successes.

This debate obviously has constitutional implications. For instance, in January 2011, the Fifth Circuit found unconstitutional a Louisiana rule prohibiting any marketing statements providing factual descriptions of a lawyer's past successes.

- Public Citizen Inc. v. La. Attorney Disciplinary Bd., 632 F.3d 212, 221, 222 (5th Cir. 2011) ("Rule 7.2(c)(1)(D) prohibits communications 'containing a reference or testimonial to past successes or results obtained.' The plain language of this rule imposes a blanket ban on all references or testimonials to past results in attorney advertisements."; providing an example of such prohibitive statements: "A statement that a lawyer has tried 50 cases to a

verdict, obtained a \$1 million settlement, or procured a settlement for 90% of his clients, for example, are objective, verifiable facts regarding the attorney's past professional work."; finding the total ban unconstitutional; "Rule 7.2(c)(1)(D) prohibits statements 'of opinion or quality and . . . [those] of objective facts that may support an inference of quality.'" (citation omitted); "To the extent that Rule 7.2(c)(1)(D) prevents attorneys from presenting 'truthful, non-deceptive information proposing a lawful commercial transaction,' it violates the First Amendment." (citation omitted)).

More recently, a Florida lawyer challenged a Florida rule prohibiting lawyers from listing their successes.

- Julie Kay, Personal Injury Law Firm Sues Florida Bar Over Advertising Rules, Daily Business Review, Dec. 16, 2013 ("Searcy Denney Scarola Barnhart & Shipley in West Palm Beach is suing The Florida Bar, alleging its new attorney advertising rules violate the First Amendment."; "Searcy Denney filed the suit after submitting its website, blog and LinkedIn pages to The Florida Bar for an advisory opinion, said partner F. Gregory Barnhart. The Bar objected to all versions, including Barnhart's resume listing every case he has tried or settled for more than \$1 million. The Bar stated such information was not 'objectively verifiable,' Barnhart said."; "The lawsuit said The Bar also concluded the firm's entries on the social media site LinkedIn violate several rules because LinkedIn automatically lists the firm's specialties and includes an unsolicited review posted by a former client.").

(a)-(b) States take one of four basic approaches to marketing that describes a lawyer's past successes.

First, some states flatly prohibited any marketing that describes past successes.

Florida completely prohibited such marketing until its May 1, 2013, amendments.

It is unclear whether other states' older legal ethics opinions would still apply in those states.

- Connecticut LEO 88-3 (2/25/88) (prohibiting advertisement that contains a news article about a specific jury award in a personal injury case).
- Nassau County LEO 86-39 (9/11/86) (prohibiting reference in an advertisement to "a certain number of successful previous representations of defendant clients," because the statistic is deceptive).

Second, some states permit lawyers to describe their past successes, but require specific disclaimers.

- Missouri Rule 7.1(c) (allowing lawyers to describe past results, as long as they also include a disclaimer "that past results afford no guarantee of future results and that every case is different and must be judged on its own merits").
- New York Rule 7.1(e)(3) (requiring a disclaimer that "[p]rior results do not guarantee a similar outcome.").
- Virginia Rule 7.1(b) (prohibiting an advertisement which "advertises specific or cumulative case results, without a disclaimer that (i) puts the case results in a context that is not misleading; (ii) states that case results depend upon a variety of factors unique to each case; and (iii) further states that case results do not guarantee or predict a similar result in any future case undertaken by the lawyer. The disclaimer shall precede the communication of the case results. When the communication is in writing, the disclaimer shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results.").

In 2013, the Virginia Supreme Court applied the Virginia Rule to a Richmond lawyer's blogs describing his own successes and other lawyers' successes. Hunter v. Va. State Bar ex rel. Third Dist. Comm., 285 Va. 485, 491, 499, 498, 499, 500, 501, 504, 505, 507, 509-10 (Va. Feb. 28, 2013).

- Hunter v. Va. State Bar ex rel. Third Dist. Comm., 285 Va. 485, 491, 499, 498, 499, 500, 501, 504, 505, 507, 509-10 (Va. 2013) (holding that a lawyer who published a blog about criminal cases, including his own successful cases, must include a disclaimer required of lawyers' advertisement of their own successes, but was not prohibited by Virginia's Rule 1.6 from including in the blog information in the public record, despite the lawyer's former clients' complaint that the publication was embarrassing; explaining that the blog "contains posts discussing a myriad of legal issues and cases, although the overwhelming majority are posts about cases in which Hunter obtained favorable results for his clients."; concluding that the blogs were commercial speech governed by Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980); noting that the blog is on the law firm's website, which also contained an advertisement for the firm; also noting that "[t]his non-interactive blog does not allow for discourse about the cases, as non-commercial commentary often would by allowing readers to post

comments."; citing Bates v. State Bar of Ariz., 433 U.S. 350, 383 (1977), for the proposition that "[b]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising."; "While we do not hold that the blog posts are inherently misleading, we do conclude that they have the potential to be misleading."; finding that the Virginia State Bar had satisfied the Central Hudson tests; "[W]e must examine whether the VSB has a substantial governmental interest in regulating these blog posts. . . . [t]he VSB has a substantial governmental interest in protecting the public from an attorney's self-promoting representations that could lead the public to mistakenly believe that they are guaranteed to obtain the same positive results if they were to hire Hunter."; "The VSB's regulations permit blog posts that discuss specific or cumulative case results but require a disclaimer to explain to the public that no results are guaranteed. . . . This requirement directly advances the VSB's governmental interest."; "Finally, we must determine whether the VSB's regulations are no more restrictive than necessary."; "This requirement ensures that the disclaimer is noticeable and would be connected to each post so that any member of the public who may use the website addresses to directly access Hunter's posts would be in a position to see the disclaimer. Therefore, we hold that the disclaimer's required by the VSB are 'not more extensive than is necessary to serve that interest.'" (citation omitted); noting that the circuit court "imposed the following disclaimer to be posted once: 'Case results depend upon a variety of factors unique to each case. Case results do not guarantee or predict a similar result in an future case.'"; acknowledging that "[w]hile the substantive meaning of the imposed disclaimer may conform to the requirements stated in Rule 7.2(a)(3)(i) through (iii), it nevertheless is less than what the rule requires. In contrast to the committee's determination, there is no provision in the circuit court's order requiring that the disclaimer be formatted and presented in the manner required by Rule 7.2(a)(3), and the text of the disclaimer prescribed by the circuit court is not itself formatted and presented in that manner."; noting that under Virginia Rule 7.2(a)(3), "[t]he disclaimer shall precede the communication of the case results. When the communication is in writing, the disclaimer shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results."; holding "that Hunter's blog posts are potentially misleading commercial speech that the VSB may regulate. We further hold that circuit court did not err in determining that the VBS's interpretation of Rule 1.6 violated the First Amendment. Finally, we hold that because the circuit court erred in imposing one disclaimer that did not fully comply with Rule 7.2(a)(3), we reverse and remand for imposition of disclaimers that fully comply with that Rule."; two justices dissented, explaining that "the articles on Hunter's blog are political speech that is protected by the First Amendment. The Bar

concedes that if Hunter's blog is political speech, the First Amendment protects him and the Bar cannot force Hunter to post an advertising disclaimer on his blog."; the dissent further noted that "[t]he Bar produced no evidence that anyone has found Hunter's articles to be misleading. There appears to be little benefit, if any, to the public by requiring Hunter to post a disclaimer that concedes his articles are advertisements. Hunter disagrees that his articles are advertisements, and claims they are political speech. He objects to cheapening his political speech by denominating it is advertisement material.").

Third, some states permit lawyers to describe their past successes, but require that they put the successes in context (without demanding a specific disclaimer).

- Georgia Rule 7.1 cmt. [2] ("Communications Concerning a Lawyer's Services of statements that may create 'unjustified expectations' would ordinarily preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, and advertisements containing client endorsements. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances.").
- North Carolina LEO 2009-16 (7/23/10) ("[A] website may include a case summary section showcasing successful verdicts and settlements if the section contains factually accurate information accompanied by an appropriate disclaimer. The disclaimer must be sufficiently tailored to address the information presented in the case summary section. The disclaimer must be displayed on the website in such a manner that it is reasonable to expect that anyone who reads the case summary section will also read the disclaimer. Depending on the information contained in the case summary section, an appropriate disclaimer should point out that the cases mentioned on the site are illustrative of the matters handled by the firm; that case results depend upon a variety of factors unique to each case; that not all results are provided; and that prior results do not guarantee a similar outcome."; "Providing a prominently displayed disclaimer that is specifically tailored to the information presented on a webpage regarding a lawyer or law firm's achievements precludes a finding that the webpage is likely to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters.").
- North Carolina LEO 2009-6 (7/24/09) ("The consumer of legal services benefits from the dissemination of accurate information in choosing legal representation. See D.C. Legal Ethics Comm., Op. 335 (2006). Lawyers also benefit from the dissemination of accurate information when seeking to enlist the aid of co-counsel in a particular matter. A consumer researching law firms on the Internet expects a law firm's website to include information about

the firm's past successes, and many firm websites currently include a 'verdict and settlements' section. The law firm's duty is to provide that information to the consumer without creating an unjustified expectation about the results the lawyer can achieve. However, the requirements set out in 2000 FEO 1 [earlier North Carolina LEO] may be so burdensome that they discourage lawyers from providing any information about verdicts and settlements and thereby effectively prevent consumers from getting helpful information. Therefore, a website may include a 'case summary' section if there is sufficient information about each case included on the webpage to comply with Rule 7.1(a). Some of the required disclosures set out in 2000 FEO 1 should be included in the case summary section of the website. The summary should reference the complexity of the matter; whether liability and/or damages were contested; whether the opposing party was represented by legal counsel; and, if applicable, the firm's success in actually collecting the judgment. Providing specific information about the factual and legal circumstances of the cases reported, in conjunction with the inclusion of an appropriate disclaimer, precludes a finding that the webpage is likely to create unjustified expectations or otherwise mislead a prospective client.").

- North Carolina LEO 2000-1 (4/14/00) (holding that a law firm's web page must comply with the marketing rules; "To put a verdict record in context, information about the lawyer's or law firm's record must include disclosure of the following: the lawyer's or firm's history of obtaining unfavorable, as well as favorable, verdicts and settlements; the lawyer's or firm's success in actually collecting favorable verdicts; the types of cases handled and their complexity; whether liability and/or damages were contested; and whether the opposing party or parties were represented by legal counsel. In addition, the verdict record must disclose the period of time examined. Finally, the communication must include a statement that the outcome of a particular case cannot be predicated upon a lawyer's or law firm's past results."; "If information to be disclosed is voluminous, the communication may state that list of all cases handled by the lawyer or law firm during a disclosed time period, including the required background information and explanation, will be mailed free of charge upon request. However, the availability of such a mailing does not relieve the lawyer or the law firm of the obligation to provide a context in an advertisement or communication if it contains any reference to a verdict record."; "In the instant inquiry, Law Firm's web page appropriately discloses that most of its cases were defended, that the cases involved complex medical issues, that all verdicts obtained were collected, and that past success is not a predictor of future success in any particular case."; "However, subjective statements, such as references to Law Firm as 'enormously successful' and 'consistently obtaining verdicts and settlements' as well as the statement that Law Firm's verdicts and settlements are 'among the largest reported in North Carolina each year,' are misleading. Although Law Firm has made an effort to avoid creating unjustified expectations, the web page does not provide enough explanation of Law Firm's record to avoid misleading a visitor to the website. Providing a complete record by mail,

disclosing the number of cases handled each year, the number of favorable and unfavorable settlements obtained, and the time frame examined, are necessary to bring the web page into compliance with the requirements of the Revised Rules of Professional Conduct.").

- North Carolina LEO 99-7 (7/23/99) (prohibiting a lawyer from including the following paragraph in targeted direct letters to traffic accident victims: "If you need a lawyer to represent you in connection with your recent accident, look no further. Our firm has obtained jury verdicts and settlements for individual clients in excess of \$1,000,000.00. Although there is no guarantee of any recovery in your case, we will provide you with aggressive and comprehensive legal services to protect your rights and interests and maximize your chances of recovery."; explaining that "Rule 7.1 of the Revised Rules of Professional Conduct prohibits a lawyer from making a false or misleading communication about the lawyer's services. Paragraph (b) of the rule defines a false or misleading communication, in part, as a communication that 'is likely to create an unjustified expectation about the results the lawyer can achieve. . . .' Comment [1] to the rule specifies that the prohibition in paragraph (b) 'would ordinarily preclude advertisements about the results obtained on behalf of the client, such as the amount of damage award or the lawyer's record in obtaining favorable verdicts. . . .' A general representation about past results without additional information that puts the past results in context is misleading. In the direct mail letter in this inquiry, the statement that 'there is no guarantee of any recovery in your case' is not sufficient to mitigate the unjustified expectations created by the advertisement of jury verdicts proscribed by the comment to Rule 7.1.").

Fourth, some states follow the ABA approach, which generally allows lawyers to describe past successes unless their reference would otherwise violate the anti-deception standards.

- Illinois Rule 7.1 cmt. [3] ("An advertisement that truthfully reports a lawyer's achievements on behalf of clients or former clients may be misleading if presented so as to lead a reasonable person to form an unjustified expectation that the same results could be obtained for other clients in similar matters without reference to the specific factual and legal circumstances of each client's case. Similarly, an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated. The inclusion of an appropriate disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.").

- Florida Rule 4-7.13 cmt. ("The prohibitions in subdivisions (b)(1) and (b)(2) of this rule preclude advertisements about results obtained on behalf of a client, such as the amount of a damage award or the lawyer's record in obtaining favorable verdicts, if the results are not objectively verifiable or are misleading, either alone or in the context in which they are used. For example, an advertised result that is atypical of persons under similar circumstances is likely to be misleading. A result that omits pertinent information, such as failing to disclose that a specific judgment was uncontested or obtained by default, or failing to disclose that the judgment is far short of the client's actual damages, is also misleading. Such information may create the unjustified expectation that similar results can be obtained for others without reference to the specific factual and legal circumstances. An example of a past result that can be objectively verified is that a lawyer has obtained acquittals in all charges in 4 criminal defense cases. On the other hand, general statements such as, 'I have successfully represented clients,' or 'I have won numerous appellate cases,' may or may not be sufficiently objectively verifiable. For example, a lawyer may interpret the words 'successful' or 'won' in a manner different from the average prospective client. In a criminal law context, the lawyer may interpret the word 'successful' to mean a conviction to a lesser charge or a lower sentence than recommended by the prosecutor, while the average prospective client likely would interpret the words 'successful' or 'won' to mean an acquittal.").

(c) Although it is difficult to imagine why any bar would prohibit a lawyer from providing a full and accurate list of all wins and losses, the Ohio Bar prohibited a lawyer from doing so.

- Ohio LEO 2003-2 (4/11/03) ("A law firm would like to provide attorneys, business clients, and potential business clients with statistics as to the number of intellectual property matters won, lost, and settled by the law firm. The law firm's statistics would include all results, unfavorable as well as favorable, for the last eleven years for intellectual property matters. The statistical report would include a statement that the statistics are historical data, not predictors of the future outcome of any particular case." (emphases added); "the Board advises that the proposed listing of statistics as to the number of intellectual property matters won, lost, and settled by a law firm, is also improper under the advertising rules. First, the reporting of 'wins' and 'losses' in intellectual property is misleading. Such statistics imply that wins and losses depend solely upon the law firm's skill and expertise, without regard to the merits that may more heavily influence the outcome. Second, the proposed use of the statistics is self-laudatory. Although, the statistical report clearly states that the data is historical data and not a predictor of future outcome of a particular case, the report creates unjustified expectations that the law firm is able to control the outcome of cases." (emphases added)).

(d) Although it might not make sense for a state bar to prohibit a lawyer from advertising specific results of cases while allowing the lawyer's website to link to published decisions reflecting the results of those cases, the Ohio Bar indicated that "[a] law firm's web site may provide a link from an attorney's biography to published opinions of cases in which such attorney participated." Ohio LEO 2000-6 (12/1/00) (emphasis added).

Best Answer

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

b 7/14

Referral Arrangements

Hypothetical 17

Several years ago, you moved from a large city big firm practice to a much smaller firm located in the town where you were born and raised. In addition to what you see as lifestyle advantages, you think that the move will allow you to market your services by calling upon your relationships with childhood friends who now enjoy prominent positions in many professional service firms in your hometown. Because you never had to confront marketing issues like this in your previous big-city practice, you want to make sure that you do not violate any ethics rules in taking such steps.

May you do the following:

- (a) Establish an informal referral arrangement (without any written agreement or obligation on either side) with a financial planner you have known since childhood?

YES

- (b) Arrange a formal "referral agreement" under which you agree to refer your legal clients to a small accounting firm managed by a high school classmate, with the accounting firm agreeing to refer to you any of its clients requiring legal advice?

NO (PROBABLY)

Analysis

A number of bars have analyzed the type of referral arrangements that pass ethical muster.

- (a) Informal referrals between lawyers and non-lawyers have undoubtedly existed as long as there have been lawyers. Of course, lawyers must refer their clients to others (either lawyers or non-lawyers) who will provide the best service to the clients in the situation -- even if those other service providers never return the favor by referring any business back to the lawyer.

The ABA rules permit lawyers to

refer clients to another lawyer or non-lawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if (i) the reciprocal referral agreement is not exclusive, and (ii) the client is informed of the existence and the nature of the agreement.

ABA Model Rule 7.2(b)(4).

Most bars are fairly generous in addressing such informal referral arrangements.

- Illinois Rule 7.2(b)(4)(i)-(ii) ("A lawyer shall not give anything of value to a person for recommending the lawyer's services except that a lawyer may (4) refer clients to another lawyer or a nonlawyer professional pursuant to an agreement not otherwise prohibited under these Rules that provides for the other person to refer clients or customers to the lawyer, if (i) the reciprocal referral agreement is not exclusive, and (ii) the client is informed of the existence and nature of the agreement.").
- Rhode Island LEO 96-25 (9/12/96) (allowing a lawyer to join what is called a "Leads Group" under certain conditions: "Therefore the inquiring attorney may participate in such a group as long as referring prospective clients to the attorney is not the sole purpose of the group, the attorney does not accept referrals from members in exchange for the attorney's referring his/her clients to other members, the attorney does not solicit members of the group, and there are no improper fee-sharing or referral payments involved in the arrangement.").
- Maine LEO 135 (11/10/93) (allowing a lawyer to join a non-profit national network of mortgage foreclosure lawyers who periodically meet, discuss matters of mutual interest, and prepare a network directory).

(b) In contrast to the informal referral situation discussed above, state bars condemn any kind of formal referral arrangement with an explicit or implicit quid pro quo.

- Texas LEO 629 (5/2013) ("It is not permissible under the Texas Disciplinary Rules of Professional Conduct for a personal injury lawyer to agree to refer all criminal cases to another lawyer in exchange for the other lawyer's agreement to refer all personal injury cases to the personal injury lawyer.").
- Illinois LEO 10-02 (10/2009) ("A lawyer may not enter into a referral arrangement with a real estate company that would require the lawyer to use the real estate company's affiliated title insurer for the lawyer's clients as a condition of receiving referrals from the real estate company."; "A lawyer who

agrees to the proposed arrangement with the Real Estate Company would violate the Illinois Rules of Professional Conduct in at least three respects. First, a lawyer must exercise independent professional judgment in the representation of a client and may not allow a nonlawyer who refers clients to the lawyer to direct or control the representation of a client, including the selection of a title insurer. Second, a lawyer may not give anything of value to another in exchange for client referrals and may not agree to an exclusive referral arrangement. Third, the mandatory aspects of the referral relationships result in a conflict of interest between the lawyer and the client, and the nature of the conflict makes it unlikely that the lawyer could obtain a valid consent to the conflict.").

- Virginia LEO 1846 (2/2/09) (explaining that lawyers may not join a lead-sharing organization in which membership "is often dependent on the number of leads a member passes," because such "reciprocal" referrals amounts to a "quid pro quo payment for services" in violation of the prohibition on providing something of value in return for a referral; such participation "may put the client's interests at risk" because the lawyer "may be obligated to refer a client to a particular member specialist when a non-member specialist may be better suited to meet the client's needs"; the lawyer faces a personal conflict of interest because the lawyer may not feel free "to choose the most appropriate specialty provider for a client"; "[t]he mere disclosure of a client's name and specific need in certain circumstances may be enough to violate the Rule without consent of the client."; also explaining that a lawyer may own an interest in a company that is such a lead-sharing organization "as long as the lawyer is not a member."; noting that lawyers may also engage in voluntary referrals to other lawyers and professionals, but may not join "a hypothetical organization which bases membership on the commitment to provide referrals.").
- Massachusetts LEO 08-01 (3/6/08) ("A lawyer may not participate in a private business networking organization that requires members to cross-refer potential clients to one another. Under Rule 7.3(f), a lawyer may not 'give anything of value to any person or organization to solicit professional employment for the lawyer from a prospective client,' provided that he or she may 'request[] referrals from a lawyer referral service operated, sponsored, or approved by a bar association' or 'cooperat[e] with any qualified legal assistance organization.' A for-profit business networking organization, however, is not an authorized 'lawyer referral service' or a 'qualified legal assistance organization' for purposes of the Massachusetts Rules of Professional Conduct, and a lawyer's commitment to provide business referrals to other organization members in return for their agreement to refer potential clients to him or her represents the 'giv[ing] . . . of value' to those other members in contravention of Rule 7.3(f).").
- North Carolina LEO 2006-7 (10/20/06) ("[A] lawyer may participate in a networking organization, such as the one described in this inquiry, only if

making referrals to other members of the organization is not a condition of membership and the lawyer is not required to fill out referral 'tickets.' If the lawyer refers a client to another member of the organization, he may only do so upon receiving the informed consent of the client, and after determining that the client would benefit from the referral, the other member's credentials are legitimate, and the other member is qualified to provide services to the client. The lawyer is prohibited from making a referral to another member of the organization on a quid pro quo basis. The lawyer must emphasize to the other members of the organization that any referral to him should be based upon the member's independent analysis of his qualifications."; answering further questions with fairly restrictive answers: "May Attorney provide his/her business cards to other members for distribution to third parties? . . . No, because of the risk of in-person solicitation by the other members on the lawyer's behalf. . . . May Attorney ask other members to refer business to Attorney? . . . No. However, Attorney may provide the other members with information about his qualifications.").

- New York LEO 791 (2/1/06) ("A lawyer may not participate in an organization that requires the lawyer to refer potential clients or customers to other lawyers or to nonlawyer members in exchange for their referral of legal business, or charges membership fees and other fees and requires nonlawyer members to refer potential clients to the lawyer.").
- Maryland LEO 05-11 (3/21/05) (holding that Maryland lawyer may not join a "networking and referral organization" consisting of "various professionals and business people who seek to obtain referrals and learn marketing techniques"; noting that the referral organization earns a profit through annual membership fees; also noting that there are no required referrals, no quotas and no "quid pro quo" referrals; holding that "[a]rrangements of this nature create undisclosed conflicts of interest, compromise an attorney's professional independence and risk violation of the rule prohibiting in-person solicitation"; noting that lawyers cannot engage in in-person solicitation of clients and therefore would not be able to pass around their business cards to others in the organization; also finding that the proposed arrangements would involve lawyers giving "something of value" in return for a referral, because the organization "clearly promotes the concept of "[y]ou distribute my cards, and I'll distribute yours"").
- Ohio LEO 2004-9 (10/8/04) (prohibiting a lawyer from entering into "an agreement with the chiropractor for mutual referral of clients"; explaining that the lawyer and the chiropractor can refer clients to each other, but indicating that "there be no mutual referral agreements, no rewards or compensation for recommendations or referrals, and no improper self-recommendation of legal services").
- New Jersey LEO 694 (11/3/03) (prohibiting two law firms from using the term "affiliated" because it is misleading; forbidding the two firms from entering into

an agreement for mandatory referrals; explaining that reciprocal fee sharing would be unethical absent client consent; noting that the sharing of facilities by the two firms might create confidentiality problems).

- Montana LEO 960227 (1996) (prohibiting a lawyer from joining what is described as a "network group" because "the referrals or 'leads' exchanged among members of the group [are] things of value which are given by one member to another who recommends his services. . . . Referrals are valuable to this scheme, where 'backscratching' is both compulsory and profitable.").
- New Jersey LEO 681 (7/17/95) (prohibiting a U.S. law firm from entering into an arrangement with a foreign law firm in which each firm pledges to use its best efforts to promote the other and refer clients to the other, with fees divided in proportion to the work performed by each firm under a specified formula; finding that such a system of mutual referrals may satisfy the fee-sharing provisions but amounts to an impermissible rewarding for a recommendation).

Best Answer

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

b 7/14

Money-Back Guarantees

Hypothetical 18

You have found that many clients seem reluctant to sign a retainer arrangement calling for an hourly rate. One of your partners suggested that you add a "money-back guarantee" to your retainer arrangements.

May you offer clients a "money-back guarantee" if you are not successful?

MAYBE

Analysis

In 2003, the Ohio Bar prohibited Ohio lawyers from using such "money-back guarantees" in their marketing.

- Ohio LEO 2003-2 (4/11/03) ("[T]he law firm would like to offer money-back guarantees to clients in intellectual property matters. For example, if based on its statistics the law firm believes there is a sixty five percent or greater chance of winning an intellectual property matter, the law firm will offer a money-back guarantee to the client. If based upon its statistics the law firm believes that a trademark will be registered, the law firm will offer a money-back guarantee if the law firm does not register the trademark."; "[T]his Board advises that it is improper for a lawyer or law firm to offer money-back guarantees to clients on intellectual property matters. Money-back guarantees violate DR 5-103(B) because the lawyer acquires a prohibited proprietary interest in the cause of action or subject of litigation. Money-back guarantees also create a conflict of interest between the lawyer and the client under DR 5-101(A), because when the agreed upon outcome is not reached the lawyer has a strong financial incentive to claim that the client did not comply with conditions of the guarantee and is not entitled to a refund. Money-back guarantees also create an unjustified expectation under DR 2-101(C)(2) that the lawyer has improper control or influence over the legal system." (emphasis added)).

Best Answer

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

General Rules for Direct Mail

Hypothetical 19

You just started your own firm with two law school classmates, and you think that direct mail marketing can provide "more bang for the buck" than television or media advertising. However, before you get started you want to make sure you understand the ethics rules.

- (a) May you send targeted direct mail to people involved in serious automobile accidents (and whose names appear in the newspaper)?

MAYBE

- (b) May you send direct mail marketing to folks who have just declared bankruptcy (and whose names appear in the newspaper)?

YES (PROBABLY)

- (c) Will your direct mail marketing have to comply with any specific requirements, include disclaimers, etc.?

YES

Analysis

States have taken to heart the United States Supreme Court's invitation to regulate details of direct mail marketing materials.

States that take a "one-size-fits-all" approach to lawyer marketing necessarily apply the same direct mail restrictions to a personal injury lawyer sending direct mail pieces to those injured in automobile accidents and to a Wall Street law firm seeking business from sophisticated consumers of the law firm's skills and experience in reverse triangular mergers.

One well-respected commentator on lawyer marketing has criticized such rules.

Attempts at heavy-handedness meet with mixed results in states such as Florida, New York, Connecticut, Louisiana,

Missouri and New Jersey (to name a few). In recent years, some of the world's largest and most prestigious corporate law firms were forced to either scrap or change the way they sent out informational client alerts, due to the implied need to slap the phrase "ATTORNEY ADVERTISING" on the subject line of an e-mail. Pardon me, but I highly doubt the recipient, perhaps the general counsel of General Electric Co. or Johnson & Johnson, is hornswaggled (a legal term of art) by the trickery of a tax law update from Sullivan & Cromwell. I think the "this is not legal advice" disclaimer on the bottom probably would suffice.

Micah U. Buchdahl, Archaic Rules Hobble Attorneys, Nat'l L.J., Sept. 7, 2009.

(a) Not surprisingly, every state prohibits lawyers from sending direct mail to clients whom the lawyer knows to be vulnerable, emotionally distraught, etc.

Some bars have adopted additional restrictions on certain types of direct mail.

For instance, some states restrict direct mail to certain recipients for a specified amount of time after the incident giving rise to their need for legal advice.

- Florida Rule 4-7.18(b)(1)(A) ("A lawyer may not send, or knowingly permit to be sent, on the lawyer's behalf or on behalf of the lawyer's firm or partner, an associate, or any other lawyer affiliated with the lawyer or the lawyer's firm, a written communication directly or indirectly to a prospective client for the purpose of obtaining professional employment if . . . the written communication concerns an action for personal injury or wrongful death or otherwise relates to an accident or disaster involving the person to whom the communication is addressed or a relative of that person, unless the accident or disaster occurred more than 30 days prior to the mailing of the communication").

Some states have expanded such restrictions.

- Matt Friedman, Assembly committee approves bill making public wait 90 days to see accident reports, Star-Ledger, June 18, 2012, http://www.nj.com/news/index.ssf/2012/06/assembly_committee_passes_bill.html ("The Assembly Judiciary Committee this morning approved a bill that would make the public wait 90 days to see accident reports."; "The bill (A801) is intended to bar lawyers, doctors, chiropractors and others from soliciting victims shortly after their accidents. Only accident victims, insurance companies and government authorities would have immediate access to the report."; "Both the Senate and Assembly passed a bill in January would restrict solicitation of accident victims for 30 days, but it was 'pocket vetoed'")

by Gov. Chris Christie when he did not sign it before the session ended. The current bill, however, is substantially different.").

In a rare federal statutory intrusion into lawyer marketing issues, a federal law restricts direct mail marketing to airplane crash victims or their families for a specified amount of time.

§ 1136. Assistance to families of passengers involved in aircraft accidents.

. . . .

(g) Prohibited actions. . . . In the event of an accident involving an air carrier providing interstate or foreign air transportation and in the event of an accident involving a foreign air carrier that occurs within the United States, no unsolicited communication concerning a potential action for personal injury or wrongful death may be made by an attorney (including any associate, agent, employee, or other representative of an attorney) or any potential party to the litigation to an individual injured in the accident, or to a relative of an individual involved in the accident, before the 45th day following the date of the accident.

49 U.S.C. § 1136(g)(2).

Every serious plane crash seems to implicate this rule.

- Juan Carlos Rodriguez, [Asiana Flight Crash Victims Report Illegal Attorney Contact](#), Law360, Aug. 1, 2013 ("Passengers on the Asiana Airlines flight that recently crash-landed in San Francisco have complained that attorneys have been contacting them about potential lawsuits in violation of a 45-day ban on solicitations following an aviation accident, the National Transportation Safety Board (NTSB) said Thursday."; "NTSB spokeswoman Kelly Nantel said she didn't know how many complaints have been received or how exactly the attorneys allegedly have been contacting the victims -- whether through phone calls or Internet communication -- but either way, she said, such contact is illegal under the Aviation Disaster Family Assistance Act."; "This is not an uncommon practice following an aviation accident, but it is a prohibited practice, so we certainly take action because we need to make sure that survivors and family members are protected,' Nantel said. 'We take it seriously.'"; "She said one firm, Chicago-based Ribbeck Law Chartered International, was referred to the Attorney Registration and Disciplinary Commission (ARDC) of the Illinois Supreme Court for its alleged contacting of victims.").

One New Jersey lawyer found to his regret that this federal law trumped a less restrictive New Jersey rule.

- Henry Gottlieb, Lawyer Fined for Soliciting Families of Air-Crash Victims Within Banned Period, N.J. L.J., Sept. 3, 2009 ("Richard J. Weiner, a prominent New Jersey personal injury lawyer, paid a \$5,000 federal civil penalty for sending solicitation letters to families of passengers killed in the February crash of commuter jet in Buffalo, New York, authorities announced Wednesday."; "A federal statute bars unsolicited contacts by lawyers with victims or their families within 45 days of an air-carrier accident. Weiner admitted in a settlement with the United States Attorney's Office in Buffalo that he sent the families letters within that time."; "The letters included the line, 'please consider giving me the opportunity to sit down with you and discuss your rights with regard to this tragedy.'"; "Weiner says he sent 12 or 13 letters and that he made the mistake because he was unaware of the 45-day requirement. The New Jersey Rules of Professional Conduct require a 30-day wait. Indeed, the federal law also had a 30-day period until 2008 when 15 days were added."; "I guess my mistake was not reading all the fine print of the federal regulations,' Weiner says.").

A 2013 United States Supreme Court decision dealt with another federal issue.

- Maracich v. Spears, 133 S. Ct. 2191, 2207-08 (2013) (holding that a lawyer could not use personal information obtained from the state motor vehicle department database to solicit participation in a lawsuit by those data the lawyer obtained; "Attorneys are free to solicit plaintiffs through traditional and permitted advertising without obtaining personal information from a state DMV. Here, the attorneys could also have complied with (b)(12) and limited their solicitation to those individuals who had expressly consented, or respondents could have requested consent through the DPPA's [Driver's Privacy Protection Act] waiver procedure. See §2721(d). In light of these and other alternatives, attorneys are not without the necessary means to aggregate a class of plaintiffs. What they may not do, however, is to acquire highly restricted personal information from state DMV records to send bulk solicitations without express consent from the targeted recipients. This is not to suggest that attorneys may not obtain DPPA-protected personal information for a proper investigatory purpose. Where respondents obtained petitioners' personal information to discern the extent of the alleged misconduct or identify particular defendants, those FOIA requests appear permissible under (b)(4) as 'investigation in anticipation of litigation.' Solicitation of new business, however, is not 'investigation' within the meaning of (b)(4). And acquiring petitioners' personal information for a legitimate investigatory purpose does not entitle respondents to then use that same information to send direct solicitations. Each distinct disclosure or use of personal information acquired from a state DMV must be permitted by the

DPPA. See §2724(a) ("A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains"); see also §2721(c). If the statute were to operate otherwise, obtaining personal information for one permissible use would entitle attorneys to use that same information at a later date for any other purpose. For example, a lawyer could obtain personal information to locate witnesses for a lawsuit and then use those same names and addresses later to send direct marketing letters about a book he wrote.").

Interestingly, one court addressed the possibility that a symbol on the outside of a direct mail piece might disclose the nature of the recipient's legal problems -- which it justifiably wanted to prevent.

- Fla. Bar v. Gold, 937 So. 2d 652, 654, 655-56 (Fla. 2006) (addressing a brochure that the bar alleged to have violated a specific Florida rule prohibiting any direct mail from disclosing on its face the nature of the recipients' legal problems; "The outside of the brochure contains the addressee's name and address; the name of Gold's firm, The Ticket Clinic, which appears on a diamond shape resembling the outline of a traffic sign with the drawing of a roadway disappearing into the distance; a drawing of a stop sign; and the words 'Don't Just Roll Over Fight Back.' The Bar alleges the outside of Gold's brochure expressly reveals the nature of the recipient's specific legal problems, in violation of rule 4-7.4(b)(2)(K). That rule provides: 'A written communication seeking employment by a specific prospective client in a specific matter shall not reveal on the envelope, or on the outside of a self-mailing brochure or pamphlet, the nature of the client's legal problem.'"; ultimately finding that the direct mail did not violate the Florida rule; "The outside of the brochure contained the names and addresses of the recipients. The sender was identified as The Ticket Clinic, the name of Gold's law practice. In addition, there was a picture of a stop sign and a roadway, along with the words: 'Don't Just Roll Over Fight Back.' While it is possible that someone seeing the outside of Gold's brochure might guess that the recipient was being targeted by a law firm, there is nothing that would lead inescapably to the conclusion that the recipient had indeed been charged with a particular offense. There is certainly nothing on the outside of the brochure to indicate the recipient had actually been charged with DUI. In fact, there was nothing to distinguish the outside of the brochure from numerous other unsolicited, seemingly random bulk mail advertisements which are mailed and delivered regularly in the hopes of gaining, by chance alone, some new customers or purchasers. Accordingly, the referee's report is approved insofar as it granted summary relief in favor of Gold on the rule 7.4(b)(2)(K) claim.").

Lawyers obviously must comply with the most restrictive rule.

Bar disciplinary regulators severely punish lawyers who violate these restrictions.

- In re Shapiro, 780 N.Y.S.2d 680, 682-83 (N.Y. App. Div. 2004) (suspending a lawyer for one year because, among other things, the lawyer sent an improper letter to an accident victim; "The letter sent by respondent states, in pertinent part, 'We are holding a letter containing valuable information regarding your legal rights. . . . When you are well enough to exercise such judgment, please call me.' We conclude that the letter, sent to a comatose patient in the intensive care unit of a hospital three days after her automobile collided with a train, was a solicitation of legal employment sent at a time when respondent, who acknowledged that he had read newspaper articles reporting the accident and the condition of the victim, knew or reasonably should have known that the recipient was unable to exercise reasonable judgment in retaining counsel." (emphasis added)).
- Ky. Bar Ass'n v. Mandello, 32 S.W.3d 763, 764 (Ky. 2000) (suspending for six months a lawyer who improperly wrote a letter soliciting a representation in a medical malpractice case by sending a letter to a woman whose husband had recently died at a hospital; finding among other things that the lawyer violated the prohibition on self-laudatory claims by stating: "While I would like to represent you and feel that my background provides me with a strong basis of knowledge with which to protect your interests, I must say that in this particular situation, it is not who you choose to represent you, but that you choose someone").

(b) Most states would permit such targeted mailing, because the potential client has not been involved in a personal injury or wrongful death incident.

For instance, ABA Model Rule 7.3(c) does not prohibit targeted "written, recorded or electronic communication[s]" to any particular potential client, although the ABA Model Rules require that the words "Advertising Material" be included on the "outside envelope, if any, and at the beginning and ending of any recorded or electronic communication" (unless a communication is to a lawyer or to someone who "has a family, close personal, or prior professional relationship with the lawyer").

In 2010, the Second Circuit upheld New York's fairly broad restriction on marketing (including direct mail) to accident victims.

- Alexander v. Cahill, 598 F.3d 79, 102, 103 (2d Cir. 2010) (in an opinion filed by Circuit Judge Guido Calabresi, upholding the constitutionality of New York

State's 30-day moratorium on direct marketing in wrongful death or personal injury situations, but finding unconstitutional other provisions of New York's marketing rules, including bans on testimonials, portrayals of judges, irrelevant techniques such as gimmicky depictions, nicknames, and trade names; ultimately upholding the constitutionality of New York State's 30-day moratorium on certain direct marketing in wrongful death and personal injury cases; "[W]e conclude that ads targeting certain accident victims that are sent by television, radio, newspapers, or the Internet are more similar to direct-mail solicitations, which can properly be prohibited within a limited time frame, than to 'an untargeted letter mailed to society at large,' which 'involves no willful or knowing affront to or invasion of the tranquility of bereaved or injured individuals and simply does not cause the same kind of reputational harm to the profession' as direct mail solicitations." (citation omitted); "Moreover, we do not find constitutional fault with the 30-day time period during which attorneys may not solicit potential clients in a targeted fashion.").

Because other types of clients are not as likely to be susceptible to improper lawyer conduct, at least one circuit court had earlier declared unconstitutional restrictions on direct mail marketing to criminal clients.

- Ficker v. Curran, 119 F.3d 1150, 1151, 1153, 1154, 1156 (4th Cir. 1997) (analyzing the following situation: "Robin Ficker, a Maryland attorney, and Natalie Boehm, the owner of a direct-mail advertising company, challenged the constitutionality of a Maryland law forbidding lawyers from targeted direct-mail solicitation of criminal and traffic defendants within thirty days of arrest. We agree with the district court that the Maryland ban encroaches impermissibly on First Amendment rights."; explaining that "as the Supreme Court has already recognized, targeted letters do not carry the same potential for undue influence as in-person solicitation, and such letters are no more likely to overwhelm the judgment of a potential client than an untargeted letter or newspaper advertisement."; "We will not resolve this battle of studies, nor will we credit or discredit state interests based on the shifting sands of polling data, which change according to techniques, sample populations, and even the phrasing of the questions. It is hardly clear, however, that where criminal and traffic defendants, in need of timely legal advice and representation, receive just such information in the mail, they will hold the legal profession in low esteem." (footnote omitted); ultimately holding that "a thirty day ban on attorney advertising to defendants charged with crimes and incarcerable traffic offenses cannot stand.").

(c) The following are examples of the specific requirements that some states have included in their ethics rules.

- Florida Rule 4-7.18(b)(2)(A)-(C) ("Written communications to prospective clients for the purpose of obtaining professional employment that are not prohibited by subdivision (b)(1) are subject to the following requirements: (A) Such communications are subject to the requirements of 4-7.11 through 4-7.17 of these rules. (B) Each page of such communication and the face of an envelope containing the communication must be reasonably prominently marked 'advertisement' in ink that contrasts with both the background it is printed on and other text appearing on the same page. If the written communication is in the form of a self-mailing brochure or pamphlet, the 'advertisement' mark must be reasonably prominently marked on the address panel of the brochure or pamphlet and on each panel of the inside of the brochure or pamphlet. If the written communication is sent via electronic mail, the subject line must begin with the word 'Advertisement.' Brochures solicited by clients or prospective clients need not contain the 'advertisement' mark. (C) Every written communication must be accompanied by a written statement detailing the background, training and experience of the lawyer or law firm. This statement must include information about the specific experience of the advertising lawyer or law firm in the area or areas of law for which professional employment is sought. Every written communication disseminated by a lawyer referral service must be accompanied by a written statement detailing the background, training, and experience of each lawyer to whom the recipient may be referred.").
- Georgia Rule 7.3(b) ("Written communications to a prospective client, other than a close friend, relative, former client or one whom the lawyer reasonably believes is a former client, for the purpose of obtaining professional employment shall be plainly marked 'Advertisement' on the face of the envelope and on the top of each page of the written communication in type size no smaller than the largest type size used in the body of the letter.").
- Illinois Rule 7.3(c) ("Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words 'Advertising Material' on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).").
- North Carolina Rule 7.3(c)(1), (c)(2), (c) & (c)(3) ("Written Communications. Written communications shall be mailed in an envelope. The advertising notice shall be printed on the front of the envelope, in font that is as large as any other printing on the envelope. The front of the envelope shall contain no printing other than the name of the lawyer or law firm and return address, the name and address of the recipient, and the advertising notice. The advertising notice shall also be printed at the beginning of the body of the letter in font as large as or larger than any other printing contained in the letter."; "Electronic Communications. The advertising notice shall appear in the 'in reference' block of the address section of the communication. No other

statement shall appear in this block. The advertising notice shall also appear, at the beginning and ending of the electronic communication, in a font as large as or larger than any other printing in the body of the communication or in any masthead on the communication."; These words, "THIS IS AN ADVERTISEMENT FOR LEGAL SERVICES," are required in all capital letters on any communications from lawyer soliciting professional employment. This advertising notice must be "clearly articulated" at the beginning and end of any recorded communications.).

- South Carolina Rule 7.3(c) ("Any lawyer who uses written or recorded solicitation shall maintain a file for two years showing the following: (1) the basis by which the lawyer knows the person solicited needs legal services; and (2) the factual basis for any statements made in the written, recorded, or electronic communication.").
- South Carolina Rule 7.3(d)(1) ("The words 'ADVERTISING MATERIAL,' printed in capital letters and in prominent type, shall appear on the front of the outside envelope and on the front of each page of the material. Every such recorded communication shall clearly state both at the beginning and at the end that the communication is an advertisement.").

Ethics opinions provide additional explanation:

- Rhode Island LEO 2013-02 (3/13/2013) (finding that a lawyer could ethically send letters to those with potential information the lawyer could use in representing a client, but that the letter proposed by the lawyer seeking the opinion instead amounted to an effort to obtain business and therefore had to comply with the applicable direct mail ethics regulations; "The inquiring attorney represents a client who is attempting to withdraw from his/her membership plan at a Golf Club. The client is on a membership-redemption waiting list, seeking the return of his/her initiation payment pursuant to the Golf Club's membership plan. In a pending lawsuit against the Golf Club, the inquiring attorney's client has alleged that the membership agreement is unfair and unconscionable. The inquiring attorney has obtained through discovery a list of other Club members who are also on the redemption list. The inquiring attorney wants to send a letter to each of the members on the list in an effort to obtain further information about the Golf Club's redemption process, but states that he/she is concerned about running afoul of Rule 7.3 of the Rules of Professional Conduct entitled 'Direct contact with prospective clients.' The inquiring attorney submitted a proposed letter to the Panel."; "The Panel has reviewed the proposed letter submitted by the inquiring attorney in the instant inquiry. The letter states that the inquiring attorney represents X, a member of the Golf Club who is on the membership-redemption waiting list; states that he/she filed a lawsuit against the Club; states that the inquiring attorney is looking to obtain information about the redemption process and about representations made to the member upon joining the Club; and asks the member to contact the inquiring attorney. The

inquiring attorney's letter should, but does not, stop there. In additional paragraphs, the inquiring attorney describes the Club's redemption process, states the inquiring attorney's position that the redemption process is unfair and unconscionable, and discloses that at a recent deposition it was learned that only a small number of members received a return of the initiation fee over the last ten years. In a separate lengthy paragraph, the inquiring attorney describes with particularity how recent changes to the Golf Club's bylaws deliberately impede the return of initiation payments; states that arbitrary new-member classifications make it highly unlikely that a resigning member will live to see the return of his or her initiation payment; and likens the Golf Club to 'Hotel California, where you can get in anytime you want but you can never leave.' In the Panel's view, the proposed letter goes too far, and it appears to be more a solicitation for professional employment than a request for information from persons having knowledge of matters related to the inquiring attorney's client's case. As such, the proposed letter must comply with the requirements of Rule 7.3. The Panel believes, however, that the Rules permit lawyers to contact persons who have knowledge related to their clients' lawsuits by letter or advertisement without complying with Rule 7.3. . . . Such a letter for this inquiry would simply state that the inquiring attorney represents a Club member who is suing the Golf Club; that the inquiring attorney is seeking information about the membership-redemption process; and that the inquiring attorney is requesting Club members to contact the inquiring attorney for this purpose. The restrictions of Rule 7.3(c) and (d) would not apply to such a letter.").

- Nebraska LEO 09-04 (2009) (addressing the following question: "With respect to email communications which require the inclusion of the words 'This is an advertisement,' where must these words appear when the newsletter is included as an attachment to an email message?"; answering as follows: "With respect to newsletters emailed as attachments, where the words 'This is an advertisement' are required, it is sufficient if those words are included in the subject line of the email message and at the end of the email message. It is not necessary to include those words in the attached newsletter."; also addressing the following question: "May a law firm mail or email a newsletter to present clients, former clients, and persons who request a copy of the newsletter without including the disclaimer 'This is an Advertisement' on either the front of the mailing envelope or within the email?"; answering as follows: "It is not necessary to include the words 'This is an advertisement' for law firm newsletters sent to present clients, former clients, and persons who request a copy of the newsletter."; ("The Committee is of the opinion that an advertisement coupon placed in a mass mailer, which does not state 'This is an advertisement' on the outside of the envelope[,] violates Rule 7.2.").
- North Carolina LEO 2007-15 (4/25/08) (providing guidance for lawyers sending targeted direct mail; "Rule 7.3(c) allows a lawyer to solicit professional employment from a potential client known to be in need of legal

services by written, recorded, or electronic communication provided the statement, in capital letters, 'THIS IS AN ADVERTISEMENT FOR LEGAL SERVICES' (the advertising notice) appears on a specified part of the communication. If the solicitation is by letter, Rule 7.3(c)(1) requires the advertising notice to 'be printed at the beginning of the body of the letter in a font as large or larger than the lawyer's or law firm's name in the letterhead or masthead.'; [T]he requirement in Rule 7.3(c) that the advertising notice 'be printed at the beginning of the body of the letter' is satisfied if the advertising notice appears anywhere between the top of the page to immediately below the salutation of a direct mail letter."; "[I]f the insignia or border is used consistently by the firm in official communications on behalf of the firm, the insignia or border is considered a part of the firm name and may appear next to the firm name in the return address on the front of the envelope provided the advertising notice remains conspicuous."; "The front of the envelope may contain an insignia with initials that are in a font that is larger than the font used for the advertising notice provided the insignia is used consistently by the firm in official communications on behalf of the firm, the advertising notice is in a font that is the same size or larger than the font used for the firm name, and the advertising notice remains conspicuous."; also addressing the following question: "ABC Law Firm uses the motto 'Attorneys for Injured People' and prints the motto just below its name in all of its official written communications. May the front of the envelope for a direct mail letter contain a motto connected with the law firm name in the return address on the envelope?"; answering as follows: "No. A motto will detract from the conspicuousness of the advertising notice. However, the motto may appear on the back of the envelope subject to the font size requirements in Rule 7.3(c)."; also addressing the following question: "May the URL or website address for a law firm appear in the return address on the front of the envelope for a direct mail letter?"; answering as follows: "No. It may appear on the back of the envelope subject to the font size requirements in Rule 7.3(c)." (emphases added)).

- Ohio LEO 2007-5 (6/8/07) ("A lawyer's or law firm's advertising of legal services to a prospective business client through a personalized letter addressed to a contact person at the business is a direct mail solicitation subject to the requirements of Rule 7.3(c). A lawyer or law firm should disclose in the letter how the identity of the prospective client was obtained. A lawyer or law firm should include the recital 'Advertising Material' or 'Advertisement Only' in the text of the letter and on the envelope. And, a lawyer or law firm must refrain from addressing a predetermined evaluation of the merits of any legal matter that the business might pursue." (emphasis added)).
- Maryland LEO 2004-27 (11/10/04) (forbidding Maryland lawyers from using a marketing firm to send mailings or otherwise contact people who have not responded to a lawyer's mailed advertisement).

- North Carolina LEO 97-6 (1/16/98) (holding that a lawyer violated the ethics rules in the way that the lawyer included a disclosure statement in a direct mail piece; "The disclosure statement must be in a shade of print that contrasts sufficiently with the stationery to be easily read by a recipient. Revised Rule 7.3(c) requires the advertising disclosure statement 'at the beginning of the body of the written communication in print as large or larger than the lawyer's or law firm's name. . . .' The font size and location of the disclosure are dictated by the rule to insure that the recipients of direct mail letters have notice that the letters are advertisements and may be discarded. This purpose is defeated if the shade of print is so light that the disclaimer cannot be read."; "The omission of a lawyer's address from the stationery used for targeted direct mail letters is a material misrepresentation because a recipient of the letter will not be able to determine whether the lawyer practices in the recipient's community, in another community in North Carolina, or out of state.").
- Illinois LEO 90-37 (5/15/91) ("A lawyer may initiate contact with a prospective client by written communication plainly labeled as advertising material.").
- Illinois LEO 90-22 (1/29/91) ("Labeling marketing materials as 'promotional' materials complies with requirements of the Rules as to the labeling of 'advertising' materials.").

As in other areas, some states have unique rules governing targeted mailings.

For instance:

- South Carolina Rule 7.3(d)(2)-(3) ("Each solicitation must include the following statements: (A) 'You may wish to consult your lawyer or another lawyer instead of me (us). You may obtain information about other lawyers by consulting directories, seeking the advice of others, or calling the South Carolina Bar Lawyer Referral Service at 799-7100 in Columbia or toll free at 1-800-868-2284. If you have already engaged a lawyer in connection with the legal matter referred to in this communication, you should direct any questions you have to that lawyer' and (B) 'The exact nature of your legal situation will depend on many facts not known to me (us) at this time. You should understand that the advice and information in this communication is general and that your own situation may vary.' Where the solicitation is written, the above statements must be in a type no smaller than that used in the body of the communication. (3) Each solicitation must include the following statement: 'ANY COMPLAINTS ABOUT THIS COMMUNICATION OR THE REPRESENTATIONS OF ANY LAWYER MAY BE DIRECTED TO THE COMMISSION ON LAWYER CONDUCT, 1015 SUMTER STREET, SUITE 305, COLUMBIA, SOUTH CAROLINA 29201 - TELEPHONE NUMBER 803-734-2037.' Where the solicitation is written, this statement must be printed in capital letters and in a size no smaller than that used in the body of the communication.").

- South Carolina Rule 7.3(g) ("Any written communication prompted by a specific occurrence involving or affecting the intended recipient of the communication or a family member shall disclose how the lawyer obtained the information prompting the communication.").

Best Answer

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

b 7/14

Different State Rules Governing Solicitation

Hypothetical 20

You financed your college and law school education by selling magazine subscriptions to your fellow students, so you know that you have the type of sales skills that will serve you well as you try to build your practice as a new lawyer. However, you do not want to start your legal career with an ethics charge, so you want to make sure that you do not engage in any solicitation prohibited by the ethics rules.

May you engage in the following type of solicitation:

- (a) Placing telephone calls to automobile accident plaintiffs while they are in the hospital?

NO

- (b) Calling members of your church to see if they would like some estate planning advice?

MAYBE

- (c) Setting up appointments to see the general counsel of local companies?

YES (PROBABLY)

Analysis

The United States Supreme Court has long recognized that in-person solicitation creates a far greater risk of abuse than general advertising or even targeted mailings.¹

The Supreme Court has therefore given states wide latitude to restrict solicitation.²

¹ Ohralik v. Ohio State Bar, 436 U.S. 447 (1978) (upholding ban on in-person solicitation in personal injury and wrongful death cases because of the potential for overreaching); see also In re Primus, 436 U.S. 412 (1978) (holding that in-person solicitation is permissible if the lawyer is motivated by political objectives rather than monetary objectives).

² Some corporate clients are disappointed that lawyers generally are not prohibited from publishing advertisements which seemed designed to find plaintiffs (or in some cases additional plaintiffs) to sue a company -- but which do not explicitly indicate as much, or which purport to seek "witnesses" who might provide favorable testimony on behalf of another one of the lawyer's clients. See, e.g., EEOC v. McCormick & Schmick's Seafood Rests., Inc., Civ. A. WMN-08-CV-984, 2011 U.S. Dist. LEXIS 35258, at

Most states lump live telephone and real-time solicitation in the same category.

For example, the ABA Model Rules flatly state that

[a] lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted: (1) is a lawyer; or (2) has a family, close personal, or prior professional relationship with the lawyer.

ABA Model Rule 7.3(a). Most states follow this basic formulation.

Many states severely discipline lawyers who violate the anti-solicitation rules, especially in situations where there could be overreaching or coercion.

- Hamm v. TBC Corp., 345 F. App'x 406, 410-11 (11th Cir. 2009) (unpublished opinion) (affirming the district court's sanctions against a law firm for soliciting employees of various companies to file Fair Labor Standards Act cases, under the guise of interviewing them as witnesses; also upholding the magistrate judge's sanction prohibiting the plaintiff's law firm from representing employees of these other companies; "[T]he magistrate judge recommended narrowly tailored sanctions to permit SLG [law firm] to continue to represent the named plaintiffs and co-workers of the named plaintiffs (presumably because they most likely learned about SLG and the lawsuit from the named plaintiffs), but prohibited SLG from representing opt-in plaintiffs from other stores.").
- Fla. Bar v. Wolfe, No. SC94226, 2000 Fla. LEXIS 659 (Fla. Mar. 30, 2000) (suspending for one year a lawyer who engaged in unethical in-person solicitation of clients after they were hit by tornadoes).
- In re Ravich, Koster, Tobin, Oleckna, Reitman & Greenstein, 715 A.2d 216, 220, 224, 225 (N.J. 1998) (publicly reprimanding lawyers for personally soliciting clients after a gas explosion at an apartment building; Oleckna and TEAMLAW rented an RV to use as "a mobile office for potential clients at the site" and after a day with no calls, returned with "copies of the advertisement the firm was to run in the weekend paper and taped several copies of it to the windows of the RV."; "After hearing about the explosion on the radio, Charles Meaden, a solo practitioner, drove to Edison the day after the explosion

*2 (D. Md. Mar. 17, 2011) (denying defendant's motion to prevent the EEOC from running the following radio advertisement: "In connection with the class rate discrimination lawsuit, the U.S. EEOC is looking for black individuals who applied for employment at or used to work for McCormick and Schmick's or M&S Grill at the Inner Harbor. If you applied to work, or worked at either restaurant, please call the EEOC at 410-209-2208. Again, 410-209-2208.").

seeking clients. When he was stopped by the Edison police and told that he could proceed no further by car, he began to walk into Edison."; "When Meaden went to the Red Roof Inn, he knew that the Inn was temporarily housing many of the victims of the explosion. He also went to the Inn specifically for the purpose of pecuniary gain in the form of obtaining professional employment.").

One New York state court case involved a type of solicitation that most large law firms would find acceptable -- but which a New York state court judge relied on to punish what the judge found was an improper attempt to block plaintiffs' ex parte communications with the defendant's current and former employees.

- Rivera v. Lutheran Med. Ctr., 866 N.Y.S.2d 520, 525, 526 (N.Y. Sup. Ct. 2008) (in an opinion by Supreme Court of New York, Kings County, Judge Michael A. Ambrosio, analyzing defendant hospital's law firm Morgan Lewis's conduct in soliciting as separate clients of the firm: two executives of the defendant hospital; one current lower level employee who was involved in the alleged sexual harassment; two other current lower level hospital employees, apparently not involved in the incident; two former hospital supervisory employees; recognizing that the first three individuals would be considered "parties" under New York's ex parte communications rule, and therefore not "subject to informal interviews by plaintiff's counsel"; explaining that the last four witnesses would have been fair game for ex parte communications from the plaintiff's lawyer; "These [four] witnesses are not parties to the litigation in any sense and there is no chance that they will be subject to any liability. They were clearly solicited by Morgan Lewis on behalf of LMC to gain a tactical advantage in this litigation by insulating them from any informal contact with plaintiff's counsel. This is particularly egregious since Morgan Lewis, by violating the Code in soliciting these witnesses as clients, effectively did an end run around the laudable policy consideration of Niesig in promoting the importance of informal discovery practices in litigation, in particular, private interviews of fact witnesses. This impropriety clearly affects the public view of the judicial system and the integrity of the court."; ultimately disqualifying Morgan Lewis from representing the four witnesses, because of the firm's improper solicitation of the witnesses, and reporting Morgan Lewis to the bar's Disciplinary Committee).

Not surprisingly, lawyers cannot use nonlawyers to solicit clients -- which courts traditionally called "running and capping."

- Marilyn Tennison, Texas state rep. named 'Freshman of the Year' jailed on barratry charges, Southeast Tex. Record, Apr. 25, 2012 ("A state representative who was named the Democrats' 'Freshman of the Year' spent

some time in jail Tuesday night. State Representative Ron Reynolds (District 27), a managing partner at Brown, Brown and Reynolds Law Firm, is accused of illegally soliciting legal cases. Reynolds, 38, whose district includes Fort Bend County, was arrested Tuesday. He posted a \$5,000 bond and was released after midnight Wednesday. He will make his first court appearance Thursday. According to Fox 26 in Houston, another Houston attorney, Marcela Halmagean, filed a complaint against Reynolds that led to his arrest. The complaint alleges Reynolds used an individual to solicit Halmagean as a client when she was involved in an auto crash. Texas law prohibits soliciting a client for legal services, and just last year, the Texas Legislature passed a statute that makes barratry a civil as well as criminal infraction, allowing civil suits to be filed. Reynolds, a former municipal court judge, past president of the Houston Lawyers Association and an adjunct professor at Texas Southern University was named 'Freshman of the Year' in 2011 by the House Democratic Caucus.").

- In re Ravith, 919 N.Y.S.2d 141 (N.Y. App. Div. 2011) (suspending for three months a lawyer who directed her paralegal to solicit clients).
- In re Sinowski, 720 S.E.2d 597, 597-98, 598 (Ga. 2011) (disbarring two lawyers for using "runners,"; "The State Bar alleged that in their practice Respondents utilized 'runners' (non-lawyers who recruit, recommend or direct people to the services of a given lawyer in return for a fee or other compensation from the lawyer)."; "The Review Panel adopted the special master's findings of fact, and Respondents' admissions, that from April 1995 through April 1999 they paid runners to secure clients for them and paid non-lawyers compensation for referrals. They kept a record of those payments in a 'Runner Book.' Although Respondents and the State Bar disagree on the amount and volume of the runner activity, Respondents admit to payments to 46 runners (the State Bar contends it was 54) or \$276,025 (as opposed to the State Bar's assertion of \$399,733) in 1,376 separate cases (versus the State Bar's assertions of 2,441 cases").
- Samuel Howard, Arent Fox, Elliott Greenleaf Tossed From UBP Ch. 11, Bankruptcy Law360 (Nov. 5, 2010), <http://www.law360.com/bankruptcy/articles/207257> (disqualifying the law firm of Arent Fox from representing a bankruptcy creditor's committee, because the law firm had solicited creditors to serve on the committee through an intermediary in China).
- Philadelphia LEO 2010-12 (10/2010) (analyzing the following situation: "Physicians employ a consulting firm that monitors police reports and then contacts injured persons to see if they need medical treatment. The consulting firm through an investigator will also obtain relevant photographs and statements from the injured. The representative of the consulting firm inquires as to whether the injured person has an attorney. If not, the representative will obtain an executed fee agreement and forward the relevant documents to different attorneys on a revolving basis. The assigned

attorney is then required to pay a flat fee to the consulting firm."; finding the arrangement unethical for various reasons; "There are multiple reasons why the arrangement as described by the inquirer is unethical. Standing alone, Rule 7.3(a) prohibits the conduct since an intermediary (the consulting firm) is engaged in direct solicitation by phone. The rationale behind the prohibition and its application to this inquiry is made clear by the Comment to the Rule. It does not matter that the consulting firm is hired by physicians rather than the inquirer. The consulting firm still is engaging in prohibited telephonic solicitation as an intermediary for the inquirer as well as any of the other lawyers who receive clients in this fashion. The specific prohibition in the Rule on the use of an intermediary (in this case that is professionally trained) clearly places the inquirer in violation of Rule 7.3a should he accept referrals that come as a result of the conduct in question."; "The violation is again present in reviewing Rule 5.3, specifically 5.3(c)(1). By accepting a referral obtained via unethical solicitation from the consulting firm, the attorney is ratifying the third party's conduct which conduct is in direct violation of the Rule. Furthermore, each of these violations is compounded by the prohibition, contained in Rule 8.3a, which prohibits an attorney from engaging in unethical conduct through the acts of a third party."; explaining that the solicitation would be improper even if it were undertaken in writing; "It is clear under Rule 1.2 that an attorney must clearly communicate with a client what the scope and goal of representation are from the start of the attorney-client relationship. The fact that the individual sent out to meet with the prospective client has that client sign a fee agreement with the attorney before meeting with the attorney, and in fact acts without any direct supervision from the attorney, thwarts the requirements of the Rule. There is no way for the attorney to determine whether the client's stated goal is or is not an acceptable one. In addition, there is no way for the client to obtain direct information from the attorney prior to agreeing to the attorney's representation. Furthermore, since the 'investigatory work' is being done by an individual prior to the client hiring the attorney, there could in fact be a problem with an inadvertent waiver of the attorney-client privilege."; finding that the arrangement also involved an improper fee-split; "Finally, the Committee has a grave concern regarding the payment by the attorney of the fee to the consulting firm. Clearly, fee splitting with a non-attorney is prohibited by Rule 5.4. While the inquiry tries to couch the payment to the consulting firm for the fee as payment for 'investigative services,' that a flat fee is paid and that non-legal services were provided do not standing alone make the payment permissible. Other factors which would affect that determination include the amount of the payment, the amount of time spent by the investigator, and whether the flat fee is in any way dependent upon the size of the possible recovery in the case. The payment should be reasonably related to the value of the services provided. If not, it can easily be seen as a subterfuge to avoid the prohibition against fee sharing with a non-lawyer.").

- Illinois LEO 97-05 (1/23/98) ("A lawyer is approached by a non-lawyer who proposed setting up a marketing company which would solicit personal injury

cases by methods which would violate the Rules of Professional Conduct if employed by a lawyer. The lawyers would receive referrals from the non-lawyer's company. The lawyers would pay a fee to the company for each referral.").

- New York LEO 565 (10/1/84) ("May an attorney employ a public relations and marketing firm to solicit potential clients for whom the attorney will provide prepaid legal services and pay such firm as compensation either a salary, commission or percentage of the annual fee charged to such clients by the attorney for legal services where the public relations firm will handle all advertising, inquiries, and initial correspondence on behalf of the attorney as well as the presentation and marketing of the prepaid legal services and such public relations firm will seek out corporations, non-profit organizations and various groups?"; concluding that "any compensation in the form of a commission or percentage based upon the volume of business developed would be clearly improper. Such form of compensation would tend to give the marketing firm a pecuniary interest in the success of the solicitation, and may lead to the use of hard-sell tactics or other improprieties.").

Ethics rules prohibiting solicitation have been upheld by various courts.

- McKinley v. Abbott, 643 F.3d 403, 408-09 (5th Cir.) (upholding the Texas barratry statute making it a crime to solicit accident victims within a certain time after the accident; "[T]he state introduced anecdotal testimony from accident victims about solicitation directly after an automobile accident and the stress causes by those solicitations. There was also expert testimony about the stress disorder many people suffer for up to a month after a traumatic event, which can lead to cognitive dysfunctions in information processing and decision-making. This is sufficient evidence to demonstrate that the harm is real."), cert. denied, 132 S. Ct. 825 (2011)
- Bergman v. District of Columbia, 986 A.2d 1208, 1211, 1212, 1217 (D.C. Cir. 2010) (upholding the constitutionality of a Washington, D.C., law; explaining that "[t]he Act makes it unlawful for 'practitioner[s]' to solicit business from 'a client, patient, or customer within 21 days of a motor vehicle accident with the intent to seek benefits under a contract of insurance or to assert a claim against an insured, a governmental entity, or an insurer on behalf of any person arising out of the accident.' D.C. Code § 22-3225.14 (a)(1)."; "The Act contains several exemptions from this twenty-one day prohibition. It permits immediate solicitation of legal business from accident victims through the mail, and the proscription against in-person solicitation does not apply if there is a preexisting relationship between the practitioner and the person solicited, or if the contact is initiated by the 'potential client, patient, or customer.' D.C. Code § 22-3225.14 (a)(2)."; analyzing the D.C. law under commercial speech guidelines; concluding that "[w]e are satisfied that the Act addresses a substantial governmental interest, namely, the protection of consumers from unsolicited and often distressing one-on-one intrusions upon their privacy,

effected for the purpose of securing their business in the immediate aftermath of an automobile accident, a time when many of them are likely to be in physical or emotional distress or in vulnerable circumstances."; noting that the United States Supreme Court upheld a thirty-day prohibition on direct mail solicitation of accident victims in Florida Bar v. Went For It, Inc., 515 U.S. 618, 620 (1995)).

- Falanga v. State Bar of Ga., 150 F.3d 1333 (11th Cir. 1998) (upholding Georgia's prohibition on in-person solicitation), cert denied, 526 U.S. 1087 (1999).

Courts have also upheld (against equal protection claims) state ethics rules that prohibit solicitation in certain situations while permitting it in others.

- State v. Falk, 724 So. 2d 146 (Fla. Dist. Ct. App. 1998) (upholding against an equal protection claim a Florida ethics prohibiting solicitation of automobile accident victims but not other injured claimants), review denied, 740 S. 2d 527 (Fla. 1999).

State ethics rules that permit solicitation in certain circumstances obviously spawn various issues about whether those circumstances exist.

Some states have peculiar rules regarding solicitation.

- Florida Rule 4-7.18(a)(1) ("Except as provided in subdivision (b) of this rule, a lawyer may not: (1) solicit, or permit employees or agents of the lawyer to solicit on the lawyer's behalf, professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term 'solicit' includes contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient and includes any written form of communication, including any electronic mail communication, directed to a specific recipient and not meeting the requirements of subdivision (b) of this rule and rules 4-7.11 through 4-7.17 of these rules.").
- Georgia Rule 7.3(d) ("A lawyer shall not solicit professional employment as a private practitioner for the lawyer, a partner or associate through direct personal contact or through live telephone contact, with a non-lawyer who has not sought advice regarding employment of a lawyer.").
- Illinois Rule 7.3(a)(1)-(2) ("A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted: (1) is a lawyer; or

(2) has a family, close personal, or prior professional relationship with the lawyer.").

- New York Rule 7.3(a)(1) ("A lawyer shall not engage in solicitation . . . by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client.").
- Virginia Rule 7.3(a) ("A lawyer shall not solicit employment from a potential client if: (1) the potential client has made known to the lawyer a desire not to be solicited by the lawyer; or (2) the solicitation involves harassment, undue influence, coercion, duress, compulsion, intimidation, threats or unwarranted promises of benefits.").
- D.C. Rule 7.1(d) ("No lawyer or any person acting on behalf of a lawyer shall solicit or invite or seek to solicit any person for purposes of representing that person for a fee paid by or on behalf of a client or under the Criminal Justice Act, D.C. Code Ann. §11-2601 (2001) et seq., in any present or future case in the District of Columbia Courthouse, on the sidewalks on the north, south, and west sides of the courthouse, or within 50 feet of the building on the east side.").

Bars have had the most difficulty wrestling with lawyers' activities at meetings or seminars, either legitimately or illegitimately scheduled to provide general information about legal issues.

- New York LEO 830 (7/14/09) ("A lawyer may ethically contact lay organizations to inform them that he or she is available as a public speaker on legal topics, but must adhere to advertising and solicitation requirements under the Rules where the communication is made expressly to encourage participants to retain the lawyer or law firm.").
- Disciplinary Bd. of Supreme Court v. McCray, 755 N.W.2d 835, 841-42, 843-44, 845, 844 (N.D. 2008) (suspending for six months a lawyer for improperly soliciting vulnerable client who required legal assistance with financial woes, and who also permitted most of the work to be done by nonlawyers; "The evidence supports this finding. McCray testified he spent between 10 and 40 hours per week working for Bradley Ross Law, P.C. Assuming for the sake of argument McCray worked 40 hours per week during the 10 months or approximately 45 weeks McKenzie was a client, he would have spent 1,800 hours servicing approximately 9,450 clients, including McKenzie. According to our calculations, this results in .19 hours, or less than 12 minutes, McCray spent working for each client during the 10-month period. We agree with the hearing panel that this is an insufficient amount of time to adequately represent McKenzie along with his other clients. . . . We also agree that 'little

in the way of meaningful legal work' was performed for McKenzie. It appears the vast majority of the work performed consisted of simply inundating credit reporting agencies with dispute letters written in the consumer's name to trigger the obligation of those agencies under the Credit Repair Organizations Act, 15 U.S.C., § 1679 et seq., to respond to all consumer disputes within 30 days and remove any legitimately challenged item that cannot be verified within the 30-day period. . . . The persons who prepared and mailed the dispute letters were located in Indiana. Moreover, the panel's finding that Bradley Ross Law, P.C., did not until recently verify that work was performed for clients each month they were billed is supported by McCray's own testimony."; also explaining that the lawyer engaging in improper solicitation at "manned booths" at "numerous seminars on the topic of how to improve a person's credit scores"; "McCray had 9,450 clients, and the vast majority of the work performed by Bradley Ross Law, P.C., i.e., mailing dispute letters, was performed by his leased employees in Indiana. McCray could not have given individual attention to all of his clients or sufficiently overseen the work performed by his leased workers in Indiana. In effect, McCray allowed the Indiana employees to practice law under his license."; "A 'seminar . . . is a curious hybrid of advertising and in-person solicitation as well as a pure educational effort . . .," N. Keilin, Client Outreach 101: Solicitation of Elderly Clients by Seminar Under the Model Rules of Professional Conduct, 62 Fordham L. Rev. 1547, 1548 (1994), but the Rules of Professional Conduct do not expressly prohibit a lawyer's involvement in an educational seminar. However, improper solicitation of clients occurs when a lawyer involves himself with an organization that independently targets and solicits prospects for his representation.").

- North Carolina LEO 2007-4 (4/25/08) (providing guidance on issues "relative to client seminars and solicitation, gifts to clients and others following referrals, distribution of business cards, and client endorsements"; explaining that "[a]n attorney may conduct educational seminars for non-clients. See RPC 36. The attorney may advertise the seminars so long as the advertisements comply with the Rules of Professional Conduct. See Rule 7.2. The attorney may request attendees to complete an evaluation feedback form that includes the attendee's name, contact, and family information, as well as check boxes to indicate areas of particular interest. After the seminar, the attorney may not contact an attendee by in-person or telephone solicitation, but must wait for the attendee to contact the attorney. Rule 7.3(a)."; also holding that a lawyer may host a social event for non-clients and "allied professionals" who have referred business to the lawyer; "An attorney may host a social function for existing clients, non-clients, or both. See RPC 146. The attorney may invite non-clients, provided the attorney does not solicit business from the non-clients."; also holding that a lawyer may not "send a restaurant or store gift certificate to a client or non-client in appreciation for a referral from that person" because "Rule 7.2(b) prohibits a lawyer from giving anything of value to a person for recommending the lawyer's services"; holding that a lawyer may "send gifts of nominal

value -- such as holiday fruit baskets, flowers, or gift certificates -- to existing clients or non-clients with whom the attorney has an existing professional relationship . . . as long as a gift is not a quid pro quo for the referral of clients. Rule 7.2(b).").

- Philadelphia LEO 2007-13 (12/2007) (generally permitting lawyers to be included on a "preferred" lawyer list prepared by a non-profit educational institution; also generally permitting the lawyer to purchase "booth space" at "housing fairs" sponsored by the institution).
- Illinois LEO 06-02 (7/2006) ("Lawyer may make appearances before civil and similar organizations in an effort to obtain clients").
- Ohio LEO 2005-7 (8/5/05) (allowing Ohio lawyers to provide pro bono legal services regarding "advance directive" forms such as living wills and anatomical gift forms, as long as the lawyer was not using the program to solicit clients; warning that it "would be improper if the purpose and modus operandi is in-person solicitation of legal business").
- Nebraska LEO 09-05 (2009) ("[A]n attorney may rent a booth at a Chamber of Commerce event to promote his professional services. This includes offering a drawing for a prize so long as the use of the attorney's services is not required to enter or win the drawing. Listening to a 'pitch' should not be a requirement for entering or winning the drawing."; "[A] lawyer may rent a table or sponsor a booth at a business exposition and not violate Rule 7.3, as long as the lawyer does not approach, accost, or importune members of the public in the area of the table or the booth. A lawyer must not use any deceptive tactics to influence the public's decision to visit or not visit the table or the booth. The decision to make contact must always be made by the public, not by the lawyer. Once members of the public take the initiative to contact the lawyer, the lawyer has the right to respond and to distribute written materials which otherwise comply with the Rules of Professional Conduct, just as the lawyer would be free to do in his or her own office.").
- Maryland LEO 2004-29 (6/24/04) (providing guidance for a lawyer asking whether he could set up a booth at professional conferences and seminars which would allow the lawyer to solicit clients at those meetings; "Solicitation occurs when an attorney initiates personal contact with a potential client with whom the attorney had no previous relationship, for the purpose of pecuniary gain. Whereas you suggest that it is the attendee at a conference who would initiate the contact by choosing to approach the vendor booth, the whole idea of having a booth at the event is to entice attendees to approach your booth and then hire your firm for their needs. Under the circumstances, it would be impossible for the Committee to provide you with a definitive statement as to which actions would, or would not, involve 'initiation' of a personal contact. Whether solicitation occurs will depend on the factual context of each case."; considering as irrelevant "the sophistication of an attendee" at the type of

- conference the lawyer describes; "the provisions of Rule 7.3 on 'Direct contact with prospective clients' (or 7.2 on 'Advertising') do not concern themselves with the sophistication of the prospective client in describing conduct which is permissible. Sophisticated and unsophisticated persons are equally off-limits for impermissible advertisement and in-person contact by lawyers."; concluding that the lawyer's plan is not a per se violation of the rules but "appears to be fraught with potential problems").
- Arizona LEO 02-08 (9/2002) (holding that a lawyer may sponsor a booth at a business exposition and speak personally with visitors, as long as the visitors initiate the contact, are acting in "an atmosphere free of coercion and deception" and are not vulnerable to overreaching).
 - Illinois LEO 96-1 (7/1996) ("A lawyer may distribute printed material advising persons of their legal rights who are in attendance at public service seminars and to community advocates for personal circulation to interested persons."; "A lawyer may distribute materials at a seminar and community advocates may distribute the lawyer's material, which materials must contain at least the name of one attorney responsible for the content. The lawyer would be restricted from giving anything of value to the promoter of the seminar or community advocates for the distribution of the materials.").
 - Illinois LEO 94-4 (7/1994) ("A lawyer or law firm may participate in a seminar relating to advance directive services in which a health care organization (HCO) assists in preparation of materials so long as any payment by the lawyer or firm to the HCO is limited to the costs of preparation of the materials, those materials and their distribution comply with the rules on advertising, and all legal services are rendered solely by the lawyer.").
 - Rhode Island LEO 93-30 (5/12/93) (holding that a "common membership" by a law firm's lawyer and a prospective client in a "professional business organization" does not constitute a "prior professional relationship" for purposes of the solicitation rules, meaning that a mailing to such a prospective client must be marked as an advertisement).

State bars having to regulate solicitation have sometimes drawn lines so thin as to be nearly ludicrous. For instance, one bar indicated that lawyers could display law firm brochures at church festivals, but could not hand them out.

- Ohio LEO 99-5 (10/8/99) (prohibiting lawyers from handing out brochures at church festivals and fairs, but allowing the lawyer to display the brochures on a counter at such events).

(a) All (or most) states would prohibit telephone calls to accident victims, either because they fall within some explicit prohibition, or because they violate the general ban on inherently coercive solicitation.

(b)-(c) A state bar's attitude toward these more benign forms of solicitation would depend on the state's specific rules.

Some states have addressed whether a third person had a "prior professional relationship" with the lawyer, thus permitting in-person solicitation.

- Nebraska LEO 09-04 (2009) (addressing the following question: "Is the general prohibition of Neb. Ct. R. Prof. Cond. § 3-507.3 concerning in-person, live telephone or real-time electronic contact solicitation of professional employment inapplicable to persons who have engaged the law firm for estate planning in the past?"; answering as follows: "The general prohibition of Neb. Ct. R. Prof. Cond. § 3-507.3 concerning in-person, live telephone or real-time electronic contact solicitation of professional employment is inapplicable to persons who have engaged the law firm for estate planning in the past.").
- North Carolina LEO 2000-9 (1/18/01) (analyzing the following question about a lawyer who also acts as a CPA: "Attorney may decide to join an existing accounting practice as a CPA. If so, may Attorney operate a separate legal practice within his office in the accounting firm?"; answering as follows: "Yes, this arrangement is not distinct from the arrangement allowed in RPC 201 in which a lawyer/real estate agent operated a separate law practice within the offices of a real estate brokerage. Nevertheless, such an arrangement presents serious obstacles to the fulfillment of a lawyer's professional responsibility. Preserving the confidentiality of client information and records is virtually impossible in such a setting. Client information must be isolated and concealed from all of the employees of the CPA firm. See Rule 1.6. In addition, Attorney must avoid conflicts of interest between the interests of his legal clients and the interests of the clients of the CPA firm. See Rules 1.7 and 1.9. There may be no sharing of legal fees with the CPA firm in violation of Rule 5.4(a) which prohibits a lawyer from sharing legal fees with a non-lawyer. Finally, Attorney must maintain a separate trust account for the funds of his law clients pursuant to Rule 1.15 et seq."; also analyzing the question of whether the lawyer may "offer legal services to his accounting clients and vice versa"; answering as follows: "Yes, if there is full disclosure of the lawyer's self-interest in making the referral and Attorney reasonably believes that he is exercising independent professional judgment on behalf of his legal clients in making such a referral. However, direct solicitation of legal clients is

prohibited under Rule 7.3 although it may be permitted by the regulations for certified public accountants. Rule 7.3(a) does permit a lawyer to engage in in-person or telephone solicitation of professional employment if the lawyer has a 'prior professional relationship' with a prospective client. If a prior professional relationship was established with a client of the accounting firm, Attorney may call or visit that person to solicit legal business."; also holding that the lawyer may share a telephone number with the accounting firm with whom the lawyer also works).

Most states' ethics rules specifically exempt any restrictions to direct mail sent to lawyers. At least one state reached the same conclusion in an opinion.

- Ohio LEO 2002-6 (6/14/02) (permitting out-of-state lawyers to solicit Ohio lawyers in an effort to seek appellate work).

Best Answer

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

b 7/14

Law Firm Websites: Content

Hypothetical 21

As one of your firm's newest partners, you have been pushing your firm to hire a consultant who can help with expanding your firm's website. Your firm's managing partner just put you in charge of the job, and now you have a few questions about the pertinent ethics rules.

- (a) Will your law firm's website be considered an "advertisement" for ethics purposes?

YES

- (b) If so, will your law firm's website have to comply with all ethics requirements governing advertisements?

MAYBE

Analysis

Not surprisingly, state bars have struggled with applying their often-specific lawyer marketing rules to law firm websites and other forms of electronic marketing (such as those using social media).

For instance, many states require that lawyers using advertisements retain copies of the advertisements for a specified number of years.

- New York Rule 7.1(k).
- Georgia Rule 4-102-7.2(b); Pennsylvania Rule 7.2(b).
- Florida Rule 4-7.19(j) ("A copy or recording of an advertisement must be submitted to The Florida Bar in accordance with the requirements of this rule, and the lawyer must retain a copy or recording for 3 years after its last dissemination along with a record of when and where it was used. If identical advertisements are sent to 2 or more prospective clients, the lawyer may comply with this requirement by filing 1 of the identical advertisements and retaining for 3 years a single copy together with a list of the names and addresses of persons to whom the advertisement was sent.").

- Maryland Rule 7.2(b).

Some bars also require that the lawyers keep records of when and where the advertisements were used.

- Florida Rule 4-7.19(j) ("A copy or recording of an advertisement must be submitted to The Florida Bar in accordance with the requirements of this rule, and the lawyer must retain a copy or recording for 3 years after its last dissemination along with a record of when and where it was used. If identical advertisements are sent to 2 or more prospective clients, the lawyer may comply with this requirement by filing 1 of the identical advertisements and retaining for 3 years a single copy together with a list of the names and addresses of persons to whom the advertisement was sent.").
- Maryland Rule 7.2(b).
- Pennsylvania Rule 7.2(b).

The ABA Model Rules formerly required that all advertisements be kept for two years, but this requirement was deleted several years ago. The Reporter's explanation indicates that "the requirement that a lawyer retain copies of all advertisements for two years has become increasingly burdensome, and such records are seldom used for disciplinary purposes." Time will tell if states follow the ABA's lead.

Some bars apply a different (more lenient) standard to brief announcements that a lawyer or law firm is contributing to a specific charity, has sponsored a public service announcement, or supported a specific charitable, community or public interest program, activity or event.

Most state bars require that the name of a lawyer¹ (or at least the law firm)² appear on all advertisements. This allows the pertinent state bar authorities to punish

¹ Illinois Rule 7.2(c) ("Any communication made pursuant to this Rule shall include the name and office address of at least one lawyer or law firm responsible for its content."); New York Rule 7.1(h) ("All advertisements shall include the name, principal law office address and telephone number of the lawyer or law firm whose services are being offered.").

someone for any unethical advertisements. Some states require inclusion of the lawyer's address.

Some states require certain disclaimers on all lawyer marketing, and even regulate the speed at which a marketing spokesman recites the disclaimer at the end of a marketing video or audio. This type of restriction does not always survive constitutional scrutiny.

- Public Citizen Inc. v. La. Attorney Disciplinary Bd., 632 F.3d 212, 217, 229 (5th Cir. 2011) (finding unconstitutional, among other things, a Louisiana rule regulating the font size of written disclaimers, and requiring that any television advertisement include both a written and oral disclaimer – "spoken at the same or slower rate of speed as the other spoken content of the advertisement" (citation omitted); concluding that "[t]he record is devoid of evidence that Rule 7.2(c)(10)'s font size, speed of speech, and spoken/written provisions are 'reasonably related' to LADB's substantial interests in preventing consumer deception and preserving the ethical standards of the legal profession."; "The objected-to restrictions in Rule 7.2(c)(10) effectively rule out the ability of Louisiana lawyers to employ short advertisements of any kind. Accordingly, we hold that they are overly burdensome and violate the First Amendment.").

(a) All bars now seem to hold that websites amount to a form of advertising, and therefore must comply with at least some advertising rules.

States have all tried in one way or another to apply the ethics rules to websites.

- West Virginia LEO 98-03 (10/16/98) (law firm websites must satisfy the advertising rules).
- Vermont LEO 97-05 (1997) ("As long as the Web Page is equivalent to a 'yellow page' advertisement or a magazine article, the general rules of truth in advertising and limitations on indirect solution [sic] should apply to a lawyer's use of Web Pages.").
- Missouri Bar Office of Chief Disciplinary Counsel, Informal Op. 970161 (1997) ("In the course of internet communications regarding Attorney's services, Attorney is required to comply with the Supreme Court Rule 4, including Rules 7.1 through 7.5, relating to advertising.").

² See, e.g., ABA Model Rule 7.2(c) (requiring the "name and office address of at least one lawyer or law firm"); North Carolina Rule 7.2(c).

- Illinois LEO 96-10 (5/16/97) ("For example, the Committee views an Internet home page as the electronic equivalent of a telephone directory 'yellow pages' entry and other material included in the web site to be the functional equivalent of the firm brochures and similar materials that lawyers commonly prepare for clients and prospective clients. An Internet user who has gained access to a lawyer's home page, like a yellow pages user, has chosen to view the lawyer's message from all the messages available in that medium. Under these circumstances, such materials are not a 'communication directed to a specific recipient' that would implicate Rule 7.3 and its provisions governing direct contact with prospective clients. Thus, with respect to a web site, Rule 7.1, prohibiting false or misleading statements concerning a lawyer's services, and Rule 7.2, regulating advertising in the public media, are sufficient to guide lawyers and to protect the public.").
- Arizona LEO 97-04 (4/1997) ("A lawyer's web site is a 'communication' about the lawyer or the lawyer's services that is subject to the ethics rules.").
- Maryland LEO 97-26 (7/17/97) ("The Committee's opinion is that a web page constitutes advertising under Rule 7.2(a) as it is plainly a communication 'not involving in person contact.' Therefore, the Rules allow such advertising. . . . Such advertising creates another potential problem under the Rules. Rule 5.5(a) prohibits you from practicing law in a jurisdiction where you are not licensed to practice. Rule 7.1 prohibits the making of misleading communications about one's services. Because your web page may be accessed by persons outside Maryland, you need to be very careful to make sure that your web page makes clear the states in which you are licensed to practice.").
- North Carolina LEO RPC 241, 1996 WL 875832, at *1 (1/24/97) ("[A] lawyer may participate in a directory of lawyers on the Internet if the information about the lawyer in the directory is truthful").
- North Carolina LEO RPC 239, 1996 WL 875828, at *1 (10/18/96) ("[A] lawyer may display truthful information about the lawyer's legal services on a World Wide Web site on the Internet").
- Iowa LEO 96-01 (8/29/96) ("The Board is of the opinion that such law firms' (and lawyers') home page or web sites are generally designed to promote the firm and to sell legal services of the firm and constitute advertising. Therefore it is the opinion of the Board that they must conform to the Iowa Code of Professional Responsibility for Lawyers provisions governing advertising.").
- Michigan LEO RI-276, 1996 WL 909975, at *1 (7/11/96) ("A lawyer may post information about available legal services on the Internet which may be accessed by users of the technology as long as ethics rules governing the content of the posted information are observed.").

- Pennsylvania LEO 96-17, 1996 WL 928126, at *1 (5/3/96) ("Thus, if the web site contains communications about the lawyer or the lawyer's services, it is my opinion that it is lawyer advertising subject to the Rules of Professional Conduct.").

Not surprisingly, the website cannot contain any false or misleading language or pictures.

- In re Hyderally, 32 A.3d 1117, 1117, 1122 (N.J. 2011) (criticizing but not sanctioning a lawyer who improperly used a "seal" of a New Jersey Board on Attorney Certification on his website; finding that the lawyer did not realize that the seal was on his website for approximately two years; nevertheless warning lawyers about such matters; "[W]e remind the Bar that attorneys are responsible for monitoring the content of all communications with the public -- including their websites -- to ensure that those communications conform at all times with the Rules of Professional Conduct.").

(b) State bars have struggled with determining how traditional ethics requirements covering advertisements should apply to websites.

First, will state rules requiring preapproval or prefiling of advertisements apply to each new version of a law firm's website?

Some states have applied such rules to websites.

- Anderson v. Ky. Bar Ass'n, 262 S.W.3d 636 (Ky. 2008) (publicly reprimanding a lawyer and conditionally suspending his license for 30 days for improperly establishing a website to recruit plaintiffs involved in an airplane crash without seeking pre-approval of the website advertisement as required by the Kentucky ethics rules; also noting that the lawyer's paralegal had sent emails to a potential client without the appropriate disclaimer indicating that the email was an advertisement (emphasis added)).
- Tennessee LEO 95-A-570 (5/17/95) (not for publication) ("The posting on the World Wide Web must comply with all ethical rules regarding publicity. For instance, if there is an area of practice listed the appropriate certification disclaimer should be utilized. DR 2-101(C). The statement: 'This Is An Advertisement' must also be utilized on the posting. DR 2-101(N). The Board must be furnished a copy of the communication three days before it is placed on the World Wide Web. DR 2-101(F). The information contained in the posting must be truthful and not a misrepresentation. DR 2-101(A)." (emphasis added)).

One state has not required such preapproval.

- Arizona LEO 97-04 (4/1997) ("Do lawyers need to submit a copy of their web sites to the State Bar and the Supreme Court pursuant to ER 7.3? Probably not. Web sites probably will not fall within the requirements of ER 7.3, which requires lawyers to submit a copy of all direct mail solicitation letters to the State Bar and the Supreme Court. Lawyers only need to send copies of direct mail correspondence to the Bar and the Court when the solicitation is sent to a prospective client who has a known need for legal services for a particular matter. Presumably web sites are designed to provide general information about a law firm and are not sent directly to certain prospective clients and thus do not need to follow ER 7.3." (emphasis omitted)).

Second, will state rules requiring lawyers to preserve their advertisements for a certain period of time apply to each version of its website?

Several states have applied such retention requirements to websites.

- California LEO 2001-155 (2001) ("Rule 1-400(F) adds the requirements that the attorney retain for two years copies or recordings of any communications by written or electronic media and that these copies or recordings be made available to the State Bar if requested. These requirements apply to each page of every version and revision of the web site." (emphasis added)).
- New York City LEO 1998-2 (1998) (law firms should maintain a copy of their website for one year; lawyers communicating electronically with clients must avoid impermissible solicitation; law firms may not pay an internet service provider a percentage of fees earned through internet contacts).

Some states require that lawyers retain "material" changes on their website.

- Arizona LEO 97-04 (4/1997) ("Do lawyers need to keep a copy of their websites and any changes that they make to their websites pursuant to ER 7.1(o)? Yes. Lawyers need to keep a copy of their websites in some retrievable format for three years after dissemination along with a record of when and where the website was used. Additionally, if there is a material substantive change to the website, the lawyer should retain a copy of all material changes as well." (emphasis omitted)). Some states seem to be softening the application of their bar rules' literal language. For instance, Florida only requires approval and retention of a home page rather than an entire website.).
- New York Rule 7.1(k) ("Any advertisement contained in a computer-accessed communication shall be retained for a period of not less than one year. A copy of the contents of any web site covered by this Rule shall be preserved upon the initial publication of the web site, any major web site redesign, or a meaningful and extensive content change, but in no event less frequently than once every 90 days.").

If states begin to insist that websites comply with all of the ethics rules governing advertising, they have quite a chore ahead of them.

Best Answer

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

b 7/14

Websites Offering Legal Advice but Attempting to Disclaim an Attorney-Client Relationship

Hypothetical 22

You have been trying to determine how you can "cash in" on consumers' increasing use of the internet to obtain advice, while avoiding some of the implications of an attorney-client relationship. One idea comes to mind, and you want to make sure that it would work.

May you set up a website in which you and other lawyers answer consumers' questions in return for a fee, while explicitly disclaiming an attorney-client relationship?

NO

Analysis

Whenever lawyers communicate with non-clients about a legal matter, the communication might create an attorney-client relationship. Of course, in some situations the lawyer and the would-be client intend to create such a relationship. In other situations, the law essentially imposes the relationship -- based on the nonlawyers' reasonable understanding and expectation. This possibility has always existed. A lawyer who answers a neighbor's legal question at a cocktail party or a fellow church member's question as they sit together in a pew might find that the lawyer has assumed the burdens of an attorney-client relationship. These might include the risk of liability, the inability to represent a "real" client whose interests are adverse to the person with whom the lawyer briefly interacted, etc.

Social media create many opportunities for this type of "accidental" (from the lawyer's standpoint) creation of an attorney-client relationship. Given the ease with which lawyers can engage in back-and-forth communications, many lawyers have found

it wise to disclaim an attorney-client relationship -- to reduce the odds that the law will impose the burdens of an attorney-client relationship on the lawyer.

This hypothetical involves a different scenario -- lawyers hoping to provide legal advice in return for a fee, but without assuming the duties of an attorney-client relationship. Not surprisingly, such an effort normally would fail.

- South Carolina LEO 12-03 (2012) (explaining that a lawyer could not participate in a website in which the lawyer answered questions in return for earning a fee from the website, while disclaiming providing any legal advice; "The website's use of testimonials, endorsements, the word 'expert,' and other misleading statements prohibit Lawyer's participation. The site invites specific questions about specific legal matters and offers specific legal advice but uses buried small-type statements to attempt to disclaim the creation of attorney-client relationships and to warn against reliance on the advice. The Committee believes Lawyer's participation under these circumstances would be improper."; "As to legal information websites in general, if a website complies with all communications and advertising rules, Lawyer could participate in such a program but with specific caution against inadvertently forming an attorney-client relationship by offering more than basic information of general applicability. Where legal advice is provided, it is improper for Lawyer to accept compensation from the website provider without complying with Rule 1.8(f)."; "Attempting to disclaim (through buried language) an attorney-client relationship in advance of providing specific legal advice in a specific matter, and using similarly buried language to advise against reliance on the advice given is patently unfair and misleading to laypersons."; "Finally, the language of the disclaimer, including the 'as is' clause, may be construed as an attempt to prospectively limit the lawyer's liability for the advice given, which would violate Rule 1.8(h) and therefore be deceptive in violation of Rule 7.1."; "The Committee specifically cautions lawyers to treat online communications with potential clients just as they would a live meeting, specifically regarding conflict checking and 'prospective clients.' However, because this particular website specifically disclaims the creation of attorney/client relationships, a lawyer's use of the website to create them would be tantamount to false, 'bait and switch' advertising by the lawyer."; "Where information provided through a website is limited to general information and not specific advice, and no attorney-client relationship is created, Rule 1.8(f) is not implicated. However, where providing legal advice regarding a specific matter does not result in the formation of an attorney-client relationship, a lawyer may not accept compensation from the service provider unless she complies with Rule 1.8(f).").

Best Answer

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

b 7/14

Law Firm Domain Names and URLs

Hypothetical 23

You and another law school classmate plan to start practicing together immediately after graduation. Among other things, you are trying to determine what domain name to use.

- (a) May you use "southsidelawfirm.com" as a domain name?

YES

- (b) May you use "smithandjones.org" as a domain name?

YES (PROBABLY)

- (c) If you use "smithandjones.com" as your domain name and eventually go your separate ways, may either of you continue to use "smithandjones.com" as a domain name?

YES (PROBABLY)

Analysis

The use of domain names and URLs have complicated the issue of law firm names.

- (a) Law firms may use domain names.

However, only a few states have addressed the ethics issues that such domain names might raise.

- New York Rule 7.5(e) ("A lawyer or law firm may utilize a domain name for an internet web site that does not include the name of the lawyer or law firm provided: (1) all pages of the web site clearly and conspicuously include the actual name of the lawyer or law firm; (2) the lawyer or law firm in no way attempts to engage in the practice of law using the domain name; (3) the domain name does not imply an ability to obtain results in a matter; and (4) the domain name does not otherwise violate these Rules.").

- New York Rule 7.5(f) ("A lawyer or law firm may utilize a telephone number which contains a domain name, nickname, moniker or motto that does not otherwise violate these Rules.").
- North Carolina LEO 2005-14 (1/20/06) (holding that a law firm could register a URL "that does not include words or language sufficient to identify it as the address of a website of a law firm" -- "provided the URL is not otherwise false or misleading and the homepage of the website clearly and unambiguously identifies the site as belonging to a lawyer or a law firm"; "Rule 7.1 and Rule 7.5(a) prohibit lawyers and law firms from using trade names that are misleading. Nevertheless, the Rules of Professional Conduct are rules of reason and should be interpreted with reference to the purposes of legal representation. Rule 0.2, Scope, cmt. [1]. None of the URLs listed in the inquiry make false promises or misrepresentations about a lawyer or a lawyer's services. Although a person who is using the internet to research a medical condition, such as mesothelioma, or injuries caused by prescription medications or on the job, may be given one of these website addresses in a response to an internet browser search, if the user is not interested in legal advice relative to the medical condition or the injury, the user does not have to click on the URL or, having done so, may exit the website as soon as he or she determines that it does not contain the information being sought. At worst, the URLs may cause the user of the internet an extra click of the mouse and, at best, they may provide a user with helpful information about legal rights. Therefore, as long as a URL of a law firm is not otherwise misleading or false and the homepage of the website identifies the sponsoring law firm or lawyer, the URL does not have to contain language specifically identifying the website as one belonging to a law firm.").
- New Jersey Adver. Op. 32 (5/23/05) ("[A] law firm may adopt a domain name for its Internet Uniform Resource Locator ('URL'), that does not include the firm's name or that of any individual attorney within that firm, provided that the Internet web site to which the browser is directed clearly and prominently identifies the actual law firm name and its address; the domain name must not be false or misleading; the name must not imply that the lawyer has been recognized or certified as a specialist other than as provided by rules of professional conduct; and, the domain name must not be used in advertising exclusively as a substitute identifier of the firm"; noting that other states have allowed domain names as long as they are not misleading; also indicating that "a firm may use a different form of its name for purposes of Internet access and retrieval of information about the firm and its services").
- Arizona LEO 01-05 (3/2001) (explaining that "[a] trade name may not be used by a lawyer in private practice" (citing Arizona Rule 7.5), but that a law firm could use a domain name; indicating that a law firm could not use the secondary domain name "countybar.com" because it would "erroneously suggest that this private law firm has some special affiliation with the local bar association."; also noting that a law firm could not use the top level domain

suffix ".org" -- because such a top level domain suffix would create "a false impression that the firm either is a non-profit or is in some way specifically affiliated with a non-profit.").

(b) In 2001, Arizona prohibited the use of the domain suffix ".org," because it would create a false impression that the firm either is a nonprofit or is in some way specifically affiliated with a nonprofit. Arizona LEO 01-05 (3/2001).

In 2011, Arizona reversed this earlier holding.

- Arizona LEO 11-04 (12/2011) ("In March 2001, the Committee issued Ariz. Ethics Op. 01-05, which discussed the limitations to which a law firm is subject when creating or using a website address for its law firm website. Among other conclusions, the Committee opined that a for-profit law firm may not use a domain name that contains the suffix '.org,' on the ground that such use 'creates a false impression that the firm either is a non-profit or is in some way specifically affiliated with a non-profit.'; "A law firm has requested that the Committee reconsider its position that the use of the suffix '.org' violates the Arizona Rules of Professional Conduct."; "Since 2011 [sic], use of Internet domain names, including those with the suffix '.org,' has skyrocketed. Of particular significance here, notwithstanding the 'guidelines' in the Department of Commerce document relied on in Op. 01-05, the use of an '.org' suffix for Internet domain names has not been restricted to 'non-profit' entities. To the contrary, anyone may register a website address that contains the suffix '.org,' and the person registering the address is not required to demonstrate that the website is or will be owned by a non-profit entity."; "In light of the foregoing, the Committee does not believe that the mere use of '.org' by a for-profit law firm is a violation of the Arizona Rules of Professional Conduct. Opinion 01-05 is modified accordingly.").

(c) Virginia dealt with this issue in a 2014 legal ethics opinion -- concluding that immediately terminating the domain name's use would prejudice the public.

- Virginia LEO 1873 (3/20/14) (explaining that the hypothetical law firm of "Smith & Jones, P.C." need not immediately stop using the Internet domain name and URL "smithjones.com" after Smith withdraws from the P.C. -- because an immediate termination would not serve "the interests of the public" or "the partners in the former firm who collectively built goodwill and created value associated with that firm name."; noting that the "appropriate way of explaining why smithjones.com is no longer the Smith & Jones website" is to place a notice on that website; explaining that although the P.C. owns the former domain name, it may not indicate on the website that the Smith & Jones "has now become" the "Jones Law Office," because that implies that Smith is no longer practicing law; similarly noting that any

redirection of visitors to the smithjones.com website to the "joneslawoffice.com" website also requires additional information, and is appropriate only if the joneslawoffice.com website, or a page visible during the process of redirecting, "explains the change from Smith & Jones to Jones Law Office and that Smith continues to practice law in a different firm.").

Best Answer

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

b 7/14

"Virtual" Law Firms

Hypothetical 24

As a computer science major in college, you have always tried to use your special skills once you became a lawyer. You are now considering establishing a "virtual" law firm, and wonder how state marketing rules apply to such arrangements.

If you practice law without an actual physical office, may you include in your marketing the address of an office suite that you rent (as required) for meeting clients?

YES (PROBABLY)

Analysis

Practicing law "virtually" raises a number of issues. Perhaps most importantly, lawyers practicing in another state "virtually" may run afoul of that state's multijurisdictional practice limitations if the lawyer is not licensed there. Conversely, lawyers practicing "virtually" in a state where they are licensed may violate various regulations of the state where they are physically working -- if they are not licensed there.

Practicing "virtually" also raises confidentiality and supervision issues.

In the marketing context, practicing "virtually" raises an obvious question in states requiring lawyers to include their office address in all of their marketing. Even if such information is not required, lawyers must decide if they may include as an office address a place where they occasionally rent space to meet their clients.

Adding to the subtlety of this issue, some lawyers have improperly listed as their "office" some remote location where a nonlawyer essentially works without supervision. It can be difficult to distinguish such an improper arrangement from a legitimate "virtual" practice.

Not surprisingly, bars and courts have sanctioned lawyers for listing as their "office" such unsupervised outposts.

- Unnamed Attorney v. Ky. Bar Ass'n, 143 S.W.3d 600, 601 (Ky. 2004) (privately reprimanding a Kentucky lawyer who advertised various office locations in Kentucky in telephone directories, which were "neither staffed by a lawyer or any legal support staff" and in fact were not actual offices; "Movant and the KBA [Kentucky Bar Association] agree that no client has ever expressed any confusion or misunderstanding concerning the location of Movant's Kentucky law offices. But by stating addresses in Movant's telephone directory advertisements for which no actual offices existed, Movant's communication is misleading, a misrepresentation, and a violation of SCR 3.130-7.15(1).").

Some bars have continued to insist that lawyers' marketing use only a real office address.

- New York LEO 964 (4/4/13) ("Advertising for legal services may not identify a mail drop as the sole address, but must also include the street address of the lawyer's principal office[.] . . . A lawyer's business or professional cards and letterhead may use a mail drop as the sole address, provided they are not being used as advertising and use of the mail address is not misleading.").

But as some lawyers began to spend more and more of their time practicing outside a traditional "office," some courts acknowledged that lawyers could treat a physical location as their "office" despite only intermittently using the space.

- In re Carlton, 708 F. Supp. 2d 524, 526, 525, 526, 527 (D. Md. 2010) (holding that a lawyer who sometimes visits her firm's D.C. office and uses that office's computer for her work and conference rooms for client meetings can claim that a D.C. office is her "principal law office" when applying for admission to the District of Maryland bar, even though she does not physically work full-time in that office; explaining the factual background; "Ms. Carlton advised that from her home in Cambridge, she accesses a computer in the Washington, D.C. office of the firm that is designated for her use. She is thus able to use the firm's computer network and access all programs used by the firm's attorneys, including the internal firm email and firm time-keeping program. Thus, even though she is physically located in Cambridge, Massachusetts, she works off a computer and server located in Washington, D.C., and, just as when she physically worked in Washington, D.C., and, all of her correspondence is sent to the Washington, D.C. address and forwarded to her by the firm's office staff. Clients communicate with her

by calling the firm's Washington, D.C. phone number which forwards those calls to her in Cambridge in the same manner as would be the case at an extension in the District of Columbia office. All of her outgoing client correspondence is sent from the D.C. office and all court pleadings are also prepared for filing and filed from the District of Columbia office, unless she is filing a pleading electronically which she can do from Cambridge. Finally, she stated that she only meets with clients when she is in Washington, D.C., and that she has traveled there several times over the past year to complete large projects and meet with clients."; noting that "Local Rule 701.1 (a) provides that 'in order for an attorney to be qualified for admission to the bar of this district, the attorney must be, and continuously remain, a member in good standing of the highest court of any state (or the District of Columbia) in which the attorney maintains his or her principal law office, or the Court of Appeals of Maryland.'"; explaining that "in recent years, the concept of a 'principal law office' has evolved somewhat as a result of significant advances in technology which provide an attorney with the flexibility to carry out a variety of activities at different locations and under varying circumstances. The term does not necessarily mean continuous physical presence but, at a minimum it requires some physical presence sufficient to assure accountability of the attorney to clients and the Court." (emphasis added); noting that the Washington, D.C., office was more than just a "mail drop" in this situation, and that the lawyer was occasionally physically present in Washington, D.C.).

More recently, bars have begun to accommodate the growing trend of lawyers practicing "virtually."

- New York City LEO 2014-2 (6/2014) ("A New York lawyer may use the street address of a virtual law office ('VLO') located in New York state as the 'principal law office address' for the purposes of Rule 7.1(h) of the New York Rules of Professional Conduct (the 'New York Rules' or the 'Rules'), even if most of the lawyer's work is done at another location. In addition, a New York lawyer may use the address of a VLO as the office address on business cards, letterhead and law firm website. Given the lower overhead, improved encryption systems, expansion of mobile communication options, availability of electronic research, and the ease of storing and transmitting digital documents and information, VLOs are becoming an increasingly attractive option for attorneys throughout the country. A New York lawyer who uses a VLO must also comply with other New York Rules, including Rules 1.4, 1.6, 5.1, 5.3, 8.4(a) and 8.4(c)."; "A New York lawyer (the 'Lawyer') is considering becoming a solo practitioner and plans to do most of her work at her home. The Lawyer does not intend to maintain a separate physical office. Instead, she plans to use a VLO in New York State, as defined below, to meet with clients, hold 'office hours,' receive mail, or otherwise be present and available at various times. For privacy and security reasons, she does not wish to identify her home address as her business address. She would like to use

the address of the VLO as her 'principal office address' for purposes of advertising her legal services under Rule 7.1(h). She would also like to use the VLO address on her letterhead, business cards and law firm website."; "The VLO, as used herein, has a physical street address where the Lawyer plans to make herself available for meetings with clients and where the Lawyer can receive service and delivery of legal papers. Accordingly, we conclude that the use of a VLO address in attorney advertising complies with the requirement of 7.1(h) to disclose a physical street address."; "[L]awyers who use VLOs may need to take additional precautions to ensure that they are fulfilling their supervisory obligations. Notwithstanding the differences between VLOs and traditional law firms, the '[a]ttorney must take reasonable measures to ascertain that everyone under her supervision is complying with the Rules of Professional Conduct, including the duties of confidentiality and competence.'" (citation omitted); "A lawyer who uses the shared services and office space of a VLO to perform legal services and to meet with clients, witnesses, or other third parties must take reasonable steps to ensure that she does not expose or put the client's confidential information at risk. This should include, as appropriate, training and educating staff at the VLO on these obligations."; "Lawyers who use VLOs must be particularly mindful of these ethical obligations, given that the lawyers may frequently be away from the physical location that serves as their business address. Lawyers who use VLOs should also take steps to ensure that they are available to meet with and communicate with their clients and respond promptly to their requests for information.").

- Virginia LEO 1872 (3/29/13) (Lawyers must be mindful of their confidentiality, supervision and marketing responsibilities, among other things, if they practice "virtually," or if they combine a virtual practice with an "executive office suite" for meetings and other activities requiring a physical office; "The use of an executive office/suite rental or any other kind of shared, non-exclusive space, either in conjunction with a virtual law practice or as an addition to a 'traditional' office-based practice, raises a separate issue. A non-exclusive office space or virtual law office that is advertised as a location of the firm must be an office where the lawyer provides legal services. Depending on the facts and circumstances, it may be improper under Rule 7.1 for a lawyer to list or hold out a rented office space as her 'law office' on letterhead or other public communications. Factors to be considered in making this determination include the frequency with which the lawyer uses the space, whether nonlawyers also use the space, and whether signage indicates that the space is used as a law office. In addition, a lawyer may not list alternative or rented office spaces in public communications for the purpose of misleading prospective clients into believing that the lawyer has a more geographically diverse practice and/or more firm resources than is actually the case. As discussed above in the context of Internet-based service providers, a lawyer must also pay careful attention to protecting confidentiality if any client information is stored or received in a shared space

staffed by nonlawyers who are not employees of the law firm and may not be aware of the nature or extent of the duty of confidentiality.").

- Pennsylvania LEO 2010-200 (2010) (analyzing the marketing implications of a lawyer practicing out a "virtual law office"; "[T]his Committee believes that an attorney is not required to disclose the specific location of his or her office, but must disclose the geographic location, by city or town, of the office in which the lawyer or lawyers who will actually perform the services advertised principally practice law."; "The Committee notes that, consistent with Rule 7.1, the address provided by an attorney may not be misleading. Thus, letterhead or other documents that list a private mailbox or similar service as a physical address, but which is merely a mail drop, may be misleading and violate the Rules."; "[A] solo practitioner with a VLO, principally practicing law in Philadelphia, decides to expand the practice by hiring two additional attorneys, one of whom principally practices in Pittsburgh and one of whom principally practices in Harrisburg. The solo practitioner and his associates each work from home and share client files and communicate electronically. If the attorney in Philadelphia is sending the electronic files of his local clients to the two attorneys in Pittsburgh and Harrisburg, then the two attorneys in Pittsburgh and Harrisburg are principally practicing law in Philadelphia, even if they never set foot within that city. Such a situation is analogous to outsourcing, and will not require the firm to list additional addresses in Pittsburgh and Harrisburg.").

Best Answer

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

b 7/14

Lawyers' Favorable Reviews on Other Websites

Hypothetical 25

You and one of your law school classmates just started your own law firm, and have been looking for ways to increase your local profile.

- (a) May you encourage satisfied clients to write a review in a local website that solicits such reviews?

YES

- (b) May you link your website to another website filled with complimentary reviews?

MAYBE

Analysis

Although lawyers have always faced limits on touting satisfied clients' statements, the internet obviously magnifies the issue.

(a) Traditional ethics rules cover testimonials and endorsements. Not surprisingly, lawyers cannot put words in a client's mouth that the lawyer could not publish herself. Furthermore, lawyers may not quote such testimonials if the ethics rules would prohibit lawyers from making such statements themselves.

Most bars would probably permit lawyers to encourage satisfied clients to post favorable reviews.

- North Carolina LEO 2012-8 (10/26/12) (holding that a lawyer can seek a former client's LinkedIn recommendation, as long as the lawyer follows the client testimonial rules).

However, most bars would also probably prohibit lawyers from "scripting" such reviews.

Not surprisingly, lawyers may not post their own fake reviews, hoping to generate favorable publicity. In 2013, the Consumer Review website Yelp sued a law firm for allegedly posting such fraudulent reviews.

- Max Taves, Yelp Sues Law Firm Over Fake Reviews, Recorder, Sept. 9, 2013 ("Yelp Inc., the popular consumer review website, is suing a small San Diego law firm, alleging it used its own staff and a circle of five back-scratching local attorneys, to write fake, glowing reviews promoting its bankruptcy practice."; "The suit accuses the McMillan Law Group and owner, Julian McMillan, of violating Yelp's terms of service and eroding its value to consumers with fake reviews and false testimonials."; "The McMillan Law Group's efforts to mislead consumers are particularly brazen and disappointing given they have targeted some of the most vulnerable consumers of all -- individuals who may be facing bankruptcy and who are looking for potential legal representation," wrote Yelp's attorney Daralyn Durie of Durie Tangri in a sharply worded complaint filed August 20 in San Francisco Superior Court."; "By posing as clients and posting glowing reviews, the McMillan Law Group breached its contract with Yelp and violated California's unfair competition and false advertising laws, the suit alleges.").

The complaint contains powerful evidence of several law firms' involvement in the fraud.

- Complaint at 5, 6-7, 7, 8, Yelp Inc. v. McMillan Law Grp., Inc., Case No. CGC 13-533654 (Cal. Super. Ct. filed Aug. 20, 2013) (alleging that a law firm arranged for several of its employees and related individual to file favorable reviews about the law firm on Yelp; among other things noting that the firm's office manager [Isabella Lung] and legal assistant filed a favorable review indicating (among other things) that "[t]he entire firm staff was very helpful"; finding that she later issued another favorable report using an account under "Bella Lung"; noting that an individual who filed a favorable report later married one of the firm's lawyers; noting that on December 30, 2010, four new Yelp user accounts were created from a computer at the law firm between 8:00 and 9:00 a.m., and that during that hour four individuals posted favorable reviews on those accounts, which then remained inactive for the next two and a half years; noting that two of the favorable reviews started with the same sentence, containing a typo: "They promised [sic] me a fresh start through a Chapter 7 bankruptcy and I got it." (emphasis added); also allegeding that the law firm "also participated in a circle of San Diego lawyers who trade positive reviews, and that in April 2012 "within the space of a few days, these lawyer gave one another rave reviews on Yelp.").

(b) Only one state seems to have explicitly dealt with a lawyer's responsibility for the accuracy of information on other websites that the lawyer "adopts or endorses."

- South Carolina LEO 09-10 (2010) (holding that a lawyer directing potential clients to a website had to assure that statements on the website complied with the advertising rules; "[A] lawyer may claim the website listing, but all information contained therein (including peer endorsements, client ratings, and Company X ratings) are subject to the rules governing communication and advertising once the lawyer claims the listing."; "A lawyer may invite peers to rate the lawyer and may invite and allow the posting of peer and client comments, but all such comments are governed by the Rules of Professional Conduct, and the lawyer is responsible for their content."; "Statements made by Company X on its website about a lawyer are not governed by the Rules of Professional Conduct unless placed or disseminated by the lawyer or by someone on the lawyer's behalf."; "[S]everal states have concluded that client comments contained in lawyer advertising violate the prohibition against misleading communications if the comments include comparative language such as 'the best' or statements about results obtained."; "[A] lawyer who adopts or endorses information on any similar web site becomes responsible for conforming all information in the lawyer's listing to the Rules of Professional Conduct. Martindale-Hubbell, SuperLawyers, LinkedIn, Avvo, and other such websites may place their own informational listing about a lawyer on their websites without the lawyer's knowledge or consent, and allow lawyers to take over their listings. The language employed by the website for claiming a listing is irrelevant. (Martindale.com, for example, uses an 'update this listing' link for lawyers to claim their listings). Regardless of the terminology, by requesting access to and updating any website listing (beyond merely making corrections to directory information), a lawyer assumes responsibility for the content of the listing.").

Best Answer

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

b 7/14

Intruding Into Other Law Firms' Internet Marketing

Hypothetical 26

Your small firm has been playing "catch-up" in its internet marketing efforts, and you are wondering what steps you may ethically take.

- (a) May you list a competitor's name as a key word in a search engine company's search-based advertising program for your firm?

NO (PROBABLY)

- (b) May you arrange for a pop-up ad for your firm to appear when an internet user types the name of your competitor?

YES (PROBABLY)

Analysis

Even the logistics of internet marketing has spawned questions about lawyers' permissible marketing steps.

- (a) In 2012, the North Carolina Bar indicated that lawyers may not engage in this practice.

- North Carolina LEO 2010-14 (4/27/12) (answering the following question by indicating that the conduct was unethical: "Does Attorney A's selection of a competitor's name as a keyword for use in a search engine company's search-based advertising program violate the Rules of Professional Conduct?").

- (b) In 2013, a Wisconsin state court found that a law firm engaging in this practice did not violate Wisconsin's invasion of privacy law.

- Habush v. Cannon, 828 N.W.2d 876, 876-77 (Wis. Ct. App. 2013) (holding that a Wisconsin law firm did not violate Wisconsin's statutory invasion of privacy statute by arranging for its advertisement to pop up when an internet user typed the name of a competitive law firm; "[T]he law firm Cannon & Dunphy bid on the search terms 'Habush' and 'Rottier' through Google, Yahoo!, and Bing search engines. Cannon & Dunphy, by successfully bidding on the names Habush and Rottier, assured that, when a person entered either name

as a search term into one of these search engines, a link to Cannon & Dunphy's website would appear as a 'sponsored link' above the 'organic' link to the law firm of Habush Habush & Rottier. Attorneys Robert Habush and Daniel Rottier contend that, by successfully bidding on their names, Cannon & Dunphy violated § 995.50(2)(b) by using their names for advertising or trade purposes. We conclude that Cannon & Dunphy's 'use' of the names Habush and Rottier is not 'use' within the meaning of § 995.50(2)(b). We therefore affirm the circuit court's decision granting summary judgment in favor of Cannon & Dunphy.").

Best Answer

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

b 7/14

Internet Referral Arrangements

Hypothetical 27

As you try to catch up with some of your competitors' marketing, several questions have arisen.

- (a) May you add your firm's name to a for-profit internet "referral service" that lists lawyers practicing in certain substantive areas?

MAYBE

- (b) May you pay an internet "referral service" based on the number of "hits" on your website?

MAYBE

Analysis

As in so many other areas, the internet has impacted law firms' participation in referral services.

- (a) Lawyers may participate in approved non-profit referral services.

However, many states have prohibited lawyers from participating in for-profit referral services.

A nationwide debate focuses on internet companies which "sell" a certain zip code to a lawyer -- and then link to that lawyer anyone visiting the company's website from that zip code. Absent some disclaimer, such a process would almost surely violate several ethics rules.

Several older ethics opinions found such a process unethical, even with disclaimers.

- Kentucky LEO E-429 (6/17/08) (holding that Kentucky lawyers may not participate in a for-profit referral service that matches clients with lawyers or refers clients to lawyers).

- Washington LEO 2106 (2006) (holding that a lawyer may not participate in a legal marketing plan operated by a company which describes itself as an "attorney/client matching service" rather than a referral service; pointing to various other states' legal ethics opinions in concluding that "it appears that the Company's system is a referral service. In particular, the 'verified' attorneys are recommended above others, a logo appears next to their profile, and their responses are presented above those from 'standard' attorneys. Thus, the Company makes 'subjective judgments,' and provides more than 'ministerial services.'"; holding that the process violates the ethics prohibition on a lawyer making payment for a referral).
- New York LEO 799 (9/29/06) ("Lawyer may not participate in website that charges lawyer a fee to provide information about potential clients whom lawyer will then contact, where the website purports to analyze the prospective client's problem and selects which of its subscribing lawyers should respond, nor may the lawyer contact the prospective client by telephone unless the prospective client has expressly requested a telephone contact."; finding that the arrangement amounted to an improper lawyer referral service; finding that the arrangement would not constitute improper solicitation if both the potential client specifically has to check a box in order to "authorize telephone contact" by a lawyer).
- Arizona LEO 06-06 (9/2006) ("An online service that matches prospective clients with potential lawyers based on the appropriate geographic and practice areas, makes representations about the qualifications of its member lawyers, and provides a monetary satisfaction guarantee, is a 'lawyer referral service' within the meaning of ER 7.2(b). Unless the service is a non-profit service or is approved by an appropriate regulatory authority, Arizona attorneys may not pay a fee to participate.").
- Texas LEO 561 (8/2005) (holding that Texas lawyers may not pay a fee to an internet service that forwards client information to certain lawyers or recommends certain lawyers, and which has not been approved by the Texas bar).
- Maryland LEO 2001-03 (5/16/01) (prohibiting an arrangement under which an internet site designed "to bring lawyers and potential clients together" required the lawyers to pay a referral fee for any engagement and name both the participating lawyer and a lawyer for the company that operated the website to be named as lawyers for the client; finding that the arrangement amounted to fee-splitting without the client's consent).
- Iowa LEO 00-07 (12/5/00) (holding that Iowa lawyers may not participate in an internet referral service that collects information from potential clients and forwards it to certain lawyers on the list (and who pay to be on the list)).

In 2011, New Jersey condemned such an arrangement.

- New Jersey Comm. on Attorney Adver. Op. 43 (6/28/11) (finding that an internet company which recommends lawyers based on the lawyer's purchase of a particular zip code area's coverage was not an impermissible referral service, but engaged in misleading conduct; "The website contains a lengthy, 16-sentence disclaimer at the bottom of the home page that the site is a lawyer advertisement, not a referral service, and the company is not making an attorney recommendation. The 5th sentence of this 16-sentence disclaimer states that '[t]he sole basis for the inclusion of the participating lawyers or law firms is the payment of a fee for exclusive geographical advertising rights.' This convoluted 'legalese' means, in plain English, that only one participating attorney is offered per geographical area, though the translation from 'legalese' to plain English is unlikely to be grasped by most consumers."; "[I]f sufficient information is clearly imparted to a consumer, the consumer should be able to differentiate between an attorney referral service and a commercial enterprise designed to publicize attorneys practicing in a certain field. The Committee finds that the Internet company website is not an impermissible referral service provided it supplies additional information regarding the basis for selection of attorneys and addresses the other concerns discussed below."; "Arizona, Washington, Kentucky, and New York have found that websites are referral services when they purport to evaluate the needs of the User to match the User to the attorney, or vouch for the qualifications of the participating attorneys. Texas and Ohio have found websites to be advertising rather than referral services when sufficient information is presented to the User and the websites make no assertions about the qualifications of the participating attorneys. South Carolina takes a different view, finding that any website that restricts attorney participation is an impermissible referral service and not advertising." (footnotes omitted); "Websites that direct Users to only attorney based on the purchase of exclusive rights to geographical areas are suspect. To avoid misleading consumers, the methodology for the selection of the attorney's name must be made clear, including the fact that the website limits participation to one (paying) attorney per geographical area. The website must inform the consumer in plain language that the 'local bankruptcy attorney' name provided to the User is based solely on the zip code provided and not by an evaluation. This information cannot be countermanded by contrary statements, like the suggestion that the zip code is necessary only because 'the law varies from state to state' or the implication that a financial evaluation is required to identify the participating attorney."; "The Committee hereby decides that attorneys are not flatly prohibited from paying 'per-lead' Internet advertising charges provided the marketing scheme is advertising and not an impermissible referral service. Just as 'pay-per-click' has become more prevalent in the Internet advertising community, 'pay-per-lead' or 'pay-per-contact' for Internet advertising is likely to become a more common model due to its inherent reward for effective advertising.").

In contrast, other recent ethics opinions seem to generally approve such a process, as long as the website contains sufficient disclaimers.

- Arizona LEO 11-02 (10/2011) ("A lawyer may ethically participate in an Internet-based group advertising program that limits participation to a single lawyer for each ZIP code from which prospective clients may come, provided that the service fully and accurately discloses its advertising nature and, specifically, that each lawyer has paid to be the sole lawyer listed in a particular ZIP code. To remain a permissible group advertising program, such a service may do nothing more to match clients with lawyers than provide inquiring clients with the name and contact information of participating lawyers, without communicating (expressly or by implication) any substantive endorsement."; "A lawyer may also ethically participate in Internet advertising on a pay-per-click basis in which the advertising charge is based on the number of consumers who request information or otherwise respond to the lawyer's advertisement, provided that the fee is not based on the amount of fees ultimately paid by any clients who actually engage the lawyer.").
- Colorado LEO 122 (as amended 10/16/10) (distinguishing between permissible "on-line directory listings" and impermissible for-profit "referral services"; "The pivotal point is the distinction between 'on-line directory listings' and a for-profit 'referral service.' The lawyer must evaluate the program under consideration to ascertain that it is in the nature of a listing-type directory rather than a for-profit program that provides referrals to specific lawyers, regardless of the purported criteria for such referrals."; "It is likely that the proliferation of online attorney marketing programs will continue and that new programs will arise with various permutations of the characteristics identified in this opinion. For future guidance to Colorado lawyers, the Committee sets out the following characteristics that must be present in such a program for it to be an advertising program in which a lawyer is permitted to participate: A. The selection of lawyers for a potential client identified in response to the potential client's information is a non-subjective process performed by a software program or, in any event, performed without exercise of any discretion, based on the information provided by the potential client and the information provided by participating lawyers.; B. The program takes sufficient steps to ensure that a reasonable potential client understands that (1) only lawyers who have paid a fee to be included in the service will be given the opportunity to respond to the potential client and (2) the service makes no assertion about the quality of the lawyers included in the service without an objective basis for such assertion. The service must not state that it is making referrals of lawyers and must not describe itself in a way that would cause a reasonable potential client to believe the program is selecting, referring, and recommending the participating lawyers. The service should disclose whether the program is open to all licensed lawyers or, if there are limits on the number or

qualifications of lawyers who may participate in the program, it should disclose the nature of those limits.; C. The fee charged by the program is a reasonable fee for the advertising and public relations services provided.; D. The program does not limit or restrict, whether directly or by means of a high fee structure, finely drawn geographic and legal practice areas, or otherwise, the number of lawyers it allows to participate for a given geographic area or legal practice area to such an extent that the program in effect recommends particular types of potential clients to a particular lawyer.; E. Every initial communication sent by the lawyer to a potential client that is identified through the program complies with Colo. RPC 7.3(d).").

- Rhode Island LEO 2005-01 (2/24/05) (allowing lawyers to participate in an internet site called "LegalMatch.com"; noting that the annual fee "is not a percentage of, or otherwise linked to, a participating attorney's legal fees"; also noting that "[t]he proposed arrangement is not a referral service. LM.com does not recommend, refer, or electronically direct consumers, i.e. potential clients, to a specific attorney; and all requests for legal services by consumers are accessible to every attorney who registers to receive them. After viewing the various advertisements on the website, or upon receiving a lawyer's reply to a request for legal services, a consumer contacts a participating attorney directly. Attorney-client relationships are established off-line and without LM.com's participation. On the basis of these facts therefore, the annual membership fee does not appear to the Panel to be a payment 'for recommending the lawyer's services' prohibited by Rule 7.2(c)."; finding that the membership fee was a cost of advertising).

(b) Determining the ethical propriety of payments to even permissible internet referral site requires a more complex analysis. Several states' legal ethics opinions have dealt with this issue, usually approving such an arrangement.

- New Jersey Comm. on Attorney Adver. Op. 43 (6/28/11) ("The Committee hereby decides that attorneys are not flatly prohibited from paying 'per-lead' Internet advertising charges provided the marketing scheme is advertising and not an impermissible referral service. Just as 'pay-per-click' has become more prevalent in the Internet advertising community, 'pay-per-lead' or 'pay-per-contact' for Internet advertising is likely to become a more common model due to its inherent reward for effective advertising.").
- Oregon LEO 2007-180 (11/2007) (holding that a lawyer may pay an internet advertising service by the "hits" on the internet, but not based on referrals that the lawyer receives; "In the context of advertising, Oregon RPC 5.4 thus precludes a lawyer from paying someone, or a related third party, who advertises or otherwise disseminates information about the lawyer's services based on the number of referrals, retained clients, or revenue generated from the advertisements. By contrast, paying a fixed annual or other set periodic

fee not related to any particular work derived from a directory listing, violates neither RPC 5.4(a) nor RPC 7.2(a). A charge to Lawyer based on the number of hits or clicks on Lawyer's advertising, and that is not based on actual referrals or retained clients, would also be permissible.").

- District of Columbia LEO 342 (11/2007) ("Lawyers may participate in both not-for-profit and for-profit lawyer Internet-based referral services where the services require a flat fee for participation, a flat fee for transmitting the lawyer's name to a potential client, and/or a flat fee for every client secured as a result of a referral."; noting that D.C. Rule 7.1 does not share the ABA Model Rule's limitation of the payment of fees only to not-for-profit or otherwise "qualified" lawyer referral services).
- North Carolina LEO 2004-1 (4/23/04) ("A commercial Internet company (the company) operates a website that matches prospective clients with lawyers. A prospective client logs onto the website where he registers and is given an identification number to preserve anonymity"; "A participating lawyer is charged a one-time registration fee that covers expenses for verifying credentials, technical system programming, and other set-up expenses. An annual fee is charged to each participating lawyer for ongoing administrative, system, and advertising expenses. The amount of the annual fee varies by lawyer based on a number of components, including the lawyer's current rates, areas of practice, geographic location, and number of years in practice."; "Only participating lawyers can access the information posted by a prospective client on the website. A local participating lawyer who is interested in a posted case may list his qualifications and send the prospective client an offer message setting forth an explanation of the services he can provide and his qualifications. The prospective client can review offer messages from lawyers and learn more about these lawyers by reviewing the company's on-line lawyer profiles and consumer rating information. If a lawyer has a website, the prospective client may also visit it. Using this information, the prospective client selects a lawyer and contacts the lawyer at which time the prospective client reveals his identity."; a lawyer may participate in this service, provided there is no fee sharing with the company in violation of Rule 5.4(a), and further provided the participating lawyer is responsible for the veracity of any representation made by the company about the lawyer or the lawyer's services or the process whereby lawyers' names are provided to a user. This on-line service has aspects of both a lawyer referral service and a legal directory. On the one hand, the on-line service is like a lawyer referral service because the company purports to screen lawyers before allowing them to participate and to match a prospective client with suitable lawyers. On the other hand, it is like a legal directory because it provides a prospective client with the names of lawyers who are interested in handling his matter together with information about the lawyers' qualifications. The prospective client may do further research on the lawyers who send him offer messages. Using this information, the prospective client decides which lawyer to contact about representation."; "It

appears that the on-line service satisfies all of the conditions of Rule 7.2 except that it is operated for a profit, potential clients are charged a fee if they chose the priority service, and the website does not include a statement on how the names of all participating lawyers may be obtained."; "[T]he potential harm to the consumer of a pure lawyer referral service is avoided because the company does not decide which lawyer is right for the client.").

- South Carolina LEO 01-03 (6/1/01) (approving an arrangement under which a lawyer made payments to the company operating an internet referral website "based either on a set monthly or yearly fee or based on the number of hits or referrals from the service to the lawyer," although the lawyer could not actually pay the company a portion of the fees received from the clients; analogizing such result-based payments to different advertising charges based on proven market penetration and coverage; holding that the arrangement was proper only if the website was open to all lawyers; indicating that the ethics rules would prohibit a for-profit referral service that limited the number of lawyers listed under specific subject matters; citing that Nebraska and the Association of the Bar of the City of New York have taken the same position on this issue).
- Ohio LEO 2001-2 (4/6/01) (indicating that lawyers could advertise in a law-related commercial website, assuming that the advertisements were not false or deceptive, and as long as the company operating the website did not engage in the unauthorized practice of law by offering services "that go beyond merely a ministerial function of providing a legal form to Users"; explaining that the law firm could pay for the advertisement, but could not pay the website for referrals (which would be prohibited under Ohio DR 2-103(B)); acknowledging that distinguishing between these two types of payments would be difficult, but reminding lawyers that an improper payment for referral would likely consist of payments "based upon the actual number of people who contact or hire the attorney or an amount based upon a percentage of the fee obtained for rendering legal services.").

Best Answer

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

b 7/14

Firms' Joint Advertisements

Hypothetical 28

Some of your firm's newer lawyers want your firm to expand its marketing using the internet. Among other things, one of your lawyers suggests that perhaps you can sell advertising space on your law firm's website and in its brochures.

- (a) May your law firm sell advertising space on your website and in brochures?

YES (PROBABLY)

- (b) May you split the cost of jointly advertising with another professional such as a realtor?

YES (PROBABLY)

Analysis

- (a) In 2014, the New York state bar found this process ethically permissible.
- New York LEO 1001 (3/28/14) (finding that a law firm could sell third-party advertisement space in its brochures; "The inquirer is a New York law firm that offers professional services in several practice areas. On a monthly basis, the law firm publishes a newsletter containing information about a variety of legal subjects on which the firm concentrates, which is distributed free of charge through several means to clients and non-clients. The content of this newsletter provides analysis of legal issues of importance in the practice areas the law firm offers, but the articles typically conclude with an invitation to call the law firm for additional information. Some articles prominently feature a successful representation by the law firm. The newsletter also prominently features advertisements for the law firm, offering, among other things, free legal consultations, 'reasonable' fees, and payment plans for the firm's services. The back cover of the newsletter consists entirely of an advertisement for the firm. . . . The law firm's sole question is whether the law firm may accept advertising for the newsletter from other professionals, including law firms, medical professionals, and others. The law firm states that it will charge a straight fee for this advertising, without any arrangement indicative of referrals, fee-sharing, or other illicit agreements between service providers. The inquiry, then, is essentially whether a lawyer who engages in advertising on the lawyer's own behalf through a regular publication of interest to the public may also sell advertising in the same publication, without any kind of agreement between the publishing law firm and the advertiser. In our view, if the publication complies with New York Rule

of Professional Conduct 7.1, then the law firm may provide space in its newsletter to others provided no impermissible conditions accompany the transaction."; "Law firms that distribute brochures with educational content on legal issues of importance to the public may sell advertising in those brochures to third parties, including other law firms, as long as the publishing law firm does not charge rates for the advertising suggestive of improper referral or fee-splitting arrangements. Whether a brochure constitutes lawyer advertising depends on the entirety of the brochure and not only those portions promoting the firm.").

(b) In 2012, the Vermont Bar approved such a marketing campaign.

- Vermont LEO 2012-1 (2012) ("Attorney has been approached by realtor to enter into a marketing agreement with realtor and lender. The agreement would include a mix of print and on-line marketing geared to buyers and sellers of real estate, and would advertise the services of the attorney, the realtor and a lender. All advertising materials would be posted, printed or sent by the realtor. The parties would split the cost of the advertising campaign three ways on a month to month basis. The payment of the attorney's share of the marketing costs would not depend on whether any new clients or business came from the advertising, and payment for the advertising would not derive from the proceeds of any particular real estate transaction but would rather come from the attorney's general office account."; "A lawyer may enter into a marketing agreement with a nonlawyer professional to share the cost of advertising, but the lawyer must ensure that the content of the advertising materials complies with the Rules, and all payments to the nonlawyer must be for actual marketing costs and services rendered. The advertisements must not state or imply that the lawyer is in business or partnership with the nonlawyer. Should the MSA result in an informal referral arrangement with the nonlawyer, the lawyer shall comply with the Rules regarding reciprocal referral agreements and shall disclose potential conflicts of interest to the client.").

Best Answer

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

PROBABLY YES.

b 7/14

Lawyers' Use of Social Media in Their Marketing

Hypothetical 29

As a fairly veteran lawyer, you have been slow to use social media in your marketing. One of your children has urged you to take advantage of this new type of marketing.

- (a) May you offer a prize to clients who join your social network?

YES (PROBABLY)

- (b) May you include information in a social network profile's "expertise" and "specialty" fields?

NO

Analysis

Social media has opened up new forms of marketing, but also created difficulty in applying traditional marketing ethics rules.

- (a) In 2011, the New York state bar approved such a prize process.

- New York LEO 873 (6/9/11) ("The Rules of Professional Conduct do not prohibit an attorney from offering a prize to join the attorney's social network as long as the prize offer is not illegal, but if the primary purpose of the prize offer is the retention of the attorney, then it will constitute an 'advertisement' and will be subject to the rules governing lawyer advertising. If the prize offer is an advertisement, and if it is targeted to specific recipients, and if a significant motive is pecuniary gain, it will also constitute a 'solicitation' and will be subject to additional requirements and restrictions.").

(b) In states that explicitly prohibit lawyers from using words like "expertise" and "specialty," lawyers attempting to use social media have been hampered by some social media sites' use of such seemingly innocuous terms.

- New York LEO 972 (6/26/13) ("A law firm may not list its services under the heading 'Specialities' on a social media site. A lawyer may not list services under that heading unless the lawyer is certified in conformity with the provisions of Rule 7.4(c).").

As a result of this square peg/round hole dilemma, one social media site even changed the name of its fields.

- Adrian Dayton, Ethics Guardians Are Falling Behind, Nat'l L.J., Oct. 7, 2013 ("In August, the New York State Bar Association issued an ethics opinion telling lawyers they should no longer use the 'specialties' section on the professional networking site LinkedIn. The only thing is, LinkedIn.com had removed its 'specialties' section months earlier."; "The episode is but one piece of evidence that legal ethics guidelines across the country are failing to keep up technological advances. This and similar opinions issued elsewhere make it increasingly difficult for large firms to navigate ethical strictures involving marketing practices that cross state lines."; "On September 11, the Florida Bar warned an attorney that 'you may not list your areas of practice under the headers 'Skills & Expertise' as you are not board certified.' The organization cited a New York opinion in support of its position."; "The only problem? New York's position wasn't similar at all, having addressed the defunct LinkedIn 'Specialties' section. The New York opinion even warned, 'We do not in this opinion address whether the lawyer or law firm could . . . list practice areas under other headings such as 'Products & Services' or 'Skills & Expertise.'").

As is typical, Florida's marketing rules have generated consternation.

- Julie Kay, New Florida Bar Advertising Rules Vex Lawyers, Daily Bus. Review, Sept. 25, 2013 ("Orlando attorney Luis Gonzalez has no intention of following The Florida Bar's new social media rules, particularly those relating to LinkedIn."; "The Bar defends the social media rules, saying lawyers must comply with ethical guidelines whether their advertising is on Facebook, billboards or TV. The guidelines warn attorneys to refrain from testimonials, holding themselves out as experts and posting inappropriate and unprofessional photos or videos on Facebook."; "Kristin Vasilj, digital communications manager for Holland & Knight, said the New York State Bar Association and The Florida Bar are the only ones in the country to ban the word 'expertise' on attorneys' LinkedIn accounts. She has asked LinkedIn to consider changing the word expertise to skills to comply with Florida Bar rules."; "Law firms also are annoyed about the new Twitter rule. Some, like Greenberg Traurig, are interpreting the rule narrowly and including both names of lawyers and office locations in their tweets."; "Holland & Knight has taken the position that informational tweets or posts about community events do not constitute advertising and the firm is not listing office locations."; "A concern for law firms is that with just 140 characters per tweet, locations will eat up a good part of a tweet.").

As is also traditional in Florida, the rules have also triggered litigation.

- Julie Kay, Personal Injury Law Firm Sues Florida Bar Over Advertising Rules, Daily Business Review, Dec. 16, 2013 ("Searcy Denney Scarola Barnhart & Shipley in West Palm Beach is suing The Florida Bar, alleging its new attorney advertising rules violate the First Amendment."; "Searcy Denney filed the suit after submitting its website, blog and LinkedIn pages to The Florida Bar for an advisory opinion, said partner F. Gregory Barnhart. The Bar objected to all versions, including Barnhart's resume listing every case he has tried or settled for more than \$1 million. The Bar stated such information was not 'objectively verifiable,' Barnhart said."; "The lawsuit said The Bar also concluded the firm's entries on the social media site LinkedIn violate several rules because LinkedIn automatically lists the firm's specialties and includes an unsolicited review posted by a former client.").

Best Answer

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

b 7/14

Lawyers Blogs

Hypothetical 30

One of your newest lawyers wants to start a blog, and you are analyzing how the ethics rules will apply.

- (a) Will a blog dedicated to work-life balance in a large law firm have to comply with lawyer marketing rules?

NO (PROBABLY)

- (b) Will a blog describing case results (some of which your firm won) have to comply with the marketing rule governing case results?

MAYBE

Analysis

Not surprisingly, blogs' content must comply with content-based lawyer marketing rules. However, given the nature of blogs, it can be difficult to determine if a blog's content crosses the line into regulated lawyer marketing.

(a) In 2013, the New York Bar determined that a blog focusing on work-life balance did not have to comply with lawyer marketing rules.

- New York LEO 967 (6/5/13) ("The inquirer is a columnist who is also an attorney licensed in New York. The inquirer has become an employee of a corporation that promotes work-life balance. In that capacity the inquirer will write a blog that will be titled 'The [Inquirer's Name] Esq. Blog.' The blog will not address legal topics but will include posts about work-life balance."; "A blog written by an attorney that does not discuss legal topics and whose primary purpose is not the retention of the lawyer is not an advertisement, and would thus not be subject to the retention and preservation rules for lawyer advertising, even though the title of the blog makes clear that the authority is an attorney.").

Determining whether a blog amounts to lawyer marketing for ethics purposes may even require a blog-by-blog analysis.

(b) The more restrictive the ethics rule, the more difficult it can be to balance bloggers' First Amendment rights and the constitutionality of lawyer marketing restrictions.

In 2013, the Virginia Supreme Court extensively analyzed this issue, and held that a Richmond lawyer's blog describing his own and other lawyers' successes must be accompanied by the disclaimer mandated for all "successful case results."

- Hunter v. Va. State Bar ex rel. Third Dist. Comm., 285 Va. 485, 491, 499, 498, 499, 500, 501, 504, 505, 507, 509-10 (Va. Feb. 28, 2013) (holding that a lawyer who published a blog about criminal cases, including his own successful cases, must include a disclaimer required of lawyers' advertisement of their own successes, but was not prohibited by Virginia's Rule 1.6 from including in the blog information in the public record, despite the lawyer's former clients' complaint that the publication was embarrassing; explaining that the blog "contains posts discussing a myriad of legal issues and cases, although the overwhelming majority are posts about cases in which Hunter obtained favorable results for his clients."; concluding that the blogs were commercial speech governed by Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980); noting that the blog is on the law firm's website, which also contained an advertisement for the firm; also noting that "[t]his non-interactive blog does not allow for discourse about the cases, as non-commercial commentary often would by allowing readers to post comments."; citing Bates v. State Bar of Ariz., 433 U.S. 350, 383 (1977), for the proposition that "[b]ecause the public lacks sophistication concerning legal services, misstatements that might be overlooked or deemed unimportant in other advertising may be found quite inappropriate in legal advertising."; "While we do not hold that the blog posts are inherently misleading, we do conclude that they have the potential to be misleading."; finding that the Virginia State Bar had satisfied the Central Hudson tests; "[W]e must examine whether the VSB has a substantial governmental interest in regulating these blog posts. . . . [t]he VSB has a substantial governmental interest in protecting the public from an attorney's self-promoting representations that could lead the public to mistakenly believe that they are guaranteed to obtain the same positive results if they were to hire Hunter."; "The VSB's regulations permit blog posts that discuss specific or cumulative case results but require a disclaimer to explain to the public that no results are guaranteed. . . . This requirement directly advances the VSB's governmental interest."; "Finally, we must determine whether the VSB's regulations are no more restrictive than necessary."; "This requirement ensures that the disclaimer is noticeable and would be connected to each post so that any member of the public who may use the website addresses to

directly access Hunter's posts would be in a position to see the disclaimer. Therefore, we hold that the disclaimer's required by the VSB are 'not more extensive than is necessary to serve that interest.'" (citation omitted); noting that the circuit court "imposed the following disclaimer to be posted once: 'Case results depend upon a variety of factors unique to each case. Case results do not guarantee or predict a similar result in an future case.'"; acknowledging that "[w]hile the substantive meaning of the imposed disclaimer may conform to the requirements stated in Rule 7.2(a)(3)(i) through (iii), it nevertheless is less than what the rule requires. In contrast to the committee's determination, there is no provision in the circuit court's order requiring that the disclaimer be formatted and presented in the manner required by Rule 7.2(a)(3), and the text of the disclaimer prescribed by the circuit court is not itself formatted and presented in that manner."; noting that under Virginia Rule 7.2(a)(3), "[t]he disclaimer shall precede the communication of the case results. When the communication is in writing, the disclaimer shall be in bold type face and uppercase letters in a font size that is at least as large as the largest text used to advertise the specific or cumulative case results and in the same color and against the same colored background as the text used to advertise the specific or cumulative case results."; holding "that Hunter's blog posts are potentially misleading commercial speech that the VSB may regulate. We further hold that circuit court did not err in determining that the VBS's interpretation of Rule 1.6 violated the First Amendment. Finally, we hold that because the circuit court erred in imposing one disclaimer that did not fully comply with Rule 7.2(a)(3), we reverse and remand for imposition of disclaimers that fully comply with that Rule."; two justices dissented, explaining that "the articles on Hunter's blog are political speech that is protected by the First Amendment. The Bar concedes that if Hunter's blog is political speech, the First Amendment protects him and the Bar cannot force Hunter to post an advertising disclaimer on his blog."; the dissent further noted that "[t]he Bar produced no evidence that anyone has found Hunter's articles to be misleading. There appears to be little benefit, if any, to the public by requiring Hunter to post a disclaimer that concedes his articles are advertisements. Hunter disagrees that his articles are advertisements, and claims they are political speech. He objects to cheapening his political speech by denominating it is advertisement material.").

The Virginia Supreme Court's opinion has generated some criticism.

Best Answer

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

b 7/14

Daily Deals

Hypothetical 31

You just asked one of your newest lawyers to propose ways to expand your firm's marketing activities using social media. Now you have to decide whether to accept one of her recommendations.

May your law firm offer the sort of "daily deals" that have become increasingly popular?

MAYBE

Analysis

Bars' analyses of "daily deals" provides a stark example of the profession's difficulty in applying traditional ethics marketing rules to new marketing techniques.

States have taken diametrically opposed positions on the ethics permissibility of daily deals. In 2013, the ABA issued an ethics opinion generally permitting daily deals, but articulating a very elaborate and complicated set of guidelines -- especially governing payments made pursuant to a daily deal. It is too early to tell if states will adopt the ABA's approach.

ABA Legal Ethics Opinions

In 2013, the ABA issued a very subtle and complicated legal ethics opinion dealing with daily deals.

- ABA 465 LEO (10/21/13) (concluding that lawyers may engage in "daily deal" marketing, but must comply with all of their Model Rules obligations, "including avoiding false or misleading statements and conflicts of interest, providing competent and diligent representation, and appropriately handling all money received."; explaining that under a "coupon deal" arrangement, a lawyer sells a coupon entitling the purchaser to a certain number of hours of legal service at a discounted rate -- the marketing organization handling the arrangement collects purchasers' payments and forwards them to the lawyer, retaining a contractually-agreed upon percentage of the payments; under this approach, the purchaser later directly pays the lawyer at the discounted rate

when the lawyer provides the services; explaining that under the different "prepaid deal" arrangement, the purchaser pays the marketing organization the entire legal fee, and then receives services that would normally have cost more than that payment; concluding that despite some state bars conclusion that such daily deal marketing are per se unethical, the ABA Model Rules do not automatically prohibit such daily deals if lawyers follow the Rules: (1) payments to the marketing organization do not constitute unethical fee splitting; instead, they essential constitute "payment for advertising and processing services."; although "one caveat is that the percentage retained by the marketing organization must be reasonable."; (2) lawyers may not advertise daily deals in a false or misleading fashion; for instance, lawyers must "define the scope of services offered," and "explain under what circumstances the purchase price of a deal may be refunded, to whom, and what amount."; (3) lawyers must explain that until the lawyer and the daily deal purchaser engage in a "consultation," no client-lawyer relationship exists and must further warn anyone trading for, or receiving as a gift, any daily deal rights must carefully review all the terms and conditions; (4) before entering into a client-lawyer relationship, lawyers must assure that they are competent to undertake the representation, and warn any prospective clients if their matters will require more of the lawyers' time than the prospective client purchased under the daily deal; lawyers must also assure that they do not accept so many daily deal clients that they cannot competently and diligently represent them all; (5) lawyers must properly handle any payments they receive from the marketing organization; explaining that under a coupon deal, payments collected by the marketing organization and sent to lawyers are not legal fees -- and must be deposited into lawyers' operating account -- while under a prepaid deal, payments lawyers receive from the marketing organization constitute "advance legal fees," and must be deposited into the lawyers' trust account; reminding lawyers that they must explain to anyone purchasing a prepaid deal what amount of the payment "is not a legal fee and will be retained by the marketing organization."; noting that although it may be difficult, lawyers must also coordinate with marketing organizations to obtain required information about the purchasers whose funds the lawyers deposit into their trust account; (6) lawyers must properly handle money they have received in connection with purchasers who never use the lawyer's services; that if a coupon purchaser never uses the lawyer's services, the lawyer may retain such payments (despite some state bars' disagreement) -- if the lawyer has "explained as part of the offer that the cost of the coupon will not be refunded."; but that if a prepaid deal purchaser never uses the lawyer's services, the lawyer "likely" must refund any unearned advanced fees -- unless the prepaid offer was "for a simple service at a modest charge," in which case "it is possible no refund would be required, provided proper and full disclosure of a no-refund policy had been made."; (7) lawyers must properly handle money they receive from daily deal purchasers whom the lawyer cannot represent because of a conflict or other "ethical impediment."; explaining that in such a situation, lawyers must provide a full refund to the

purchaser under either a coupon or a prepaid deal -- and cannot avoid this duty by disclosing otherwise in marketing materials; reasoning that the lawyer is unable to undertake the representation "through no fault of the purchaser," the lawyer must refund all the money the purchaser has paid -- even if the lawyer cannot recoup the money retained by the marketing organization.).

States Approving Daily Deals

In 2011 and 2012, several states explicitly approved law firms' use of "daily deals" in their marketing efforts.

- Nebraska LEO 12-03 (2012) ("The use of a Groupon for discounted, prepaid legal services does not violate Rule 5.4 as an improper sharing of legal fees, but the amount charged as an advertising fee must be reasonable otherwise it may be deemed to be in the nature of fee-splitting. In addition, the following ethical safeguards must be taken: (1) the Groupon must clearly identify the service being offered and cannot be false, deceptive, or misleading; (2) the Groupon must clearly disclose that no lawyer-client relationship is established until after a conflicts check has been performed; (3) the Groupon must state that it is 'advertising material[']; (4) payment received from Groupon must be placed in the attorney's trust account until earned; (5) if the services cannot be performed due to conflicts, or if the customer later decides not to utilize the service, the entire fee paid by the customer must be refunded.").
- Maryland LEO 2012-07 (2012) ("With the drastic change in technology and the advent of the internet, lawyers are presented with new ways to market their services as well as a host of ethical implications of such use. In addition to several social media websites such as LinkedIn, Facebook, and Twitter, lawyers are now looking to daily deal websites as a creative way to sell legal services. Several other jurisdictions have looked at this issue and some have answered in the affirmative that such advertising is permissible, so long as attorneys proceed with caution and contemplate special considerations, including Missouri, New York, North Carolina, Oregon, and South Carolina. Other jurisdictions like Pennsylvania, recently issued an opinion prohibiting its attorneys from utilizing Groupon-type websites" (footnote omitted); "First, lawyers should recognize that internet based advertising is governed by the same rules which govern print or public media advertisements."; "[T]he transaction of the coupon discount website retaining a percentage of the fee paid by the prospective client may, upon first glance, look like a legal splitting arrangement, but this Committee believes that this arrangement is the cost of the advertising. Even though the website company collects the fees upfront and retains a percentage of the purchase price that each prospective client/consumer pays, the use of such a website does not violate Rule 5.4(a). Additionally, the website company does not interfere with the professional judgment of the lawyer. In the scenario you present, the daily deal website is not directing, regulating, or interfering with the lawyer's professional judgment

in rendering legal services to another."; "The lawyer, of course, is still responsible for the content of the advertisement as well as the necessary disclosures that need to be made to the prospective client before an attorney-client relationship can be established. The lawyer must spell out that the 'daily deal' offered is subject to certain conditions. . . . If the prospective client waits until after the expiration of the coupon period to engage the lawyer's services, or never actually engages the lawyer's services, the lawyer still has the responsibility to refund those fees to the prospective client. If, after consultation, an attorney-client relationship is established, the lawyer should provide the client with a written fee agreement which sets forth the rate or basis of the fee as well as the scope of the representation, pursuant to MRPC 1.5 (Fees), as advertised by the lawyer on the website."; "The remaining ethical issue involves the lawyer's role as fiduciary to the client. At the point and time that the lawyer collects payment for the legal services advertised, the lawyer must deposit entrusted funds into an attorney trust account pursuant to MRPC 1.15(a) (Safekeeping Property). The payments received by the lawyer from the daily deal website company are advance payments of legal fees that must be deposited in the lawyer's trust account and may not be paid to the lawyer or transferred to the law firm operating account until earned by the provision of the legal services. Maryland's 'default' position is that unearned fees belong in trust, absent informed consent, confirmed in writing by the client, to a different arrangement. See MRPC 1.15(c). Although the lawyer may charge a flat fee for services to be rendered in the future, that fee is deemed unearned and property of the client until such time that the attorney has performed the legal service. Lawyers must take care not to confuse this arrangement with an engagement retainer which is a fee for the purpose of ensuring the attorney's availability to the client, usually for a specific period of time, which is earned upon receipt. See Ethics Opinion 1993-24. Here, in the scenario that you present, the client has paid a pre-determined flat fee for a specific legal service to be done in the future."; "Lastly, the lawyer will be responsible for keeping and maintaining complete accounting records for each prospective and actual client gained through the use of such daily deal websites pursuant to MRPC 1.15(a). At any given time, a lawyer should be able to demonstrate whose funds that they are in possession of."; "Because the issue of lawyer advertising on daily deal websites is relatively new, this Committee warns that this Opinion does not address every scenario that could arise from such advertisement but rather focused on the proposed use of advertising a flat fee paid in advance for a basic will package as presented.").

- South Carolina LEO 11-05 (2011) ("The use of 'daily deal' websites to sell vouchers to be redeemed for discounted legal services does not violate the Rule 5.4(a) prohibition on sharing of legal fees, but the attorney is cautioned that the use of such websites must be in compliance with Rules 7.1 and 7.2 and could lead to violations of several other rules if logistical issues are not appropriately addressed."; "The fact that the charge for this form of advertising service is deducted up front by the company rather than invoiced

and then paid from the lawyer's operating account does not transform the transaction from the payment of advertising costs into an improper fees split.").

- New York LEO 897 (12/13/11) ("A lawyer may properly market legal services on a 'deal of the day' or 'group coupon' website, provided that the advertisement is not false, deceptive or misleading, and that the advertisement clearly discloses that a lawyer-client relationship will not be created until after the lawyer has checked for conflicts and determined whether the lawyer is competent to perform a service appropriate to the client. If the offered service cannot be performed due to conflicts or competence reasons, the lawyer must give the coupon buyer a full refund. The website advertisement must comply with all of the Rules governing attorney advertising, and if the advertisement is targeted, it must also comply with Rule 7.3 regarding solicitation.").
- North Carolina LEO 2011-10 (10/21/11) (finding that a lawyer could advertise a "deal of the day" or "group coupon," and pay a percentage of each "daily deal" or coupon sold; noting that the amount paid to the website company with which the lawyer advertised do not depend on the lawyer's fees received but rather on the coupons sold; "Lawyer would like to advertise on a 'deal of the day' or 'group coupon' website. To utilize such a website, a consumer registers his email address and city of residence on the website. The website company emails local 'daily deals' or coupons for discounts on services to registered consumers. The daily deals are usually for services such as spa treatments, tourist attractions, restaurants, photography, house cleaning, etc. The daily deals can represent a significant reduction off the regular price of the offered service. Consumers who wish to participate in the 'deal of the day' purchase the deal online using a credit card that is billed."; "The website company negotiates the discounts with businesses on a case-by-case basis; however, the company's fee is always a percentage of each "daily deal" or coupon sold. Therefore, the revenue received by the business offering the daily deal is reduced by the percentage of the revenue paid to the website company."; concluding that "[a]lthough the website company's fee is deducted from the amount paid by a purchaser for the anticipated legal service, it is paid regardless of whether the purchaser actually claims the discounted service and the lawyer earns the fee by providing the legal services to the purchaser. Therefore, the fee retained by the website company is the cost of advertising on the website and does not violate Rule 5.4(a) which prohibits, with a few exceptions, the sharing of legal fees with nonlawyers. The purpose for fee-splitting prohibition is not confounded by this arrangement."; warning the lawyer to avoid misleading advertising; also advising (a) that "a lawyer must deposit entrusted funds in a trust account. Rule 1.15-2(b). The payments received by the lawyer from the website company are advance payments of legal fees that must be deposited in the lawyer's trust account and may not be paid by the lawyer or transferred to the law firm operating account until earned by the provision of legal services."; (b) that "a

professional relationship with a purchaser of the discounted legal service is established once the payment is made and this relationship must be honored. The lawyer has offered his services on condition that there is no conflict of interest and the service is appropriate for the purchaser, and the purchaser has accepted the offer. At a minimum, the purchaser must be considered a prospective client entitled to the protections afforded to prospective clients under Rule 1.18."; (c) that the lawyer must refund any amount to a client who does not ultimately use the lawyer's services before the "expiration date" of the discount or coupon, and (d) that the lawyer may not condition the offer "upon the purchaser's agreement that the money paid will be a flat fee or a minimum fee that is earned by the lawyer upon payment" -- "[i]n light of the many uncertainties of a legal representation arranged in the manner proposed").

States Criticizing Daily Deals

Several states have criticized daily deal marketing, without absolutely prohibiting it.

- New Hampshire LEO 2013-14/8 (2/22/14) ("Under certain circumstances, a coupon deal can be structured in such a manner as to comport with the New Hampshire Rules of Professional Conduct. The Committee believes that it is unlikely that a prepaid deal could be structured to comply with the Rules."; "As observed by the Indiana Bar Association [Indiana OP1 (2012)] in its opinion, offering legal services through a group coupon deal is 'fraught with peril.' The Committee agrees, but believes that a lawyer may offer a coupon deal through a group coupon service, if the lawyer carefully reviews the policies and practices of a group coupon service, and ensures that the offer can be made consistent with the applicable ethical obligations, as discussed above. The Committee believes that it is unlikely that a prepaid deal can be structured in such a way as to permit it to comply with a lawyer's ethical obligations, in particular, the obligations under Rule 1.15(a)."; analyzing the trust account treatment of payments; "Lawyers must comply with ethical rules governing the safeguarding of client property. Rule 1.15(a) requires that unearned legal fees must be deposited into designated trust accounts that comply with New Hampshire Supreme Court Rules. Rule 1.15(d) requires that legal fees and expenses paid in advance be deposited into a client trust account, to be withdrawn by the lawyer only as fees are earned and expenses incurred. Given the way that many group coupon services operate, it is unlikely that a lawyer would be able to comply with these requirements in connection with a prepaid deal. As observed by the ABA in its opinion, group coupon services typically collect fees from all participating subscribers, withhold the service's share, and pay the remainder to the vendor in a single lump sum, without identifying who the funds came from. Before offering a prepaid deal, a lawyer would need to carefully review the group coupon service's policies and practices to ensure that the lawyer will be able to timely

obtain advance legal fees collected by the group coupon service, and properly account for them in the lawyer's trust account. It is the sense of the Committee that the difficulty of accomplishing this makes the offering of a prepaid deal unworkable. With regard to a coupon deal, no legal fees are collected by the group coupon service, and this concern is not implicated.").

- Indiana LEO 1 (2012) (holding that a lawyer's use of daily deal coupons was probably unethical and "fraught with peril"; "The obligation to establish the attorney-client relationship and the language of the guideline are such that engaging in the Company's [which administers the coupon program] style of sales arrangement is a problem for the lawyer who would thereby delegate the initial creation of the lawyer-client relationship to either the Company or the client. That duty rests with the lawyer. The proposed coupon arrangement may be an abrogation and/or violation of that duty."; "The Committee finds that when a lawyer has received funds from a prospective client who is not or cannot be represented by the lawyer for any reason, the lawyer has a duty to refund the entire amount of fee paid, including the Company's share, to the client. Because the Company might be disbursing the 'funds' to the lawyer incrementally, it is unclear how a lawyer can ethically refund the client's funds at that time."; "[T]he business models employed by many of the online coupon providers do not ask the attorney to pay 'reasonable costs.' Rather, some of the Companies ask for half of the fees collected. Notwithstanding the fixed, minimal costs associated with creating and administering the online coupon, the Company gets 50% of the fees charged. The Committee finds that such an arrangement violates Rule 7.2(b)(1), because the fees being kept by the Company are not tied to the 'reasonable costs' of the advertisements."; "The Committee's analysis of this inquiry is that a lawyer accepting a group coupon style arrangement may violate the Rules of Professional Conduct by: (1) delegating the creation of the lawyer-client relationship to a nonlawyer; (2) allowing someone other than the lawyer to hold the property of the potential client pending the lawyer's engagement or transfer of the property of the potential client, or completion of the legal work, which is not permitted by Rule 1.15; (3) allowing a potential client to create a conflict of interest with a current client which may force the lawyer to withdraw from the representation of a current client for an inappropriate reason under Rule 1.16; and (4) sharing fees for channeling clients in violation of Rules 5.4 and 7.2 as stated.").

States Prohibiting Daily Deals

In 2012, two states explicitly prohibited the use of such "daily deals." Among other things, those bars condemned: what they consider to be the fee-splitting aspect of such marketing arrangements; the inability of lawyers to check for conflicts before taking on new clients; the inherently ambiguous or even deceitful phrases lawyers seem

to use (such as offering to write a "simple will" without defining that term); the possible incompetence of a lawyer to handle the sort of matters that might come in; the lawyer's inability to control his or her case load (possibly resulting in a lack of diligence).

- Pennsylvania LEO 2011-027 (7/27/11) ("The described Groupon procedure would appear to violate Rule 5.4(a) which prohibits sharing legal fees with a non lawyer. Groupon keeps a portion of the amount paid by each of the 'clients' who 'sign up for the deal' and remits the remainder to you. This appears to be a straightforward sharing of a legal fee."; "Furthermore, the Groupon procedures raise issues involving a number of other Pennsylvania Rules of Professional Conduct.": "Rule 1.7, prohibits concurrent conflicts of interest. There appears to be no procedure by which Groupon permits you to evaluate whether the prospective client would cause a conflict of interest. The Groupon procedure does not appear to provide for treating those who sign up for the deal of the day as 'prospective clients.'[;] Rules 7.1 and 7.2, prohibit, inter alia, 'false or misleading communications . . . about a lawyer's services.' In the Groupon ad which you and I reviewed, a 'simple will' was advertised for \$99, and it was stated that the 'normal price' was \$750, for an '87% discount.' Is that accurate? What is a 'simple will?' Do the lawyer and the Groupon customer have the same understanding or, could it be misleading?[;] Suppose the Groupon customer does not need a 'simple will' but needs different advice? How can any of that be determined without talking directly to the 'client.' Indeed a Groupon is a buffer between you and your 'client' for a considerable period of time which could be problematic if the 'client' needs immediate assistance.[;] The Groupon procedures (but not the advertisement which we reviewed) indicate that no 'deal' is made unless a sufficient number of individuals sign up. However, someone who accepts the offer in the advertisement might immediately reasonably believe that they have counsel, and might become your 'client[.]' Thus, the offer of a fee of \$99 is misleading in the sense that it is really a contingent fee, contingent not in on the result of the matter, but contingent on enough other 'clients' signing up.").
- Alabama LEO R0 2012-01 (2012) ("Groupon and other similar sites do not charge a flat rate fee or even a fee based on the website's traffic. Instead, as noted by the Indiana State Bar Ass'n Ethics Committee, Groupon and other sites take a percentage (usually 50%) of each and every purchase. The percentage taken by the site is not tied in any manner to the 'reasonable cost' of the advertisement. As a result, the Disciplinary Commission finds that the use of such sites to sell legal services is a violation of Rule 5.4 because legal fees are shared with a non-lawyer."; "The use of sites like Groupon would also violate a number of other ethics rules. For example, it is well-settled that pursuant to Rule 1.15(a), all unearned fees must be placed into a lawyer's trust account until earned. . . . However, under the fee model employed by

Groupon, half of the legal fee paid by the purchaser is claimed by Groupon at the time of the purchase making it impossible for the lawyer to place the entire unearned legal fee into trust as required by Rule 1.15(a). Further, if the purchaser were to demand a refund prior to any services being performed by the lawyer, the purchaser would be entitled to a complete refund regardless of the fact that half of the fees were claimed by Groupon. Failure to make a full refund would be considered charging a clearly excessive fee in violation of Rule 1.5(a)"; "Another ethical Dilemma created by the use of daily deal websites is the inability of the lawyer to perform any conflict check prior to the payment of legal fees by the potential client. Under the Groupon model, the lawyer is selling future legal services and receiving the fees for such future services without ever having spoken with or having met with the client. Because the lawyer cannot perform a conflict check prior to being retained, the potential for conflicts of interest among the lawyer's former and current clients is great."; "Additionally, the Disciplinary Commission is concerned that the use of such daily deal sites could result in violations of Rule 1.1 Because there is no meaningful consultation prior to the payment of legal fees, the purchaser may be retaining a [lawyer] that does not possess the requisite skills or knowledge necessary to competently represent the purchaser. There is no opportunity for the lawyer to determine his own competence or ability to represent the client prior to his being hired."; "Likewise, the lawyer is also unable to judge whether he will be able to diligently represent the client. Unless the lawyer places restrictions on the type of services offered and on the number of deals available for purchase, the lawyer may find that his caseload become unmanageable."; "If a large number of purchases are made through Groupon, the lawyer may not have the time or resources to diligently represent each new client resulting in violations of Rules 1.1").

Best Answer

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

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New Forms of Marketing Using Automatic Means

Hypothetical 32

As new forms of marketing have begun using novel automated methods, you wonder whether the ethics rules permit two specific methods that one of your partners just mentioned to you.

- (a) May you arrange for a vendor to analyze (without human intervention) emails that you receive, and then automatically send targeted advertising to the senders based on words in the email?

MAYBE

- (b) May you arrange for an autodial message to be sent to potential clients, ending with a statement indicating that the potential client can speak to a lawyer or lawyer's representative by pressing a number on the telephone?

MAYBE

Analysis

Technology allows lawyers to automate some of their marketing. The only limits seem to be lawyers' and their technical assistants' imagination.

(a) Perhaps surprisingly, a 2008 New York state legal ethics opinion found this process acceptable, as long as no human reviewed the client's emails.

- New York LEO 820 (2/8/08) (analyzing the ethics of a service which reviews lawyers' emails and prepares advertisements; "In recent years, some e-mail providers have offered free or low-cost e-mail services in which, in exchange for providing the user with e-mail services -- sending and receiving e-mail and providing storage on the provider's servers -- the provider's computers scan e-mails and send or display targeted advertising to the user of the service. The e-mail provider identifies the presumed interests of the service's user by scanning for keywords in e-mails opened by the user. The provider's computers then send advertising that reflects the keywords in the e-mail. As an example, an e-mail that referred to travel to a particular locale might be accompanied by an advertisement for travel service providers in that locale." (emphasis added); "A lawyer may use an e-mail service provider that conducts computer scans of e-mails to generate computer advertising, where the e-mails are not reviewed by or provided to human beings other than the

sender and recipient." (emphasis added); "We would reach the opposite conclusion if the e-mails were reviewed by human beings or if the service provider reserved the right to disclose the e-mails or the substance of the communications to third parties without the sender's permission (or a lawful judicial order). Merely scanning the content of e-mails by computer to generate computer advertising, however, does not pose a threat to client confidentiality, because the practice does not increase the risk of others obtaining knowledge of the e-mails or access to the e-mails' content. A lawyer must exercise due care in selecting an e-mail service provider to ensure that its policies and stated practices protect client confidentiality." (emphasis added)).

(b) This question comes from a North Carolina legal ethics opinion, which found the process unethical.

In North Carolina LEO 2006-17 (1/19/07), the North Carolina Bar framed the question as follows:

Attorney would like to solicit professional employment by use of a recorded telephone message. He intends to obtain telephone numbers from the census bureau's database of persons who are not on the "do not call" list for commercial solicitations by telephone. Attorney's law firm (or a service hired by the firm) will autodial the people on the list. When a person answers the phone, he will hear the following recorded message:

This is an announcement of the Tax, Estate & Elder Planning Center, a North Carolina law firm. Have you or your loved ones experienced the overwhelming cost of nursing home, assisted living, or in home care? The Tax, Estate & Elder Planning Center would like for you to know more about government programs that may help cover these costs while protecting your savings. If you would like to know more about these programs press one now.

If the recipient presses the number one on the key pad of his phone, he will hear a short pre-recorded informational message on programs such as Medicaid, Special Assistance, and veterans' benefits. Whether the recipient opts to listen to the message or not, he will hear the following recorded message at the end of the phone call:

If you are interested in knowing more about how to qualify for these programs, then press two to be connected with a representative of the Tax, Estate & Elder Planning Center Law Firm. Thanks you for taking time to listen to this announcement.

If the recipient of the phone call follows the prompts, he will be connected with a person at Attorney's law firm.

Id. The North Carolina Bar distinguished between a message that a listener could essentially ignore, and a message that invited the listener to establish a person-to-person or telephonic relationship.

Although it appears that recorded telephone advertising messages are permitted by the Rules of Professional Conduct, Rule 7.3(a) and the comment to the rule do not contemplate that a recorded message will lead to an interpersonal encounter with a lawyer (or the lawyer's agent) at the push of a button on the telephone key pad. To avoid the risks of undue influence, intimidation and, over-reaching, a potential client must be given an opportunity to contemplate the information about legal services received in a recorded telephone solicitation. This cannot occur if a brief, unexpected, and unsolicited telephone call leads to an in-person encounter with a lawyer, even if the recipient of the phone call must choose to push a number to be connected with the lawyer.

Therefore, Attorney may autodial potential clients and play a recorded message provided the message is truthful and not misleading. He may not, however, include a means for the recipient of the call to be immediately connected with a lawyer (or an agent of the lawyer). Instead, the message may provide a telephone number or other contact information for the lawyer or the lawyer's firm so that the potential client may subsequently call the lawyer or law firm after contemplating the information received from the recorded message.

Id. (emphases added).

Best Answer

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

b 7/14

Texting and Social Media Postings

Hypothetical 33

You have served for several decades as your firm's general counsel and chief ethics advisor. Your firm is just now beginning to encourage its lawyers to market themselves through texts, tweets, and social media postings. Given the succinct nature of these communications, you wonder if all of the normal ethics rules apply to them.

Do all of the ethics marketing rules apply to texts, tweets and social media postings?

YES

Analysis

Content communicated by text, tweets, or website postings clearly must meet all of the ethics marketing rules' content restrictions. However, given the frequently truncated and cryptic nature of short texts and social media postings, it might be difficult to distinguish between content that complies with the ethics rules and content that does not.

In 2012, California issued a detailed and very helpful ethics opinion providing examples of short postings -- and explaining whether they amount to advertising that must comply with ethics requirements. In essence, the marketing rules' applicability depends on whether the communication seeks to establish a professional relationship.

- California LEO 2012-186 (2012) ("Material posted by an attorney on a social media website will be subject to professional responsibility rules and standards governing attorney advertising if that material constitutes a 'communication' within the meaning of rule 1-400 (Advertising and Solicitation) of the Rules of Professional Conduct of the State Bar of California; or (2) 'advertising by electronic media' within the meaning of Article 9.5 (Legal Advertising) of the State Bar Act. The restrictions imposed by the professional responsibility rules and standards governing attorney advertising are not relaxed merely because such compliance might be more difficult or awkward in a social media setting." (emphasis added); "**Example Number 1: 'Case finally over. Unanimous verdict! Celebrating tonight.'** In the Committee's opinion, this statement, standing alone, is not a communication

under rule 1-400(a) because it is not a message or offer 'concerning the availability for professional employment,' whatever Attorney's subjective motive for sending it."; **Example Number 2: "Another great victory in court today! My client is delighted. Who wants to be next?"** Similarly, the statement 'Another great victory in court today!' standing alone is not a communication under rule 1-400(a) because it is not a message or offer 'concerning the availability for professional employment.' However, the addition of the text, '[w]ho wants to be next?' meets the definition of a 'communication' because it suggests availability for professional employment. Thus, it is subject to rule 1-400(D) and rule 1-400's Standards. Having concluded this status posting is a communication, the post violates the prohibition on client testimonials. An attorney cannot disseminate 'communications' that contain testimonials about or endorsements of a member unless the communication also contains an express disclaimer. . . . Similarly, the post may be presumed to violate rule 1-400 because it includes 'guarantees, warranties, or predictions regarding the result of the representation.' See Rules Prof. Conduct, rule 1-400(E), Std. 1. The post expressly relates to a 'victory,' and could be interpreted as asking who wants to be the next victorious client. The Committee further concludes that 'Who wants to be next?' when viewed in context, seeks professional employment for pecuniary gain. Accordingly, Attorney's post runs afoul of rule 1-400(E), Std. 5, because it does not bear the word 'Advertisement,' 'Newsletter,' or words to that effect."; **Example Number 3: 'Won a million dollar verdict. Tell your friends to check out my website.'** In the Committee's opinion, this language also qualifies as a 'communication' because the words 'tell your friends to check out my website,' in this context, convey a message or offer 'concerning the availability for professional employment.' It appears that Attorney is asking the reader to tell others to look at her website so that they may consider hiring her. This language therefore is subject to the adverse presumption in rule 1-400(E), Standard 5 (e.g., it must contain the word 'Advertisement' or a similar word) and the preservation requirement in rule 1-400(F)."; **Example Number 4: 'Won another personal injury case. Call me for a free consultation.'** Again, the Committee concludes that this posting is a 'communication' under rule 1-400(A), due primarily to the second sentence."; **Example Number 5: 'Just published an article on wage and hour breaks. Let me know if you would like a copy.'** In this instance, we believe the statement does not concern 'availability for professional employment.' The attorney is merely relaying information regarding an article that she has published, and is offering to provide copies. See Belli v. State Bar, [519 P.2d 575 (Cal. 1974)] (holding that '[e]xposition of an attorney's accomplishments in an effort to interest persons' in an event involving an attorney did not violate restrictions on attorney advertising); see also Los Angeles County Bar Assn. Formal Opn. 494 ('Communications or solicitations solely relating to the availability of seminars or educational programs, or the mailing of bulletins or briefs where there is no solicitation of business, are also constitutionally protected under the State Constitution and First Amendment

as noncommercial speech.'). Accordingly, this posting does not fall under rule 1-400, and need not comply with any of the Standards of rule 1-400(E).").

This approach makes sense in the abstract. However, as with law firm websites, it can be nearly impossible to apply the normal ethics marketing rules in real life.

In 2013, the Ohio Bar issued a presumably straight-faced ethics opinion acknowledging that lawyers may market through text messages -- but almost offhandedly noting that any text messages or similar communications must include:

1. The name and address of the "responsible lawyer or law firm" sending the text.
2. The following language in all caps, if the lawyer "has a reasonable belief that the prospective client is in need of legal services in a particular matter: "ADVERTISING MATERIAL" or "ADVERTISEMENT ONLY" at "BOTH THE BEGINNING AND ENDING OF THE MESSAGE."
3. An explanation of "how the lawyer learned of the need for legal services," under those circumstances.
4. The following language, if the lawyer sends the text "to prospective clients or relatives of prospective clients within 'thirty days of an accident or disaster that gives rise to a potential claim for personal injury or wrongful death':
"THE SUPREME COURT OF OHIO, WHICH GOVERNS THE CONDUCT OF LAWYERS IN THE STATE OF OHIO, NEITHER PROMOTES NOR PROHIBITS THE DIRECT SOLICITATION OF PERSONAL INJURY VICTIMS. THE COURT DOES REQUIRE THAT, IF SUCH A SOLICITATION IS MADE, IT MUST INCLUDE THE ABOVE DISCLOSURE.' (Emphasis in Prof.Cond.R. 7.3(e).)" -- this statement "must appear in the body of lawyer's communication, and not as an internet link, attachment, photograph, or other item requiring additional action to access the statement."

Ohio LEO 2013-2 (4/5/13).¹

¹ Ohio LEO 2013-2 (4/5/13) (treating text message marketing like direct mail rather than "real time" electronic communications; "'Electronic communication' is not defined in the Rules of Professional Conduct (Rules), but is generally understood to include text messages."; "Like Prof.Cond.R. 7.3(a), the American Bar Association's (ABA) Model Rule 7.3(a) also prohibits the solicitation of prospective clients by 'real-time' electronic contact. The ABA has interpreted real-time electronic contact to include internet chat room communications. Bennett, Cohen & Whittaker, Annotated Model Rules of Professional Conduct, 553-554 (7th Ed. 2011). Chat rooms facilitate 'live' text or voice conversations among multiple persons connected to the internet. The Board agrees that Prof.Cond.R. 7.3(a) prohibits lawyers from soliciting prospective clients via internet chat rooms as these are real-time electronic contacts. However, as stated in Prof.Cond.R. 7.2, Comment [3], lawyers are permitted to advertise by email. The Board's

view is that a standard text message is more akin to an email than a chat room communication. Accordingly, a typical text message is not a 'real-time' electronic contact. Lawyers may likewise solicit clients using text messages so long as the technology used to implement the text message does not generate a real-time or live conversation."; "Because most text messages are received on cellular phones, which are often carried on one's person, lawyers should be sensitive to the fact that a text message may be perceived as more invasive than an email."; "The final content-based requirement of Prof.Cond.R. 7.3 is stated in division (e), which applies to lawyer solicitations sent to prospective clients or relatives of prospective clients within 'thirty days of an accident or disaster that gives rise to a potential claim for personal injury or wrongful death.' Prof.Cond.R. 7.3(e) mandates that the text of the 'Understanding Your Rights' statement contained in the rule be 'included with the communication.' The 'Understanding Your Rights' statement incorporates the following language: **'THE SUPREME COURT OF OHIO, WHICH GOVERNS THE CONDUCT OF LAWYERS IN THE STATE OF OHIO, NEITHER PROMOTES NOR PROHIBITS THE DIRECT SOLICITATION OF PERSONAL INJURY VICTIMS. THE COURT DOES REQUIRE THAT, IF SUCH A SOLICITATION IS MADE, IT MUST INCLUDE THE ABOVE DISCLOSURE.'** (Emphasis in Prof.Cond.R. 7.3(e).)"; "Due to the limited number of characters available in the standard text message, including the entire 'Understanding Your Rights' statement may cause the message to be split into multiple messages or fail to transmit in the entirety. Likely for this reason, some Ohio lawyers have included an internet link in their text message solicitations that allows the prospective client to view the 'Understanding Your Rights' statement on the lawyer's website. In the Board's view, simply providing an internet link to the 'Understanding Your Rights' statement does not comply with Prof.Cond.R. 7.3(e). Similarly, the Board believes that attachments or photographs containing the statement fail to satisfy Prof.Cond.R. 7.3(e). . . . [T]he Board concludes that the 'Understanding Your Rights' statement must appear in the body of the lawyer's communication, and not as an internet link, attachment, photograph, or other item requiring additional action to access the statement. Although this may create multiple messages, it ensures that all recipients, regardless of the features on their cellular phones or service plans, have immediate access to the information."; "Because text message advertising is a written or electronic communication made pursuant to Prof.Cond.R. 7.2, the text message must include the name and office address of the lawyer or law firm responsible for the message."; "The Board has identified three practical considerations for a lawyer who chooses to directly solicit prospective clients using text messages. First, the text message should not create a cost to the prospective client. Not every cellular phone service plan includes free or unlimited text messaging, and significant costs may be incurred if the recipient is traveling internationally when the text is received. If the lawyer is unable to verify that a text message solicitation will not result in a cost to the prospective client, he or she should employ 'Free to End User' or similar technology, by which the initiator of the text message is responsible for the cost of both delivery and receipt."; "Second, the lawyer should be mindful of the age of the recipient of the text message. Minors are in possession of cellular phones in increasing numbers, and accident and police reports may contain cellular phone numbers that belong to minors."; "Finally, lawyers must use due diligence to ensure that any text message advertisement or solicitation complies with the applicable federal and state telemarketing laws."; "Lawyers may advertise their services through SMS text messages, which are written and/or electronic communications for purposes of Prof.Cond.R. 7.2(a). All lawyer advertising, including text message advertising, must comply with Prof.Cond.R. 7.1 and 7.3. Under Prof.Cond.R. 7.1, the text message may not contain a false, misleading, or nonverifiable communication about the lawyer or the lawyer's services. Prof.Cond.R. 7.3 imposes five additional requirements that apply to text message advertising by lawyers: The text message cannot create a 'real-time' interaction similar to an internet chat room; The text message may not involve coercion, duress, or harassment, and the lawyer must abide by a person's request not to receive solicitations; If the lawyer has a reasonable belief that the prospective client is in need of legal services in a particular matter, the text message must state how the lawyer learned of the need for legal services, include the language 'ADVERTISING MATERIAL' OR 'ADVERTISEMENT ONLY' at both the beginning and ending of the message, and cannot offer a case evaluation or prediction of outcome; If the prospective client is a defendant in a civil case, the lawyer shall verify that the person has been served; and Text message solicitations sent within 30 days of an accident or disaster must include, in the body of the text message, the entire 'Understanding Your Rights' statement contained in Prof.Cond.R. 7.3(e)."; "In addition, under Prof.Cond.R. 7.2(c) and (d), the text message must include the name and address of the responsible lawyer or law firm and the lawyer may not solicit prospective clients if the lawyer does not

Best Answer

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

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intend to actively participate in the representation. The Board further recommends that lawyers employ 'Free to End User' to other technology to avoid creating a cost to the text message recipient and attempt to verify that the text message recipient is not a minor. Finally, the Board advises lawyers to confirm that their text message advertising complies with all applicable federal and state laws, rules, and regulations, including the TCPA, CAN-SPAM Act, and Do Not Call Registry.").

Characterizing the Intrusiveness of Electronic Marketing

Hypothetical 34

After attending a spectacular seminar entitled "Lawyer Marketing: An Ethics Guide," you understand that bars' ability to restrict marketing varies directly with the marketing's intrusiveness. All marketing must meet the content-based restrictions. The state can more severely restrict "direct mail" marketing because it is more intrusive than a newspaper ad or billboard. And bars can even more severely restrict in-person marketing, because it is more intrusive than "direct mail." You wonder how these basic principles apply to lawyer websites, emails, text messages, and real-time electronic communications.

(a) How are lawyer websites characterized for ethics marketing rules purposes:

Direct mail?

In-person?

NEITHER

(b) How are lawyer emails characterized for ethics marketing rules purposes:

Direct mail?

In-person?

DIRECT MAIL

(c) How are lawyer texts characterized for ethics marketing rules purposes:

Direct mail?

In-person?

DIRECT MAIL (PROBABLY)

(d) How are lawyer real-time electronic communications characterized for ethics marketing rules purposes:

Direct mail?

In-person?

IN-PERSON (MAYBE)

Analysis

All lawyer marketing must satisfy the rules governing content. However, bars have struggled with characterizing new types of marketing -- deciding whether they amount to "direct mail" or to "in-person solicitation." The analysis can have important consequences, because bars can restrict the latter much more than the former.

(a) As lawyers and law firms began to use websites, bars analyzed whether this new form of marketing amounted to either direct-mail or in-person solicitation. Bars agreed that websites did not fall within either category.

- Pennsylvania LEO 96-17, 1996 WL 928126, at *2 (5/3/96) ("It is my opinion that advertising on the Internet via a web site does not constitute in-person solicitation as prohibited under Rule 7.3(a).").
- Vermont LEO 97-5 (1997) ("[T]he Committee concludes that the Code of Professional Responsibility's Disciplinary Rules governing advertising and solicitation provides sufficient guidance. An internet 'home page' is similar to the phone book's 'yellow pages' and law firm brochures and is not 'directed to a specific recipient'. See DR 2-103 and DR 2-104.").
- Illinois LEO 96-10, 1997 WL 317367, at *1 (5/16/97) ("The creation and use by a lawyer of an Internet 'web site' containing information about the lawyer and the lawyer's services that may be accessed by Internet users, including prospective clients, is not 'communication directed to a specific recipient' within the meaning of the rules, and therefore only the general rules governing communications concerning a lawyer's services and advertising should apply to a lawyer 'web site' on the Internet.").
- California LEO 2001-155 (6/19/01) ("We conclude that Attorney A's web site is not a 'solicitation' under rule 1-400(B). . . . We further conclude that neither the nature of the website communication nor the nature of the technology it employs to reach readers requires a different result. Although e-mail communication as part of website technology permits faster responses and more interaction than is possible with other forms written communication, it does not create the risk that the attorney might be able to use her persuasive ability and experience to influence unduly the potential client's thoughtful decision to hire her. Similarly, although e-mail can be transmitted through telephone lines, its resemblance to a telephone discussion ends with the

mechanism of transmission. The static nature of an e-mail message allows a potential client to reflect, re-read, and analyze; the written form allows the potential client to share and discuss the communication with others and maintain a permanent record of its contents; and the mechanical steps involved in sending and receiving messages impose a measured pace on the interchange.").

However, courts and bars have continued to debate the exact nature of lawyer websites.

On February 27, 2009, the Florida Supreme Court addressed the Florida Bar's proposed ethics rules governing electronic marketing. The Florida Supreme Court described the context of its analysis.

Before submitting previous proposed amendments to the Court for consideration, see *In re Amendments to the Rules Regulating the Florida Bar - Advertising*, 971 So. 2d 763 (Fla. 2007), the Task Force originally concluded that websites are distinguished from general advertising because the typical viewer would not access a lawyer's website by accident, but would be searching for that lawyer, a lawyer with similar characteristics, or information regarding a specific legal topic. In contrast, the Board of Governors' Citizens Forum disagreed with the Task Force and concluded that attorney websites should be subject to the same general regulations as other forms of lawyer advertising. The Citizen's Forum reasoned that for website advertising, the public should be provided with the same protections (from false and misleading attorney advertising) that are required for more traditional methods of advertising. Thereafter, the Board voted to continue regulating websites pursuant to the general advertising regulations, except for a few specified exceptions.

Afterwards, through its study, the Special Committee determined that each substantive attorney advertising regulation should apply to attorney websites, and that websites should be subject to the same regulation as other forms of media, except websites should be exempt from the requirement that advertisements must be filed with the Bar for review. However, in December 2006, the Board voted against adopting the Special Committee's recommendation that all substantive lawyer advertising rules apply to lawyer websites.

In re Amendments to Rules Regulating the Fla. Bar -- Rule 4-7.6, Computer Accessed Commc'ns, No. SC08-1181, 2009 Fla. LEXIS 271, at *3 n.1 (Fla. Feb. 27, 2009). The Florida Supreme Court quoted the bar's petition as framing the basic issue.

"A website cannot be easily categorized as either information at the request of the prospective client, which is subject to no regulation under this subchapter but is subject to the general prohibition against dishonesty, or as advertising in a medium that is totally unsolicited and broadly disseminated to the public, such as television, radio, or print media. Although some steps must be initiated by the viewer to access a website, the viewer might not necessarily be attempting to access that law firm's website, or a law firm website at all. It is therefore inappropriate to treat a website as information upon request, because it is not the same as direct contact with a known law firm requesting information. On the other hand, the viewer is unlikely to access a lawyer or law firm website completely by accident."

Id. at *3 (emphases added; internal citation omitted).

The Florida Bar petitioned the Florida Supreme Court to approve rules that would have required a lawyer's home page to comply "with all the substantive lawyer advertising regulations" -- but which would declined to apply all marketing rules to a lawyer's website "[a]fter the homepage." Id. at *4.

The Florida Supreme Court rejected the Florida Bar's approach.

In contrast to the Bar's arguments, we find that the proposed amendments are not sufficient to make material behind the homepage fall under the concept of information "upon request" (which is exempted from regulation by subchapter 4-7, pursuant to rule 4-7(f)). We recognize, however, that sufficient changes could be made to the rules regulating websites to make pages behind the homepage constitute materials "upon request." For example, a website could require users to complete two steps on webpages before they could access result or testimonial information. First, a user could be required to complete a "Request" page with their name, address, and phone number (all required fields). Second a disclaimer page could appear with the bottom of the page requiring a click on a button to indicate that the

user had read the disclaimer (and an option for the user to discontinue the request for information). Only after the user navigated through these two pages would the user be able to obtain the additional information. This process would make obtaining information from a website similar to obtaining information "upon request" from a lawyer, when a potential client picks up a phone and calls a lawyer to ask for information, and then is mailed a DVD or brochure by the lawyer with the requested information.

Id. at *6-7 (emphases added).

Several months after issuing this opinion, the Florida Supreme Court withdrew the opinion -- because the Florida Bar had essentially complied with the Supreme Court's implicit direction to take a different approach about such website pages. In re Amendments to Rules Regulating Fla. Bar, 24 So. 3d 172 (Fla. 2009).

The Florida Supreme Court's difficulty in applying marketing rules to lawyers' websites reflects the unique nature of that type of marketing.

(b) Lawyers' emails to prospective clients seem to fall somewhere between the less intrusive direct mail communication and the more intrusive telephone call or in-person visit.

Predictably, one early legal ethics opinion found that emails were sufficiently intrusive to justify application of the in-person solicitation marketing rules.

- Tennessee LEO 95-A-570 (5/17/95) (not for publication) ("While unsolicited mailing and promotions have been permitted by the Supreme Court, unsolicited phone contacts have not been. The reasoning is that a letter can be thrown away while a phone call or direct personal solicitation is an intrusion into the privacy of the recipient and cannot be so easily ignored. This form of solicitation on the Internet would be an improper solicitation in violation of DR 2-103.").

However, as emails became more popular, bars eventually agreed that they amounted to direct mail rather than in-person solicitation.

- Michigan LEO RI-276, 1996 WL 909975, at *1 (7/11/96) ("A lawyer may solicit legal business through an electronic mail communication directed to a specific addressee or group of addressees by following the same ethics rules applicable to general and direct mail solicitation.").
- Arizona LEO 97-04 (4/1997) ("Communication with a potential client via cyberspace should not be considered either a prohibited telephone or in-person contact because there is not the same element of confrontation/immediacy as with the prohibited mediums. A potential client reading his or her e-mail, or even participating in a 'chat room' has the option of not responding to unwanted solicitations.").
- Pennsylvania LEO 97-130, 1997 WL 816711, at *6 (9/26/97) ("If the e-mail is about the lawyer or the lawyer's services and is intended to solicit new clients, it is lawyer advertising similar to targeted, direct mail and is subject to the same restrictions under the Rules of Professional Conduct.").
- Utah LEO 97-10 (10/24/97) ("The applicability of the Rules of Professional Conduct to e-mail is more difficult to analyze. Because (a) e-mail is in writing (similar to a facsimile transmission), (b) it does not represent a 'live' communication (unlike the chat-room discussions), and (c) the recipient can ignore the message or respond at leisure and after due reflection, we find that e-mail is not an "in person" communication under Rule 7.3(a). However, because e-mail is different from a written advertisement that is delivered through the U.S. Postal Service or other similar services, it may have a different impact due to the speed and mode of transmission and the difficulty of regulation. In addition to the rules discussed above, the lawyer should be aware that the instantaneous nature of e-mail could raise issues regarding Rules 7.3(b)(1) and (b)(3), which prohibit direct solicitation to those who are in such a state that they cannot exercise reasonable judgment in employing a lawyer and solicitations which involve coercion, duress, or harassment." (footnote omitted; emphasis added)).
- West Virginia LEO 98-03 (10/16/98) ("The Lawyer Disciplinary Board also finds that e-mail and messages left in news groups can be a form of written solicitation governed by Rule 7.3(b) and (c). . . . This would require an attorney who is soliciting professional employment from a prospective client to include the words 'ADVERTISING MATERIAL' in the heading for an e-mail or news group communication. That way, when the e-mail message or news group posting comes up, the receiver has the option of opening it or putting [it] in the electronic trash without reading it, just like the recipient of mail has. In the past, the Lawyer Disciplinary Board has interpreted the Rules of Professional Conduct to permit an attorney to omit the words 'ADVERTISING MATERIAL' on the outside of an envelope if the attorney is mailing to a market not necessarily known to be in need of legal services, such as a geographic area or a legally obtained list of customers. Because of the ease and low cost of sending e-mail, the Board has concerns about recipients

being inundated with solicitations and being forced to review them all to make sure that a lawyer is not trying to communicate personally with the user on a current matter. The Board therefore strongly recommends that all e-mail messages and news group postings have the 'ADVERTISING MATERIAL' designation as part of the heading.").

- California LEO 2001-155 (2001) ("We further conclude that neither the nature of the website communication nor the nature of the technology it employs to reach readers requires a different result. Although e-mail communication as part of website technology permits faster responses and more interaction than is possible with other forms written communication, it does not create the risk that the attorney might be able to use her persuasive ability and experience to influence unduly the potential client's thoughtful decision to hire her. Similarly, although e-mail can be transmitted through telephone lines, its resemblance to a telephone discussion ends with the mechanism of transmission. The static nature of an e-mail message allows a potential client to reflect, re-read, and analyze; the written form allows the potential client to share and discuss the communication with others and maintain a permanent record of its contents; and the mechanical steps involved in sending and receiving messages impose a measured pace on the interchange." (emphasis added).
- Ohio LEO 2004-1 (2/13/04) (holding that email advertisement sent to prospective clients must be treated as direct mail solicitation under the Ohio ethics rules, including limitations on recipients and requirement of disclaimers such as "ADVERTISEMENT ONLY" in the email).

(c) Not many bars have dealt with properly characterizing text messages as either direct mail or in-person solicitation. Although most people probably find text messages a bit more intrusive than emails, perhaps bars recognized that ultimately text messages would become as common as emails -- and therefore deserve the same characterization.

In 2013, the Ohio Bar concluded that text messages should be treated as "direct mail" for ethics purposes.

- Ohio LEO 2013-2 (4/5/13) ("'Electronic communication' is not defined in the Rules of Professional Conduct (Rules), but is generally understood to include text messages."; "Like Prof.Cond.R. 7.3(a), the American Bar Association's (ABA) Model Rule 7.3(a) also prohibits the solicitation of prospective clients by 'real-time' electronic contact. The ABA has interpreted real-time electronic contact to include internet chat room communications. Bennett, Cohen &

Whittaker, Annotated Model Rules of Professional Conduct, 553-554 (7th Ed. 2011). Chat rooms facilitate 'live' text or voice conversations among multiple persons connected to the internet. The Board agrees that Prof.Cond.R. 7.3(a) prohibits lawyers from soliciting prospective clients via internet chat rooms as these are real-time electronic contacts. However, as stated in Prof.Cond.R. 7.2, Comment [3], lawyers are permitted to advertise by email. The Board's view is that a standard text message is more akin to an email than a chat room communication. Accordingly, a typical text message is not a 'real-time' electronic contact. Lawyers may likewise solicit clients using text messages so long as the technology used to implement the text message does not generate a real-time or live conversation."; "Because most text messages are received on cellular phones, which are often carried on one's person, lawyers should be sensitive to the fact that a text message may be perceived as more invasive than an email." (emphasis added)).

(d) Real-time electronic communications raise the same issue as other forms of electronic communications. However, this type of marketing involves the added complication of a common rules amendment arguably ending the debate. Several new ethics opinions addressing real-time electronic communications ignored the rule.

In 2002, the ABA amended the Model Rules to explicitly indicate that "real-time electronic contact" should be treated as in-person solicitation under ABA Model Rule 7.3(a).

A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted: (1) is a lawyer; or (2) has a family, close personal, or prior professional relationship with the lawyer.

ABA Model Rule 7.3(a) (emphasis added).

Nearly every state which has dealt with real time "chat rooms" or similar electronic communications has applied the solicitation rather than the direct mail marketing rules.

- Michigan LEO RI-276, 1996 WL 909975, at *1 & *3 (7/11/96) ("A lawyer may not solicit legal business during an interactive electronic communication unless ethics rules governing in-person solicitation are followed. . . . A

different situation arises if a lawyer is participating in interactive communication on the Internet, carrying on an immediate electronic conversation. If the communication was initiated by the lawyer without invitation, such 'real time' communications about the lawyer's services would be analogous to direct solicitation, outside the activity permitted by MRPC 7.3.").

- Illinois LEO 96-10, 1997 WL 317367, at *5 (5/16/97) ("On the other hand, lawyer participation in an electronic bulletin board, chat group, or similar service, may implicate Rule 7.3, which governs solicitation, the direct contact with prospective clients. The Committee does not believe that merely posting general comments on a bulletin board or chat group should be considered solicitation. However, of [sic] a lawyer seeks to initiate an unrequested contact with a specific person or group as a result of participation in a bulletin board or chat group, then the lawyer would be subject to the requirements of Rule 7.3. For example, if the lawyer sends unrequested electronic messages (including messages in response to inquiries posted in chat groups) to a targeted person or group, the messages should be plainly identified as advertising material.").
- Utah LEO 97-10 (10/24/97) ("'Chat rooms' have become a popular medium of communication on Internet sites. The typical format involves simultaneous participation of several users in a real-time exchange of written messages at a common site that are displayed at each participant's computer terminal. Although these communications can often be reduced to written form, a chat-group communication is more analogous to an in-person conversation due to its direct, confrontational nature and the difficulty of monitoring and regulating it. We, therefore, find that an attorney's advertising and solicitation through a chat group are 'in person' communications under Rule 7.3(a) and are accordingly restricted by the provisions of that rule.").
- New York City LEO 1998-2 (1998) (law firms should maintain a copy of their website for one year; lawyers communicating electronically with clients must avoid impermissible solicitation; law firms may not pay an internet service provider a percentage of fees earned through internet contacts).
- Philadelphia LEO 98-6 (3/1998) ("The inquirer should be careful that he does not engage in any activity which constitutes improper solicitation. In the opinion of the Committee, conversation interactions with persons on the Internet do not constitute improper solicitation, but in any one particular case the interaction may evolve in such a way that it could be characterized as such.").
- Virginia Adver. Op. A-0110 (4/14/98) ("Lawyers who communicate on the Internet in 'real time' chat rooms must abide by the restrictions on solicitation set forth in DR 2-103 [now appearing in Rule 7.3(a)]. 'In-person' communication in personal injury and wrongful death cases is prohibited,

subject to certain exceptions, by DR 2-103(F) [now appearing in Rule 7.3(f)]. 'In-person' communications include not only face to face communication but also 'telephonic communication.' The Committee believes that a lawyer who solicits employment in a 'real time' chat room may not solicit employment in personal injury or wrongful death cases by communicating with the victim or their immediate family.").

- West Virginia LEO 98-03 (10/16/98) ("The Board is of the opinion that solicitations via real time communications on the computer, such as a chat room, should be treated similar to telephone and in-person solicitations. Although this type of communication provides less opportunity for an attorney to pressure or coerce a potential client than do telephone or in-person solicitations, real-time communication is potentially more immediate, more intrusive and more persuasive than e-mail or other forms of writing. Therefore, the Board considers Rule 7.3(a) to prohibit a lawyer from soliciting potential clients through real-time communications initiated by the lawyer.").
- Florida LEO A-00-1 (8/15/00) (relying on legal ethics opinions from Michigan, West Virginia, Utah, and Virginia in bolstering its conclusion that lawyer participation in a real time "chat room" would amount to prohibited solicitation under Florida Rule 4-7.4(a)).
- California LEO 2004-166 (2004) (holding that the pertinent California rule defines "solicitation" as communication in person or over a telephone line, thus technically excluding on-line communications -- but noting that most states rely on a broader definition to find that real time on-line communications fall under the definition of "solicitation"; "While an attorney's communication with a prospective fee-paying client in the mass disaster victims Internet chat room described herein is not a prohibited 'solicitation' within the meaning of subdivision (B) of rule 1-400, it violates subdivision (D)(5) of rule 1-400, which bans transmittal of communications that intrude or cause duress. Attorney's communication would also be a presumed violation of Standard (3) to rule 1-400, which presumes improper any communication delivered to a prospective client whom the attorney knows may not have the requisite emotional or mental state to make a reasonable judgment about retaining counsel."; noting "that ethics committees in other states, including Florida, Michigan, Oregon, Utah, Virginia, and West Virginia, have concluded that messages delivered via real time Internet communication channels are prohibited solicitations. Some of these states, for example, Florida, have a rule more broadly-worded than rule 1-400, which more readily permits its application to chat room situations. However, other states, including Utah and Michigan, have interpreted their rules regulating in person and telephonic communications to encompass 'real time' chat room conversations." (footnotes omitted); concluding that "the 'by telephone' language in rule 1-400(B)(2)(a) does not apply to chat room communications because that would contradict the rule's plain language and undermine fair notice of prohibited conduct").

- Ohio LEO 2013-2 (4/5/13) ("Electronic communication' is not defined in the Rules of Professional Conduct (Rules), but is generally understood to include text messages."; "Like Prof.Cond.R. 7.3(a), the American Bar Association's (ABA) Model Rule 7.3(a) also prohibits the solicitation of prospective clients by 'real-time' electronic contact. The ABA has interpreted real-time electronic contact to include internet chat room communications. Bennett, Cohen & Whittaker, Annotated Model Rules of Professional Conduct, 553-554 (7th Ed. 2011). Chat rooms facilitate 'live' text or voice conversations among multiple persons connected to the internet. The Board agrees that Prof.Cond.R. 7.3(a) prohibits lawyers from soliciting prospective clients via internet chat rooms as these are real-time electronic contacts. However, as stated in Prof.Cond.R. 7.2, Comment [3], lawyers are permitted to advertise by email. The Board's view is that a standard text message is more akin to an email than a chat room communication. Accordingly, a typical text message is not a 'real-time' electronic contact. Lawyers may likewise solicit clients using text messages so long as the technology used to implement the text message does not generate a real-time or live conversation."; "Because most text messages are received on cellular phones, which are often carried on one's person, lawyers should be sensitive to the fact that a text message may be perceived as more invasive than an email." (emphasis added)).

In 1997, Arizona took the opposite approach.

- Arizona LEO 97-04 (4/7/97) ("ER 7.3 prohibits telephone and in-person solicitation. Communication with a potential client via cyberspace should not be considered either a prohibited telephone or in-person contact because there is not the same element of confrontation/immediacy as with the prohibited mediums. A potential client reading his or her e-mail, or even participating in a 'chat room' has the option of not responding to unwanted solicitations. . . . In order for this portion of ER 7.3 to apply to a computerized solicitation, the following elements would be necessary: 1) the lawyer must initiate the contact (thus, lawyer responses to questions posed by potential clients in 'chat rooms' or inquiries sent directly to a particular lawyer would not need to comply with this rule); and 2) the potential client would have to have a known legal need for a particular matter. Thus, for instance, solicitations sent to all members of an environmental listserve would not be affected because those members might be interested in environmental issues but not necessarily have a need for representation in a particular environmental case. If those elements exist, then the lawyer must comply with the disclosure obligations set forth in ER 7.3(b)." (emphasis added)).

Interestingly, the two most recent ethics opinions to deal with this issue conclude that real-time electronic communications should be treated like direct mail rather than in-person solicitation.

In 2010, the Philadelphia Bar dealt with this issue. The Bar concluded after a very lengthy and detailed analysis that real-time electronic communications should now be treated under the direct mail provision rather than the solicitation provision -- because "the social attitudes and developing rules of internet etiquette are changing," so that "it has become readily apparent to everyone that they need not respond instantaneously to electronic overtures." Philadelphia LEO 2010-6 (6/2010).

- Philadelphia LEO 2010-6 (6/10) (analyzing the categorization of blogs and "chat rooms" for purposes of marketing regulation; noting that Pennsylvania Rule 7.3 defines "solicit" as including "contact in-person, by telephone or by real-time electronic communication," but that the term "solicit" does "not include written communications, which may include targeted, direct mail advertisements"; noting that "[u]ntil January 1, 2005, Rule 7.3 did not include the phrase, or any reference to, 'real-time electronic communication.' That phrase was added to the Pennsylvania Rule on January 1, 2005."; "The question of whether or not Rule 7.3 barred electronic communication arose before this body before. We opined in late 2004 -- applying the then current, now former Rule 7.3 -- that participation in chat rooms was not barred by 7.3(a), reasoning that the kind of risk inherent in direct communication via telephone or personal interaction was not present in the social medium of a chat room. See, Philadelphia Bar Association Formal Opinion 2004-5. It seemed clear at the time, however, that the opinion would not survive the amendment to the Rule."; after analyzing emails, blogging and chat rooms, concluding that "[i]n this respect, each of these kinds of electronic communication is different from in-person direct communication and telephone calls. In the latter kinds of in-person communications with an overbearing lawyer, the prospective client can walk away or hang up the phone, but it is socially awkward to do so in the face of a determined advocate. In the former, however, as the Supreme Court found even in the case of individually targeted direct mail solicitations, a recipient can readily and summarily decline to participate in the communication. Moreover, each of these kinds of social interactions enables the lawyer using it to make and retain a copy of the communication, as required by Rule 7.2."; ultimately concluding that "[t]he Committee believes that the rationale of the prohibition on direct solicitation, both as explained in the Rule itself and the accompanying comments, and by the Supreme Court's opinion in Shapero [Shapero v. Ky. Bar Ass'n, 486 U.S. 466 (1988)], lead to the conclusion that usage of these kinds of social media for solicitation purposes is acceptable under Rule 7.3. All of these kinds of social interactions are characterized by an ability on the part of the prospective client to 'turn off' the soliciting lawyer and respond or not as he or she sees fit, and an ability to keep a record of its

contents."; rejecting the ABA's approach to "real-time electronic communication"; "We do recognize that Rule 7.3 does specifically refer to 'real-time electronic communication,' and that the ABA Reporter's Explanation states that those words were intended to refer to 'chat rooms.' But we do not feel bound to apply them as the Reporter's Explanation may have intended." (emphasis added); noting that the ABA (in Pennsylvania) did not "refer specifically to 'chat rooms' in the Rule itself"; also explaining that "even assuming that the technological abilities of chat rooms are the same today as they were in 2000, we think it also relevant that the social attitudes and developing rules of internet etiquette are changing. It seems to us that with the increasing sophistication and ubiquity of social media, it has become readily apparent to everyone that they need not respond instantaneously to electronic overtures, and that everyone realizes that, like targeted mail, e-mails, blogs and chat room comments can be readily ignored, or not, as the recipient wishes." (emphasis added); "Thus, the Committee concludes that Rule 7.3 does not bar the use of social media for solicitation purposes where the prospective clients to whom the lawyer's communication is directed have the ability, readily exercisable, to simply ignore the lawyer's overture, just like they could a piece of directed, targeted mail. Where that is the case those risks which might be inherent in an individualized, overbearing communication are not sufficiently present [emphasis in original] to bar the use of such methods of social interaction for any solicitation purposes. Under this view of Rule 7.3, 'real-time electronic communication' is limited to electronic modes of communication used in a way in which it would be socially awkward or difficult for a recipient of a lawyer's overtures to not respond in real time. The Committee also concludes that even on line chat rooms of the sort where discussion occurs by typed communications do not constitute real-time electronic media." (emphasis added); ultimately permitting solicitation during real-time electronic "chat rooms").

In 2011, the North Carolina Bar took the same basic approach, explicitly pointing with approval to the Philadelphia Bar's analysis.

- North Carolina LEO 2011-8 (7/15/11) (holding that a law firm can "utilize a live chat support service on its website"; warning that the law firm would have to consider the possibility of establishing an "inadvertent" lawyer-client relationship, and would also have to avoid misleading any potential client who was chatting with a nonlawyer but might think he was chatting with a lawyer; noting that Rule 7.3(a)'s provision prohibiting "real-time electronic" solicitation did not apply, because the client was initiating the communication with the firm; also pointing to the discussion in Philadelphia LEO 2010-6 (2010); explaining that "[t]he use of a live chat support service does not subject the website visitor to undue influence or intimidation. The visitor has the ability to ignore the live chat button or to indicate with a click that he or she does not wish to participate in a live chat session.").

It will be interesting to see whether other states follow this lead.

Although neither the Philadelphia nor the North Carolina Bar dealt with the type of "real-time electronic communication," it would be easy to see the difference between a communication involving words on a computer screen or smartphone, and face-to-face electronic communications such as Skype.© Folks might find it increasingly easy to ignore words on a screen or smartphone, but still feel pressure to respond if they are looking into the face of another person on the screen or smartphone. Such communications involving an oral conversation probably fall somewhere in between. These types of considerations highlight the difficulty of applying traditional ethics rules to communications of varying intrusiveness.

Best Answer

The best answer to **(a)** is **NEITHER**; the best answer to **(b)** is **DIRECT MAIL**; the best answer to **(c)** is **DIRECT MAIL (PROBABLY)**; the best answer to **(d)** is **IN-PERSON (MAYBE)**.

b 7/14