National Clean Water Law & Enforcement Seminar (NACWA)

November 16, 2018
San Diego, CA

ETHICS ISSUES: COMMUNICATIONS, NEGOTIATIONS AND INVESTIGATIONS

Hypotheticals and Analyses*

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

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Ethical Propriety of Electronic Communications

Hypothetical 1

You have one colleague who seems to be a "nervous Nelly." He worries about nearly everything, and he frequently bothers you with what sometimes seem to be frivolous questions. He must have just read some marketing piece from an electronic security firm, because he has called you in a panic with several questions.

(a) May a lawyer ethically communicate with a client using a cordless phone?

YES

(b) May a lawyer ethically communicate with a client using a cell phone?

YES

(c) May a lawyer ethically communicate with a client using unencrypted email?

YES

(d) May a lawyer ethically store confidential client communications using WIFI?

YES

(e) May a lawyer ethically store confidential client communications in the "cloud"?

YES

Analysis

Both the ethics rules and case law have had to evolve as new forms of communication and data storage have appeared.

Introduction

Not surprisingly, lawyers must take reasonable steps to safeguard their clients' confidential information.

The original 1908 ABA Canons dealt with confidentiality almost as an afterthought in Canon 6 ("Adverse Influences and Conflicting Interests").

> The obligation to represent the client with undivided loyalty and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

ABA Canons of Professional Ethics, Canon 6 (8/27/1908) (emphasis added). Thus, this original Canon recognized lawyers' obligation not to divulge protected client information, but did not articulate an affirmative duty to protect against other types of disclosure.

The 1928 ABA Canons (amended in 1937) similarly emphasized lawyers' duty to maintain former clients' confidences, without providing much explanation.

> It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even tough [sic] there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

ABA Canons of Professional Ethics, Canon 37, amended Sept. 30, 1937 (emphasis added).

Although the ABA Model Code did not deal extensively with lawyers' duties to former clients, an Ethical Consideration dealt with lawyers' duty to preserve former clients' confidences and secrets when they retire.

> A lawyer should also provide for the protection of the confidences and secrets of his client following the termination of the practice of the lawyer, whether termination is due to death, disability, or retirement. For example, a lawyer might provide for the personal papers of the client to

> be returned to him and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration.

ABA Model Code of Professional Responsibility, EC 4-6.

The ABA Model Rules have a more extensive discussion of this duty.

First, ABA Model Rule 1.6(a) prohibits lawyers from disclosing "information relating to the representation of a client," absent some exception. ABA Model Rule 1.6(a).

Second, lawyers must take reasonable steps to avoid the accidental disclosure of client information.

> A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

ABA Model Rule 1.6(c). The ABA Ethics 20/20 Commission, which focused primarily on mobility and technology, suggested the addition of this provision, which was approved by the ABA House of Delegates on August 6, 2012.

At the same time, the ABA approved substantial revisions to a comment which is now ABA Model Rule 1.6 cmt. [18], quoted below.

Two comments describe predictable requirements.

> Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. . . . . The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the

representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts include, but are not limited to, the sensitivity of the information, the likelihood of disclosure if additional safeguards are not employed, the cost of employing additional safeguards, the difficulty of implementing the safeguards, and the extent to which the safeguards adversely affect the lawyer's ability to represent clients (e.g., by making a device or important piece of software excessively difficult to use). A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to forgo security measures that would otherwise be required by this Rule. Whether a lawyer may be required to take additional steps to safeguard a client's information in order to comply with other law, such as state and federal laws that govern data privacy or that impose notification requirements upon the loss of, or unauthorized access to, electronic information, is beyond the scope of these Rules. For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4].

When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. Special circumstances, however, may warrant special precautions. Factors to be considered in determining the reasonableness of the lawyer's expectation of confidentiality include the sensitivity of the information and the extent to which the privacy of the communication is protected by law or by a confidentiality agreement. A client may require the lawyer to implement special security measures not required by this Rule or may give informed consent to the use of a means of communication that would otherwise be prohibited by this Rule. Whether a lawyer may be required to take additional steps in order to comply with other law, such as state and federal laws that govern data privacy, is beyond the scope of these Rules.

ABA Model Rule 1.6 cmt. [18], [19] (emphases added).

The ABA Ethics 20/20 Commission also recommended, and the ABA House of Delegates approved on August 6, 2012, a change to ABA Model Rule 1.1, which deals with competence. Comment [8] to that Rule now reads as follows:

> To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.

ABA Model Rule 1.1 cmt. [8] (emphasis added).

Third, ABA Model Rule 1.9 deals with lawyers' duties to former clients. ABA Model Rule 1.9(c)(2). A comment confirms an obvious principle.

> After termination of a client-lawyer relationship, a lawyer has certain continuing duties with respect to confidentiality.

ABA Model Rule 1.9 cmt. [1].

Fourth, ABA Model Rule 1.15 deals with lawyers' safe keeping of client property. That rule primarily focuses on trust accounts, but applies to other client information in the lawyer's possession.

The Restatement takes essentially the same approach.

> [T]he lawyer must take steps reasonable in the circumstances to protect confidential client information against impermissible use or disclosure by the lawyer's associates or agents that may adversely affect a material interest of the client or otherwise than as instructed by the client.

Restatement (Third) of Law Governing Lawyers § 60(1)(b) (2000). A comment provides additional guidance.

> A lawyer who acquires confidential client information has a duty to take reasonable steps to secure the information against misuse or inappropriate disclosure, both by the lawyer and by the lawyer's associates or agents to whom the lawyer may permissibly divulge it . . . . This requires that client confidential information be acquired, stored, retrieved, and transmitted under systems and controls that are reasonably designed and managed to maintain confidentiality. In responding to a discovery request, for example, a lawyer must exercise reasonable care against risk that confidential client information not subject to the request is inadvertently disclosed . . . . A lawyer should so conduct interviews with clients and others that the benefit of the attorney-client privilege and work-product immunity are preserved.

Restatement (Third) of Law Governing Lawyers § 60 cmt. d (2000) (emphasis added).

The Restatement specifically addresses lawyers' obligation to carefully destroy client files.

> The duty of confidentiality continues so long as the lawyer possesses confidential client information. It extends beyond the end of the representation and beyond the death of the client. Accordingly, a lawyer must take reasonable steps for the future safekeeping of client files, including files in closed matters, or the systematic destruction of nonessential closed files. A lawyer must also take reasonably appropriate steps to provide for return, destruction, or continued safekeeping of client files in the event of the lawyer's retirement, ill health, death, discipline, or other interruption of the lawyer's practice.

Restatement (Third) of Law Governing Lawyers § 60 cmt. e (2000) (emphasis added).

To comply with their broad duty of confidentiality, lawyers must also take all reasonable steps to assure that anyone with whom they are working also protects client information.

For instance, in ABA LEO 398 (10/27/95), the ABA indicated that a lawyer who allows a computer maintenance company access to the law firm's files must ensure that the company establishes reasonable procedures to protect the confidentiality of the information in the files. The ABA also indicated that the lawyer would be "well-advised" to secure the computer maintenance company's written assurance of confidentiality.

In its more recent legal ethics opinion generally approving outsourcing of legal services, the ABA reminded lawyers that they should consider conducting due diligence of the foreign legal providers -- such as "investigating the security of the provider's premises, computer network, and perhaps even its recycling and refuse disposal procedures." ABA LEO 451 (7/9/08).[1]

[1] ABA LEO 451 (7/9/08) (generally approving the use of outsourcing of legal services, after analogizing them to such "[o]utsourced tasks" as reliance on a local photocopy shop, use of a "document management company," "use of a third-party vendor to provide and maintain a law firm's computer system" and "hiring of a legal research service"; lawyers arranging for such outsourcing must always "render legal services competently," however the lawyers perform or delegate the legal tasks; lawyers must comply with their obligations in exercising "direct supervisory authority" over both lawyers and nonlawyers, "regardless of whether the other lawyer or the nonlawyer is directly affiliated with the supervising lawyer's firm"; the lawyer arranging for outsourcing "should consider" conducting background checks of the service providers, checking on their competence, investigating "the security of the provider's premises, computer network, and perhaps even its recycling and refuse disposal procedures"; lawyers dealing with foreign service providers should analyze whether their education and disciplinary process is compatible with that in the U.S. -- which may affect the level of scrutiny with which the lawyer must review their work product; such lawyers should also explore the foreign jurisdiction's confidentiality protections (such as the possibility that client confidences might be seized during some proceedings, or lost during adjudication of a dispute with the service providers); because the typical outsourcing arrangement generally does not give the hiring lawyer effective "supervision and control" over the service providers (as with temporary lawyers working within the firm), arranging for foreign outsourced work generally will require the client's informed consent; lawyers must also assure the continued confidentiality of the client's information (thus, "[w]ritten confidentiality agreements are . . . strongly advisable in outsourcing relationships"); to minimize the risk of disclosure of client confidences, the lawyer should verify that the service providers are not working for the adversary in the same or substantially related matter; lawyers generally may add a surcharge (without advising the client) to a contract lawyer's expenses before billing the client; if the lawyer "decides" to bill those expenses as a disbursement, the lawyer may only bill the client for the actual cost of the services "plus a reasonable allocation of associated overhead, such as the amount the lawyers spent on any office space, support staff, equipment, and supplies"; the same rules apply to outsourcing, although there may be little or no overhead costs).

Lawyers must also be very careful when dealing with service providers such as copy services.

- Universal City Dev. Partners, Ltd. v. Ride & Show Eng'g, Inc., 230 F.R.D. 688, 698 (M.D. Fla. 2005) (assessing a litigant's efforts to obtain the return of inadvertently produced privileged documents; noting that the litigant had sent the documents to an outside copy service after putting tabs on the privileged documents, and had directed the copy service to copy everything but the tabbed documents and send them directly to the adversary; noting that the litigant had not reviewed the copy service's work or ordered a copy of what the service had sent the adversary; emphasizing what the court called the "most serious failure to protect the privilege" -- the litigant's "knowing and voluntary release of privileged documents to a third party -- the copying service -- with whom it had no confidentiality agreement. Having taken the time to review the documents and tab them for privilege, RSE's counsel should have simply pulled the documents out before turning them over to the copying service. RSE also failed to protect its privilege by promptly reviewing the work performed by the outside copying service."; refusing to order the adversary to return the inadvertently produced documents).

Not surprisingly, lawyers using new forms of communication and data storage must take care when disposing of any device containing confidential client communications.

- Florida LEO 10-2 (9/24/10) ("A lawyer who chooses to use Devices that contain Storage Media such as printers, copiers, scanners, and facsimile machines must take reasonable steps to ensure that client confidentiality is maintained and that the Device is sanitized before disposition, including: (1) identification of the potential threat to confidentiality along with the development and implementation of policies to address the potential threat to confidentiality; (2) inventory of the Devices that contain Hard Drives or other Storage Media; (3) supervision of nonlawyers to obtain adequate assurances that confidentiality will be maintained; and (4) responsibility of sanitization of the Device by requiring meaningful assurances from the vendor at the intake of the Device and confirmation or certification of the sanitization at the disposition of the Device." (emphasis added)).

Lawyers obviously must be careful not to engage in sloppy intentional disclosure of client confidences. Several examples highlight the importance of this issue.

- Max Stendahl, Tipsy Lawyer Disclosed Secret $3.6B Pfizer Deal, Securities and Exchange Commission Says, Law360, Sept. 20, 2013 ("A Washington attorney drunkenly passed confidential information to a friend about Pfizer Inc.'s planned $3.6 billion acquisition of a pharmaceutical industry client in 2010, the United States Securities and Exchange Commission (SEC) said in a Friday complaint." (emphasis added); "The SEC filed an insider trading suit in Florida federal court against Tibor Klein, an investment adviser who allegedly bought shares of King Pharmaceuticals Inc. shortly before the firm was acquired by Pfizer Inc. for $3.6 billion. Klein learned about the planned acquisition in August 2010 from an attorney and investment advisory client named Robert M. Schulman, according to the SEC. Schulman, who was not named as a defendant in the suit, learned about the deal because he represented King Pharmaceuticals in separate litigation, the SEC said." (emphasis added); "Hunton & Williams LLP employs a partner in its Washington office named Robert M. Schulman who represented King Pharmaceuticals in a patent case in Virginia federal court. That case was dismissed in August 2010 following a settlement." (emphasis added); "When reached by phone Friday afternoon, the Hunton & Williams partner said, 'I can't talk to you.'" (emphasis added); "The complaint alleged that Schulman and Klein, a Long Island resident, 'enjoyed a close professional and personal relationship.' Beginning in 2002, Klein made a habit of visiting Schulman and Schulman's wife at their home at least three to four times a year, the complaint said. During those visits, Klein enjoyed meals with the Schulmans and reviewed their investment accounts, and Klein often stayed overnight as a guest, according to the SEC."; "In early August 2010, Schulman learned about the planned Pfizer deal through his work as an attorney representing King, the SEC alleged. Shortly thereafter, Klein visited the Schulmans at their Washington, D.C., home, the SEC said. That is allegedly when the improper disclosure took place."; "'During a meal with Klein at their home that weekend, Schulman drank several glasses of wine and became intoxicated. He blurted out to Klein, 'It would be nice to be King for a day.' Schulman intended to imply he was a 'big shot' who knew 'some kind of information' about King Pharmaceuticals,' the complaint said." (emphasis added); "Following that weekend visit, Klein purchased thousands of shares of King Pharmaceuticals for himself and his clients, including Schulman, the SEC alleged. Klein also allegedly tipped off a friend named Michael Shechtman who purchased his own King Pharmaceutical shares." (emphasis added)).

- Jill Lawless, J.K. Rowling's Law Firm Leaks Her Alter Ego, Associated Press, July 19, 2013 ("The mystery has been solved. A British law firm admitted Thursday that one of its partners inadvertently revealed that J.K. Rowling had authored a mystery novel, 'The Cuckoo's Calling.'"; "The Sunday Times newspaper revealed over the weekend that the 'Harry Potter' author had penned the book under the pseudonym Robert Galbraith. The newspaper

said it had received a tip-off on Twitter, and there was speculation that Rowling or her publisher were behind the revelation - which has sent sales of the thriller skyrocketing."; "But law firm Russells said Thursday that one of its partners, Chris Gossage, had let the information slip to his wife's best friend, Judith Callegari - the woman behind the tweet. Her Twitter account has now been deleted. A phone message left for Callegari was not immediately returned."; "Russells said in a statement that 'we apologize unreservedly' to Rowling. It said that while Gossage was culpable, 'the disclosure was made in confidence to someone he trusted implicitly.'"; "Rowling said that 'only a tiny number of people knew my pseudonym and it has not been pleasant to wonder for days how a woman whom I had never heard of prior to Sunday night could have found out something that many of my oldest friends did not know.'" (emphasis added); "'To say that I am disappointed is an understatement,' she added. 'I had assumed that I could expect total confidentiality from Russells, a reputable professional firm, and I feel very angry that my trust turned out to be misplaced.'" (emphasis added)).

- Richard Vanderford, Ex-BakerHostetler Atty's Hubby Traced On Pillow Talk: SEC, Law360, Feb. 6, 2013 ("The U.S. Securities and Exchange Commission (SEC) on Wednesday sued a Houston man who allegedly traded ahead of Texas Instruments Inc.'s [TI] 2011 purchase of National Semiconductor Corporation using inside information from his wife, then a partner at BakerHostetler."; "The SEC claims James W. Balchan, 48, made $30,000 in illicit profits trading ahead of TI's acquisition of National after his wife tipped him that National's general counsel had canceled an appearance at a social function to work on the deal." (emphasis added); "'The SEC alleges that the very next morning, Balchan misappropriated the confidential information he learned about the acquisition and purchased 2,000 National Semiconductor shares,' the commission said in a statement."; "The commission did not name Balchan's wife or her firm, but marriage records and an engagement announcement in a Houston-area newspaper identify her as Tonya Jacobs, a University of Houston Law Center graduate who worked at BakerHostetler from 1994 until January 2012." (emphasis added); "Balchan has agreed to pay about $60,000 to resolve the SEC action."; "According to the SEC complaint, which outlines the claims against Balchan but omits the names of the other parties, the tip originated in the cancellation of weekend social events. Another partner at BakerHostetler was organizing 'wine and dine' functions to honor National's then-general counsel, Todd Duchene. The partner was close to Jacobs and was acquainted with Balchan, and invited both of them to the parties, which had been slated for the first weekend in April 2011." (emphasis added); "A few days before the big weekend, Duchene allegedly called the partner to cancel his appearances, saying he was tied up working on the TI deal. The partner allegedly passed the information on to

Jacobs, who mentioned it to Balchan when they were discussing weekend plans." (emphasis added)).

- Brian Baxter, Associate's Failure to Keep Secrets a Cautionary Tale for Young Lawyers, AmLaw Daily, Nov. 30, 2012 ("Call it a cautionary tale for young corporate lawyers who might be inclined to discuss their work in what they think is an innocent fashion." (emphasis added); "On Thursday, federal prosecutors in Manhattan charged two former stockbrokers, Thomas Conradt of Denver and David Weishaus of Baltimore, with running an insider trading scheme that yielded more than $1 million in illicit profits based on confidential information about International Business Machines' (IBM's) $1.2 billion acquisition of analytics software maker SPSS in 2009." (emphasis added); "According to the complaints filed by the Justice Department and the SEC, the scheme allegedly hatched by Conradt and Weishaus began in May 2009 when the unnamed lawyer met an individual identified by federal prosecutors as 'CC-3' and the SEC as the 'Source' for what is variously described as brunch or lunch. The source, identified as an Australian citizen who worked as a research analyst at a major international financial services firm in Stamford, Connecticut, is described by the SEC as the associate's 'closest friend in New York.'" (emphasis added); "During the get-together in late May 2009, the lawyer, who had been at his firm [identified elsewhere as Cravath, Swaine & Moore] for eight months and had just been assigned to work on the IBM–SPSS deal, discussed with his friend his new role on the looming transaction as part of a broader conversation about what working on such a major M&A deal might mean for his career at the firm." (emphasis added); "It was not an uncommon exchange between the two—or one that the lawyer had any reason to think might lead to wrongdoing, according to the government's complaints against Conradt and Weishaus."; "Indeed, the associate and the source 'frequently shared both personal and professional confidences with one another and had a history of maintaining and not betraying those confidences,' according to the SEC's civil complaint. 'Based on their history, pattern, and practice of sharing confidences, each knew or reasonably should have known that the other expected such information to be maintained in confidence.'" (emphasis added); "The SEC states that over the course of their friendship, the associate never revealed or traded on any confidential information that the source shared.").

- In re Woodward, 661 N.Y.S.2d 614, 615, 616, 615-616, 616, 615 (N.Y. App. Div. 1997) (suspending for three years lawyer improperly disclosed client confidences to his brother, who then traded on those confidences; "Respondent committed the underlying misconduct between May 1990 and December 1994, while an associate in the corporate department at the firm Cravath, Swaine & Moore. During the time, respondent provided material, nonpublic information about merger and acquisition activities of firm clients to

his brother, John Woodward, and to his friend, Warren Eizman." (emphasis added); "Respondent . . . testified on his own behalf, expressing sincere remorse for his wrongdoing and admitting that he should have 'kept his mouth shut'. While respondent was unable to give a conclusive explanation for why he disclosed the information, he denied having done so intentionally or for the purpose of illegal trading. He suggested that his indiscretions were prompted by his own 'awe' and 'amazement' at the financial magnitude of the cases on which he was working . . . . He also stated that he was initially unaware that the men were using the information for illegal trades and, on one occasion, after learning that they had done so, asked them both to rescind the trades." (emphasis added); "The Federal investigation into this matter revealed that the insider information that respondent divulged was actually used for illegal trading and proved highly profitable to both his brother and his friend. John Woodward earned about $255,000 while Warren Eizman earned about $132,000 and passed the information on to 11 of his friends and relatives, who earned another $165,000 collectively. However, there was no finding that respondent ever personally traded with the information or profited from the illegal trading." (emphasis added); "[R]espondent, informed the Panel that he is a Mormon and is actively involved in church activities, such as teaching Sunday school and working with youth programs. Respondent added that the church has played a major role in his life since college, which he spent two years working as a voluntary missionary near Seattle, Washington."; "Respondent was sentenced to five months' home detention, two years' probation, 150 hours of community service, and a special assessment of $50. Respondent also paid $25,000 in restitution as a result of a civil proceeding commenced by the United States Securities and Exchange Commission (SEC) relating to his criminal conduct." (emphasis added)).

Lawyers must also be careful not to engage in inadvertent disclosure of protected client information. Such accidents have embarrassed lawyers from well-known firms.

- Debra Cassens Weiss, Did Lawyer's E-Mail Goof Land $1B Settlement on New York Time's Front Page?, ABA J., Feb. 6, 2008 ("An outside lawyer for Eli Lilly & Company apparently has two people named 'Berenson' in her e-mail address book. One is a reporter for the New York Times and the other is her co-counsel assisting in confidential negotiations on a possible $1 billion settlement between the pharmaceutical company and the government." (emphasis added); "The question is whether her e-mail to the wrong Berenson spurred last week's front-page New York Times story revealing talks to resolve criminal and civil investigations into the company's marketing of the anti-psychotic drug Zyprexa, as Portfolio.com reports."; "The unidentified lawyer who wrote the e-mail works at Pepper Hamilton in Philadelphia, the story says. She was trying to e-mail Bradford Berenson of

Sidley Austin rather than Times reporter Alex Berenson." (emphasis added); "Eli Lilly had initially believed that federal officials leaked the information. 'As the company's lawyers began turning over rocks closer to home, however, they discovered what could be called A Nightmare on E-mail Street,' the Portfolio story says." (emphasis added); "A Lilly spokeswoman told *Portfiolio.com* that the company will continue to retain Pepper Hamilton. A search for the words 'Eli Lilly' on the firm's Web site shows that two of the firm's lawyers are scheduled to speak on the subject of Resolving Ethical Concerns and Preserving Attorney-Client Privilege When Faced With Fraud and Abuse Charges at an April conference.") (emphasis added); analyzing the source of information included in the following article: Alex Berenson, Lilly in Settlement Talks With U.S., N.Y. Times, Jan. 30, 2008 ("Eli Lilly and federal prosecutors are discussing a settlement of a civil and criminal investigation into the company's marketing of the antipsychotic drug Zyprexa that could result in Lilly's paying more than $1 billion to federal and state governments."; "If a deal is reached, the fine would be the largest ever paid by a drug company for breaking the federal laws that govern how drug makers can promote their medicines."; "Lilly may also plead guilty to a misdemeanor criminal charge as part of the agreement, the people involved with the investigation said. But the company would be allowed to keep selling Zyprexa to Medicare and Medicaid, the government programs that are the biggest customers for the drug. Zyprexa is Lilly's most profitable product and among the world's best-selling medicines, with 2007 sales of $4.8 billion, about half in the United States."; "Lilly would neither confirm nor deny the settlement talks.").

Even lawyers' destruction of client property can implicate privilege and ethics issues.

- Megan Leonhardt, Ex-Dewey Attorneys May Be Liable For Client Privacy Breaches, Law360, July 16, 2012 ("Former Dewey & LeBoeuf LLP partners could face malpractice suits should clients experience privacy breaches as the bankrupt firm starts to look for ways to cut costs by quickly disposing of hundreds of thousands of client files, experts said Monday." (emphasis added); "While the issue of storage costs may seem like small potatoes in a bankruptcy with listed debts of $245 million and assets of $193 million, experts said Monday that the issue could have gigantic privacy and liability consequences for clients and former partners if handled improperly."; "'If you [incorrectly] disposed of a single file, it could result in a multimillion[-dollar] malpractice suit,' said Steven J. Harper, a retired Kirkland & Ellis LLP partner and adjunct professor at Northwestern University's School of Law."; "On Friday, United States Bankruptcy Judge Martin Glenn partially approved a move by Dewey's attorneys to start notifying former clients and partners of the

processes in place in order to retrieve their files, but refused to approve any measures regarding the future disposal of client files currently in storage."; "Dewey has faced initial opposition from clients, former partners and its file storage facilities over who would be required to take on the responsibility of disposing of the files, including paying for the continued storage of files or future shredding. And while the order failed to resolve the issue of who was responsible for the cost and associated liability with getting rid of the files, Judge Glenn said the firm should retain an expert in legal ethics to submit a document verifying that it had gone through the proper procedures for dealing with such a task."; "In its petition seeking court approval for its plan, Dewey said the continued storage of thousands of client files was unnecessary and burdened the collapsed firm with fees of up to $20,000 a month from a single storage facility. The firm cited previous law firm bankruptcies and ethical codes in order to come up with a plan that would 'strike an appropriate balance' between its duties to its creditors and to former clients, according to the motion.").

- Disciplinary Counsel v. Shaver, 904 N.E.2d 883, 884 (Ohio 2009) (issuing a public reprimand against a lawyer (and Mayor of Pickerington, Ohio) for discarding client files in a dumpster, and leaving approximately 20 boxes of other client files next to the dumpster; noting that the tenant who had moved into the office that was vacated by the lawyer "had misgivings about the propriety of respondent's disposal method," "examined the contents of several of the boxes left by the dumpster," and moved the boxes back into a garage that the lawyer continued to lease; also explaining that "[n]either of the property owners nor the new tenant contacted respondent again about his failure to remove all the contents of the garage. An anonymous tipster, however, contacted a television station about the incident, and the tip led to television news and newspaper stories."; publicly remanding the lawyer for violations of Rules 1.6(a) and 1.9(c)(2) -- which prohibit lawyers from revealing client confidences).

- United States v. Scott, 975 F.2d 927, 929, 930 (1st Cir. 1992) (explaining that a criminal defendant argued that the government violated his Fourth Amendment rights by conducting a warrantless seizure and reconstruction of shredded documents from trash bags he had left outside his home; concluding that the defendant could have no expectation of privacy after placing the shredded documents "in a public area accessible to unknown third parties."; holding that "[i]n our view, shredding garbage and placing it in a public domain subjects it to the same risks regarding privacy, as engaging in a private conversation in public where it is subject to the possibility that it may be overheard by other persons."), cert. denied, 507 U.S. 1042 (1993).

- Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254 (N.D. Ill. 1981) (explaining that the plaintiff sifted through the defendant's trash dumpster for two years, which yielded hundreds of discarded privileged documents; holding that the defendants had not taken reasonable steps to ensure complete obliteration of the documents -- such as shredding -- and, therefore, had expressly waived the privilege.).

Other courts have taken a more forgiving approach.

- Sparshott v. Feld Entm't, Inc., Civ. A. No. 99-0551 (JR), 2000 U.S. Dist. LEXIS 13800, at *2-3 (D.D.C. Sept. 21, 2000) (finding that a discharged employee had not waived the attorney-client privilege covering a dictaphone tape recording of conversations with his lawyer by failing to take the tape from his office after he was fired; "A reasonable analysis of the record compels the conclusion that Smith simply forgot the tape on March 7 and, under pressure (and under scrutiny) to clear out his office a few days later, forgot it then as well. That set of facts does not amount to a waiver of Smith's attorney-client privilege. Smith's ejection from the building and lockout from his office was indeed involuntary, and his neglect or failure to recall that the tape was in the dictaphone was not an affirmative act such as, for example, throwing a confidential document into the garbage").

- McCafferty's, Inc. v. Bank of Glen Burnie, 179 F.R.D. 163, 169-70 (D. Md. 1998) (finding that client had not waived the attorney-client privilege by discarding a privileged document by tearing it into sixteen pieces and throwing it in the trash; "To be sure, there were additional precautions which Joyner could have taken. . . . BGB could have used a paper shredder. . . . Joyner could have burned the pieces of the memo before throwing the ashes away. She could have torn it into smaller pieces, or distributed the pieces into several trash cans in different locations. However, the issue is not whether every conceivable precaution which could have been taken was taken, but whether reasonable precautions were taken. Under the facts of this case, Joyner would have had to anticipate that someone would trespass onto BGB's private property, look through an entire dumpster of trash, remove sealed bags of garbage, sift through them looking for torn up documents, and then piece them together. Even in an age where commercial espionage is increasingly common, the likelihood that someone will go to the unseemly lengths which Mariner did to obtain the Serotte memo is not sufficiently great that I can conclude that the precautions Joyner took were not reasonable. Although the precautions taken in this case were not perfect, they were sufficient to preserve the attorney-client privilege against the clandestine assault by Mariner's 'dumpster diver.'" (citation omitted)).

(a)-(c) As in so many other areas, bar committees amending, interpreting and enforcing ethics rules have scrambled to keep up with technology.

One of the first bars to deal with unencrypted email held that lawyers could not communicate "sensitive" material using unencrypted email.

- Iowa LEO 95-30 (5/16/96) ("[S]ensitive material must be encrypted to avoid violation of DR 4-101 and pertinent Ethical Considerations of the Iowa Code of Professional Responsibility for Lawyers and related Formal Opinions of the Board." (emphasis added)).

However, the Iowa Bar quickly backed away from a per se prohibition.

- Iowa LEO 96-01 (8/29/96) ("[W]ith sensitive material to be transmitted on E-mail counsel must have written acknowledgment by client of the risk of violation of DR 4-101 which acknowledgment includes consent for communication thereof on the Internet or non-secure Intranet or other forms of proprietary networks, or it must be encrypted or protected by password/firewall or other generally accepted equivalent security system."), amended by Iowa LEO 97-01 ("[W]ith sensitive material to be transmitted on e-mail counsel must have written acknowledgment by client of the risk of violation of DR 4-101 which acknowledgment includes consent for communication thereof on the Internet or non-secure Intranet or other forms of proprietary networks to be protected as agreed between counsel and client.").

At what could be called the dawn of the electronic age, some bars required lawyers to obtain their clients' consent to communicate their confidences using unencrypted email or cell phone technology.

- New Hampshire LEO 1991-92/6 (4/19/92) ("In using cellular telephones or other forms of mobile communications, a lawyer may not discuss client confidences or other information relating to the lawyer's representation of the client unless the client has consented after full disclosure and consultation. (Rule 1.4; Rule 1.6; Rule 1.6(a)). An exception to the above exits [sic], where a scrambler-descrambler or similar technological development is used. (Rule 1.6).").

- Iowa LEO 96-01 (8/29/96), as amended by Iowa LEO 97-01 (9/18/97) ("[W]ith sensitive material to be transmitted on E-mail counsel must have written

acknowledgment by client of the risk of violation of DR 4-101 which acknowledgment includes consent for communication thereof on the Internet or non-secure Intranet or other forms of proprietary networks, as agreed between counsel and client.").

Other bars indicated that lawyers must warn participants about the risks of communicating in this new way.

- North Carolina LEO RPC 215 (7/21/95) ("A lawyer has a professional obligation, pursuant to Rule 4 of the Rules of Professional Conduct, to protect and preserve the confidences of a client. This professional obligation extends to the use of communications technology. However, this obligation does not require that a lawyer use only infallibly secure methods of communication. Lawyers are not required to use paper shredders to dispose of waste paper so long as the responsible lawyer ascertains that procedures are in place which 'effectively minimize the risks that confidential information might be disclosed.' RPC 133. Similarly, a lawyer must take steps to minimize the risks that confidential information may be disclosed in a communication via a cellular or cordless telephone. First, the lawyer must use reasonable care to select a mode of communication that, in light of the exigencies of the existing circumstances, will best maintain any confidential information that might be conveyed in the communication. Second, if the lawyer knows or has reason to believe that the communication is over a telecommunication device that is susceptible to interception, the lawyer must advise the other parties to the communication of the risks of interception and the potential for confidentiality to be lost." (emphasis added)).

- Missouri Informal Op. 970161 (1997) ("[U]nless e-mail communications, in both directions, are secured through a quality encryption program, Attorney would need to advise clients and potential clients that communication by e-mail is not necessarily secure and confidential." (emphasis added)).

Other bars did not go quite as far, but indicated that lawyers should warn their clients of the dangers of communicating confidences using such new technologies.

- Arizona LEO 97-04 (1997) ("Lawyers may want to have the e-mail encrypted with a password known only to the lawyer and the client so that there is no inadvertent disclosure of confidential information. Alternatively, there is encryption software available to secure transmissions. E-mail should not be considered a 'sealed' mode of transmission. See American Civil Liberties Union v. Reno, 929 F. Supp. 824, 834 (E.D. Pa. 1996). At a minimum, e-mail transmissions to clients should include a cautionary statement either in the 're'

line or beginning of the communication, indicating that the transmission is 'confidential' 'Attorney/Client Privileged', similar to the cautionary language currently used on facsimile transmittals. Lawyers also may want to caution clients about transmitting highly sensitive information via e-mail if the e-mail is not encrypted or otherwise secure from unwanted interception.").

- South Carolina LEO 97-08 (6/1997) ("A lawyer should discuss with a client such options as encryption in order to safeguard against even inadvertent disclosure of sensitive or privileged information when using e-mail.").

- Pennsylvania Informal Op. 97-130 (9/26/97) ("A lawyer may use e-mail to communicate with or about a client without encryption; the lawyer should advise a client concerning the risks associated with the use of e-mail and obtain the client's consent either orally or in writing."; "A lawyer should not use unencrypted e-mail to communicate information concerning the representation, the interception of which would be damaging to the client, absent the client's consent after consultation."; "A lawyer may, but is not required to, place a notice on client e-mail warning that it is a privileged and confidential communication."; "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.").

- Alaska LEO 98-2 (1/16/98) ("In the Committee's view, a lawyer may ethically communicate with a client on all topics using electronic mail. However, an attorney should use good judgment and discretion with respect to the sensitivity and confidentiality of electronic messages to the client and, in turn, the client should be advised, and cautioned, that the confidentiality of unencrypted e-mail is not assured. Given the increasing availability of reasonably priced encryption software, attorneys are encouraged to use such safeguards when communicating particularly sensitive or confidential matters by e-mail, i.e., a communication that the attorney would hesitate to communicate by phone or by fax. . . . While e-mail has many advantages, increased security from interception is not one of them. However, by the same token, e-mail in its various forms is no less secure than the telephone or a fax transmission. Virtually any of these communications can be intercepted, if that is the intent. The Electronic Communications Privacy Act (as amended) makes it a crime to intercept communications made over phone lines, wireless communications, or the Internet, including e-mail, while in transit, when stored, or after receipt. See 18 U.S.C. § 2510 et[] seq. The Act also provides that '[n]o otherwise privileged wire, oral or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.' 18 U.S.C. §

2517(4). Accordingly, interception will not in most cases result in a waiver of the attorney-client privilege." (footnotes omitted)).

Some bars simply approved lawyers' general use of such electronic communications in most circumstances.

- New York City LEO 1994-11 (10/21/94) ("Lawyers should consider taking measures sufficient to ensure, with a reasonable degree of certainty, that communications are no more susceptible to interception than standard land-line telephone calls. At a minimum, given the potential risks involved, lawyers should be circumspect and discreet when using cellular or cordless telephones, or other similar means of communication, to discuss client matters, and should avoid, to the maximum reasonable extent, any revelation of client confidences or secrets. . . . A lawyer should exercise caution when engaging in conversations containing or concerning client confidences or secrets by cellular or cordless telephones or other communication devices readily capable of interception, and should consider taking steps sufficient to ensure the security of such conversations.").

- Vermont LEO 97-5 (1997) ("[T]he Committee decides that since (a) e-mail privacy is no less to be expected than in ordinary phone calls, and (b) unauthorized interception is illegal, a lawyer does not violate DR 4-101 by communicating with a client by e-mail, including the internet, without encryption. In various instances of a very sensitive nature, encryption might be prudent, in which case ordinary phone calls would obviously be deemed inadequate.").

- Illinois LEO 96-10 (5/16/97) ("In summary, the Committee concludes that because (1) the expectation of privacy for electronic mail is no less reasonable than the expectation of privacy for ordinary telephone calls, and (2) the unauthorized interception of an electronic message subject to the ECPA is illegal, a lawyer does not violate Rule 1.6 by communicating with a client using electronic mail services, including the Internet, without encryption. Nor is it necessary, as some commentators have suggested, to seek specific client consent to the use of unencrypted e-mail. The Committee recognizes that there may be unusual circumstances involving an extraordinarily sensitive matter that might require enhanced security measures like encryption. These situations would, however, be of the nature that ordinary telephones and other normal means of communication would also be deemed inadequate.").

- South Carolina LEO 97-08 (6/1997) ("There exists a reasonable expectation of privacy when sending confidential information through electronic mail

(whether direct link, commercial service, or Internet). Use of electronic mail will not affect the confidentiality of client communications under South Carolina Rule of Professional Conduct 1.6. . . . . The Committee concludes, therefore, that communication via e-mail is subject to a reasonable expectation of privacy. Because the expectation is no less reasonable that [sic] the expectation of privacy associated with regular mail, facsimile transmissions, or land-based telephone calls and because the interception of e-mail is now illegal under the Electronic Communications Privacy Act, 18 U.S.C. §§2701(a) and 2702(a), use of e-mail is proper under Rule 1.6.").

- North Dakota LEO 97-09 (9/4/97) ("More recent and, in the view of this Committee, more reasoned opinions, have concluded that a lawyer may communicate routine matters with clients, and/or other lawyers jointly representing clients, via unencrypted electronic mail (e-mail) transmitted over commercial services . . . or the Internet without violating the aforesaid rule [1.6] unless unusual circumstances require enhanced security measures.").

- Philadelphia LEO 98-6 (3/1998) ("A thoughtful practitioner can communicate with persons on the Internet as the inquirer intends and steer clear of ethical violations as long as he or she is mindful of the rules.").

- District of Columbia LEO 281 (9/18/98) ("In most circumstances, transmission of confidential information by unencrypted electronic mail does not per se violate the confidentiality rules of the legal profession. However, individual circumstances may require greater means of security.").

- Maine LEO 195 (6/30/08) ("The Commission concludes that, as a general matter and subject to appropriate safeguards, an attorney may utilize unencrypted e-mail without violating the attorney's ethical obligation to maintain client confidentiality.").

In 1999, the ABA settled on this position.

- ABA LEO 413 (3/10/99) (lawyers may ethically communicate client confidences using unencrypted email sent over the Internet, but should discuss with their clients different ways of communicating client confidences that are "so highly sensitive that extraordinary measures to protect the transmission are warranted").

As technology improved, the risks of being overheard or intercepted diminished. More importantly, the law caught up with the technology, and now renders illegal most interception of such electronic communications. These changes have created a legal

expectation of confidentiality, which renders ethically permissible the use of such communications.

After all, every state and bar has long held that lawyers normally can use the United States Postal Service to communicate client confidences -- yet anyone could steal an envelope from a mailbox and rip it open.

(d) More recently, the analysis has shifted to newer forms of technology. Not surprisingly, bars have warned about the danger of using various wireless technologies that might easily be intercepted.

- California LEO 2010-179 (2010) ("With regard to the use of a public wireless connection, the Committee believes that, due to the lack of security features provided in most public wireless access locations, Attorney risks violating his duties of confidentiality and competence in using the wireless connection at the coffee shop to work on Client's matter unless he takes appropriate precautions, such as using a combination of file encryption, encryption of wireless transmissions and a personal firewall. Depending on the sensitivity of the matter, Attorney may need to avoid using the public wireless connection entirely or notify Client of possible risks attendant to his use of the public wireless connection, including potential disclosure of confidential information and possible waiver of attorney-client privilege or work product protections, and seek her informed consent to do so." (footnote omitted)).

- ABA LEO 459 (8/4/11) (explaining that a lawyer representing an employee who might communicate with the lawyer using the employer's email system should warn the employee that the employer's policy might allow it to access such communications; noting that lawyers ordinarily should take the same step if they represent clients using library or hotel computers, or using a home computer that can be accessed by adverse family members; acknowledging that this disclosure duty arises "once the lawyer has reason to believe that there is a significant risk" that the client might communicate through means that third parties can access.).

(e) A new wave of ethics opinions also deal with various forms of data storage, such as the "cloud." Bars dealing with such storage do not adopt per se prohibitions. Instead, they simply warn the users to be careful.

- New Jersey LEO 701 (4/24/06) (allowing law firms to keep their files in an electronic format as long as the law firm exercises reasonable care to preserve the confidences of its clients; "What the term 'reasonable care' means in a particular context is not capable of sweeping characterizations or broad pronouncements. But it certainly may be informed by the technology reasonably available at the time to secure data against unintentional disclosure"; "when client confidential information is entrusted in unprotected form, even temporarily, to someone outside the firm, it must be under a circumstance in which the outside party is aware of the lawyer's obligation of confidentiality, and is itself obligated, whether by contract, professional standards, or otherwise, to assist in preserving it. Lawyers typically use messengers, delivery services, document warehouses, or other outside vendors, in which physical custody of client sensitive documents is entrusted to them even though they are not employed by the firm. The touchstone in using 'reasonable care' against unauthorized disclosure is that: (1) the lawyer has entrusted such documents to an outside provider under circumstances in which there is an enforceable obligation to preserve confidentiality and security, and (2) use is made of available technology to guard against reasonably foreseeable attempts to infiltrate the data. If the lawyer has come to the prudent professional judgment he has satisfied both these criteria, then 'reasonable care' will have been exercised. In the specific context presented by the inquirer, where a document is transmitted to him by email over the Internet, the lawyer should password a confidential document (as is now possible in all common electronic formats, including PDF), since it is not possible to secure the Internet itself against third party access.").

- North Carolina LEO 2008-5 (7/18/08) (explaining that lawyers may store confidential client files in a website that can be accessed by the internet, but must be careful to protect confidentiality).

- Missouri LEO 127 (5/19/09) ("Rule 4-1.15(j) requires attorneys to maintain the file for a period of ten years, or for such other period as agreed upon with the client. However, no rule or previous opinion addresses the issue of whether the file may be maintained in electronic form.").

- Arizona LEO 09-04 (12/2009) ("Lawyers providing an online file storage and retrieval system for client access of documents must take reasonable precautions to protect the security and confidentiality of client documents and information. Lawyers should be aware of limitations in their competence regarding online security measures and take appropriate actions to ensure that a competent review of the proposed security measures is conducted. As technology advances over time, a periodic review of the reasonability of security precautions may be necessary.").

- Alabama LEO 2010-02 (2010) (analyzing various issues relating to client files; allowing lawyers to retain the client files in the "cloud" as long as they take reasonable steps to maintain the confidentiality of the data; "The Disciplinary Commission . . . has determined that a lawyer may use 'cloud computing' or third-party providers to store client data provided that the attorney exercises reasonable care in doing so.").

- California LEO 2010-179 (2010) ("Whether an attorney violates his or her duties of confidentiality and competence when using technology to transmit or store confidential client information will depend on the particular technology being used and the circumstances surrounding such use. Before using a particular technology in the course of representing a client, an attorney must take appropriate steps to evaluate: 1) the level of security attendant to the use of that technology, including whether reasonable precautions may be taken when using the technology to increase the level of security; 2) the legal ramifications to a third party who intercepts, accesses or exceeds authorized use of the electronic information; 3) the degree of sensitivity of the information; 4) the possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product; 5) the urgency of the situation; and 6) the client's instructions and circumstances, such as access by others to the client's devices and communications."; "Attorney takes his laptop computer to the local coffee shop and accesses a public wireless Internet connection to conduct legal research on the matter and email Client. He also takes the laptop computer home to conduct the research and email Client from his personal wireless system."; "[A]n attorney should consider the following before using a specific technology: . . . Whether reasonable precautions may be taken when using the technology to increase the level of security. As with the above-referenced views expressed on email, the fact that opinions differ on whether a particular technology is secure suggests that attorneys should take reasonable steps as a precautionary measure to protect against disclosure. For example, depositing confidential client mail in a secure postal box or handing it directly to the postal carrier or courier is a reasonable step for an attorney to take to protect the confidentiality of such mail, as opposed to leaving the mail unattended in an open basket outside of the office door for pick up by the postal service. Similarly, encrypting email may be a reasonable step for an attorney to take in an effort to ensure the confidentiality of such communications remain so when the circumstance calls for it, particularly if the information at issue is highly sensitive and the use of encryption is not onerous. To place the risks in perspective, it should not be overlooked that the very nature of digital technologies makes it easier for a third party to intercept a much greater amount of confidential information in a much shorter period of time than would be required to transfer the same amount of data in hard copy format. In this regard, if an attorney can readily employ encryption when using public wireless connections and has enabled

his or her personal firewall, the risks of unauthorized access may be significantly reduced. Both of these tools are readily available and relatively inexpensive, and may already be built into the operating system. Likewise, activating password protection features on mobile devices, such as laptops and PDAs, presently helps protect against access to confidential client information by a third party if the device is lost, stolen or left unattended." (footnotes omitted); "The greater the sensitivity of the information, the less risk an attorney should take with technology. If the information is of a highly sensitive nature and there is a risk of disclosure when using a particular technology, the attorney should consider alternatives unless the client provides informed consent. As noted above, if another person may have access to the communications transmitted between the attorney and the client (or others necessary to the representation), and may have an interest in the information being disclosed that is in conflict with the client's interest, the attorney should take precautions to ensure that the person will not be able to access the information or should avoid using the technology. These types of situations increase the likelihood for intrusion." (footnote omitted); "If use of the technology is necessary to address an imminent situation or exigent circumstances and other alternatives are not reasonably available, it may be reasonable in limited cases for the attorney to do so without taking additional precautions."; "With regard to the use of a public wireless connection, the Committee believes that, due to the lack of security features provided in most public wireless access locations, Attorney risks violating his duties of confidentiality and competence in using the wireless connection at the coffee shop to work on Client's matter unless he takes appropriate precautions, such as using a combination of file encryption, encryption of wireless transmissions and a personal firewall. Depending on the sensitivity of the matter, Attorney may need to avoid using the public wireless connection entirely or notify Client of possible risks attendant to his use of the public wireless connection, including potential disclosure of confidential information and possible waiver of attorney-client privilege or work product protections, and seek her informed consent to do so." (footnote omitted); "Finally, if Attorney's personal wireless system has been configured with appropriate security features, the Committee does not believe that Attorney would violate his duties of confidentiality and competence by working on Client's matter at home. Otherwise, Attorney may need to notify Client of the risks and seek her informed consent, as with the public wireless connection." (footnotes omitted)).

- New York LEO 842 (9/10/10) ("A lawyer may use an online data storage system to store and back up client confidential information provided that the lawyer takes reasonable care to ensure that confidentiality will be maintained in a manner consistent with the lawyer's obligations under Rule 1.6. In addition, the lawyer should stay abreast of technological advances to ensure

that the storage system remains sufficiently advanced to protect the client's information, and should monitor the changing law of privilege to ensure that storing the information online will not cause loss or waiver of any privilege.").

- Florida LEO 10-2 (9/24/10) ("The Professional Ethics Committee has been asked by the Florida Bar Board of Governors to write an opinion addressing the ethical obligations of lawyers regarding information stored on hard drives. An increasing number of devices such as computers, printers, copiers, scanners, cellular phones, personal digital assistants ('PDAs'), flash drives, memory sticks, facsimile machines and other electronic or digital devices (collectively, 'Devices') now contain hard drives or other data storage media . . . (collectively, 'Hard Drives' or 'Storage Media') that can store information. . . . Because many lawyers use these Devices to assist in the practice of law and in doing so intentionally and unintentionally store their clients' information on these Devices, it is important for lawyers to recognize that the ability of the Devices to store information may present potential ethical problems for lawyers."; "For example, when a lawyer copies a document using a photocopier that contains a hard drive, the document is converted into a file that is stored on the copier's hard drive. This document usually remains on the hard drive until it is overwritten or deleted. The lawyer may choose to later sell the photocopier or return it to a leasing company. Disposal of the device without first removing the information can result in the inadvertent disclosure of confidential information."; "If a lawyer chooses to use these Devices that contain Storage Media, the lawyer has a duty to keep abreast of changes in technology to the extent that the lawyer can identify potential threats to maintaining confidentiality. The lawyer must learn such details as whether the Device has the ability to store confidential information, whether the information can be accessed by unauthorized parties, and who can potentially have access to the information. The lawyer must also be aware of different environments in which confidential information is exposed such as public copy centers, hotel business centers, and home offices. The lawyer should obtain enough information to know when to seek protection and what Devices must be sanitized, or cleared of all confidential information, before disposal or other disposition. Therefore, the duty of competence extends from the receipt, i.e., when the lawyer obtains control of the Device, through the Device's life cycle, and until disposition of the Device, including after it leaves the control of the lawyer."; "A lawyer has a duty to obtain adequate assurances that the Device has been stripped of all confidential information before disposition of the Device. If a vendor or other service provider is involved in the sanitization of the Device, such as at the termination of a lease agreement or upon sale of the Device, it is not sufficient to merely obtain an agreement that the vendor will sanitize the Device upon sale or turn back of the Device. The lawyer has an affirmative obligation to ascertain that the sanitization has been accomplished, whether by some type

of meaningful confirmation, by having the sanitization occur at the lawyer's office, or by other similar means."; "Further, a lawyer should use care when using Devices in public places such as copy centers, hotel business centers, and outside offices where the lawyer and those under the lawyer's supervision have little or no control. In such situations, the lawyer should inquire and determine whether use of such Devices would preserve confidentiality under these rules."; concluding that when a lawyer "chooses to use Devices that contain Storage Media such as printers, copiers, scanners, and facsimile machines must take reasonable steps to ensure that client confidentiality is maintained and that the Device is sanitized before disposition, including: (1) identification of the potential threat to confidentiality along with the development and implementation of policies to address the potential threat to confidentiality; (2) inventory of the Devices that contain Hard Drives or other Storage Media; (3) supervision of nonlawyers to obtain adequate assurances that confidentiality will be maintained; and (4) responsibility of sanitization of the Device by requiring meaningful assurances from the vendor at the intake of the Device and confirmation or certification of the sanitization at the disposition of the Device.").

- District of Columbia LEO 357 (12/2010) ("As a general matter, there is no ethical prohibition against maintaining client records solely in electronic form, although there are some restrictions as to particular types of documents. Lawyers and clients may enter into reasonable agreements addressing how the client's files will be maintained, how copies will be provided to the client if requested, and who will bear what costs associated with providing the files in a particular form; entering into such agreements is prudent and can help avoid misunderstandings. Assuming no such agreement was entered into prior to the termination of the relationship, however, a lawyer must comply with a reasonable request to convert electronic records to paper form. In most circumstances, a former client should bear the cost of converting to paper form any records that were properly maintained in electronic form. However, the lawyer may be required to bear the cost if (1) neither the former client nor substitute counsel (if any) can access the electronic records without undue cost or burden; and (2) the former client's need for the records in paper form outweighs the burden on the lawyer of furnishing paper copies. Whether (1) a request for electronic files to be converted to paper form is reasonable and (2) the former client's need for the files in paper form outweighs the lawyer's burden of providing them (such that the lawyer should bear the cost) should be considered both from the standpoint of a reasonable client and a reasonable lawyer and should take into account the technological sophistication and resources of the former client."; "Even if the lawyer must bear the cost of converting the electronic records to paper form, however, the lawyer may charge the former client for the reasonable time and labor expense associated with locating and reviewing the electronic records where

such time and expense results from special instructions or requests from the former client. See D.C. Legal Ethics Op. 283 (1998) ('review of the files is being undertaken for the benefit of the client and, like other forms of client services, may be compensated by a reasonable fee').").

- Vermont LEO 2010-6 (2011) ("The Vermont Bar Association Professional Responsibility Section agrees with the consensus view that has emerged with respect to use of SaaS [Software as a Service]. Vermont lawyers' obligations in this area include providing competent representation, maintaining confidentiality of client information, and protecting client property in their possession. As new technologies emerge, the meaning of 'competent representation' may change, and lawyers may be called upon to employ new tools to represent their clients. Given the potential for technology to grow and change rapidly, this Opinion concurs with the views expressed in other States, that establishment of specific conditions precedent to using SaaS would not be prudent. Rather, Vermont lawyers must exercise due diligence when using new technologies, including Cloud Computing. While it is not appropriate to establish a checklist of factors a lawyer must examine, the examples given above are illustrative of factors that may be important in a given situation. Complying with the required level of due diligence will often involve a reasonable understanding of: (a) the vendor's security system; (b) what practical and foreseeable limits, if any, may exist to the lawyer's ability to ensure access to, protection of, and retrieval of the data; (c) the material terms of the user agreement; (d) the vendor's commitment to protecting confidentiality of the data; (e) the nature and sensitivity of the stored information; (f) notice provisions if a third party seeks or gains (whether inadvertently or otherwise) access to the data; and (g) other regulatory, compliance, and document retention obligations that may apply based upon the nature of the stored data and the lawyer's practice. In addition, the lawyer should consider: (a) giving notice to the client about the proposed method for storing client data; (b) having the vendor's security and access systems reviewed by competent technical personnel; (c) establishing a system for periodic review of the vendor's system to be sure the system remains current with evolving technology and legal requirements; and (d) taking reasonable measures to stay apprised of current developments regarding SaaS systems and the benefits and risks they present.").

- Pennsylvania LEO 2011-200 (2011) (describing the steps that a lawyer should take when dealing with "cloud" computing, including detailed lists of required steps and descriptions of what other states have held on this issue; "If an attorney uses a Smartphone or an iPhone, or uses web-based electronic mail (e-mail) such as Gmail, Yahoo!, Hotmail or AOL Mail, or uses products such as Google Docs, Microsoft Office 365 or Dropbox, the attorney is using 'cloud computing.' While there are many technical ways to describe

cloud computing, perhaps the best description is that cloud computing is merely 'a fancy way of saying stuff's not on your computer.'"; "The use of 'cloud computing,' and electronic devices such as cell phones that take advantage of cloud services, is a growing trend in many industries, including law. Firms may be eager to capitalize on cloud services in an effort to promote mobility, flexibility, organization and efficiency, reduce costs, and enable lawyers to focus more on legal, rather than technical and administrative issues. However, lawyers must be conscientious about maintaining traditional confidentiality, competence, and supervisory standards."; "This Committee concludes that the Pennsylvania Rules of Professional Conduct require attorneys to make reasonable efforts to meet their obligations to ensure client confidentiality, and confirm that any third-party service provider is likewise obligated."; "Accordingly, as outlined above, this Committee concludes that, under the Pennsylvania Rules of Professional Conduct an attorney may store confidential material in 'the cloud.' Because the need to maintain confidentiality is crucial to the attorney-client relationship, attorneys using 'cloud' software or services must take appropriate measures to protect confidential electronic communications and information. In addition, attorneys may use email but must, under appropriate circumstances, take additional precautions to assure client confidentiality.").

- Oregon LEO 2011-188 (11/2011) ("Lawyer may store client materials on a third-party server so long as Lawyer complies with the duties of competence and confidentiality to reasonably keep the client's information secure within a given situation. To do so, the lawyer must take reasonable steps to ensure that the storage company will reliably secure client data and keep information confidential. Under certain circumstances, this may be satisfied though a third-party vendor's compliance with industry standards relating to confidentiality and security, provided that those industry standards meet the minimum requirements imposed on the Lawyer by the Oregon RPC's. This may include, among other things, ensuring the service agreement requires the vendor to preserve the confidentiality and security of the materials. It may also require that vendor notify Lawyer of any nonauthorized third-party access to the materials. Lawyer should also investigate how the vendor backs up and stores its data and metadata to ensure compliance with the Lawyer's duties." (footnote omitted); "Although the third-party vendor may have reasonable protective measures in place to safeguard the client materials, the reasonableness of the steps taken will be measured against the technology 'available at the time to secure data against unintentional disclosure.' As technology advances, the third-party vendor's protective measures may become less secure or obsolete over time. Accordingly, Lawyer may be required to reevaluate the protective measures used by the third-party vendor to safeguard the client materials." (footnotes omitted)).

- Washington LEO 2215 (2012) ("A lawyer may use online data storage systems to store and back up client confidential information as long as the lawyer takes reasonable care to ensure that the information will remain confidential and that the information is secure against risk of loss.").

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**.

b 2/14

Inadvertent Transmission of Communications

Hypothetical 2

A lawyer on the other side of one of your largest cases has always relied on his assistant to send out his emails. He must just have hired a new assistant, because several "incidents" in the past few months have raised some ethics issues.

(a) A few weeks ago, you received a frantic call from the other lawyer saying that his assistant had accidently just sent you an email with an attachment that was intended for his client and not for you. He tells you that the attachment contains his litigation strategy, and warned you not to open and read it. You quickly find the email in your "in box," and wonder about your obligations.

May you open and read the attachment?

MAYBE

(b) Last week you opened an email from the other lawyer. It seems to be some kind of status report. About halfway through reading it, you realize that it is the other lawyer's status report to her client.

Must you refrain from reading the rest of the status report?

MAYBE

(c) You just opened an email from the other lawyer. After you read several paragraphs, you realize that the email was intended for a governmental agency. The email seems very helpful to your case, but would not have been responsive to any discovery requests because your adversary created it after the agreed-upon cut-off date for producing documents.

Must you refrain from reading the remainder of the email?

NO (PROBABLY)

(d) Must you advise your client of these inadvertently transmitted communications from the other lawyer, and allow the client to decide how you should act?

YES (PROBABLY)

(e) Must the other lawyer advise his client of the mistakes he has made?

YES (PROBABLY)

Analysis

This issue has vexed the ABA, state bars and state courts for many years.

ABA Approach

(a)-(b) In the early 1990s, the ABA started a trend in favor of requiring the return of such documents, but then shifted course in 2002. In 1992, the ABA issued a surprisingly strong opinion directing lawyers to return obviously privileged or confidential documents inadvertently sent to them outside the document production context.

In ABA LEO 368, the ABA indicated that

> as a matter of ethical conduct contemplated by the precepts underlying the Model Rules, [the lawyer] (a) should not examine the materials ["that appear on their face to be subject to the attorney-client privilege or otherwise confidential"] once the inadvertence is discovered, (b) should notify the sending lawyer of their receipt and (c) should abide by the sending lawyer's instructions as to their disposition.

ABA LEO 368 (11/10/92).

As explained below, many bars and courts took the ABA's lead in imposing some duty on lawyers receiving obviously privileged or confidential documents to return them forthwith.

However, ten years later the ABA retreated from this position. As a result of the Ethics 2000 Task Force Recommendations (adopted in 2002), ABA Model Rule 4.4(b) now indicates that

> [a] lawyer who receives a document relating to the representation of the lawyer's client and knows or

> reasonably should know that the document was inadvertently sent shall promptly notify the sender.

ABA Model Rule 4.4(b) (emphasis added).

Comment [2] to this rule reveals that in its current form the ABA's approach is both broader and narrower than the ABA had earlier announced in its Legal Ethics Opinions.

ABA Model Rule 4.4(b) is broader because it applies to documents "that were mistakenly sent or produced by opposing parties or their lawyers," thus clearly covering document productions. ABA Model Rule 4.4 cmt. [2] (emphasis added).

The rule is narrower than the earlier legal ethics opinion because it explains that:

> If a lawyer knows or reasonably should know that such a document was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the original document, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document that the lawyer knows or reasonably should know may have been wrongfully obtained by the sending person.

ABA Model Rule 4.4 cmt. [2] (emphasis added).

A comment to ABA Model Rule 4.4 contains a remarkable statement that would seem to allow lawyers to read inadvertently transmitted documents that they know were not meant for them.

> Some lawyers may choose to return a document unread, for example, when the lawyer learns before receiving the document that it was inadvertently sent to the wrong address.

ABA Model Rule 4.4 cmt. [3] (emphasis added).[1]

Thus, the ABA backed off its strict return requirement and now defers to legal principles stated by other bars or courts.

As a result of these changes in the ABA Model Rules, the ABA took the very unusual step of withdrawing the earlier ABA LEO that created the "return unread" doctrine.[2]

Restatement

The Restatement would allow use of inadvertently transmitted privileged information under certain circumstances.

> If the disclosure operates to end legal protection for the information, the lawyer may use it for the benefit of the lawyer's own client and may be required to do so if that would advance the client's lawful objectives . . . . That would follow, for example, when an opposing lawyer failed to object to privileged or immune testimony . . . . The same legal result may follow when divulgence occurs inadvertently outside of court . . . . The receiving lawyer may be required to consult with that lawyer's client . . . about whether to take advantage of the lapse. If the person whose information was disclosed is entitled to have it suppressed or excluded . . . , the receiving lawyer must either return the information or hold it for disposition after appropriate notification to the opposing person or that person's counsel. A court may suppress material after an inadvertent disclosure that did not

[1] ABA Model Rule 4.4 cmt. [3] ("Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.").

[2] ABA LEO 437 (10/1/05) (citing February 2002 ABA Model Rules changes; withdrawing ABA LEO 368; holding that ABA Model Rule 4.4(b) governs the conduct of lawyers who receive inadvertently transmitted privileged communications from a third party; noting that Model Rule 4.4(b) "only obligates the receiving lawyer to notify the sender of the inadvertent transmission promptly. The rule does not require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the sending lawyer.").

> amount to a waiver of the attorney-client privilege . . . . Where deceitful or illegal means were used to obtain the information, the receiving lawyer and that lawyer's client may be liable, among other remedies, for damages for harm caused or for injunctive relief against use or disclosure. The receiving lawyer must take steps to return such confidential client information and to keep it confidential from the lawyer's own client in the interim. Similarly, if the receiving lawyer is aware that disclosure is being made in breach of trust by a lawyer or other agent of the opposing person, the receiving lawyer must not accept the information. An offending lawyer may be disqualified from further representation in a matter to which the information is relevant if the lawyer's own client would otherwise gain a substantial advantage . . . . A tribunal may also order suppression or exclusion of such information.

Restatement (Third) of Law Governing Lawyers § 60 cmt. m (2000).

State Bar Opinions

States began to adopt, adopt variations of, or reject the ABA Model Rule version of Rule 4.4(b).

States are moving at varying speeds, and (not surprisingly) taking varying approaches.

First, some states have simply adopted the ABA version. See, e.g., Florida Rule 4-4.4(b).[3]

Second, some states have adopted a variation of the ABA Model Rule that decreases lawyers' responsibility upon receipt of an inadvertently transmitted communication or document. For instance, as of January 1, 2010, Illinois adopted a

[3] Interestingly, despite adopting the ABA "simply notify the sender" approach, Florida has also prohibited a receiving lawyer from searching for metadata in an electronic document received from a third party (which at best could be characterized as having been "inadvertently" included with the visible parts of such a document). Florida LEO 06-2 (9/15/06).

version of Rule 4.4(b) that only requires the receiving lawyer to notify the sending lawyer if the lawyer "knows" of the inadvertence -- explicitly deleting the "or reasonably should know" standard found in the ABA Model Rule 4.4(b).[4]

Third, some states have adopted the ABA Model Rule approach, but warn lawyers that case law might create a higher duty. For instance, the New York state courts adopted the ABA version of Rule 4.4(b), but the New York State Bar adopted comments with such an explicit warning.[5]

Fourth, some jurisdictions have explicitly retained a higher duty for the receiving lawyer. For instance, Washington, D.C. Rule 4.4(b) uses only a "knows" and not a "knows or reasonably should know" standard -- but require receiving lawyers who know of the inadvertence to stop reading the document. D.C. Rule 4.4(b) ("A lawyer who receives a writing relating to the representation of a client and knows, before examining

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[4] Illinois Rule 4.4(b) ("A lawyer who receives a document relating to the representation of the lawyer's client and knows that the document was inadvertently sent shall promptly notify the sender.").

Interestingly, Illinois formerly prohibited lawyers from reading and using inadvertently transmitted communication once the lawyer realized the inadvertence. Illinois LEO 98-04 (1/1999). Thus, Illinois moved from a variation of the "return unread" approach beyond the ABA "simply notify the sender" approach to a much more harsh approach -- which requires the receiving lawyer to notify the sender of the receipt only if the receiving lawyer actually "knows" of the inadvertent nature of the communication.

Somewhat ironically, despite the Illinois Bar's move in that direction, one Illinois federal court pointed to the new Illinois rule's simply "notify the sender" approach in prohibiting lawyers receiving inadvertently produced documents in litigation from using the documents -- explaining that "[r]equiring the receiving lawyer to notify the sending lawyer is clearly at odds with any purported duty on the part of the receiving lawyer to use the information for the benefit of his or her client." Coburn Group, LLC v. Whitecap Advisors LLC, 640 F. Supp. 2d 1032, 1043 (N.D. Ill. 2009).

[5] New York Rule 4.4 cmt. [2] (2009) "Although this Rule does not require that the lawyer refrain from reading or continuing to read the document, a lawyer who reads or continues to read a document that contains privileged or confidential information may be subject to court-imposed sanctions, including disqualification and evidence-preclusion."); New York Rule 4.4 cmt. [3] (2009) ("[T]his Rule does not subject a lawyer to professional discipline for reading and using that information." Nevertheless, substantive law or procedural rules may require a lawyer to refrain from reading an inadvertently sent document, or to return the document to the reader, or both.").

the writing, that it has been inadvertently sent, shall not examine the writing, but shall notify the sending party and abide by the instructions of the sending party regarding the return or destruction of the writing.").[6]

Fifth, some states have not adopted any variation of ABA Model Rule 4.4(b), and continue to address the issues through legal ethics opinions. See, e.g., Virginia LEO 1702 (11/24/97) (adopting the reasoning of ABA LEO 368; explaining that once the lawyer recognizes a document as confidential, the lawyer "has an ethical duty to notify opposing counsel, to honor opposing counsel's instructions about disposition of the document, and not to use the document in contravention of opposing counsel's instructions"); Virginia LEO 1786 n.7 (12/10/04) (acknowledging that the ABA has changed its Model Rules to replace a "return unread" policy with a notice requirement, but reiterating Virginia's approach articulated in Virginia LEO 1702).

Courts' Approach

Court decisions have also reached differing conclusions. Some courts have allowed lawyers to take advantage of their adversary's mistake in transmitting privileged or confidential documents. These courts normally do not even mention the ethics issues, but instead focus on attorney-client privilege or work product waiver issues.

Other decisions indicate that lawyers who fail to notify the adversary or return inadvertently transmitted privileged documents risk disqualification or sanctions.

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[6] A comment to that rule provides more explanation. D.C. Rule 4.4 cmt. [2] ("Consistent with Opinion 256, paragraph (b) requires the receiving lawyer to comply with the sending party's instruction about disposition of the writing in this circumstances [sic], and also prohibits the receiving lawyer from reading or using the material. ABA Model Rule 4.4 requires the receiving lawyer only to notify the sender in order to permit the sender to take protective measures, but Paragraph (b) of the D.C. Rule 4.4 requires the receiving lawyer to do more.").

- Greg Mitchell, E-Mail "Oops" Ends With General Counsel Being Booted From Case, The Recorder, Jan. 4, 2011 ("Hagey represents a handful of engineers in Oakland who in September left engineering and design firm Arcadis to start their own shop. Apparently worried their former employer would try to interfere, they hired Braun Hagey and later conferred by e-mail -- with autocomplete inserting an old Arcadis address for one of the former employees. So four message threads, including one attaching a draft declaration, were delivered to Arcadis, where an e-mail monitoring system routed them to legal."; "In a declaration, Hagey said the plaintiffs didn't realize their e-mails had been intercepted until lawyers at Gordon & Rees filed a counterclaim that references the day the former employees held a meeting -- a date, he said, Gordon & Rees could only have learned from the e-mails. Reached Wednesday, Hagey declined to comment publicly."; "In a declaration, Elizabeth Spangler, an in-house lawyer at Arcadis, acknowledged receiving the threads and reviewing the draft complaint -- at which point she said she realized the material was probably privileged. She said, however, that there were no great revelations in the material, and she didn't share it with anyone. She did say, though, that she must have inadvertently given Gordon & Rees the date on which the exiting employees met. She also said she later learned her boss, Arcadis' general counsel Steven Niparko, had also briefly reviewed the e-mail."; "On December 17, United States District Judge Jeffrey White ordered that Arcadis replace Gordon & Rees with new, untainted counsel. He also ordered Spangler off the case, and said the General Counsel must be 'removed from all aspects of the day-to-day management.' And he ordered Arcadis to pay fees and costs of $40,000.").

- Rico v. Mitsubishi Motors Corp., 171 P.3d 1092, 1096, 1097, 1099, 1099-1100, 1100-01 (Cal. 2007) (upholding the disqualification of a plaintiff's lawyer who somehow came into possession of and then used notes created by defendant's lawyer to impeach defendant's expert; noting that defendant's lawyer claimed that plaintiff's lawyer took the notes from his briefcase while alone in a conference room, while the plaintiff's lawyer claimed that he received them from the court reporter -- although she had no recollection of that and generally would not have provided the notes to one of the lawyers; agreeing with the trial court that the notes were "absolutely privileged by the work product rule" because they amounted to "an attorney's written notes about a witness's statements"; "When a witness's statement and the attorney's impressions are inextricably intertwined, the work product doctrine provides that absolute protection is afforded to all of the attorney's notes."; explaining that "[t]he document is not a transcript of the August 28, 2002 strategy session, nor is it a verbatim record of the experts' own statements. It contains Rowley's summaries of points from the strategy session, made at Yukevich's direction. Yukevich also edited the document in order to add his own thoughts and comments, further inextricably intertwining his personal

impressions with the summary."; not dealing with the attorney-client privilege protection; rejecting the argument that the notes amounted to an expert's report; "Although the notes were written in dialogue format and contain information attributed to Mitsubishi's experts, the document does not qualify as an expert's report, writing, declaration, or testimony. The notes reflect the paralegal's summary along with counsel's thoughts and impressions about the case. The document was absolutely protected work product because it contained the ideas of Yukevich and his legal team about the case."; adopting a rule prohibiting a lawyer from examining materials "where it is reasonably apparent that the materials were provided or made available through inadvertence"; acknowledging that the defense lawyer's notes were not "clearly flagged as confidential," but concluding that the absence of such a label was not dispositive; noting that the plaintiff's lawyer "admitted that after a minute or two of review he realized the notes related to the case and that Yukevich did not intend to reveal them"; ultimately adopting an objective rather than a subjective standard on this issue; also rejecting plaintiff's lawyer's argument that he could use the work product protected notes because they showed that the defense expert had lied; agreeing with the lower court and holding that "'once the court determines that the writing is absolutely privileged, the inquiry ends. Courts do not make exceptions based on the content of the writing.' Thus, 'regardless of its potential impeachment value, Yukevich's personal notes should never have been subject to opposing counsel's scrutiny and use.'"; also rejecting plaintiff's argument that the crime fraud exception applied, because the statutory crime fraud exception applies only in a law enforcement action and otherwise does not trump the work product doctrine).

- Conley, Lott, Nichols Mach. Co. v. Brooks, 948 S.W.2d 345, 349 (Tex. App. 1997) (although a lawyer's failure to return a purloined privileged document would not automatically result in disqualification, "what he did after he obtained the documents must also be considered"; disqualifying the lawyer in this case because his retention and use of the knowingly privileged documents amounted to "conduct [that] fell short of the standard that an attorney who receives unsolicited confidential information must follow").

- Am. Express v. Accu-Weather, Inc., Nos. 91 Civ. 6485 (RWS), 92 Civ. 705 (RWS), 1996 WL 346388 (S.D.N.Y. June 25, 1996) (imposing sanctions on a lawyer for what the court considered the unethical act of opening a Federal Express package and reviewing a privileged document after receiving a telephone call and letter advising that the sender had inadvertently included a privileged document in the package and asking that the package not be opened).

Conclusion

Thus, lawyers seeking guidance on the issue of inadvertently transmitted communications must check the applicable ethics rules, any legal ethics opinions analyzing those rules (remembering that some of the old legal ethics opinions might now be inoperative), and any case law applying the ethics rules, other state statutes, or any governing common law principles that supplement or even trump the ethics rules. Lawyers should remember that many judges have their own view of ethics and professionalism -- and might well consider lawyers seeking to diligently represent their clients in reviewing inadvertently transmitted communications as stepping over the line and thus acting improperly.

(c) The 1992 ABA ethics opinion articulating a "do not read" rule applied that principle only to materials "that appear on their face to be subject to the attorney-client privilege or otherwise confidential" privileged communications. In contrast, ABA Model Rule 4.4(b) on its face applies to any document meeting the Rule 4.4(b) standard. In other words, it is not limited to documents containing the other client's confidences, or to privileged communications between the other client and her lawyer.

(d) Only one state has articulated a principle that probably most lawyers would not welcome -- that they have a duty to communicate with their client about how the lawyer should treat an inadvertently transmitted communication he or she receives.

- Pennsylvania LEO 2011-010 (3/2/11) (addressing the following situation: "You advised that during the course of settlement negotiations, opposing clients and opposing counsel have on several occasions copied you on e-mails between them which related to the litigation matter. You properly advised opposing counsel of these emails, and you erased them and asked him to advise his clients to stop copying you on emails."; noting that the

> lawyer properly complied with Rule 4.4(b) by advising the opposing lawyer of the inadvertence, but also finding that the lawyer was obligated to consult with his client about what steps to take; "You are required by PA rule of Professional Conduct ("RPC") 1.1 to represent your client effectively and competently. In order to do so, you must evaluate the nature of the information received in the emails, the available steps to protect your client's interests in light of this information, and the advantages and disadvantages of disclosing this information to the client and utilizing the information."; "<u>These rules require that you make the decision whether and how to use the information in the emails from opposing counsel in consultation with your client. It is necessary to advise the client of the nature of the information, if not the specific content, in order to have that discussion.</u>" (emphasis added)).

No other state has taken this position, although it certainly seems consistent with lawyers' general duty of disclosure to their clients.

Under ABA Model Rule 1.4,

> a lawyer shall . . . keep the client reasonably informed about the status of the matter.

ABA Model Rule 1.4(a)(3). On the other hand, the version of ABA Model Rule 4.4 adopted in 2002 seems to give lawyer's discretion about how to proceed.

> Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment <u>ordinarily</u> reserved to the lawyer.

ABA Model Rule 4.4 cmt. [3] (emphasis added).[7]

If the client insists on his or her lawyer reading the inadvertently transmitted communication, the lawyer might try to talk the client out of such a hardline position. Of course, clients probably would not be impressed with such a lawyer's argument that he

[7] ABA Model Rule 4.4 cmt. [3] ("Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.").

or she might make the same mistake in the future and should build up sufficient "good will" with the adversary's lawyer in case the client's lawyer needs a similar favor in the future. Many clients would dismiss such an argument, justifiably pointing out that in that circumstance the client can simply sue his or her lawyer for malpractice -- so the client does not need any "good will" from the adversary.

If the lawyer cannot dissuade the client from insisting that the lawyer read the inadvertently transmitted communication, the lawyer might withdraw from the representation. Under ABA Model Rule 1.16(b)(4) the lawyer may withdraw even if the withdrawal will have a "material adverse effect on the interests of the client" if (among other things)

> the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement.

ABA Model Rule 1.16(b)(4). It is difficult to imagine a complete rupture of the relationship based on such a disagreement, but one is certainly theoretically possible.

(e) Lawyers who accidentally transmit a communication to an adversary might have a duty to advise their client of the mistake. Under ABA Model Rule 1.4,

> [a] lawyer shall . . . keep the client reasonably informed about the status of the matter.

ABA Model Rule 1.4(a)(3).

Authorities generally agree that lawyers' duty of communication requires them to advise their clients of their possible malpractice to clients.

- In re Kieler, 227 P.3d 961, 962, 965 (Kan. 2010) (suspending for one year a lawyer who had not advised the client of the lawyer's malpractice in missing the statute of limitations; "'The Respondent told Ms. Irby that the only way she

could receive any compensation for her injuries sustained in that accident was to sue him for malpractice. He told her that it was "not a big deal," that he has insurance, and that is why he had insurance. The Respondent was insured by The Bar Plan.'" (internal citation omitted); "In this case, the Respondent violated KRPC 1.7 when he continued to represent Ms. Irby after her malpractice claim ripened, because the Respondent's representation of Ms. Irby was in conflict with his own interests. Though the Respondent admitted that Ms. Irby's malpractice claim against him created a conflict, he failed to cure the conflict by complying with KRPC 1.7(b). Accordingly, the Hearing Panel concludes that the Respondent violated KRPC 1.7.").

- Texas LEO 593 (2/2010) (holding that a lawyer who has committed malpractice must advise the client, and must withdraw from the representation, but can settle the malpractice claim if the client has had the opportunity to seek independent counsel but has not done so; "Although Rule 1.06(c) provides that, if the client consents, a lawyer may represent a client in certain circumstances where representation would otherwise be prohibited, the Committee is of the opinion that, in the case of malpractice for which the consequences cannot be significantly mitigated through continued legal representation, under Rule 1.06 the lawyer-client relationship must end as to the matter in which the malpractice arose."; "[A]s promptly as reasonably possible the lawyer must terminate the lawyer-client relationship and inform the client that the malpractice has occurred and that the lawyer-client relationship has been terminated."; "Once the lawyer has candidly disclosed both the malpractice and the termination of the lawyer-client relationship to the client, Rule 1.08(g) requires that, if the lawyer wants to attempt to settle the client's malpractice claim, the lawyer must first advise in writing the now former client that independent representation of the client is appropriate with respect to settlement of the malpractice claim: 'A lawyer shall not . . . settle a claim for . . . liability [for malpractice] with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.'").

- California 12009-178 (2009) ("An attorney must promptly disclose to the client the facts giving rise to any legal malpractice claim against the attorney. When an attorney contemplates entering into a settlement agreement with a current client that would limit the attorney's liability to the client for the lawyer's professional malpractice, the attorney must consider whether it is necessary or appropriate to withdraw from the representation. If the attorney does not withdraw, the attorney must: (1) [c]omply with rule 3-400(B) by advising the client of the right to seek independent counsel regarding the settlement and giving the client an opportunity to do so; (2) [a]dvise the client that the lawyer is not representing or advising the client as to the settlement of the fee dispute or the legal malpractice claim; and (3) [f]ully disclose to the client the

terms of the settlement agreement, in writing, including the possible effect of the provisions limiting the lawyer's liability to the client, unless the client is represented by independent counsel."; later confirming that "[a] member should not accept or continue representation of a client without providing written disclosure to the client where the member has or had financial or professional interests in the potential or actual malpractice claim involving the representation."; "Where the attorney's interest in securing an enforceable waiver of a client's legal malpractice claim against the attorney conflicts with the client's interests, the attorney must assure that his or her own financial interests do not interfere with the best interests of the client. . . . Accordingly, the lawyer negotiating such a settlement with a client must advise the client that the lawyer cannot represent the client in connection with that matter, whether or not the fee dispute also involves a potential or actual legal malpractice claim."; "A lawyer has an ethical obligation to keep a client informed of significant developments relating to the representation of the client. . . . Where the lawyer believes that, he or she has committed legal malpractice, the lawyer must promptly communicate the factual information pertaining to the client's potential malpractice claim against the lawyer to the client, because it is a 'significant development.'"; "While no published California authorities have specifically addressed whether an attorney's cash settlement of a fee dispute that includes a general release and a section 1542 waiver of actual or potential malpractice claims for past legal services falls within the prescriptions of this rule, it is the Committee's opinion that rule 3-300 should not apply.").

- Minnesota LEO 21 (10/2/09) (a lawyer "who knows that the lawyer's conduct could reasonably be the basis for a non-frivolous malpractice claim by a current client" must disclose the lawyer's conduct that may amount to malpractice; citing several other states' cases and opinions; "See, e.g., Tallon v. Comm. on Prof'l Standards, 447 N.Y.S. 2d 50, 51 (App. Div. 1982) ('An attorney has a professional duty to promptly notify his client of his failure to act and of the possible claim his client may thus have against him.'); Colo. B. Ass'n Ethics Comm., Formal Op. 113 (2005) ('When, by act or omission, a lawyer has made an error, and that error is likely to result in prejudice to a client's right or claim, the lawyer must promptly disclose the error to the client.'); Wis. St. B. Prof'l Ethics Comm., Formal Op. E-82-12 ('[A]n attorney is obligated to inform his or her client that an omission has occurred which may constitute malpractice and that the client may have a claim against him or her for such an omission.'); N.Y. St. B. Ass'n Comm. on Prof'l Ethics, Op. 734 (2000); 2000 WL 33347720 (Generally, an attorney 'has an obligation to report to the client that [he or she] has made a significant error or omission that may give rise to a possible malpractice claim.'); N.J. Sup. Ct. Advisory Comm. on Prof'l Ethics, Op. 684 ('The Rules of Professional Conduct still require an attorney to notify the client that he or she may have a legal

malpractice claim even if notification is against the attorney's own interest.')."; also explaining the factors the lawyer must consider in determining whether the lawyer may still represent the client; "Under Rule 1.7 the lawyer must withdraw from continued representation unless circumstances giving rise to an exception are present. . . . Assuming continued representation is not otherwise prohibited, to continue the representation the lawyer must reasonably believe he or she may continue to provide competent and diligent representation. . . . If so, the lawyer must obtain the client's 'informed consent,' confirmed in writing, to the continued representation. . . . Whenever the rules require a client to provide 'informed consent,' the lawyer is under a duty to promptly disclose to the client the circumstances giving rise to the need for informed consent. . . . In this circumstance, 'informed consent' requires that the lawyer communicate adequate information and explanation about the material risks of and reasonably available alternatives to the continued representation.").

- New York LEO 734 (11/1/00) (holding that the Legal Aid Society "has an obligation to report to the client that it has made a significant error or omission [missing a filing deadline] that may give rise to a possible malpractice claim"; quoting from an earlier LEO in which the New York State Bar "held that a lawyer had a professional duty to notify the client promptly that the lawyer had committed a serious and irremediable error, and of the possible claim the client may have against the lawyer for damages" (emphasis added)).

Given the hundreds (if not thousands) of judgment calls that lawyers make during an average representation, it might be very difficult to determine what sort of mistake rises to the level of such mandatory disclosure. For instance, it is difficult to imagine that a lawyer might tell the client that the lawyer could have done a better job of framing one question during a discovery deposition. However, it seems equally clear that a lawyer would have to advise his client if the lawyer accidentally transmitted to the adversary a document containing some critical litigation or settlement strategy.

Best Answer

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

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Metadata

Hypothetical 3

You just received an email with an attached settlement proposal from an adversary. Coincidentally, last evening you read an article about the "metadata" that accompanies many electronic documents, and which might allow you to see who made changes to the settlement proposal, when they made the changes, and even what changes they made (such as including a higher settlement demand in an earlier version of the proposal).

What do you do?

(A) You must check for any metadata (to diligently serve your client).

(B) You may check for any metadata, but you don't have to.

(C) You may not check for any metadata.

(B) OR (C), DEPENDING ON THE STATE

Analysis

This hypothetical situation involves "metadata," which is essentially data about data. The situation involves the same basic issue as the inadvertent transmission of documents, but is even more tricky because the person sending the document might not even know that the "metadata" is being transmitted and can be read.

Ethics Opinions

New York. In 2001, the New York State Bar held that the general ethics prohibition on deceptive conduct prohibits New York lawyers from "get[ting] behind" electronic documents sent by adversaries who failed to disable the "tracking" software. New York LEO 749 (12/14/01).

Interestingly, the New York State Bar followed up this legal ethics opinion with New York LEO 782 (12/8/04), indicating that lawyers have an ethical duty to "use reasonable care when transmitting documents by e-mail to prevent the disclosure of metadata containing client confidences or secrets."

Florida. The Florida Bar followed the New York approach -- warning lawyers to be careful when they send metadata, but prohibiting the receiving lawyer from examining the metadata. Florida LEO 06-2 (9/15/06) (lawyers must take "reasonable steps" to protect the confidentiality of any information they transmit, including metadata; "It is the recipient lawyer's concomitant obligation, upon receiving an electronic communication or document from another lawyer, not to try to obtain from metadata information relating to the representation of the sender's client that the recipient knows or should know is not intended for the recipient. Any such metadata is to be considered by the receiving lawyer as confidential information which the sending lawyer did not intend to transmit."; not reconciling these positions with Florida Rule 4-4.4(b), under which the receiving lawyer must "'promptly notify the sender'" if the receiving lawyer "inadvertently obtains information from metadata that the recipient knows or should know was not intended for the recipient" but not preventing the recipient from reading or relying upon the inadvertently transmitted communication; explicitly avoiding any discussion of metadata "in the context of documents that are subject to discovery under applicable rules of court or law").

ABA. In 2006, the ABA took exactly the opposite position -- holding that the receiving lawyer may freely examine metadata. ABA LEO 442 (8/5/06) (as long as the

receiving lawyer did not obtain an electronic document in an improper manner, the lawyer may ethically examine the document's metadata, including even using "more thorough or extraordinary investigative measures" that might "permit the retrieval of embedded information that the provider of electronic documents either did not know existed, or thought was deleted"; the opinion does not analyze whether the transmission of such metadata is "inadvertent,"[1] but at most such an inadvertent transmission would require the receiving lawyer to notify the sending lawyer of the metadata's receipt; lawyers "sending or producing" electronic documents can take steps to avoid transmitting metadata (through new means such as scrubbing software, or more traditional means such as faxing the document); lawyers can also negotiate confidentiality agreements or protective orders allowing the client "to 'pull back,' or prevent the introduction of evidence based upon, the document that contains that embedded information or the information itself").

[1] In 2011, the ABA explained its definition of the term "inadvertent" in a legal ethics opinion indicating that an employee's electronic communication with his or her own personal lawyer was not "inadvertently" transmitted to an employer who searches for and discovers such personal communications in the company's computer system. ABA LEO 460 (8/4/11) (despite some case law to the contrary, holding that a lawyer's Rule 4.4(b) duty to advise the sender if the lawyer receives "inadvertently sent" documents does not arise if the lawyer's client gives the lawyer documents the client has retrieved "from a public or private place where [the document] is stored or left"; explaining that a document is "inadvertently sent" when it is "accidentally transmitted to an unintended recipient, as occurs when an e-mail or letter is misaddressed or when a document is accidentally attached to an e-mail or accidentally included among other documents produced in discovery"; concluding that a lawyer representing an employer does not have such a disclosure duty if the employer retrieves and gives the lawyer privileged emails between an employee and the employee's lawyer that are stored on the employer's computer system; noting that such lawyers might face some duty or even punishment under civil procedure rules or court decisions, but the ethics rules "do not independently impose an ethical duty to notify opposing counsel" in such situations; holding that the employer client's possession of such employee documents is a confidence that the employer's lawyer must keep, absent some other duty or discretion to disclose it; concluding that if there is no law requiring such disclosure, the employer-client must decide whether to disclose its possession of such documents, although "it often will be in the employer-client's best interest to give notice and obtain a judicial ruling" on the admissibility of the employee's privileged communications before the employer's lawyer reviews the documents).

Maryland. Maryland then followed this ABA approach. Maryland LEO 2007-09 (2007) (absent some agreement with the receiving lawyer, the sending lawyer "has an ethical obligation to take reasonable measures to avoid the disclosure of confidential or work product materials imbedded in the electronic discovery" (although not every inadvertent disclosure constitutes an ethics violation); there is no ethical violation if a lawyer or the lawyer's assistant "reviews or makes use of the metadata [received from another person] without first ascertaining whether the sender intended to include such metadata"; pointing to the absence in the Maryland Rules of any provision requiring the recipient of inadvertently transmitted privileged material to notify the sender; a receiving lawyer "can, and probably should, communicate with his or her client concerning the pros and cons of whether to notify the sending attorney and/or to take such other action which they believe is appropriate"; noting that the 2006 Amendments to the Federal Rules will supersede the Maryland ethics provisions at least in federal litigation, and that violating that new provision would likely constitute a violation of Rule 8.4(b) as being "prejudicial to the administration of justice").

Alabama. In early 2007, the Alabama Bar lined up with the bars prohibiting the mining of metadata. In Alabama LEO 2007-02 (3/14/07), the Alabama Bar first indicated that "an attorney has an ethical duty to exercise reasonable care when transmitting electronic documents to ensure that he or she does not disclose his or her client's secrets and confidences." The Alabama Bar then dealt with the ethical duties of a lawyer receiving an electronic document from another person. The Bar only cited

New York LEO 749 (2001), and did not discuss ABA LEO 442. Citing Alabama Rule 8.4 (which is the same as ABA Model Rule 8.4), the Alabama Bar concluded that:

> [t]he mining of metadata constitutes a knowing and deliberate attempt by the recipient attorney to acquire confidential and privileged information in order to obtain an unfair advantage against an opposing party.

Alabama LEO 2007-02 (3/14/07).

The Alabama Bar did not address Alabama's approach to inadvertently transmitted communications (Alabama does not have a corollary to ABA Model Rule 4.4(b)). The Bar acknowledged that "[o]ne possible exception" to the prohibition on mining metadata involves electronic discovery, because "metadata evidence may be relevant and material to the issues at hand" in litigation. Id.

District of Columbia. The D.C. Bar dealt with the metadata issue in late 2007. The D.C. Bar generally agreed with the New York and Alabama approach, but noted that as of February 1, 2007, D.C. Rule 4.4(b) is "more expansive than the ABA version," because it prohibits the lawyer from examining an inadvertently transmitted writing if the lawyer "knows, before examining the writing, that it has been inadvertently sent." District of Columbia LEO 341 (9/2007).

The D.C. Bar held that:

> [a] receiving lawyer is prohibited from reviewing metadata sent by an adversary only where he has actual knowledge that the metadata was inadvertently sent. In such instances, the receiving lawyer should not review the metadata before consulting with the sending lawyer to determine whether the metadata includes work product of the sending lawyer or confidences or secrets of the sending lawyer's client.

Id. (emphases added).

After having explicitly selected the "actual knowledge" standard, the D.C. Bar then proceeded to abandon it.

First, the D.C. Bar indicated that lawyers could not use "a system to mine all incoming electronic documents in the hope of uncovering a confidence or secret, the disclosure of which was unintended by some hapless sender." Id. n.3. The Bar warned that "a lawyer engaging in such a practice with such intent cannot escape accountability solely because he lacks 'actual knowledge' in an individual case." Id.

Second, in discussing the "actual knowledge" requirement, the D.C. Bar noted the obvious example of the sending lawyer advising the receiving lawyer of the inadvertence "before the receiving lawyer reviews the document." District of Columbia LEO 341. However, the D.C. Bar then gave another example that appears much closer to a negligence standard.

> Such actual knowledge may also exist where a receiving lawyer immediately notices upon review of the metadata that it is clear that protected information was unintentionally included. These situations will be fact-dependent, but can arise, for example, where the metadata includes a candid exchange between an adverse party and his lawyer such that it is "readily apparent on its face," . . . that it was not intended to be disclosed.

Id.

The D.C. Bar indicated that "a prudent receiving lawyer" should contact the sending lawyer in such a circumstance -- although the effect of District of Columbia LEO 341 is to allow ethics sanctions against an imprudent lawyer. Id.

Third, the Bar also abandoned the "actual knowledge" requirement by using a "patently clear" standard. The D.C. Bar analogized inadvertently transmitted metadata

to a situation in which a lawyer "inadvertently leaves his briefcase in opposing counsel's office following a meeting or a deposition." Id. n.4.

> The one lawyer's negligence in leaving the briefcase does not relieve the other lawyer from the duty to refrain from going through that briefcase, at least when it is patently clear from the circumstances that the lawyer was not invited to do so.

Id.

After describing situations in which the receiving lawyer cannot review metadata, the Bar emphasized that even a lawyer who is free to examine the metadata is not obligated to do so.

> Whether as a matter of courtesy, reciprocity, or efficiency, "a lawyer may decline to retain or use documents that the lawyer might otherwise be entitled to use, although (depending on the significance of the documents) this might be a matter on which consultation with the client may be necessary."

Id. n.9 (citation omitted).

Unlike some of the other bars which have dealt with metadata, the D.C. Bar also explicitly addressed metadata included in responsive documents being produced in litigation. Interestingly, the D.C. Bar noted that other rules might prohibit the removal of metadata during the production of electronic documents during discovery. Thus:

> [i]n view of the obligations of a sending lawyer in providing electronic documents in response to a discovery request or subpoena, a receiving lawyer is generally justified in assuming that metadata was provided intentionally.

District of Columbia LEO 341. Even in the discovery context, however, a receiving lawyer must comply with D.C. Rule 4.4(b) if she has "actual knowledge" that metadata containing protected information has been inadvertently included in the production.

Arizona. In Arizona LEO 07-03,[2] the Arizona Bar first indicated that lawyers transmitting electronic documents had a duty to take "reasonable precautions" to prevent the disclosure of confidential information.

The Arizona Bar nevertheless agreed with those states prohibiting the receiving lawyer from mining metadata -- noting that Arizona's Ethical Rule 4.4(b) requires a lawyer receiving an inadvertently sent document to "promptly notify the sender and preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures." The Arizona Bar acknowledged that the sending lawyer might not have inadvertently sent the document, but explained that the lawyer did not intend to transmit metadata -- thus triggering Rule 4.4(b). The Arizona Bar specifically rejected the ABA approach, because sending lawyers worried about receiving lawyers reading their metadata "might conclude that the only ethically safe course of action is to forego the use of electronic document transmission entirely."

[2] Arizona LEO 07-03 (11/2007) (a lawyer sending electronic documents must take "reasonable precautions" to prevent the disclosure of client confidential information; also explicitly endorsing the approach of New York, Florida and Alabama in holding that "a lawyer who receives an electronic communication may not examine it for the purpose of discovering the metadata embedded in it"; noting that Arizona's version of Rule 4.4(b) requires a lawyer receiving an inadvertently sent document to "promptly notify the sender and preserve the status quo for a reasonable period of time in order to permit the sender to take protective measures"; finding that any client confidential metadata was inadvertently transmitted, and thus fell under this rule; "respectfully" declining to adopt the ABA approach, under which lawyers "might conclude that the only ethically safe course of action is to forego the use of electronic document transmission entirely"; also disagreeing with District of Columbia LEO 341 (9/2007), although misreading that LEO as generally allowing receiving lawyers to examine metadata).

Pennsylvania. In Pennsylvania LEO 2007-500, the Pennsylvania Bar promised that its opinion "provides ethical guidance to lawyers on the subject of metadata received from opposing counsel in electronic materials" -- but then offered a totally useless standard.

> [I]t is the opinion of this Committee that each attorney must, as the Preamble to the Rules of Professional Conduct states, "resolve [the issue] through the exercise of sensitive and moral judgment guided by the basic principles of the Rules" and determine for himself or herself whether to utilize the metadata contained in documents and other electronic files based upon the lawyer's judgment and the particular factual situation.

Pennsylvania LEO 2007-500 (2007). The Pennsylvania Bar's conclusion was equally useless.

> Therefore, this Committee concludes that, under the Pennsylvania Rules of Professional Conduct, each attorney must determine for himself or herself whether to utilize the metadata contained in documents and other electronic files based upon the lawyer's judgment and the particular factual situation. This determination should be based upon the nature of the information received, how and from whom the information was received, attorney-client privilege and work product rules, and common sense, reciprocity and professional courtesy.

Id. As explained below, the Pennsylvania Bar returned to this topic two years later.

New York County. Another legal ethics opinion on this issue came from the New York County Lawyers' Association Committee on Professional Ethics in 2008.

In N.Y. County Law. Ass'n LEO 738, the Committee specifically rejected the ABA approach, and found that mining an adversary's electronic documents for metadata

amounts to unethical conduct that "is deceitful and prejudicial to the administration of justice."[3]

Colorado. Colorado dealt with this issue in mid-2008.

Relying on a unique Colorado rule, the Colorado Bar explained that a receiving lawyer may freely examine any metadata unless the lawyer received an actual notice from the sending lawyer that the metadata was inadvertently included in the transmitted document. In addition, the Colorado Bar explicitly rejected the conclusion reached by jurisdictions prohibiting receiving lawyers from examining metadata. For instance, the Colorado Bar explained that "there is nothing inherently deceitful or surreptitious about searching for metadata." The Colorado Bar also concluded that "an absolute ethical bar

[3] New York County Law. Ass'n LEO 738 (3/24/08) (holding that a lawyer "has the burden to take due care" in scrubbing metadata before sending an electronic document, but that the receiving lawyer may not seek to discover the metadata; "By actively mining an adversary's correspondence or documents for metadata under the guise of zealous representation, a lawyer could be searching only for attorney work product or client confidences or secrets that opposing counsel did not intend to be viewed. An adversary does not have the duty of preserving the confidences and secrets of the opposing side under DR 4-101 and EC 4-1. Yet, by searching for privileged information, a lawyer crosses the lines drawn by DR 1-102(A)(4) and DR 1-102(A)(5) by acting in a manner that is deceitful and prejudicial to the administration of justice. Further, the lawyer who searches an adversary's correspondence for metadata is intentionally attempting to discover an inadvertent disclosure by the opposing counsel, which the Committee has previously opined must be reported to opposing counsel without further review in certain circumstances. See NYCLA Op. 730 (2002). Thus, a lawyer who seeks to discover inadvertent disclosures of attorney work product or client confidences or secrets or is likely to find such privileged material violates DR 1-102(A)(4) and DR 1-102(A)(5)."; specifically excluding from its analysis electronic documents produced during litigation discovery; specifically rejecting the ABA approach, and instead agreeing with New York LEO 749 (12/14/01); "While this Committee agrees that every attorney has the obligation to prevent disclosing client confidences and secrets by properly scrubbing or otherwise protecting electronic data sent to opposing counsel, mistakes occur and an attorney may neglect on occasion to scrub or properly send an electronic document. The question here is whether opposing counsel is permitted to take advantage of the sending attorney's mistake and hunt for the metadata that was improperly left in the document. This Committee finds that the NYSBA rule is a better interpretation of the Code's disciplinary rules and ethical considerations and New York precedents than the ABA's opinion on this issue. Thus, this Committee concludes that when a lawyer sends opposing counsel correspondence or other material with metadata, the receiving attorney may not ethically search the metadata in those electronic documents with the intent to find privileged material or if finding privileged material is likely to occur from the search.").

on even reviewing metadata ignores the fact that, in many circumstances, metadata do not contain Confidential Information."[4]

Maine. The next state to vote on metadata was Maine. In Maine LEO 196,[5] the Maine Bar reviewed most of the other opinions on metadata, and ultimately concluded that:

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[4] Colorado LEO 119 (5/17/08) (addressing a receiving lawyer's right to review metadata in an electronic document received from a third party; explaining that the receiving lawyer should assume that any confidential or privileged information in the metadata was sent inadvertently; noting that Colorado ethics rules require the receiving lawyer to notify the sending lawyer of such inadvertent transmission of privileged communications; "The Receiving Lawyer must promptly notify the Sending Lawyer. Once the Receiving Lawyer has notified the Sending Lawyer, the lawyers may, as a matter of professionalism, discuss whether a waiver of privilege or confidentiality has occurred. In some instances, the lawyers may be able to agree on how to handle the matter. If this is not possible, then the Sending Lawyer or the Receiving Lawyer may seek a determination from a court or other tribunal as to the proper disposition of the electronic documents or files, based on the substantive law of waiver."; relying on a unique Colorado ethics rule to conclude that "[i]f, before examining metadata in an electronic document or file, the Receiving Lawyer receives notice from the sender that Confidential Information was inadvertently included in metadata in that electronic document or file, the Receiving Lawyer must not examine the metadata and must abide by the sender's instructions regarding the disposition of the metadata"; rejecting the conclusion of jurisdictions which have forbidden receiving lawyers from reviewing metadata; "First, there is nothing inherently deceitful or surreptitious about searching for metadata. Some metadata can be revealed by simply passing a computer cursor over a document on the screen or right-clicking on a computer mouse to open a drop-down menu that includes the option to review certain metadata. . . . Second, an absolute ethical bar on even reviewing metadata ignores the fact that, in many circumstances, metadata do not contain Confidential Information."; concluding that "where the Receiving Lawyer has no prior notice from the sender, the Receiving Lawyer's only duty upon viewing confidential metadata is to notify the Sending Lawyer. See RPC 4.4(b). There is no rule that prohibits the Receiving Lawyer from continuing to review the electronic document or file and its associated metadata in that circumstance.").

[5] Maine LEO 196 (10/21/08) (reviewing most of the other opinions on metadata, and concluding that "an attorney may not ethically take steps to uncover metadata, embedded in an electronic document sent by counsel for another party, in an effort to detect information that is legally confidential and is or should be reasonably known not to have been intentionally communicated"; explaining that "[n]ot only is the attorney's conduct dishonest in purposefully seeking by this method to uncover confidential information of another party, that conduct strikes at the foundational principles that protect attorney-client confidences, and in doing so it clearly prejudices the administration of justice"; also explaining that "the sending attorney has an ethical duty to use reasonable care when transmitting an electronic document to prevent the disclosure of metadata containing confidential information. Undertaking this duty requires the attorney to reasonably apply a basic understanding of the existence of metadata embedded in electronic documents, the features of the software used by the attorney to generate the document and practical measures that may be taken to purge documents of sensitive metadata where appropriate to prevent the disclosure of confidential information.").

> an attorney may not ethically take steps to uncover metadata, embedded in an electronic document sent by counsel for another party, in an effort to detect information that is legally confidential and is or should be reasonably known not to have been intentionally communicated.

Maine LEO 196 (10/21/08). The Maine Bar explained that "[n]ot only is the attorney's conduct dishonest in purposefully seeking by this method to uncover confidential information of another party, that conduct strikes at the foundational principles that protect attorney-client confidences, and in doing so it clearly prejudices the administration of justice."

Not surprisingly, the Maine Bar also held that:

> the sending attorney has an ethical duty to use reasonable care when transmitting an electronic document to prevent the disclosure of metadata containing confidential information. Undertaking this duty requires the attorney to reasonably apply a basic understanding of the existence of metadata embedded in electronic documents, the features of the software used by the attorney to generate the document and practical measures that may be taken to purge documents of sensitive metadata where appropriate to prevent the disclosure of confidential information.

Id.

Pennsylvania. Early in 2009, the Pennsylvania Bar issued another opinion dealing with metadata -- acknowledging that its 2007 opinion (discussed above) "provided insufficient guidance" to lawyers.[6]

[6] Pennsylvania LEO 2009-100 (2009) (revisiting the issue of metadata following a 2007 opinion that "provided insufficient guidance" to lawyers; emphasizing the sending lawyer's duty to preserve client confidences when transmitting electronic documents; explaining that Pennsylvania's Rule 4.4(b) required a lawyer receiving an inadvertent document to "promptly notify the sender"; "When applied to metadata, Rule 4.4(b) requires that a lawyer accessing metadata evaluate whether the extra-textual information was intended to be deleted or scrubbed from the document prior to transmittal. In many instances, the process may be relatively simple, such as where the information does not appear on the face of the

Unlike other legal ethics opinions, the Pennsylvania Bar reminded the receiving lawyer that his client might be harmed by the lawyer's review of the adversary's metadata -- depending on the court's attitude. However, the Bar reminded lawyers that the receiving lawyer must undertake this analysis, because:

> an attorney who receives such inadvertently transmitted information from opposing counsel may generally examine and use the metadata for the client's benefit without violating the Rules of Professional Conduct.

Pennsylvania LEO 2009-100 (2009).

New Hampshire. New Hampshire dealt with metadata in early 2009. In an April 16, 2009 legal ethics opinion,[7] the New Hampshire Bar indicated that receiving

document sent but is accessible only by means such as viewing tracked changes or other mining techniques, or, in the alternative, where a covering document may advert to the intentional inclusion of metadata. The resulting conclusion or state of knowledge determines the course of action required. The foregoing again presumes that the mere existence of metadata confirms inadvertence, which is not warranted. This conclusion taken to its logical conclusion would mean that the existence of any and all metadata be reported to opposing counsel in every instance."; explaining that despite the possible ethics freedom to review metadata, the client might be harmed if the pertinent court would find such reading improper; describing the duty of the receiving lawyer as follows: "The receiving lawyer: '(a) must then determine whether he or she may use the data received as a matter of substantive law; (b) must consider the potential effect on the client's matter should the lawyer do so; and (c) should advise and consult with the client about the appropriate course of action under the circumstances.'"; "If the attorney determines that disclosure of the substance of the metadata to the client may negatively affect the process or outcome of the case, there will in most instances remain a duty to advise the client of the receipt of the metadata and the reason for nondisclosure. The client may then make an informed decision whether the advantages of examining or utilizing the metadata outweigh the disadvantages of so doing."; ultimately concluding "that an attorney has an obligation to avoid sending electronic materials containing metadata, where the disclosure of such metadata would harm the client's interests. In addition, an attorney who receives such inadvertently transmitted information from opposing counsel may generally examine and use the metadata for the client's benefit without violating the Rules of Professional Conduct.").

[7] New Hampshire LEO 2008-2009/4 (4/16/09) ("Receiving lawyers have an ethical obligation not to search for, review or use metadata containing confidential information that is associated with transmission of electronic materials from opposing counsel. Receiving lawyers necessarily know that any confidential information contained in the electronic material is inadvertently sent, triggering the obligation under Rule 4.4(b) not to examine the material. To the extent that metadata is mistakenly reviewed, receiving lawyers should abide by the directives in Rule 4.4(b)."; noting that under New Hampshire Rule 4.4(b), a lawyer receiving "materials" inadvertently sent by a sender "shall not examine the materials," but instead should notify the sender and "abide by the sender's instructions or seek determination by a tribunal"; finding that this Rule applies to metadata; "The Committee believes that all circumstances, with the exception of

lawyers may not ethically review an adversary's metadata. The New Hampshire Bar pointed to the state's version of Rule 4.4(b), which indicates that lawyers receiving materials inadvertently sent by a sender "shall not examine the materials," but instead should notify the sender and "abide by the sender's instructions or seek determination by a tribunal."

Interestingly, although the New Hampshire Bar could have ended the analysis with this reliance on New Hampshire Rule 4.4(b), it went on to analogize the review of an adversary's metadata to clearly improper eavesdropping.

> Because metadata is simply another form of information that can include client confidences, the Committee sees little difference between a receiving lawyer uncovering an opponent's metadata and that same lawyer peeking at opposing counsel's notes during a deposition or purposely eavesdropping on a conversation between counsel and client. There is a general expectation of honesty, integrity, mutual courtesy and professionalism in the New Hampshire bar. Lawyers should be able to reasonably assume that confidential information will not be sought out by their opponents and used against their clients, regardless of the ease in uncovering the information.

New Hampshire LEO 2008-2009/4 (4/16/09) (emphasis added).

express waiver and mutual agreement on review of metadata, lead to a necessary conclusion that metadata is 'inadvertently sent' as that term is used in Rule 4.4(b)."; analogizing the reading of metadata to clearly improper eavesdropping; "Because metadata is simply another form of information that can include client confidences, the Committee sees little difference between a receiving lawyer uncovering an opponent's metadata and that same lawyer peeking at opposing counsel's notes during a deposition or purposely eavesdropping on a conversation between counsel and client. There is a general expectation of honesty, integrity, mutual courtesy and professionalism in the New Hampshire bar. Lawyers should be able to reasonably assume that confidential information will not be sought out by their opponents and used against their clients, regardless of the ease in uncovering the information.").

West Virginia. In West Virginia LEO 2009-01,[8] the West Virginia Bar warned sending lawyers that they might violate the ethics rules by not removing confidential metadata before sending an electronic document.

On the other hand:

> [w]here a lawyer knows that privileged information was inadvertently sent, it could be a violation of Rule 8.4(c) for the receiving lawyer to review and use it without consulting with the sender. Therefore, if a lawyer has received electronic documents and has actual knowledge that metadata was inadvertently sent, the receiving lawyer should not review the metadata before consulting with the sending lawyer to determine whether the metadata includes work-product or confidences.

West Virginia LEO 2009-01 (6/10/09). West Virginia Rule 8.4(c) prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation." The West Virginia Bar also explained that:

> [i]n many situations, it may not be clear whether the disclosure was inadvertent. In order to avoid

[8] West Virginia LEO 2009-01 (6/10/09) (warning lawyers that "it is important to be familiar with the types of metadata contained in computer documents and to take steps to protect or remove it whenever necessary. Failure to do so could be viewed as a violation of the Rules of Professional Conduct. Additionally, searching for or viewing metadata in documents received from others after an attorney has taken steps to protect such could also be reviewed as a violation of the Rules of Professional Conduct."; also explaining that "[w]here a lawyer knows that privileged information was inadvertently sent, it could be a violation of Rule 8.4(c) [which prohibits 'conduct involving dishonesty, fraud, deceit or misrepresentation'] for the receiving lawyer to review and use it without consulting with the sender. Therefore, if a lawyer has received electronic documents and has actual knowledge that metadata was inadvertently sent, the receiving lawyer should not review the metadata before consulting with the sending lawyer to determine whether the metadata includes work-product or confidences."; noting that lawyers producing electronic document in "a discovery or a subpoena context" might have to deal with metadata differently, including asserting privilege for protected metadata; "In many situations, it may not be clear whether the disclosure was inadvertent. In order to avoid misunderstandings, it is always safer to notify the sender before searching electronic documents for metadata. If attorneys cannot agree on how to handle the matter, either lawyer may seek a ruling from a court or other tribunal on the issue."; ultimately concluding that "[t]he Board finds that there is a burden on an attorney to take reasonable steps to protect metadata in transmitted documents, and there is a burden on a lawyer receiving inadvertently provided metadata to consult with the sender and abide by the sender's instructions before reviewing such metadata").

> misunderstandings, it is always safer to notify the sender before searching electronic documents for metadata. If attorneys cannot agree on how to handle the matter, either lawyer may seek a ruling from a court or other tribunal on the issue.

West Virginia LEO 2009-01 (6/10/09).

Vermont. In Vermont LEO 2009-1, the Bar pointed to its version of Rule 4.4(b) -- which takes the ABA approach -- in allowing lawyers to search for any hidden metadata in electronic documents they receive.[9]

North Carolina. In early January 2010, the North Carolina Bar joined other bars in warning lawyers to take "reasonable precautions" to avoid disclosure of confidential metadata in documents they send.

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[9] Vermont LEO 2009-1 (9/2009) (holding that lawyers must take reasonable steps to avoid sending documents that contain client confidential metadata; also holding that lawyers who receive electronic documents may search for metadata; "The Bar Associations that have examined the duty of the sending lawyer with respect to metadata have been virtually unanimous in concluding that lawyers who send documents in electronic form to opposing counsel have a duty to exercise reasonable care to ensure that metadata containing confidential information protected by the attorney client privilege and the work product doctrine is not disclosed during the transmission process."; "This Opinion agrees that, based upon the language of the VRPC, a lawyer has a duty to exercise reasonable care to ensure that confidential information protected by the attorney client privilege and the work product doctrine is not disclosed. This duty extends to all forms of information handled by an attorney, including documents transmitted to opposing counsel electronically that may contain metadata embedded in the electronic file."; noting that Vermont Rule 4.4(b) follows the ABA approach, and was effective as of September 1, 2009; declining to use the word "mine" in describing the search for metadata, because of its "pejorative characterization"; "[T]he Vermont Bar Association Professional Responsibility Section finds nothing to compel the conclusion that a lawyer who receives an electronic file from opposing counsel would be ethically prohibited from reviewing that file using any available tools to expose the file's content, including metadata. A rule prohibiting a search for metadata in the context of electronically transmitted documents would, in essence, represent a limit on the ability of a lawyer diligently and thoroughly to analyze material received from opposing counsel." (footnote omitted); "The existence of metadata is an unavoidable aspect of rapidly changing technologies and information data processing tools. It is not within the scope of this Section's authority to insert an obligation into the Vermont Rules of Professional Conduct that would prohibit a lawyer from thoroughly reviewing documents provided by opposing counsel, using whatever tools are available to the lawyer to conduct this review."; also explaining that Federal Rule of Evidence 502 provides the substantive law that governs waiver issues, and that documents produced in discovery (which may contain metadata) must be handled in the same way as other documents being produced).

The Bar also prohibited receiving lawyers from searching for any confidential information in metadata, or using any confidential metadata the receiving lawyer "unintentionally views."[10]

The North Carolina Bar analogized the situation to a lawyer who receives "a faxed pleading that inadvertently includes a page of notes from opposing counsel." The North Carolina Bar concluded that a lawyer searching for metadata in an electronic document received from another lawyer would violate Rule 8.4(d)'s prohibition on conduct that is "prejudicial to the administration of justice" -- because such a search "interferes with the client-lawyer relationship of another lawyer and undermines the confidentiality that is the bedrock of the relationship."

The North Carolina Bar did not explain why the receiving lawyer must do anything more than notify the sending lawyer of the inadvertently included confidential

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[10] North Carolina LEO 2009-1 (1/15/10) (in an opinion issued sua sponte, concluding that a lawyer "who sends an electronic communication must take reasonable precautions to prevent the disclosure of confidential information, including information in metadata, to unintended recipients."; also concluding that "a lawyer may not search for confidential information embedded in metadata of an electronic communication from another party or a lawyer for another party. By actively searching for such information, a lawyer interferes with the client-lawyer relationship of another lawyer and undermines the confidentiality that is the bedrock of the relationship. Rule 1.6. Additionally, if a lawyer unintentionally views confidential information within metadata, the lawyer must notify the sender and may not subsequently use the information revealed without the consent of the other lawyer or party."; analogizing the presence of embedded confidential metadata in a document received by the lawyer to "a faxed pleading that inadvertently includes a page of notes from opposing counsel"; noting that under North Carolina Rule 4.4(b), the receiving lawyer in that situation must "promptly notify the sender," and not explaining why the receiving lawyer must do anything more than comply with this rule when receiving an electronic document and discovering any metadata that the sender appears to have inadvertently included; later reiterating that "a lawyer who intentionally or unintentionally discovers confidential information embedded within the metadata of an electronic communication may not use the information revealed without the consent of the other lawyer or party."; explaining that a lawyer searching for metadata would violate Rule 8.4(d)'s prohibition on conduct that is "prejudicial to the administration of justice"; concluding that "a lawyer may not search for and use confidential information embedded in the metadata of an electronic communication sent to him or her by another lawyer or party unless the lawyer is authorized to do so by law, rule, court order or procedure, or the consent of the other lawyer or party. If a lawyer unintentionally views metadata, the lawyer must notify the sender and may not subsequently use the information revealed without the consent of the other lawyer or party.").

metadata -- which is all that is required in the North Carolina Rule 4.4(b). Like other parallels to ABA Model Rule 4.4(b), the North Carolina Rule does not prohibit receiving lawyers from searching for confidential information in a document or documents received from an adversary, and likewise does not address the receiving lawyer's use of any confidential information the receiving lawyer discovers.

Minnesota. In March 2010, Minnesota issued an opinion dealing with metadata. Minnesota LEO 22 (3/26/10).[11]

The court pointed to some examples of the type of metadata that a receiving lawyer could find useful.

> Other metadata may contain confidential information the disclosure of which can have serious adverse consequences to a client. For example, a lawyer may use a template for pleadings, discovery and affidavits which contain metadata within the document with names and other important information about a particular matter which should not be

[11] Minnesota LEO 22 (3/26/10) (analyzing the ethics issues raised by lawyers' use of metadata; warning the sending lawyer to avoid inadvertently including metadata, and pointing to Minnesota's Rule 4.4(b) (which matches the ABA version) in simply advising the receiving lawyer to notify the sending lawyer; providing some examples of the type of metadata that could provide useful information; "Other metadata may contain confidential information the disclosure of which can have serious adverse consequences to a client. For example, a lawyer may use a template for pleadings, discovery and affidavits which contain metadata within the document with names and other important information about a particular matter which should not be disclosed to another party in another action. Also as an example, a lawyer may circulate within the lawyer's firm a draft pleading or legal memorandum on which other lawyers may add comments about the strengths and weaknesses of a client's position which are embedded in the document but not apparent in the document's printed form. Similarly, documents used in negotiating a price to pay in a transaction or in the settlement of a lawsuit may contain metadata about how much or how little one side or the other may be willing to pay or to accept."; concluding that "a lawyer is ethically required to act competently to avoid improper disclosure of confidential and privileged information in metadata in electronic documents."; pointing to Minnesota's Rule 4.4(b) in holding that "[i]f a lawyer receives a document which the lawyer knows or reasonably should know inadvertently contains confidential or privileged metadata, the lawyer shall promptly notify the document's sender as required by Rule 4.4(b), MRPC."; not pointing to any other state's approach to the receiving lawyer's ethics duty; explicitly indicating that "Opinion 22 is not meant to suggest there is an ethical obligation on a receiving lawyer to look or not to look for metadata in an electronic document. Whether and when a lawyer may be advised to look or not to look for such metadata is a fact specific question beyond the scope of this Opinion.").

> disclosed to another party in another action. Also as an example, a lawyer may circulate within the lawyer's firm a draft pleading or legal memorandum on which other lawyers may add comments about the strengths and weaknesses of a client's position which are embedded in the document but not apparent in the document's printed form. Similarly, documents used in negotiating a price to pay in a transaction or in the settlement of a lawsuit may contain metadata about how much or how little one side or the other may be willing to pay or to accept.

Id. The Minnesota Bar then emphasized the sending lawyer's responsibility to "scrub" metadata.

In discussing the receiving lawyer's ethics duty, the Minnesota Bar essentially punted. It cited Minnesota's version of Rule 4.4(b) (which matches the ABA Model Rule version) -- which simply requires the receiving lawyer to notify the sending lawyer of any inadvertently transmitted document. In fact, the Minnesota Bar went out of its way to avoid taking any position on the receiving lawyer's ethics duty.

> Opinion 22 is not meant to suggest there is an ethical obligation on a receiving lawyer to look or not to look for metadata in an electronic document. Whether and when a lawyer may be advised to look or not to look for such metadata is a fact specific question beyond the scope of this Opinion.

Id. It is difficult to imagine how the receiving lawyer's decision is "fact specific." The Minnesota Bar did not even indicate where the receiving lawyer should look for ethics guidance.

Amazingly, the Minnesota Bar did not point to any other state's opinion on metadata, or even acknowledge the national debate.

Oregon. In November 2011, Oregon took a novel approach to the metadata issue, articulating an ethics standard that varies with technology.

In Oregon LEO 2011-187 (11/2011),[12] the bar started with three scenarios. The first scenario involved a lawyer receiving a draft agreement from another lawyer. The receiving lawyer was "able to use a standard word processing feature" to reveal the document's metadata. That process showed that the sending lawyer had made a number of revisions to the draft, and later deleted some of them.

The next scenario started with the same facts, but then added a twist. In that scenario, "shortly after opening the document and displaying the changes" the receiving lawyer received an "urgent request" from the sending lawyer asking the receiving lawyer to delete the document because the sending lawyer had "mistakenly not removed the metadata."

[12] Oregon LEO 2011-187 (11/2011) (holding that lawyers may use a "standard word processing feature" to find metadata in documents they receive, but that using "special software" to thwart metadata scrubbing is unethical; explaining that lawyers' duties of competence and confidentiality require them to take "reasonable care" to prevent the inadvertent disclosure of metadata; noting that Oregon's Rule 4.4(b) at most requires a lawyer to notify the sender if the receiving lawyer "knows or should have known" that the document contains inadvertently transmitted metadata; concluding that the receiving lawyer (1) may use "a standard word processing feature" to find metadata; (2) does not have to comply with the sender's "urgent request" asking that the receiving lawyer delete a document without reading it because the sender "had mistakenly not removed the metadata" -- even if the lawyer receives the request "shortly after opening the document and displaying the changes" using such a "standard word processing feature"; (3) "should consult with the client" about "the risks of returning a document versus the risks of retaining and reading the document and its metadata"; (4) may not use special software "designed to thwart the metadata removal tools of common word processing software"; acknowledging that it is "not clear" whether the receiving lawyer has a duty to notify the sender if the receiving lawyer uncovers metadata using such "special software"; although answering "No" to the short question "[May the receiving lawyer] use special software to reveal the metadata in the document," describing that prohibition elsewhere as conditioned on it being "apparent" that the sending lawyer attempted to scrub the metadata; "Searching for metadata using special software when it is apparent that the sender has made reasonable efforts to remove the metadata may be analogous to surreptitiously entering the other lawyer's office to obtain client information and may constitute 'conduct involving dishonesty, fraud, deceit or misrepresentation' in violation of Oregon RPC 8.4(a)(3).").

In the third scenario, the receiving lawyer wanted to search for metadata using "software designed to thwart the metadata removal tools of common word processing software."

In sum, the Oregon Bar concluded that the receiving lawyer (1) could use "a standard word processing feature" to search for metadata, and at most must notify the sending lawyer of the metadata's existence; (2) could ignore the sending lawyer's request to delete the document; and (3) could not use "special software" to find the metadata that the sending lawyer intended to remove before sending the document.

The Oregon Bar started its analysis by emphasizing the sending lawyer's duty to take "reasonable care" to avoid inadvertently including metadata in an electronic document. The Oregon Bar relied on both competence and confidentiality duties.

The Oregon Bar next pointed to its version of Rule 4.4(b), which matches the ABA's Model Rule 4.4(b).

In turning to the receiving lawyer's duties, the Oregon Bar presented another scenario -- involving a sending lawyer's inadvertent inclusion of notes on yellow paper with a hardcopy of a document sent to an adversary. The Oregon Bar explained that the receiving lawyer in that scenario "may reasonably conclude" that the sending lawyer inadvertently included the yellow note pages, and therefore would have a duty to notify the sending lawyer. The same would not be true of a "redline" draft transmitted by the sending lawyer, given the fact that "it is not uncommon for lawyers to share marked-up drafts."

If the receiving lawyer "knows or reasonably should know" that a document contains inadvertently transmitted metadata, the receiving lawyer at most has a duty to notify the sending lawyer. The Oregon Bar bluntly explained that Rule 4.4(b):

> does not require the receiving lawyer to return the document unread or to comply with the request by the sender to return the document.

Id. (emphasis added). In fact, the receiving lawyer's duty to consult with the client means that the receiving lawyer:

> should consult with the client about the risks of returning the document versus the risks of retaining and reading the document and its metadata.

Id. Other bars have also emphasized the client's right to participate in the decision-making of how to treat an inadvertently transmitted document. The Oregon Bar acknowledged the language in Comment [3] to ABA Model Rule 4.4(b) that such a decision is "a matter of professional judgment reserved to the lawyer," [13] but also pointed to other ethics rules requiring lawyers to consult with their clients.

The Oregon Bar then turned to a situation in which the sending lawyer has taken "reasonable efforts" to "remove or screen metadata from the receiving lawyer." The Oregon Bar explained that the receiving lawyer might be able to "thwart the sender's efforts through software designed for that purpose." The Oregon Bar conceded that it is "not clear" whether the receiving lawyer learning of the metadata's existence has a duty

[13] Interestingly, the Oregon Bar did not fully quote ABA Model Rule 4.4(b), cmt. [3], which indicates that the decision is "a matter of professional judgment ordinarily reserved to the lawyer" (emphasis added).

to notify the sending lawyer in that circumstance. However, the Oregon Bar concluded with a warning about the use of such "special software."

> Searching for metadata using special software when it is apparent that the sender has made reasonable efforts to remove the metadata may be analogous to surreptitiously entering the other lawyer's office to obtain client information and may constitute "conduct involving dishonesty, fraud, deceit or misrepresentation" in violation in Oregon RPC 8.4(a)(3).

Id.

Although this conclusion indicated that such conduct "may be" analogous to improper conduct, the Oregon Bar offered a blunt "No" to the question: "May Lawyer B use special software to reveal the metadata in the document?" The short answer to that question did not include the premise that it be "apparent" that the sending lawyer tried to scrub the metadata. Thus, the simple "No" answer seemed to indicate that in that circumstance it would clearly be improper (rather than "may be" improper) for a receiving lawyer to use the "special software."

The Oregon Bar's analysis seems sensible in some ways, but nearly impossible to apply. First, it assumes that any metadata might have been "inadvertently" transmitted, and thus trigger a Rule 4.4(b) analysis. It is equally plausible to consider the metadata as having been intentionally sent. Perhaps the sending lawyer did not intend that the receiving lawyer read the metadata, but the sending lawyer surely directed the document to the receiving lawyer, unlike an errant fax or even the notes on yellow paper that the sending lawyer did not mean to include. The metadata is part of the document that was intentionally sent -- it is just that the sending lawyer might not

know it is there. Considering that to be an "inadvertent" transmission might let someone argue that a sending lawyer "inadvertently" made some admission in a letter, or "inadvertently" relied on a case that actually helps the adversary, etc.

Second, if someone could use "special software" to discover metadata, it would be easy to think that the sending lawyer has almost by definition not taken "reasonable effort" to avoid disclosure of the metadata. The sending lawyer could just send a scanned PDF of the document, a fax, a hard copy, etc.

Third, the Oregon Bar makes quite an assumption in its conclusion about the receiving lawyer's use of "special software" that not only finds the metadata, but also renders it "apparent that the sender has made reasonable efforts to remove the metadata." The Oregon Bar did not describe any such "special software," so it is unclear whether it even exists. However, the Oregon Bar's conclusion rested (at least in part of the opinion) on the receiving lawyer discovering that the sending lawyer has attempted to remove the metadata. As explained above, however, the short question and answer at the beginning of the legal ethics opinion seems to prohibit the use of such "special software" regardless of the receiving lawyer's awareness that the sending lawyer had attempted to scrub the software.

Fourth, it is frightening to think that some lawyer using "a standard word processing feature" to search for metadata is acting ethically, but a lawyer using "special software designed to thwart the metadata removal tools of common word processing software" might lose his or her license. It is difficult to imagine that the line between ethical and unethical conduct is currently defined by whether a word

processing feature is "standard" or "special." And of course that type of technological characterization changes every day.

Washington. The Washington State Bar Association dealt with metadata in a 2012 opinion. Washington LEO 2216 (2012).[14] In essence, Washington followed Oregon's lead in distinguishing between a receiving lawyer's permissible use of "standard" software to search for metadata and the unethical use of "special forensic software" designed to thwart the sending lawyer's scrubbing efforts.

The Washington LEO opinion posed three scenarios. In the first, a sending lawyer did not scrub metadata, so the receiving lawyer was able to use "standard word processing features" to find metadata in a proposed settlement document. Id. Washington state began its analysis of this scenario by noting that the sending lawyer:

[14] Washington LEO 2216 (2012) (analyzing both the sending and the receiving lawyers' responsibilities in connection with metadata; analyzing three hypotheticals: (1) a receiving lawyer uses "standard word processing features" to view metadata; concluding that the receiving lawyer's sole duty is to notify the sending lawyer of the metadata's presence; (2) "shortly after opening the document and discovering the readily accessible metadata, [receiving lawyer] receives an urgent email from [sending lawyer] stating that the metadata had been inadvertently disclosed and asking [receiving lawyer] to immediately delete the document without reading it"; concluding that the receiving lawyer "is not required to refrain from reading the document, nor is [receiving lawyer] required to return the document to [sending lawyer]. . . . [Receiving lawyer] may, however, be under a legal duty separate and apart from the ethical rules to take additional steps with respect to the document."; explaining that absent a legal duty governing the situation, the receiving lawyer must consult with the client about what steps to take; (3) a sending lawyer makes "reasonable efforts to 'scrub' the document" of metadata, and believes that he has successfully scrubbed the metadata; concluding that the receiving lawyer's use of "special forensic software designed to circumvent metadata removal tools" would be improper; "The ethical rules do not expressly prohibit [receiving lawyer] from utilizing special forensic software to recover metadata that is not readily accessible or has otherwise been 'scrubbed' from the document. Such efforts would, however, in the opinion of this committee, contravene the prohibition in RPC 4.4(a) against 'us[ing] methods of obtaining evidence that violate the legal rights of [third persons]' and would constitute 'conduct that is prejudicial to the administration of justice' in contravention of RPC 8.4(d). To the extent that efforts to mine metadata yield information that intrudes on the attorney-client relationship, such efforts would also violate the public policy of preserving confidentiality as the foundation of the attorney-client relationship. . . . As such, it is the opinion of this committee that the use of special software to recover, from electronic documents, metadata that is not readily accessible does violate the ethical rules.").

> has an ethical duty to "act competently" to protect from disclosure the confidential information that may be reflected in a document's metadata, including making reasonable efforts to "scrub" metadata reflecting any protected information from the document before sending it electronically . . . .

Id. The Bar pointed to the Washington version of Rule 4.4(b) in explaining that the receiving lawyer could read the metadata. The Bar indicated that the receiving lawyer in that scenario simply had a duty to notify the sending lawyer "that the disclosed document contains readily accessible metadata." Id.

In the second scenario:

> shortly after opening the document and discovering the readily accessible metadata, [the receiving lawyer] receives an urgent e-mail from [the sending lawyer] stating that the metadata had been inadvertently disclosed and asking [the receiving lawyer] to immediately delete the document without reading it.

Id. Somewhat surprisingly, the Washington Bar indicated that in that scenario the receiving lawyer:

> is not required to refrain from reading the document, nor is [the receiving lawyer] required to return the document to [the sending lawyer]. . . . [The receiving lawyer] may, however, be under a legal duty separate and apart from the ethical rules to take additional steps with respect the document.

Id. The Bar explained that if there were no such separate legal duty applicable, the receiving lawyer would have to decide what steps to take in a consultation with the client.

In the third scenario, the sending lawyer had taken "reasonable efforts to 'scrub' the document" of metadata and believed that he had done so. Id. However, the

receiving lawyer "possesses special forensic software designed to circumvent metadata removal tools." Id. The Washington Bar found that a receiving lawyer's use of such "special forensic software" violated Rule 8.4.

> The ethical rules do not expressly prohibit [the receiving lawyer] from utilizing special forensic software to recover metadata that is not readily accessible or has otherwise been 'scrubbed' from the document. Such efforts would, however, in the opinion of this committee, contravene the prohibition in RPC 4.4(a) against 'us[ing] methods of obtaining evidence that violate the legal rights of [third persons]' and would constitute 'conduct that is prejudicial to the administration of justice' in contravention of RPC 8.4(d). To the extent that efforts to mine metadata yield information that intrudes on the attorney-client relationship, such efforts would also violate the public policy of preserving confidentiality as the foundation of the attorney-client relationship. . . . As such, it is the opinion of this committee that the use of special software to recover, from electronic documents, metadata that is not readily accessible does violate the ethical rules.

Id.

New Jersey. The New Jersey Supreme Court articulated that state's approach to metadata on April 14, 2016.[15]

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[15] New Jersey Supreme Court, Administrative Determinations on the Report and Recommendations of the Working Group on Ethical Issues Involving Metadata in Electronic Documents, Apr. 14, 2016, (adopting a change in New Jersey Rule 4.4(b); Official Comment (Aug. 1, 2016); "A lawyer who receives an electronic document that contains unrequested metadata may, consistent with Rule of Professional Conduct 4.4(b), review the metadata provided the lawyer reasonably believes that the metadata was not inadvertently sent. When making a determination as to whether the metadata was inadvertently sent, the lawyer should consider the nature and purpose of the document. For example, absent permission from the sender, a lawyer should not review metadata in a mediation statement or correspondence from another lawyer, as the metadata may reflect attorney-client communications, work product or internal communications not intended to be shared with opposing counsel. The lawyer should also consider the nature of the metadata at issue. Metadata is presumed to be inadvertently sent when it reflects privileged attorney-client or work product information. Metadata is likely to be inadvertently sent when it reflects private or proprietary information, information that is outside the scope of discovery by agreement or court order, or information specifically objected to in discovery. If a lawyer must use forensic 'mining' software or similar methods to reveal metadata in an electronic document when metadata was not specifically

Unlike states which provide complete freedom for receiving lawyers to check for metadata or flatly prohibit lawyer from checking for metadata, the New Jersey standard contained a potentially confusing subjective element.

The New Jersey rule permitted receiving lawyers to check for metadata, under certain conditions.

> A lawyer who receives an electronic document that contains unrequested metadata may, consistent with Rule of Professional Conduct 4.4(b), review the metadata provided the lawyer reasonably believes that the metadata was not inadvertently sent.

Id. (emphasis added). New Jersey's explanation of this subjective element did not provide any certainty, but offered some guidance.

> When making a determination as to whether the metadata was inadvertently sent, the lawyer should consider the nature and purpose of the document. For example, absent permission from the sender, a lawyer should not review metadata in a mediation statement or correspondence from another lawyer, as the metadata may reflect attorney-client communications, work product or internal communications not intended to be shared with opposing counsel. The lawyer should also consider the nature of the metadata at issue. Metadata is presumed to be inadvertently sent when it reflects privileged attorney-client or work product information. Metadata is likely to be inadvertently sent when it reflects private or proprietary information, information that is outside the scope of discovery by agreement or court order, or information specifically objected to in discovery. If a lawyer must use forensic 'mining' software or similar methods to reveal metadata in an electronic document when metadata was not specifically requested, as opposed to using simply computer keystrokes on ordinary business software, it is likely that the information so revealed was

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requested, as opposed to using simply computer keystrokes on ordinary business software, it is likely that the information so revealed was inadvertently sent, given the degree of sophistication required to reveal the metadata."), available at http://www.judiciary.state.nj.us/notices/2016/n160809a.pdf.

> inadvertently sent, given the degree of sophistication required to reveal the metadata.").

Id.

Lawyers governed by this New Jersey standard would be wise to avoid searching for any metadata in other lawyers' correspondence or in mediation statements, although the New Jersey Supreme Court approach did not even totally prohibit such review. Similarly, such lawyers should probably not rely on special forensic metadata mining software, although New Jersey does not flatly prohibit such software's use.

Interestingly, the New Jersey approach also focused on the metadata's content as a factor in determining whether the sending lawyer inadvertently included it. That seems odd, because the receiving lawyer cannot assess that content without first finding and reviewing the metadata.

Texas. A Texas legal ethics opinion stated that state's metadata approach in December 2016.[16]

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[16] Texas LEO 665 (12/16) (holding that lawyers must take reasonable steps to prevent the inadvertent transmission of metadata to adversaries, but also noting that the receiving lawyers may read such metadata -- although they should keep in mind the risk of disqualification; "Lawyers . . . have a duty to take reasonable measures to avoid the transmission of confidential information embedded in electronic documents, including the employment of reasonably available technical means to remove such metadata before sending such documents to persons to whom such confidential information is not to be revealed pursuant to the provisions of Rule 1.05. Commonly employed methods for avoiding the disclosure of confidential information in metadata include the use of software to remove or 'scrub' metadata from the document before transmission, the conversion of the document into another format that does not preserve the original metadata, and transmission of the document by fax or hard copy."; "[A]lthough the Texas Disciplinary Rules do not prohibit a lawyer from searching for, extracting, or using metadata and do not require a lawyer to notify any person concerning metadata obtained from a document received, a lawyer who has reviewed metadata must not, through action or inaction, convey to any person or adjudicative body information that is misleading or false because the information conveyed does not take into account what the lawyer has learned from such metadata. For example, a Texas lawyer, in responding to a question, is not permitted to give an answer that would be truthful in the absence of metadata reviewed by the lawyer but that would be false or misleading when the lawyer's knowledge gained from the metadata is also considered." (emphasis added); "'A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or

The Texas legal ethics opinion allowed lawyers to search for metadata in documents they receive, but included a series of warnings – some of which were obvious, and some of which were unique.

After reminding sending lawyers about the risk of including metadata in their communications, the Texas legal ethics opinion coupled its statement freeing Texas lawyers to review such metadata with a warning that they cannot lie about it.

> [A]lthough the Texas Disciplinary Rules do not prohibit a lawyer from searching for, extracting, or using metadata and do not require a lawyer to notify any person concerning

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reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.'" (citation omitted); "To the extent a Texas lawyer becomes subject to the disciplinary rules of other jurisdictions, the lawyer may be subject to additional requirements concerning the treatment of metadata that would not be applicable if only the Texas Disciplinary Rules of Professional Conduct were considered." (emphasis added); "The Committee also cautions that a lawyer's conduct upon receipt of an opponent's confidential information may have material consequences for the client, including the possibility of procedural disqualification. . . . If in a given situation a client will be exposed to material risk by a lawyer's intended treatment of an opponent's inadvertently transmitted confidential information contained in metadata, the lawyer should discuss with the client the risks and benefits of the proposed course of action as well as other possible alternatives so that the client can make an informed decision. *See* Rule 1.03(b) ('A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.')." (emphasis added); "This opinion applies only to the voluntary transmission of electronic documents outside the normal course of discovery. The production of electronic documents in discovery is governed by court rules and other law, which may prohibit the removal or alteration of metadata. Court rules may also govern the obligations of a lawyer who receives inadvertently transmitted privileged information in the course of discovery. *See, e.g.,* Tex. R. Civ. P. 193.3(d)." (emphasis added); "The Texas Disciplinary Rules of Professional Conduct require lawyers to take reasonable measures to avoid the transmission of confidential information embedded in electronic documents, including the employment of reasonably available technical means to remove such metadata before sending such documents to persons other than the lawyer's client. Whether a lawyer has taken reasonable measures to avoid the disclosure of confidential information in metadata will depend on the factual circumstances.";"While the Texas Disciplinary Rules of Professional Conduct do not prescribe a specific course of conduct for a lawyer who receives from another lawyer an electronic document containing confidential information in metadata that the receiving lawyer believes was not intended to be transmitted to the lawyer, court rules or other applicable rules of conduct may contain requirements that apply in particular situations. Regardless, a Texas lawyer is required by the Texas Disciplinary Rules to avoid misleading or fraudulent use of information the lawyer may obtain from the metadata. In the absence of specific governing provisions, a lawyer who is considering the proper course of action regarding confidential information in metadata contained in a document transmitted by opposing counsel should determine whether the possible course of action poses material risks to the lawyer's client. If so, the lawyer should explain the risks and potential benefits to the extent reasonably necessary to permit the client to make informed decisions regarding the matter.").

> metadata obtained from a document received, a lawyer who has reviewed metadata must not, through action or inaction, convey to any person or adjudicative body information that is misleading or false because the information conveyed does not take into account what the lawyer has learned from such metadata.

Texas LEO 665 (12/16) (emphasis added).

The Texas legal ethics opinion then understandably warned lawyers that other states' ethics rules might apply.

> To the extent a Texas lawyer becomes subject to the disciplinary rules of other jurisdictions, the lawyer may be subject to additional requirements concerning the treatment of metadata that would not be applicable if only the Texas Disciplinary Rules of Professional Conduct were considered.

Id.

Implicitly acknowledging that courts may take a different attitude about lawyers' search for metadata, the Texas legal ethics opinion also warned receiving lawyers about the risk of their disqualification should they review metadata, and advised lawyers to review such risks with their clients.

> The Committee also cautions that a lawyer's conduct upon receipt of an opponent's confidential information may have material consequences for the client, including the possibility of procedural disqualification. . . . If in a given situation a client will be exposed to material risk by a lawyer's intended treatment of an opponent's inadvertently transmitted confidential information contained in metadata, the lawyer should discuss with the client the risks and benefits of the proposed course of action as well as other possible alternatives so that the client can make an informed decision.

Id.

Current "Scorecard"

A chronological list of state ethics opinions dealing with metadata highlights the states' widely varying approaches.

The following is a chronological list of state ethics opinions, and indication of whether receiving lawyers can examine an adversary's electronic document for metadata.

2001

New York LEO 749 (12/14/01) -- **NO**

2004

New York LEO 782 (12/18/04) -- **NO**

2006

ABA LEO 442 (8/5/06) -- **YES**

Florida LEO 06-2 (9/5/06) -- **NO**

2007

Maryland LEO 2007-9 (2007) -- **YES**

Alabama LEO 2007-02 (3/14/07) -- **NO**

District of Columbia LEO 341 (9/2007) -- **NO**

Arizona LEO 07-3 (11/2007) -- **NO**

Pennsylvania LEO 2007-500 (2007) -- **YES**

2008

N.Y. County Law. Ass'n LEO 738 (3/24/08)-- **NO**

Colorado LEO 119 (5/17/08) -- **YES**

Maine LEO 196 (10/21/08) -- **NO**

2009

Pennsylvania LEO 2009-100 (2009) -- **YES**

New Hampshire LEO 2008-2009/4 (4/16/09) -- **NO**

West Virginia LEO 2009-01 (6/10/09) -- **NO**

Vermont LEO 2009-1 (10/2009) -- **YES**

2010

North Carolina LEO 2009-1 (1/15/10) -- **NO**

Minnesota LEO 22 (3/26/10) -- **MAYBE**

2011

Oregon LEO 2011-187 (11/2011) -- **YES** (using "standard word processing features") and **NO** (using "special software" designed to thwart metadata scrubbing).

2012

Washington LEO 2216 (2012) -- **YES** (using "standard word processing features") and **NO** (using "special forensic software" designed to thwart metadata scrubbing).

2016

New Jersey Rules change (4/14/16) – **YES** (if receiving lawyers reasonably believe the metadata was not inadvertently sent).

Texas LEO 665 (12/16) -- **YES**

Thus, states take widely varying approaches to the ethical propriety of mining an adversary's electronic documents for metadata.

Interestingly, neighboring states have taken totally different positions. For instance, in late 2008, the Maine Bar prohibited such mining -- finding it "dishonest" and

prejudicial to the administration of justice -- because it "strikes at the foundational principles that protect attorney-client confidences." Maine LEO 196 (10/21/08).

About six months later, New Hampshire took the same basic approach (relying on its version of Rule 4.4(b)), and even went further than Maine in condemning a receiving lawyer's mining of metadata -- analogizing it to a lawyer "peeking at opposing counsel's notes during a deposition or purposely eavesdropping on a conversation between counsel and client." New Hampshire LEO 2008-2009/4 (4/16/09).

However, another New England state (Vermont) reached exactly the opposite conclusion in 2009. Pointing to its version of Rule 4.4(b), Vermont even declined to use the term "mine" in determining the search, because of its "pejorative characterization." Vermont LEO 2009-1 (9/2009).

Basis for States' Differing Positions

In some situations, the bars' rulings obviously rest on the jurisdiction's ethics rules. For instance, the District of Columbia Bar pointed to its version of Rule 4.4(b), which the bar explained is "more expansive than the ABA version," because it prohibits the lawyer from examining an inadvertently transmitted writing if the lawyer "knows, before examining the writing, that it has been inadvertently sent." District of Columbia LEO 341 (9/2007).

On the other hand, some of these bars' rulings seem to contradict their own ethics rules. For instance, Florida has adopted ABA Model Rule 4.4(b)'s approach to

inadvertent transmissions (requiring only notice to the sending lawyer), but the Florida Bar nevertheless found unethical the receiving lawyer's "mining" of metadata. [17]

Other jurisdictions have not adopted any version of Rule 4.4(b), and therefore were free to judge the metadata issue without reference to a specific rule. See, e.g., Alabama LEO 2007-02 (3/14/07).

On the other hand, some states examining the issue of metadata focus on the basic nature of the receiving lawyer's conduct in attempting to "mine" metadata. Such conclusions obviously do not rest on a particular state's ethics rules. Instead, the different bars' characterization of the "mining" reflects a fascinating dichotomy resting on each state's view of the conduct.

- On March 24, 2008, the New York County Bar explained that mining an adversary's electronic documents for metadata amounted to unethical conduct that "is deceitful and prejudicial to the administration of justice." N.Y. County Law. Ass'n LEO 738 (3/24/08).

- Less than two months later, the Colorado Bar explained that "there is nothing inherently deceitful or surreptitious about searching for metadata." Colorado LEO 119 (5/17/08).

- A little over five months after that, the Maine Bar explained that "[n]ot only is the attorney's conduct dishonest in purposefully seeking by this method to uncover confidential information of another party, that conduct strikes at the foundational principles that protect attorney-client confidences, and in doing so it clearly prejudices the administration of justice." Maine LEO 196 (10/21/08).

Thus, in less than seven months, two states held that mining an adversary's electronic document for metadata was deceitful, and one state held that it was not.

[17] Florida LEO 06-2 (9/16/06).

Best Answer

The best answer to this hypothetical is **(b) or (c), DEPENDING ON THE STATE**.

B 4/17

Negotiation/Transactional Adversaries' Misunderstanding of Clients' Intent

Hypothetical 4

You are preparing for settlement negotiations, and have posed several questions to a partner whose judgment you trust.

(a) May you advise the adversary that you think that your case is worth $250,000, although you really believe that your case is worth only $175,000?

(A) YES

(b) May you argue to the adversary that a recent case decided by your state's supreme court supports your position, although you honestly believe that it does not?

(A) YES (MAYBE)

(c) Your client (the defendant) has instructed you to accept any settlement demand that is less than $100,000. If the plaintiff's lawyer asks "will your client give $90,000?," may you answer "no"?

MAYBE

Analysis

In some situations, lawyers must assess whether the lawyer must or may disclose protected client information to correct a negotiation or transactional adversary's misunderstanding. Such negotiations or transactions can occur in a purely commercial setting or in connection with settling litigation.

The analysis frequently involves characterized statements that the lawyer or lawyer's client has made -- which might have induced the adversary's misunderstanding. This in turn sometimes involves distinguishing between harmless statements of intent and wrongful statements of fact. Most authorities label the former

"puffery" -- as if giving it a special name will immunize such statements from common law or ethics criticism. The latter type of statement can run afoul of both common law and ethics principles significantly. The ethics rules prohibit misrepresentation regardless of the adversary's reliance or lack of reliance, and regardless of any causation.

Under ABA Model Rule 4.1 and its state counterparts,

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

ABA Model Rule 4.1

The first comment confirms that lawyers do not have an obligation to volunteer unfavorable facts to the adversary.

> A lawyer is required to be truthful when dealing with others on a client's behalf, <u>but generally has no affirmative duty to inform an opposing party of relevant facts.</u>

ABA Model Rule 4.1 cmt. [1] (emphasis added).

Comment [2] addresses the distinction between factual statements and what many call "puffing."

> This Rule refers to statements of fact. Whether a particular statement should be regarded as one of fact can depend on the circumstances. <u>Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's</u>

> intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except when nondisclosure of the principal would constitute fraud. Lawyers should be mindful of their obligations under applicable law to avoid criminal and tortious misrepresentation.

ABA Model Rule 4.1 cmt. [2] (emphasis added).

Not surprisingly, it can be very difficult to distinguish between ethical statements of fact and ethically permissible "puffing."

Perhaps because of this difficulty in drawing the lines of acceptable conduct, the ABA explained in one legal ethics opinion that judges should not ask litigants' lawyers about the extent of their authority.[1]

The Restatement takes the same necessarily vague approach -- although focusing more than the ABA Model Rules on the specific context of the statements.

> A knowing misrepresentation may relate to a proposition of fact or law. Certain statements, such as some statements relating to price or value, are considered nonactionable hyperbole or a reflection of the state of mind of the speaker and not misstatements of fact or law . . . . Whether a misstatement should be so characterized depends on whether it is reasonably apparent that the person to whom the statement is addressed would regard the statement as one of fact or based on the speaker's knowledge of facts reasonably implied by the statement or as merely an expression of the speaker's state of mind. Assessment depends on the circumstances in which the statement is made, including the past relationship of the negotiating persons, their apparent sophistication, the plausibility of the statement on its face, the phrasing of the statement, related

[1] ABA LEO 370 (2/5/93) (unless the client consents, a lawyer may not reveal to a judge the limits of his settlement authority or advice to the client regarding settlement; the judge may not require the disclosure of such information; a lawyer may not lie in response to a direct question about his settlement authority, although "a certain amount of posturing or puffery in settlement negotiations may be an acceptable convention between opposing counsel.")

> communication between the persons involved, the known negotiating practices of the community in which both are negotiating, and similar circumstances. In general, a lawyer who is known to represent a person in a negotiation will be understood by nonclients to be making nonimpartial statements, in the same manner as would the lawyer's client. Subject to such an understanding, the lawyer is not privileged to make misrepresentations described in this Section.

Restatement (Third) of Law Governing Lawyers § 98 cmt. c (2000) (emphasis added).

A 2015 California legal ethics opinion distinguished between statements that amount to harmless "puffery" and those that cross the line into knowing misrepresentations.

Some statements obviously violate the ethics rules, because they involve demonstrably false statements of objectively provable facts.

- California LEO 2015-194 (2015) (analyzing the following scenario, and finding that the lawyer's representation constituted a factual statement rather than puffery; "While the settlement officer is talking privately with Attorney and Plaintiff, he asks Attorney and Plaintiff about Plaintiff's wage loss claim. Attorney tells the settlement officer that Plaintiff was earning $75,000 per year, which is $25,000 more than Client was actually earning; Attorney is aware that the settlement officer will convey this figure to Defendant, which he does." (emphasis added); "Attorney's statement that Plaintiff was earning $75,000 per year, when Plaintiff was actually earning $50,000, is an intentional misstatement of a fact. Attorney is not expressing his opinion, but rather is stating a fact that is likely to be material to the negotiations, and upon which he knows the other side may rely, particularly in the context of these settlement discussions, which are taking place prior to discovery. As with Example Number 1, above, Attorney's statement constitutes an improper false statement and is not permissible." (emphasis added)).

- California LEO 2015-194 (2015) (analyzing the following scenario, and finding that the lawyer's representation constituted a factual statement rather than puffery; "In response to Plaintiff's settlement demand, Defendant's lawyer informs the settlement officer that Defendant's insurance policy limit is $50,000. In fact, Defendant has a $500,000 insurance policy." (emphasis added); "Defendant's lawyer's inaccurate representations regarding

> Defendant's policy limits is an intentional misrepresentation of fact intended to mislead Plaintiff and her lawyer. See Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone (2003) 107 Cal.App.4th 54, 76 [131 Cal.Rptr.2d 777] (plaintiffs 'reasonably relied on the coverage representations made by counsel for an insurance company'). As with Example Number 1, above, Defendant's lawyer's intentional misrepresentation about the available policy limits is improper." (emphasis added)).

Some statements are also demonstrably false, but seem somewhat less objective than the easily analyzed misstatements.

- California LEO 2015-194 (2015) (analyzing the following scenario, and finding that the lawyer's representation constituted a factual statement rather than puffery; "In the settlement conference brief submitted on Plaintiff's behalf, Attorney asserts that he will have no difficulty proving that Defendant was texting while driving immediately prior to the accident. In that brief, Attorney references the existence of an eyewitness to the accident, asserts that the eyewitness's account is undisputed, asserts that the eyewitness specifically saw Defendant texting while driving immediately prior the accident, and asserts that the eyewitness's credibility is excellent. In fact, Attorney has been unable to locate any eyewitness to the accident." (emphasis added); "Attorney's misrepresentations about the existence of a favorable eyewitness and the substance of the testimony the attorney purportedly expects the witness to give are improper false statements of fact, intended to mislead Defendant and his lawyer. Attorney is making representations regarding the existence of favorable evidence for the purpose of having the Defendant rely on them. The attorney has no factual basis for the statements made. Further, Attorney's misrepresentation is not an expression of opinion, but a material representation that "a reasonable [person] would attach importance to . . . in determining his choice of action in the transaction in question . . ." (Charpentier v. Los Angeles Rams (1999) 75 Cal.App.4th 301, 313 [89 Cal.Rptr.2d 115], quoting Rest.2d Torts § 538). Thus, Attorney's misrepresentations regarding the existence of a favorable eyewitness constitute improper false statements and are not ethically permissible. This is consistent with Business and Professions Code section 6128(a) . . ., and Business and Professions Code section 6106 . . ., which make any act involving deceit, moral turpitude, dishonesty or corruption a cause for disbarment or suspension." (emphasis added)).

The existence of an eyewitness can be proven true or false. The question would presumably be closer if the lawyer directly testified that an eyewitness saw the accident,

but stretched a bit when proclaiming to the adversary that the eyewitness will support the lawyer's client's version of the facts.

The 2015 California legal ethics opinion also included an illustration of classic permissible "puffery."

- California LEO 2015-194 (2015) (analyzing the following scenario, and finding that the lawyer's representation constituted puffery; "While talking privately outside the presence of the settlement officer, Attorney and Plaintiff discuss Plaintiff's 'bottom line' settlement number. Plaintiff advises Attorney that Plaintiff's 'bottom line' settlement number is $175,000. When the settlement officer asks Attorney for Plaintiff's demand, Attorney says, 'Plaintiff needs $375,000 if you want to settle this case.'" (emphasis added); "Statements regarding a party's negotiating goals or willingness to compromise, as well as statements that constitute mere posturing or 'puffery,' are among those that are not considered verifiable statements of fact. A party negotiating at arm's length should realistically expect that an adversary will not reveal its true negotiating goals or willingness to compromise. Here, Attorney's statement of what the client will need to settle the matter is allowable 'puffery' rather than a misrepresentation of fact. Attorney has not committed an ethical violation by overstating Client's 'bottom line' settlement number." (emphasis added)).

The California legal ethics opinion also analyzed a statement that could fall into either category, depending on the facts.

- California LEO 2015-194 (2015) (finding that a lawyer's threat of bankruptcy when bankruptcy was not available to the client constituted an impermissible false representation of fact; "Defendant's lawyer also states that Defendant intends to file for bankruptcy if Defendant does not get a defense verdict. In fact, two weeks prior to the mediation, Defendant consulted with a bankruptcy lawyer and was advised that Defendant does not qualify for bankruptcy protection and could not receive a discharge of any judgment entered against him. Defendant has informed his lawyer of the results of his consultation with bankruptcy counsel and that Defendant does not intend to file for bankruptcy." (emphasis added); "Whether Defendant's lawyer's representations regarding Defendant's plans to file for bankruptcy in the event that Defendant does not win a defense verdict constitute a permissible negotiating tactic will hinge on the specific representations made and the facts known. Here, Defendant's lawyer knows that Defendant does not intend to file for bankruptcy and that Defendant consulted with bankruptcy

> counsel before the mediation and was informed that Defendant is not legally eligible to file for bankruptcy. A statement by Defendant's lawyer that expresses or implies that Defendant's financial condition is such that he is in fact eligible to file for bankruptcy is therefore a false representation of fact. The conclusion may be different[,] however, if Defendant's lawyer does not know whether or not his client intends to file for bankruptcy or whether his client is legally eligible to obtain a discharge." (emphasis added)).

The California legal ethics opinion's analysis left two issues unaddressed. First, one might think that the defendant's lawyer could ethically state that the defendant intends to declare bankruptcy -- even if a creditor could seek to have the bankruptcy action dismissed or could resist the discharge of any judgment. As long as the bankruptcy filing was not frivolous, one might think that the adversary's ability to challenge the filing (and even have it dismissed) would not prevent the filing itself. Every bar seems to take the position that a plaintiff can file a knowingly time-barred claim, even if the defendant could easily rely on the statute of limitations in seeking the action's dismissal. Perhaps that basic principle does not apply in the bankruptcy setting, but the California Bar could have explained why.

Second, the California legal ethics opinion indicated that its "conclusion may be different" if defendant's lawyer "does not know whether or not his client intends to file for bankruptcy." Id. In that scenario, one might wonder how the defendant's lawyer could "state[] that Defendant intends to file for bankruptcy if Defendant does not get a defense verdict." Id. Lawyers generally cannot make such a definite statement if the defendant has not authorized it.

(a) A 1980 American Bar Foundation article explains that this type of tactic does not violate the ethics rules.

> It is a standard negotiating technique in collective bargaining negotiation and in some other multiple-issue negotiations for one side to include a series of demands about which it cares little or not at all. The purpose of including these demands is to increase one's supply of negotiating currency. One hopes to convince the other party that one or more of these false demands is important and thus successfully to trade it for some significant concession. The assertion of and argument for a false demand involves the same kind of distortion that is involved in puffing or in arguing the merits of cases or statutes that are not really controlling. The proponent of a false demand implicitly or explicitly states his interest in the demand and his estimation of it. Such behavior is untruthful in the broadest sense; yet at least in collective bargaining its use is a standard part of the process and is not thought to be inappropriate by any experienced bargainer.

James J. White, Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation, 1980 Am. B. Found. Res. J. 926, 932 (1980) (emphases added; footnote omitted).

An ABA legal ethics opinion defines this type of statement as harmless puffery rather than material misstatement of fact.

> For example, parties to a settlement negotiation often understate their willingness to make concessions to resolve the dispute. A plaintiff might insist that it will not agree to resolve a dispute for less than $ 200, when, in reality, it is willing to accept as little as $ 150 to put an end to the matter. Similarly, a defendant manufacturer in patent infringement litigation might repeatedly reject the plaintiff's demand that a license be part of any settlement agreement, when in reality, the manufacturer has no genuine interest in the patented product and, once a new patent is issued, intends to introduce a new product that will render the old one obsolete. In the criminal law context, a prosecutor might not reveal an ultimate willingness to grant immunity as part of a cooperation agreement in order to retain influence over the witness.
>
> A party in a negotiation also might exaggerate or emphasize the strengths, and minimize or deemphasize the weaknesses, of its factual or legal position. A buyer of

> products or services, for example, might overstate its confidence in the availability of alternate sources of supply to reduce the appearance of dependence upon the supplier with which it is negotiating. Such remarks, often characterized as "posturing" or "puffing," are statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely, and must be distinguished from false statements of material fact.

ABA LEO 439 (4/12/06) (emphases added). The opinion makes essentially the same point a few pages later.

> [S]tatements regarding negotiating goals or willingness to compromise, whether in the civil or criminal context, ordinarily are not considered statements of material fact within the meaning of the Rules. Thus, a lawyer may downplay a client's willingness to compromise, or present a client's bargaining position without disclosing the client's "bottom line" position, in an effort to reach a more favorable resolution. Of the same nature are overstatements or understatements of the strengths or weaknesses of a client's position in litigation or otherwise, or expressions of opinion as to the value or worth of the subject matter of the negotiation. Such statements generally are not considered material facts subject to Rule 4.1.

Id. (emphases added). This sort of statement represents the classic type of settlement "bluffing" that the authorities seem to condone, and most lawyers expect during settlement discussions.

(b) As explained above, courts and bars anticipate that lawyers will exaggerate the strength of their factual and legal positions.

For instance, the 1980 American Bar Foundation article explains this common practice.

> In writing his briefs, arguing his case, and attempting to persuade the opposing party in negotiating, it is the lawyer's right and probably his responsibility to argue for plausible

> interpretations of cases and statutes which favor his client's interest, even in circumstances where privately he has advised his client that those are not his true interpretations of the cases and statutes.

White, 1980 Am. B. Found. Res. J. at 931-32.

(c) The American Bar Foundation article poses this question, but has a difficult time answering it.

> Assume that the defendant has instructed his lawyer to accept any settlement offer under $100,000. Having received that instruction, how does the defendant's lawyer respond to the plaintiff's question, "I think $90,000 will settle this case. Will your client give $90,000?" Do you see the dilemma that question poses for the defense lawyer? It calls for information that would not have to be disclosed. A truthful answer to it concludes the negotiation and dashes any possibility of negotiating a lower settlement even in circumstances in which the plaintiff might be willing to accept half of $90,000. Even a moment's hesitation in response to the question may be a nonverbal communication to a clever plaintiff's lawyer that the defendant has given such authority. Yet a negative response is a lie.

Id. at 932-33 (emphasis added).

Some ethicists providing advice to lawyers in this situation might advise those lawyers to plan ahead -- by foregoing such settlement authority or otherwise telling the adversary at the very beginning of the settlement negotiations about how the lawyer might or might not respond to questions during the negotiations. The article describes this "solution" as unrealistic.

> It is no answer that a clever lawyer will answer all such questions about authority by refusing to answer them, nor is it an answer that some lawyers will be clever enough to tell their clients not to grant them authority to accept a given sum until the final stages in negotiation. Most of us are not that careful or that clever. Few will routinely refuse to

> answer such questions in cases in which the client has granted a much lower limit than that discussed by the other party, for in that case an honest answer about the absence of authority is a quick and effective method of changing the opponent's settling point, and it is one that few of us will forego when our authority is far below that requested by the other party. Thus despite the fact that a clever negotiator can avoid having to lie or to reveal his settling point, many lawyers, perhaps most, will sometime be forced by such a question either to lie or to reveal that they have been granted such authority by saying so or by their silence in response to a direct question.

Id. at 933 (emphases added).

It would be easy to reach the opposite conclusion in this setting -- arguing that the adversary could not reasonably expect an honest answer to such a question. Instead, the adversary might be hoping to gain some insight into the possible outcome of negotiations by examining both the verbal and non-verbal responses to such a question.

The article's author ultimately concludes that lying is not permissible in this setting, but concedes that "I am not nearly as comfortable with that conclusion" as in situations involving more direct deception. Id. at 934.

Best Answer

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

B 8/11, 1/15, 10/15, 2/16

Negotiation/Transactional Adversaries' Legal Misunderstanding

Hypothetical 5

You are trying to settle a complex case involving very complicated federal regulations. The lawyer representing your adversary clearly does not understand her client's legal right to seek government funding in certain circumstances. You conclude that she does not understand the law in this area.

What do you do?

(A) You must disclose the adverse law to your adversary.

(B) You may disclose the adverse law to your adversary, but you don't have to.

(C) You may not disclose the adverse law to your adversary, unless your client consents.

(C) YOU MAY NOT DISCLOSE THE ADVERSE LAW TO YOUR ADVERSARY, UNLESS YOUR CLIENT CONSENTS

Analysis

Lawyers sometimes assess whether they must or may disclose protected client information to correct a negotiation/transactional adversary's misunderstanding about the law. Although ethics rules and authorities have debated knowledge of the law's protection under ABA Model Rule 1.6 and other confidentiality rules, the issue is largely mooted by the majority approach concluding that lawyers generally have no duty to correct adversaries' misunderstanding of the law that was not induced by some misrepresentation.

Not surprisingly, bar groups and others which stress lawyers' confidentiality duty deemphasize or even prohibit lawyers' disclosure of some legal development that benefits the adversary but harms the client.

For instance, in the run-up to the ABA's 1983 adoption of its ABA Model Rules, the American Trial Lawyers issued its own proposed ethics principles. One example indicated that a lawyer representing a real estate buyer would violate the ethics rules by advising the seller about a zoning change (successfully sought by that lawyer) that would obviously have increased the real estate's value.

> A lawyer represents a client negotiating the purchase of real estate. During negotiations, the parties and their lawyers discuss the adverse effect of existing zoning restrictions, which prevent commercial development of the property. Just prior to formalizing an agreement of sale, however, the buyer learns that his lawyer has persuaded the zoning board to change the zoning to permit commercial use. The buyer decides not to tell the seller about the imminent zoning change. The buyer's lawyer would commit a disciplinary violation by informing the seller.

Am. Lawyer's Code of Conduct, Proposed Revision of the Code of Prof'l Responsibility, illus. 1(d), Comm'n on Prof'l Responsibility, Roscoe Pound-Am. Trial Lawyers Found., Revised Draft (May 1982) (emphasis added).

Most authorities hold lawyers do not have a duty to disclose adverse law to a negotiation adversary.

- Philadelphia LEO 2005-2 (4/2005) ("The inquirer represents a truck driver who suffered serious injuries in a motor vehicle accident during the course of his employment. The driver of the other vehicle was at fault. The inquirer pursued three sources of recovery for the client: (1) workers compensation benefits; (2) a third party claim against the driver of the other vehicle who has a policy limit of $25,000, and (3) underinsured motorist benefits with a policy limit of $100,000. The workers compensation insurer is paying lost wage and

medical benefits. The insurance company for the other driver has tendered the $25,000 policy limit. Inquirer has not yet settled the underinsured motorist claim, but inquirer believes that the full $100,000 will be offered to the client. The workers compensation insurance adjuster, in discussing with the inquirer the workers compensation subrogation lien, limited the discussion of the lien to the $12,000 net proceeds to the client from the third-party action and stated that there could be no subrogation lien in the underinsured motorist action. This, according to the inquirer, is wrong as a matter of law. In fact, according to the inquirer, workers compensation carriers have the right to a subrogation lien in the proceeds of an uninsured motorist action. The inquirer's question is whether he or she has an ethical obligation to disclose to the workers compensation insurance adjuster that the law permits the carrier to have a subrogation lien in the proceeds from the underinsured motorist claim. Of course, if inquirer made this disclosure, the adjuster would demand a share of the client's recovery from the underinsured motorist claim. Pennsylvania Rule of Professional Conduct 4.1 (the 'Rules') does not compel disclosure because the inquirer has not made a false statement of material fact or law. The omission at issue, i.e., the failure to correct the mistake of law, is not the kind of false statement Rule 4.1 would prohibit. Furthermore, the committee concludes that Rule 8.4's prohibition of dishonesty, fraud, deceit or misrepresentations does not require the correction of the adjuster's mistake of law. Finally, Rule 3.3 does not compel disclosure because there have been no representations of law made to a tribunal in the facts presented. For these reasons, the committee has concluded that the inquirer has no ethical duty to comment on the adjuster's mistake of law." (emphasis added).

- ABA LEO 387 (9/26/94) (posing the following question: "Does a lawyer have an ethical duty to inform an opposing party that the statute of limitations has run on the claim over which they are negotiating?"; answering as follows: "[T]he lawyer is not ethically obligated to reveal to opposing counsel the fact that her client's claim is time-barred in the context of negotiations").

- Rhode Island LEO 94-40 (7/27/94) ("The inquiring attorney represents a plaintiff in a personal injury matter. The attorney believes that his/her client's claim may be barred by a recent development in Rhode Island case law. Notwithstanding this information, an out-of-state insurance company made an offer of settlement. The attorney asks if the continuation of negotiations regarding a settlement with the insurance company would violate any ethical rules in light of the change in case law. . . . A lawyer generally has no affirmative duty to inform an opposing party of statutory or case law adverse to his/her client's case. Since the inquiring attorney is not making false representations in this matter, Rule 4.1 is not being violated." (emphasis added)).

As in other areas, courts tend to be more result-driven, and occasionally recognize such a duty.

- Hamilton v. Harper, 404 S.E.2d 540, 542 n.3, 544 (W. Va. 1991) (invalidating a settlement agreement in which plaintiff's lawyer accepted a $100,000 settlement from Nationwide without advising the insurance company that a federal court had recently granted Nationwide a summary judgment in a declaratory judgment case which had eliminated Nationwide's possible liability; "While we do not dispose of this case on the grounds of misrepresentation or fraud, we take a particularly dim view of the Hamiltons' attorney's failure to disclose his knowledge regarding the action taken by the federal court. The preferred course of action for the Hamiltons' counsel, in our opinion, would have required him to voluntarily disclose that information to Nationwide in the spirit of encouraging truthfulness among counsel and avoiding the consequences of his failure to disclose, e.g. this appeal."; finding that the settlement agreement was unenforceable for "failure of consideration," rather than concluding that the plaintiff's lawyer had engaged in fraudulent conduct.).

Best Answer

The best answer to this hypothetical is **(C) YOU MAY NOT DISCLOSE THE ADVERSE LAW TO YOUR ADVERSARY, UNLESS YOUR CLIENT CONSENTS**.

B 1/15, 10/15

Negotiation/Transactional Adversaries' Factual Misunderstanding

Hypothetical 6

You have been negotiating with a vendor over a $5,000,000 contract. The vendor has a lawyer, but he and her vendor client have misinterpreted clear contractual provisions -- and told you that they are pleased that the contract offers additional funds if conditions warrant, even though the contract explicitly states that there will be no additional funding.

What do you do?

(A) You must explain the contract's absence of such possible funding.

(B) You may disclose the contract's absence of such possible funding, but you don't have to.

(C) You may not disclose the contract's absence of such possible funding, unless your client consents.

(C) YOU MAY NOT DISCLOSE THE CONTRACT'S ABSENCE OF SUCH POSSIBLE FUNDING, UNLESS YOUR CLIENT CONSENTS (MAYBE)

Analysis

The ABA Model Rules recognize a limited duty by lawyers to correct a negotiation adversary's misunderstanding not resulting from the lawyer's or the client's factual misstatements.[1]

[1] Authorities agree that lawyers must correct their own misstatements or their client's misstatements that might mislead a transactional counterparty. Restatement (Third) of Law Governing Lawyers § 98 cmt. d (2000) ("A lawyer who has made a representation on behalf of a client reasonably believing it true when made may subsequently come to know of its falsity. An obligation to disclose before consummation of the transaction ordinarily arises, unless the lawyer takes other corrective action. . . . Disclosure, being required by law . . . , is not prohibited by the general rule of confidentiality . . . . Disclosure should not exceed what is required to comply with the disclosure obligation, for example by indicating to recipients that they should not rely on the lawyer's statement."); Edward M. Waller, Jr., There are Limits: Ethical Issues in Settlement Negotiations, ABA Litigation Ethics 1 (Summer 2005) (explaining that a lawyer learning that her client had lied to a transactional counterparty must correct the client's lie before consummating a settlement).

> In the course of representing a client a lawyer shall not knowingly:
>
> (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

ABA Model Rule 4.1(b).

Comment [1] provides some explanation.

> A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

ABA Model Rule 4.1 cmt. [1] (emphasis added).

The Restatement deals in several places with a lawyer's silence in the face of a negotiation/transactional adversary's misunderstanding of facts.

In one section, the Restatement explains that

> A person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist in the following cases only:
>
> (a) where he knows that disclosure of the fact is necessary to prevent some previous assertion from being a misrepresentation or from being fraudulent or material.
>
> (b) where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.

> (c) where he knows that disclosure of the fact would correct a mistake of the other party as to the contents or effect of a writing, evidencing or embodying an agreement in whole or in part.
>
> (d) where the other person is entitled to know the fact because of a relation of trust and confidence between them.

Restatement of the Law (Second) Contracts, § 161 (1981). A comment sets a fairly high disclosure duty.

> One party cannot hold the other to a writing if he knew that the other was mistaken as to its contents or as to its legal effect. He is expected to correct such mistakes of the other party and his failure to do so is equivalent to a misrepresentation, which may be grounds either for avoidance under § 164 or for reformation under § 166. . . . The failure of a party to use care in reading the writing so as to discover the mistake may not preclude such relief . . . . In the case of standardized agreements, these rules supplement that of § 211(3), which applies, regardless of actual knowledge, if there is reason to believe that the other party would not manifest assent if he knew that the writing contained a particular term. Like the rule stated in Clause (b), that stated in Clause (c) requires actual knowledge and is limited to non-disclosure by a party to the transaction.

Restatement of the Law (Second) Contracts, § 161 cmt. e (1981).

The Restatement includes an illustration of this concept.

> A, seeking to induce B to make a contract to sell a tract of land to A for § 100,000, makes a written offer to B. A knows that B mistakenly thinks that the offer contains a provision under which A assumes an existing mortgage, and he knows that it does not contain such a provision but does not disclose this to B. B signs the writing, which is an integrated agreement. A's non-disclosure is equivalent to an assertion that the writing contains such a provision, and this assertion is a misrepresentation. Whether the contract is voidable by B is determined by the rule stated in § 164. Whether, at the request of B, the court will decree that the writing be

> reformed to add the provision for assumption is determined by the rule stated in § 166.

Restatement of the Law (Second) Contracts, § 161 cmt. e, illus. 12 (1981).

Another Restatement section states a more obvious rule -- requiring lawyers to comply with any legal compulsion requiring disclosure of facts.

> A lawyer communicating on behalf of a client with a nonclient may not . . . fail to make a disclosure of information required by law.

Restatement (Third) of Law Governing Lawyers § 98(3) (2000).

A Restatement comment bluntly states that

> In general, a lawyer has no legal duty to make an affirmative disclosure of fact or law when dealing with a nonclient. Applicable statutes, regulations, or common-law rules may require affirmative disclosure in some circumstances, for example disciplinary rules in some states requiring lawyers to disclose a client's intent to commit life-threatening crimes or other wrongful conduct.

Restatement (Third) of Law Governing Lawyers § 98 cmt. e (2000).

Bars and courts have taken differing positions on a lawyer's duty in this setting.

Some states have seemingly increased lawyers' disclosure obligation by removing the confidentiality reference. For instance, Virginia's Rule 4.1(b) indicates as follows:

> [i]n the course of representing a client a lawyer shall not knowingly . . . fail to disclose a fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client.

Virginia Rule 4.1(b). Deleting the phrase "unless disclosure is prohibited by Rule 1.6" removes the confidentiality duty's ability to "trump" the disclosure duty.

Most authorities go the other way -- requiring lawyers to stay silent in the face of an adversary's factual misunderstanding that the lawyer or the lawyer's client did not induce.

For instance, a 1965 ABA legal ethics opinion emphasized lawyers' duty of confidentiality in describing lawyers' approach to negotiations.

- ABA LEO 314 (4/27/65) (explaining that lawyers who learn that their clients have provided false information to the IRS may withdraw, but may not disclose the client's deception, because the IRS is not a tribunal; "The Committee has received a number of specific inquiries regarding the ethical relationship between the Internal Revenue Service and lawyers practicing before it."; "The Internal Revenue Service is neither a true tribunal, nor even a quasijudicial institution. It has no machinery or procedure for adversary proceedings before impartial judges or arbiters, involving the weighing of conflicting testimony of witnesses examined and cross-examined by opposing counsel and the consideration of arguments of counsel for both sides of a dispute."; "The difficult problem arises where the client has in fact misled but without the lawyer's knowledge or participation. In that situation, upon discovery of the misrepresentation, the lawyer must advise the client to correct the statement; if the client refuses, the lawyer's obligation depends on all the circumstances."; "Fundamentally, subject to the restrictions of the attorney-client privilege imposed by Canon 37 [emphasizing "the duty of a lawyer to preserve his client's confidences"], the lawyer may have the duty to withdraw from the matter. If for example, under all circumstances, the lawyer believes that the service relies on him as corroborating statements of his client which he knows to be false, then he is under a duty to disassociate himself from any such reliance unless it is obvious that the very fact of disassociation would have the effect of violating Canon 37. Even then, however, if a direct question is put to the lawyer, he must at least advise the service that he is not in a position to answer." (emphasis added); withdrawn in ABA LEO 352 (7/7/85), which explained the criticism of ABA LEO 314's position that lawyers may take positions with the IRS "just as long as there is a reasonable basis" for doing so; concluding that lawyers "may advise reporting a position on a [tax] return" even though the lawyer "believes the position probably will not prevail," there is no "substantial authority" supporting the position -- as long as the position satisfies ABA Rule 3.1's requirement that lawyers may assert a position "which includes a good faith argument for an extension, modification or reversal of existing law.").

A thoughtful 1980 article published by the American Bar Foundation bluntly stated that all settlement negotiations involve deception.

> On the one hand the negotiator must be fair and truthful; on the other he must mislead his opponent. Like the poker player, a negotiator hopes that his opponent will overestimate the value of his hand. Like the poker player, in a variety of ways he must facilitate his opponent's inaccurate assessment. The critical difference between those who are successful negotiators and those who are not lies in this capacity both to mislead and not to be misled.

James J. White, Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation, 1980 Am. B. Found. Res. J. 926, 927 (1980).

Thus, some ethics opinions take a narrow view of lawyers' duty to correct a negotiating counterparty's misunderstanding.

- N.Y. Cnty. Law. Ass'n LEO 731 (9/1/03) (holding that a litigant's lawyer did not have to disclose the existence of an insurance policy during settlement negotiations, unless the dispute was in litigation and the pertinent rules required such disclosure; "A lawyer has no duty in the course of settlement negotiations to volunteer factual representations not required by principle of substantive law or court rule. Nor is the lawyer obliged to correct an adversary's misunderstanding of the client's resources gleaned from independent, unrelated sources. However, while the lawyer has no affirmative obligation to make factual representations in settlement negotiations, once the topic is introduced the lawyer may not intentionally mislead. If a lawyer believes that an adversary is relying on a materially misleading representation attributable to the lawyer or the lawyer's client, or a third person acting at the direction of either, regarding insurance coverage, the lawyer should take such steps as may be necessary to disabuse the adversary from continued reliance on the misimpression created by the prior material misrepresentation. This is not to say that the lawyer must provide detailed corrective information; only that the lawyer may not permit the adversary to continue to rely on a materially inaccurate representation presented by the lawyer, his or her client or another acting at their direction." (emphases added); "It is the opinion of the Committee that it is not necessary to disclose the existence of insurance coverage in every situation in which there is an issue as to the available assets to satisfy a claim or pay a judgment. While an attorney has a duty not to mislead intentionally, either

directly or indirectly, we believe that an attorney is not ethically obligated to prevent an adversary from relying upon incorrect information which emanated from another source. Under those circumstances, we conclude that the lawyer may refrain from confirming or denying the exogenous information, provided that in so doing he or she refrains from intentionally adopting or promoting a misrepresentation.").

- New York County LEO 686 (7/9/91) ("If, based on information imparted by the client, a lawyer makes an oral representation in a negotiation, which is still being relied upon by the other side, and the lawyer discovers the representation was based on materially inaccurate information, the lawyer may withdraw the representation even if the client objects. The Code of Professional Responsibility does not require the lawyer to disclose the misrepresentation.").

Some ethics opinions seem to require such disclosure. A 2015 California legal ethics opinion presented one scenario in which a lawyer would violate the ethics rules by failing to disclose a material fact unknown to the adversary. The scenario involved a lawyer scheduling settlement negotiations in an unemployed client's case against a former employer seeking lost wages, among other things. In the Bar's scenario, the lawyer deliberately scheduled the settlement negotiations the day before the client was to begin a new job, which allowed the client and lawyer to honestly say to the adversary that the client was still unemployed. However, the Bar explained that a wage-loss claim assumes continuing losses in the future -- which would be inconsistent with the lawyer's knowledge that the client would start a new job the next day.

- California LEO 2015-194 (2015) (finding that a lawyer making a true but misleading statement about a client's employment had a duty to disclose additional facts to avoid an impermissibly misleading statement to an adversary; "The matter does not resolve at the settlement conference, but the parties agree to participate in a follow-up settlement conference one month later, pending the exchange of additional information regarding Plaintiff's medical expenses and future earnings claim. In particular, Attorney agrees to provide additional information showing Plaintiff's efforts to obtain other employment in mitigation of her damages and the results of those

efforts. During that month, Attorney learns that Plaintiff has accepted an offer of employment and that Plaintiff's starting salary will be $75,000.00. Recognizing that accepting this position may negatively impact her future earnings claim, Plaintiff instructs Attorney not to mention Plaintiff's new employment at the upcoming settlement conference and not to include any information concerning her efforts to obtain employment with this employer in the exchange of additional documents with Defendant. At the settlement conference, Attorney makes a settlement demand that lists lost future earnings as a component of Plaintiff's damages and attributes a specific dollar amount to that component."; "This example raises two issues: the failure to disclose the new employment, and client's instruction to Attorney to not disclose the information. First, as to the underlying fact of employment itself, assuming that Plaintiff would not be entitled to lost future earnings if Plaintiff found a new job, including in the list of Plaintiff's damages a separate component for lost future earnings is an implicit misrepresentation that Plaintiff has not yet found a job. This is particularly true because the Plaintiff agreed to show documentation of her job search efforts to establish her mitigation efforts, but did not include any documentation showing that she had, in fact, been hired. Listing such damages, then, constitutes an impermissible misrepresentation. See, e.g., Scofield v. State Bar (1965) 62 Cal.2d 624, 629 [43 Cal.Rptr. 825] (attorney who combined special damages resulting from two different auto accidents in separate claims against each defendant, disciplined for making affirmative misrepresentations with the intent to deceive); Pickering v. State Bar (1944) 24 Cal.2d 141, 144 [148 P.2d 1] (attorney who alleged claim for loss of consortium knowing that plaintiff was not married and that her significant other was out of town during the relevant time period violated Business and Professions Code section 6068(d)). Second, Attorney was specifically instructed by Plaintiff, his client, not to make the disclosure. That instruction, conveyed by a client to his attorney, is a confidential communication that Attorney is obligated to protect under rule 3-100 and Business and Professions Code section 6068(e). While an attorney is generally required to follow his client's instructions, rule 3-700(B)(2) requires withdrawal if an attorney's representation would result in a violation of the ethical rules, of which a false representation of fact or implicit misrepresentation of a material fact would be. When faced with Plaintiff's instruction, Attorney should first counsel his client against the misrepresentation and/or suppression. If the client refuses, Attorney must withdraw under rule 3-700(B)(2), as Attorney may neither make the disclosure absent client consent, nor may Attorney take part in the misrepresentation and/or suppression. (California State Bar Formal Opn. No. 2013-189; 8/ see also Los Angeles County Bar Association Opn. No. 520).").

Other bars have also indicated that lawyers in some situations must affirmatively disclose adverse facts to the adversary.

- Pennsylvania LEO 97-107 (8/21/97) (analyzing a settlement agreement that was premised on a client's inability to convey a timeshare by deed; explaining that after negotiating a settlement agreement but before consummating the settlement, the client's lawyer learned that his client could convey the timeshare by deed; holding that the lawyer must disclose that fact; "Based on my review of these rules, and most importantly that the opposing lawyer by letter to you has expressly stated that the settlement is conditioned on the inability of your client to convey the first time share unit, I am of the opinion that you do have the duty to apprise the opposing lawyer that your client may now be able to convey her interest in her time sharing unit to the second development company. Under the circumstances, to remain silent may be a representation of a material fact by the affirmation of a statement of another person that you know is false." (emphasis added)).

Courts show the same dichotomy.

Some courts find that lawyers need not disclose adverse facts to an adverse party entering into settlement negotiations before the completion of discovery.

- Hardin v. KCS Int'l, Inc., 682 S.E.2d 726, 731, 734, 736 (N.C. Ct. App. 2009) (addressing a situation in which a plaintiff settled with the seller of a large boat for any past problems with the boat, and reserved only the right to pursue claims against the seller based on warranty work; rejecting the plaintiff's effort to void the settlement after discovering "that Hardin's boat, while being shipped from Cruisers' manufacturing facility in Wisconsin to North Carolina, had been involved in a collision with a tree"; explaining that "Hardin had the ability by virtue of the civil discovery rules to obtain from defendants -- prior to entering into the settlement agreement -- information about the pre-sale collision. Hardin, therefore, could have, through the exercise of due diligence, learned of the supposed latent defect."; noting that "Hardin cites no authority -- and we have found none -- requiring opposing parties in litigation to disclose information adverse to their positions when engaged in settlement negotiations. Such a requirement would be contrary to encouraging settlements. One of the reasons that a party may choose to settle before discovery has been completed is to avoid the opposing party's learning of information that might adversely affect settlement negotiations. The opposing party assumes the risk that he or she does not know all of the facts favorable to his or her position when choosing to enter into a settlement prior to discovery. On the other hand, the opposing party may also have

information it would prefer not to disclose prior to settlement."; also explaining that "Hardin chose to forego discovery, settle his claims, and enter into this general release. Like the plaintiffs in Talton [Talton v. Mac Tools, Inc., 453 S.E.2d 563 (N.C. Ct. App. 1995)], he cannot now avoid the release by arguing that subsequent to signing the release, he learned of facts that would have persuaded him not [to] sign the release when he has not demonstrated that defendants had any duty to disclose those facts.").

- Brown v. County of Genesse, 872 F.2d 169, 173, 175 (6th Cir. 1989) (reversing a trial court's conclusion that a county had acted improperly in failing to disclose the highest pay level to which a plaintiff might have risen (which was an important element in a settlement); first noting that "counsel for Brown could have requested this information from the County, but neglected to do so. The failure of Brown's counsel to inform himself of the highest pay rate available to his client cannot be imputed to the County as unethical or fraudulent conduct."; criticizing the lower court's analysis; "[T]he district court erred in its alternative finding that the consent agreement should be vacated because of fraudulent and unethical conduct by the County. The district court concluded that the appellant had both a legal and ethical duty to have disclosed to the appellee its factual error, which the appellant may have suspected had occurred. However, absent some misrepresentation or fraudulent conduct, the appellant had no duty to advise the appellee of any such factual error, whether unknown or suspected. 'An attorney is to be expected to responsibly present his client's case in the light most favorable to the client, and it is not fraudulent for him to do so. . . . We need only cite the well-settled rule that the mere nondisclosure to an adverse party and to the court of facts pertinent to a controversy before the court does not add up to "fraud upon the court" for purposes of vacating a judgment under Rule 60(b).'" (emphasis added) (citation omitted); also noting that the county's lawyer was not certain that the claimant misunderstood the facts; "The district court, in the case at bar, concluded that since counsel for the appellant knew that appellee's counsel misunderstood the existing pay scales available to Brown and knew that she could have been eligible for a level "D" promotion at the time the July 9, 1985 settlement had been executed, the consent judgment should be vacated. This conclusion, however, is in conflict with the facts as stipulated, which specified with particularity that appellant and its counsel had not known of appellee's misunderstanding and/or misinterpretation of the County's pay scales, although believing it to be probable.").

In contrast, several courts either criticized, imposed liability, refused to dismiss cases or otherwise condemned lawyers who did not disclose adverse facts.

- Vega v. Jones, Day, Reavis & Pogue, 17 Cal. Rptr. 3d 26, 28-29, 32 n.6, 33, 38 (Cal. Ct. App. 2004) (reversing a dismissal of a fraud action against Jones Day for representing a buyer in a corporate transaction who did not advise the seller of shares of a "toxic" financing deal that adversely affected the value of the shares in the new company that the seller obtained; affirming dismissal of a negligent misrepresentation claim against Jones Day, but declining to find against Jones Day on the fraud claim; noting in the description of the case that Jones Day won summary judgment in other similar cases against it; "A shareholder in a company acquired in a merger transaction sued the law firm which represented the acquiring company for fraud. He alleged the law firm concealed the so-called toxic terms of a third party financing transaction, and thus defrauded him into exchanging his valuable stock in the acquired company for 'toxic' stock in the acquiring company. The law firm demurred. It contended it made no affirmative misstatements and had no duty to disclose the terms of the third party investments to an adverse party in the merger transaction. We conclude the complaint stated a fraud claim based on nondisclosure. The complaint alleged the law firm, while expressly undertaking to disclose the financing transaction, provided disclosure schedules that did not include material terms of the transaction." (emphases added); "The demurrer to Vega's cause of action for negligent misrepresentation was properly sustained by the trial court, since such a claim requires a positive assertion. . . . Since no positive assertions are alleged, other than the comments that the financing was 'standard' and 'nothing unusual,' no claim for negligent misrepresentation is stated."; "Jones Day specifically undertook to disclose the transaction and, having done so, is not at liberty to conceal a material term. Even where no duty to disclose would otherwise exist, 'where one does speak he must speak the whole truth to the end that he does not conceal any facts which materially qualify those stated. . . . One who is asked for or volunteers information must be truthful, and the telling of a half-truth calculated to deceive is fraud.'" (citation omitted) (emphasis added); "Jones Day contends that Vega's claims are barred by the doctrine of res judicata, because Jones Day obtained summary judgment in its favor on fraud claims in earlier lawsuits brought by three other shareholders, who subsequently waived, abandoned and dismissed their respective appeals. Jones Day argues Vega was in privity with each of those three shareholders, because he is also a former shareholder in MonsterBook, his fraud claim is the same as their claims, he knew about their lawsuits, and he is using the same attorney. This relationship, Jones Day contends, is sufficiently close to justify application of the principle of preclusion. Again, we cannot agree."; "While Jones Day obtained summary judgment on fraud claims by three other shareholders, Vega was not a party to those lawsuits.").

- Statewide Grievance Comm. v. Egbarin, 767 A.2d 732, 735 (Conn. App. Ct. 2001) (suspending for five years a lawyer for making a true but misleading statement -- providing lenders copies of his tax return, but failing to explain that he had not actually paid the taxes; "As a condition to receiving the loans, the defendant provided Sanborn [mortgage company] and the Picards [couple whose property defendant purchased, who also made a $30,000 loan to him] with copies of his 1992 and 1993 federal income tax returns. The defendant's 1992 federal income tax return listed an adjusted gross income of $93,603 and a tax liability of $26,210. His 1993 federal income tax return stated that the adjusted gross income was $116,950, with a tax owing of $31,389."; "As of the date of the closing, however, the defendant had in fact not paid, not even filed for, the amounts due and owing on the 1992 and 1993 federal income tax returns. The defendant did not disclose either to Sanborn or to the Picards that he had not paid his 1992 and 1993 federal income tax obligations.").

- Neb. v. Addison, 412 N.W.2d 855, 856 (Neb. 1987) (suspending for six months a lawyer who knew that an unrepresented counterparty was unaware of a $1,000,000 insurance policy that the lawyer's client had available; "On November 5, 1985, respondent Addison visited the business offices of Lutheran Medical Center, where he met with Gregory Winchester, the business office manager for the hospital. Addison became aware at this meeting that Winchester was under the false impression that State Farm and Allstate were the only two companies whose policies were in force in connection with the accident. Rather than disclose the third policy, Addison negotiated for a release of the hospital's lien based upon Winchester's limited knowledge. Winchester agreed to release the lien in exchange for $45,000 of the State Farm settlement of $100,000, and an additional $15,000 if and when Medina settled with Allstate, plus another $5,000 if the settlement proceeds from Allstate exceeded $40,000. Subsequent to this agreement the hospital learned of the third policy, and thereafter informed the Sea Insurance Company that it did not consider the release binding, since it was obtained by fraudulent misrepresentations made by respondent Addison."; "In his report the referee found that the respondent had a duty to disclose to Winchester the material fact of the Sea Insurance Company policy and that his failure to do so constituted a violation of DR 1-102(A)(1) and (4). The referee also found that the respondent's act of omission in failing to correct Winchester's false impression constituted a violation of DR 7-102(A)(5).").

- Slotkin v. Citizens Cas. Co., 614 F.2d 301 (2nd Cir. 1979) (finding a hospital's lawyer liable for fraud because he failed to advise the plaintiff of a $1,000,000 excess insurance policy, but nevertheless represented the hospital in settling with the plaintiff for a much smaller amount; noting that a letter in the lawyer's file mentioned the larger insurance policy).

In 1999, the District of New Mexico dealt with what the court found was "sharp practice." A plaintiff's lawyer, who had deliberately picked an effective date of a release knowing the release would not cover an additional claim that his client eventually asserted. The court held that the plaintiff had not acted unethically, but decried the unprofessional conduct.

> Pendleton v. Cent. N.M. Corr. Facility, 184 F.R.D. 637, 640, 638, 640-41, 641 (D.N.M. 1999) (rejecting defendant's claim for sanctions based on "a material misrepresentation by Plaintiff's attorney as to why he sought the change in the effective date of the release in CIV 96-1472."; finding that defendant's argument procedurally defective; also finding plaintiff's claim for sanctions against defendant procedurally defective; describing the background of the parties' competing claims for sanctions: "Defendant's counsel drafted the settlement documents in the prior action unaware of the CNMCF Warden's August 28, 1997 letter or Plaintiff's retaliation claim. As drafted, the effective date of the release was to be the date Plaintiff executed the document. On September 2, 1997, Plaintiff's counsel (Mr. Mozes) requested that the release be effective only through August 21, the date of the settlement conference. When questioned why, Plaintiff's counsel responded that such was his normal practice. Defendant contends that based on this representation, its counsel agreed to the request. Plaintiff's counsel discussed the change in a September 2, 1997 letter indicating that 'we will release the "State" up through the date of the Settlement Conference, August 21, 1997.'" (emphases added); "Although Rule 11(c)(1)(A) provides that 'if warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion [for sanctions]' (emphasis added), the court does not believe that such fees are warranted, even in the face of Defendant's non-compliance with the safe-harbor provisions of Rule 11, because of the sharp practices engaged in by the Plaintiff's counsel."; "As we go through this life we learn, and sometimes the hard way, who we can trust to be candid and who we cannot. It is unfortunate that some attorneys apparently feel no obligation to their fellow attorneys, but then again, as the saying goes, 'it's a short road that doesn't have a bend in it.' The Rules of Professional Conduct and the case law suggest that, even in the context of finalizing a settlement agreement and release, a knowing failure to disclose a non-confidential, material and objective fact upon inquiry by opposing counsel is improper. See 2 N.M. R. Ann. (1998), Rules of Professional Conduct, Preamble, A Lawyer's Responsibilities ('As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing

with others.'); id. § 16-401 ('In the course of representing a client a lawyer shall not knowingly [] make a false statement of material fact or law to a third person.'); id § 16-804(C); ABA/BNA Lawyers' Manual on Professional Conduct, § 71:201 ('An omission of material information that is intended to mislead a third person may constitute a 'false statement.'). The court agrees with Defendant that the failure to disclose a fact may be a misrepresentation in certain circumstances. See Restatement (Second) of Torts § 529 & cmt. A ('A statement containing a half-truth may be as misleading as a statement wholly false.') (1977)."; "What is particularly troubling in this case is that the second retaliation lawsuit arose directly and immediately out of efforts to settle the prior action. Holding back information that if divulged might have led to a quick low-cost resolution of this action without resort to additional litigation is exactly the type of conduct that the public finds abhorrent and that contributes to the low esteem that the bar currently is trying to reverse." (emphasis added); "Practicing law transcends gamesmanship and making a buck. We should be trying to make a difference. The profession is more than a business, and should remain so. As professionals we should, while trying to solve our clients' problems, make every effort to avoid needless litigation. The conduct employed in this case certainly was not calculated to achieve that end." (emphasis added)).

Best Answer

The best answer to this hypothetical is **(C) YOU MAY NOT DISCLOSE THE CONTRACT'S ABSENCE OF SUCH POSSIBLE FUNDING, UNLESS YOUR CLIENT CONSENTS (MAYBE)**.

B 1/15, 2/15, 4/15, 10/15

Transactional Adversaries' Substantive Mistakes

Hypothetical 7

You are representing the seller in negotiating a complex transaction memorialized in a 50-page draft agreement. One provision indicates that buyer's sole remedy for seller's breach of a covenant not to compete is return of the consideration allocated in the agreement for the covenant not to compete. Near the end of the drafting process, the buyer amends another provision in the agreement so that only one dollar is allocated to consideration for the covenant not to compete -- which essentially renders the covenant meaningless (because seller's breach would at most result in one dollar of damages). When you advise your client of the buyer's mistake, she directs you to keep it secret.

What do you do?

(A) You must disclose the buyer's mistake.

(B) You may disclose the buyer's mistake, but you don't have to.

(C) You may not disclose the buyer's mistake, unless your client consents.

(C) YOU MAY NOT DISCLOSE THE BUYER'S MISTAKE, UNLESS YOUR CLIENT CONSENTS (PROBABLY)

Analysis

In some situations, a negotiation/transaction adversary makes a substantive mistake. For instance, the adversary might forget to ask for an indemnity in a situation which would normally call for an indemnity. Or the adversary might make changes in one part of a lengthy contract that has implications in another part of the contract, which the adversary does not realize. These mistakes differ from what might be considered drafting mistakes (sometimes called "scrivener's errors"), such as overlooking a necessary comma, or failing to include a provision that the negotiating parties agree to add to a contract, etc.

Courts and bars seem to agree that lawyers generally have no duty to transactional adversaries, other than to avoid fraudulent representations or asserting clients' misconduct.

In 2015, a Michigan appellate court vigorously rejected plaintiff's argument that she should be entitled to recover from defendant Progressive $28,000 to cover a hospital bill -- which arrived after she had given Progressive a full release in return for a $78,000 settlement on a personal injury claim. The court repeatedly blamed the plaintiff's predicament on her lawyer rather than defendant Progressive or its lawyer.

> When plaintiff settled the case, she or her lawyer could have demanded that the settlement only include a specific list of PIP benefits incurred to date, rather than all PIP benefits incurred to date. But neither she nor her lawyer made such a demand. Alternatively, because her claims involved continuing medical treatment and numerous related charges over long periods of time, plaintiff and her lawyer could have conditioned any settlement by specifying that if any charges incurred before the date of settlement came to light after the settlement, the settlement could be reopened to address such a charge. But again, neither plaintiff nor her lawyer took this precaution. . . . Having failed to protect her interests, and plaintiff's trial lawyer having failed to protect his client's interests, plaintiff now claims that the settlement should be set aside because Progressive (or its counsel) should have asked plaintiff, before the settlement, if she had considered the $28,000 charge -- even though it is conjecture to allege that Progressive (or its counsel) knew that plaintiff lacked knowledge of this charge. . . . If this claim sounds strange, that's because it is. Why? Because were we to agree with plaintiff's theory -- which she does not articulate legally -- then this case would stand for the unprecedented proposition that an adversary in litigation has a duty to ensure that his opponent considered all relevant factors before making a settlement decision. . . . If plaintiff or her lawyer had any doubt about such an agreement, it was the responsibility of plaintiff's lawyer to demand a different kind of settlement. . . . Yet, plaintiff instead says the lawyer

> for her adversary (or her adversary itself) should advise her of relevant information before settlement. To shift what is rightly the obligation of plaintiff's attorney to opposing counsel or the defendant would fly in the face of the adversarial nature of litigation, and compromise a lawyer's obligation to zealously represent his client -- and his client alone -- without any conflicts. . . . Progressive paid to buy its peace, not to advise plaintiff and her lawyer on how to settle a case. Were we to accept the proposition advanced by plaintiff, we would undermine the finality of settlements, and, perhaps, place opposing counsel in the untenable and conflicted position of advising two parties: his client on how best to settle a claim, and his opponent on what claims to include in a settlement. This we cannot and will not do.

Clark v. Progressive Ins. Co., No. 319454, 2015 Mich. App. LEXIS 458, at *2-20 (Mich. Ct. App. Mar. 5, 2015)[1] (emphasis added).

[1] Clark v. Progressive Ins. Co., No. 319454, 2015 Mich. App. LEXIS 458, at *2-4, *4-5, *5, *16, *19-20, *20 (Mich. Ct. App. Mar. 5, 2015) (analyzing efforts by a car accident plaintiff who settled her personal injury protection claim against defendant Progressive for $78,000 for which she gave Progressive a full release; noting that days after the settlement she received a $28,000 from the hospital at which she was treated, which was in addition to the surgeon's bill; explaining that plaintiff sought to void the settlement agreement because Progressive was aware of the hospital bill but that she was not aware of it at the time she settled with Progressive; reversing the trial court's order voiding the settlement; noting plaintiff's lawyer could have handled the settlement differently, but had failed to protect his client; "When plaintiff settled the case, she or her lawyer could have demanded that the settlement only include a specific list of PIP benefits incurred to date, rather than all PIP benefits incurred to date. But neither she nor her lawyer made such a demand. Alternatively, because her claims involved continuing medical treatment and numerous related charges over long periods of time, plaintiff and her lawyer could have conditioned any settlement by specifying that if any charges incurred before the date of settlement came to light after the settlement, the settlement could be reopened to address such a charge. But again, neither plaintiff nor her lawyer took this precaution. There are many other ways plaintiff or her lawyer could have settled her claim besides a universal settlement that wiped the slate clean of any claims incurred prior to the date of settlement. But they did not do so. Instead, they settled for a complete waiver of claims for $78,000, and Progressive paid this sum to buy its peace and achieve finality in this litigation." (footnote omitted); "Having failed to protect her interests, and plaintiff's trial lawyer having failed to protect his client's interests, plaintiff now claims that the settlement should be set aside because Progressive (or its counsel) should have asked plaintiff, before the settlement, if she had considered the $28,000 charge -- even though it is conjecture to allege that Progressive (or its counsel) knew that plaintiff lacked knowledge of this charge." (footnotes omitted); "If this claim sounds strange, that's because it is. Why? Because were we to agree with plaintiff's theory -- which she does not articulate legally -- then this case would stand for the unprecedented proposition that an adversary in litigation has a duty to ensure that his opponent considered all relevant factors before making a settlement decision. And, were we to credit the theory that opposing counsel had a duty to notify plaintiff of the $28,000 charge, then this case would stand for the novel theory that opposing counsel has a duty to do what is in fact, law, and professional obligation, the duty of plaintiff's lawyer. It is the obligation of plaintiff's attorney to ensure his client knows that a

Other courts take the same approach, although perhaps without the vehement language.

- Lighthouse MGA, L.L.C. v. First Premium Ins. Grp., Inc., 448 F. App'x 512, 516, 517, 518 (5th Cir. 2011) (holding that the general counsel of a party in a transaction did not jointly represent the counterparty, and did not engage in an affirmative misrepresentation about a forum selection clause in the contract; concluding that the lawyer did not have a duty to tell the unrepresented counterpart about the forum selection provision; finding that the lawyer did not have a conflict under Rule 1.7; "Lighthouse's Director of Marketing has affirmed that the general counsel was 'the attorney for First Premium,' and there is no evidence in the record that the general counsel ever undertook to give legal advice to Lighthouse or purported to draft the contract on Lighthouse's behalf. As First Premium notes, even if Lighthouse subjectively believed that First Premium's general counsel was also Lighthouse's attorney, such a belief would not be reasonable." (footnote omitted); finding the lawyer did not violate Rule 4.3 by providing advice to an unrepresented party; "As First Premium notes, no authority supports Lighthouse's contention that First Premium's general counsel provided legal advice to Lighthouse merely by drafting the contract."; concluding that the lawyer did not violate Rule 8.4(c)); "There is no evidence that the general counsel made any false or misleading statements to Lighthouse. To the extent that Lighthouse's argument is based on the general counsel's failure to point out of explain the forum selection clause to Lighthouse, First Premium's general counsel did not have a fiduciary relationship with

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settlement, like the one at issue here, encompasses all claims. If plaintiff or her lawyer had any doubt about such an agreement, it was the responsibility of plaintiff's lawyer to demand a different kind of settlement."; "Yet, plaintiff instead says the lawyer for her adversary (or her adversary itself) should advise her of relevant information before settlement. To shift what is rightly the obligation of plaintiff's attorney to opposing counsel or the defendant would fly in the face of the adversarial nature of litigation, and compromise a lawyer's obligation to zealously represent his client -- and his client alone -- without any conflicts."; finding that the settlement did not result from a "mutual mistake," but rather because plaintiff's lawyer had not protected his client; "Here, plaintiff seeks to engage in exactly this sort of obligation shifting: because her trial attorney did not consider that she might face additional (and perhaps unknown) charges for PIP benefits incurred before November 5, 2013 -- i.e., the $28,942 Synergy billing -- she argues that Progressive had a duty to inform her of this billing during the settlement negotiation. Of course, Progressive has no such duty. Progressive, as a defendant in litigation, is in an adversarial position with plaintiff, and, as such, has every right to protect its interest and to expect that courts will uphold a settlement freely entered into by the parties. Progressive paid to buy its peace, not to advise plaintiff and her lawyer on how to settle a case. Were we to accept the proposition advanced by plaintiff, we would undermine the finality of settlements, and, perhaps, place opposing counsel in the untenable and conflicted position of advising two parties: his client on how best to settle a claim, and his opponent on what claims to include in a settlement. This we cannot and will not do.").

Lighthouse that would give rise to a duty to convey that information under Louisiana law.").

- Fox v. Pollack, 226 Cal. Rptr. 532 (Cal. Ct. App. 1986) (holding that a lawyer did not have a duty of professional care to an unrepresented counterparty in a real estate transaction).

This hypothetical comes from a 2013 California legal ethics opinion. California LEO 2013-189 (2013)[2] started with a basic scenario:

[2] California LEO 2013-189 (2013) (explaining that a lawyer could not advise an adversary of the adversary's mistake in drafting a transactional document, but had a duty to disclose to the adversary the lawyer's accidental failure to redline a change; providing the facts of the opinion: "Buyer's Attorney prepares an initial draft of the Purchase and Sale Agreement. One section towards the back of the 50-page draft agreement contains the terms of an enforceable covenant not to compete, and includes a provision that Buyer's sole and exclusive remedy for a breach by Seller of its covenant not to compete is the return of that portion of the total consideration which has been allocated in the Purchase and Sale Agreement for the covenant not to compete."; presenting two scenarios; explaining that "[u]nder either Scenario A or Scenario B of our Statement of Facts, once Seller's Attorney has informed Seller of the development, Seller's Attorney must abide by the instruction of Seller to not disclose. If, however, failure to make such disclosure constitutes an ethical violation by Seller's Attorney, then Seller's Attorney may have an obligation to withdraw from the representation under such circumstances." (footnote omitted); "Any duty of professionalism, however, is secondary to the duties owed by attorneys to their own clients. There is no general duty to protect the interests of nonclients."; "Attorneys generally owe no duties to opposing counsel nor do they have any obligation to correct the mistakes of opposing counsel. There is no liability for conscious nondisclosure absent a duty of disclosure."; "[A]n attorney may have an obligation to inform opposing counsel of his or her error if and to the extent that failure to do so would constitute fraud, a material misstatement, or engaging in misleading or deceitful conduct."; describing Scenario A: "Buyer's Attorney then prepares a revised version of the Purchase and Sale Agreement which, apparently in response to the comments of Seller's Attorney, provides for an allocation of only $1 as consideration for the covenant not to compete with $4,999,999 allocated to the purchase price for the Company. In reviewing the changes made in the revised version, Seller's Attorney recognizes that the allocation of only $1 as consideration for the covenant not to compete essentially renders the covenant meaningless, because Buyer's sole and exclusive remedy for breach by Seller of the covenant would be the return by Seller of $1 of the total consideration. Seller's Attorney notifies Seller about the apparent error with respect to the consequences of the change made by Buyer's Attorney. Seller instructs Seller's Attorney to not inform Buyer's Attorney of this apparent error. Seller's Attorney says nothing to Buyer's Attorney and allows the Purchase and Sale Agreement to be entered into by parties in that form."; analyzing Scenario A as follows: "In Scenario A of our Statement of Facts, although the Purchase and Sale Agreement contains a covenant not to compete, the apparent error of Buyer's Attorney limits the effectiveness of the covenant because the penalty for breach results in payment by Seller of only $1. However, Seller's Attorney has engaged in no conduct or activity that induced the apparent error. Further, under our Statement of Facts, there had been no agreement on the allocation of the purchase price to the covenant, and the Purchase and Sale Agreement does in fact contain a covenant not to compete the terms of which are consistent with the parties' mutual understanding. Under these circumstances, where Seller's Attorney has not engaged in deceit, active concealment or fraud, we conclude that Seller's Attorney does not have an affirmative duty to disclose the apparent error to Buyer's Attorney."; also explaining Scenario B: "After receiving the initial draft from Buyer's Attorney, Seller's Attorney prepares a revised version of the Purchase and Sale Agreement which provides for an allocation

> Buyer's Attorney prepares an initial draft of the Purchase and Sale Agreement. One section towards the back of the 50-page draft agreement contains the terms of an enforceable covenant not to compete, and includes a provision that Buyer's sole and exclusive remedy for a breach by Seller of its covenant not to compete is the return of that portion of the total consideration which has been allocated in the Purchase and Sale Agreement for the covenant not to compete.

California LEO 2013-189 (2013).

Scenario A involves an adversary's substantive mistake.

> Buyer's Attorney then prepares a revised version of the Purchase and Sale Agreement which, apparently in response to the comments of Seller's Attorney, provides for an allocation of only $1 as consideration for the covenant not to compete with $4,999,999 allocated to the purchase price for the Company. In reviewing the changes made in the revised version, Seller's Attorney recognizes that the allocation of only $1 as consideration for the covenant not to

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of only $1 as consideration for the covenant not to compete, with the intent of essentially rendering the covenant not to compete meaningless. Although Seller's Attorney had no intention of keeping this change secret from Buyer's Attorney, Seller's Attorney generates a 'redline' of the draft that unintentionally failed to highlight the change, and then tenders the revised version to Buyer's attorney. Subsequently, Seller's Attorney discovers the unintended defect in the 'redline' and notifies Seller about the change, including the failure to highlight the change, in the revised version. Seller instructs Seller's Attorney to not inform Buyer's Attorney of the change. Seller's Attorney says nothing to Buyer's Attorney and allows the Purchase and Sale Agreement to be entered into by the parties in that form."; analyzing Scenario B as follows: "Had Seller's Attorney intentionally created a defective 'redline' to surreptitiously conceal the change to the covenant not to compete, his conduct would constitute deceit, active concealment and possibly fraud, in violation of Seller's Attorney's ethical obligations. However, in Scenario B of our Statement of Facts, Seller's Attorney intentionally made the change which essentially renders the covenant not to compete meaningless, but unintentionally provided a defective 'redline' that failed to highlight for Buyer's Attorney that the change had been made. Under these circumstances, and prior to discovery of the unintentional defect, Seller's Attorney has engaged in no such unethical conduct. But once Seller's Attorney realizes his own error, we conclude that the failure to correct that error and advise Buyer's Attorney of the change might be conduct that constitutes deceit, active concealment and/or fraud, with any such determination to be based on the relevant facts and circumstances. If Seller instructs Seller's Attorney to not advise Buyer's Attorney of the change, where failure to do so would be a violation of his ethical obligations, Seller's Attorney may have to consider withdrawing." (footnote omitted); concluding with the following: "Where an attorney has engaged in no conduct or activity that induced an apparent material error by opposing counsel, the attorney has no obligation to alert the opposing counsel of the apparent error. However, where the attorney has made a material change in contract language in such a manner that his conduct constitutes deceit, active concealment or fraud, the failure of the attorney to alert opposing counsel of the change would be a violation of his ethical obligation.").

> compete essentially renders the covenant meaningless, because Buyer's sole and exclusive remedy for breach by Seller of the covenant would be the return by Seller of $1 of the total consideration. Seller's Attorney notifies Seller about the apparent error with respect to the consequences of the change made by Buyer's Attorney. Seller instructs Seller's Attorney to not inform Buyer's Attorney of this apparent error. Seller's Attorney says nothing to Buyer's Attorney and allows the Purchase and Sale Agreement to be entered into by parties in that form.

Id.

The legal ethics opinion started its analysis with a general statement:

> Any duty of professionalism, however, is secondary to the duties owed by attorneys to their own clients. There is no general duty to protect the interests of nonclients. . . . Attorneys generally owe no duties to opposing counsel nor do they have any obligation to correct the mistakes of opposing counsel. There is no liability for conscious nondisclosure absent a duty of disclosure.

Id. (emphasis added). On the other hand,

> an attorney may have an obligation to inform opposing counsel of his or her error if and to the extent that failure to do so would constitute fraud, a material misstatement, or engaging in misleading or deceitful conduct.

Id.

The legal ethics opinion provided the following analysis of this scenario:

> In Scenario A of our Statement of Facts, although the Purchase and Sale Agreement contains a covenant not to compete, the apparent error of Buyer's Attorney limits the effectiveness of the covenant because the penalty for breach results in payment by Seller of only $1. However, Seller's Attorney has engaged in no conduct or activity that induced the apparent error. Further, under our Statement of Facts, there had been no agreement on the allocation of the purchase price to the covenant, and the Purchase and Sale Agreement does in fact contain a covenant not to compete

> the terms of which are consistent with the parties' mutual understanding. Under these circumstances, where Seller's Attorney has not engaged in deceit, active concealment or fraud, we conclude that Seller's Attorney does not have an affirmative duty to disclose the apparent error to Buyer's Attorney.

Id. (emphasis added).

Scenario B involved what would be considered an adversary's scrivener's error -- which raises different issues.

The legal ethics opinion recognized that California's confidentiality-centric rules might require withdrawal under certain circumstances, even if they did not require disclosure.

> Under either Scenario A or Scenario B of our Statement of Facts, once Seller's Attorney has informed Seller of the development, Seller's Attorney must abide by the instruction of Seller to not disclose. If, however, failure to make such disclosure constitutes an ethical violation by Seller's Attorney, then Seller's Attorney may have an obligation to withdraw from the representation under such circumstances.

Id. (footnote omitted).

Best Answer

The best answer to this hypothetical is **(C) YOU MAY NOT DISCLOSE THE BUYER'S MISTAKE, UNLESS YOUR CLIENT CONSENTS (PROBABLY)**.

B 1/15, 10/15

Transactional Adversaries' Scrivener's Errors

Hypothetical 8

Since late yesterday afternoon, you have been furiously exchanging draft contracts with a transactional counterparty. You finally reached agreement on the last few provisions, which the adversary's lawyer says she will write up while you head home for an hour or two of sleep. When you returned to the office this morning to check what the other lawyer prepared, you realize that she left out an important term (favorable to her client) to which you had agreed during the final negotiation discussion.

(a) What do you do when dealing with your client?

(A) You must disclose the adversary's mistake to your client.

(B) You may disclose the adversary's mistake to your client, but you don't have to.

(C) You may not disclose the adversary's mistake to your client.

(B) YOU MAY DISCLOSE THE ADVERSARY'S MISTAKE TO YOUR CLIENT, BUT YOU DON'T HAVE TO (PROBABLY)

(b) What do you do when dealing with the adversary's lawyer?

(A) You must disclose the adversary's mistake to the adversary's lawyer.

(B) You may disclose the adversary's mistake to the adversary's lawyer, but you don't have to.

(C) You may not disclose the adversary's mistake to the adversary's lawyer, unless your client consents.

(A) YOU MUST DISCLOSE THE ADVERSARY'S MISTAKE TO THE ADVERSARY'S LAWYER

Analysis

In some situations, lawyers or their clients make what could be called a scrivener's error. These differ from substantive mistakes, such as forgetting to negotiate a provision that would normally be found in a contract, etc.

A scrivener's error often involves a typographical mistake, a failure to highlight a change, etc. In today's fast-paced and electronic communication-intensive world, such mistakes can occur easily.

- Jim Carlton, Fresh Dispute Mars Bay Area Transit Deal, Wall St. J., Nov. 18, 2013 ("An unusual dispute threatens to undo a contract agreement between management and labor leaders of the Bay Area Rapid Transit (BART) system, raising the possibility of another crippling public-transit strike."; "The dispute centers on a provision in the contract that allows workers to take up to six weeks of paid family leave. Management says the provision was never agreed to and was left in as a result of a clerical error. Representatives of the two unions, Amalgamated Transit Union (ATU) Local 1555 and Service Employees International Union (SEIU) Local 1021, say BART negotiators were fully aware of it."; "Labor experts said that, while unusual, it isn't unprecedented for a dispute to arise over the terms of a labor contract after it has been ratified. 'There are a number of cases that arise in arbitration over the allegation that something is in the agreement as a result of a mutual mistake,' said William B. Gould IV, emeritus professor of law at the Stanford Law School and former chairman of the National Labor Relations Board."; "In the BART case, 'there is certainly some kind of screw-up,' Mr. Gould added. 'The question is really going to be, if they are unable to resolve this through discussion and negotiations, was this a mutual mistake?'").

- BBC News (Europe), Bank Clerk Falls Asleep On Keyboard And Accidentally Transfers £189 Million To Customer, June 10, 2013 ("A German labour court has ruled that a bank supervisor was unfairly sacked for missing a multi-million-euro error by a colleague who fell asleep during a financial transaction. The clerk was transferring 64.20 euros (£54.60) when he dozed off with his finger on the keyboard, resulting in a transfer of 222,222,222.22 euros (£189Million). His supervisor was fired for allegedly failing to check the transaction. But judges in the state of Hesse said she should have only been reprimanded.").

- Brad Heath, Small Mistakes Cause Big Problems, USA Today, March 30, 2011 ("If you're reading this in New York, you're probably too drunk to drive. That's because lawmakers accidentally got too tough with a get-tough drunken-driving law, inserting an error that set the standard for 'aggravated driving while intoxicated' below the amount of alcohol that can occur naturally. The one-word mistake makes the new law unenforceable, says Lieutenant Glenn Miner, a New York State Police spokesman. However, drivers with a blood-alcohol content of 0.08% or higher can still be prosecuted under other state laws. In the legislative world, such small errors, while uncommon, can carry expensive consequences. In a few cases around the nation this year, typos and other blunders have redirected millions of tax dollars or threatened to invalidate new laws. In Hawaii, for instance, lawmakers approved a cigarette-tax increase to raise money for medical care and research. Cancer researchers, however, will get only an extra 1.5 cents next year -- instead of the more than $8 million lawmakers intended. That's because legislators failed to specify that they should get 1.5 cents from each cigarette sold, says Linda Smith, an adviser to Governor Linda Lingle."; "New York's mistake came in a bill meant to set tougher penalties and curb plea bargains for drivers well above the legal intoxication standard. Instead of specifying blood alcohol as a percentage, as most drunken-driving laws do, New York set its threshold as 0.18 grams --'so low you can't even measure it,' Miner says.").

- Anahad O'Connor, New York State Backs Remorseful Buyers at Rushmore Tower, The New York Times, April 9, 2010 ("Call it the multimillion-dollar typo. On Friday, the New York State attorney general's office ruled in favor of a group of buyers who were looking to back out of their multimillion-dollar contracts at The Rushmore, an expensive Manhattan condominium building along the Hudson River. The buyers found an unusual loophole -- a seemingly minor typo in a date in the densely worded 732-page offering plan -- and used it to argue that they deserved their hefty deposits back."; "In this case, the typo got in the way. Instead of stating that buyers had the right to back out if the first closing did not occur before September 1, 2009, the offering plan stated that buyers had the right to back out if the first closing did not occur before September 1, 2008, which was the first day of the budget year, not the last. Ultimately, the first closing took place in February 2009. The sponsors argued that they made a trivial mistake -- a typo that lawyers refer to as a 'scrivener's error' -- that should be overlooked. But the attorney general's office disagreed. It sided with the buyers.").

- Mizuho Securities Sues Tokyo Stock Exchange Over 41 Billion Yen Trade Fiasco, Kyodo News, Oct. 28, 2006 ("Mizuho Securities Company filed a lawsuit Friday against Tokyo Stock Exchange (TSE) Inc. at the Tokyo District Court for 41.5 billion yen in damages, claiming the bourse caused it huge

losses when the TSE computer system failed to process a correction to an erroneous order the brokerage placed last December. The suit brought by Mizuho Securities, a unit of Mizuho Financial Group Inc., marks the first time a brokerage has sued the operator of the Tokyo Stock Exchange over equity trading. Last December, a Mizuho Securities clerk mistakenly entered a sell order for 610,000 shares in staffing company J-Com Company for 1 yen each. The actual order was one share for 610,000 yen. As soon as the brokerage noticed the mistake, it tried to withdraw the sell order but the TSE's computer system took time to process the cancellation order. Sources said earlier this month that Mizuho lost about 40.7 billion yen buying back all the shares from people who bought at the erroneous price and said the brokerage has calculated 40.4 billion yen of that loss was due to a system failure at the TSE.").

- Grant Robertson, Comma Quirk Irks Rogers Communications, The Globe & Mail, Aug. 6, 2006 ("It could be the most costly piece of punctuation in Canada. A grammatical blunder may force Rogers Communications Inc. to pay an extra $2.13-million to use utility poles in the Maritimes after the placement of a comma in a contract permitted the deal's cancellation. The controversial comma sent lawyers and telecommunications regulators scrambling for their English textbooks in a bitter 18-month dispute that serves as an expensive reminder of the importance of punctuation. Rogers thought it had a five-year deal with Aliant Inc. to string Rogers' cable lines across thousands of utility poles in the Maritimes for an annual fee of $9.60 per pole. But early last year, Rogers was informed that the contract was being cancelled and the rates were going up. Impossible, Rogers thought, since its contract was iron-clad until the spring of 2007 and could potentially be renewed for another five years. Armed with the rules of grammar and punctuation, Aliant disagreed. The construction of a single sentence in the 14-page contract allowed the entire deal to be scrapped with only one-year's notice, the company argued. Language buffs take note -- Page 7 of the contract states: The agreement 'shall continue in force for a period of five years from the date it is made, and thereafter for successive five year terms, unless and until terminated by one year prior notice in writing by either party.'"; "Had it not been there, the right to cancel wouldn't have applied to the first five years of the contract and Rogers would be protected from the higher rates it now faces. 'Based on the rules of punctuation,' the comma in question 'allows for the termination of the [contract] at any time, without cause, upon one-year's written notice,' the regulator said. Rogers was dumbfounded. The company said it never would have signed a contract to use roughly 91,000 utility poles that could be cancelled on such short notice. Its lawyers tried in vain to argue the intent of the deal trumped the significance of a comma. 'This is clearly not what the parties intended,' Rogers said in a letter to the CRTC.").

- Gladwin Hill, For Want of Hyphen, N.Y. Times, July 27, 1962 ("The omission of a hyphen in some mathematical data caused the $18,500,000 failure of a spacecraft launched toward Venus last Sunday, scientists disclosed today. The spacecraft, Mariner I, veered off course about four minutes after its launching from Cape Canaveral, Florida, and had to be blown up in the air. The error was discovered here this week in analytical conferences of scientists and engineers of the National Aeronautics and Space Administration, the Air Force and the California Institute of Technology Jet Propulsion Laboratory, manager of the project for N.A.S.A. Another launching will be attempted sometime in August. Plans had been suspended pending discovery of what went wrong with the first firing. The hyphen, a spokesman for the laboratory explained, was a symbol that should have been fed into a computer, along with a mass of other coded mathematical instructions. The first phase of the rocket's flight was controlled by radio signals based on this computer's calculations. The rocket started out perfectly on course, it was stated. But the inadvertent omission of the hyphen from the computer's instructions caused the computer to transmit incorrect signals to the spacecraft.").

Ethics authorities usually do not deal with such drafting errors, but rather with more substantive mistakes or misunderstanding.

(a) In 1986, the ABA explained that a lawyer in this situation did not have to advise a client of the adversary's scrivener's error.

- Informal ABA LEO 1518 (2/9/86) (analyzing the following situation: "A and B, with the assistance of their lawyers, have negotiated a commercial contract. After deliberation with counsel, A ultimately acquiesced in the final provision insisted upon by B, previously in dispute between the parties and without which B would have refused to come to overall agreement. However, A's lawyer discovered that the final draft of the contract typed in the office of B's lawyer did not contain the provision which had been in dispute. The Committee has been asked to give its opinion as to the ethical duty of A's lawyer in that circumstance." (emphasis added); concluding that the lawyer must advise the adversary of the mistake but need not advise the lawyer's client of the mistake; "The Committee considers this situation to involve merely a scrivener's error, not an intentional change in position by the other party. A meeting of the minds has already occurred. The Committee concludes that the error is appropriate for correction between the lawyers without client consultation. A's lawyer does not have a duty to advise A of the error pursuant to any obligation of communication under Rule 1.4 of the ABA Model Rules of Professional Conduct (1983)." (emphases added); "The

client does not have a right to take unfair advantage of the error. The client's right pursuant to Rule 1.2 to expect committed and dedicated representation is not unlimited. Indeed, for A's lawyer to suggest that A has an opportunity to capitalize on the clerical error, unrecognized by A and B's lawyer, might raise a serious question of the violation of the duty of A's lawyer under Rule 1.2(d) not to counsel the client to engage in, or assist the client in, conduct the lawyer knows is fraudulent. In addition, Rule 4.1(b) admonishes the lawyer not knowingly to fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a fraudulent act by a client, and Rule 8.4(c) prohibits the lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation."; providing a further explanation in a footnote; "The delivery of the erroneous document is not a 'material development' of which the client should be informed under EC 9-2 of the Model Code of Professional Responsibility, but the omission of the provision from the document is a 'material fact' which under Rule 4.1(b) of the Model Rules of Professional Conduct must be disclosed to B's lawyer." (emphasis added); also analyzing the impact of ABA Model Rule 1.6, and the opinion's deliberate lack of an analysis if the client wanted to take advantage of the adversary's mistake; "Assuming for purposes of discussion that the error is 'information relating to [the] representation,' under Rule 1.6 disclosure would be 'impliedly authorized in order to carry out the representation.' The Comment to Rule 1.6 points out that a lawyer has implied authority to make 'a disclosure that facilitates a satisfactory conclusion' -- in this case completing the commercial contract already agreed upon and left to the lawyers to memorialize. We do not here reach the issue of the lawyer's duty if the client wishes to expl[oi]t the error.").

(b) The next question is whether a lawyer in this situation must advise the adversary of the error.

The ABA dealt with this situation in ABA LEO 1518 (2/9/86). As explained above, the ABA concluded that "the omission of the provision from the document is a 'material fact' which . . . must be disclosed to [the other side's] lawyer." Id.

The Ethical Guidelines for Settlement Negotiations similarly indicates that lawyers "should identify changes from draft to draft or otherwise bring them explicitly to the other counsel's attention." ABA, Ethical Guidelines for Settlement Negotiations 57 (Aug. 2002). The Guidelines explain that "[i]t would be unprofessional, if not unethical,

knowingly to exploit a drafting error or similar error concerning the contents of the settlement agreement." Id.

Other authorities agree. See, e.g., Patrick E. Longan, Ethics in Settlement Negotiations: Foreword, 52 Mercer L. Rev. 807, 815 (2001) ("the lawyer has the duty to correct the mistakes" if the lawyer notices typographical or calculation errors in a settlement agreement).

Predictably, courts have little patience with transactional or litigation adversaries' attempt to exploit a scrivener's error.

- Cadbury UK Ltd. v. Meenaxi Enterprise, Inc.,, Cancellation No. 92057280, Trademark Trial & Appeal Board,at 3, 4, 9, 10, 11, 13 (USTPO July 21, 2015) (compelling responses to document requests, and rejecting the recipient's delay in responding to the document requests based on requesting party's obviously incorrect designation of the entity from which it sought the document; "As to the merits, this dispute centers on a typographical error. Respondent concedes that it made a typographical error in its document requests, inadvertently referring in the preamble to Petitioner as 'Venture Execution Partners, Inc.,' instead of 'Cadbury UK Limited.'"; "Petitioner argues that the typographical error was a crucial mistake, the result of which is that the document requests were never directed to Petitioner."; "The isolated reference to Venture Execution Partners, Inc., was clearly a typographical error; it did not cause a matter of real confusion or misunderstanding. The motion to compel is the result of Petitioner's attorney apparently concluding, upon the discovery of a typographical error, that he had found an excuse to become pedantic, unreasonable, and uncooperative. The Board expects each party to every case to use common sense and reason when faced with what the circumstances clearly show to be a typographical error." (emphasis added); "Although the mistake of mentioning a third party in the preamble to Respondent's First Set of Requests for the Production of Documents and Things suggests that the document requests were modeled from another case in which Respondent or its prior counsel was involved, the refusal of Petitioner to provide any response to the requests is untenable. If Petitioner had any doubt as to the document requests, it should have contacted Respondent for clarification rather than simply refusing to respond."; "The Board expects that when there is an obvious and inadvertent typographical error in any discovery request or other filing -- particularly where, as here, the intended meaning was clear—the

parties will not require the Board's intervention to correct the mistake." (emphasis added); "It also must be stressed that Petitioner's conduct has not demonstrated the good faith and cooperation that is expected of litigants during discovery. Such conduct has delayed this proceeding, unnecessarily increased the litigation costs of the parties, wasted valuable Board resources, and interfered with Respondent's ability and, indeed, its right, to take discovery. If Respondent perceives Petitioner as not having complied with the terms of this order, or can establish any further abusive, uncooperative, or harassing behavior from Petitioner, then Respondent's remedy will lie in a motion for entry of sanctions. Sanctions the Board can order, if warranted, may include judgment against Petitioner.").

- Stare v. Tate, 98 Cal. Rptr. 264, 266, 267 (Cal. Ct. App. 1971) (analyzing a situation in which a husband negotiating a property settlement with his former wife noticed two calculation errors in the agreement; noting that the husband nevertheless signed the settlement without notifying his former wife of the errors; explaining the predictable way in which the issue arose: "The mistake might never have come to light had not Tim desired to have that exquisite last word. A few days after Joan had obtained the divorce he mailed her a copy of the offer which contained the errant computation. On top of the page he wrote with evident satisfaction: 'PLEASE NOTE $100,000.00 MISTAKE IN YOUR FIGURES. . . .' The present action was filed exactly one month later."; pointing to a California statute allowing lawyers to revise written contracts that contain a "mistake of one party, which the other at the time knew or suspected."; revising the property settlement to match the parties' agreement).

A lawyer may even face bar discipline for trying to take advantage of an adversary's drafting error.

- Alan Cooper, Roanoke Lawyer gets reprimand in case with divorce drafting error, Va. Law. Wkly., Nov. 9, 2010 ("Richard L. McGarry represented his sister in her divorce, and in drafting the final order the husband's lawyer made a mistake. The sister owed her ex more than $11,000, but the order switched the parties, and stated the man owed the money. McGarry's position was that the order had been entered and had become final. The judge later corrected the order. The VSB [Virginia State Bar] 8th District Disciplinary Committee issued a public reprimand without terms, citing the disciplinary rule that prohibits taking action that 'would serve merely to harass or maliciously injure another.' . . . The husband's attorney, Stacey Strentz, drafted the final order, but inadvertently said in it that the husband owed the sister the child's support arrearages. The judge entered the order on Oct. 15, 2007. A short time after the order was entered, Strentz discovered the error and asked McGarry to

> cooperate in presenting a corrected order. He refused and instead contacted the Division of Child Support Enforcement and demanded that the agency take action to collect the arrearages. On Oct. 25, Strentz mailed McGarry notice of a hearing for Nov. 6 to correct a clerk's error as set forth in Virginia Code § 8.01-428.2. The provision is an exception to the general rule that a court order becomes final after 21 days. The matter was not heard that day because the judge was ill. Despite Strentz's effort to correct the order, McGarry wrote the Division of Child Support Enforcement on Nov. 5 that the order was final and could not be modified under Rule 1:1 of the Rules of the Supreme Court of Virginia even if Strentz claimed she had made a mistake. . . . On Nov. 8, McGarry wrote Strentz contending that the error was a 'unilateral mistake' that could not be corrected. He cited cases in support of his position that the findings of fact . . . did not support that conclusion. . . . The VSB district committee concluded that McGarry had violated Rule 3.4 of the Rules of Professional Conduct, in taking action that 'would serve merely to harass or maliciously injure another,' and Rule 4.1, in knowingly making a false state[ment] of fact or law. Although McGarry said he believed the committee strayed across the line and considered a legal matter rather than an ethical one, he emphasized that he has no criticism of the committee. 'I don't want anybody to think I'm trying to re-chew this bitter cabbage,' he said."

In 2013, a California legal ethics opinion[1] dealt with a similar situation, although the lawyer seeking the opinion had made a scrivener's error by not highlighting a

[1] California LEO 2013-189 (2013) (explaining that a lawyer could not advise an adversary of the adversary's mistake in drafting a transactional document, but had a duty to disclose to the adversary the lawyer's accidental failure to redline a change; providing the facts of the opinion: "Buyer's Attorney prepares an initial draft of the Purchase and Sale Agreement. One section towards the back of the 50-page draft agreement contains the terms of an enforceable covenant not to compete, and includes a provision that Buyer's sole and exclusive remedy for a breach by Seller of its covenant not to compete is the return of that portion of the total consideration which has been allocated in the Purchase and Sale Agreement for the covenant not to compete."; presenting two scenarios; explaining that "[u]nder either Scenario A or Scenario B of our Statement of Facts, once Seller's Attorney has informed Seller of the development, Seller's Attorney must abide by the instruction of Seller to not disclose. If, however, failure to make such disclosure constitutes an ethical violation by Seller's Attorney, then Seller's Attorney may have an obligation to withdraw from the representation under such circumstances." (footnote omitted); "Any duty of professionalism, however, is secondary to the duties owed by attorneys to their own clients. There is no general duty to protect the interests of nonclients."; "Attorneys generally owe no duties to opposing counsel nor do they have any obligation to correct the mistakes of opposing counsel. There is no liability for conscious nondisclosure absent a duty of disclosure."; "[A]n attorney may have an obligation to inform opposing counsel of his or her error if and to the extent that failure to do so would constitute fraud, a material misstatement, or engaging in misleading or deceitful conduct."; describing Scenario A: "Buyer's Attorney then prepares a revised version of the Purchase and Sale Agreement which, apparently in response to the comments of Seller's Attorney, provides for an allocation of only $1 as consideration for the covenant not to compete with $4,999,999 allocated to the purchase price for the Company. In reviewing the changes made in the revised version, Seller's Attorney recognizes that the

change that the lawyer intended to point out to the transactional adversary as part of the negotiation process.

> After receiving the initial draft from Buyer's Attorney, Seller's Attorney prepares a revised version of the Purchase and Sale Agreement which provides for an allocation of only $1

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allocation of only $1 as consideration for the covenant not to compete essentially renders the covenant meaningless, because Buyer's sole and exclusive remedy for breach by Seller of the covenant would be the return by Seller of $1 of the total consideration. Seller's Attorney notifies Seller about the apparent error with respect to the consequences of the change made by Buyer's Attorney. Seller instructs Seller's Attorney to not inform Buyer's Attorney of this apparent error. Seller's Attorney says nothing to Buyer's Attorney and allows the Purchase and Sale Agreement to be entered into by parties in that form."; analyzing Scenario A as follows: "In Scenario A of our Statement of Facts, although the Purchase and Sale Agreement contains a covenant not to compete, the apparent error of Buyer's Attorney limits the effectiveness of the covenant because the penalty for breach results in payment by Seller of only $1. However, Seller's Attorney has engaged in no conduct or activity that induced the apparent error. Further, under our Statement of Facts, there had been no agreement on the allocation of the purchase price to the covenant, and the Purchase and Sale Agreement does in fact contain a covenant not to compete the terms of which are consistent with the parties' mutual understanding. Under these circumstances, where Seller's Attorney has not engaged in deceit, active concealment or fraud, we conclude that Seller's Attorney does not have an affirmative duty to disclose the apparent error to Buyer's Attorney."; also explaining Scenario B: "After receiving the initial draft from Buyer's Attorney, Seller's Attorney prepares a revised version of the Purchase and Sale Agreement which provides for an allocation of only $1 as consideration for the covenant not to compete, with the intent of essentially rendering the covenant not to compete meaningless. Although Seller's Attorney had no intention of keeping this change secret from Buyer's Attorney, Seller's Attorney generates a 'redline' of the draft that unintentionally failed to highlight the change, and then tenders the revised version to Buyer's attorney. Subsequently, Seller's Attorney discovers the unintended defect in the 'redline' and notifies Seller about the change, including the failure to highlight the change, in the revised version. Seller instructs Seller's Attorney to not inform Buyer's Attorney of the change. Seller's Attorney says nothing to Buyer's Attorney and allows the Purchase and Sale Agreement to be entered into by the parties in that form."; analyzing Scenario B as follows: "Had Seller's Attorney intentionally created a defective 'redline' to surreptitiously conceal the change to the covenant not to compete, his conduct would constitute deceit, active concealment and possibly fraud, in violation of Seller's Attorney's ethical obligations. However, in Scenario B of our Statement of Facts, Seller's Attorney intentionally made the change which essentially renders the covenant not to compete meaningless, but unintentionally provided a defective 'redline' that failed to highlight for Buyer's Attorney that the change had been made. Under these circumstances, and prior to discovery of the unintentional defect, Seller's Attorney has engaged in no such unethical conduct. But once Seller's Attorney realizes his own error, we conclude that the failure to correct that error and advise Buyer's Attorney of the change might be conduct that constitutes deceit, active concealment and/or fraud, with any such determination to be based on the relevant facts and circumstances. If Seller instructs Seller's Attorney to not advise Buyer's Attorney of the change, where failure to do so would be a violation of his ethical obligations, Seller's Attorney may have to consider withdrawing." (footnote omitted); concluding with the following: "Where an attorney has engaged in no conduct or activity that induced an apparent material error by opposing counsel, the attorney has no obligation to alert the opposing counsel of the apparent error. However, where the attorney has made a material change in contract language in such a manner that his conduct constitutes deceit, active concealment or fraud, the failure of the attorney to alert opposing counsel of the change would be a violation of his ethical obligation.").

> as consideration for the covenant not to compete, with the intent of essentially rendering the covenant not to compete meaningless. Although Seller's Attorney had no intention of keeping this change secret from Buyer's Attorney, Seller's Attorney generates a 'redline' of the draft that unintentionally failed to highlight the change, and then tenders the revised version to Buyer's attorney. Subsequently, Seller's Attorney discovers the unintended defect in the 'redline' and notifies Seller about the change, including the failure to highlight the change, in the revised version. Seller instructs Seller's Attorney to not inform Buyer's Attorney of the change. Seller's Attorney says nothing to Buyer's Attorney and allows the Purchase and Sale Agreement to be entered into by the parties in that form.

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The legal ethics opinion provided the following analysis of Scenario B:

> Had Seller's Attorney intentionally created a defective 'redline' to surreptitiously conceal the change to the covenant not to compete, his conduct would constitute deceit, active concealment and possibly fraud, in violation of Seller's Attorney's ethical obligations. However, in Scenario B of our Statement of Facts, Seller's Attorney intentionally

> made the change which essentially renders the covenant not to compete meaningless, but unintentionally provided a defective 'redline' that failed to highlight for Buyer's Attorney that the change had been made. Under these circumstances, and prior to discovery of the unintentional defect, Seller's Attorney has engaged in no such unethical conduct. But once Seller's Attorney realizes his own error, we conclude that the failure to correct that error and advise Buyer's Attorney of the change might be conduct that constitutes deceit, active concealment and/or fraud, with any such determination to be based on the relevant facts and circumstances. If Seller instructs Seller's Attorney to not advise Buyer's Attorney of the change, where failure to do so would be a violation of his ethical obligations, Seller's Attorney may have to consider withdrawing. . . . Where an attorney has engaged in no conduct or activity that induced an apparent material error by opposing counsel, the attorney has no obligation to alert the opposing counsel of the apparent error. However, where the attorney has made a material change in contract language in such a manner that his conduct constitutes deceit, active concealment or fraud, the failure of the attorney to alert opposing counsel of the change would be a violation of his ethical obligation.

Id. (emphases added) (footnote omitted).

The legal ethics opinion recognized that California's confidentiality-centric rules might require withdrawal under certain circumstances, even if they did not require disclosure.

> Under either Scenario A or Scenario B of our Statement of Facts, once Seller's Attorney has informed Seller of the development, Seller's Attorney must abide by the instruction of Seller to not disclose. If, however, failure to make such disclosure constitutes an ethical violation by Seller's Attorney, then Seller's Attorney may have an obligation to withdraw from the representation under such circumstances.

Id. (footnote omitted).

Not all authorities agree that lawyers must disclose an adversary's mistake of this sort.

In 1989 a Maryland legal ethics opinion seemed to take the opposite position -- in an analogous situation.

- Maryland LEO 89-44 (1989) ("The issue which you raise is basically as follows: what duty of disclosure, if any, does a lawyer have in negotiating a transaction when the other party's counsel has drafted contracts which fail to set forth all of the terms which you believe have been agreed to, and where the omission results in favor of your client?"; "[T]he Committee is of the opinion that you are under no obligation to reveal to the other counsel his omission of a material term in the transaction. Based on the facts set forth in your letter, it does not appear that you or your client have made any false statement of material fact or law to the other side at any time during the negotiations, and, furthermore, the omission in no way is attributable to a fraudulent act committed by you or your client. To the contrary, it appears that the omission was made by the other counsel either negligently or, conceivably, because they do not believe that the terms were part of the transaction. In either case, Rule 5.1(a), based on these facts, does not require you to bring the omission to the other side's attention." (emphasis added)).

This situation fell somewhere between a pure scrivener's error (such as those discussed above) and a more substantive error such as failing to negotiate for an indemnity provision that most parties would normally have included in an agreement.

Best Answer

The best answer to **(a)** is **(B) YOU MAY DISCLOSE THE ADVERSARY'S MISTAKE TO YOUR CLIENT, BUT YOU DON'T HAVE TO (PROBABLY)**; the best answer to **(b)** is **(A) YOU MUST DISCLOSE THE ADVERSARY'S MISTAKE TO THE ADVERSARY'S LAWYER**.

B 1/15, 10/15

Ex Parte Communications with a Corporate Adversary's Employees

Hypothetical 9

Your client has been sued by a plaintiff hit by one of your client's work trucks. You are trying to determine if the plaintiff's lawyer may communicate ex parte with certain employees of your client.

Without your consent, may the plainiff's lawyer interview:

(a) Your client's chief operating officer?

NO

(b) Your client's chief engineer, who had nothing to do with the case and would not be involved in any settlement?

MAYBE

(c) The supervisor of the truck driver who hit the plaintiff (and whose statements would be admissible as "statements against interest")?

YES (PROBABLY)

(d) A truck driver who has worked for your client for the same number of years as the truck driver who hit the plaintiff (to explore the type of training she received)?

YES (PROBABLY)

(e) Your client's mechanic who checked out the truck the day before the accident?

MAYBE

(f) The truck driver who hit the plaintiff?

NO

Analysis

Introduction

Of all the ex parte contact issues, the permissible scope of ex parte contacts with employees of a corporate adversary has the most practical consequences, and (unfortunately) the most subtle differences from state to state.

The ABA Model Rules address this issue in a comment.

> In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

ABA Model Rule 4.2 cmt. [7].

Significantly, the Ethics 2000 changes deleted an additional category of corporate employees that had formerly been off-limits:

> or whose statement may constitute an admission on the part of the organization.

Thus, the ABA Ethics 2000 changes liberalized the Rule, expanding the number of corporate employees who are fair game for ex parte contacts.

The Restatement defines a "represented nonclient" who is off-limits to ex parte contacts as follows:

> [A] current employee or other agent of an organization represented by a lawyer:
>
> (a) if the employee or other agent supervises, directs, or regularly consults with the lawyer concerning the matter or if the agent has power to compromise or settle the matter;

> (b) if the acts or omissions of the employee or other agent may be imputed to the organization for purposes of civil or criminal liability in the matter; or
>
> (c) if a statement of the employee or other agent, under applicable rules of evidence, would have the effect of binding the organization with respect to proof of the matter.

Restatement (Third) of Law Governing Lawyers § 100(2) (2000). The first two categories match ABA Model Rule 4.2 cmt. [7], but the third category is quite different.

Elsewhere, the Restatement explains that

> [m]odern evidence rules make certain statements of an employee or agent admissible notwithstanding the hearsay rule, but allow the organization to impeach or contradict such statements. Employees or agents are not included within Subsection (2)(c) solely on the basis that their statements are admissible evidence. A contrary rule would essentially mean that most employees and agents with relevant information would be within the anti-contact rule, contrary to the policies described in Comment b.

Restatement (Third) of Law Governing Lawyers § 100 cmt. e (2000). Thus, the Restatement takes the same position as the ABA Ethics 2000 change.

In a 2009 article, Professors Hazard and Irwin explained the confusion about permissible ex parte communications with employees of a corporate adversary. After a lengthy discussion, they proposed to add a Comment to Rule 4.2 to explain the standard.

> In the context of organizational representation, the prohibition on communications applies where the lawyer knows or reasonably should know that a constituent is in a position within the organization to be classified as a represented person. This means that the lawyer has actual knowledge of the constituent's position or that a lawyer of reasonable prudence and competence would have actual knowledge in the same circumstances. See Rule 1.0(j).

Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Toward a Revised 4.2 No-Contact Rule, 60 Hastings L.J. 797, 840 (Mar. 2009).

In 2002, the Nevada Supreme Court issued an opinion which provided an excellent summary of the principles involved in this issue, the competing approaches and the advantages and disadvantages of those approaches. Palmer v. Pioneer Inn Assocs., Ltd., 59 P.3d 1237 (Nev. 2002).

The Nevada Supreme Court listed various interests furthered by restricting contacts between the corporation's adversary and corporate employees.

- "[P]rotecting the attorney-client relationship from interference." Id. at 1242.
- "[P]rotecting represented parties from overreaching by opposing lawyers." Id.
- "[P]rotecting against the inadvertent disclosure of privileged information." Id.
- "[B]alancing on one hand an organization's need to act through agents and employees, and protecting those employees from overreaching and the organization from the inadvertent disclosure of privileged information." Id.

The Nevada Supreme Court also listed the interests that would justify some ex parte contacts between a plaintiff's lawyer and corporate employees.

- "[T]he lack of any such protection afforded an individual, whose friends, relatives, acquaintances and co-workers may generally all be contacted freely." Id.
- "[P]ermitting more equitable and affordable access to information pertinent to a legal dispute." Id.
- "[P]romoting the court system's efficiency by allowing investigation before litigation and informal information-gathering during litigation." Id.
- "[P]ermitting a plaintiff's attorney sufficient opportunity to adequately investigate a claim before filing a complaint in accordance with Rule 11." Id.

- "[E]nhancing the court's truth-finding role by permitting contact with potential witnesses in a manner that allows them to speak freely." Id.

The Nevada Supreme Court described the pros and cons of six possible tests.

First, the "blanket test" prohibits all ex parte contacts with employees of a corporate adversary.

The blanket test has the advantages of clarity, and offering the most protection to the organization. However, the blanket test limits or eliminates counsel's opportunity to "properly investigate a potential claim before a complaint is filed," and also forces all discovery to be taken through expensive depositions. Id. at 1243.

Second, the "party-opponent admission test" prohibits ex parte contacts with

> any employee whose statement might be admissible as a party-opponent admission under FRE 801(d)(2)(D) and its state counterparts.

Id.

Under this approach, an employee's statement "is not hearsay, and thus is freely admissible against the employer, if it concerns a matter within the scope of the employee's employment, and is made during the employee's period of employment." Id. The party-opponent admission test has the advantage of protecting the organization "from potentially harmful admissions made by its employees to opposing counsel, without the organization's counsel's presence." Id. The organization's interest in avoiding such a situation is "particularly strong because such admissions are generally recognized as a very persuasive form of evidence." Id.

The party-opponent admission test has a disadvantage of "essentially cover[ing] all or almost all employees, since any employee could make statements concerning a

matter within the scope of his or her employment, and thus could potentially be included within the Rule." Id. This means that the test can "effectively serve as a blanket test." Id.

Third, the "managing-speaking agent test" prohibits ex parte contacts with

> those employees who have "speaking" authority for the organization, that is, those with legal authority to bind the organization.

Id. at 1245 (footnote omitted).

Identifying such off-limits employees must be "determined on a case-by-case basis according to the particular employee's position and duties and the jurisdiction's agency and evidence law." Id. The managing-speaking agent test has the advantage of balancing the competing policies of "protecting the organizational client from overreaching . . . and the adverse attorney's need for information in the organization's exclusive possession that may be too expensive or impractical to obtain through formal discovery." Id. The managing-speaking agent test has the disadvantage of "lack of predictability." Id.

Fourth, the "control group test" prohibits ex parte contacts with

> only those top management level employees who have responsibility for making final decisions, and those employees whose advisory roles to top management indicate that a decision would not normally be made without those employees' advice or opinion.

Id.

The control group test has the advantage of reducing discovery costs by increasing the number of fair-game employees. The control group test has the

disadvantage of being narrower than the attorney-client privilege rule expressed in Upjohn. It also lacks predictability, because it is not easy to tell who is within the "control group." Id.

Fifth, the "case-by-case balancing test" looks at each case and determines which ex parte contacts would be appropriate. According to the Nevada Supreme Court, "this test has been applied only when a lawyer seeks prospective guidance from a court." Id. at 1246.

Sixth, the "New York test" prohibits ex parte communications with

> corporate employees whose acts or omissions in the matter under inquiry are binding on a corporation (in effect, the corporation's "alter egos") or imputed to the corporation for purposes of its liability, or employees implementing the advice of counsel.

Id. This is the approach adopted by the Restatement, and is also called the "alter ego test." This approach "would clearly permit direct access to employees who were merely witnesses to an event for which the corporate employer is sued." Id. The advantages of the New York test are its balancing of protection of the organization and the need for informal investigation. Its disadvantages are its unpredictability, and the possibility that it provides too much protection for the organization.

The Nevada Supreme Court ultimately selected the "Managing-Speaking Agent Test." The court explained that this approach does not prohibit ex parte contacts with "employees whose conduct could be imputed to the organization based simply on the doctrine of respondeat superior." Id. at 1248. The off-limits employees under this test are only those whose statements can "bind" the corporation in a "legal evidentiary

sense." Id. An employee is not deemed off-limits "simply because his or her statement may be admissible as a party-opponent admission." Id.

States take varying approaches to this common situation. For instance, some jurisdictions include their approach in the black-letter rule.

> For purposes of this Rule, the term "party" or "person" includes any person or organization, including an employee of an organization, who has the authority to bind a party organization as to the representation to which the communication relates.

D.C. Rule 4.2(c). In a comment, D.C. Rule 4.2(c) explains that "the Rule does not prohibit a lawyer from communicating with employees of an organization who have the authority to bind the organization with respect to the matters underlying the representation if they do not also have authority to make binding decisions regarding the representation itself." D.C. Rule 4.2 cmt. [4].

Some states include their approach in a comment to their ethics rules.

> In the case of an organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons in the organization's "control group" as defined in Upjohn v. United States, 449 U.S. 383 (1981) or persons who may be regarded as the "alter ego" of the organization. The "control group" test prohibits ex parte communications with any employee of an organization who, because of their status or position, have the authority to bind the corporation. Such employees may only be contacted with the consent of the organization's counsel, through formal discovery or as authorized by law. An officer or director of an organization is likely a member of that organization's "control group." The prohibition does not apply to former employees or agents of the organization, and an attorney may communicate ex parte with such former employee or agent even if he or she was a member of the organization's "control group." If an agent or employee of the organization is represented in the matter by separate

> counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.

Virginia Rule 4.2 cmt. [7].

Most states follow the basic ABA Model Rule and Restatement approach -- considering "off-limits" corporate employees with managerial responsibility or involvement in the pertinent incident.

- North Carolina LEO 2005-5 (7/21/06) ("Even when a lawyer knows an organization is represented in a particular matter, Rule 4.2(a) does not restrict access to all employees of the represented organization. See[,] e.g., 97 FEO 2 and 99 FEO 10 (delineating which employees of a represented organization are protected under Rule 4.2). Counsel for an organization, be it a corporation or government agency, may not unilaterally claim to represent all of the organization's employees on current or future matters as a strategic maneuver. See 'Communications with Person Represented by Counsel,' Practice Guide, Lawyers' Manual on Professional Conduct 71:301 (2004) (list of cases and authorities rejecting counsel's right to assert blanket representation of organization's constituents). The rule's protections extend only to those employees who should be considered the lawyer's clients either because of the authority they have within the organization or their degree of involvement or participation in the legal representation of the matter.").

- North Carolina LEO 99-10 (7/21/00) ("[A] government lawyer working on a fraud investigation may instruct an investigator to interview employees of the target organization provided the investigator does not interview an employee who participates in the legal representation of the organization or an officer or manager of the organization who has the authority to speak for and bind the organization."; inexplicably holding that the government fraud investigator could conduct ex parte interviews of corporate employees whose acts apparently might be imputed to the corporation; explaining the factual context of the question: "[t]he fraud investigator wants to interview the current house managers and aides, without notice and outside the presence of Attorney C, to ask them whether they falsified records, whether they saw others falsify records, and whether they or others were ordered by supervisors to falsify records. The investigator will take the following steps before each such interview: (1) identify himself, (2) state that he is investigating possible criminal violations, (3) not interview any employee who participated substantially in the legal representation of Corporation, and (4) not elicit privileged communications between Corporation and Attorney C."; answering the following question affirmatively: "May Attorney A direct the investigator to

proceed with informal interviews of the house managers and aides without the consent of Attorney C?").

- North Carolina LEO 97-2 (1/16/98) (finding that a lawyer for an employee may not communicate ex parte with an adjuster for an insurance workers' compensation insurance carrier; "Although an adjuster for an insurance company may not be considered a 'manager' or 'management personnel' for the company, the adjuster does have managerial responsibility for the claims that she investigates. The adjuster is also privy to privileged communications with the legal counsel for the company and is generally involved in substantive conversations with the organization's lawyer regarding the representation of the organization. To safeguard the client-lawyer relationship from interference by adverse counsel and to reduce the likelihood that privileged information will be disclosed, Rule 4.2(a) protects from direct communications by opposing counsel not only employees who are clearly high-level management officials but also any employee who, like the adjuster in this inquiry, has participated substantially in the legal representation of the organization in a particular matter. Such participation includes substantive and/or privileged communications with the organization's lawyer as to the strategy and objectives of the representation, the management of the case, and other matters pertinent to the representation.").

However, the ABA Model Rules' dramatic changes in its approach (essentially rendering "fair game" for ex parte communications large numbers of corporate employees) and variations among states' ethics rules have generated considerable confusion in many states.

Examining federal and state courts' decisions in just two states -- Illinois and Virginia -- shows how confusing all of this can be. In some ways, this confusion plays to the advantage of corporations' lawyers, because it certainly might deter ex parte communications by lawyers representing the corporation's adversaries.

Illinois

Illinois seems to have a mismatch between its federal courts and its state courts. (As explained below, the Illinois Bar issued an opinion that provides at least some consistency.)

In Weibrecht v. Southern Illinois Transfer, Inc., 241 F.3d 875 (7th Cir. 2001), the Seventh Circuit upheld the Southern District of Illinois's adoption of the ABA approach. The Seventh Circuit acknowledged that an earlier Illinois court decision applied Illinois Rule 4.2

> only to those members of a corporate defendant's "control group" who have "the responsibility of making final decisions and those employees whose advisory roles to top management are such that a decision would not normally be made without those persons' advice."

Id. at 881-82 (quoting Fair Auto. Repair, Inc. v. Car-X Serv. Sys., Inc., 471 N.E.2d 554, 560 (Ill. App. Ct. 1984)).

The Seventh Circuit half-heartedly explained that federal courts were free to take a different approach than Illinois courts in applying the same Illinois rule.

> Nonetheless, the district court considered the Fair Automotive test in its order denying Shane's Rule 60(b) motion and concluded that, because Fair Automotive was decided under a prior version of the Illinois Rules, it is not clear that the Illinois courts would still apply the control group test. In any event, the district court was construing its own local rule, and even though in this case the district court has incorporated Illinois's rules by reference, nothing compelled the district court to adopt the same interpretation of those rules that has been adopted by an intermediate Illinois court. (We see no indication in the materials accompanying the professional conduct rules of the Southern District of Illinois that the district court intended to bind itself to follow the Illinois Supreme Court's interpretations of the Illinois rules,

> much less to follow decisions from other Illinois courts.) The district court was within its discretion in choosing to follow the ABA test rather than the control group test, and we will not disturb that decision.

Id. at 882.

Illinois federal court decisions issued since Weibrecht follow the same approach -- ignoring the Illinois state court interpretation of Rule 4.2 in favor of the ABA version. Hill v. Shell Oil Co., 209 F. Supp. 2d 876, 878-79 (N.D. Ill. 2002) (finding that managers at a gas station were within the "off-limits" category of Rule 4.2; "In determining whether Rule 4.2 covers non-managerial employees, courts have recognized the tension between a party's need to conduct low-cost informal discovery, and an opposing party's need to protect employees from making ill-considered statements or admissions . . . . The conduct of station attendants is at the heart of this litigation, and it is being offered as an example of the alleged discrimination of the defendants. As a result, the employees fall under the second category of Rule 4.2: employees whose acts or omissions in the matter at issue can be imputed to the organization."); Mundt v. U.S. Postal Serv., No. 00 C 6177, 2001 U.S. Dist. LEXIS 17622, at *12 (N.D. Ill. Oct. 25, 2001) ("In Weibrecht, the Seventh Circuit upheld the District Court's adoption of a three-part test, set out in the American Bar Association's official commentary to the Model Rules of Professional Conduct, to determine whether an employee is to be considered represented. See ABA Model Rules of Professional Conduct Rule 4.2 cmt. 4 (1995). Under that test, a defendant's employee is regarded as being represented by the defendant's lawyer if any of three conditions are met: (1) the employee has 'managerial responsibility' in the defendant's organization, (2) the

employee's acts or omissions can be imputed to the organization for purposes of liability, or (3) the employee's statements constitute an admission.").

To make matters even more complicated, the ABA has changed its Model Rule 4.2 since the Seventh Circuit issued this opinion. One is left to wonder whether an Illinois federal court would follow the old ABA approach or the new ABA approach.

In at least one respect, the Illinois Bar provided some clarification. In Illinois LEO 09-01, the Illinois Bar rejected its earlier "control group" analysis and adopted the ABA Model Rule approach. Illinois LEO 09-01 (1/2009) (rejecting earlier Illinois law which placed off-limits ex parte communications by a corporation's adversary only those within the corporate "control group"; instead adopting the ABA Model Rule 4.2 standard; "A lawyer may communicate with a current constituent of a represented organization about the subject-matter of the representation without the consent of the organization's counsel only when the constituent does not (i) supervise, direct or regularly consult with the organization's lawyer concerning the matter; (ii) have authority to obligate the organization with respect to the matter; or (iii) have acts or omissions in connection with the matter that may be imputed to the organization for purposes of civil or criminal liability. Consent of the organization's lawyer is not required for communication with former constituents about the matter of the representation. If the constituent has his or her own counsel, however, that counsel must consent to the communication."; also explaining that "a lawyer who is allowed to communicate with a constituent may not invade the privileges of the Represented Organization"; holding that former employee could be contacted ex parte).

However, this still leaves a mismatch between the federal and the state courts. As explained above, the Illinois federal courts' adoption of the ABA Model Rule approach included the prohibition on ex parte contacts with a corporate employee whose statements would be admissible against the corporation.

The Illinois Bar's current approach does not include that prohibition, but instead adopts the post-2000 ABA Model Rule approach -- which renders those employees fair game for ex parte contacts.

Virginia

Virginia has had trouble reconciling its Bar's approach with its federal courts' approach.

The Virginia ethics rules contain a unique comment describing folks who are off-limits to ex parte communications with representatives of a corporate adversary.

> In the case of organization, this Rule prohibits communications by a lawyer for one party concerning the matter in representation with persons in the organization's "control group" as defined in Upjohn v. United States, 449 U.S. 383 (1981) or persons who may be regarded as the "alter ego" of the organization. The "control group" test prohibits ex parte communications with any employee of an organization who, because of their status or position, have the authority to bind the corporation. Such employees may only be contacted with the consent of the organization's counsel, through formal discovery or as authorized by law. An officer or director of an organization is likely a member of that organization's "control group." The prohibition does not apply to former employees or agents of the organization, and an attorney may communicate ex parte with such former employee or agent even if he or she was a member of the organization's "control group." If an agent or employee of the organization is represented in the matter by separate counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.

Virginia Rule 4.2 cmt. [7].

The "control group" reference seems fairly clear -- because it piggybacks on the Upjohn United States Supreme Court case. However, the comment does not describe who "may be regarded as the 'alter ego' of the organization." That term usually comes up in cases involving plaintiffs' efforts to pierce the corporate veil and hold others responsible for a corporation's liabilities.

Neither the "control group" nor "alter ego" phrase would seem to include some corporate employees or other representatives who should clearly be off-limits -- defined in ABA Model Rule 4.2 cmt. [7] as those "whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." In essence, that exclusion includes the bus company employee who ran over a plaintiff's client. The bus driver clearly is not in the bus company "control group." In traditional corporate terms, the bus driver clearly is not the "alter ego" of the bus company. Thus, the Virginia Bar and Virginia courts have had to deal with this obvious hole in the Virginia rules' definition of those immune from ex parte communications by the corporation's adversary.

On a number of occasions, the Virginia Bar held that a lawyer may contact the employee of a corporate adversary unless the employee could "commit the corporation to specific courses of action" or could be characterized as the corporation's "alter ego." See, e.g., Virginia LEO 801 (5/27/86); Virginia LEO 795 (5/27/86); Virginia LEO 530 (11/23/83); Virginia LEO 507 (3/30/83); Virginia LEO 459 (7/21/82); Virginia LEO 347

(12/4/79). The Virginia Bar has even referred to the pre-Upjohn "control group" test. See, e.g., Virginia LEO 801 (5/27/86); Virginia LEO 795 (5/27/86).

Although the Virginia Bar has not explained exactly where the line should be drawn, it has provided some hints. For instance, in Virginia LEO 507 (3/30/83), the Virginia Bar held that a lawyer could not contact his corporate opponent's "regional manager." Accord Virginia LEO 459 (7/21/82) (store managers deemed off-limits).

On the other hand, in one Legal Ethics Opinion the Virginia Bar indicated that lawyers initiating such ex parte contacts must disclose their adversarial role, and then try "to ascertain whether that employee feels that his employment or his situation requires that he first communicate with counsel for the corporate entity." Virginia LEO 905 (3/17/89). A lawyer concluding that the employee "feels" this way must presumably end the communication.

Virginia court decisions are hopelessly confused. Four cases decided in a little over ten months in the mid-1990s would leave any practitioner perplexed.

In Queensberry v. Norfolk & Western Railway, 157 F.R.D. 21 (E.D. Va. 1993), the Eastern District of Virginia dealt with a railroad's motion to prohibit plaintiff (an injured railroad worker proceeding under the Federal Employers' Liability Act ("FELA")) from conducting ex parte communications with the railroad's employees. The court acknowledged that its local rule adopted as the applicable ethics standards the then-current Virginia Code of Professional Responsibility. The court quoted Virginia Code of Prof'l Responsibility DR 7-103(A), and then noted that its language was "identical" to what was then the ABA Model Code of Prof'l Responsibility DR 7-104(A)(1). For some

reason, the court did not rely on the Virginia Code comment describing who is fair game and off-limits within an organization, but instead relied on ABA LEO 359 (3/22/91). The ABA approach has always been different from Virginia's approach.

Focusing on what was then the ABA prohibition on ex parte contacts with those "whose statement may constitute an admission on the part of the organization" -- a prohibition that has never appeared in the Virginia Code or the Virginia Rules -- the court then turned to Federal Rule of Evidence 801(d)(2) in concluding that "'virtually any employee may conceivably make admissions binding on his or her employer.'" Queensberry, 157 F.R.D. at 23. Thus, the court granted the railroad's motion, and prohibited the plaintiff from conducting ex parte interviews of railroad workers.

Just a few months later, the Roanoke (Virginia) Circuit Court dealt with an identical request by the same railroad to prohibit a plaintiff from conducting ex parte interviews of railroad employees. Schmidt v. Norfolk & W. Ry., 32 Va. Cir. 326 (Va. Cir. Ct. 1994). The state court explained that "while I have the greatest respect for the district judge who decided Queensberry, I conclude that he was incorrect in his interpretation of the application of Virginia's Disciplinary Rules in this situation and therefore do not follow his guidance on the point." Id. at 328.

> Though there is no Virginia appellate decision on point, the standing committee on Legal Ethics of the Virginia State Bar "has consistently opined that it is not impermissible for an attorney to directly contact and communicate with employees of an adverse party provided that the employees are not members of the corporation's control[] group and are not able to commit the organization or corporation to specific courses of action that would lead one to believe the employee is the corporation's alter ego. See, e.g., Legal Ethics Opinion Nos. 347, 530, 795; Upjohn Co. v. U.S., 449

> U.S. 383, 101 S. Ct. 677, 66 L. Ed. 2d 584 (1981)." Legal Ethics Opinion No. 1504, December 14, 1992.
>
> While the Virginia State Bar's "control group" test may not be the one followed in the majority of jurisdictions, the overwhelming weight of authority rejects the Railway Company's argument that the Disciplinary Rules prohibit contact with any employee of the corporate defendant. See, e.g., Niesig v. Team I, et al., 76 N.Y.2d 363, 558 N.E.2d 1030, 559 N.Y.S.2d 493 (1990), a persuasive opinion by the current chief judge of New York's highest court.
>
> The railway company relies for support of its interpretation of DR 7-103(A)(1) on a memorandum opinion of another trial judge. Queensberry v. Norfolk and Western Railway Company, 157 F.R.D. 21 (E.D. Va. 1993). The plaintiff argues, and I agree, that in deciding that case, the federal district judge was justifiably concerned with the effect, under the Federal Rules of Evidence, of any admission that even the lowest-level employee might make. As the plaintiff notes, such a concern does not exist in Virginia's state courts, where the Federal Rules do not apply. Thus, the plaintiff suggests, Queensberry should be distinguished from the case at bar.

Id. at 327-28. The court therefore denied the railroad's motion.

A few months after that, another Eastern District of Virginia judge addressed an identical request by the same railroad. Tucker v. Norfolk & W. Ry., 849 F. Supp. 1096 (E.D. Va. 1994). The court followed what it called the "thoughtful" opinion in Queensberry in granting the railroad's request. Id. at 1099. Interestingly, the court indicated that "both parties in this action agree" that the ex parte prohibition applies only "after a lawsuit is filed." Id. at 1098. This is an incorrect statement of the law in every state. The court therefore allowed the plaintiff to re-interview employees his lawyer had spoken with before litigation began, although they would not be able to obtain any "new information" from them. Id. at 1101.

Several months later, the Winchester, Virginia Circuit Court addressed this issue in connection with a hospital's motion to prevent plaintiff from engaging in ex parte communications with the hospital's nurses about a malpractice case. Dupont v. Winchester Med. Ctr., Inc., 34 Va. Cir. 105 (Va. Cir. Ct. 1994). The state court judge cited the Virginia Rule, but quoted from the ABA comment -- as well as noting the Queensberry and Tucker cases. The court found that the hospital's nurses were not the "alter ego" of the hospital, but that they would be off-limits under either the Virginia precedent or the ABA approach.

> However, the nurses' negligent acts may make the Medical Center vicariously liable in that the nurses may "act on behalf of the corporation or make decisions on behalf of the corporation in the particular area which is the subject matter of the litigation." LEO 905, which will control the destiny of the Medical Center vis a vis its potential liability to the Plaintiff. This LEO 905 language, which LEO 1504 characterizes as "dispositive," is substantially similar to that of the official comment to ABA Model Rule 4.2, and is in fact a functional analysis based upon either the employee's relationship to the corporation ("make decisions on behalf"), which is the traditional control group analysis, or the employees's participation in the events giving rise to the cause of action ("act on behalf of the corporation"), which is closely akin to the substance of the official comment to ABA Rule 4.2.

Id. at 108. As the court explained,

> [w]here the employees are actual players in the alleged negligent act or where they have the authority to make decisions to bind the corporation, then they are acting as the corporation with regard to those acts and are in essence its alter ego. A corporation may have many heads and even more hands, and any one or more of the heads and hands may bind the corporation. There is no reason why a corporation or other organization, which must act through surrogates, should be afforded less protection under the

> rules of discovery than a natural person. Therefore, the better rule to be applied in the context of permissible discovery and ex parte contacts would be that of the official comment to ABA Model Rule 4.2 and LEO 905. Accordingly, the plaintiff may not contact The Medical Center's nurses who were, or may be, directly involved in the sponge issue in this case outside the discovery process. However, to the extent that employees of the Medical Center are not persons "whose act or omission in connection with that matter [in litigation] may be imputed to the organization for purposes of civil . . . liability or whose statement may constitute an admission on the part of the organization," those corporate employees may be contacted ex parte by the Plaintiff.

Id. at 108-09. The court entered an order prohibiting the plaintiff from ex parte contacts with

> the nurses who attended to the physician and who may have negligently placed the sponges. However, to the extent that there are other nurses or employees who are not involved in the sponge placement process of this particular plaintiff, then the plaintiff is free to talk to such nurses outside the discovery process so long as traditional rules of patient confidentiality and the principles discussed in this order are not transgressed.

Id. at 109-10.

A federal court decision in Virginia on this topic also followed the ABA approach rather than the Virginia approach. In Lewis v. CSX Transportation, Inc., 202 F.R.D. 464 (W.D. Va. 2001), the court addressed CSX's motion to enjoin a plaintiff's lawyer from conducting ex parte interviews of CSX employees. The court relied on the Tucker and Queensberry approach. The court acknowledged that the Western District of Virginia Local Rules adopt the Virginia ethics rules, but noted that the court can "'look to federal law in order to interpret and apply those rules.'" Id. at 466 (quoting McCallum v. CSX

Transp., Inc., 149 F.R.D. 104, 108 (M.D.N.C. 1993)). The court also cited Federal Rule of Evidence 801 -- noting that an employee's statement can amount to an admission.

Of course, all of these cases were decided under the old ABA approach, which placed off-limits corporate employees whose statements were admissible as admissions against their corporate employer's interest. In fact, that was the explicit provision on which all three federal district court decisions rested. Now that the ABA has changed its approach, and rendered those corporate employees fair game for ex parte contacts, there is simply no telling what the federal courts would do in Virginia.

In 2005, a Virginia state court decision dealing with this topic followed the Virginia rules. Pruett v. Virginia Health Servs., Inc., 69 Va. Cir. 80, 85 (Va. Cir. Ct. 2005) (permitting plaintiff's lawyer to initiate ex parte communications with a defendant nursing home's current employees, except for current "control group" employees and current non "control group" employees who provide resident care; permitting ex parte contacts even with those nursing home employees, as long as the communications "do not relate to the acts or omissions alleged to have caused injury, damage or death to plaintiff's decedent"; also permitting ex parte contacts with former nursing home "control group" and non "control group" employees).

The most recent Virginia state court to deal with this topic extensively analyzed both the "control group" and "alter ego" definition in Virginia Rule 4.2 cmt. [7]. In Yukon Pocahontas Coal Co. v. Consolidation Coal Co., 72 Va. Cir. 75 (Va. Cir. Ct. 2006), defendant's lawyer communicated briefly with several limited partners of plaintiffs' limited liability partnerships. The court concluded that the limited partners were not

members of the plaintiffs' "control group," because "[b]y definition, a limited partner cannot bind or act on behalf of" plaintiffs. Id. at 91.

However, the court held that the limited partners were somehow "alter egos" of the plaintiffs, because the plaintiffs' partnership agreements allowed them to "make decisions on behalf of [plaintiffs] in the particular area which is a subject matter in the underlying litigation" -- voting on the general partner's proposed partnership agreement amendments dealing with his power to act on plaintiffs' behalf (which the court described as the issue being litigated). Id. at 92. The court pointed to several old Virginia legal ethics opinions, which defined as "alter egos" of a corporation those agents who can commit the organization because of their authority or some other law providing that power. The court also pointed to the Pruett case, in which another circuit court found off-limits to ex parte communications floor nurses who obviously were not in the nursing home's "control group," but who allowed the nursing home to carry on its business through their "'hands on' interaction." Id. (quoting Pruett v. Virginia Health Servs., Inc. at 84-85).

This strange definition of "alter ego" does not come from any standard corporate law jurisprudence. Instead, it appears to be a judicial effort to plug the hole left in Virginia Model Rule 4.2 cmt. [7], which does not include the obvious prohibition on ex parte contacts with those (as characterized in ABA Model Rule 4.2 cmt. [7]) "whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability." However, this definition of "alter ego" does not exactly match with the ABA Model Rule definition of those off-limits lower level

employees. It makes sense to prevent ex parte contacts with non-control group corporate employees whose "act or omission" might put the corporation at risk, but these Virginia courts' definition of "alter ego" employees goes beyond that group and apparently includes witnesses whose acts or omissions would not have that effect.

The most recent Virginia federal court opinion takes the same inexplicable approach as an earlier federal court decision.

- Smith v. United Salt Corp., Case No. 1:08cv00053, 2009 U.S. Dist. LEXIS 82685, at *9-10, *9, *11 (W.D. Va. Sept. 9, 2009) (analyzing a corporate defendant's effort to enjoin lawyers for a sexual harassment and discrimination plaintiff from ex parte contacts with company employees; declining to apply the holding in Lewis v. CSX Transp., Inc., 202 F.R.D. 464 (W.D. Va. 2001) because that case involved ex parte contact with "the very employees who used and maintained the piece of equipment at issue," which meant that their statements would "be an admission of liability imputable to the employer"; inexplicably analyzing the issue as the Lewis court had done, in light of the standard found in an earlier version of ABA Rule 4.2 (which prohibited ex parte communications with persons "'whose statement[s] may constitute an admission on the part of the corporate party'"); ultimately declining to enjoin ex parte contacts by the plaintiff's lawyer with employees "whose statements could not be used to impute liability upon the employee," but prohibiting "ex parte contact in this context with any supervisory or managerial employee").

All in all, Virginia case law presents a confusing and contradictory amalgam of current and obsolete Virginia and ABA principles.

Best Answer

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

n 12/11

Ex Parte Communications with a Corporate Adversary's Former Employees

Hypothetical 10

Your client is involved in a contentious litigation involving a fact pattern extending over many years. The aggressive plaintiff's lawyer has been attempting to communicate ex parte with client's current and even former employees.

(a) Without your consent, may the plaintiff's lawyer communicate ex parte with your client's former chairman?

YES (PROBABLY)

(b) Without your consent, may the plaintiff's lawyer interview an engineer that was directly involved in the scenario resulting in litigation?

YES (PROBABLY)

Analysis

Introduction

Unlike other areas involving ex parte communications, the ethics authorities seem to be unanimous in this area -- although the courts are not.

A comment to ABA Model Rule 4.2 clearly indicates that the

> [c]onsent of the organization's lawyer is not required for communication with a former constituent.

ABA Model Rule 4.2 cmt. [7]. See also ABA LEO 396 (7/28/95); ABA LEO 359 (3/22/91).

The Restatement is just as clear, and even provides an explanation.

> Contact with a former employee or agent ordinarily is permitted, even if the person had formerly been within a category of those with whom contact is prohibited. Denial of access to such a person would impede an adversary's

> search for relevant facts without facilitating the employer's relationship with its counsel.

Restatement (Third) of Law Governing Lawyers § 100 cmt. g (2000).

Thus, under both the ABA Model Rules and the Restatement, former corporate employees are fair game for ex parte communications initiated by the corporation's adversary's lawyer -- even if they would have clearly been off-limits while still with the company.

In a 2009 article, Professors Hazard and Irwin explained the mixed approach the courts take towards ex parte communications with a corporate adversary's former employees. They proposed a revision to the comments to Rule 4.2 as follows:

> In the case of a represented organization, consent of the organization's lawyer is not required for communication with a former constituent unless the former constituent is represented by the organization's lawyer through an independent engagement or unless a lawyer knows or reasonably should know the former constituent's conduct materially contributed to the matter underlying the representation. In communicating with a former constituent, a lawyer shall not seek to elicit privileged or confidential information.

Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Toward a Revised 4.2 No-Contact Rule, 60 Hastings L.J. 797, 842 (Mar. 2009).

Courts take differing approaches. Most courts find such ex parte communications permissible.

- Rubis v. Hartford Fire Ins. Co., Civ. No. 3:11CV796 (WWE), 2012 U.S. Dist. LEXIS 52982, at *8-9, *11-12 (D. Conn. Apr. 16, 2012) (declining to disqualify a lawyer who had conducted ex parte communications with a former manager of a corporate adversary; noting that "[a] minority of courts . . . have applied Rule 4.2 to former employees in certain situations, such as where the former employee was a member of an organization's management or control group,

or where the former employee had privileged or confidential information, or where the conduct of the former employee could have been imputed to the employer." [citing Serrano v. Cintas Corp., Civ. A. No. 04-40132, 2009 U.S. Dist. LEXIS 120068 (E.D. Mich. Dec. 23, 2009)]; "Without deciding the motion to disqualify at this time, and considering the nuanced approach counseled in Serrano at the deposition stage, the Motion for Protective Order [Doc. #56] is GRANTED, to the extent that counsel may not inquire at the deposition about communications Mr. Kemp had with Madsen, Presley & Parenteau, LLC, concerning his involvement in the termination of these plaintiffs. There is no claim that Mr. Kemp possesses either privileged or confidential information concerning plaintiffs' claims. The Hartford may inquire whether its former employee Gary Kemp has communicated to plaintiffs' counsel knowledge that may support a claim of discriminatory pattern and practice beyond his involvement in the termination of plaintiffs. A fair subject of inquiry includes Mr. Kemp's past involvement in reduction in force initiatives and/or termination of others' employment, conversations with The Hartford's lawyers, his access to confidential and/or privileged materials, and specific litigation strategies in other cases. The Hartford's counsel may inquire by naming employees and/or the lawsuit or describe the litigation so that Mr. Kemp will be able to recall his involvement and counsel can determine whether Kemp has specific privileged and/or confidential information that could prejudice The Hartford in this lawsuit. At this time, defendant has only speculated that Mr. Kemp was exposed to privileged/confidential information during his employment that could prejudice The Hartford in this lawsuit.").

- Arista Records LLC v. v. Lime Group LLC, 715 F. Supp. 2d 481, 500 (S.D.N.Y. 2010) (declining to issue a protective order preventing plaintiffs from ex parte communications with a defendant's former chief technology officer; "The Court will not issue a protective order prohibiting Plaintiff's from speaking with Bildson [a defendant's former chief technology officer]. Plaintiffs have made a good faith effort to avoid learning privileged information from Bildson. Forrest and Page, Bildson's attorney, have submitted affidavits stating that Forrest met with Bildson only once, and that she never sought privileged information from him. Forrest and Page both state that they repeatedly warned Bildson not to provide him with such information. Defendants have presented no evidence that Bildson disclosed privileged communications to Plaintiffs, other than the two declarations discussed.").

- MCC Mgmt. of Naples, Inc. v. Arnold & Porter, LLP, Case Nos. 2:07-cv-387-FtM-29SPC & -420-FtM-29DNF, 2009 U.S. Dist. LEXIS 44992, at *65-66 (M.D. Fla. May 29, 2009) ("An attorney may ethically communicate with a former officer or employee of a corporation on an ex parte basis even though the attorney knows that the corporation is represented by counsel.").

- Victory Lane Quick Oil Change, Inc. v. Hoss, Case No. 07-14463, 2009 U.S. Dist. LEXIS 22579, at *5-6, *6-7(E.D. Mich. Mar. 20, 2009) (holding that Michigan Rule 4.2 permits ex parte communications with a corporate adversary's former high-level executive [former high ranking Director of Operations who has been a central defense operative in this litigation and privy to substantial privileged attorney-client communications concerning this case]; explaining the substance of the ex parte communications; "[I]t was determined that the Roberts Supplemental Affidavit did not involve any party admissions of Plaintiff because the document was prepared when Mr. Roberts was no longer an agent or employee of Plaintiff and thus was not making the statements in the scope of his agency or employment authority. It was also determined that the Roberts Supplemental Affidavit did not contain disclosure of any confidential attorney-client communications. There were certain portions that arguably might relate to factual admissions of Mr. Roberts while still employed by Plaintiff that might be imputed to the Plaintiff. Yet, the overwhelming majority of the contents of the Roberts Supplemental Affidavit does not topics [sic] of concern to the ethics committees applying M.R.P.C. 4.2 to former employees."; explaining that "[w]hile Defense counsel displayed some caution when Mr. Roberts first approached them in December 2008, and urged Mr. Roberts to consult with his personal attorney prior to their having his statements reduced to an affidavit, given his former role with Plaintiff, his extensive involvement in this case, and his being privy to confidential discussions with Plaintiffs' counsel, Defense counsel would have been prudent to contact Plaintiff's counsel prior to furthering the discussions with Mr. Roberts or sought direction from this Court. As noted at the hearing, it could be argued that defense counsel violated M.R.P.C. 4.2 in their contact with Mr. Roberts."; ultimately prohibiting defendants from using the affidavit they obtained from plaintiff's former high-level executive, but allowing a limited additional discovery).

- Muriel Siebert & Co. v. Intuit Inc., 820 N.Y.S.2d 54, 55 (N.Y. App. Div. 2006) (assessing a defense lawyer's ex parte interview of one of plaintiff's former employees; noting that the lower court had disqualified the lawyer because of an "appearance of impropriety," despite the inapplicability of the ex parte contact prohibition on ex parte communications with former employees of a corporate adversary); also noting that "[h]ere, after the litigation had commenced, plaintiff terminated its chief operating officer. After plaintiff's counsel informed defense counsel that the executive was no longer within its control, both attorneys agreed that it would be appropriate for defense counsel to subpoena the witness for deposition. Before that deposition was held, defense counsel conducted a pre-deposition interview of the witness for approximately three hours. At the commencement of the interview, defense counsel's colleague warned the executive to be careful not to disclose any privileged information, including any legal strategies or communications with

plaintiff's counsel."; reversing the disqualification), appeal granted, No. M-4630, 2006 N.Y. App. Div. LEXIS 12331 (N.Y. App. Div. Oct. 12, 2006).

- Snowling v. Massanutten Military Acad., 57 Va. Cir. 284, 284 (Va. Cir. Ct. 2002) ("I will allow the Plaintiff to contact ex parte the former employees of the Defendant who were named at our hearing on January 3, 2002. Such contact is ethically permitted under Legal Ethics Opinion No. 1670. These persons are no longer employees of the Defendant, and I do not believe that they were part of the 'control group' when they were employed by MMA.").

- Turnbull v. Topeka State Hosp., 185 F.R.D. 645, 652 (D. Kan. 1999) (a party's lawyer could ethically interview former employees of a corporate adversary).

- Olson v. Snap Prods., Inc., 183 F.R.D. 539, 544 (D. Minn. 1998) ("likewise, a majority of Courts which have considered the issue agree that, in general, Rule 4.2 does not bar ex parte attorney contacts with an adversary's former employees who are not themselves represented in the matter. A minority of Courts, which are concerned over the unfairness of litigants being able to obtain the sensitive information of an opponent from the opponent's past employees, extend the 'no contact' rule to former employees." (citations omitted)).

- Davidson Supply Co. v. P.P.E., Inc., 986 F. Supp. 956, 959 (D. Md. 1997) (holding that the Maryland ethics code does not prohibit ex parte contacts with former employees, and refusing to disqualify a law firm for conducting an ex parte interview of a former employee who was "not an attorney or an investigator, but was simply a marketer").

Other courts and bars treat former employees the same way they treat current employees.

- North Carolina LEO 97-2 (1/16/98) (addressing an adversary's ability to communicate ex parte with former employees of a corporate adversary; distinguishing between permissible ex parte contacts with a former employee who was not heavily involved in the legal representation of the corporation in the pertinent matter and impermissible ex parte communications with a former employee who played such a role while at the company; holding that a lawyer representing a sexual harassment plaintiff could communicate ex parte with a former employee who might have engaged in alleged sexual harassment; addressing the following situation: "Employee X is no longer employed by Corporation. While an employee of Corporation, however, Employee X may have engaged in activities that would constitute the sexual harassment of other employees of Corporation. An action alleging sexual harassment based

on Employee X's conduct was brought against Corporation. Although he is not a named defendant in the action, Employee X's acts, while an employee, may be imputed to the organization. When he was employed, Employee X did not discuss the corporation's representation in this matter with Corporation's lawyer. Employee X is unrepresented. May the lawyer for the plaintiffs in the sexual harassment action interview Employee X without the consent of the lawyer for Corporation?"; finding the communications permissible; "Unlike the adjuster in the two prior inquiries, Employee X was not an active participant in the legal representation of his former employer in the sexual harassment action. It does not appear that he was involved in any decision making relative to the representation of Corporation nor was he privy to privileged client-lawyer communications relative to the representation. Rather, Employee X is a fact witness and a potential defendant in his own right. Permitting ex parte contact with Employee X by the plaintiff's counsel will not interfere with Corporation's relationship with its lawyer nor will it result in the disclosure of privileged client-lawyer communications regarding the representation. Comment [5] to Rule 4.2, which indicates that the rule prohibits communications with any employee '. . . whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization,' should be applicable only to current employees. The purpose of Rule 4.2 is not enhanced by extending the prohibition to former employees who, during the time of their employment, did not participate substantively in the representation of the organization."; contrasting this scenario with an adversary's ex parte communication with a former corporate employee who had played an intimate role in the legal issues while employed by the company; "The protection afforded by Rule 4.2(a) to 'safeguard the client-lawyer relationship from interference by adverse counsel' can be assured to a represented organization only if there is an exception to the general rule that permits ex parte contact with former employees of an organization without the consent of the organization's lawyer. See RPC 81 (permitting a lawyer to interview an unrepresented former employee of an adverse corporate party without the permission of the corporation's lawyer). The exception must be made for contacts with a former employee who, while with the organization, participated substantially in the legal representation of the organization, including participation in and knowledge of privileged communications with legal counsel. Permitting direct communications with such a person, although no longer employed by the organization, would interfere with the effective representation of the organization and the organization's relationship with its legal counsel. Such communications are permitted only with the consent of the organization's lawyer or in formal discovery proceedings. The general rule, set forth in RPC 81, permitting a lawyer to interview an unrepresented former employee of an

adverse organizational party without the consent of the organization's lawyer, remains in effect with the limited exception explained above.").

- Rentclub, Inc. v. Transamerica Rental Fin. Corp., 811 F. Supp. 651 (M.D. Fla. 1992), aff'd, 43 F.3d 1439 (11th Cir. 1995).

- MMR/Wallace Power & Indus., Inc. v. Thames Assocs., 764 F. Supp. 712 (D. Conn. 1991) (disqualifying a law firm for improper ex parte contacts with a former employee of a litigation adversary).

- Public Serv. Elec. & Gas Co. v. Associated Elec. & Gas Ins. Servs., Ltd., 745 F. Supp. 1037 (D.N.J. 1990).

- American Protection Ins. Co. v. MGM Grand Hotel -- Las Vegas, Inc., Nos. Civ.-LV-82-26 HEC, LV-82-96 HEC, 1983 WL 25286 (D. Nev. Dec. 8, 1983) (disqualifying a law firm for improper ex parte contacts and payments to a former employee of the litigation adversary).

One court concocted an interesting process.

- Equal Employment Opportunity Comm'n v. First Wireless Group Inc., No. CV-03-4990 (JS)(ARL), 2006 U.S. Dist. LEXIS 67694, at *3-5 (E.D.N.Y. Sept. 20, 2006) ("With respect to the non-managerial former employees, the court agrees with the EEOC that there is no basis for prohibiting the EEOC's contact with former employees. . . . The only justification for restricting contact with a former employee would be to protect privileged information that the employee may possess. . . . This circumstance typically arises only with former managerial or supervisory employees. Accordingly, by September 27, 2006, First Wireless is to identify, from the list provided, any former managerial or supervisory employees with access to privileged information. As to each of these employees, First Wireless is to provide the EEOC with a declaration identifying the position held by each such employee, as well as a description of their duties and responsibilities. Upon receipt of the list form [sic] First Wireless, the EEOC is to provide First Wireless with the subject matter of its intended communication with such employees by September 29, 2006. If, after reviewing the subject matter of the intended communication, First Wireless believes that those employees may be asked about information protected by a privilege belonging to First Wireless, it shall communicate its concern to the EEOC. If the issue cannot be resolved by the parties, First Wireless may then renew its application for a protective order with respect to the 'manager-level' employees.").

In some states, the answer might depend on the court and even the geographic area where the lawyer acts.

Virginia provides a good example of how confusing this can be. The Virginia ethics rules could not be any clearer: "[t]he prohibition [on ex parte contacts] does not apply to former employees or agents." Virginia Rule 4.2 cmt. [7]. Several Virginia state court cases reaffirmed this approach.

- Pruett v. Va. Health Servs., Inc., 69 Va. Cir. 80 (Va. Cir. Ct. 2005) (declining to prohibit a plaintiff's lawyer from ex parte contacts with any former employees of defendant nursing home).

- Snowling v. Massanutten Military Acad., 57 Va. Cir. 284, 284 (Va. Cir. Ct. 2002) ("I will allow the Plaintiff to contact ex parte the former employees of the Defendant who were named at our hearing on January 3, 2002. Such contact is ethically permitted under Legal Ethics Opinion No. 1670. These persons are no longer employees of the Defendant, and I do not believe that they were part of the "control group" when they were employed by MMA. I have reviewed the opinion of the Honorable John E. Wetsel Jr., Judge of the Twenty-sixth Judicial Circuit, in Dupont v. Winchester Medical Center, 34 Va. Cir. 105 (Circuit Court of the City of Winchester, 1994). While I do not disagree with Judge Wetsel's reasoning, there is, in my view, an important difference between the situation presented there and the one at hand. That distinction lies in the employment status of the persons with whom the Plaintiff seeks contact. In our case, these persons are no longer employed by the Defendant. I realize this ruling puts me at odds with Magistrate Judge Sargent in Armsey v. Medshares Management Services, 184 F.R.D. 569 (W. D. Va. 1998); however, I find myself in agreement with the opinions handed down in those several cases cited in Armsey where ex parte contact with former non-managerial employees was allowed.").

In 1998, a Western District of Virginia federal court case relied on the court's inherent power to preclude ex parte communications with a corporate defendant's former employees whose "statements, actions or omissions" could be imputed to the corporate defendant.

- Armsey v. Medshares Mgmt. Servs., Inc., 184 F.R.D. 569, 574 (W.D. Va. 1998) ("I agree with the committee that former employees may no longer bind their corporate employer by their current statements, acts or omissions. Yet, this does not prevent liability being imposed upon their former employer based on the statements, acts or omissions of these individuals which occurred during the course of their employment. In fact, Plaintiffs' counsel in this case has informed the court that it seeks to speak to each of these former employees because Plaintiffs believe that they can impute liability upon Medshares through the statements, actions or omissions of these former employees. Under these facts, I do not believe ex parte communications with these former employees is proper." (citations omitted)).

However, ten years later another Western District of Virginia decision concluded that Virginia Rule 4.2 "strikes the correct balance between efficient and appropriate discovery, protection from overreaching by counsel in dealing with unrepresented persons, and a protection of a corporate party's privileged and confidential information." Bryant v. Yorktowne Cabinetry, Inc., 538 F. Supp. 2d 948, 953 (W.D. Va. 2008). The Bryant court distinguished the Armsey case because the plaintiff was not seeking to impute the former employees' "statements, conduct or actions" to the corporate defendant. Id.[1] However, Bryant clearly represents a fundamental disagreement with

[1] Bryant v. Yorktowne Cabinetry, Inc., 538 F. Supp. 2d 948, 950, 953, 953-954 (W.D. Va. 2008) (assessing the permissibility of plaintiff's ex parte communications with former employees of a corporate adversary; explaining that the Virginia State Bar has issued legal ethics opinions permitting such ex parte communications, while another Western District of Virginia case (Armsey v. Medshares Mgmt. Servs., Inc., 184 F.R.D. 569 (W.D. Va. 1998) prohibited such ex parte communications; noting "the vast divergence of opinion in state and federal courts in other jurisdictions on the issue of ex parte communications between counsel and former management employees of an adverse corporate party."; explaining several policy reasons in favor of the bar approach; "First, as this issue is an ethical one, it is critical to provide clear guidance to practicing lawyers. Lawyers need to know where the electrified third rail lies. The bright line rule set forth in the text and comments to Virginia Rule 4.2 serves this purpose. Indeed, any lack of clarity in this area can only serve to foster more discovery disputes requiring the parties and the courts to expend resources to resolve. Second, requiring discovery of former employees only through formal means will needlessly raise the cost of litigating with corporate parties. Third, the court in Frank v. L.L. Bean, Inc., 377 F. Supp. 2d 233, 238 (D. Me. 2005), appropriately inquired as to 'why the onus should not be on counsel for the witness' former employer to offer him or her counsel,' and suggested that '[s]uch efforts could be undertaken by defense counsel as a matter of course when a plaintiff seeks to hold a corporate defendant vicariously liable for the wrongful acts of a former employee.'"; finding the situation distinguishable from that in Armsey because the plaintiff did not seek to

the Armsey case, so it is unclear where the Western District of Virginia now stands on that issue. The Eastern District of Virginia has not spoken, so it would be difficult to guess its approach.

Thus, Virginia practitioners apparently may conduct ex parte communications with former employees if they are litigating in state court, may not engage in such ex parte communications if they are litigating in western Virginia federal courts, and will have to guess what they can do if they are litigating in eastern Virginia federal courts.

A far more difficult dilemma arises if the lawyer wants to communicate ex parte with a former employee who is clearly fair game under the ethics rules, but who has been so infused with privileged or confidential information that the lawyer almost inevitably risks obtaining such information. For instance, a lower level employee of a

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impute the former corporate employee's "statements, conduct or actions" to the corporate defendant; ultimately allowing such ex parte communications; "In sum, the court believes that the approach taken by the Virginia State Bar Committee on Legal Ethics and the Rules of Professional Conduct strikes the correct balance between efficient and appropriate discovery, protection from overreaching by counsel in dealing with unrepresented persons, and the protection of a corporate party's privileged and confidential information. . . . Thus, although the Rules allow communication with former corporate employees, including those with managerial responsibilities, opposing counsel must tread very carefully to avoid discussing information which 'may reasonably be foreseen as stemming from attorney/client communications,' Virginia LEO 1749, or to 'use methods of obtaining evidence that violate the legal rights of such a person.' Va. R. Prof'l Conduct 4.4."; imposing several procedural requirements on such communications; "1. Upon contacting any former employee, plaintiff's counsel shall immediately identify himself as the attorney representing plaintiff in the instant suit and specify the purpose of the contact. 2. Plaintiff's counsel shall ascertain whether the former employee is associated with defendant or is represented by counsel. If so, the contact must terminate immediately. 3. Plaintiff's counsel shall advise the former employee that (a) participation in the interview is not mandatory and that (b) he or she may choose not to participate or to participate only in the presence of personal counsel or counsel for the defendant. Counsel must immediately terminate the interview of the former employee if he or she does not wish to participate. 4. Plaintiff's counsel shall advise the former employee to avoid disclosure of privileged or confidential corporate materials. In the course of the interview, plaintiff's counsel shall not attempt to solicit privileged or confidential corporate information and shall terminate the conversation should it appear that the interviewee may reveal privileged or confidential matters. 5. Plaintiff shall create and preserve a list of all former employees contacted and the date(s) of contact(s) and shall maintain and preserve any and all statements or notes resulting from such contacts, whether by phone or in person, as they may be subject to in camera review to ensure compliance with this Order.").

corporate adversary might have had extensive discussions with the corporation's lawyer about an incident. Lawyers undertaking ex parte communications with such persons risk disqualification, even if they try to avoid explicitly asking questions calling for such information, or stumbling into such information.

Some courts take a surprisingly liberal (and trusting) view.

- Gianzero v. Wal-Mart Stores, Inc., Civ. A. No. 09-cv-00656-REB-BEB, 2011 U.S. Dist. LEXIS 50630 (D. Colo. May 5, 2011) (allowing a company's adversary to communicate ex parte with a former company employee, even though the former employee had been exposed to privilege communications while working at the company).

- Arista Records LLC v. Lime Group LLC, 784 F. Supp. 2d 398, 417 (S.D.N.Y. 2011) (allowing a corporation's adversary to communicate ex parte with a former company employee; "The Court will not issue a protective order prohibiting Plaintiffs from speaking with Bildson. Plaintiffs have made a good faith effort to avoid learning privileged information from Bildson. Forrest and Page, Bildson's attorney, have submitted affidavits stating that Forrest met with Bildson only once, and that she never sought privileged information from him. Forrest and Page both state that they repeatedly warned Bildson not to provide them with such information. Defendants have presented no evidence that Bildson disclosed privileged communications to Plaintiffs, other than the two declarations discussed above."; "Because Bildson had access to privileged information while at LW[plaintiff], however, the Court believes that it is sensible and fair to order additional precautions to ensure that Bildson does not reveal privileged information to Plaintiffs in the future. Accordingly, the Court orders Plaintiffs: (1) not to request privileged information from Bildson; (2) to stop Bildson from revealing privileged information, if Plaintiffs become aware that he is doing so; and (3) to promptly provide Bildson and his attorney with a copy of this order, and to ensure that Bildon's attorney discusses with Bildson his obligation not to disclose privileged information.").

- Siebert & Co. v. Intuit Inc., 820 N.Y.S.2d 54, 55, 56 (N.Y. App. Div. 2006) (reversing a lower court's disqualification of a defense lawyer who spoke for three hours ex parte with plaintiff company's former chief operating officer; noting that "[a]t the commencement of the interview, defense counsel's colleague warned the executive to be careful not to disclose any privileged information, including any legal strategies or communications with plaintiff's counsel"; finding that a document entitled "Timeline" that the former executive shared with defense counsel did not deserve attorney-client privilege because

the document was "essentially a list of events" and therefore did not meet the standard for the attorney-client privilege, which requires that the "communication itself must be primarily of a legal, not factual, character").

One court did not criticize a lawyer for ex parte communications with such a former high-level official of a corporate adversary, but prohibited the defendants from using the fruits of the communications.

- Victory Lane Quick Oil Change, Inc. v. Hoss, Case No. 07-14463, 2009 U.S. Dist. LEXIS 22579, at *5-6, *6-7 (E.D. Mich. Mar. 20, 2009) (holding that Michigan Rule 4.2 permits ex parte communications with a corporate adversary's former high-level executive [former high ranking Director of Operations who has been a central defense operative in this litigation and privy to substantial privileged attorney-client communications concerning this case]; explaining the substance of the ex parte communications; "[I]t was determined that the Roberts Supplemental Affidavit did not involve any party admissions of Plaintiff because the document was prepared when Mr. Roberts was no longer an agent or employee of Plaintiff and thus was not making the statements in the scope of his agency or employment authority. It was also determined that the Roberts Supplemental Affidavit did not contain disclosure of any confidential attorney-client communications. There were certain portions that arguably might relate to factual admissions of Mr. Roberts while still employed by Plaintiff that might be imputed to the Plaintiff. Yet, the overwhelming majority of the contents of the Roberts Supplemental Affidavit does not topics [sic] of concern to the ethics committees applying M.R.P.C. 4.2 to former employees."; explaining that "[w]hile Defense counsel displayed some caution when Mr. Roberts first approached them in December 2008, and urged Mr. Roberts to consult with his personal attorney prior to their having his statements reduced to an affidavit, given his former role with Plaintiff, his extensive involvement in this case, and his being privy to confidential discussions with Plaintiffs' counsel, Defense counsel would have been prudent to contact Plaintiff's counsel prior to furthering the discussions with Mr. Roberts or sought direction from this Court. As noted at the hearing, it could be argued that defense counsel violated M.R.P.C. 4.2 in their contact with Mr. Roberts."; ultimately prohibiting defendants from using the affidavit they obtained from plaintiff's former high-level executive, but allowing a limited additional discovery).

Other courts are more restrictive.

- Weber v. Fujifilm Medical Systems, U.S.A., No. 3:10 CV 401 (JBA), 2010 U.S. Dist. LEXIS 72416 (D. Conn. July 19, 2010) (holding that several former

employees of a corporate defendant were off limits for ex parte communications because they had been exposed to privileged communications while at the company).

(a)-(b) Either of these ex parte contacts would be acceptable under the ABA Model Rules, the Restatement, and most (if not all) state ethics rules.

However, court decisions might prohibit or restrict such ex parte contacts.

Best Answer

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

B 2/13

Ex Parte Communications with Government Employees

Hypothetical 11

You have been dealing with a troublesome plaintiff and his lawyer. On several occasions, the plaintiff's lawyer has taken the position that he may ethically communicate ex parte with member of your board about possible policy and funding changes, and even with the engineer who was overseeing the water treatment process whose malfunction resulted in the lawsuit.

(a) Without your consent, may the plaintiff's lawyer call a member of your board to discuss possible policy and funding changes?

YES

(b) Without your consent, may the plaintiff's lawyer call the engineer who was overseeing the water treatment process whose malfunction resulted in the lawsuit?

NO

Analysis

Introduction

Ex parte contacts with a government entity follow some of the traditional analysis, but with a constitutional twist.

The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

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

ABA Model Rule 4.2.[1]

[1] The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the

This hypothetical addresses both the "in representing a client" phrase and the ABA rule comment addressing permissible ex parte communications with constituents of a represented organization.

> In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.

ABA Model Rule 4.2 cmt. [7].

ABA Model Rule 4.2 contains the standard exception, which permits ex parte communications that are "authorized" by law. Comment [5] explains how this exception applies to ex parte contacts with government officials.

> Communications authorized by law may include communications by a lawyer on behalf of a client who is exercising a constitutional or other legal right to communicate with the government.

ABA Model Rule 4.2 cmt. [5].

The ABA explained this issue in ABA LEO 408 (8/2/97) (although generally a lawyer may not have ex parte contacts with a represented government entity, the constitutional right to petition allows a lawyer to establish such ex parte contacts if the official has authority to "take or recommend action in the controversy, and the sole

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subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.").

purpose of the communication . . . is to address a policy issue, including settling the controversy"; the lawyer must give advance notice of such contact to the government lawyer and provide copies of any written materials to be presented to the government official).

The Restatement devotes an entire rule to this issue. According to the Restatement, the general prohibition

> against contact with a represented nonclient does not apply to communications with employees of a represented governmental agency or with a governmental officer being represented in the officer's official capacity.
>
> . . . In negotiation or litigation by a lawyer of a specific claim of a client against a governmental agency or against a governmental officer in the officer's official capacity, the prohibition stated in § 99 applies, except that the lawyer may contact any officer of the government if permitted by the agency or with respect to an issue of general policy.

Restatement (Third) of Law Governing Lawyers §101(1) & (2) (2000).

Restatement § 101 cmt. b provides a lengthy justification for this approach, emphasizing the First Amendment right to petition the government, and the "dubious" need of "the government for the broad protection of the anti-contact rule. " Comment b explains that the limit on ex parte contacts "should be limited to those instances in which the government stands in a position closely analogous to that of a private litigant and with respect to contact where potential for abuse is clear." Restatement (Third) of Law Governing Lawyers § 101 cmt. b.

Academics have also analyzed this issue. In a 2009 article, Professors Hazard and Irwin explained the ABA's and the Restatement's approach to citizens contacting government officials.

> An ABA formal opinion in 1997 concluded that a lawyer representing a private party in a suit against the government can communicate directly with a public official who has authority "to take or recommend action in the matter of communication" if two conditions are met: (i) the communication is for the purpose of addressing a policy issue, and (ii) government counsel is given reasonable advance notice of the intent to communicate. The ABA opinion concluded that notwithstanding this exception, Rule 4.2 applies in full force in contexts "where the right to petition has no apparent applicability, either because of the position and authority of the official sought to be contacted or because of the purpose of the proposed communication."
>
> The Restatement (Third) articulates an exception, independent from the "authorized by law" exception, which permits direct communications "with employees of a represented governmental agency or with a governmental officer being represented in the officer's official capacity." But the Restatement (Third) then articulates an exception to this exception: the no-contact rule continues to apply "[i]n negotiation or litigation by a lawyer or a specific claim of a client against a governmental agency or against a governmental officer in the officer's official capacity." The coherence of this formulation depends on definitions of "specific claim" and "official capacity." The Restatement (Third)'s comment offers little additional guidance regarding the intended meanings of these phrases, but observes that "[w]hen the government is represented in a dispute involving a specific claim, the status of the government as client may be closely analogous to that of any other organizational party."

Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Toward a Revised 4.2 No-Contact Rule, 60 Hastings L.J. 797, 820 (Mar. 2009) (footnotes omitted).

Bars take differing approaches to this issue.

For instance, the D.C. Bar has a specific black-letter rule on this issue.

> This rule does not prohibit communication by a lawyer with government officials who have the authority to redress the grievances of the lawyer's client, whether or not those grievances or the lawyer's communications relate to matters that are the subject of the representation, provided that in the event of such communications the disclosures specified in (b) are made to the government official to whom the communication is made.

D.C. Rule 4.2(d). The D.C. Rule also has a unique comment.

> Paragraph (d) does not permit a lawyer to bypass counsel representing the government on every issue that may arise in the course of disputes with the government. It is intended to provide lawyers access to decision makers in government with respect to genuine grievances, such as to present the view that the government's basic policy position with respect to a dispute is faulty, or that government personnel are conducting themselves improperly with respect to aspects of the dispute. It is not intended to provide direct access on routine disputes such as ordinary discovery disputes, extensions of time or other scheduling matters, or similar routine aspects of the resolution of disputes.

D.C. Rule 4.2 cmt.[11].

- Accord District of Columbia LEO 340 (6/2007) ("Under D.C. Rule 4.2(d) [which differs from the ABA Model Rules, and permits ex parte contact with "government officials who have the authority to redress grievances of the lawyer's client"], a lawyer representing a client in a dispute being litigated against a government agency may contact a government official within that agency without the prior consent of the government's counsel to discuss substantive legal issues [not just public policy issues], so long as the lawyer identifies himself and indicates that he is representing a party adverse to the government. In addition, the lawyer may also contact officials at other government agencies who have the authority to affect the government's position in the litigation concerning matters, provided that the lawyer makes the same disclosures as stated above. The lawyer cannot, however, contact government officials either within the agency involved in the litigation or elsewhere concerning routine discovery matters, scheduling issues or the like, absent the consent of government counsel."; "[The government official]

is not obligated to engage in the communication and may ask the lawyer to communicate with government counsel rather than directly with the official.").

- District of Columbia LEO 280 (3/18/98) (explaining the D.C. approach, and indicating that any concern about a lawyer being able to "overwhelm the lay person" is "not fully applicable in the governmental context because government officials generally are presumed to be sufficiently capable of resisting legal or policy arguments that are not proper and genuinely persuasive, " and because "government officials, by virtue of their experience and expertise, should be competent to decide whether to engage in such discussions with opposing counsel without seeking legal advice or having a lawyer present").

A 2006 North Carolina legal ethics opinion explained that in that state the prohibition:

- Applies only to "negotiation or litigation of a specific claim";[2]
- Applies only to upper level governmental officials;[3]
- Requires notice to the government's lawyer;[4]

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[2] North Carolina LEO 2005-5 (7/21/06) ("[T]here is some authority that the Rule 4.2(a) prohibition should only apply to communications with a government agency or employee if the communication relates to negotiation or litigation of a specific claim of a client. We agree."; "Routine communications on general policy issues or administrative matters would not require prior approval from government counsel. The rationale for this partial exception is that the limitations on communications under Rule 4.2(a) should be confined to those instances where the government stands in a position analogous to a private litigant or any other private organizational party. Under these circumstances, the government agency or official should be protected because the opportunity for abuse is clear.").

[3] North Carolina LEO 2005-5 (7/21/06) ("The protections under Rule 4.2(a) only extend to County Manager and department heads if, with respect to this employment matter, 1) they supervise, direct, or consult with County Attorney, 2) they can bind or obligate County as to its position in litigation or settlement; 3) their acts or omissions are at issue in the litigation; or 4) they have participated substantially in the legal representation of County. Because it is likely that the human resources director and the county manager fall within one or more of these categories in an employment dispute, and because Attorney A should have known that County Attorney represented County on this matter, Attorney A must obtain consent from County Attorney before communicating a threat of litigation directly to County Manager and Human Resources Director.").

[4] North Carolina LEO 2005-5 (7/21/06) ("Under Rule 4.2(b), in representing a client who has a dispute with a represented government agency or body, a lawyer may communicate orally about the subject of the representation with elected officials who have authority over such government agency or body so long as the lawyer gives 'adequate notice to opposing counsel.' Adequate notice should be meaningful notice: that is, sufficient information for opposing counsel to act on it to protect the client's interests. The time and place of the intended oral communication with the elected official must be

- Applies only in the course of an official proceeding;[5]

A 2011 North Carolina legal ethics opinion explained that lawyers could rely on the "authorized by law" exception in filling freedom of information act requests.

- North Carolina LEO 2011-15 (10/21/11) (explaining that a lawyer may communicate ex parte with a government official to identify and request access to public records; "Adopted in 1995, RPC 219 rules that a lawyer may communicate with a custodian of public records, pursuant to the North Carolina Public Records Act, N.C. Gen. Stat. Chap. 132, for the purpose of making a request to examine public records related to a representation although the custodian and the government entity employing the custodian are adverse parties and the lawyer for the custodian and the government entity does not consent to the communication."; "ABA Formal Ethics Opinion 95-396 (1995) observes that Model Rule 4.2's exception permitting a communication 'authorized by law' is satisfied by a 'constitutional provision, statute, or court rule, having the force and effect of law, that expressly allows a particular communication to occur in the absence of counsel.'"; "N.C. Gen. Stat. §132-6(a) requires that: '[e]very custodian of public records shall permit any record in the custodian's custody to be inspected and examined at reasonable times and under reasonable supervision by any person, and shall, as promptly as possible, furnish copies thereof upon payment of any fees as may be prescribed by law.'"; "The statute authorizes direct communication with a custodian of public records for the purpose of inspecting and furnishing copies of public records and remains an exception to the communications prohibited in current Rule 4.2(a)."; "A lawyer may communicate with a custodian of public records for the purposes set forth in N.C. Gen. Stat. §132-6(a), to inspect, examine, or obtain copies of public records. To the extent that the lawyer must communicate with the custodian to identify the records to be inspected, examined, or copied, the communication is in furtherance of the purpose of the Public Records Act to facilitate access to

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included as well as the identity of the elected official or officials to whom the communication will be directed. Notice must also be reasonable and give opposing counsel enough time to act on it and be present if he so chooses.").

[5] North Carolina LEO 2005-5 (7/21/06) ("Attorney A appears at a public meeting of the elected Board of County Commissioners. Prior to the board meeting, Attorney A approaches a member of the board to tell him that he is there to advise the board of a grave injustice that has been done to his client, and that County Attorney is trying to prevent Attorney A from bringing this matter to the board's attention."; finding that the communication violates the ex parte communication rule; "Pursuant to Rule 4.2(b), a communication with an elected official may only occur under the following circumstances: 1) in writing, if a copy is promptly delivered to opposing counsel, 2) orally, with adequate notice to opposing counsel, or 3) in the course of official proceedings. To the extent RPC 202 differs from this opinion and Rule 4.2(b), it is hereby overruled.").

public records and is allowed without obtaining the consent of opposing counsel. Such communications should be limited to the identification of records and should not be used by the lawyer as an opportunity to engage in communications about the substance of the disputed matter." (footnote omitted)).

Virginia takes an interesting approach that is directly contrary to the ABA approach. In Virginia, a lawyer apparently may engage in ex parte contacts with lower government officials but not those with decision-making power.

- Virginia LEO 1537 (6/22/93) (a lawyer representing a child and parents adverse to a school board may directly contact school board employees who are not in a position to bind the school board; the rule prohibiting an attorney's communication with adverse parties should be narrowly construed in the context of litigation with the government in order to permit reasonable access to witnesses for the purpose of uncovering evidence, particularly where no formal discovery processes exist).

- Virginia LEO 777 (4/22/86) (a lawyer suing a county board may not contact a board member, but may contact county employees if they are "not charged with the responsibility of executing board policy").

Some courts and bars seem to generally allow such ex parte communications -- relying on the constitutional standard, the "authorized by law" exception or simply their own analysis.

- Kansas LEO 00-6 (2000) ("Communications between a lawyer representing a zoning applicant and an elected or appointed government official regarding the zoning matter fall under the 'authorized by law' exception to Rule 4.2 and are therefore permissible.").

- Alabama LEO 2003-03 (9/18/03) (holding that a lawyer for one state agency may "communicate directly with members of the County Board of Education to discuss settlement of the pending lawsuit without obtaining the consent or approval of the attorney representing the County Board of Education").

- Kansas LEO 00-6 (8/28/02) ("communications between a lawyer representing a zoning applicant and an elected or appointed government official regarding the zoning matter falls under the 'authorized by law' exception to Rule 4.2 and are therefore permissible. The Comment to KRPC 4.2 specifically states that

'communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.' The mere fact that a city has a legal department does not create a barrier between elected and appointed officials and counsel representing private clients. We also counsel lawyers to consider KRPC 3.9 in these situations, which we believe excludes the application of KRPC 3.5(c) in the context of a zoning board process. If this request was set in the context of litigation, it would require a different type of analysis. However, this situation comports with constitutional guarantees of freedom of access to government. Counsel may want to heed the advice given by one commentator who believes that such contact is permissible even over the objection of the government's counsel, but who advises that counsel should notify the government's counsel of the fact of the contact as a reasonable accommodation.").

- American Canoe Ass'n v. City of St. Albans, 18 F. Supp. 2d 620, 621 (S.D.W. Va. 1998) (holding that ex parte contact with government agencies is "authorized by law" and therefore "permissible").

Other courts and bars are more restrictive.

- United States v. Sierra Pac. Indus., 759 F. Supp. 2d 1198, 1201, 1213 (E.D. Cal. 2010) (finding that defendant's lawyer improperly engaged in ex parte communications with lower level government employees; explaining that defendant's lawyer took a field trip (open to the public) with United States Forest Service tour guides, and asked them various questions during the tour; finding that "Schaps' actions were not an exercise of a First Amendment right to seek redress of a particular grievance, but were rather an attempt to obtain evidence from these employees."; "There is little to support the characterization of Schaps' communications with the employees as an exercise of the right to petition a policy level government official for a change in policy or to redress a grievance. Rather, the facts show and the court finds that he was attempting to obtain information for use in the litigation that should have been pursued through counsel and through the Federal Rules of Civil Procedure governing discovery. SPI surely has the right to conduct discovery. But interviewing Forest Service employees, without notice to government's counsel, on matters SPI considers part of its litigation with the government -- even if not successful in obtaining relevant evidence -- strikes at and, indeed questions they very policy purpose for the no contact rule.").

(a)-(b) Ironically, under the ABA approach, it would be more likely that the ethics rules permit contact with the chairman of the school board rather than with a lower level employee -- while at least one state (Virginia) takes exactly the opposite approach.

Best Answer

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

n 12/11

Ex Parte Communications with a Corporate Adversary's In-House Lawyer

Hypothetical 12

You represent the defendant in a large patent infringement case. The plaintiff company hired a bombastic trial lawyer to handle its lawsuit against your client. The other side's Assistant General Counsel for Litigation is a law school classmate with whom you have been on friendly terms for years. You think there might be some merit in calling your friend in an effort to resolve the case.

(a) Without the outside lawyer's consent, may you call the other side's in-house lawyer -- if she has been listed as "counsel of record" on the pleadings?

YES (PROBABLY)

(b) Without the outside lawyer's consent, may you call the other side's in-house lawyer -- if she has not been listed as "counsel of record" on the pleadings?

MAYBE

Analysis

The ABA Model Rules contain a one-sentence prohibition that generates numerous issues.

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

ABA Model Rule 4.2.[1]

This hypothetical addresses the "[i]n representing a client" phrase.

[1] The Restatement contains essentially the same standard. Restatement (Third) of Law Governing Lawyers § 99(1) (2000) ("A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless: (a) the communication is with a public officer or agency to the extent stated in § 101; (b) the lawyer is a party and represents no other client in the matter; (c) the communication is authorized by law; (d) the communication reasonably responds to an emergency; or (e) the other lawyer consents.").

Introduction

It is difficult enough in a case of individual lawyers to properly characterize them as "clients" or as "lawyers" for purposes of analyzing Rule 4.2, but trying to assess the role of in-house lawyers complicates the analysis even more.

The ABA Model Rules and Comments are silent on the issue of in-house lawyers. However, the ABA issued a legal ethics opinion generally permitting ex parte contacts with the corporate adversary's in-house lawyers.

- ABA LEO 443 (8/5/06) (explaining that Rule 4.2 is designed to protect a person "against possible overreaching by adverse lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information regarding the representation"; concludes that the protections of Rule 4.2 "are not needed when the constituent of an organization is a lawyer employee of that organization who is acting as a lawyer for that organization," so "inside counsel ordinarily are available for contact by counsel for the opposing party"; noting that adverse counsel can freely contact an in-house lawyer unless the in-house lawyer is "part of a constituent group of the organization as described in Comment [7] of Rule 4.2 as, for example, when the lawyer participated in giving business advice or in making decisions which gave rise to the issues which are in dispute" or the in-house lawyer "is in fact a party in the matter and represented by the same counsel as the organization"; acknowledging that "in a rare case adverse counsel is asked not to communicate about a matter with inside counsel"; not analyzing the circumstance in which an in-house lawyer is "simultaneously serving as counsel for an organization in a matter while also being a party to, or having their own independent counsel in, that matter").

The Restatement similarly explains that

> [i]nside legal counsel for a corporation is not generally within Subsection (2) [those off limits to ex parte communications], and contact with such counsel is generally not limited by § 99.

Restatement (Third) of Law Governing Lawyers § 100 cmt. c (2000).

Both the ABA legal ethics opinions and the Restatement deal with ex parte communication to an in-house lawyer.

Most states follow the same approach as the ABA and the Restatement take.

- Wisconsin LEO E-07-01 (7/1/07) ("A lawyer does not violate SCR 20:4.2 by contacting in-house counsel for an organization that is represented by outside counsel in a matter. The retention of outside counsel does not normally transform counsel for an organization into a represented constituent and contact with a lawyer does not raise the same policy concerns as contact with a lay person.").

- Virginia LEO 1820 (1/27/06) (holding that an in-house lawyer "is not a party to the dispute but instead is counsel for a party").

- District of Columbia LEO 331 (10/2005) (concluding that "[i]n general, a lawyer may communicate with in-house counsel of a represented entity about the subject of the representation without obtaining the prior consent of the entity's other counsel"; explaining that "if the in-house counsel is represented personally in a matter, Rule 4.2 would not permit a lawyer to communicate with that in-house counsel regarding that matter, without the consent of the in-house counsel's personal lawyer").

Other states disagree.

- Rhode Island LEO 94-81 (2/9/95) (indicating that a lawyer may not communicate a settlement offer to in-house counsel with a copy to outside counsel, unless outside counsel consents).

- North Carolina LEO 128 (4/16/93) (explaining that "a lawyer may not communicate with an adverse corporate party's house counsel, who appears in the case as a corporate manager, without the consent of the corporation's independent counsel").

The ABA legal ethics opinions and the Restatement do not address communications by an in-house lawyer who is not otherwise clearly designated as a lawyer representing the corporation in litigation or some transactional matter. Because clients can always speak to clients, characterizing an in-house lawyer as a "client" rather than a lawyer presumably frees such in-house lawyers to communicate directly

with a represented adversary of the corporation -- without the adversary's lawyer's consent. This seems inappropriate at best (although presumably corporate employees with a law degree may engage in such ex parte communications as long as they are not "representing" their corporation in a legal capacity).

In any event, at least one bar has forbidden such communications by in-house lawyers.

- Illinois LEO 04-02 (4/2005) (holding that a company's general counsel may not initiate ex parte contacts permitted by Rule 4.2).

Of course, lawyers and their clients must consider other issues as well. For instance, in-house lawyers hoping to avoid the ex parte prohibition rules by characterizing themselves as clients rather than as lawyers might jeopardize their ability to have communications protected by the attorney-client privilege.

(a) Although the answer might differ from state to state, it seems likely that ex parte contacts would be appropriate with an in-house lawyer who has signed on as "counsel of record" on the pleadings -- because that lawyer should appropriately be seen as representing the corporation.

(b) This scenario presents a more difficult analysis, because the in-house lawyer has not signed on as the corporation's representative in the lawsuit. Therefore, the answer to this hypothetical would depend on the state's approach.

Although the pertinent ABA legal ethics opinion and the Restatement would permit such ex parte communications, lawyers would be wise to check the applicable state's approach.

Best Answer

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

n 12/11

Intentional Joint Representation of Corporate Employees

Hypothetical 13

As one of the only two in-house lawyers, you are occasionally asked to represent your client's employees. You want to make sure that such representations do not run afoul of any rules, or jeopardize your main job as the company's lawyer.

(a) May you intentionally represent a company employee in a company-related matter?

YES

(b) May you intentionally represent a company employee in a non-company-related matter?

MAYBE

Analysis

Introduction

Although it certainly raises conflicts of interest issues and privilege ownership issues, there is nothing inherently unethical about a lawyer representing both a corporation and one or more of the corporation's employees. In fact, ABA Model Rule 1.13 specifically acknowledges such joint representations.

> A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

ABA Model Rule 1.13(g).

Unauthorized Practice of Law/Multijurisdictional Practice Issues

However, the issue becomes much more complicated in the case of in-house lawyers.

This situation is governed by unauthorized practice of law ("UPL") regulations in each state. States take differing approaches to the permissibility of in-house lawyers representing individual constituents (officers, directors, employees) of their corporate client-employers. The stakes can be surprisingly high -- an in-house lawyer representing such an individual in a state that does not permit such representations would be engaging in the unauthorized practice of law. Most states prohibit the unauthorized practice of law in their criminal statutes.

Even in-house lawyers fully licensed in the state where they practice must examine their state's unauthorized practice of law rules. In-house lawyers represent somewhat of an anomaly in the law -- because they ultimately report to a nonlawyer (the company's board of directors). Because of this unique role, in-house lawyers must assess with whom they can establish an attorney-client relationship. At the extreme, an in-house lawyer working for a large retailer could not set up a table near the store's front door and begin representing customers who might want a will drafted for them. This would essentially make the corporation a law firm owned by shareholders -- which no state permits. On the other hand, some states allow in-house lawyers to represent their corporation's employees (subject to the conflicts rules). Other states are more liberal, and allow in-house lawyers to represent their corporation's former employees, and in some situations even their corporation's customers. However, each state takes a

slightly different approach, and in-house lawyers would be wise to check the applicable rules.

States' somewhat hostile attitude toward in-house lawyers' representation of such third parties creates a special dilemma for in-house lawyers hoping to engage in pro bono work. As indicated above, no in-house lawyer could begin to represent thousands of company customers. Technically, pro bono clients stand in the same shoes as those customers -- they are strangers to the corporation. Many states have wrestled with this issue, and most find a way to turn a blind eye toward any technical violation of the unauthorized practice of law rules that might occur if an in-house lawyer engages in pro bono work.

These issues become even more complicated for in-house lawyers who are not full members of the bar in the state where they are practicing. Traditionally, most states often did not require in-house lawyers to join the bar or even register with the bar in some way. However, most states now require in-house lawyers to either take the full step of joining the bar where they practice, or at least register in some way.

Cynics would argue that states are as much interested in the dues money as in their desire to police in-house lawyers' conduct. It is easy to see why states normally do not have much of an interest in regulating in-house lawyers. Because in-house lawyers generally cannot represent entities or people outside their corporate employer (as discussed above), there normally is no great danger that in-house lawyers will harm the public. And to the extent that they harm their corporation or its employees, the corporation itself generally can take care of such misdeeds.

The ethics rules contain provisions dealing with what in-house lawyers may do when practicing in states in which they are not licensed.

This issue (called the "multijurisdictional practice" (or MJP) issue) is governed by ABA Model Rule 5.5 and the parallel rules in states adopting the ABA approach.

Under ABA Model Rule 5.5, all lawyers (including in-house lawyers) may practice law in other states as long as they do not hold themselves out as being admitted in that state, and as long as they provide legal services in that other state only on a "temporary basis." In addition, the lawyer practicing in another state must either associate with a lawyer from that state, comply with whatever pro hac vice rules apply to appear before a tribunal, or engage in representations that "arise out of or are reasonably related to" the lawyer's practice in a state where the lawyer is admitted. ABA Model Rule 5.5(c).

Of special interest to in-house lawyers, ABA Model Rule 5.5(d) allows an in-house lawyer to represent the lawyer's "employer or its organizational affiliates" in a state where the lawyer is not licensed, even as part of a "systematic and continuous presence" in the other state. ABA Model Rule 5.5(d).

A comment explores this "safe harbor" -- which does <u>not</u> allow the in-house lawyer to represent individual constituents of the client-employer in the other state.

> Paragraph (d)(1) applies to a lawyer who is employed by a client to provide legal services to the client or its organizational affiliates, i.e., entities that control, are controlled by, or are under common control with the employer. <u>This paragraph does not authorize the provision of personal legal services to the employer's officers or employees.</u> The paragraph applies to in-house corporate lawyers, government lawyers and others who are employed to render legal services to the employer. The lawyer's ability to represent the employer outside the jurisdiction in which

> the lawyer is licensed generally serves the interests of the employer and does not create an unreasonable risk to the client and others because the employer is well situated to assess the lawyer's qualifications and the quality of the lawyer's work.

ABA Model Rule 5.5 cmt. [16] (emphasis added).

Thus, in-house lawyers moving to a state that follows the ABA Model Rules and not wishing to join that state's bar may represent the corporation's "organizational affiliates" -- but not any individual corporate constituents.

Conflicts Issues

Lawyers who represent corporations sometimes intentionally create a separate representation of a corporate employee. Such a joint representation does not have any dramatic effect on either the corporation's or the employee's attorney-client privilege. The lawyer must maintain the privilege protecting communications with the employee on such a separate matter, and must of course do likewise for any communications relating to the lawyer's representation of the corporation.

Such separate representations clearly carry ethics implications. A lawyer representing an employee on a traffic ticket matter has an attorney-client relationship with the employee, which precludes the lawyer from adversity to the employee even on unrelated matters (absent consent). This is one reason why wise lawyers try to avoid representing the employees of companies they also represent, even on unrelated matters. For instance, a lawyer representing a corporate vice president in buying a house cannot (absent consent) advise the company's board about its right to fire that vice president. Consent would normally be unavailable as a practical matter, because

the board would not permit the lawyer to make the sort of disclosure necessary to obtain a valid consent. A lawyer might find it awkward to arrange for a prospective consent when beginning to represent the employee in his or her house purchase, because it might send an unfortunate signal that such adversity might develop, or be a "turn off" to the lawyer's important contact and business generator in the corporate hierarchy.

When a law firm explicitly represents both the company and an employee, it might be necessary to determine if the representations are joint or separate. A lawyer who jointly represents a corporation and a corporate employee must consider all of the normal ramifications of such a joint representation on the same matter. First, the lawyer might not be able to keep secrets from either of the jointly represented clients. Second, a joint representation gives the employee equal ownership of and power over the attorney-client privilege. This means that the employee might have later access to the lawyer's file and communications between the lawyer and the corporation. It also means that absent some degree of adversity between the corporation and the employee, the corporation and the employee would have to unanimously vote to reveal any of their privileged communications to outsiders. Third, the development of any adversity between the jointly represented clients almost inevitably requires the withdrawal from representation of both clients. To make matters worse, the imputed disqualification rules applicable to law firms also generally apply to law departments, which means that an in-house lawyer's disqualification from a joint representation of the

corporation and an individual employee normally would require the entire law department's disqualification.[1]

Lawyers might be able to mitigate some of the risks by arranging for a prospective consent from the employee, attempting to allow the lawyer to withdraw from representing the employee if adversity develops between her and the corporation, while continuing to represent the corporation.[2] The efficacy of such prospective consents is outside the scope of this hypothetical, but it is worth noting that courts and bars examine prospective consents both when the lawyers arrange for them and when the lawyers attempt to rely on them. Thus, there is never a guarantee that such a prospective consent will allow the lawyer to continue representing the corporation on the same matter if that would include adversity to the employee who is now the lawyer's former client. Lawyers therefore can never assure their corporate clients with confidence that they can completely mitigate the risks of a joint representation should adversity develop.

Despite these risks, lawyers representing corporations frequently enter into such intentional joint representations.

Trying to avoid a joint representation might be easy, if the law firm represents the executive in some non-corporate matters such as a traffic ticket or a house purchase. However, law firms might try to "thread the needle" by claiming that they represented a

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1 ABA Model Rule 1.0(c).

2 For instance, one court refused to disqualify a firm from representing a company in litigation adverse to a former company executive whom the firm had also represented -- finding that the firm had adequately described its role and obtained a valid prospective consent from the executive. Laborers Local 1298 Annuity Fund v. Grass (In re Rite Aid Corp. Sec. Litig.), 139 F. Supp. 2d 649, 660 (E.D. Pa. 2001).

company and an executive on a company-related matter, but that their representations were separate rather than joint. This is nearly an impossible argument to successfully make, absent very clear retainer letters.

A 2009 decision highlights the risks that a lawyer runs when intentionally entering into separate representations of both a company and one of its employees, who was under investigation for wrongdoing. In that case, the well-known California law firm of Irell & Manella undertook what the court called "three separate, but inextricably related, representations" of Broadcom and its CFO.[3] The law firm represented Broadcom in connection with the company's internal investigation of stock option issues, and the CFO in two lawsuits brought by shareholders alleging wrongdoing in connection with stock options. The law firm interviewed the CFO, and then disclosed information it learned during the interview to the U.S. Attorney's Office, the SEC, and Broadcom's auditor. When the government pursued criminal charges against the CFO, he sought to suppress the statements he had made to the law firm during the interview, and the trial court granted his motion. Among other things, the court noted that the law firm had not advised the CFO before the interview that the firm was wearing only its "Broadcom" hat during the interview, and that it might disclose to third parties what it learned from the CFO. The court explained that "whether an Upjohn [Upjohn Co. v. United States, 449 U.S. 383 (1981)] warning was or was not given is irrelevant" -- because the firm clearly represented the CFO.[4] As the court put it, "[a]n oral warning to a current client that no

[3] United States v. Nicholas, 606 F. Supp. 2d 1109, 1111 (C.D. Cal. 2009), rev'd and remanded sub nom. United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009).

[4] Id. at 1117.

attorney-client relationship exists is nonsensical at best -- and unethical at worst."[5] In addition to suppressing the evidence, the court referred the law firm to the State Bar for "appropriate discipline," based on the firm's ethical misconduct that "[t]he Court simply cannot overlook."[6]

The Ninth Circuit reversed the district court's holding, but lawyers should not breathe easy.[7] The Ninth Circuit (i) found that the law firm had represented both Broadcom and its former CFO Ruehle in connection with possible option backdating; (ii) agreed with Ruehle that the law firm had not provided the proper Upjohn warning to Ruehle, despite the lawyers' contrary claims (pointedly noting that the [law firm] lawyers "took no notes nor memorialized their conversation on this issue in writing";[8] (iii) held that the district court had improperly applied California law rather than federal law to the privilege question (meaning that the district court might have been upheld if it had made the same findings under the federal standard); (iv) noted that Ruehle "was no ordinary Broadcom employee" because he knew that the law firm was sharing information with Broadcom's auditor Ernst & Young (a fact that will not be present in most situations involving law firms representing both corporations and executives);[9] (v) labeled as "troubling" the law firm's "allegedly unprofessional conduct";[10] and (vi) emphasized that "our holding today should not be interpreted as carte blanche approval" of the law firm

5 Id.

6 Id. at 1112.

7 United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009).

8 Id. at 604 n.3.

9 Id. at 610.

10 Id. at 613.

lawyers' testimony about their communications with Ruehle (implying that the law firm's proffer to the FBI might have included impermissible disclosures).[11]

In 2007, another lawyer avoided disqualification in a similar setting.

- United States v. White Buck Coal Co., Crim A. No. 2:06-00114, 2007 U.S. Dist. LEXIS 3163, at *29, *39, *41, *42-43 (S.D. W. Va. Jan. 16, 2007) (declining to disqualify a lawyer who formerly represented Massey Energy as an in-house lawyer, and jointly representing Massey's subsidiary White Buck and an individual employee accused of mine safety violations; explaining that the lawyer eventually withdrew from representing the individual employee, but continued to represent White Buck after joining the Spilman Thomas law firm; finding a conflict of interest, but declining to disqualify the lawyer or Spilman; "Heath represented Wine and White Buck during the investigation of the citation, an inquiry that has now blossomed into the criminal prosecution of both Wine and White Buck. Additionally, Wine will be the key witness against White Buck in this criminal action. The two entities have held fast to diametrically opposed positions since the day following the citation. Specifically, Wine has insisted since the morning of June 28, 2002, that his White Buck supervisors instructed him to conduct his pre-shift duties in an unlawful manner. Since that same time, White Buck has engaged in determined efforts to pin all fault upon Wine for the violation. When the case is called for trial, one of the most significant challenges for White Buck will be the utter decimation of Wine's credibility. The architect charged with assembling the strategem designed to achieve that end is none other than the Spilman firm, with which Heath is now associated. The conflict of interest could not be clearer."; "[O]ne can readily discern the two subjects for inquiry under Wheat [Wheat v. United States, 486 U.S. 153 (1988)] when the court is presented, as here, with an actual conflict of interest. First, the court must ascertain whether the conflict will interfere with the proper functioning of the adversarial process, namely, whether counsel's ethical dilemma robs the client of a constitutionally effective advocate. Second, the court must ascertain whether allowing conflicted counsel to proceed will cause observers to question the fairness or integrity of the proceeding."; noting that the individual former client could not point to any privileged or confidential information that the lawyer possessed; "White Buck has offered Robert Luskin, counsel of record from a different law firm, to conduct the Wine cross examination. The government has not challenged White Buck's observations concerning this proposal, which provide as follows: 'First, Mr. Luskin has had minimal contact with Mr. Heath, and possesses no knowledge of confidential

[11] Id. at 613 n.10.

communications that could be used in the cross-examination of Mr. Wine. Second, Mr. Luskin will not hesitate to conduct a rigorous cross-examination of Mr. Wine, and cannot possibly fear breaching a confidential relationship because none ever existed. Third, Mr. Luskin does not anticipate that Mr. Wine will ever be his client and, thus, is not encumbered by the speculative conflict that might arise from the loss of future business.'"; "Additionally, our courts of appeals has tacitly approved such arrangements. See [United States v.]Williams, 81 F.3d 1321, 1325 (4th Cir. 1996). ('While allowing . . . [auxiliary counsel under similar circumstances] might have been within the court's discretion, declining to use it cannot be held an abuse of that discretion.')"; "[I]t is important to note that Wine has never moved to disqualify Heath. Also, Wine has waived any remaining privilege on the apparent subject matter involved in this action. Finally, his former counsel's present firm will be barred from confronting him on cross examination."; explaining a lawyer from another firm would cross-examine the former client).

Although some lawyers jointly representing companies and their employees dodge the bullet, a Union Pacific in-house lawyer was not so lucky.

- Yanez v. Plummer, 164 Cal. Rptr. 3d 309, 310, 311, 313, 313-14, 314, 315 (Cal. Ct. App. 2013) (holding that a Union Pacific in-house lawyer could be sued by a Union Pacific employee for malpractice; explaining that their lawyer jointly represented Union Pacific and the employee in the employee's deposition as a witness in litigation involving a fellow employee's injury, and that the lawyer did not protect the client/witness -- who was later fired for inconsistency in his testimony and earlier version of the accident; "Union Pacific fired Yanez [Employee] for dishonesty, citing a discrepancy between a witness statement that Yanez wrote and a deposition answer he gave concerning a coemployee's on-the-job injury (the deposition answer occurred in the coemployee's lawsuit against Union Pacific under the Federal Employers Liability Act . . . . At the deposition, Plummer [Union Pacific in-house lawyer] represented both Union Pacific and Yanez. Yanez claims the alleged dishonesty was a simple miswording in his witness statement that Plummer, during the deposition, manufactured into something sinister for Union Pacific's benefit."; "Yanez expressed concern about his job because his deposition testimony was likely to be unfavorable to Union Pacific, and asked Plummer who would 'protect' him at the deposition. Plummer responded that Yanez was a Union Pacific employee and Plummer was his attorney for the deposition; as long as Yanez told the truth in the deposition, Yanez's job would not be affected. Plummer never told Yanez about any conflict of interest involving Plummer representing Union Pacific and Yanez at the deposition."; "Yanez and Union Pacific occupied adverse positions regarding Garcia's FELA lawsuit against Union Pacific. Yanez -- working with Garcia

when Garcia was injured, and the only percipient witnesses to Garcia's accident -- was aware of several unsafe work conditions that may have contributed to Garcia's injury."; "Despite these conflicting interests, Union Pacific's in-house counsel, Plummer, represented both Union Pacific and Yanez at Yanez's deposition in Garcia's lawsuit. Prior to being deposed, Yanez expressed to Plummer his concern about how this state of affairs would affect his job, and Yanez asked Plummer who would 'protect' him at the deposition. Plummer responded that Yanez was a Union Pacific employee and Plummer was Yanez's attorney for the deposition, and stated that if Yanez told the truth at the deposition, his job would not be affected."; "Yanez presented evidence in his summary judgment papers that Plummer neither informed him about conflicts with Union Pacific nor obtained his written consent to represent him despite such conflicts."; "As for Plummer's conduct, it is true Yanez wrote in his second statement that he 'saw' Garcia slip and fall, and it is true Yanez first admitted to Garcia's counsel in the deposition that he did not 'witness' Garcia's 'accident.' But it was Plummer who highlighted Yanez's deposition testimony that he did not 'see' Garcia slip; it was Plummer who presented the second statement at the deposition; it was Plummer who got Yanez, under oath at the deposition, to effectively admit that his deposition testimony conflicted with the second statement; it was Plummer who did not offer Yanez a chance to explain this discrepancy; and it was Plummer who failed to present the first statement as an exhibit at Yanez's deposition."; "Yanez has presented a triable issue of material fact that but for Plummer's alleged malpractice, breach of fiduciary duty and fraud, Yanez would not have been terminated.").

There is a slight bit of good news for lawyers who would like to represent company executives in a very limited way. In a somewhat surprising approach that helps corporations, several courts and one bar have disagreed with the California court's analysis of Yanez (discussed above), and instead held that a company's lawyer's representation of a company executive during depositions or other testimony did not create a joint attorney-client relationship.

- Springs v. First Student, Inc., Case No. 4:11CV00240 BSM, slip op. at 2-3 (E.D. Ark. Nov. 30, 2011) (declining to disqualify Jackson Lewis from representing its client First Student in an action brought by several plaintiffs, on the grounds that the law firm represented the plaintiffs in their role as deponents in an earlier related case; "It appears that Munger's and Barnes's [Jackson Lewis lawyers] representation of plaintiffs was fairly limited and

nothing in the record indicates that plaintiffs provided Munger and Barnes with 'confidential factual information' when plaintiffs gave their depositions in the *Douglas* case. Indeed, Springs did not meet with Munger prior to giving her deposition. . . . Further, while Burnley states that he told Munger that he made an internal FLSA-based complaint to First Student, . . . nothing indicates that Munger received any relevant information regarding that complaint or that Munger advised Burnley regarding that complaint. . . . Finally, nothing indicates that plaintiffs have given Munger and Barnes the type of information that would materially advance First Student's position in this case.").

- Perez v. PetSmart, Inc., No. CV 10-5339 (LDW) (ETB), 2011 U.S. Dist. LEXIS, at *18-19 102229 (E.D.N.Y. Sept. 12, 2011) (finding that a former PetSmart employee could not disqualify the law firm of Littler Mendelson on the grounds that the law firm represented him rather than the company; "[P]laintiff did not form a de facto attorney-client relationship with any Littler Mendelson attorneys he may have spoken to. . . . Rather, plaintiff allegedly revealed confidences to Littler Mendelson attorneys in the context of the firm's defense of PetSmart against allegations of wrongful termination in another action. . . . Knowing that Littler Mendelson represented PetSmart, plaintiff could not have reasonably believed that information he provided to the firm in the course of that representation would be kept confidential and not shared with the corporation.").

- Gary Friedrich Enters., LLC v. Marvel Enters., Inc., No. 08 Civ. 1533 (BSJ) (JCF), 2011 U.S. Dist. LEXIS 54154, at *11-12 (S.D.N.Y. May 20, 2011) ("In situations such as this where a former employee is represented by counsel for a defendant corporation for the purpose of testifying at a deposition at no cost to him, courts have not treated the former employee as having an independent right to the privilege, even where that employee believes that he is being represented by that counsel.").

- Wisconsin LEO E-07-01 (7/1/07) ("Lawyers for organizations may appear on behalf of the organization when a constituent is deposed, but that does not mean that the lawyer represents that constituent as an individual. This practice is common, but the mere fact that a lawyer accompanies a constituent to a deposition and consults with that constituent does not transform that constituent into a client. . . . The lawyer's client remains the organization and the lawyer is obligated to protect the interests of the organization first. In such a situation, the lawyer should take care to ensure that the constituent does not misunderstand the lawyer's role . . . .").

This forgiving attitude can have two significant implications. First, the lack of a joint attorney-client relationship means the company has the sole power to waive the privilege protecting the communications between the lawyer and the executive. Second, as an ethics matter, the lack of a joint representation allows the company lawyer to later represent the company adverse to the executive whom the lawyer had represented in such a limited way.

Not surprisingly, other courts disagree with this approach.

- Advanced Mfg. Techs., Inc. v. Motorola, Inc., No. CIV 99-01219 PHX-MHM (LOA), 2002 U.S. Dist. LEXIS 12055, at *17-19 (D. Ariz. July 2, 2002) (addressing a motion by a former Motorola employee (Corley) to disqualify the law firm of Lewis & Roca from representing Motorola in taking any action (such as depositions) of the former employee; explaining that a Lewis & Roca lawyer (Irish) had appeared for Motorola at an earlier deposition of the retired Motorola employee; rejecting Irish's argument that he never represented the former Motorola employee -- noting that Corley had testified at the deposition that Irish represented him as well as Motorola, and that Irish had not spoken up at the deposition to indicate otherwise; "Regardless of whether Corley's personal belief that Irish represented him was reasonable prior to the September 20, 2001 deposition, the irrefutable expressed belief by Corley that Irish represented him in his deposition coupled with Irish's silent acquiescence to that representation established an attorney-client relationship ab initio. Irish's failure to timely object to, or otherwise contest, Corley's explicit belief, whether reasonable or not, that Corley was being represented by Irish in his deposition manifested Irish's implied consent to an attorney-client relationship between them. Moreover, at a minimum, Irish should have known that his silence to Corley's expressed belief in the deposition that Irish represented him would cause confirmation and further reliance by Corley to the belief that Irish represented him. An attorney can not [sic] have it both ways: on the one hand to sit by silently at the public expression by a possible client of the existence of their attorney-client relationship, that would preclude adverse counsel from properly inquiring into the nature and substance of their prior communications protected by the attorney-client privilege, and then, at a later date, to permit that silent attorney to disavow and deny that such a relationship existed when the interests of the former employer and employee unexpectedly became adverse. Therefore, on and after this deposition date until expressly told otherwise, Corley's belief that Irish represented both Motorola and him was reasonable." (emphases

added, footnote omitted); declining to disqualify Lewis & Roca because the firm had not yet filed a lawsuit against Corley after discovering he had engaged in alleged wrongdoing adverse to Motorola, but noting that the court would entertain a mechanism by which Corley's interests would be protected if Lewis & Roca remained on the case for Motorola.)

In 2014, a New York City legal ethics opinion analyzed an issue that many lawyers may not even have considered – whether offering to represent a company employee violated the anti-solicitation rule. The New York City LEO eventually determined that it did not.

- New York Cnty. LEO 747 (6/9/14) (holding that a corporation's lawyer does not act unethically if the lawyer offers to also represent corporate employees, because the purpose of the meeting between the lawyer and the employee does not generate business for the lawyer; "Under Rule 7.3(b), the question of whether the lawyer properly may offer in-person (rather than in writing) to represent the corporation's employee following the conclusion of the interview depends on whether the 'primary purpose' of the lawyer's 'private communication' with the employee 'is the retention of the lawyer or law firm, and a significant motive for [the communication] is pecuniary gain.' We conclude that conveying the corporation's offer, and following up if the employee expresses interest, would not constitute a 'solicitation' for several reasons." (footnote omitted); "First, the primary purpose of the in-person meeting at its inception is not to offer the lawyer's services to the employee, but to interview the employee as a potential witness. Indeed, in many cases, that may turn out to be the exclusive purpose of the meeting, if the lawyer concludes that the employee does not require legal representation or that the lawyer cannot provide it. Second, when the lawyer initially offers to represent the employee, the lawyer is acting on behalf of the corporation, as its lawyer and agent, primarily for purposes of conveying the corporation's offer to secure legal representation for an employee in need of legal assistance. The corporation could, of course, have one of its non-lawyer officers or its in-house counsel extend the offer on behalf of the corporation. But, as the corporation's lawyer and agent, the lawyer may be in a better position to do so, because the lawyer may be better qualified to answer questions and provide information about the implications of the representation. Moreover, in conveying the corporation's offer and, if the employee is interested, following up by offering representation, the lawyer's 'primary purpose' is not to secure legal fees from a new client but to render competent representation to a current corporate client by enabling it to fulfill its objective (and, in some cases, its statutory or contractual obligation or internal policy) of making legal

assistance available to an employee who may need counsel." (footnote omitted); "When a corporation's lawyer conveys in person or by telephone an offer to represent a corporate employee in connection with a lawsuit, the application of the solicitation rule, Rule 7.3(a), depends on the factual context and the lawyer's motivation. Under Rivera [Rivera v. Lutheran Med. Ctr., 866 N.Y.S.2d 520 (N.Y. Sup. Ct. 2008)], the communication would be improper if the lawyer's motivation was exclusively 'to gain a tactical advantage in th[e] litigation by insulating [witnesses] from any informal contact with plaintiff's counsel.' However, we conclude that an offer of representation at the corporation's request would be proper where the lawyer initially interviews the employee as a non-client witness in order to learn relevant information and subsequently determines that the individual is in need of legal services as a party or potential testifying witness and that the concurrent representation would be permissible.").

AN EARLIER NEW YORK STATE COURT CASE TOOK A FRIGHTENINGLY DIFFERENT APPROACH.

- 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).

Conclusion

(a) Unless a conflict of interest would prevent it, an in-house lawyer fully licensed in a state can represent a company employee in a company matter.

(b) Unless a conflict of interest would prevent it, a fully licensed company lawyer may also represent a company employee in a non-company matter -- although in-house lawyers frequently seek to avoid such representations. An in-house lawyer who is not fully licensed in the state where he or she practices probably could not undertake such a representation.

Best Answer

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

B 8/16

Accidental Creation of a Joint Representation of a Corporate Employee

Hypothetical 14

As your company's in-house lawyer primarily responsible for litigation matters, you recently worked with outside counsel during an investigation of possible wrongdoing by three executives. You prepared notes of your interview sessions. Your notes reflect that you and your outside colleague made the following statements to the three executives:

- "We represent the company but we could represent you as well, as long as no conflict appeared."
- "We can represent you until such time as there appears to be a conflict of interest."
- "We represent the company, and can represent you too if there is not a conflict."

As it turned out, the executives had indeed engaged in wrongdoing -- and the company fired them. The federal government began to investigate the wrongdoing, and asked for your interview notes. The former employees' new lawyers claim that you and outside counsel jointly represented the company and the employees, which gives them a "veto power" over your waiver of the privilege. The federal government is becoming increasingly insistent that you hand over the notes.

May you waive the privilege covering your interview of the then-employees, over their objection?

MAYBE

Analysis

The real danger in the corporate context is that a lawyer representing the corporation will accidentally create a joint representation with a corporate employee.

Theoretically this should never happen. As a matter of ethics, lawyers dealing with company executives who might misunderstand the lawyer's role must "explain the

identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."[1] The standard Upjohn warning includes essentially the same disclosure.

On the other hand, it is easy to see how lawyers who are not scrupulous in following their ethics duties and the Upjohn standard might generate a reasonable belief in corporate employees that the lawyer is representing them as well as the corporation in a corporate-related matter. This is because lawyers can engage in privileged communications with employees in their role as employees, without separately representing them. This is not the case with third parties. Neither the lawyer nor the third party in that non-corporate setting is likely to think that an attorney-client relationship exists. In contrast, a corporation's lawyer generally knows that the privilege applies to communications with the employees even if the lawyer does not represent them. The corporate employee in that setting knows that he or she is talking with a lawyer. Given this setting, it is no wonder that there can some confusion.

The key point here is not the existence of the privilege, but who owns it. The corporate lawyer following Upjohn and protecting a corporate client will ensure that the corporate client owns the privilege. This means that the corporation can assert the privilege and, most importantly, can waive the privilege. A corporate employee usually claims a joint representation when the corporation wants to waive the privilege otherwise covering communications between the corporate lawyer and the employee, and the employee wants to prevent such a waiver. This situation often arises when the

[1] ABA Model Rule 1.13(f).

government or another third party seeks disclosure of those communications. The corporation might want to cooperate with the government by disclosing them, while the employee who is often the subject of government inquiry wants to keep those communications secret.

Given the high stakes involved, one would think that company lawyers would always explicitly indicate whether they jointly represent employees with whom they are dealing. In other words, they would either explicitly disclaim an attorney-client relationship with the employees, or in very unusual circumstances explicitly articulate a joint representation. As the Southern District of New York explained,

> [t]his problem could be avoided if counsel in these situations routinely made clear to employees that they represent the employer alone and that the employee has no attorney-client privilege with respect to his or her communications with employer retained counsel. Indeed, the Second Circuit advised that they do so years before the communications here in question. But there is no evidence that the attorneys who spoke to Ms. Warley followed that course.

United States v. Stein, 463 F. Supp. 2d 459, 460 (S.D.N.Y. 2006) (footnote omitted).

An earlier example highlighted the dangers of ambiguity. In that case,[2] a court criticized (but ultimately found effective) what it called a "watered down 'Upjohn warning[]'" that a company's in house lawyers and outside lawyers gave to executives they were interviewing. The lawyers had made the following statements to the three executives that they interviewed:

- "[T]hey represented [the company] but that they 'could' represent him as well, 'as long as no conflict appeared.'"

[2] Under Seal v. United States (In re Grand Jury Subpoena: Under Seal), 415 F.3d 333, 340 (4th Cir. 2005).

- "We can represent [you] until such time as there appears to be a conflict of interest."
- "We represent [the company], and can represent [you] too if there is not a conflict."[3]

The employees had claimed joint ownership of the privilege covering the interview to block the company's disclosure of the interview notes to the government. The company ultimately won sole ownership of the privilege, but had to fight the now-former employees up to the circuit court level.

The law had to develop a test for determining whether a corporate employee's argument about a joint representation would succeed or would not.

Some lawyers who represent corporations also intentionally establish either separate or joint representations of corporate employees. In other situations, lawyers explicitly disclaim an attorney-client relationship with a corporate employee, following their ethics duty to disclose their role and the Upjohn warning's provision explicitly denying that the lawyer represent the employee either separately or jointly with the corporate client.

However, in the absence of such an intentional representation or explicit disclaimer of a representation, courts developed a standard for determining whether an attorney-client relationship exists between a corporation's lawyer and a corporate employee.

Thus, the test essentially amounts to a "default" standard in the absence of some explicit memorialization of a relationship or the lack of a relationship. Careful lawyers

[3] Id. at 336.

have already taken care of this issue, and therefore do not need a "default" standard. However, the large number of cases dealing with such a "default" situation highlights many lawyers' inattention to this important issue.

A 1986 Third Circuit case articulated the most widely recognized standard -- the Bevill standard.[4] Under the Bevill standard, a corporate employee seeking to prove an attorney-client relationship with a corporation's lawyer (thus carrying both privilege and other ethics implications) must establish that:

- The employee approached the corporation's attorney for legal advice;
- The employee made it clear that the request had to do with matters that arose in his or her individual capacity;
- The attorney understood this request and advised on the matter even though there was a potential for conflict;
- These communications were confidential;
- The subject matter of the communication did not concern a more general corporate matter.

The critical element is the last one: The communication usually may not relate to the employee's duties on behalf of the corporation.[5]

Most courts now adopt the Bevill standard. For instance, in 2010, the Ninth Circuit explicitly adopted the Bevill standard.[6] Other courts have adopted variations of the Bevill standard, but with essentially the same bottom line.[7]

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4 In re Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120 (3d Cir. 1986).

5 In re Grand Jury Subpoena, 274 F.3d 563, 573-74 (1st Cir. 2001).

6 United States v. Graf, 610 F.3d 1148 (9th Cir. 2010) (the court ultimately determined that a company consultant did not meet that standard).

7 United States v. Stein, 463 F. Supp. 2d 459 (S.D.N.Y. 2006).

Most courts applying the Bevill standard refuse to recognize an attorney-client relationship between a corporation's lawyer and individual corporate constituents.[8] For instance, a 2010 Eastern District of Pennsylvania decision analyzed the issue, ultimately concluding that the corporation's lawyer did not also represent an executive.

> [A]t no time did Keany [company lawyer] think that he was representing [executive] individually. In fact, at some point during Keany's representation of [company], he advised [executive] that he should retain separate counsel. . . . [T]he conversations between [executive] and Keany only involved matters within [company] or the business affairs of [company]. At the hearing, [executive] failed to adduce any conversation with Keany which was confidential or which dealt with [executive's] personal liability or criminal exposure as opposed to [company's]. . . . Under these circumstances, Defendant can claim no attorney client privilege which would bar Keany's testimony at trial or which would trump [company's] waiver of the attorney-client privilege.

United States v. Norris, 722 F. Supp. 2d 632, 639-40 (E.D. Pa. 2010). Many courts take this approach.[9]

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[8] United States v. Norris, 753 F. Supp. 2d 492 (E.D. Pa. 2010), aff'd 419 F. App'x 190 (3d Cir. 2011); Grunstein v. Silva, 2010 Del. Ch. LEXIS 68 (Del. Ch. Apr. 13, 2010); In re Paul W. Abbott Co., Inc., 767 N.W.2d 14 (Minn. 2009).

[9] Kennedy v. Gulf Coast Cancer & Diagnostic Center at Se., Inc., 326 S.W.3d 352, 358 (Tex. Ct. App. 2010) (in a TRO proceeding, ordering a former in-house lawyer to return privileged documents that he had taken with him when he left the client's employment; holding that the company rather than any individual executives or directors own the privilege; "Kennedy's subjective intent notwithstanding, no evidence objectively manifests that EBGWH [Epstein Becker Law Firm, who represented the in-house lawyer even before he left the client's employment] secured the parties' consent or undertook any of the other steps that Texas law requires for dual representation of Gulf Coast and either the officers and directors or Kennedy individually. . . . We therefore hold that the trial court did not abuse its discretion in determining that Gulf Coast alone holds the attorney-client privilege applicable to the memo."); In re Grand Jury Proceedings, 469 F.3d 24 (1st Cir. 2006); United States ex rel. Magid v. Barry Wilderman, M.D., P.C., Civ. A. No. 96-CV-4346, 2006 U.S. Dist. LEXIS 56116 (E.D. Pa. Aug. 10, 2006); Applied Tech. Int'l, Ltd. v. Goldstein, Civ. A. No. 03-848, 2005 U.S. Dist. LEXIS 1818, at *11-12 (E.D. Pa. Feb. 7, 2005); In re Grand Jury Subpoena, 274 F.3d 563, 573 (1st Cir. 2001); United States v. Int'l Bhd. of Teamsters, 119 F.3d 210, 215 (2d Cir. 1997); United States v. Aramony, 88 F.3d 1369, 1390 (4th Cir. 1996).

However, some courts permit those relationships and therefore recognize the privilege in limited circumstances.[10] Perhaps more importantly, a court finding that the law firm had established an attorney-client relationship with an employee might disqualify the firm from representing the company if adversity develops between it and the employee.[11]

Even high-profile in-house lawyers might find themselves dealing with the ramifications of having accidentally created an attorney-client relationship with corporate employees.

Starting in 2012, Penn State's general counsel found herself embroiled in a high-profile question about whether she had simultaneously represented the University and two high-level officials appearing before a grand jury. A chronological list of newspaper articles show the deepening dispute -- and its possible effect in one of America's most celebrated child abuse cases.

- Shannon Green, Was Penn State's GC Counsel for University Officials?, Corporate Counsel, Feb. 3, 2012 ("In-house lawyers understand that they're hired to represent the entity that issues their paychecks -- not the company's executives and other staff. But as evidenced by the grand jury testimony of two Penn State University (PSU) officials, sometimes there can be a disconnect between how a company's lawyers and constituents understand the relationship. According to a special report in The Patriot News, when Tim Curley and Gary Schultz testified before a grand jury in the Jerry Sandusky child sex abuse investigation on January 12, 2011, they thought PSU's then-General Counsel Cynthia Baldwin was their counsel. The men said as much in their testimony, and Baldwin -- seated right beside them -- did not correct

[10] Intervenor v. United States (In re Grand Jury Subpoenas), 144 F.3d 653, 659 (10th Cir.), cert. denied, 525 U.S. 966 (1998).

[11] Home Care Indus., Inc. v. Murray, 154 F. Supp. 2d 861, 869 (D.N.J. 2001) (disqualifying Skadden, Arps from representing a company in an action against its former CEO; agreeing with the CEO that, because the lawyers created an environment in which he comfortably confided in them, his "belief that the [law] firm represented him personally was reasonable.").

what she later called a misinterpretation. Baldwin did not respond directly to The Patriot News, but she deferred to Lanny Davis, the high-profile Washington, D.C., lawyer who was hired by Penn State last year after the scandal broke. Davis said that Baldwin had previously told the two officials that she represented the University, and that they were free to hire counsel of their own. Whether or not Curley and Schultz were justified in thinking they had representation, according to legal ethics scholar and law professor Charles Wolfram, it's quite common for employees to assume the company lawyer's representation trickles down to them. "Employees often refer to their company's General Counsel as 'our' lawyer," he told CorpCounsel.com in an email. In-house lawyers know that employees often aren't aware of the distinction. And under ordinary circumstances, no harm results from the misunderstanding. But according to Wolfram, a professor emeritus at Cornell University Law School, "the crunch comes" when the interests of the organization diverge with those of one of the company's constituents. In those situations, lawyers have a duty under their state's version of the ABA Model Rules of Professional Conduct to set employees straight. The comments to Pennsylvania Rule 1.13, "Organization as a Client," indicate that "[w]hether such a warning should be given by the lawyer to any constituent individual may turn on the facts of each case." Wolfram said that most non-lawyers who were accompanied to a grand jury proceeding by a university lawyer would naturally assume that the lawyer was there to assist them personally.").

- Catherine Dunn, Court Weighs Admissibility of Ex-Penn State General Counsel Testimony in Criminal Cases, Corporate Counsel, Nov. 27, 2012 ("Can Cynthia Baldwin, the former general counsel of Penn State University (PSU), testify against two former Penn State officials in upcoming criminal proceedings?"; "That's the question before a Dauphin County, Pennsylvania, judge as former PSU senior vice president Gary Schultz and athletic director Tim Curley, who's on leave from the university, prepare their defense against charges stemming from the Jerry Sandusky sexual abuse scandal."; "Last week, attorneys for Curley and Schultz filed their second motion in a month related to Baldwin's counsel and the cases being brought against them by the Pennsylvania Attorney General. This latest filing seeks to bar Baldwin's testimony from a preliminary hearing scheduled for next month on new charges of conspiracy, endangering the welfare of children, and obstruction of justice."; "Curley and Schultz have also faced charges of perjury and failure to report suspected child abuse since November 2011. They are scheduled for trial in January."; "In the latest set of papers, filed last Tuesday, defense attorneys argue that testimony by Baldwin would violate Curley and Schultz's attorney-client privilege with the ex-general counsel, who left Penn State in June, having established the school's first in-house legal department in 2010."; "Curley and Schultz's lawyers argue that Baldwin acted as their attorney during a grand jury investigation into allegations that Sandusky

molested children on Penn State's campus."; "Though just what role Baldwin played in the grand jury investigation has itself been an ongoing source of controversy -- particularly since the release of a Penn State internal investigation last summer."; "According to the Patriot News, which cited grand jury transcripts, both Curley and Schultz identified Baldwin as their legal counsel during their grand jury appearances in January 2011. But according to the Freeh Report, Baldwin has maintained that she represented the university during those appearances -- and not Curley or Schultz."; "Baldwin told the Special Investigative Counsel that she went to the Grand Jury appearances as the attorney for Penn State, and that she told both Curley and Schultz that she represented the University and that they could hire their own counsel if they wished,' the report states."; "The defense teams for Curley and Schultz have taken a different view. In a motion to dismiss the charges against the two men filed earlier this month, defense attorneys argued that Baldwin's counsel to Curley and Schultz constituted a conflict of interest, and that they were deprived of their right to counsel."; "Prosecutors countered in a November 14 filing, arguing that 'at the time that Attorney Baldwin represented the Defendants, there was no actual conflict of interest,' according to court papers. 'Based on their interviews prior to testifying, it appeared that the Defendants intended to cooperate with the investigation. Such an action would not conflict with the interests of the other witnesses represented by attorney Baldwin, who also were cooperating.'").

- Ben Present, Schultz Could Sue Ex-Penn State General Counsel, Legal Intelligencer, Dec. 13, 2012 ("A former Penn State administrator facing criminal charges related to the Jerry Sandusky sex-abuse scandal has filed a praecipe for writ of summons against the university's former general counsel, Cynthia Baldwin, indicating he intends to sue her for legal malpractice."; "Gary Schultz, represented by a team of Sprague & Sprague attorneys led by Richard A. Sprague, filed papers that were docketed Wednesday in the Centre County Court of Common Pleas. Schultz faces charges of perjury, endangering the welfare of children, failure to report child abuse and other criminal charges related to allegations he engaged in a conspiracy to conceal allegations against Sandusky, the school's former defense coordinator and convicted serial child molester."; "In court papers, Schultz has pled Baldwin allowed him to 'believe she was his unencumbered, conflict-free lawyer,' telling him before is grand jury appearance that she would represent him at the proceeding."; "Former Penn State athletic director Tim Curley also moved to dismiss his case, or suppress his grand jury testimony in the alternative, arguing in court papers that Baldwin told him she could represent him before the grand jury."; "When the two men testified before the grand jury, both said they were being represented by Baldwin."; "Baldwin, however, has claimed she was present before the grand jury to represent the university -- not Schultz or Curley, both of whom have testified she was their lawyer."

(emphasis added); "As previously reported by The Legal Intelligencer, Baldwin has labeled the whole thing a misunderstanding."; "Washington, D.C., attorney Lanny Davis, who Baldwin has previously authorized to speak on her behalf, told the Harrisburg Patriot-News and The Legal Intelligencer that, when Baldwin told supervising Judge Barry Feudale and representatives from the Office of the Attorney General in Feudale's chambers that she represented the university, nobody objected to her listening to the administrators' testimony."; "Then, Davis told The Legal Intelligencer, when the administrators testified that Baldwin was their attorney, she did not think it was 'appropriate' to interrupt the proceedings and clarify." (emphases added)).

- Dan Packel, Sandusky Defendants Say State Knew Of Attorney Conduct, Law360, Jan. 8, 2013 ("Two former Pennsylvania State University administrators charged with covering up sexual abuse committed by former assistant football coach Jerry Sandusky argued Friday that the state knew that because of a conflict of interest, they were deprived of their right to counsel prior to going before a grand jury. Former Penn State Vice President Gary Schultz and former Athletic Director Tim Curley allege the prosecution conceded that Penn State's former general counsel Cynthia Baldwin represented both the university as well as the administrators, leading to a conflict of interest. They seek to suppress their grand jury testimony prior to their upcoming criminal trial. They contended in separate filings that Pennsylvania's Office of the Attorney General (OAG) was also aware of the conflict of interest. The circumstances in this case lead to the unavoidable conclusion that although aware of Ms. Baldwin's conflict, the OAG chose to ignore it in order to hear the testimony of her clients,' Curley said. 'Bluntly put, Ms. Baldwin and the OAG put their own interests before the interest[s] of the witnesses they were meant to protect.'"; "They contended that Baldwin, in her role for the university, was obligated to work to minimize its civil and criminal liability, and that as a consequence she was incapable of representing them as well since the parties had differing interests. In October motions, Schultz and Curley argued that Penn State's interests were best served by cooperation, while their own interests would have been better served by invoking their own Fifth Amendment rights. In Friday's filings, Curley and Schultz allege that in its response to their motions, the state conceded that while both defendants had the right to counsel before testifying, Baldwin did not consider herself to be their counsel, even though she represented herself as such to the judge and the defendants.").

- Matt Fair, Sandusky Defendants Can't Nix Ex-Penn State Attorney Testimony, Law360, Apr. 10, 2013 ("A state judge ruled Tuesday that he did not have authority to quash testimony from a former Pennsylvania State University attorney included in a grand jury presentment indicting a trio of school

administrators for allegedly covering up the crimes of convicted child molester Jerry Sandusky.;" "While ousted Penn State president Graham Spanier and two other high-ranking administrators charged in the alleged conspiracy had sought to have testimony from former university attorney Cynthia Baldwin stricken from the presentment on grounds that she'd violated their attorney-client privilege, Judge Barry Feudale said that he lacked the authority to do so as the grand jury's supervising judge.;" "'The singular issue before this court involves the absence of jurisdictional authority for the grand jury supervising judge to quash a presentment after steps were properly taken to issue the presentment and adhere to statutory procedure.' Judge Feudale said. 'It is not within the supervising judge's jurisdiction to entertain the joint motion to quash presentments put before this court.'").

- Ama Sarfo, Ex-Penn State Execs Lose 2nd Atty Privilege Appeal, Law 360, June 19, 2013 ("The Pennsylvania Superior Court on Tuesday squashed a second appeal by two former Pennsylvania State University administrators who said a grand jury presentment relied on privileged attorney-client information and was defective, as they face charges for conspiring to cover up Jerry Sandusky's child abuse. Earlier this month, the state's Supreme Court denied petitions for review filed by former Penn State vice president Gary Schultz and former athletic director Tim Curley, saying they can raise their issue in their underlying criminal prosecution. The Superior Court on Tuesday declined to weigh in on the matter, saying that issues surrounding grand jury investigations can only be addressed by the state Supreme Court."; "In filings and a brief, Schultz, Curley and ousted Penn State President Graham Spanier argued that the conflict created by Baldwin's dual roles as their attorney and as attorney for the school effectively deprived them of their right to counsel. They also argued that Baldwin's testimony against them violated attorney-client and work-product privileges. However, Judge Feudale said his review of Baldwin's testimony left him inclined to disagree. 'My review of the testimony of attorney Baldwin before the grand jury persuaded me . . . that her testimony was circumspect and circumscribed,' he said. 'It was not a violation of the attorney-client privilege but rather was related to her belated awareness of the commission of alleged criminal acts and was in accordance with her responsibilities as an officer of the court. Finally, attorney Baldwin testified as approved by her then client, [Penn State,] the organization for which she was employed.'").

In January 2015, the trial court declined to dismiss criminal charges based on Penn State's General Counsel's alleged improper action and resulting confusion about

the existence of an attorney-client relationship with the three former Penn State executives.

- Commonwealth v. Curley, Nos. 5164- & 5165 CR 2011 & 3614-, 3615-, & 3616 CR 2013, slip op. at 27, 30, 34, 34-35, 35, 39 (Pa. C.P. Dauphin Jan. 18, 2015) (in a Memorandum Opinion and Order, refusing to dismiss criminal charges against three Penn State officials, despite Penn State's general counsel's alleged improper activity; noting that Penn State general counsel Cynthia Baldwin attended Grand Jury testimony from defendants Curley and Schultz on January 12, 2011, and herself appeared before the Grand Jury on October 26, 2012, to give testimony adverse to them; rejecting defendants' argument that Baldwin represented them personally, and therefore had acted improperly by testifying herself before the Grand Jury; "Central to disposition of Defendants' claims and theories for relief is determination of the scope of the attorney-client privilege asserted by each Defendant. We must determine whether the record demonstrates the existence of an individual attorney-client privilege between each Defendant personally and Ms. Baldwin."; "We find that, in all matters related to their appearances before the grand jury, including preparation for such appearances, Ms. Baldwin represented each Defendant in his capacity as an agent of the University conducting University business, not in an individual, personal capacity. Thus, in their roles as agents of the University, the Defendants received representation and no denial of counsel occurred."; "We further find that the University, as the holder of the privilege, waived its attorney-client privilege, and that any disclosure of information related to the ongoing investigation of Sandusky fell within the terms of the waiver. Therefore, no violations of the attorney-client privilege occurred."; "Defendants assert, however, that Ms. Baldwin represented each Defendant individually and, because of alleged failures of or conflicts in representation, they were deprived of the right to counsel throughout the proceedings, which failures or conflicts entitle them to relief."; relying on the Bevill case (In the Matter of Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 124 (3d Cir. 1988)); "Defendants presented no evidence that they sought representation in their individual rather than their organizational capacities."; "Defendants chose to proceed with Ms. Baldwin as their counsel, aware of her role as University counsel and made no request that she represent them individually."; "[T]here exists no evidence that Ms. Baldwin communicated with the officials in their individual capacities, knowing that a conflict could arise. We cannot conclude that Ms. Baldwin was aware of the facts which raised a conflict between the interests of the University and the Defendants personally; that is, potential personal exposure to criminal charges. In response to Ms. Baldwin's request to gather information required by the subpoena duces tecum directed to the University, Defendants responded that they had none. If Defendants possessed personal knowledge

which created either personal criminal exposure or a conflict of interest, we have no evidence upon which we could conclude that Ms. Baldwin was or should have been aware of such information and communicated with them in their individual capacities in spite of such knowledge."; "Defendants have not alleged that conversations occurred with Ms. Baldwin which related to private individual matters outside of their roles as University officials."; "We find that the interests of the University and the individuals appeared aligned at the time the Defendants met with Ms. Baldwin and testified before the grand jury, that is, the interests in providing truthful information within their knowledge, as agents of the University, regarding the apparent target of the investigation, Sandusky."; "We disagree with the assertion that Ms. Baldwin knew or should have known that the interests of the individual Defendants would diverge from the interests of the University, such that an inevitable conflict existed, which denied Defendants of representation.").

ALMOST EXACTLY ONE YEAR LATER, THE APPELLATE COURT REVERSED -- AND DISMISSED SEVERAL CRIMINAL COUNTS AGAINST THE THREE FORMER PENN STATE EXECUTIVES BASED UPON THE GENERAL COUNSEL'S CONDUCT.

- Commonwealth v. Spanier, 132 A.3d 481, 485, 487, 496, 497, 498 (Pa. Super Ct. 2016) (dismissing charges against Penn State's former president, because they were based on grand jury testimony during which he reasonably believed that he was being personally represented by Penn State's general counsel Cynthia Baldwin; "Subsequently, after discussions regarding compliance with the Subpoena 1179 were coming to a close, Judge Feudale inquired, 'Cindy, [Ms. Baldwin] just for the record, who do you represent? . . . Outside the presence of Spanier, and for the first time on the record, Ms. Baldwin responded, 'The university.' . . . Judge Feudale followed up, 'The university solely?' Ms. Baldwin answered, 'Yes, I represent the university solely.'" (internal citation omitted); "Upon entering the grand jury room, the OAG queried, 'Sir, you're represented by counsel today?' . . . Spanier responded, 'Yes.' The OAG then asked, 'Could you just identify counsel?' . . . Spanier answered, 'Cynthia Baldwin setting behind me.'" (internal citations omitted); "After entering the courtroom, Ms. Baldwin indicated that she was present with and accompanied by two attorneys. Those attorneys were representing her personally. Despite the foregoing representations by Mr. Fina, a significant number of the Commonwealth's questions to Ms. Baldwin before the grand jury implicated potential confidential communications.'"; "Consistent with our decision in Schultz [Commonwealth v. Schultz, No. 280 MDA 2015, 2016 Pa. Super. LEXIS 30 (Pa. Jan. 22, 2016)], we find that Ms. Baldwin did not adequately explain to Spanier that her representation of him was solely as an agent of Penn State and that she did not represent his individual interests. Although Spanier knew

Ms. Baldwin was general counsel for Penn State, this knowledge does not ipso facto result in Spanier understanding that she represented him solely in an agency capacity before the grand jury. Spanier was not aware that Ms. Baldwin was not appearing with him in order to protect his interests and therefore unable to provide advice concerning whether he should answer potentially incriminating questions or invoke his right against self-incrimination. In line with our holdings in Schultz and Curley [Commonwealth v. Curley, No. 299 MDA 2015, 2016 Pa. Super. LEXIS 31 (Pa. Jan. 22, 2016)], we conclude that Ms. Baldwin was incompetent to testify at the grand jury hearing as to communications between her and Spanier."; "As we discussed in both Schultz and Curley, communications between a corporate attorney and an employee of a corporation may be personally privileged. It simply does not follow that, if Ms. Baldwin represented Spanier as an agent of Penn State, none of his communications with her were privileged."; "Instantly, Spanier met with Ms. Baldwin to discuss subpoenas served on Curley, Schultz, Paterno, the University, and later himself. His meetings with Ms. Baldwin relative to his own subpoenas did not pertain to a subpoena for the University. He consulted Ms. Baldwin for the purpose of securing legal advice. The issues discussed between Ms. Baldwin and Spanier were not general business matters related to the operation of the University, but concerned the criminal investigation into Jerry Sandusky and Spanier's own response to learning of certain information in 1998 and 2001."; "[W]e agree that an attorney-client relationship existed between Spanier and Ms. Baldwin before and during his grand jury testimony, thereby giving rise to an attorney-client privilege. Ms. Baldwin's grand jury testimony regarding communications with Spanier constituted a violation of the attorney-client privilege, rendering her incompetent to testify. Accordingly, and in light of our holdings in Schultz and Curley , we quash the challenged charges of perjury, obstruction of justice, and conspiracy to commit those crimes.").

- Commonwealth v. Schultz, 133 A.3d 294, 301, 303, 321 n.22, 323, 324, 325, 326, 326-17, 328 (Pa. Super. Ct. 2016) (dismissing charges against Penn State's former senior vice president for finance and business, because they were based on grand jury testimony during which he reasonably believed that he was being personally represented by Penn State's general counsel Cynthia Baldwin; "Ms. Baldwin did not advise Schultz regarding his Fifth Amendment right against self-incrimination. Ms. Baldwin also did not explain the difference between her representation of Schultz in his individual capacity or as an agent of his former employer, Penn State. Nonetheless, she did inform Schultz that any information he told her was not confidential insofar as she could relay it to the University Board of Trustees."; citing Ms. Baldwin's statement; "'I told him that as long as there was no conflict, that I could go in with him.'" (internal citation omitted); "Schultz then entered the courtroom with Ms. Baldwin, who was seated beside him during his testimony. At the outset,

a deputy attorney general asked Schultz, 'You are accompanied today by counsel, Cynthia Baldwin, is that correct?' . . . Schultz answered, 'That is correct.' . . . Ms. Baldwin did not indicate at that time that she represented Schultz solely in an agency capacity due to his prior employment at Penn State or that she was not representing him in a personal capacity."; "Both the Tenth Circuit Court of Appeals and the First Circuit of Appeals have explained the fifth aspect of Bevill [In re Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120 (3d Cir. 1988)] as follows, 'The fifth prong of In the Matter of Bevill, properly interpreted, only precludes an officer from asserting an individual attorney client privilege when the communication concerns the corporation's rights and responsibilities. However, if the communication between a corporate officer and corporate counsel specifically focuses upon the individual officer's personal rights and liabilities, then the fifth prong of In the Matter of Bevill can be satisfied even though the general subject matter of the conversation pertains to matters within the general affairs of the company. In re Grand Jury Subpoena, 274 F.3d 563, 572 (1st Cir. 2001) (citing Grand Jury Proceedings v. United States, 156 F.3d 1038, 1041 (10th Cir. 1998))."; "Ms. Baldwin also communicated with Schultz and expressed her belief that no conflict prevented her from representing Schultz and Curley. Thus, ostensibly, Ms. Baldwin was aware of the potential for a conflict of interest between Schultz and other individuals. The communication between Schultz and Ms. Baldwin occurred one-on-one and she did not reveal those communications to the Board of Trustees of Penn State, outside of possibly Spanier. The communications concerned the rights and responsibilities of Schultz relative to appearing before a criminal investigating grand jury and not Penn State's corporate rights." (footnote omitted); "Moreover, Ms. Baldwin did not adequately explain to Schultz that her representation of him was solely as an agent of Penn State and that she did not represent his individual interests. Although Schultz was certainly aware that Ms. Baldwin was general counsel for Penn State, it is unreasonable to conclude that this awareness by a lay person ipso facto results in Schultz knowing that she represented him solely in an agency capacity."; "Ms. Baldwin's after-the-fact justifications for her own testimony were not expressed on the record prior to Schultz's testimony, nor is there sufficient evidence that she properly advised Schultz of the limits of her representation. Simply stating that she could reveal communications to the Penn State Board of Trustees and was general counsel to the University was decidedly inadequate."; "Insofar as Ms. Baldwin has repeatedly maintained that she did not represent Schultz's individual interests, absent an adequate colloquy or other evidence reflecting acquiescence to such limited representation for purposes of her presence during his grand jury testimony, we find that Schultz's statutory right to counsel during his grand jury testimony was infringed. Indeed, we agree that Ms. Baldwin's acknowledged agency representation of Schultz during his grand jury testimony, without proper and adequate explanation and informed consent to allow limited representation,

left Schultz constructively without personal counsel for purposes of his grand jury appearance."; "As Schultz consulted with Ms. Baldwin for purposes of preparing for his grand jury testimony relative to a criminal investigation into Jerry Sandusky, and reasonably believed she represented him, and Ms. Baldwin neglected to adequately explain the distinction between personal representation and agency representation, and give appropriate warnings to Schultz, we conclude that all the communications between Schultz and Ms. Baldwin were protected by the attorney-client privilege. Consequently, Ms. Baldwin breached that privilege by testifying before the grand jury with respect to such communications."; "[W]e preclude Ms. Baldwin from testifying in future proceedings regarding privileged communications between her and Schultz, absent a waiver by Schultz."; "Since Schultz was constructively without counsel during his grand jury testimony, and he did not provide informed consent as to limited representation, we agree that his right against self-incrimination was not protected by Ms. Baldwin's agency representation, and the appropriate remedy is to quash the perjury charge arising from the first grand jury presentment."; "The charges of perjury, obstruction of justice, and conspiracy are hereby quashed.").

- Commonwealth v. Curley, 131 A.3d 994, 998, 1006-07, 1007 (Pa. Super Ct. 2016) (dismissing charges against Penn State's former athletic director, because they were based on grand jury testimony during which he reasonably believed that he was being personally represented by Penn State's general counsel Cynthia Baldwin; "Curley entered the courtroom with Ms. Baldwin, who was seated beside him during his testimony. At the outset, a deputy attorney general asked Curley, 'You have counsel with you?' . . . 'Yes, I do.' . . . The prosecutor then asked, 'Would you introduce her, please?' . . . Curley responded, 'My counsel is Cynthia Baldwin.' . . . Ms. Baldwin did not indicate at that time that she represented Curley solely in an agency capacity or that she was not representing him in a personal capacity."; "In the present case, Curley met with Ms. Baldwin to discuss the subpoena served on him to testify before a criminal grand jury investigating Jerry Sandusky. The subpoena was not for the University. This meeting was for the purpose of securing legal advice. The trial court itself found that Curley sought legal advice from Ms. Baldwin related to appearing before the grand jury investigation into Jerry Sandusky."; "Moreover, Ms. Baldwin did not adequately explain to Curley that her representation of him was solely as an agent of Penn State and that she did not represent his individual interests. Although Curley was certainly aware that Ms. Baldwin was general counsel for Penn State, this awareness did not result in Curley knowing that she represented him solely in an agency capacity. Indeed, it is illogical to conclude that Curley was aware of this critical distinction when there is no evidence to suggest that at the relevant time, the OAG and the supervising grand jury judge, experts in the law, were able to distinguish Ms. Baldwin's

representation of Curley as being so limited."; "Curley's final issue, that Ms. Baldwin violated his attorney-client privilege by testifying at a grand jury hearing regarding communications between him and her, flows from his prior positions. For the reasons already outlined, we agreed that Ms. Baldwin's grand jury testimony was improper. Ms. Baldwin was not competent to testify. Accordingly, and in light of our holding and discussion in Schultz [Commonwealth v. Schultz, 133 A.3d 294 (Pa. Super Ct. 2016)], we quash the obstruction of justice and related conspiracy charge and find that Ms. Baldwin is precluded from disclosing privileged communications between herself and Curley.").

In April 2016, the Pennsylvania Attorney General (who then was not able to practice law, because she had been suspended) determined not to appeal these rulings.

- Dan Packel, Pa. To Drop Appeals In Penn State Sex Abuse Cover-Up Case, Law360, Apr. 29, 2016 ("Pennsylvania Attorney General Kathleen G. Kane announced Friday that the state would not appeal rulings that slashed the charges faced by three former Pennsylvania State University administrators accused of interfering with the investigation into assistant football coach Jerry Sandusky's sexual abuse."; "Kane pointed to a legal opinion from recently appointed state Solicitor General Bruce Castor, who acknowledged concerns about how the trio were represented when they testified in front of a grand jury."; "The state's Superior Court in January found fault with the conduct of university general counsel Cynthia Baldwin, concluding that she should not have been permitted to testify against former Penn State President Graham Spanier, former Athletic Director Tim Curley and former Senior Vice President Gary Schultz, as their communications with her were protected by attorney-client privilege."; "The court also found that Schultz and Spanier were not properly represented during their testimony before a grand jury, as Baldwin had advised them that she was serving as their counsel when she had a stronger duty to the university."; "'Attorney General Kane recognizes the efforts of members of her office to get the cases to this point, but now directs her staff shall proceed in accordance with the opinions of the Superior Court, and prepare the cases for trial,' she said in a release."; "The state had initially asked the Superior Court for an en banc rehearing, but the court denied the request at the end of March. As a result of the decision not to appeal the rulings to the state's Supreme Court, Spanier and Schultz will no longer face perjury, obstruction of justice and conspiracy charges. Curley will no longer face obstruction of justice and conspiracy charges."; "The three men still face charges of failure to report suspected abuse and endangering the welfare of children, and Curley also faces a perjury charge. The state's decision not to

> appeal paves the way for a trial on these remaining charges, which had originally been anticipated for the spring of 2014, before the questions surrounding the grand jury testimony halted the process.").

Penn State General Counsel's experience highlights the wisdom of carefully defining the "client" in a corporate setting and -- especially -- avoiding the accidental creation of attorney-client relationships.

Best Answer

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

B 8/16

Communications With Former Employees

Hypothetical 15

You just spent an hour interviewing one of your corporate client's former employees.

Are your communications protected by the attorney-client privilege?

YES (PROBABLY)

Analysis

Most if not all states traditionally followed the "control group" privilege standard, which extended privilege protection only to communications between a company lawyer and those in the company's upper hierarchy -- who acted on the lawyer's advice. The United States Supreme Court reject this concept in the Upjohn case -- correctly extending privilege protection to a company lawyer's communication with any employee possessing facts the lawyer needs before giving advice to the company. Upjohn Co. v. United States, 449 U.S. 383 (1981). Starting with federal question cases, the Upjohn standard now applies in nearly every state but Illinois.

Once most courts abandoned what used to be the hierarchical "control group" privilege approach in favor of the functionality privilege approach, it was easy for them to extend privilege protection to companies' former employees. Most courts now protect such communications, as long as they deal with the former employees' experience at the company. Peralta v. Cendant, 190 F.R.D. 38 (D. Conn. 1999). A few courts take a different approach. Newman v. Highland School Dist., No. 90194-5, 2016 Wash. LEXIS 1135 (Wash. Sup. Ct. Oct. 20, 2016).

But this majority approach does not extend privilege protection to communication about what happened after the employee left. In 2014, a North Carolina federal court applied the general rule, and denied privilege protection to communications that clearly would have deserved privilege protection with a current employee. Winthrop Resources Corp. v. CommScope, Inc., Civ. A. No. 5:11-CV-172, 2014 U.S. Dist. LEXIS 158413 (W.D.N.C. Nov. 7, 2014).

Best Answer

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

Thomas E. Spahn, *Attorney Client Privilege and Work Product Doctrine: A Practitioner's Guide*, § 6.12 (3rd ed. 2013).

B 12/16

"Functional Equivalent" Doctrine

Hypothetical 16

As your client has downsized, it increasingly relies on temporary agency employees who are not on your client's payroll -- but who spend every day at the client's headquarters building handling clerical tasks.

Will the attorney-client privilege protect communications with or in the presence of these non-employees?

YES

Analysis

Courts applying the Upjohn standard focus on employees' function within the corporation and possession of knowledge the lawyer needs before giving advice to the corporation. Starting in 1994, courts began to extend protection to independent contractors who are the "functional equivalent" of corporate employees. In re Bieter Co., 16 F.3d 929 (8th Cir. 1994). This is an obvious and almost necessary doctrine, given corporations' increasing use of outsourced employees.

Courts adopting this "functional equivalent" standard often follow a multi-factor test articulated by the Southern District of New York in 2011. Steinfeld v. IMS Health Inc., No. 10 Civ. 3301 (CS)(PED), 2011 U.S. Dist. LEXIS 142288 (S.D.N.Y. Dec. 9, 2011).

However, not all courts endorse the "functional equivalent" doctrine. In July 2013, the Northern District of Illinois questioned the "functional equivalent" doctrine. BSP Software, LLC v. Motio, Inc., No. 12 C 2100, 2013 U.S. Dist. LEXIS 95511, at *2 (N.D. Ill. July 9, 2013). In December 2014, a Southern District of New York decision

predicted that the Second Circuit would not recognize the doctrine. Church & Dwight Co. v. SPD Swiss Precision Diagnostics, GmbH, No. 14-cv-585, 2014 U.S. Dist. LEXIS 175552 (S.D.N.Y. Dec. 19, 2014). These courts did not reject the doctrine, but their comments were disturbing.

Despite these worrisome decisions, it is difficult to imagine that courts will abandon this logical and necessary doctrine. Still, corporations must carefully assess any independent contractor's status. If independent contractors fall short of meeting the "functional equivalent" standard, their involvement in, or later receipt of, privileged communications can destroy or waive the privilege protection.

Best Answer

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

Thomas E. Spahn, *Attorney Client Privilege and Work Product Doctrine: A Practitioner's Guide*, § 6.13 (3rd ed. 2013).

B 12/16

Client and Lawyer Agents/Consultants

Hypothetical 17

One of your client's senior executives likes to establish what she calls "tiger teams" to deal with the client's thorniest problems. You wonder about the privilege impact of involving outsiders as "tiger team" members.

(a) Does the privilege protect communications with, in the presence of, or shared with an environmental consultant that your client considers a key participant in such a "tiger team?"

NO

(b) Would the privilege analysis be any different if you retained the environmental consultant?

NO (PROBABLY)

Analysis

(a) Perhaps the most dangerous privilege concept shared by many business executives is their incorrect equating of contractual confidentiality and privilege protection. This misunderstanding becomes most acute in connection with independent contractors assisting the client. In most courts, the only client agent/consultants within privilege protection are those necessary for the communication between a lawyer and the client.[60]

These include translators, interpreters, etc. Corporations generally lose privilege protection if they involve other client agent/consultants in otherwise privileged

[60] Cardinal Aluminum Co. v. Cont'l Cas. Co., Case No. 3:14-CV-857-TBR-LLK, 2015 U.S. Dist. LEXIS 95361, at *8 (W.D. Ky. July 22, 2015) (holding that plaintiff's insurance broker was outside privilege protection -- despite the plaintiff's CFO's affidavit that the plaintiff relied on the broker to submit an insurance claim, negotiate with the insurance company, and advise the plaintiff about the claims process; noting that "Plaintiff did to argue that its broker acted to effectuate legal representation for Plaintiff.").

communications, or share preexisting privileged communications with such agent/consultants -- such as environmental consultants, investment bankers, etc.

As a practical matter, this risk to privilege protection is magnified because such outsiders must be listed on privilege logs -- which can alert adversaries.

(b) Lawyer agent/consultants present a different analysis from client agent/consultants. For obvious reasons, having the lawyer retain who is really a client agent/consultant is not dispositive. Courts look at their bona fides of the arrangement, not who retained the agent/consultant. In fact, some courts have been extremely critical of lawyers who have tried to "launder" an agent/consultant's advice through the lawyer back to the client. Lawyers' assistants such as secretaries, paralegals, file clerks, etc. are clearly within the privilege -- because their assistance is required for the communication with clients.

Beyond that, many courts unfortunately start with the client agent/consultant analysis when considering privilege protection for lawyer agent/consultants. Although some courts are more protective, many courts protect only lawyers' agent/consultants who essentially act as translators or interpreters.[61] This does not make much sense, but is a widely applied approach. Lawyers' retainer letters with their agent/consultants should try to support this standard.

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[61] Fine v. ESPN, Inc., No. 5:12-CV-0836 (LEK/DEP), 2015 U.S. Dist. LEXIS 6870, at *324 (N.D.N.Y. May 28, 2015) (holding that a public relations firm hired by a law firm was outside privilege protection; noting that the privilege did not apply "[i]f public relations support is merely helpful, but not necessary to the provision of legal advice.").

Best Answer

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

Thomas E. Spahn, *Attorney Client Privilege and Work Product Doctrine: A Practitioner's Guide*, Chs. 8, 10, §§ 19.9, 19.11, 26.10, 26.11 (3rd ed. 2013).

B 12/16, 4/17

Non-Client Employees' Non-Material Misconduct

Hypothetical 18

While handling a business transaction for your client, you discovered that an assistant vice president with whom you are working (and with whom you have become quite friendly) has been stealing lunch every day from the company cafeteria.

What do you do?

(A) You must disclose the vice president's theft "up the ladder" within the corporation.

(B) You may disclose the vice president's theft "up the ladder" within the corporation, but you don't have to.

(C) You may not disclose the vice president's theft "up the ladder" within the corporation, unless the vice president consents.

(B) YOU MAY DISCLOSE THE VICE PRESIDENT'S THEFT "UP THE LADDER" WITHIN THE CORPORATION, BUT YOU DON'T HAVE TO

Analysis

One might expect the ethics rules to require lawyers to report essentially any important internal incident to an institutional client.

Under ABA Model Rule 1.4:

> [a] lawyer shall . . . keep the client reasonably informed about the status of the matter.

ABA Model Rule 1.4(3).

The end of one of ABA Model Rule 1.4 comments confirms that:

> paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

ABA Model Rule 1.4 cmt. [3]. This duty to communicate clearly covers any material development relating to lawyers' representation of a corporation or other organization.

Additional rules buttress this duty. For instance, ABA Model Rule 1.3's requirement that lawyers "shall act with reasonable diligence and promptness in representing a client" might require lawyers to disclose material developments within the organization to the organization's management. Of course, lawyers' fiduciary duties and other common law duties might supplement the ethics rules' obligations.

However, under ABA Model Rule 1.13, corporation lawyers' "up the ladder" disclosure duty applies only if:

> an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and . . . is likely to result in substantial injury to the organization.

ABA Model Rule 1.13(b) (emphasis added).

Similarly, the Restatement recognizes such an "up the ladder" reporting obligation only if an organization's lawyer:

> knows of circumstances indicating that a constituent of the organization has engaged in action or intends to act in a way that violates a legal obligation to the organization that will likely cause substantial injury to it, or that reasonably can be foreseen to be imputable to the organization and likely to result in substantial injury to it.

Restatement (Third) of Law Governing Lawyers § 96(2) (2000) (emphasis added).

Unlike the ABA Model Rules, the Restatement explains the type of wrongdoing that triggers this obligation.

> Within the meaning of Subsection (2), a wrongful act of a constituent threatening substantial injury to a client organization may be of two types. One is an act or failure to act that violates a legal obligation to the organization and that would directly harm the organization, such as by unlawfully converting its assets. The other is an act or failure to act by the constituent that, although perhaps intended to serve an interest of the organization, will foreseeably cause injury to the client, such as by exposing the organization to criminal or civil liability.
>
> In either circumstance, as stated in Subsection (2), if the threatened injury is substantial the lawyer must proceed in what the lawyer reasonably believes to be the best interests of the organization. Those interests are normally defined by appropriate managers of the organization in the exercise of the business and managerial judgment that would be exercised by a person of ordinary prudence in a similar position. The lawyer's duty of care is that of an ordinarily prudent lawyer in such a position . . . . In the face of threats of substantial injury to the organization of the kind described in Subsection (2), the lawyer must assess the following: the degree and imminence of threatened financial, reputational, and other harms to the organization; the probable results of litigation that might ensue against the organization or for which it would be financially responsible; the costs of taking measures within the organization to prevent or correct the harm; the likely efficaciousness of measures that might be taken; and similar considerations.

Restatement (Third) of Law Governing Lawyers § 96 cmt. f (2000) (emphasis added).

This is a surprisingly narrow view of corporation's lawyers' duty. In fact, normal fiduciary duties might well require disclosure of less serious incidents. And presumably most lawyers would have an interest in generating good will or avoiding malpractice by reporting employee wrongdoing that does not meet that heightened standard.

The few ethics opinions dealing with this issue normally involve fairly egregious constituent misconduct. However, as an example of the counterintuitive nature of the

"up the ladder" reporting obligation, a 2008 Michigan legal ethics opinion held that a corporation's lawyer did not have to inform management of a corporation officer's intent to destroy pertinent documents -- as long as the officer abandoned the intent.

- Michigan LEO RI-345 (10/24/08) ("An officer of a corporation has informed the corporation's lawyer of his intent to destroy documents that are subject to a judicial discovery order, and asks the lawyer to return copies of those documents in the lawyer's possession. The lawyer should first attempt to dissuade the officer from the threatened misconduct. If the officer does not recant, the lawyer should refer the matter to higher authority in the organization. The lawyer should decline to return copies of the documents in his possession until the matter is resolved so as not to assist in the unlawful destruction or concealment of evidence. The lawyer may continue representing the corporation and is not required to withdraw merely because the officer suggests improper conduct." (emphasis added)).

Upon reflection, this is a remarkable result. The Michigan Bar must not have thought that the officer was joking, because it directs the lawyer to withhold the documents from the officer "until the matter is resolved" -- whatever that means. One would think upper management would like to know that an officer made such a serious threat, even if the officer did not have a chance to carry it out because the lawyer withheld the documents.

It is unclear why the ABA Model Rules have always taken such a narrow view of lawyers' duty to report "up the ladder" within a corporate client. Although the ABA has only reluctantly allowed lawyers to disclose certain protected client information, that reluctance should not have ever affected this scenario -- in which the lawyer learns of non-clients' wrongdoing. One would think that the same duty of loyalty restricting lawyers' disclosure of protected client information would magnify lawyers' obligation to advise a corporate client about what is going on inside it.

Best Answer

The best answer to this hypothetical is **(B) YOU MAY DISCLOSE THE VICE PRESIDENT'S THEFT "UP THE LADDER" WITHIN THE CORPORATION, BUT YOU DON'T HAVE TO**.

B 4/15, 8/15

Non-Client Employees' Misconduct Unrelated to the Representation

Hypothetical 19

You have represented a water authority for over a decade, and have come to know most of its executives. As a litigator, you rarely become involved in any transactional matters (unless they result in litigation). You recently stumbled onto evidence that the client's CEO has been embezzling substantial amounts of money and signing off on materially false reports to the state. The CEO's misconduct is unrelated to anything you are handling for the client.

What do you do?

(A) You must disclose the CEO's embezzlement and other misconduct "up the ladder" within the client.

(B) You may disclose the CEO's embezzlement and other misconduct "up the ladder" within the client, but you don't have to.

(C) You may not disclose the CEO's embezzlement and other misconduct within the client, unless the CEO consents.

(B) YOU MAY DISCLOSE THE CEO'S EMBEZZLEMENT AND OTHER MISCONDUCT "UP THE LADDER" WITHIN THE CORPORATION, BUT YOU DON'T HAVE TO

Analysis

One might think that a corporation's lawyers would be obligated to report any serious corporate constituent's misconduct that threatens the corporation -- even if the lawyers stumble upon misconduct unrelated to the matter the lawyer is then handling.

In fact, the ABA Task Force suggesting post-Enron changes to ABA Model Rule 1.13 suggested such a change.

> The Task Force therefore recommends that Rule 1.13 be amended to make clear that it requires the lawyer to pursue the measures outlined in Rule 1.13(c)(1) through (3)

> (including referring the matter to higher corporate authority), in a matter either related to the lawyer's representation (as currently provided) or that has come to the lawyer's attention through the representation, where the misconduct by a corporate officer, employee or agent involves crime or fraud, including violations of federal securities laws and regulations. Rule 1.13(b) could also be amended to emphasize in the text of the Rule itself that the list of potential remedial measures need not be pursued in sequential order, and that in circumstances involving potentially serious misconduct with significant risk to the corporation, an effort to seek reconsideration by a particular officer or employee that is unlikely to succeed should be bypassed in favor of referral to a higher authority in the corporation. Finally, the Task Force recommends that both the text of and Comments to Rule 1.13 should be revised to avoid unduly discouraging action by counsel to prevent or rectify corporate misconduct, and to encourage lawyers to take the action required by the rule.

Preliminary Report of the American Bar Association Task Force on Corporate Responsibility July 16, 2002, 58 Bus. Law. 189, 204 (Nov. 2002) (footnotes omitted) (emphasis added). However, the Task Force eventually dropped that expansion.

Under current ABA Model Rule 1.13, corporations' lawyers face an "up the ladder" reporting requirement only for very serious misconduct "in a matter relating to the representation."

> If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if

> warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

ABA Model Rules 1.13(b) (emphasis added).

The Restatement takes a different approach, not limiting such "up the ladder" reporting obligations to matters relating to the lawyer's work.

> If a lawyer representing an organization knows of circumstances indicating that a constituent of the organization has engaged in action or intends to act in a way that violates a legal obligation to the organization that will likely cause substantial injury to it, or that reasonably can be foreseen to be imputable to the organization and likely to result in substantial injury to it, the lawyer must proceed in what the lawyer reasonably believes to be the best interests of the organization.

Restatement (Third) of Law Governing Lawyers § 96(2) (2000).

As a practical matter, the ABA Model Rules' limitation to matter-related constituent wrongdoing may have little impact. Corporations' lawyers presumably would report any substantially material misconduct to corporate management, even if unrelated to the matters being handled by the lawyer. In fact, not doing so might very well violate the lawyers' duties of diligence and loyalty. One would expect the lawyers' fiduciary and other duties to also require such reporting.

Best Answer

The best answer to this hypothetical is **(B) YOU MAY DISCLOSE THE CEO'S EMBEZZLEMENT AND OTHER MISCONDUCT "UP THE LADDER" WITHIN THE CORPORATION, BUT YOU DON'T HAVE TO**. B 4/15, 8/15

Non-Client Employees' Serious Misconduct

Hypothetical 20

Your firm's largest client's executive vice president is both your closest friend and the source of nearly all your firm's work for the client. When your friend recently invited you to lunch to discuss an important issue, you assumed it involved one of the deals you are work on. However, your friend instead tearfully confessed that he has been taking kick-backs from suppliers. He begs you not to tell anyone else about it.

What do you do?

(A) You must disclose the vice president's wrongdoing "up the ladder" within the corporation.

(B) You may disclose the vice president's wrongdoing "up the ladder" within the corporation, but you don't have to.

(C) You may not disclose the vice president's wrongdoing "up the ladder" within the corporation, unless the vice president consents.

(A) YOU MUST DISCLOSE THE VICE PRESIDENT'S WRONGDOING "UP THE LADDER" WITHIN THE CORPORATION

Analysis

Under both the ethics rules and common law principles, lawyers who represent organizations have an attorney-client relationship with the incorporeal institution.

ABA Model Rule 1.13 puts it this way:

> A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

ABA Model Rule 1.13(a). ABA Model Rule 1.13(g) recognizes that:

> A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7 [which addresses conflicts of interest].

ABA Model Rule 1.13(g).

The parallel comment does not provide any additional useful guidance. ABA Model Rule 1.13 cmt. [12] ("Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder."). Actually, the comment describes a subset of an organization's constituents that the organization's lawyer may also represent in the appropriate circumstances.

In any event, lawyers who limit their representation to the organization itself may discover constituent wrongdoing. Although it may seem counterintuitive at first, that scenario involves lawyers reporting non-clients' wrongdoing to a client.

Pre-Enron ABA Model Rules

The ABA rarely dealt with corporate lawyers' intra-corporate disclosure obligations before the Enron scandal.

Nearly 30 years before the ABA adopted its 1969 ABA Model Code, the ABA recognized a common-sense notion that an institution's lawyer should disclose a constituent's misconduct to the institution's leadership.

- ABA LEO 202 (5/25/40) (analyzing the ethics implications of a trust company's lawyer who has learned that a manager hired by trust beneficiaries to oversee property transactions and pay the proceeds to the trust company has embezzled money -- creating a liability for the trust company to the beneficiaries; explaining that a trust company officer requests the lawyer to draft a contract under which the embezzling manager will purchase the beneficial interest in the trust -- which the lawyer advises will be proper only if the trust company discloses the embezzlement to the beneficiaries; further explaining that the lawyer later learns that a manager has purchased the beneficiaries' interest at nominal prices, and without the disclosure of the embezzlement "with the apparent purpose of eliminating the beneficiaries and concealing from them [the manager's] embezzlements in the trust company's liability"; noting that the lawyer then learns that the trust company's general counsel knew of this action; concluding that the lawyer

may not disclose the manager's embezzlement to the beneficiaries without the trust company's consent, because the purchase transaction has already been conseminated; also concluding that the lawyer may advise the trust company's board of directors of the situation, but may not start disciplinary proceedings against trust company officers acting as lawyers without the trust company's consent -- although the lawyer may disclose confidential client information if the trust company makes a false accusation against the lawyer; "Knowledge of the facts respecting B's defalcations, the trust company's liability therefor, and the plan to purchase the outstanding certificates was imparted to A as attorney for the trust company, and was acquired during the existence of his confidential relations with the trust company. He may not divulge confidential communications, information, and secrets imparted to him by the client or acquired during their professional relations, unless he is authorized to do so by the client."; "Had A been advised that the trust company intended to carry out the plan to purchase the outstanding certificates without making the disclosures which he advised should be made, and if such transaction would have constituted an offense against criminal law when carried out, he might have made disclosure at that time."; "But, since it does not appear that A was advised of such intention on the part of the trust company, and since the transaction has been consummated, we conclude the exception is not applicable and that A must keep the confidences of his client inviolate."; "Since, however, the board of directors of the trust company is its governing body, we think A, with propriety, may and should make disclosures to the board of directors in order that they make take such action as they deem necessary to protect the trust company from the wrongful acts of its executive officers. Such a disclosure would be to the client itself and not to a third person." (emphasis added); "We are of the opinion that A may not, without consent of the trust company, institute disciplinary action against the officers of the trust company who are members of the Bar, if to do so would involve a disclosure of confidential communications to A."; "Neither do we think A may initiate, without consent of the trust company, any proceeding to protect himself which would involve a disclosure of such confidential communications. He would be justified in making disclosure only if he should be subject to false accusation by the trust company.").

The 1983 ABA Model Rules of Professional Conduct finally addressed corporations' lawyers' obligation to undertake what is frequently called "up-the-ladder" reporting or "reporting up" of corporate constituents' misconduct. This internal reporting obligation contrasts with such lawyers' possible duty or discretion to report corporate

constituents' misconduct outside the corporation. Not surprisingly, that is called "reporting out."

Because such lawyers represent the corporate entity, such disclosure to third parties often involves disclosing the client's possible wrongdoing (based on the respondeat superior doctrine or some other imputed theory liability). This is far different from the "up-the-ladder" reporting, which involves lawyers' disclosure of non-clients' (corporate employees) wrongdoing to the corporate client.

Under the long-standing version of ABA Model Rule 1.13, lawyers were required to take some action if they "knew" of any action by company employees that (1) violated the employees' legal obligation to the corporation or was a "violation of law" which could be imputed to the corporation; (2) was related to the lawyer's representation; and (3) could subject the company to "substantial injury."

When deciding how to proceed, lawyers had to consider a number of factors listed in the Rule. ABA Model Rule 1.13 offered suggested courses of conduct, including reporting up the corporate ladder all the way to the board of directors (if necessary). The lawyer could resign if the corporation's "highest authority" insisted upon action (or "a refusal to act") that was "clearly" a legal violation and was likely to result in "substantial injury" to the company. ABA Model Rule 1.13(c).

The ABA debated dramatic changes to ABA Model Rule 1.13 after Enron, but ended up passing fairly modest changes. That is discussed below.

Sarbanes-Oxley

After the Enron scandal (which was quickly followed by other similar corporate meltdowns), Congress moved quickly to impose an additional layer of government regulation. Led by Maryland Senator Sarbanes and Ohio Congressman Oxley, Congress moved with remarkable speed.

Near the very end of the congressional legislative process, North Carolina Senator John Edwards noted lawyers' role in corporate failures.

> In recent weeks we have learned about high-flying corporations that came crashing to the ground after top executives played fast and loose with the law. And we have heard how ordinary employees and shareholders can lose their life savings when millionaire managers break the rules.
>
> . . .
>
> The Securities and Exchange Commission has an essential part to play as well. For some time, the SEC promoted the basic responsibility of lawyers to take steps in order to step corporate managers from breaking the law. The rule for lawyers that the SEC promoted was simple: If you find out managers are breaking the law, you tell them to stop. And if they won't stop, you go to the board of directors, the people who represent the shareholders, and you tell them what is going on.
>
> After promoting the simple principle that lawyers must "go up the ladder" when they learn about misconduct, the SEC gave up the fight. They gave up the fight in part because the American Bar Association opposed their efforts.

Congressional Record, Proceedings and Debates of the 107th Congress, Second Session, Vol. 148, No. 81, *S5652, June 18, 2002 (emphasis added).

About three weeks later, Senator Edwards spoke about an amendment that he and two other senators (including New Jersey's Senator Jon Corzine) intended to introduce.

> For some time, the SEC actually tried to do that in the late 1970s and early 1980s. They brought legal actions to enforce this basic responsibility of lawyers -- the responsibility to take steps to make sure corporate managers didn't break the law and harm shareholders in the process. If you find out that the managers are breaking the law, you must tell them to stop. If they won't stop, you go to the board of directors, which represents the shareholders, and tell them what is going on. If they won't act responsibility and in compliance with the law, then you go to the board and say something has to be done; there is a violation of the law occurring. It is basically going up the ladder, up the chain of command.
>
> For years, the SEC recognized the principle that lawyers had a legal responsibility to go up the ladder if they saw wrongdoing occurring. But then they stopped. One of the reasons they stopped is because there were a lot of protests coming from the organized bar.
>
> . . .
>
> The time has come for Congress to act. This amendment acts in a very simple way. It basically instructs the SEC to start doing exactly what they were doing 20 years ago, to start enforcing this up-the-ladder principle.

Congressional Record, Proceedings and Debates of the 107th Congress, Second Session, Vol. 148, No. 92, *S6552, July 10, 2002 (emphasis added).

Senator Edwards' suggestion quickly became part of the fast-moving legislative process.

In 2003, George Washington University Law School Professor Thomas Morgan discussed the Sarbanes-Oxley statute and regulations. Thomas D. Morgan, Sarbanes-

Oxley: A Complication, Not a Contribution, in the Effort to Improve Corporate Lawyers' Professional Conduct, 17 Geo. J. Legal Ethics 1 (Fall 2003). Among other things, Professor Morgan described how Sarbanes-Oxley came to include a provision applying to lawyers.

> [O]n June 25, 2002, when Senator Sarbanes introduced Senate Bill 2673 -- the Senate version of the bill that ultimately became Sarbanes-Oxley -- there was no special provision for regulation of lawyers. On July 10, 2002, however, Senator Edwards changed that. Announcing that Chairman Pitt had not even deigned to reply to his own letter at all, Senator Edwards proposed an amendment ("Edwards Amendment") that became Section 307 of the Act and that required the SEC, not later than 180 days after passage of the Act, to "establish rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorney appearing and practicing before the Commission in any way in the representation of public companies, including a rule requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof) and, if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors [of the issuer] or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the company, or to the board of directors."
>
> Debate on the amendment was brief, and on July 15, it was adopted by the Senate by a vote of 97-0. The entire S. 2673, as amended, passed shortly thereafter by the same margin.

Id. at 15-16 (footnotes omitted). Professor Morgan noted how quickly the final version passed Congress.

> The Act passed the House . . . on July 25, 2002, by the overwhelming vote of 423-3. It passed the Senate 99-0 on July 30. The whole legislative process had taken less than eight months from the time of the Enron bankruptcy.

Id. at 18 (footnoted omitted).

For lawyers, the most important Sarbanes-Oxley provision contained just 171 words, but generated a vigorous debate among bars, scholars, and practitioners.

> Not later than 180 days after the date of enactment of this Act, the Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule -- (1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and (2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

15 U.S.C. § 307 (2002).

Thus, Section 307 of Sarbanes-Oxley directed the Securities and Exchange Commission ("SEC") to issue regulations requiring lawyers "appearing and practicing" before the SEC who possess any "evidence" of a "material" securities law violation, breach of fiduciary duty, or "similar violation" to (1) report the evidence to the company's chief legal or executive officer; and (2) if that officer does not "appropriately respond,"

report the evidence to the company's audit committee, independent directors, or the full board.

The SEC's original proposed regulations would have covered a large number of lawyers (many of whom would not even know that they were "appearing and practicing" before the SEC), demanded extensive record-keeping, and sometimes required lawyers whose corporate clients engaged in misconduct to withdraw, and disavow tainted work product.

After a flurry of criticism, the SEC dropped most of these dramatic proposals.

The final rules only cover lawyers transacting business with the SEC; representing parties or witnesses in connection with an SEC investigation or proceeding; providing securities law advice about any document that the lawyer has notice will be filed with or submitted to the SEC; or providing advice about whether an issuer must make such a filing. The new regulations explicitly exclude lawyers who engage in activities other than providing legal services.

The rules require covered lawyers to report "up the ladder" if they have "evidence of a material violation" of particular corporate wrongdoing. For obvious reasons, the linchpin of the entire regulatory scheme is the meaning of "evidence of a material violation."

On December 2, 2002, the SEC issued its proposed regulations. Among other things, the proposed regulations defined "evidence of material violation" as follows:

> Evidence of a material violation means information that would lead an attorney reasonably to believe that a material violation has occurred, is occurring, or is about to occur.

Federal Register, Vol. 67, No. 231, Proposed Rules, at 71678(e), December 2, 2002 (second emphasis added).

The proposed regulation defined "reasonably believes" as follows:

> Reasonably believes means that an attorney, acting reasonably, would believe the matter in question.

Id. at 71680(l) (second emphasis added).

The proposed regulations wisely invited comments about these proposed regulations.

> Interested persons are invited to comment on whether this definition is sufficiently clear and whether alternative language would be an improvement.

Id.

The SEC issued its final regulations about two months later.

The final regulation's definition of "evidence of a material violation" contains a confusing series of negatives:

> Evidence of a material violation means credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur.

68 Fed. Reg. 6296, 6301(e) (Feb. 6, 2003) (emphasis added; first emphasis in original).

The final definition of "reasonably believes" is about as useless as the proposed definition:

> Reasonably believes means that an attorney believes the matter in question and that the circumstances are such that the belief is not unreasonable.

Id. at 6305(m) (second emphasis added).

Interestingly, five years before the SEC issued these tortured definitions, the agency promulgated clear writing guidelines -- including the following recommendations:

> Write in the "positive"
>
> Positive sentences are shorter and easier to understand than their negative counterparts.
>
> . . .
>
> Also, your sentences will be shorter and easier to understand if you replace a negative phrase with a single word that means the same thing.
>
> . . .
>
> Use short sentences:
>
> The longer and more complex a sentence, the harder it is for readers to understand any single portion of it.

U.S. Sec. & Exch. Comm'n, Office of Investor Educ. & Assistance, A Plain English Handbook: How to create clear SEC disclosure documents, at 27-28, Aug. 1998.

Not surprisingly, the SEC's definition has drawn academic criticism.

> The SEC rules define "evidence of a material violation" in Section 205.2(e) as "credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is occurring, or is about to occur."
>
> . . .
>
> In deciding whether to act -- whether to report what Congress wanted to encourage lawyers to report up the corporate ladder -- the lawyer confronting the definition of "evidence of a material violation" in Section 205.2(e) must ask herself whether it would be unreasonable not to conclude that the evidence before her demonstrates a reasonable likelihood of a material violation of law. This definition, which triggers the up-the-ladder reporting duty, is

> troublesome because its use of a double-negative formulation makes the standard difficult to understand, interpret or apply.
>
> Law is intended to guide action in the world. Yet it is barely possible to read the SEC's definition out loud without tripping (or, as we have discovered when presenting this definition in various fora, chuckling) over the words, let alone trying to remember the definition without reading it or trying to work out its "logic." Indeed, the provision is a gross violation of the SEC's own "plain English" rules applicable to SEC filings intended for investors. Similar language in a prospectus would not fare well.

Roger C. Cramton, George M. Cohen, and Susan P. Koniak, Legal and Ethics Duties of Lawyers After Sarbanes-Oxley, 49 Vill. L. Rev. 725, 752-53 (2004) (emphases added).

In contrast, widely-respected Professor Thomas Morgan defended the SEC's definition.

> The definition of "evidence of a material violation" is not a model of clarity. It is written in a double-negative and says the term "evidence" consists of all "credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur. The wording of the definition is clumsy but not accidental. Saying that a lawyer must report everything that *any* reasonably prudent and competent attorney *could* think might violate the law would leave companies awash in such reports. This definition says more nearly that a lawyer must report only such information as *no* reasonably prudent and competent attorney would *fail* to report.

Thomas D. Morgan, Sarbanes-Oxley: A Complication, Not a Contribution, in the Effort to Improve Corporate Lawyers' Professional Conduct, 17 Geo. J. Legal Ethics1, 20 (Fall 2003) (footnote omitted) (emphases added; emphases in original indicated by italics).

As soon as Congress passed Sarbanes-Oxley, and the SEC began considering regulations, bar groups, academicians, and practicing lawyers started a drumbeat of criticism. These attacks intensified after the SEC issued its proposed regulations, and reached a crescendo as the SEC was considering scaling back some of its proposed regulations.

The lawyers critical of Sarbanes-Oxley and the SEC's regulations focused on both process and substance.

First, the critics worried that Section 307 would begin the "federalization" of lawyer ethics rules. Lawyers are not only one of the last self-regulated professions -- they also look almost exclusively to state rather than federal law in determining their ethics obligations. There are no nationwide ethics rules. The widely quoted ABA Model Rules do not govern a single lawyer's conduct -- they merely reflect a voluntary bar association's suggested guidelines. The ABA Model Rules mean nothing unless a state bar adopts them in whole or in part to guide lawyers within that state. The critics of Section 307 worried that having a nationwide ethics obligation would start down a slippery slope. They also fretted because Congress had imposed this new obligation by statute -- in most states, courts take the primary responsibility for adopting ethics rules.

These worries might have made sense in general, but not in the context of Sarbanes-Oxley. Government agencies, commissions, and other entities before whom lawyers practice have always prescribed rules for those lawyers. The Internal Revenue Service, the United States Patent and Trademark Office, the Securities and Exchange

Commission itself, and other agencies regulate lawyers appearing before them, and Section 307 simply followed that tradition.

Second, critics of Section 307 argued that the reporting requirement would "chill" lawyers' relationship with corporate clients' employees. They reasoned that company employees would not share information with the company's lawyer, for fear that the lawyer would reveal their conversations up the corporate ladder.

On this issue, some lawyers' blasts at Sarbanes-Oxley became remarkably shrill. For instance, a New York lawyer started a column appearing in the March 23, 2003 Washington Times with the following paragraph:

> April may well be the cruelest month for lawyers practicing before the Securities and Exchange Commission; that is, if the Commission has its way with a new rule, set for adoption for April 7, that many believe would strike a dagger to the heart of the attorney client relationship.

James D. Zirin, Op-Ed, Risky SEC Rule for Noisy Withdrawal?, Wash. Times, Mar. 23, 2003, at B4 (emphasis added). This is pretty harsh language -- even for a lawyer.

This criticism ignored a basic tenet of all ethics rules. When a lawyer represents an organization, the organization itself -- the institution -- is the lawyer's client. ABA Model Rule 1.13(a). A corporation's employees merely act as agents for the institutional client. In fact, when lawyers deal with a company employee in situations where the lawyer "knows or reasonably should know" that the employee's interests are adverse to the organization's interests, the lawyer must explain the "identity of the client." ABA Model Rule 1.13(f).

Thus, lawyers sharing information they learned from company employees with company management are merely serving the institutional client -- as they must. If the critics of Section 307 believed that the reporting requirement would deter corporate employees from sharing secrets with company lawyers, they must have been advocating a system in which a company lawyer may keep secret from management any material information that the lawyer learns from company employees. This is not only contrary to well-settled ethics and agency principles, it is both inconceivable to a lawyer owing a duty of loyalty to the institution, and unworkable on a day-to-day basis.

Post-Enron ABA Task Force Initial Proposals

In the post-Enron reevaluation that many American institutions undertook, the ABA appointed a Task Force on Corporate Responsibility to examine possible revisions to Model Rule 1.13. As with the SEC's watering down of the Sarbanes-Oxley regulations, the ABA Task Force came in like a lion and went out largely like a lamb.

The Task Force's initial July 16, 2002, proposals suggested three dramatic changes in Model Rule 1.13.

First, the Task Force wanted to change the knowledge standard triggering a lawyer's up-the-ladder disclosure requirements from "know" to "reasonably should know."

> [T]he mandate of Rule 1.13 applies only if the lawyer "knows" that a person associated with an organization is engaging in or intends to engage in misconduct. The Model Rules define "knows" as "actual knowledge of the fact in question." While a person's knowledge "may be inferred from the circumstances," this term presumably does not reach conduct covered by the term "reasonably should know," which is also defined in the Model Rules.

> . . .
>
> There has also been criticism of corporate lawyers for turning a blind eye to the natural consequences of what they observe and claiming that they did not 'know' that the corporate officers they were advising were engaged in misconduct. The Task Force believes that, while lawyers should not be subject to discipline for simple negligence, they should not be permitted to ignore the obvious. Instead, lawyers should be held to the 'reasonably should know' standard, defined in the Model Rules as denoting 'that a lawyer of reasonable prudence and competence would ascertain the matter in question.'

Preliminary Report of the ABA Task Force on Corporate Responsibility July 16, 2002, 58 Bus. Law. 189, 207-08 (Nov. 2002) (footnote omitted) (emphasis added).

That would have moved away from a requirement of actual knowledge toward a negligence standard, which of course would have created a duty to investigate. The final Task Force proposal (April 29, 2003) dropped that change, and kept the "know" standard.

Second, the Task Force's initial proposal would have required lawyers to report the specified wrongdoing even it was unrelated to the lawyer's representation -- again widening the lawyer's duties of investigation and disclosure.

> The Task Force therefore recommends that Rule 1.13 be amended to make clear that it requires the lawyer to pursue the measures outlined in Rule 1.13(c)(1) through (3) (including referring the matter to higher corporate authority), in a matter either related to the lawyer's representation (as currently provided) or that has come to the lawyer's attention through the representation, where the misconduct by a corporate officer, employee or agent involves crime or fraud, including violations of federal securities laws and regulations. Rule 1.13(b) could also be amended to emphasize in the text of the Rule itself that the list of potential remedial measures need not be pursued in

> sequential order, and that in circumstances involving potentially serious misconduct with significant risk to the corporation, an effort to seek reconsideration by a particular officer or employee that is unlikely to succeed should be bypassed in favor of referral to a higher authority in the corporation. Finally, the Task Force recommends that both the text of and Comments to Rule 1.13 should be revised to avoid unduly discouraging action by counsel to prevent or rectify corporate misconduct, and to encourage lawyers to take the action required by the rule.

Id. at 204 (footnotes omitted) (emphasis added). The final Task Force proposal retained the current "related to the representation" standard.

The third material change in the Task Force's initial proposal was the only one to survive. That proposal allows (but does not require) a lawyer to reveal (outside the company) violations by one of the corporation's constituents of a "legal obligation to the organization" or a "violation of law" that might be imputed to the organization -- if the lawyer believes the violation is "reasonably certain to result in substantial injury to the organization." Model Rule 1.13 (b), (c).

In addition to this important change, the final Task Force report recommended some fine-tuning to Model Rule 1.13.

For instance, the Task Force recommended changing some language in Model Rule 1.13 to reiterate that lawyers must take some action upon learning of reportable wrongdoing. The Task Force also suggested that parts of Model Rule 1.13 be rewritten to eliminate comments that could be interpreted as diminishing the duty of disclosure. For instance, old Model Rule 1.13 Comment [3] formerly explained that a lawyer needed "clear justification" to go over the head of a corporate constituent with whom the lawyer deals. The Task Force's final proposal eliminated such discouraging language.

The ABA Task Force also recommended that corporations adopt policies in which general counsel periodically meet with independent board members (to discuss possible corporate wrongdoing), and that outside counsel should likewise establish a direct line of communication with the general counsel to discuss possible corporate wrongdoing.

Perhaps the most remarkable portion of the ABA Task Force's initial proposal involved changes to ABA Model Rule 1.6 -- which deals with confidentiality.

The Task Force's report noted that the ABA has just rejected two Ethics 2000 proposals that would have expanded the scope of lawyers' discretionary disclosure of client wrongdoing.

> The ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000") proposed in February of this year, consistent with the Restatement (Third) of the Law Governing Lawyers, that three exceptions be added to Model Rule 1.6 to permit the lawyer to disclose client confidences to third parties. The ABA House of Delegates approved one of those exceptions, permitting disclosure when necessary to prevent reasonably certain death or substantial bodily harm. It rejected the other two Ethics 2000 proposals to expand permissive disclosure under Rule 1.6. Those proposals would have permitted disclosure to prevent or rectify the consequences of a crime or fraud in which the client had used or was using the lawyer's services and that was reasonably certain to result, or had resulted, in substantial injury to the financial interests or property of another.
>
> The Task Force recommends that the House of Delegates reconsider and adopt these Ethics 2000 proposals.

Preliminary Report of the ABA Task Force, 58 Bus. Law. at 205.

The Task Force also noted that most states had rejected the ABA's very narrow approach to a lawyer's disclosure of client wrongdoing.

> Forty-one states either permit or require disclosure to prevent a client from perpetrating a fraud that constitutes a crime, and eighteen states permit or require disclosure to rectify substantial loss resulting from client crime or fraud in which the client used the lawyer's services. If existing Rule 1.6 was "out of step with public policy" a year ago, as Ethics 2000 concluded, it is even more out of step today, when public demand that lawyers play a greater role in promoting corporate responsibility is almost certainly much stronger. The Ethics 2000 proposals are an important part of an effective response to the problems that have provoked public criticism of the bar.

Id. at 206-07(footnotes omitted).

The Task Force recommended that the ABA revisit and approve these Rule 1.6 changes.

But then the Task Force went even further -- suggesting mandatory rather than discretionary disclosure.

> The Task Force further recommends amendment to Rule 1.6 to make disclosure mandatory, rather than permissive, in order to prevent client conduct known to the lawyer to involve a crime, including violations of federal securities laws and regulations, in furtherance of which the client has used or is using the lawyer's services, and which is reasonably certain to result in substantial injury to the financial interests or property of another.

Id. at 206 (emphasis added).

This would have been an astonishing change, if it had been included in the ABA Task Force's final recommendations, and adopted by the ABA House of Delegates.

The ABA has never recognized a mandatory duty to report even a client's unequivocal intent to kill someone. That has always been a discretionary provision, not mandatory. See ABA Model Code DR 4-101(C); ABA Model Rule 1.6(b)(1). If it had been adopted, the ABA Task Force's recommended provision would have required lawyers to report clients' intent to violate the federal securities laws and regulations, but not the clients' intent to murder someone. That would have been so obviously embarrassing to the ABA that one must wonder why the ABA Task Force even hinted at it, let alone included such a provision in its initial proposal.

A number of commentators have noted that during June and July of 2002 (when the ABA Task Force on Corporate Responsibility was formulating its preliminary report), Senator John Edwards and Jon Corzine were pushing for lawyer regulation in the Sarbanes-Oxley law, and Congress was debating Sarbanes-Oxley. Senator Edwards proposed the amendment that became Sarbanes-Oxley Section 307 just six days before the ABA Task Force's preliminary report, and the Senate unanimously adopted the Edwards Amendment just one day before the ABA Task Force's preliminary report. A number of commentators have surmised that the ABA Task Force floated its mandatory reporting proposal as a way to forestall more onerous congressional action.

In any event, the proposed mandatory reporting provision was not only excluded from the ABA Task Force's final report, it wasn't even mentioned in the ABA Task Force's April 29, 2003, final report.

ABA Task Force Final Report

Continuing in its back-and-forth interaction with Congress and the SEC, the ABA's Task Force on Corporate Responsibility issued its final report less than two months after the SEC's February 6, 2003, issuance of final regulations (and "reporting out" proposal).

The Task Force's final Report did not even mention its earlier outlandish suggestion that lawyers be required to report certain past client misconduct that might cause financial damage to a third person. If the Task Force's proposal of a mandatory disclosure obligation of clients' financial crimes or frauds was designed to deter the SEC from immediately adopting its own disclosure obligation in the corporate context or more widely, the tactic worked.

The final Report also abandoned (but at least mentioned) the Preliminary Report's suggestion that lawyers' "reporting up" requirement involve sufficiently egregious corporate constituent misconduct even if unrelated to the lawyer's representation. The final Report described the reason for this shift.

> In its deliberations, the Task Force considered whether the lawyer's duties under the Rule should continue to be triggered only by matters that are "related to the representation." The Task Force's Preliminary Report recommended that the Rule require the lawyer to act with respect to any known violation, even if not related to the representation. Others point out, however, that it would be unfair to hold responsible a lawyer working in one field of the law to understand that facts of which he was aware should have led to a conclusion of law violation in a field with which he was unfamiliar. The Task Force is persuaded by this analysis and recommends that this qualification be retained in the Rule.

Report of the ABA Task Force on Corporate Responsibility, 59 Bus. Law. 145, 168 (Nov. 2003) (emphasis added) (footnotes omitted).

The Task Force's final Report suggested two substantive changes to then-current ABA Model Rule 1.13.

> [T]he Task Force recommends two substantive revisions to Rule 1.13(b). The first is a refinement of the definition of the circumstances that trigger the lawyer's duty to take action within the organization. The second clarifies the circumstances in which the lawyer is required to communicate with a higher authority within the organization. Currently, Rule 1.13(b) requires a lawyer for an organizational client to act when the lawyer 'knows' that a person within the organization is violating or intends to violate the law and is likely to cause substantial injury to the organization. The Task Force recommends that this prerequisite be revised to differentiate between knowledge of facts and evaluation of legal consequences. As under the current rule, the starting point of the recommended rule is subjective: the obligation to take action would arise only on the basis of the facts known to the lawyer. The proposed trigger for requiring action by the lawyer then proceeds to an objective test, namely, whether a reasonable lawyer who knows such facts would, in similar circumstances, conclude that the conduct in which a constituent is engaging or intends to engage constitutes a violation of law or duty to the organization that is likely to result in substantial injury to the organization. This standard recognizes that there is a range of reasonable conduct, and that a lawyer satisfies that standard by acting within that range. Moreover, it does not imply any duty on the lawyer's part to investigate or inquire further as to information provided by a client or the client's agent, or by a person to whom the lawyer has been referred by the client. Although the lawyer is under no duty to investigate or inquire, however, the lawyer may not simply accept such information at face value if to do so would be unreasonable in the circumstances.
>
> The second substantive change to Rule 1.13(b) recommended by the Task Force addresses the lawyer's obligation to report wrongdoing to higher authority in the

> organizational client. Currently, that rule identifies 'reporting up' as a potential course of action when the lawyer has discerned an actual or threatened violation of law or violation of legal obligation to the organization, but the Rule imposes no clear obligation to pursue that course of action. The Task Force believes, however, that the Rule should more actively encourage such action, by requiring that the lawyer refer the matter to higher authority in the organization -- including if warranted, the organization's highest authority -- unless the lawyer reasonably believes that it is not necessary to do so.

Id. at 166-68 (emphases added) (footnotes omitted).

The Task Force even proposed specific language for the second proposed change.

> If a lawyer for an organization knows facts from which a reasonable lawyer, under the circumstances, would conclude that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization as determined by applicable law.

Id. at 169 (emphasis added).

The Task Force's final Report also proposed a new ABA Model Rule 1.13 provision addressing lawyers' continuing obligation to "report up" even after they had withdrawn from representing the corporate client or had been terminated.

> The Task Force also recommends that Rule 1.13 be amended to include a new provision to assure that the

> organization's highest authority is made aware that a lawyer for the organization has withdrawn or is discharged in circumstances addressed by the Rule. In some instances, the actions of the lawyer within the organization, pursuant to Rule 1.13(b), may fail to prevent or avoid action that seriously threatens the interest of the organization. Current Rule 1.13(c) provides that a lawyer, in this circumstance, may choose to withdraw. In that event, or if the organizational client discharges the lawyer because of the lawyer's actions under Rule 1.13(b) in reporting to higher authority, the lawyer's professional obligations to act in the best interest of the organization should require the lawyer to take reasonable steps to assure that the organization's highest authority is aware of the withdrawal or discharge, and the lawyer's understanding of the circumstances that brought it about. Therefore, the Task Force recommends the adoption of a new Rule 1.13(e).

Id. (emphases added) (footnote omitted). The final Report proposed the following provision:

> A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to Paragraphs (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of those Paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is Informed of the lawyer's discharge or withdrawal.

Id.

The Task Force then turned to the more generic provisions of ABA Model Rule 1.6 -- just as it had in its Preliminary Report. Here, the Task Force took the same position as it had earlier taken.

> The Task Force . . . recommends that Model Rule l.6(b) be amended, as proposed by the Ethics 2000 Commission, to provide that lawyer . . . [a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a crime or fraud that is reasonably

> certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; [and] . . . to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.

Id. at 172.

In essence, this recommendation harkened back to the original 1983 Kutak Commission proposal that the ABA had rejected in 1983, had rejected again in 1993 and had rejected a third time just two years earlier -- in 2001.

2003 ABA Model Rules Changes

The ABA House of Delegates adopted the final Task Force Rule 1.13 recommendation in August, 2003. Although the vote was not very close (unlike the vote on the changes to Model Rule 1.6), some lawyers continued to resist any provision allowing lawyers to reveal information outside their organizational client. Judah Best of the well-known Washington, D.C., law firm of Debevoise & Plimpton reportedly labeled the new provision as "utterly wicked." ABA Amends Ethics Rules on Confidentiality, Corporate Clients, to Allow More Disclosures, 19 ABA/BNA Law. Manual on Prof'l Conduct 467, 469 (Aug. 13, 2003).

One academic commentator coming from a different direction has also criticized ABA Model Rule 1.13 -- but for a completely different reason.

Hostra University Law School Professor Monroe Freedman complained that corporate lawyers cannot "report up" unless doing so is in the "best interest of the

organization." Professor Freedman has condemned the rule's focus on injury to the corporate client -- rather than on injury to the victims of a corporate client's wrongdoing.

> [T]he lawyer is not required by MR 1.13 to go up the ladder. Indeed, she is not even permitted to refer the matter to higher authority unless the fraud is "likely to result in substantial injury to the organization." In our hypothetical case, the fraud is not likely to be detected, so there is no likely to be substantial injury to the corporation if the lawyer remains silent. Accordingly, the lawyer is forbidden to go up the ladder.
>
> [T]he lawyer is expressly directed to act "in the best interest of the organization," and she is further told not to go up the ladder if she reasonably believes that doing so it not "necessary in the best interest of the organization." (Note again that there is not a word here about the best interests -- or any interest -- of those who are being defrauded.) Since the CEO's fraud is not likely to be detected, the lawyer could reasonably believe it to be in the best interest of the corporation not to report it to the board, on the grounds that the fewer people who know about the fraud, the better for the corporation. (This would be of particular concern whenever there are independent directors on the board.) In that event, it would not be "necessary in the best interest of the organization" to go up the ladder to the board of directors, and the lawyer would be forbidden to do so.

Monroe Freedman, The "Corporate Watch Dogs" That Can't Bark: How The New ABA Ethics Rules Protect Corporate Fraud, 8 UDC-DCSL L. Rev. 225, 229-30 (2004).

It is unclear why Professor Freedman concluded that corporations' lawyers may not "report up" in the scenario he outlined. If a lawyer jointly represents the corporate entity and the confessing constituent, there might be joint representation issues. But if the corporation's lawyer learns of some material fact from a non-client within the corporation, nothing should prevent the lawyer from disclosing the material fact to higher authorities within the corporation. ABA Model Rule 1.13 requires such disclosure

under the specified circumstances, but does not seem to ever prohibit it -- even in the absence of those circumstances.

Post-Enron ABA Rules

Under current ABA Model Rule 1.13:

> If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

ABA Model Rule 1.13(b). A comment provides further guidance.

> In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency

> to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

Id. cmt. [4]. Another comment describes the scope of such lawyers' duty to go "up the ladder."

> Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Id. cmt. [5].

The next comment explicitly indicates that lawyers who represent corporations must follow all of the other applicable ethics rules.

> The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1) - (6). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority

> insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

Id. cmt. [6].

Significantly, ABA Model Rule 1.13 extends such lawyers' duty beyond the lawyer's termination -- thus preventing the organization from firing the lawyer to cover-up the wrongdoing.

> A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

ABA Model Rule 1.13(e). For some reason, the comment dealing with this duty is exactly the same as the black letter rule, except it uses the word "must" rather than "shall."

> A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

ABA Model Rule 1.13 cmt. [8].

ABA Model Rule 1.13's duty is surprisingly narrow. First, a lawyer has no duty to report "up the ladder" a constituent's wrongdoing that is not "related to the representation." ABA Model Rule 1.13(b). Second, the lawyer has no duty to take such a step unless the misconduct is "likely to result in substantial injury to the organization." Id. Third, a lawyer's obligation to go "up the ladder" does not arise if the lawyer "reasonably believes that it is not necessary in the best interest of the organization to do so." Id.

Perhaps most significantly, ABA Model Rule 1.13 focuses on "substantial injury to the organization." It does not deal at all with injury to those who might have been, are being, or might in the future be, victimized by corporate employees' misconduct. Other ethics rules address the limited circumstances in which lawyers may have disclosure or remedial duties that focus on the victims rather than the perpetrators.

Restatement

The American Law Institute adopted the Restatement (Third) of Law Governing Lawyers (2000) just before the Enron scandal broke, so it does not reflect the post-Enron Sarbanes-Oxley turmoil that affected ABA Model Rule 1.13.

The Restatement acknowledges that lawyers owe their duty of loyalty to an institutional client, unless the lawyers jointly represent other constituents.

> The lawyer is not prevented by rules of confidentiality from acting to protect the interests of the organization by disclosing within the organization communications gained from constituents who are not themselves clients. That follows even if disclosure is against the interests of the communicating person, of another constituent whose breach

> of duty is in issue, or of other constituents . . . . Such disclosure within the organization is subject to direction of a constituent who is authorized to act for the organization in the matter and who is not complicit in the breach.

Restatement (Third) of Law Governing Lawyers § 96 cmt. e (2000). Significantly, the Restatement requirement applies to any wrongdoing -- not just wrongdoing "related to the representation."

A Restatement comment confirms that an organization's lawyer must report "up the ladder" under the specified circumstances, unless the lawyer has established an attorney-client relationship with the constituent -- even if the report harms the constituent.

> The lawyer is not prevented by rules of confidentiality from acting to protect the interests of the organization by disclosing within the organization communications gained from constituents who are not themselves clients. That follows even if disclosure is against the interests of the communicating person, of another constituent whose breach of duty is in issue, or of other constituents.

Restatement (Third) of Law Governing Lawyers § 96 cmt. e (2000). The Restatement provides an illustration.

> Lawyer represents Charity, a not-for-profit corporation. Charity promotes medical research through tax-deductible contributions made to it. President as chief executive officer of Charity retained Lawyer to represent Charity as outside general counsel and has extensively communicated in confidence with Lawyer on a variety of matters concerning Charity. President asks Lawyer to draft documents by which Charity would make a gift of a new luxury automobile to a social friend of President. In that and all other work, Lawyer represents only Charity and not President as a client. Lawyer concludes that such a gift would cause financial harm to Charity in violation of President's legal duties to it. Lawyer may not draft the documents. If unable to dissuade

> President from effecting the gift, Lawyer must take action to protect the interests of Charity . . . . Lawyer may, for example, communicate with members of Charity's board of directors in endeavoring to prevent the gift from being effectuated.

Restatement (Third) of Law Governing Lawyers § 96 illus. 1 (2000).

A Restatement provision essentially parallels ABA Model Rule 1.13.

> If a lawyer representing an organization knows of circumstances indicating that a constituent of the organization has engaged in action or intends to act in a way that violates a legal obligation to the organization that will likely cause substantial injury to it, or that reasonably can be foreseen to be imputable to the organization and likely to result in substantial injury to it, the lawyer must proceed in what the lawyer reasonably believes to be the best interests of the organization.

Restatement (Third) of Law Governing Lawyers § 96(2) (2000). The next Restatement provision explains what steps lawyers might take.

> In the circumstances described in Subsection (2), the lawyer may, in circumstances warranting such steps, ask the constituent to reconsider the matter, recommend that a second legal opinion be sought, and seek review by appropriate supervisory authority within the organization, including referring the matter to the highest authority that can act in behalf of the organization.

Restatement (Third) of Law Governing Lawyers § 96(3) (2000).

A comment provides further guidance as the circumstances triggering lawyers' "up the ladder" reporting requirement.

> Within the meaning of Subsection (2), a wrongful act of a constituent threatening substantial injury to a client organization may be of two types. One is an act or failure to act that violates a legal obligation to the organization and that would directly harm the organization, such as by unlawfully converting its assets. The other is an act or

> failure to act by the constituent that, although perhaps intended to serve an interest of the organization, will foreseeably cause injury to the client, such as by exposing the organization to criminal or civil liability.
>
> In either circumstance, as stated in Subsection (2), if the threatened injury is substantial the lawyer must proceed in what the lawyer reasonably believes to be the best interests of the organization. Those interests are normally defined by appropriate managers of the organization in the exercise of the business and managerial judgment that would be exercised by a person of ordinary prudence in a similar position. The lawyer's duty of care is that of an ordinarily prudent lawyer in such a position . . . . In the face of threats of substantial injury to the organization of the kind described in Subsection (2), the lawyer must assess the following: the degree and imminence of threatened financial, reputational, and other harms to the organization; the probable results of litigation that might ensue against the organization or for which it would be financially responsible; the costs of taking measures within the organization to prevent or correct the harm; the likely efficaciousness of measures that might be taken; and similar considerations.

Restatement (Third) of Law Governing Lawyers § 96 cmt. f (2000).

The same comment explains the scope of the lawyer's possible reporting requirement.

> The measures that a lawyer may take are those described in Subsection (3), among others. Whether a lawyer has proceeded in the best interests of the organization is determined objectively, on the basis of the circumstances reasonably apparent to the lawyer at the time. Not all lawyers would attempt to resolve a problem defined in Subsection (2) in the same manner. Not all threats to an organization are of the same degree of imminence or substantiality. In some instances the constituent may be acting solely for reasons of self-interest. In others, the constituent may act on the basis of a business judgment whose utility or prudence may be doubtful but that is within the authority of the constituent. The lawyer's assessment of those factors may depend on the constituent's credibility and

> intentions, based on prior dealings between them and other information available to the lawyer.

Id. The comment emphasizes the fact-intensive nature of the lawyers' obligation in this circumstance.

> The appropriate measures to take are ordinarily a matter for the reasonable judgment of the lawyer, with due regard for the circumstances in which the lawyer must function. Those circumstances include such matters as time and budgetary limitations and limitations of access to additional information and to persons who may otherwise be able to act. If one measure fails, the lawyer must, if the nature of the threat warrants and circumstances permit, take other reasonably available measures. With respect to the lawyer's possible liability to the organizational client, failure to take a particular remedial step is tested under the general standard of § 50. When the lawyer reasonably concludes that any particular step would not likely advance the best interests of the client, the step need not be taken.

Id.

> Several options are described in Subsection (3). The lawyer may be able to prevent the wrongful act or its harmful consequences by urging reconsideration by the constituent who intends to commit the act. The lawyer may also suggest that the organization obtain a second legal or other expert opinion concerning the questioned activity. It may be appropriate to refer the matter to someone within the organization having authority to prevent the prospective harm, such as an official in the organization senior in authority to the constituent threatening to act. In appropriate circumstances, the lawyer may request intervention by the highest executive authority in the organization or by its governing body, such as a board of directors or the independent directors on the board, or by an owner of a majority of the stock in the organization. In determining how to proceed, the lawyer may be guided by the organization's internal policies and lines of authority or channels of communication.

Id.

Later in that comment the Restatement confirms the continuing nature of such a lawyer's obligation.

> In a situation arising under Subsection (2), a lawyer does not fulfill the lawyer's duties to the organizational client by withdrawing from the representation without attempting to prevent the constituent's wrongful act. However, the lawyer's threat to withdraw unless corrective action is taken may constitute an effective step in such an attempt.

Id.

The comment also addresses the possibility of lawyers withdrawing in such awkward situations.

> If a lawyer has attempted appropriately but unsuccessfully to protect the best interests of the organizational client, the lawyer may withdraw if permissible under § 32. Particularly when the lawyer has unsuccessfully sought to enlist assistance from the highest authority within the organization, the lawyer will be warranted in withdrawing either because the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent . . . or because the client insists on taking action that the lawyer considers repugnant or imprudent . . . . On proportionality between certain grounds for withdrawal and possible harm to the organizational client that would be caused by withdrawal. . . . Following withdrawal, if the lawyer had fulfilled applicable duties prior to withdrawal, the lawyer has no further duty to initiate action to protect the interests of the client organization with respect to the matter. The lawyer continues to be subject to the duties owed to any former client, such as the duty not to become involved in subsequent adverse representations . . . or otherwise to use or disclose the former client's confidential information adversely to the former client . . . .

Id.

Unlike the ABA Model Rules, the Restatement also addresses an organization's lawyer's duty if institutional constituents become adversaries.

> One constituent of an organization may owe fiduciary duties to another such constituent, for example in some instances a majority stockholder to a minority holder. A lawyer representing only the organization has no duty to protect one constituent from another, including from a breach by one constituent of such fiduciary duties, unless the interests of the lawyer's client organization are at risk. . . . However, if the lawyer represents as a client either the entity or the constituent owing fiduciary duties, the lawyer may not counsel or assist a breach of any fiduciary obligation owed by the constituent to the organization.

Restatement (Third) of Law Governing Lawyers § 96 cmt. g (2000). The Restatement provides in two illustrations such a scenario.

> Lawyer represents Client, a closely held corporation, and not any constituent of Client. Under law applicable to the corporation, a majority shareholder owes a fiduciary duty of fair dealing to a minority shareholder in a transaction caused by action of a board of directors whose members have been designated by the majority stockholder. The law provides that the duty is breached if the action detrimentally and substantially affects the value of the minority shareholder's stock. Majority Shareholder has asked the board of directors of Client, consisting of Majority Shareholder's designees, to adopt a plan for buying back stock of the majority's shareholders in Client. A minority shareholder has protested the plan as unfair to the minority shareholder. Lawyer may advise the board about the position taken by the minority shareholder, but is not obliged to advise against or otherwise seek to prevent action that is consistent with the board's duty to Client.
>
> . . . The same facts as in Illustration 2, except that Lawyer has reason to know that the plan violates applicable corporate law and will likely be successfully challenged by minority shareholders in a suit against Client and that Client will likely incur substantial expense as a result. Lawyer owes a duty to Client to take action to protect Client, such as by advising Client's board about the risks of adopting the plan.

Restatement (Third) of Law Governing Lawyers § 96 illus. 2, 3 (2000).

After outlining these illustrations, the Restatement reiterates that the situation may be different in closely held corporations.

> The foregoing discussion assumes an entity of substantial size and significant degree of organization. On the other hand, in the case of a closely held organization, some decisions have held that a lawyer may owe duties to a non-client constituent, such as one who owns a minority interest.

Restatement (Third) of Law Governing Lawyers § 96 cmt. g (2000).

The reporter's note identifies the debate about this issue.

> Dissatisfaction has been expressed with the extension of the entity theory to all client-lawyer questions involving closely held and family corporations and other, similar arrangements where the identity of owners and managers is substantially identical.

Restatement (Third) of Law Governing Lawyers § 96 reporter's note, cmt. b (2000).

A Restatement comment also discusses lawyers' possible duty to disclose the wrongdoing outside the organization. That comment permits lawyers to make what amounts to a "noisy withdrawal" by withdrawing any documents in which the lawyer might have aided the improper conduct.

> The lawyer may withdraw any support that the lawyer may earlier have provided the intended act, such as by withdrawing an opinion letter or draft transaction documents prepared by the lawyer.

Restatement (Third) of Law Governing Lawyers § 96 cmt. e (2000). The next comment also addresses this issue.

> Whether the lawyer may disclose a constituent's breach of legal duty to persons outside the organization is determined primarily under §§ 66-67 . . . . In limited circumstances, it may clearly appear that limited disclosure to prevent or limit harm would be in the interests of the organizational client

> and that constituents who purport to forbid disclosure are not authorized to act for the organization. Whether disclosure in such circumstances is warranted is a difficult and rarely encountered issue, on which this Restatement does not take a position.

Restatement (Third) of Law Governing Lawyers § 96 cmt. f (2000).

A reporter's note to Restatement § 96 briefly notes the history of this issue.

> Disclosing otherwise confidential information of the client organization to persons other than constituents in order to prevent harm to the organization by a constituent was explicitly addressed in a rejected version of ABA Model Rule 1.13. See Kutak Commission Rule 1.13(c) (revised final draft, June 30, 1982): [Action to be taken by lawyer to protect the client organization] may include revealing information otherwise protected by Rule 1.6 only if the lawyer reasonably believes that: (1) the highest authority in the organization has acted to further the person or financial interests of members of that authority which are in conflict with the interest of the organization; and (2) revealing the information is necessary in the best interest of the organization.

Restatement (Third) of Law Governing Lawyers § 96 reporter's note, cmt. f (2000). The same note provides additional guidance.

> Although the version of Rule 1.13 adopted by the ABA in 1983 and in most states does not include the rejected Kutak Commission language, nothing in those provisions unequivocally prohibits disclosure, although it is clearly discouraged. The third sentence of the version of Rule 1.13(b) adopted by the ABA states that any step taken by the lawyer "shall be designed to minimize . . . the risk of revealing information relating to the representation to persons outside the organization. . . . "
>
> In the view of the Reporters, this reference should not be understood to preclude controlled disclosure beyond the organization in the limited instances where the wrongdoing is clear, the injury to the client organization is substantial, and disclosure would clearly be in the interest of the entity client.

> Under that view, not adopted in the Section or Comment, the lawyer would be required to limit disclosure to that reasonably appropriate to accomplish its purpose.

Id.

Conclusion

Lawyers representing organizations must report "up the ladder" under a fairly narrow range of circumstances. Lawyers must undertake the drastic step if (1) they have not established a separate representation of the constituent; (2) they have not established a joint representation of the constituent and the organization (which would trigger a different set of confidentiality and possible permissible or mandatory disclosure issues under the ethics rules; (3) the wrongdoing is "related to" the lawyer's representation of the organization; (4) the wrongdoing is "likely to result in substantial injury to the organization"; (5) the lawyer does not "reasonably believe[ ] that it is not necessary in the best interest of the organization" to go "up the ladder."

Of course, lawyers in this circumstance may face many other statutory, regulatory, contractual or common law duties. For instance, Sarbanes-Oxley might apply. Other federal or state regulations could also affect the lawyer's obligations. Lawyers and an organizational client might have entered into a retainer agreement or other contractual relationships creating such a duty. Other common law duties, such as the lawyer's fiduciary duty to the organizational client might well require "up the ladder" reporting in a broader range of circumstances than the ethics rules.

Best Answer

The best answer to this hypothetical is **(A) YOU MUST DISCLOSE THE VICE PRESIDENT'S WRONGDOING "UP THE LADDER" WITHIN THE CORPORATION**.

B 5/15, 8/15, 10/15