# LITIGATION ETHICS: PART II (DISCOVERY)

## 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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# Surveillance Videotapes

## Hypothetical 1

As a defense lawyer, you frequently defend automobile accident cases brought by plaintiffs claiming serious debilitating injuries. In some cases, you suspect that plaintiffs are lying about the extent of their injuries.

May you arrange for an investigator to drive by a plaintiff's house, and videotape the plaintiff engaged in such outdoor activities as mowing the lawn, climbing a ladder to clean gutters, playing touch football, etc.?

## YES

## Analysis

Surveillance videotapes of this sort are a traditionally accepted way for defendants and their lawyers to challenge plaintiffs' claims of permanent injuries.

There are many cases involving this practice, none of which even mention the practice's ethical propriety -- thus implicitly acknowledging the legitimacy of such discovery tactics.

Courts dealing with surveillance videotapes most frequently wrestle with one of four issues.

**First**, courts debate whether such surveillance videotapes constitute protected work product. Most courts hold that they do. Bradley v. Wal-Mart Stores, Inc., 196 F.R.D. 557, 557 (E.D. Mo. 2000). This seems like the proper conclusion under the work product doctrine. The surveillance videotapes are "tangible things" prepared at a time when the defendant is in or reasonably anticipates litigation, and motivated by that litigation.

The fact that the surveillance videotapes show non-confidential events does not change that analysis. The work product doctrine is not based on confidentiality, and can protect such "tangible things" as a court reporter's transcript (McGarrah v. Bayfront Med. Ctr., Inc., 889 So. 2d 923, 926 & n.2 (Fla. Dist. Ct. App. 2004)), a videotape of an accident scene (Falco v. N. Shore Labs. Corp., 866 So. 2d 1255 (Fla. Dist. Ct. App. 2004)) or the translation of a document from one language to another (In re Papst Licensing GmbH Patent Litig., Civ. A. No. 99-MD-1298 Section "G" (2), 2001 U.S. Dist. LEXIS 10012, at *69-70 (E.D. La. July 12, 2001)).

Interestingly, no court seems to have dealt with the possibility that a surveillance videotape might deserve opinion work product protection. This seems like a long shot, but the higher protection of opinion work product might apply to the surveillance videotape that somehow reflects the lawyer's specific instructions about how to tape the plaintiff. Because the opinion work product doctrine protection applies to opinions of any client representative (not just lawyers), the doctrine might even protect a surveillance videotape that reflects the videographer's opinion about what is important.

**Second**, courts must determine if the plaintiff can overcome the work product protection. The work product doctrine provides only a conditional or qualified immunity from discovery, and the adversary can obtain a litigant's work product by showing "substantial need" for the work product, and the inability to obtain the "substantial equivalent" without "undue hardship."

In some ways, it is almost humorous to consider how a plaintiff could ever meet this standard. After all, the plaintiff presumably knows whether she can mow the lawn, climb a ladder, play touch football, etc. Some courts recognize this common sense

principle. Ex parte Doster Constr. Co., 772 So. 2d 447 (Ala. 2000). Other courts use shaky logic to come to a different conclusion -- holding that surveillance videotape might somehow be misleading. These courts conclude that a plaintiff can overcome defendant's work product doctrine protection covering the surveillance videotapes. Southern Scrap Material Co. v. Fleming, No. 01-2554 SECTION "M" (3), 2003 U.S. Dist. LEXIS 10815, at *56 n.45 (E.D. La. June 18, 2003) (holding that surveillance videotapes and photographs were protected by the work product doctrine, but must be produced because they are "available only from the ones who obtained it, fixes information available at a particular time and place under particular circumstances, and therefore, cannot be duplicated").

**Third**, courts debate whether a defendant has to produce such surveillance videotapes that it has taken of plaintiff. This analysis also involves the "substantial need" test for overcoming an adversary's work product doctrine protection. Unlike other forms of work product, almost by definition a plaintiff does not have "substantial need" for a surveillance videotape unless the defendant intends to use the videotape at trial. Thus, most courts take the logical approach that defendant must produce such surveillance videotapes only if it intends to use the videotapes at trial. Fletcher v. Union Pac. R.R., 194 F.R.D. 666 (S.D. Cal. 2000) (finding that the defendant's secret surveillance videotape of plaintiff in daily activities amounted to factual work product, but refusing to order its production because defendant indicated that it would not use the surveillance tape at trial). Samples v. Mitchell, 495 S.E.2d 213 (S.C. Ct. App. 1997) (finding that a defendant had improperly failed to disclose the existence of a surveillance videotape showing a plaintiff engaged in activity casting doubt on her injury;

noting that defendant is obligated to at least disclose the existence of the videotape, even if it claimed work product protection; granting plaintiff a new trial after the trial judge allowed the defendant to use the videotape despite not having disclosed it). Of course, any litigant must produce documents or other exhibits that they intend to introduce at trial.

**Fourth**, courts must decide when the defendant should produce a surveillance videotape that it intends to use at trial. This analysis highlights the interesting intersection of privilege/work product doctrine and discovery/trial logistics. A majority of courts take a very clever approach -- requiring the defendant to produce surveillance videotapes but only after it deposes the plaintiff. Runions v. Norfolk & W. Ry., 51 Va. Cir. 341, 344 (Roanoke 2000) ("The court will therefore order that (1) the contents of surveillance movies, tape, and photographs must be disclosed if the materials will be used as evidence either substantively or for impeachment; and (2) the plaintiff and his attorneys must be afforded a reasonable opportunity, consistent with the needs expressed by the court in Dodson, to observe these movies or photographs before their presentation as evidence. Within its discretion, however, the court will further order that the defendant has the right to depose the plaintiff before producing the contents of the surveillance information for inspection. Counsel will forthwith arrange for the plaintiff's deposition to be taken. As soon as Mr. Runions has signed the deposition transcript, or, if he waives signature, as soon as his deposition is concluded, NW's lawyers will produce the surveillance materials."). The in terrorem effect of a secret surveillance videotape presumably drives the plaintiffs to truthfully answer deposition questions about the extent of their injuries.

## Best Answer

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

# Intrusive Surveillance Videotapes

## Hypothetical 2

As a defense lawyer, you receive numerous proposals from private investigators about how to catch plaintiffs exaggerating or even lying about the extent of their personal injuries.

May you direct a private investigator to engage in the following activities from a van parked on a public street outside a plaintiff's home:

**(a)** Use a telephoto lens to videotape plaintiff's activities?

**YES (PROBABLY)**

**(b)** Use a camera mounted on top of the van to look over a hedge on the plaintiff's property line?

**MAYBE**

**(c)** Use a camera to look through a window into the plaintiff's home to record plaintiff's activity in her home?

**NO (PROBABLY)**

**(d)** Use a special infrared camera focusing on the plaintiff's bedroom to determine the validity of his "loss of consortium" claim.

**NO**

## Analysis

**(a)–(d)** While every court seems to explicitly allow litigants to conduct secret surveillance videotape of an adversary conducting activities in plain view, more intrusive types of surveillance eventually implicate other common law and even statutory limitations.

None of these surveillance techniques intercepts communications, and therefore do not trigger what generally are more specific and narrow regulations. Still, state law at some point restricts intrusive surveillance.

Many states recognize an "invasion of privacy" tort. Although the contours of this tort vary from state to state, especially intrusive surveillance techniques presumably would run afoul of these common law torts. For example, Illinois apparently follows the Prosser and Restatement (Second) of Torts invasion of privacy approach -- which includes "unreasonable intrusion upon the seclusion of another." Huskey v. National Broadcasting Co., 632 F. Supp. 1282, 1286 (N.D. Ill. 1986); Midwest Glass Co. v. Stanford Dev. Co., 339 N.E.2d 274, 277 (Ill. App. Ct. 1975).

However, not every state recognizes such a tort. For instance, Virginia has repeatedly rejected the concept of an "invasion of privacy" tort. Instead, Virginia law simply prohibits one from using a person's "name, portrait, or picture" for commercial purposes. Va. Code § 8.01-40.

At least one state has enacted a specific law restricting certain types of intrusive surveillance. California Civil Code § 1708.8(b) limits the type of activity that "paparazzi" commonly use.

> A person is liable for constructive invasion of privacy when the defendant attempts to capture, in a manner that is offensive to a reasonable person, any type of visual image, sound recording, or other physical impression of the plaintiff engaging in a personal or familial activity under circumstances in which the plaintiff had a reasonable expectation of privacy, through the use of a visual or auditory enhancing device, regardless of whether there is a physical trespass, if this image, sound recording, or other physical impression could not have been achieved without a trespass unless the visual or auditory enhancing device was used.

Cal. [Civ.] Code § 1708.8(b). The law also makes a violator subject to disgorgement to the plaintiff of any proceeds gained as a result of such improper surveillance. Cal. [Civ.] Code § 1708.8(d).

Interestingly, the California law has a specific exemption for (1) law enforcement personnel; and (2) private entities with a reasonable suspicion that the subject of the surveillance has engaged in "suspected fraudulent conduct." Cal. [Civ.] Code §1708.8(g).

> This section shall not be construed to impair or limit any otherwise lawful activities of law enforcement personnel or employees of governmental agencies or other entities, either public or private who, in the course and scope of their employment, and supported by an articulable suspicion, attempt to capture any type of visual image, sound recording, or other physical impression of a person during an investigation, surveillance, or monitoring of any conduct to obtain evidence of suspected illegal activity, or other misconduct,, the suspected violation of any administrative rule or regulation, a suspected fraudulent conduct, or any activity involving a violation of law or business practices or conduct of public officials adversely affecting the public welfare, health or safety.

Id.

## Best Answer

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

# Eavesdropping in a Public Place

## Hypothetical 3

You are preparing for a large commercial litigation trial against Acme Company. You have been calling various hotels in a nearby city looking for a suitable spot to conduct a mock jury trial. The hotel event planner with whom you just spoke assured you that her hotel can handle such an event -- telling you that "we have a mock jury trial just like yours lined up this Saturday afternoon for Acme Company."

May you arrange for several of your law firm's secretaries and paralegals to "hang out" in that hotel's public lobby and hallways this Saturday afternoon (hoping to overhear conversations that might prove useful)?

## YES (PROBABLY)

## Analysis

This situation does not involve intrusive surveillance or any explicit deception. Instead, it involves eavesdropping in a semipublic place.

Courts seem not to have dealt with situations like this, meaning that they probably are acceptable.

One often-told incident involves a similar practice. Although perhaps apocryphal, the story relates that two large New York City law firms were battling each other in a high-stakes hostile takeover case. One law firm reportedly sent a number of its secretaries, staff and paralegals to ride up and down the elevators of the other law firm's building -- and later report back on any stray conversations they heard on the elevator.

Although a judge might find such tactics somehow "sleazy," no ethics rule seems to prohibit it.

## Best Answer

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

# Use of a Body Wire

## Hypothetical 4

You represent a wife in a bitter custody battle. The client has tearfully told you how verbally abusive her ex-husband has been to her and the children when they meet every other Saturday morning at a McDonald's parking lot where he picks up the children.

May you suggest that your client wear a "body wire" during one of the Saturday morning exchanges to capture her ex-husband's abusive language?

## MAYBE

## Analysis

This type of evidence-gathering does not involve (1) deception (as long as the person wearing the "body wire" does not affirmatively lie about anything); or (2) trespass or other arguable invasion of someone's privacy.

Still, many states' laws would consider this an electronic "interception" of someone else's communication. See, e.g., Va. Code §§ 19.2-61 et seq. If so, the legality of such "body wire" use would depend on whether the law permits such interception if only one of the participants consented.

A state's approach to the ethics of such a practice might be difficult to predict. It seems likely that a state would approach such "body wire" usage as it does the tape recording of telephone calls. However, it would be easy to envision a state taking a more liberal attitude toward the use of body wires, at least in a public space like a parking lot. It would seem that someone verbally abusing an ex-wife or children in a fast food parking lot would not have the same "expectation of confidentiality" as a participant in a telephone call. On the other hand, bars which would prohibit lawyers

from lawfully recording telephone calls might well take the same approach to this type of recording.

## Best Answer

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

# Electronic Surveillance Involving Trespass

## Hypothetical 5

You represent the wife in a bitter custody battle. Her children have reported dangerous unsanitary conditions at her ex-husband's apartment. The children have also described having trouble sleeping at night when they stay with their father, because he refuses to lock the apartment door. Your client said that last Sunday she went to her ex-husband's apartment to pick up the children, but no one was there. She peeked in the window and noticed the dangerous unsanitary conditions inside. She has asked whether she can enter her ex-husband's apartment next time she finds herself in that position, and take pictures of the unsanitary conditions.

**(a)** May your client enter her ex-husband's apartment and photograph dangerous unsanitary conditions?

**NO (PROBABLY)**

**(b)** May your client ask one of her children to photograph the dangerous unsanitary conditions?

**YES (PROBABLY)**

**(c)** If your client takes photographs of the dangerous unsanitary conditions despite your advice that she not do so, may you use the photographs in the custody dispute?

**MAYBE**

**(d)** If your client takes photographs of the dangerous unsanitary conditions despite your advice that she not do so, is the court likely to use and rely on the photographs in making custody decisions?

**YES**

## Analysis

### Introduction

The ethics rules prohibit lawyers from engaging in any activity (including discovery) that violates the "legal rights" of others.

> In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay,

> or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

ABA Model Rule 4.4(a).

ABA Model Rule 4.4 Comment [1] indicates that "[i]t is impractical to catalogue" all of the "rights of third persons" that lawyers must respect. The comment indicates that those rights "include legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship."

In this hypothetical, the client had asked ahead of time whether she can engage in such conduct herself. This situation therefore implicates the general "lawyers cannot do indirectly what they cannot do directly" principle found in every state's ethics rules.

> It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.

ABA Model Rules 8.4(a). Comment [1] to ABA Model Rule 8.4 provides a further explanation.

> Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so or do so through the acts of another, as when they request or instruct an agent to do so on the lawyer's behalf. Paragraph (a), however, does not prohibit a lawyer from advising a client concerning action the client is legally entitled to take.

ABA Model Rule 8.4 cmt. [1].

This scenario sometimes arises when journalists use aggressive investigation techniques, and the subjects of the investigation claim a news gathering tort.

For instance, Food Lion sued ABC after ABC's "Prime Time Live" program aired a report showing Food Lion employees mishandling food. Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505 (4th Cir. 1999). Two ABC employees had obtained jobs at Food Lion (using false identities, fictitious local addresses, etc.), and relied upon "lipstick cameras" and hidden body microphones to secretly record what they saw at Food Lion. Food Lion did not sue ABC for defamation, but instead "focused on how ABC gathered its information through claims for fraud, breach of duty of loyalty, trespass, and unfair trade practices." Id. at 510.

The jury awarded Food Lion $1,400 in compensatory fraud damages, $1 each on its duty of loyalty and trespass claims and $1,500 on a state statutory claim. The jury then awarded punitive damages of $5,545,750 -- which the district court remitted to $315,000. The trial court reversed the fraud verdict, upheld the breach of duty of loyalty verdict, upheld the trespass verdict, and reversed the statutory verdict. After reversing the punitive damages verdict, the Fourth Circuit left Food Lion with compensatory damages of $2.

Several other courts have dealt with news gathering torts. For instance, in KOVR-TV, Inc. v. Superior Court, 37 Cal. Rptr. 2d 431 (Cal. Ct. App. 1995), a television reporter knocked on the door of a home where three minor children (ages five, seven and eleven) were by themselves. While the camera was rolling, the television reporter asked the children if they knew the Weber children who lived nearby. The children being interviewed told the reporter that the Weber children were "nice" and that they play together "all the time." The reporter then said: "Well, the mom has killed the two little kids and herself." The seven-year-old girl is videotaped saying, "Oh my God!" The

children sued for intentional infliction of emotional distress; and the court denied the television station's motion for summary judgment.

On the other hand, the Seventh Circuit in Desnick v. American Broadcasting Cos., Inc., 44 F.3d 1345 (7th Cir. 1995), endorsed "ambush journalism" conducted by Sam Donaldson and other reporters for the ABC program "Prime Time Live." ABC had sent persons with concealed cameras into an eye surgery center to show that the eye center's doctors recommended needless cataract surgery for elderly patients with Medicare coverage for such surgery. The eye center sued ABC for defamation, trespass, invasion of the right of privacy, fraud and violations of federal and state laws regulating electronic surveillance. Judge Posner pointed to law that permits entry into an establishment even if the consent to enter is procured by fraud.

> Without it a restaurant critic could not conceal his identity when he ordered a meal, or a browser pretend to be interested in merchandise that he could not afford to buy. Dinner guests would be trespassers if they were false friends who never would have been invited had the host known their true character, and a consumer who in an effort to bargain down an automobile dealer falsely claimed to be able to buy the same car elsewhere at a lower price would be a trespasser in the dealer's showroom. Some of these might be classified as privileged trespasses, designed to promote competition. Others might be thought justified by some kind of implied consent -- the restaurant critic for example might point by way of analogy to the use of the "fair use" defense by book reviewers charged with copyright infringement and argue that the restaurant industry as a whole would be injured if restaurants could exclude critics. But most such efforts at rationalization would be little better than evasions. The fact is that consent to an entry is often given legal effect even though the entrant has intentions that if known to the owner of the property would cause him for perfectly understandable and generally ethical or at least lawful reasons to revoke his consent.

Id. at 1351.

Judge Posner contrasted those situations with a curious busybody who obtains entry to someone's home by claiming to be a meter reader, or a competitor entering a business by posing as a customer, but hoping to obtain trade secrets.

> How to distinguish the two classes of case -- the seducer from the medical impersonator, the restaurant critic from the meter-reader impersonator? The answer can have nothing to do with fraud; there is fraud in all the cases. It has to do with the interest that the torts in question, battery and trespass, protect. The one protects the inviolability of the person, the other the inviolability of the person's property. The woman who is seduced wants to have sex with her seducer, and the restaurant owner wants to have customers. The woman who is victimized by the medical impersonator has no desire to have sex with her doctor; she wants medical treatment. And the homeowner victimized by the phony meter reader does not want strangers in his house unless they have authorized service functions. The dealer's objection to the customer who claims falsely to have a lower price from a competing dealer is not to the physical presence of the customer, but to the fraud that he is trying to perpetuate. The lines are not bright -- they are not even inevitable. They are the traces of the old forms of action, which have resulted in a multitude of artificial distinctions in modern law. But that is nothing new.

Id. at 1352.

Judge Posner also pointed to housing discrimination testers, who do not violate trespass laws by entering into houses they are pretending to be interested in buying or renting. Judge Posner dismissed all of the claims but the defamation claim.

**(a)** Because your client's entry into her ex-husband's apartment would almost surely be trespass, you cannot advise her to enter the apartment and take photographs.

**(b)** It is unclear whether the children (who would not be trespassing) can take photographs of dangerous unsanitary conditions. It seems likely that a lawyer could advise the mother to arrange for the children's recording of the unsanitary conditions.

**(c)** Courts disagree about whether a lawyer can use the fruits of the investigation that the lawyer himself or herself could not engage in. In the case of an investigator acting as the lawyer's agent, such use normally would be improper. On the other hand, a court might permit the use of photographs in a situation where a less sophisticated client has gathered evidence in this fashion. If the evidence gathering involved a crime, courts might take a less forgiving approach.

**(d)** Given the courts' necessary focus on the best interest of the child, it seems likely that the court would use even wrongfully obtained evidence.

Very few cases deal with situations like this. This hypothetical comes from the case of Rogers v. Williams, 633 A.2d 747 (Del. Fam. Ct. 1993). In that case, a father sought custody of his two sons. The father's new wife went to the mother's home to make a child support payment. Finding the door unlocked, she entered the mother's house. She then brought a camcorder back to the house and videotaped what the father claimed to be the "unhealthiness" of the mother's residence. The mother sought to exclude the videotape from admission in the custody hearing. The court acknowledged that the videotape was "wrongfully obtained" because the father's wife "did not have respondent's permission to enter and videotape her home." Id. at 748. The court nevertheless admitted the videotape. As the court explained it, "[t]he state has an overwhelming interest in promoting and protecting the best interests of its children," so the "public policy" required the court to "consider as much relevant evidence as possible when deciding child custody." Id. at 749.

## Best Answer

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

# Tape Recording Telephone Calls

## Hypothetical 6

You and your partner have debated the ethical propriety of lawyers tape recording telephone calls, or directing their clients to do so.

May lawyers tape-record (or direct their clients to tape-record) telephone calls in the following situations:

**(a)** Without the other lawyer's consent, in a state where both parties' consent is required?

**NO**

**(b)** Without the other lawyer's consent, in a state where one party's consent suffices?

**YES (PROBABLY)**

## Analysis

Bars, courts, and commentators have for several decades vigorously debated what role non-governmental lawyers can play in tape recording telephone calls.

At the extremes, the answers seem easy. It might be tempting to simply say that lawyers can engage in legal conduct on behalf of their clients. The vast majority of states allow one telephone call participant to secretly tape-record the call. In those states, this approach would allow lawyers to do so.

Given the dramatic differences between states' approach to this issue, courts sometimes must deal with a choice of laws analysis -- when different states are involved in the tape recording. See, e.g., Kearney v. Salomon Smith Barney, Inc., 137 P.3d 914 (Cal. 2006) (assessing a situation in which someone in the Atlanta, Georgia, branch of Salomon Smith Barney tape-recorded a plaintiff in California without advising the

plaintiff of the recording; explaining that such tape recording was acceptable in Georgia but not California; entering an injunction against such future tape recording, but declining to award damages and declining to apply the California prohibition retroactively).

At the other extreme, tape recording a telephone call without all participants' consent seems somehow "sleazy" or "underhanded." Most commentators say that lawyers should do more than simply comply with the law.

All bars and courts agree on a few basic principles. Because a lawyer cannot conduct discovery that violates the legal rights of another person (ABA Model Rule 4.4(a)), they cannot themselves, or direct their client to, engage in illegal tape recording. In states where all telephone call participants must consent to a tape recording, a lawyer cannot record a call without everyone's consent.

Because lawyers cannot engage in knowingly deceptive conduct,[1] a lawyer who is otherwise acting ethically in tape recording a telephone call generally cannot lie if one of the other participants asks if she is being recorded.[2]

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[1] ABA Model Rule 4.1(a) ("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.").

ABA Model Rule 8.4(c) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.").

[2] In re PRB Docket No. 2007-046, 2009 VT 115, at ¶¶ 7, 9, 12, 14, 15, 17, 19 (Vt. 2009) (issuing a private admonition in the case of a criminal defense lawyer who lied to a witness asking whether the lawyers were tape recording their telephone call with the witness; "We also agree that respondents knowingly made a false statement about the recording and thus violated Rule 4.1. One respondent stated in plain terms that she was not recording the conversation, when in fact she was. The second respondent attempted to distract the witness from the issue of recording entirely, by making a statement about the speakerphone. Furthermore, she did not disagree with or correct the misrepresentation made by the first respondent. Both respondents' actions, therefore, violate Rule 4.1."; also finding that the lawyers had not violated Rule 8.4, which prohibits "'conduct involving dishonesty, fraud, deceit or misrepresentation'"; "[W]e are not prepared to believe that any dishonesty, such as giving a false reason for breaking a dinner engagement, would be actionable under the rules. Rather, Rule 8.4(c) prohibits conduct 'involving dishonesty, fraud, deceit or misrepresentation' that reflects on an attorney's fitness to

Apart from those basic concepts, the ethics rules and case law have generally evolved in favor of a more permissive attitude about tape recording telephone calls -- but with plenty of stops and starts, and with some bars and courts holding out for a very strict view.

The basic chronology shows the course of this interesting debate.

In 1974, the ABA adopted a per se approach banning lawyer participation in tape recording telephone calls without all participants' consent.

> The conduct proscribed in DR 1-102(A)(4), i.e., conduct which involves dishonesty, fraud, deceit or misrepresentation in the view of the Committee clearly encompasses the making of recordings without the consent of all parties. With the exception noted in the last paragraph, the Committee concludes that no lawyer should record any conversation

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practice law, whether that conduct occurs in an attorney's personal or professional life. V.R.Pr.C. 8.4(c). This affirms the hearing panel's conclusion the subsection (c) applies only 'to conduct so egregious that it indicates that the lawyer charged lacks the moral character to practice law.'"; "Admittedly, some false statements made to a third persons during the course of representation could also reflect adversely on a lawyer's fitness to practice, thus violating both rules. However, not all misrepresentations made by an attorney raise questions about her moral character, calling into question her fitness to practice law. If Rule 8.4 is interpreted to automatically prohibit 'misrepresentations' in all circumstances, Rule 4.1 would be entirely superfluous. There must be some meaning for Rule 8.4(c) independent of Rule 4.1 -- for we presume that the drafters meant every rule to have some meaning."; "Reading Rule 8.4 as applying only to misrepresentations that reflect adversely on a lawyer's fitness to practice law is additionally supported by authority from other jurisdictions. Sister courts have acknowledged that Rule 8.4(c) cannot reasonably be applied literally -- and with the same reasoning we have employed. See, e.g., Apple Corps. Ltd. v. Int'l Collectors Soc'y, 15 F. Supp. 2d 456, 475-76 (1998) (rejecting 'the literal application' of 8.4(c) on the grounds that it renders Rule 4.1 'superfluous'); see also D.C. Bar Legal Ethics Comm. Op. 323 (2004) ('Clearly [Rule 8.4(c)] does not encompass all acts of deceit -- for example, a lawyer is not to be disciplined professionally for committing adultery, or lying about the lawyer's availability for a social engagement.'"; ultimately concluding that '[i]n the course of zealously representing a client who was the defendant in a serious criminal matter, the respondents in this case engaged in an isolated instance of deception. All indications are that respondents earnestly believed that their actions were necessary and proper. Indeed, the panel found that respondents violated the rules of a 'determination to defend their client against serious criminal charges,' and nothing else. Under such circumstances, respondents' actions simply do not reflect adversely on their fitness to practice."; setting up a group to consider possible Rule amendments dealing with "investigatory misrepresentations"; "[W]e will establish, by separate administrative order, a joint committee comprised of members from the Civil Rules Committee, the Criminal Rules Committee, and the Professional Conduct Board, to consider whether the rules should be amended to allow for some investigatory misrepresentations, and, if so, by whom and under what circumstances. We make no comment today on the merits of the questions that we will charge the committee to consider.").

> whether by tapes or other electronic device, without the consent or prior knowledge of all parties to the conversation.

ABA LEO 337 (8/10/74). The only exception identified by the ABA involved "extraordinary circumstances" involving government investigations.

The ABA addressed the issue again twenty-seven years later. In the meantime, here is a brief review of just some of the various bar and court approaches.

- In 1990, the California Supreme Court adopted a per se ban on lawyer participation and tape recording telephone calls without everyone's consent. Kimmel v. Goland, 793 P.2d 524 (Cal. 1990).

- Perhaps not surprisingly, the first bar to take a different position was the New York County Bar -- in 1993, that Bar rejected a per se prohibition on lawyers tape recording their telephone calls because such a prohibition is "no longer viable in today's day and age."[3]

- Several years later, the Texas Bar indicated that a lawyer (1) may not herself record a telephone call without every participant's consent; (2) may ethically advise her client to do so; (3) may not request his client to tape-record a conversation in which the lawyer is a participant unless all the participants consent. Texas LEO 514 (2/96) (see below for Texas' reversal in 2006, Texas LEO 575 (11/06)).

- Several months later, the Utah bar permitted its lawyers to tape-record a telephone call if the recording was legal under Utah law. The Utah Bar addressed the "unseemly" argument as follows: "Some have expressed an intuitive feeling that the use of tape recorders by attorneys in this type of circumstance is 'bush league' or 'unseemly.' Although we do not condone deceptive, deceitful or fraudulent actions, we see no principled reason to find it to be unethical for an attorney, within the limits discussed elsewhere in this

[3] New York County LEO 696 (3/11/93) (rejecting a per se prohibition on secret recording of telephone calls to which one party to the conversation has consented; noting that such conduct does not violate New York criminal law, and is sometimes acceptable in criminal investigations; "Former pronouncements that secret recordings by lawyers are inconsistent with standards of candor and fairness are no longer viable in today's day and age. Perhaps, in the past, secret records were considered malevolent because extraordinary steps and elaborate devices were required to accomplish such recordings. Today, recording a telephone conversation may be accomplished by the touch of a button, and we do not believe that such an act, in and of itself, is unethical."; holding that lawyer may not falsely answer questions about whether they are recording the telephone call, and may not use any recorded statements in a misleading way; ultimately concluding that lawyers may secretly record telephone conversations with third parties (including other lawyers and even their own clients) -– as long as the recording does not violate the law, and as long as one party to the conversation consents to the recording).

opinion, to tape-record a conversation when it is expressly permitted by Utah law for all other persons." Utah LEO 96-04 (7/3/96).

- Two years later, the Michigan Bar noted "a trend in other states to permit the recording of conversations by lawyers." The Michigan Bar specifically rejected the per se ABA approach, with an odd analysis: "'The time has come' the Walrus said, 'to talk of many things. . . .' The committee believes that ABA Formal Opinion 337 is over broad, and the rationale which supported its statement some twenty-four years ago has weakened. Whether a lawyer may ethically record a conversation without the consent or prior knowledge of the parties involved is situation specific, not unethical per se, and must be determined on a case by case basis." Michigan LEO RI-309 (5/12/98).

- That same year, the Restatement (Third) of Law Governing Lawyers indicated that "[w]hen secret recording is not prohibited by law, doing so is permissible for lawyers conducting investigations on behalf of their clients, but should be done only when compelling need exists to obtain evidence otherwise unavailable in an equally reliable form." Restatement (Third) of Law Governing Lawyers § 106 cmt. b (2000) (the Restatement was finally published in 2001).

- In 2000, the Arizona Bar indicated that a lawyer may not herself tape-record a conversation unless all participants consented, but may advise her client to engage in lawful tape recording of telephone calls. Arizona LEO 00-04 (11/2000).

The ABA finally reversed course in 2001. In ABA LEO 422 (6/24/01), the ABA noted the trend in favor of permitting the lawful tape recording of telephone calls. The ABA explained that "[w]here nonconsensual recording of conversations is permitted by the law of the jurisdiction where the recording occurs, a lawyer does not violate the Model Rules merely by recording a conversation without the consent of the other parties to the conversation." Not surprisingly, the ABA indicated that lawyers may not engage in illegal tape recording, and may not lie when a participant asks whether the lawyer is recording the telephone call. Interestingly, the ABA Ethics Committee was "divided as to whether the Model Rules forbid a lawyer from recording a conversation with a client

concerning the subject matter of the representation without the client's knowledge." The Committee did indicate that "such conduct is at the least, inadvisable."

Even after the ABA reversed its earlier opinion, the debate has continued to rage. For instance, the Northern District of Illinois held in 2001 that it is "inherently deceitful" for a lawyer to tape-record a telephone call, even if the recording is legal. Anderson v. Hale, 159 F. Supp. 2d 1116 (N.D. Ill. 2001). The court explained that "the law recognizes, in countless areas, that omitting material facts can be as misleading as affirmative misstatements." Id. Citing the lawyers' "particularly high standard of candor," the court explained "[t]hat a conversation . . . being recorded is a material fact that must be disclosed by an attorney." Id.

The trend clearly follows the ABA approach.

- New York City LEO 2003-02 (2003) (holding that "[a] lawyer may tape a conversation without disclosure of that fact to all participants if the lawyer has a reasonable basis for believing that disclosure of the taping would significantly impair pursuit of a generally accepted societal good"; acknowledging that "undisclosed taping entails a sufficient lack of candor and a sufficient element of trickery as to render it ethically impermissible as a routine practice").

- Missouri LEO 123 (3/8/06) (allowing a lawyer/participant to tape-record a telephone communication if it is not prohibited by law, does not involve any explicit or implicit statement by the lawyer that she is not recording the call, and the lawyer is not recording a current client).

- Texas LEO 575 (11/2006) ("The Texas Disciplinary Rules of Professional Conduct do not prohibit a Texas lawyer from making an undisclosed recording of the lawyer's telephone conversations provided that (1) recordings of conversations involving a client are made to further a legitimate purpose of the lawyer or the client, (2) confidential client information contained in any recording is appropriately protected by the lawyer in accordance with Rule 1.05, (3) the undisclosed recording does not constitute a serious criminal violation under the laws of any jurisdiction applicable to the telephone conversation recorded, and (4) the recording is not contrary to a representation made by the lawyer to any person. Opinions 392 and 514 are overruled.").

- Ohio LEO 2012-1 (6/8/12) (withdrawing an earlier legal ethics opinion and finding that a secret tape recording of a conversation is not per se unethical; "A surreptitious, or secret, recording of a conversation by an Ohio lawyer is not a per se violation of Prof. Cond. R. 8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation) if the recording does not violate the law of the jurisdiction in which the recording took place. Because surreptitious recording is regularly used by law enforcement and other professions, society as a whole has a diminished expectation of privacy given advances in technology, the breadth of exceptions to the previous prohibition on surreptitious recording provides little guidance for lawyers, and the Ohio Rules of Professional Conduct are based on the Model Rules of Professional Conduct, the Board adopts the approach taken in ABA Formal Opinion 01-422. Although surreptitious recording is not inherently unethical, the acts associated with a lawyer's surreptitious recording may constitute a violation of Prof. cond. R. 8.4(c) or other Rules of Professional Conduct. Examples of misconduct may include lying about the recording, using deceitful tactics to become a party to a conversation, and using the recording to commit a crime or fraud. As a basic rule, Ohio lawyers should not record conversations with clients without their consent. A lawyer's duties of loyalty and confidentiality are central to the lawyer-client relationship, and recording client conversations without consent is ordinarily not consistent with these overarching obligations. Similar duties exist in regard to prospective clients, and Ohio lawyers should also refrain from nonconsensual recordings of conversations with persons who are prospective clients as defined in Prof. Cond. R. 1.8(a).").

Thus, the law clearly trends in favor of permitting lawyers to themselves record (or advise their clients to record) telephone calls in states allowing such activity.[4] As with most trends, some states do not follow along.

Some courts have adopted an awkward middle ground. For instance, a Colorado legal ethics opinion allowed Colorado lawyers to tape-record communications "in

[4] Courts also deal with such tape recordings in assessing work product doctrine protection. For instance, the Eastern District of Virginia has held that the work product doctrine does not protect a client's tape recording of telephone calls with other individuals who had not consented to the recording. Haigh v. Matsushita Elec. Corp. of Am., 676 F. Supp. 1332 (E.D. Va. 1987).

connection with actual or potential criminal matters" and in their personal lives -- but presumably not in other situations.[5]

The Virginia experience represents a microcosm of this evolution.

Virginia is a one-party state (Va. Code § 19.2-62(B)(2)), but another Virginia law indicates that even a legally recorded telephone call cannot be used as evidence in a civil action (other than a divorce or annulment proceeding) unless all of the participants knew they were being recorded, or if one of the participants knew the call was being recorded and the conversation serves as an admission of criminal conduct which is the basis for the civil suit. Va. Code § 8.01-420.2.

In Gunter v. Virginia State Bar, 238 Va. 617, 385 S.E.2d 597 (1989), the Virginia Supreme Court condemned a lawyer's participation in his client's interception of the client's wife's telephone calls (including some with her lawyer). Because the client did not participate in those calls, his actions were clearly illegal under Virginia law. Still, commentators treated Gunter as condemning any lawyer's participation in any tape recording of telephone calls -- perhaps based on the Virginia Supreme Court's statement that "conduct may be unethical . . . even if it is not unlawful." Id. at 621, 385 S.E.2d at 600.

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[5] Colorado LEO 112 (7/19/03) ("The Committee believes that, assuming that relevant law does not prohibit the recording, there are two categories of circumstances in which attorneys generally should be ethically permitted to engage in surreptitious recording or to direct surreptitious recording by another: (a) in connection with actual or potential criminal matters, for the purpose of gathering admissible evidence; and (b) in matters unrelated to a lawyer's representation of a client or the practice of law, but instead related exclusively to the lawyer's private life. The bases for the Committee's recognition of a 'criminal law exception' are the widespread historical practice of surreptitious recording in criminal matters, coupled with the Committee's belief that attorney involvement in the process will best protect the rights of criminal defendants. The Committee recognizes a 'private conduct exception' because persons dealing with a lawyer exclusively in his or her private capacity have diminished expectations of privacy in connection with those conversations; therefore, in the opinion of the Committee, purely private surreptitious recording is not ordinarily deceitful.").

In the next seventeen years, the Virginia Bar moved from a per se test to a gradual relaxation of the prohibition on lawyer participation in recording telephone calls.

- Virginia LEO 1324 (2/27/90) (even if it is not illegal, a lawyer cannot tape-record conversations without the other party's consent, or assist the client in doing so; a lawyer may use such a recording made by the client before the client retained the lawyer, and must keep the client's activity confidential).

- Virginia LEO 1448 (1/6/92) (even if non-consensual tape recordings are not illegal, a lawyer may not participate in such tapings or advise a client to do so; "advising one's client to initiate a conversation under possibly false pretenses and to secretly record such conversation is improper deceptive conduct" that must be reported to the Bar).

  LEO 1448 represents the Virginia Bar's most extreme statement on this issue. A lawyer's client had been sexually abused by her father for an extended period of time during her childhood. As a result of the abuse, the client "suffers from several significant psychiatric disorders and has required extensive therapy, including several periods of hospitalization." The lawyer wanted to represent his client in a civil action against her father, but there "is little corroborating evidence." The lawyer asked the bar if he can suggest that his client meet with her father (who does not have a lawyer in the matter) "and surreptitiously record their conversation, since [the father has] . . . in some conversations, . . . freely admitted his sexual abuse of [the client]." The bar held that advising the client to tape-record her conversation with her father was a flat ethics violation.

- Virginia LEO 1635 (2/7/95) (a company officer (who is also a lawyer) tape-records a telephone conversation the officer has with a terminated corporate employee; because the Code provision prohibiting lawyers from engaging in misrepresentation is "not specifically applicable to activities undertaken in an attorney-client relationship," the lawyer's tape-recording was improper even if the officer were acting only as a corporate officer and not as the corporate lawyer; after citing the familiar list of factors for determining whether a lawyer's misconduct must be reported, the Bar concluded that the tape-recording without consent "may raise a substantial question" as to the lawyer's honesty, trustworthiness, or fitness to practice law in other respects).

In 2000, the Virginia Bar finally started to move in the other direction.

- Virginia LEO 1738 (4/13/00) (lawyers may secretly record telephone conversations in which they are participants, as long as the recordings are legal and are made in connection with criminal or housing discrimination

investigations, or involve "threatened or actual criminal activity when the lawyer is a victim of such threat"; the Bar "recognizes that there may be other factual situations where such recordings would be ethical," but will address those in response to specific questions).

- Virginia LEO 1765 (6/13/03) (lawyers working for a federal intelligence agency may ethically perform such undercover work as use of "alias identities" and non-consensual tape recordings).

In 2006, the Virginia Ethics Committee revisited the issue (as explained below, the Virginia Supreme Court ultimately rejected the Virginia Ethics Committee's proposed revisions). Among other things, the Committee's research showed that states continue to be divided.

> In some states undisclosed tape-recording involving an attorney has been held to be generally permissible in the absence of some type of actual, affirmative misrepresentation. See, e.g., Alaska Ethics Op. 2003-1; Michigan Informal Ethics Op. RI-309 (1998); New York County Ethics Op. 696 (1993); Okla. Bar Ass'n Ethics Op. 337 (1994); Netterville v. Mississippi State Bar, 397 So.2d 878 (Miss. 1981) . . . Indiana State Bar Ass'n Op. 1 (2000); Missouri Bar Op. 97-0022 . . . New York City Ethics Op. 2003-2 (undisclosed tape-recording only appropriate where it promotes a generally accepted societal benefit); Hawaii Sup. Ct., Formal Op. 30 (modification 1995) (whether undisclosed recording by an attorney is unethical must be determined on a case-by-case basis); Wisconsin Bar Op. E-94-5 (determination of whether Rule 8.4 has been violated must be fact-specific on a case-by-case basis).

Va. State Bar, Standing Committee on Legal Ethics: Report on Nonconsensual Tape-Recording (Jan. 12, 2006).

The Virginia ethics committee recommended that the Virginia Supreme Court adopt rules changes occasionally permitting tape recording as part of such investigations. February 25, 2009, the Virginia Supreme Court rejected the proposed

rules change. The court acted on a 4-3 vote, which reflects the national debate about this difficult issue.

In 2011, the Virginia Bar adopted a legal ethics opinion that nudged the state in the direction of allowing tape recording in certain circumstances.

- Virginia LEO 1814 (5/3/11) (holding that a criminal defense lawyer may directly or through an agent engage in legal undisclosed recording of a telephone call with an unrepresented witness whom the lawyer worries might change his story and implicate the lawyer's client; explaining that because such tape-recording involves "a higher risk of the unrepresented party misunderstanding the lawyer or the lawyer's agent's role," the lawyer or the agent "must assure that the unrepresented third party is aware of the lawyer or agent's role" in order to comply with the Rule 4.3 provision governing a lawyer's communication with an unrepresented person; noting that although many states previously found a lawyer's participation even in lawful tape-recording of telephone calls to be unethical, "more recently a number of states have reversed or significantly revised their opinions to allow undisclosed recording" (describing many of those states' approaches in a footnote)).

Of course, such recordings implicate other areas of the law as well.

## Best Answer

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

b 11/14

# Using Arguably Deceptive Means to Gain Access to a Witness's Social Media

## Hypothetical 7

You have read about the useful data a lawyer can obtain about an adverse party or witness by searching social media sites. One of your partners just suggested that you have one of your firm's paralegals send a "friend request" to an adverse (and unrepresented) witness. The paralegal would use his personal email. He would not make any affirmative misstatements about why he is sending the "friend request," but he likewise would not explain the reason for wanting access to the witness's social media.

May you have a paralegal send a "friend request" to an adverse witness, as long as the paralegal does not make any affirmative misrepresentations?

## NO (PROBABLY)

## Analysis

This hypothetical involves the level of arguable deception that a lawyer or lawyer's representative may engage in while conducting discovery.

The Philadelphia Bar was apparently the first to address this issue, and found such a practice unacceptable.

- Philadelphia LEO 2009-02 (3/2009) (analyzing a lawyer interested in conducting an investigation of a non-party witness (not represented by any lawyer); explaining the lawyer's proposed action: "The inquirer proposes to ask a third person, someone whose name the witness will not recognize, to go to the Facebook and Myspace websites, contact the witness and seek to 'friend' her, to obtain access to the information on the pages. The third person would only state truthful information, for example, his or her true name, but would not reveal that he or she is affiliated with the lawyer or the true purpose for which he or she is seeking access, namely, to provide the information posted on the pages to a lawyer for possible use antagonistic to the witness. If the witness allows access, the third person would then provide the information posted on the pages to the inquirer who would evaluate it for possible use in the litigation."; finding the conduct improper; "Turning to the ethical substance of the inquiry, the Committee believes that the proposed course of conduct contemplated by the inquirer would violate Rule 8.4(c)

because the planned communication by the third party with the witness is deceptive. It omits a highly material fact, namely, that the third party who asks to be allowed access to the witness's pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness. The omission would purposefully conceal that fact from the witness for the purpose of inducing the witness to allow access, when she may not do so if she knew the third person was associated with the inquirer and the true purpose of the access was to obtain information for the purpose of impeaching her testimony."; "The inquirer has suggested that his proposed conduct is similar to the common -- and ethical -- practice of videotaping the public conduct of a plaintiff in a personal injury case to show that he or she is capable of performing physical acts he claims his injury prevents. The Committee disagrees. In the video situation, the videographer simply follows the subject and films him as he presents himself to the public. The videographer does not have to ask to enter a private area to make the video. If he did, then similar issues would be confronted, as for example, if the videographer took a hidden camera and gained access to the inside of a house to make a video by presenting himself as a utility worker."; "The Committee is aware that there is a controversy regarding the ethical propriety of a lawyer engaging in certain kinds of investigative conduct that might be thought to be deceitful. For example, the New York Lawyers' Association Committee on Professional Ethics, in its Formal Opinion No. 737 (May 2007), approved the use of deception, but limited such use to investigation of civil right or intellectual property right violations where the lawyer believes a violation is taking place or is imminent, other means are not available to obtain evidence and rights of third parties are not violated.").

Since then, several bars have taken the same approach.

- San Diego LEO 2011-2 (5/24/11) (holding that a lawyer may not make a "friend request" to either an upper level executive of a corporate adversary (because even the request is a "communication" about the subject matter of the representation), or even to an unrepresented person; "A friend request nominally generated by Facebook and not the attorney is at least an indirect ex parte communication with a represented party for purposes of Rule 2-100(A). The harder question is whether the statement Facebook uses to alert the represented party to the attorney's friend request is a communication 'about the subject of the representation.' We believe the context in which that statement is made and the attorney's motive in making it matter. Given what results when a friend request is accepted, the statement from Facebook to the would-be friend could just as accurately read: '[Name] wants to have access to the information you are sharing on your Facebook page.' If the communication to the represented party is motivated by the quest for information about the subject of the representation, the communication with the represented party is about the subject matter of that representation.";

"[W]e conclude that the lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members of the network and the lawyer neither 'friends' the other party nor directs someone to do so.'"; "We believe that the attorney in this scenario also violates his ethical duty not to deceive by making a friend request to a represented party's Facebook page without disclosing why the request is being made. This part of the analysis applies whether the person sought to be friended is represented or not and whether the person is a party to the matter or not."; "We agree with the scope of the duty set forth in the Philadelphia Bar Association opinion [Philadelphia LEO 2009-02], notwithstanding the value in informal discovery on which the City of New York Bar Association [New York City LEO 2010-02] focused. Even where an attorney may overcome other ethical objections to sending a friend request, the attorney should not send such a request to someone involved in the matter for which he has been retained without disclosing his affiliation and the purpose for the request."; "Nothing would preclude the attorney's client himself from making a friend request to an opposing party or a potential witness in the case. Such a request, though, presumably would be rejected by the recipient who knows the sender by name. The only way to gain access, then, is for the attorney to exploit a party's unfamiliarity with the attorney's identity and therefore his adversarial relationship with the recipient. That is exactly the kind of attorney deception of which courts disapprove."; "We have concluded that those [ethics] rules bar an attorney from making an ex parte friend request of a represented party. An attorney's ex parte communication to a represented party intended to elicit information about the subject matter of the representation is impermissible no matter what words are used in the communication and no matter how that communication is transmitted to the represented party. We have further concluded that the attorney's duty not to deceive prohibits him from making a friend request even of unrepresented witnesses without disclosing the purpose of the request. Represented parties shouldn't have 'friends' like that and no one -- represented or not, party or non-party -- should be misled into accepting such a friendship.").

- New York LEO 843 (9/10/10) ("A lawyer representing a client in pending litigation may access the public pages of another party's social networking website (such as Facebook or MySpace) for the purpose of obtaining possible impeachment material for use in the litigation."; "Here . . . the Facebook and MySpace sites the lawyer wishes to view are accessible to all members of the network. New York's Rules 8.4 would not be implicated because the lawyer is not engaging in deception by accessing a public website that is available to anyone in the network, provided that the lawyer does not employ deception in any other way (including, for example, employing deception to become a member of the network). Obtaining information about a party available in the Facebook or MySpace profile is similar to obtaining information that is available in publicly accessible online or print media, or through a subscription

research service such as Nexis or Factiva, and that is plainly permitted. Accordingly, we conclude that the lawyer may ethically view and access the Facebook and MySpace profiles of a party other than the lawyer's client in litigation as long as the party's profile is available to all members in the network and the lawyer neither 'friends' the other party nor directs someone else to do so.").

Ironically, in the very same month that the New York State Bar indicated that a lawyer could not send a "friend request" to the subject of searching, the New York City Bar held the opposite.

- New York City LEO 2010-2 (9/2010) ("A lawyer may not attempt to gain access to a social networking website under false pretenses, either directly or through an agent."; "[W]e address the narrow question of whether a lawyer, acting either alone or through an agent such as a private investigator, may resort to trickery via the internet to gain access to an otherwise secure social networking page and the potentially helpful information it holds. In particular, we focus on an attorney's direct or indirect use of affirmatively 'deceptive' behavior to 'friend' potential witnesses. . . . [W]e conclude that an attorney or her agent may use her real name and profile to send a 'friend request' to obtain information from an unrepresented person's social networking website without also disclosing the reasons for making the request. While there are ethical boundaries to such 'friending,' in our view they are not crossed when an attorney or investigator uses only truthful information to obtain access to a website, subject to compliance with all other ethical requirements." (footnote omitted) (emphasis added); "Despite the common sense admonition not to 'open the door' to strangers, social networking users often do just that with a click of the mouse."; "[A]bsent some exception to the Rules, a lawyer's investigator or other agent also may not use deception to obtain information from the user of a social networking website."; "We are aware of ethics opinions that find that deception may be permissible in rare instances when it appears that no other option is available to obtain key evidence. See N.Y. County 737 (2007) (requiring, for use of dissemblance, that 'the evidence sought is not reasonably and readily obtainable through other lawful means'); see also ABCNY Formal Op. 2003-2 (justifying limited use of undisclosed taping of telephone conversations to achieve a greater societal good where evidence would not otherwise be available if lawyer disclosed taping). Whatever the utility and ethical grounding of these limited exceptions -- a question we do not address here -- they are, at least in most situations, inapplicable to social networking websites. Because non-deceptive means of communication ordinarily are available to obtain information on a social networking page -- through ordinary discovery of the targeted individual or of the social networking sites themselves -- trickery cannot be justified as a necessary last resort. For this reason we conclude that lawyers may not use

or cause others to use deception in this context." (footnote omitted); "While we recognize the importance of informal discovery, we believe a lawyer or her agent crosses an ethical line when she falsely identifies herself in a 'friend request.'"; "Rather than engage in 'trickery,' lawyers can -- and should -- seek information maintained on social networking sites, such as Facebook, by availing themselves of informal discovery, such as the truthful 'friending' of unrepresented parties, or by using formal discovery devices such as subpoenas directed to non-parties in possession of information maintained on an individual's social networking page. Given the availability of these legitimate discovery methods, there is and can be no justification for permitting the use of deception to obtain the information from a witness on-line."; "Accordingly, a lawyer may not use deception to access information from a social networking webpage. Rather, a lawyer should rely on the informal and formal discovery procedures sanctioned by the ethical rules and case law to obtain relevant evidence.").

At least some lawyers have faced bar scrutiny and perhaps discipline for such activities.

- Mary Pat Gallagher, When "Friending" is Hostile, N.J. L.J., Sept. 8, 2012 ("Two New Jersey defense lawyers have been hit with ethics charges for having used Facebook in an unfriendly fashion."; "John Robertelli and Gabriel Adamo allegedly caused a paralegal to 'friend' the plaintiff in a personal injury case so they could access information on his Facebook page that was not available to the public."; "The 'friend' request, made 'on behalf of and at the direction of' the lawyers, 'was a ruse and a subterfuge designed to gain access to non-public portions of [the] Facebook page for improper use' in defending the case, the New Jersey Office of Attorney Ethics (OAE) charges."; "The OAE says the conduct violated Rules of Professional Conduct (RPC) governing communications with represented parties, along with other strictures. The lawyers are fighting the charges, claiming that while they directed the paralegal to conduct general Internet research, they never told her to make the request to be added as a 'friend,' which allows access to a Facebook page that is otherwise private."; "At first, Cordoba [paralegal] was able to freely grab information from Hernandez's [plaintiff] Facebook page, but after he upgraded his privacy settings so that only friends had access, she sent him the friend request, which he accepted, the complaint says.").

The trend seems to be against permitting such "friending" in the absence of a disclosure of the request's purpose.

## Best Answer

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

B 8/12

# Other Use of Modern Techniques

## Hypothetical 8

The outcome of a large commercial case might hinge on a neutral witness's credibility. You are considering ways to confidentially test his credibility.

May you:

**(a)** Bring to your deposition of the neutral witness a young associate in your law firm who has a psychology PhD and an uncanny ability to determine if a witness is telling the truth or lying?

**YES**

**(b)** Install new software on your laptop computer which can analyze speech patterns and determine the likelihood that someone is lying -- and then bring your laptop to the deposition and view the results on the screen while you are deposing the neutral witness?

**NO (PROBABLY)**

**(c)** Use the new speech pattern software to analyze the neutral witness's statements on the subject matter during a press conference that was broadcast on the local news station?

**YES (PROBABLY)**

## Analysis

This hypothetical comes from Philadelphia LEO 2000-1 (2/2000).

> The inquirer has asked this Committee to analyze the ethical implications for an attorney utilizing a recently-developed software program which purports to instantaneously analyze speech patterns to determine the veracity of the speaker. The technology firm that developed the software has asked the inquirer to use it in the inquirer's law practice "to determine its validity in real life situations."

**(a)** No one could object to using such methods unless there was some active deception involved.

**(b)** The Philadelphia Bar held that using the software during a deposition violated several rules.

> A person testifying at a deposition expects that testimony offered on the record will be transcribed and may be used thereafter at trial or in some other context. However, neither the deponent nor an attorney attending the deposition has reason to anticipate that the deponent's speech patterns will be calibrated and analyzed on a basis such as propounded for the described software. Using the software surreptitiously at the deposition, without the consent of the deponent and counsel present at the deposition, therefore may be deemed to violate Rule 4.1 (Truthfulness in Statements to Others), Rule 4.4 (Respect for Rights of Third Persons) and Rule 8.4 (prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation).

**(c)** The Philadelphia Bar took a different approach to audiotapes obtained through lawful means and analyzed using the software.

> In contrast, we see no ethical violation in using the software to analyze a lawfully-obtained, lawfully-created tape recording or videotape originally prepared for some other purpose, as long as: (1) it does not violate any restriction placed on the recording or videotape by law or otherwise, (2) the creation of the recording or videotape involved no deception. In other words, if the inquirer comes into possession of a lawfully-created tape recording without restrictions as to its use, the software may be used to analyze the speech patterns on the tape. We distinguish that scenario, however, from a situation in which the inquirer knows before making a tape that the inquirer intends to use the software to analyze it, yet fails to disclose that intention to the speaker.

Many lawyers would probably think that this activity would pass muster under the ethics rules, but the Philadelphia bar's hostile reaction should prompt lawyers to check the applicable rules and how the bars have interpreted them. This is especially important in any pre-litigation informal discovery -- because under the ABA Model

Rule 8.5 approach, the applicable ethics rules might be supplied by the state where the conduct occurred rather than by the state where the litigation ultimately will ensue.

## Best Answer

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

# Deception: Worthwhile Causes

## Hypothetical 9

You have chosen as your favorite pro bono project a local private group that fights housing discrimination. Over the years, you have learned that the only effective way to find and eliminate housing discrimination is to use "testers." These "testers" are prospective homebuyers with false backgrounds that are identical in every way but one -- their race or national origin.

**(a)** May you participate as a "tester" in an effort to find and eliminate housing discrimination?

**MAYBE**

**(b)** May you supervise your group's use of such "testers" without engaging in the practice yourself?

**YES (PROBABLY)**

## Analysis

Bars everywhere have wrestled with a lawyer's use of deception (either herself or through a non-lawyer) in the pursuit of some socially worthwhile goal.

A lawyer's deception implicates a number of ethics rules.

**First**, lawyers themselves must avoid deception when representing a client.

> In 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.

ABA Model Rule 4.1(a). A comment describes this rule.

> 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].

State ethics rules show a remarkable diversity in their approach to this basic principle. For instance, ABA Model Rule 4.1 prohibits only a lawyer's knowing false statement of material fact. The ABA Model Rules explain that this term

> denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

ABA Model Rule 1.0(f). The last sentence brings a touch of objectivity to the meaning. Commentators have explained that a lawyer cannot avoid violation of a rule requiring "knowing" conduct by willful blindness or other unreasonable behavior.

Virginia takes the ABA Model Rule approach to the level of required knowledge, but drops the materiality element.

> In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of fact or law.

Virginia Rule 4.1(a). Thus, on its face the Virginia ethics rules would prohibit a lawyer's insignificant (but knowing) lie. Ironically, this is exactly the opposite of the approach Virginia has taken to Rule 8.4. As explained below, Virginia added a phrase to ABA Model Rule 8.4(c) to avoid an absolute prohibition on all deceptive conduct, however insignificant.

Not surprisingly, courts punish such direct deception.[1]

**Second**, lawyers may not assist or counsel a client in committing fraud.

> A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or

[1] See, e.g., Attorney Grievance Comm'n v. Smith, 950 A.2d 101 (Md. 2008) (suspending a lawyer for pretending to be a police officer in a voicemail message left with a witness before a trial).

> fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

ABA Model Rule 1.2(d). A comment explains this rule.

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

ABA Model Rule 1.2 cmt. [9].

Not surprisingly, this obligation applies in litigation. "The obligation prescribed in Rule 1.2(d) not to counsel a client to commit or assist the client in committing a fraud applies in litigation." ABA Model Rule 3.3 cmt. [3].

Although such misconduct might be hard to detect, courts naturally punish lawyers who advise their clients to engage in deceptive conduct.

- See, e.g., Attorney Grievance Comm'n v. Elmendorf, 946 A.2d 542, 544 (Md. 2008) (reprimanding a lawyer who has sent an e-mail to an acquaintance to whom the lawyer had sent the following e-mail about the possibility of the acquaintance falsely claiming a one-year separation in order to obtain a no-fault divorce; "'You can file whatever you want so long as the parties say that it has been a year, the court won't question it so long as the parties agree to that.'" (citation omitted); noting that the lawyer claimed to have later advised the acquaintance that the lawyer did not imply that the acquaintance should lie to the court; rejecting the bar's effort to have the lawyer suspended).

**Third**, lawyers must assure at least some level of similar conduct from non-lawyers that they supervise.

> With respect to a nonlawyer employed or retained by or associated with a lawyer: . . . (b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ABA Model Rule 5.3(b), (c).

**Fourth**, the ABA Model Rules contain a catch-all provision that has vexed commentators for many years.

> It is professional misconduct for a lawyer to: . . . (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

ABA Model Rule 8.4(b), (c). As explained below, commentators have tried to interpret Model Rule 8.4(c) in a way that softens somewhat the absolute prohibition on any deceptive conduct.

Ironically, ABA Model Rule 8.4(b) prohibits a lawyer from committing a "criminal act" -- but only if that criminal act "reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." One would have expected that the "reflects adversely" proviso would also be added to ABA Model Rule 8.4(c). In fact, the proviso makes much more sense in ABA Model Rule 8.4(c) than (b). As it now stands, lawyers in a state following the ABA Model Rules might not automatically be

punished for a criminal act -- the bar must determine if that criminal act "reflects adversely" on the lawyer's honesty, trustworthiness, etc. However, a lawyer in that state can be punished for any other type of deceptive act (even if it does not "reflect adversely" on his honesty, etc.) -- presumably including making such knowingly false statements as "No, I really like the tie you gave me for Father's Day" or "I really loved your meatloaf."

As with ABA Model Rule 4.1, states have taken differing approaches to this rule. For instance, Virginia has taken what seems like a much more logical approach.

> It is professional misconduct for a lawyer to: . . . (b) commit a criminal or deliberately wrongful act that reflects adversely on the lawyer's honesty, trustworthiness or fitness to practice law; [or] (c) engage in conduct involving dishonesty fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law.

Virginia Rule 8.4(b), (c). Thus, Virginia includes the "reflects adversely" proviso in both the section dealing with criminal acts and the section dealing with other deceptive acts.

Vermont has not changed its rule, but a 2009 Vermont case articulated a limited reach of the seemingly unlimited prohibition on any deceptive conduct.

> [W]e are not prepared to believe that any dishonesty, such as giving a false reason for breaking a dinner engagement, would be actionable under the rules. Rather, Rule 8.4(c) prohibits conduct 'involving dishonesty, fraud, deceit or misrepresentation' that reflects on an attorney's fitness to practice law, whether that conduct occurs in an attorney's personal or professional life. V.R.Pr.C. 8.4(c). This affirms the hearing panel's conclusion the subsection (c) applies only 'to conduct so egregious that it indicates that the lawyer charged lacks the moral character to practice law.'"; "Admittedly, some false statements made to a third persons during the course of representation could also reflect adversely on a lawyer's fitness to practice, thus violating both rules. However, not all misrepresentations made by an attorney raise questions about her moral character, calling

> into question her fitness to practice law. If Rule 8.4 is interpreted to automatically prohibit 'misrepresentations' in all circumstances, Rule 4.1 would be entirely superfluous. There must be some meaning for Rule 8.4(c) independent of Rule 4.1 -- for we presume that the drafters meant every rule to have some meaning."; "Reading Rule 8.4 as applying only to misrepresentations that reflect adversely on a lawyer's fitness to practice law is additionally supported by authority from other jurisdictions. Sister courts have acknowledged that Rule 8.4(c) cannot reasonably be applied literally -- and with the same reasoning we have employed. See, e.g., Apple Corps. Ltd. v. Int'l Collectors Soc'y, 15 F. Supp. 2d 456, 475-76 (1998) (rejecting 'the literal application' of 8.4(c) on the grounds that it renders Rule 4.1 'superfluous'); see also D.C. Bar Legal Ethics Comm. Op. 323 (2004) ('Clearly [Rule 8.4(c)] does not encompass all acts of deceit -- for example, a lawyer is not to be disciplined professionally for committing adultery, or lying about the lawyer's availability for a social engagement.'

In re PRB Docket No. 2007-046, 2009 VT 115, at ¶¶ 12, 14, 15 (Vt. 2009).

**Fifth**, The ABA Model Rules contain another general provision that commentators have criticized for being essentially meaningless.

> It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice.

ABA Model Rule 8.4(d). Much like the phrase "appearance of impropriety," the term "prejudicial to the administration of justice" provides no real guidance to lawyers or bar disciplinary committees.

The Restatement deals with tape recording and ex parte contacts, but not with the basic issue of deception.

> A lawyer may conduct an investigation of a witness to gather information from or about the witness. Such an investigation may legitimately address potentially relevant aspects of the finances, associations, and personal life of the witness. In conducting such investigations personally or through others, however, a lawyer must observe legal constraints on intrusion on privacy. The law of some jurisdictions, for

> example, prohibits recording conversations with another person without the latter's consent. When secret recording is not prohibited by law, doing so is permissible for lawyers conducting investigations on behalf of their clients, but should be done only when compelling need exists to obtain evidence otherwise unavailable in an equally reliable form. Such a need may exist more readily in a criminal-defense representation. In conducting such an investigation, a lawyer must comply with the limitations of § 99 prohibiting contact with [sic] represented person, of § 102 restricting communication with persons who owe certain duties of confidentiality to others, and of § 103 prohibiting misleading an unrepresented person.

Restatement (Third) of Law Governing Lawyers § 106 cmt. b (2000) (emphasis added).

Given these flat prohibitions on any deceptive conduct, there simply is no way to reconcile the ethics rules and commonly used deception -- even for a socially worthwhile goal.

Commentators have appeared to agree on a few basic principles. For instance, most authorities agree that the complete prohibition on any conduct "involving dishonesty, fraud, deceit or misrepresentation" in ABA Model Rule 8.4(c) cannot possibly mean what it says. Otherwise, a lawyer could lose his license by dishonestly answering questions from his wife such as "Does this dress make me look fat?"[2] The authorities therefore tend to argue that ABA Model Rule 8.4(c) must involve serious misconduct, or else it would render ABA Model Rule 4.1(a) superfluous.

But of course then they have to deal with Model Rule 4.1(a). At least that rule is limited to a lawyer's conduct "[i]n the course of representing a client." It also limits its reach to statements of "material" fact or law. Still, a lawyer participating in a housing

[2] Some states have wisely amended their version of Rule 8.4(c) to add the type of "reflects adversely on a lawyer's fitness" concept that appears in the mandatory reporting requirements. See Virginia Rule 8.4(c).

discrimination "test" presumably is "representing a client" and is clearly engaged in material deception. Whether the lawyer can ask a non-lawyer colleague to engage in such deception implicates ABA Model Rule 5.3. The answer is clearly "no" if the non-lawyer's conduct must match the lawyer's conduct.

Given this intractable discrepancy between the ethics rules and these common activities, commentators have proposed various rules changes that would allow socially worthwhile deception without totally abandoning the anti-deception principle.

An often-cited law review article by well-respected national bar leaders proposed the following standard for lawyer deception.

> (1) A lawyer employing an undercover investigator or discrimination tester must have reasonable grounds to believe that either: (a) the target person, entity, or group is engaged in criminal, corrupt, or otherwise unlawful activity, or (b) the deception is necessary to avoid physical bodily harm or death; and
>
> (2) The undercover investigator or discrimination tester can engage in misrepresentation only to the extent necessary for the limited purpose of detecting and/or proving the criminal or unlawful acts. The investigator or tester cannot engage or assist in any crime, even if for the purpose of investigating the target person or entity; and
>
> (3) With special regard to civil cases, a lawyer cannot authorize deception or misrepresentation for any other reason than those listed in (1) above. An undercover investigator or tester must not be used to circumvent the responsibilities of a lawyer under the Model Rules, and must be used only in connection with activities that would not violate the Model Rules if engaged in by a lawyer not acting as such (i.e. in a nonlawyer capacity). Any necessary deception must be used only in the public interest and with the intent of furthering justice.

David B. Isbell & Lucantonio N. Salvi, Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions

Prohibiting Misrepresentation Under the *Model Rules of Professional Conduct*, 8 Geo. J. Legal Ethics 791, 808 n.58 (1995) (emphases added).

A 1989 article in the Notre Dame Law Review proposed the following standard:

> The ABA should recognize that it may not be unethical for an attorney to use deception when 1) the deception is coupled with a compelling reason to perpetrate the deception, 2) the deception is not intended for the benefit of the deceiver, 3) the deception is revealed within a reasonable time after the deception is perpetrated, 4) the deception is perpetrated with the intent of furthering justice, and 5) no reasonable alternative is available.

Christopher J. Shine, Deception and Lawyers: Away from a Dogmatic Principle and Toward a Moral Understanding of Deception, 64 Notre Dame L. Rev. 722, 749-50 (1989).

The ABA Intellectual Property Section recommended a similar standard for deceptive conduct.

> [3] This Rule pertains to statements of material facts that lawyers make in their professional capacity representing clients, not to statements made by persons acting in the capacity of an investigator in the course of gathering information, even though such person may be acting under the direction of a lawyer or may be him- or herself a lawyer. This Rule therefore does not apply to statements made by investigators to disguise their identity or purpose in order to facilitate gathering information. Communications made by an investigator may nonetheless present issues under other prohibitions of these Rules, such as those related to fraud, perjury or misrepresentations that reflect adversely on fitness to practice law or to communications with a person known to be represented by a lawyer.

Proposed Model Rule 4.1 cmt. [3] from the ABA IP Law Section (May 13, 1998).

None of these or similar proposals have made it very far at the ABA. In the meantime, several states have changed their rules.

For instance, Oregon allows all lawyers (not just government lawyers) to advise clients and supervise non-lawyers in some deceptive conduct, but not engage in it themselves.

> Notwithstanding paragraphs (a)(1), (3) and (4) and Rule 3.3(a)(1), it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. "Covert activity," as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. "Covert activity" may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future.

Oregon Rule 8.4(b).[3]

More recently, several other states have adopted changes that are limited to government lawyers.

> A government lawyer involved with or supervising a law enforcement investigation or operation does not violate this rule as a result of the use, by law enforcement personnel or

[3] An Oregon legal ethics opinion applies this general rule to several examples. Oregon LEO 2005-173 (8/05) (addressing several scenarios under Oregon Rule 8.4(b), which indicates that "it shall not be professional misconduct for a lawyer to advise clients or others about or to supervise lawful covert activity in the investigation of violations of civil or criminal law or constitutional rights, provided the lawyer's conduct is otherwise in compliance with these Rules of Professional Conduct. 'Covert activity,' as used in this rule, means an effort to obtain information on unlawful activity through the use of misrepresentations or other subterfuge. 'Covert activity' may be commenced by a lawyer or involve a lawyer as an advisor or supervisor only when the lawyer in good faith believes there is a reasonable possibility that unlawful activity has taken place, is taking place or will take place in the foreseeable future."; interpreting three situations, holding that (1) a lawyer cannot befriend or approach a witness pretending to be from witness's employer's personnel office and question the witness about an accident, because the lawyer's adversary is an injured worker and is not engaging in "violations of civil law, criminal law, or constitutional rights"; (2) a lawyer may not herself use a fictitious name when interviewing a doctor, in an effort to convince the doctor that she is severely injured, as part of an investigation into suspected fraud by the doctor in another accident case, noting that Rule 8.4(b) does not allow a lawyer to participate directly in covert activity; (3) a deputy district attorney may hire someone to pose as a drug customer in a sting operation, if he in good faith believes that unlawful drug dealings are taking place).

> others, of false identifications, backgrounds and other information for purposes of the investigation or operation.

South Carolina Rule 4.1 cmt. [2]. This South Carolina rule allows government lawyers themselves to engage in deceptive conduct.

> (2) The prosecutor shall represent the government and shall be subject to these Rules as is any other lawyer, except:
>
> (a) notwithstanding Rules 5.3 and 8.4, the prosecutor, through order, directions, advice and encouragement may cause other agencies and offices of government, and may cause nonlawyers employed or retained by or associated with the prosecutor, to engage in any action that is not prohibited by law, subject to the special responsibilities of the prosecutor established in (1) above; and
>
> (b) to the extent an action of the government is not prohibited by law but would violate these Rules if done by a lawyer, the prosecutor (1) may have limited participation in the action, as provided in (2)(a) above, but (2) shall not personally act in violation of these Rules.

Alabama Rule 3.8(2). In contrast to the South Carolina rule, this Alabama rule only allows government lawyers to <u>supervise</u> non-lawyers in the deceptive conduct.

Florida has also adopted a rule dealing with this issue.

> A lawyer shall not: . . . (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except that it shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to advise others about or to supervise another in an undercover investigation, unless prohibited by law or rule, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule.

Florida Rule 4-8.4(c). Florida's approach is different from Oregon's, South Carolina's and Alabama's. It allows government lawyers acting as lawyers only to supervise

others in the deceptive conduct. On the other hand, "government lawyers employed in a capacity other than as a lawyer" may engage in deceptive practices themselves.

Virginia added a sentence to the end of its Rule 5.3 Comment [1] -- which deals with non-lawyers.

> At the same time, however, the Rule is not intended to preclude traditionally permissible activity such as misrepresentation by a nonlawyer of one's role in a law enforcement investigation or a housing discrimination "test."

Virginia Rule 5.3 cmt. [1]. This comment essentially allows lawyers to supervise non-lawyers in traditionally accepted socially worthwhile deceptive conduct.

While the ABA has debated[4] and a handful of states acted, lawyers have continued to engage in knowingly deceptive conduct in furtherance of socially worthwhile goals.

For instance, an Arizona LEO clearly allowed lawyers to direct non-lawyers in such activities. Arizona LEO 99-11 (9/99) (indicating that "[a] private practice lawyer ethically may direct a private investigator or tester to misrepresent their identity or purpose in contacting someone who is the subject of investigation, only if the misrepresentations are for the purpose of gathering facts before filing suit"; the

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[4] ABA LEO 396 (7/28/95) ("There is no doubt that the use of investigators in civil and criminal matters is normal and proper. Particularly in the criminal context, there are legitimate reasons not only for the use of undercover agents. . . . to conduct investigations, but for lawyers to supervise the acts of those agents. And the investigators themselves are not directly subject to Rule 4.2, even if they happen to be admitted to the Bar (as many FBI agents are), because they are not, in their investigative activities, acting as lawyers: they are not 'representing a client.' However, when the investigators are directed by lawyers, the lawyers may have ethical responsibility for the investigators' conduct."; "Although there appears to be no decisional authority on the point, it seems clear, and widely understood, that the fact that an investigator is also a member of the bar does not render him, in his activities as an investigator, subject to those ethical rules -- the overwhelming majority of the provisions of the Model Rules -- that apply only to a lawyer 'representing a client.' Such an investigator would nonetheless be subject to those few provisions of the Model Rules, such as portions of Rule 8.4 (Misconduct) that apply to lawyers even when they are not acting as such. See, e.g., Rule 8.4(b): 'It is professional misconduct for a lawyer to . . . commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.'")

hypothetical involved a "tester" whose goal was to investigate a school's possible discrimination; the Arizona Bar cited a number of cases approving the use of such "testers" in racial discrimination cases, including Richardson v. Howard, 712 F.2d 319 (7th Cir. 1983)).

Courts have clearly approved such conduct.

- Mena v. Key Food Stores Co-Operative, Inc., 758 N.Y.S.2d 246, 250 (N.Y. Sup. Ct. 2003) (finding the plaintiffs in a racial bias lawsuit had not acted improperly in being trained by the lawyer how to tape-record in-person and telephone conversations in which defendant's employees made racially offensive statements; "Contemporary ethical opinions hold that a lawyer may secretly record telephone conversations with third parties without violating ethical strictures as long as the law of the jurisdiction permits such conduct."; explaining that "[h]ere, too, we have activity that might otherwise evade discovery or proof and a circumstance which has policy interests as compelling as those we find in housing discrimination matters. The interests at stake here transcend the immediate concerns of the parties and attorneys involved in this racial bias action. The public at large has an interest in insuring that all of its members are treated with that modicum of respect and dignity that is the entitlement of every employee regardless of race, creed or national origin.").

- Kyles v. J.K. Guardian Sec. Servs., Inc., 222 F.3d 289 (7th Cir. 2000) (holding that employment "testers" have standing to sue for employment discrimination).

- Richardson v. Howard, 712 F.2d 319 (7th Cir. 1983) (approving use of a professional tester's testimony in the case alleging racial discrimination in the leasing of apartments).

**(a)** The ABA Model Rules contain a general prohibition on lawyers engaging in "conduct involving dishonesty, fraud, deceit or misrepresentation." ABA Model Rule 8.4(c). ABA Model Rule 5.1(a) requires that law firms adopt "measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct." Therefore, lawyers should avoid participation in such "tests" because they would require deceitful conduct by the lawyer.

**(b)** A law firm's responsibility for non-lawyer staff members is slightly different from the responsibility the law firm has for assuring that lawyers comply with the ethics rules. ABA Model Rule 5.3(a). This difference means that in certain limited circumstances law firm staff may engage in conduct that would be a violation of the rules if performed by a lawyer.

## Best Answer

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

# Deception: Commercial and Other Causes

## Hypothetical 10

You recently represented a furniture manufacturer in terminating its relationship with a large retailer. Your client and the retailer entered into a consent decree in which the retailer agreed to stop selling your client's furniture at its stores. You and your client have heard rumors that the retailer is violating the consent decree by buying your client's furniture from other retailers and selling it at their stores. From what you hear, the retailer does not advertise that it sells your client's furniture, but arranges for sales to consumers who ask about the furniture when they visit the retailer's stores.

May you arrange for one of your law firm's associates, a paralegal and your son-in-law to visit one of the retailer's stores and pose as consumers interested in buying your client's furniture?

## YES (PROBABLY)

## Analysis

The ABA and state bars have long debated the ethical propriety of deceptive conduct undertaken for socially worthwhile goals, such as housing discrimination tests. However, there seems to have been a mismatch between courts' and bars' efforts to reconcile the explicit prohibition on deceptive conduct and the type of activity that goes on nearly every day.

Courts throughout the country have either implicitly or explicitly approved the use of deceptive conduct in pursuing commercial rather than socially worthwhile goals.

In some cases that do not even deal with ethics issues, courts blithely describe such deceptive conduct. For instance, in one Virginia decision by a very well-respected Circuit Court Judge (Charles Poston), the court addressed a defamation claim brought by a former employee who claimed that her former employer made false and defamatory statements about her. Sarno v. Johns Bros., Inc., 62 Va. Cir. 343 (Norfolk

2003). The court's statement of facts indicates that a former employee and her employer settled her wrongful termination claim with a settlement agreement requiring the employer to state in response to any job reference checks that she "stopped work as a result of her pregnancy and her desire to take care of her children." Id. at 343. The court explained what happened next.

> After the agreement has been executed, Cladeen Clanton, Sarno's former supervisor at Johns Brothers, was contacted by Sarno's private investigator and her brother. Both posed as potential employers seeking references for Sarno. When asked if Johns Brothers would rehire Sarno, Clanton answered: "No, absolutely not, there were numerous problems with her." Sarno v. Clanton, 59 Va. Cir. 384, 386 (Norfolk, 2002). When asked about Sarno's job performance, Clanton responded that she "did not find complete honesty in Sarno's work." Id.

Id. at 343-44 (emphasis added). The court did not even comment on the deception, thus implicitly finding it appropriate.

Two cases decided at about the same time and the same place dealt with and clearly accepted such deceptive conduct.

**Apple Corps Ltd. v. International Collectors Soc'y, 15 F. Supp. 2d 456 (D.N.J. 1998).** In Apple Corps, plaintiffs (which included Yoko Ono Lennon and related companies) hired a private investigator to determine if defendants were improperly selling Beatles-related products. Defendants claimed that plaintiffs' lawyer had improperly engaged in ex parte contacts, and also had violated the prohibition on deceitful conduct by arranging for investigators to pretend that they were interested in buying defendants' products.

The court first held that New Jersey ethics rules applied (because the investigation related to a New Jersey court's consent order), even though the pertinent lawyers practiced principally in New York.

The court rejected the defendants' argument that the plaintiffs' lawyer had engaged in improper ex parte contacts by arranging for investigators to communicate with defendants' sales representatives. The court explained that the investigators "posed as normal consumers," and that "the only misrepresentations made were as to the callers' purpose in calling and their identities." Id. at 474.

> RPC 4.2 [New Jersey's prohibition on certain ex parte contacts] cannot apply where lawyers and/or their investigators, seeking to learn about current corporate misconduct, act as members of the general public to engage in ordinary business transactions with low-level employees of a represented corporation. To apply the rule to the investigation which took place here would serve merely to immunize corporations from liability for unlawful activity, while not effectuating any of the purposes behind the rule.

Id. at 474-75.

The court also found that plaintiffs' lawyers had not violated the general prohibition on deceitful conduct. Citing the common use of "undercover agents" in criminal cases and in civil "discrimination tests," the court held that

> [t]his limited use of deception, to learn about ongoing acts of wrongdoing, is also accepted outside the area of criminal or civil-rights law enforcement. . . . The prevailing understanding in the legal profession is that a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means.

Id. at 475. The court explained that the plaintiffs were entitled to determine if the defendants were complying with an earlier court order, and could not have determined the defendants' compliance otherwise.

**Gidatex S.r.L. v. Campaniello Imports Ltd., 82 F. Supp. 2d 119 (S.D.N.Y. 1999).** In Gidatex, the plaintiff company wanted to determine if defendants were violating trademark and other similar laws. The plaintiff's counsel Breed, Abbott & Morgan, hired two private investigators "to pose as interior designers visiting [defendant's] showrooms and warehouse and secretly tape-record conversations with defendants' salespeople." Id. at 120.

The court found that plaintiff's lawyers had not violated the prohibition on deceptive conduct, because "hiring investigators to pose as consumers is an accepted investigative technique, not a misrepresentation." Id. at 122.

> While it might have been annoying and time-consuming for [defendant's] sales clerks to talk with phony customers who had no interest in buying furniture, the investigators did nothing more than observe and record the manner in which [defendant's] employees conducted routine business.

Id.

Citing earlier cases in which companies investigated possible "passing off" and other violations of intellectual property law, the court explained that

> enforcement of the trademark laws to prevent consumer confusion is an important policy objective, and undercover investigators provide an effective enforcement mechanism for detecting and proving anti-competitive activity which might otherwise escape discovery or proof. It will be difficult, if not impossible, to prove a theory of "palming off" without the ability to record oral sales representations made to consumers. Thus, reliable reports from investigators posing as consumers are frequently recognized as probative and admissible evidence in trademark disputes.

Id. at 124.

The court acknowledged that under relevant New York ethics rules, the salesclerks with whom the plaintiff's investigators spoke were "represented parties" for purposes of the prohibition on ex parte contacts. However, the court refused to find that plaintiff's lawyer had violated the prohibition.

> Although Bailey's [plaintiff's lawyer] conduct technically satisfies the three-part test generally used to determine whether counsel has violated the disciplinary rules [governing ex parte contacts], I conclude that he did not violate the rules because his actions simply do not represent the type of conduct prohibited by the rules. The use of private investigators, posing as consumers and speaking to nominal parties who are not involved in any aspect of litigation, does not constitute an end-run around the attorney/client privilege. [Plaintiff's] investigators did not interview the sales clerks or trick them into making statements they otherwise would not have made. Rather, the investigators merely recorded the normal business routine in the [defendant's] showroom and warehouse.

Id. at 125-26. The court also refused to exclude the evidence captured by the investigators.

Several more recent cases reached the same conclusion.

In Hill v. Shell Oil Co., 209 F. Supp. 2d 876 (N.D. Ill. 2002), plaintiffs were pursuing a class action alleging that Shell gas stations discriminated against African-Americans. The plaintiffs arranged for a videotaping of normal transactions between private investigators and Shell employees.

The court described Gidatex and Midwest Motor Sports as representing the two ends of a spectrum. Id. at 879.

> [W]e think there is a discernible continuum in the cases from clearly impermissible to clearly permissible conduct. Lawyers (and investigators) cannot trick protected

> employees into doing things or saying things they otherwise would not do or say. They cannot normally interview protected employees or ask them to fill out questionnaires. They probably can employ persons to play the role of customers seeking services on the same basis as the general public. They can videotape protected employees going about their activities in what those employees believe is the normal course. That is akin to surveillance videos routinely admitted.

Id. at 880. The court held that the videotaping of the transactions with the Shell employees fell within the acceptable range.

> Here we have secret videotapes of station employees reacting (or not reacting) to plaintiffs and other persons posing as consumers. Most of the interactions that occurred in the videotapes do not involve any questioning of the employees other than asking if a gas pump is prepay or not, and as far as we can tell these conversations are not within the audio range of the video camera.

Id. The court held that the conversations "do not rise to the level of communications" protected by the prohibition on ex parte contacts under Rule 4.2. Id. The court denied defendants' motion for a protective order prohibiting further videotaping.

In A.V. by Versace, Inc. v. Gianni Versace, S.p.A., Nos. 96 Civ. 9721 (PKL)(THK) & 98 Civ. 0123 (PKL)(THK), 2002 U.S. Dist. LEXIS 16323 (S.D.N.Y. Sept. 3, 2002), plaintiff Gianni Versace sought to hold defendants in civil contempt for violating a preliminary injunction prohibiting them from improperly using the name "Versace."

The court rejected defendants' complaint about Versace's use of a private investigator, who posed as a buyer in the fashion industry.

> The investigator's actions conformed with those of a business person in the fashion industry, and Alfredo Versace [defendant] makes no allegation that the private investigator gained access to any non-public part of [his company]. . . . [C]ourts in the Southern District of New York have frequently admitted evidence, including secretly

> recorded conversations, gathered by investigators posing as consumers in trademark disputes.

Id. at *30 (citing Gidatex and several cases that did not involve a lawyer's role in the use of investigators).

In Midwest Motor Sports v. Arctic Cat Sales, Inc., 347 F.3d 693 (8th Cir. 2003), the Eighth Circuit confirmed the District Court's exclusion of evidence obtained by the secret tape recording of in-person conversations with plaintiff franchisees by investigators hired by defendant's lawyers.

The court held that the investigators had engaged in improper ex parte contacts with the plaintiff's president/owner during litigation.

The Eighth Circuit noted that the ABA issued ABA LEO 422 (6/24/01) shortly after the district court issued its opinion (which relied on the earlier ABA LEO 337 (8/1/74) -- which was withdrawn by ABA LEO 422). The Eighth Circuit nevertheless found that the nonconsensual recording was unethical, because of the separate violation of the prohibition on ex parte contacts. The court explained that the investigators'

> unethical contact with [the plaintiff's owner/president salesman] combined with the nonconsensual recording presents the type of situation where even the new [ABA] Formal Opinion would authorize sanctions.

Id. at 699 (emphasis added).

The Eighth Circuit noted that defendants' lawyer had directed the investigators to "elicit specific admissions" that "could have been obtained properly through the use of formal discovery techniques." Id. The court rejected the defendant's excuse that it had retained the investigator only "after traditional means of discovery had failed." Id. at

700. The court explained that defendant's "frustration does not justify a self-help remedy. It is for this very reason that our system has in place formal procedures, such as a motion to compel, that counsel could have used instead of resorting to self-help remedies that violate the ethics rules." Id.

Because "South Dakota law was not fully developed" on permissibility of such deceptive conduct, the Eighth Circuit did not impose any monetary sanctions against the defendant or its lawyers. Id. at 701. Thus, courts have had no trouble treading where bars have feared to go. Although lawyers should be wary of taking their cue from case law rather than ethics rules and opinions, these many decisions clearly reflect societal acceptance of minimally deceptive conduct.[1]

In 2006, the Southern District of New York upheld Cartier's use of undercover investigators to catch those selling counterfeit watches. Cartier v. Symbolix, Inc., 454 F. Supp. 2d 175, 183 (S.D.N.Y. 2006) (upholding Cartier's use of undercover investigators to catch defendants selling counterfeit watches; denying defendants' argument that Cartier is not entitled to injunctive relief because it had used undercover investigators; undercover investigators are "'an effective enforcement mechanism for detecting and proving anticompetitive activity which might otherwise escape discovery or proof'" (citation omitted)).

[1] In contrast, Congress has been quick to condemn more serious types of deception -- such as that undertaken by investigators in the recent "pretexting" scandal at Hewlett Packard. Telephone Records and Privacy Protection Act of 2006, 109 Pub. L. No. 476, § 3, 120 Stat. 3568 (enacted Jan. 12, 2007; to be codified at 18 U.S.C. § 1039(a)(1)) (prohibiting anyone from obtaining another individual's confidential phone records by "making false or fraudulent statements or representations to an employee of a covered entity").

In contrast to these court endorsements of mildly deceptive conduct in commercial settings, bars traditionally limited their analysis to socially worthwhile contexts such as housing discrimination tests.

In what might become a groundbreaking analysis, the New York County Lawyers' Association endorsed lawyers' supervision of others who engage in mildly deceptive conduct in "a small number of exceptional circumstances." Interestingly, the New York County Lawyers' Association apparently could not bring itself to use the word "deception" -- or any of the other terms used in ABA Model Rule 8.4 or the analogous New York ethics rule DR-102(A)(1) ("a lawyer or law firm shall not . . . engage in conduct involving dishonesty, fraud, deceit, or misrepresentation"). Instead, the New York County Lawyers' Association used the word "dissemblance."[2] It will be interesting to see if other bars follow New York's lead.

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[2] New York County Law. Ass'n LEO 737 (5/23/07) (addressing a non-government lawyer's use of an investigator who employs "dissemblance"; explaining that the word "dissemble" means: "'To give a false impression about (something); to cover up (something) by deception (to dissemble the facts).'" (citation omitted); explaining that "dissemblance is distinguished here from dishonesty, fraud, misrepresentation, and deceit by the degree and purpose of dissemblance. For purposes of this opinion, dissemblance refers to misstatements as to identity and purpose made solely for gathering evidence. It is commonly associated with discrimination and trademark/copyright testers and undercover investigators and includes, but is not limited to, posing as consumers, tenants, home buyers or job seekers while negotiating or engaging in a transaction that is not by itself unlawful. Dissemblance ends where misrepresentations or uncorrected false impressions rise to the level of fraud or perjury, communications with represented and unrepresented persons in violation of the Code . . . or in evidence-gathering conduct that unlawfully violates the rights of third parties." (footnote omitted); not addressing lawyers' <u>own</u> dissemblance, but permitting a lawyer-directed investigator's dissemblance under "certain exceptional conditions," which lawyers "should interpret . . . narrowly"; "In New York, while it is generally unethical for a non-government lawyer to knowingly utilize and/or supervise an investigator who will employ dissemblance in an investigation, we conclude that it is ethically permissible in a small number of exceptional circumstances where the dissemblance by investigators is limited to identity and purpose and involves otherwise lawful activity undertaken solely for the purpose of gathering evidence. Even in these cases, a lawyer supervising investigators who dissemble would be acting unethically unless (i) either (a) the investigation is of a violation of civil rights or intellectual property rights and the lawyer believes in good faith that such violation is taking place or will take place imminently or (b) the dissemblance is expressly authorized by law; and (ii) the evidence sought is not reasonably and readily available through other lawful means; and (iii) the lawyer's conduct and the investigator's conduct that the lawyer is supervising do not otherwise violate the New York Lawyer's Code of Professional Responsibility (the 'Code') or applicable law; and (iv) the dissemblance does not unlawfully or unethically violate the rights of

## Best Answer

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

third parties. These conditions are narrow. Attorneys must be cautious in applying them to different situations. In most cases, the ethical bounds of permissible conduct will be limited to situations involving the virtual necessity of non-attorney investigator(s) posing as an ordinary consumer(s) engaged in an otherwise lawful transaction in order to obtain basic information not otherwise available. This opinion does not address the separate question of direction of investigations by government lawyers supervising law enforcement personnel where additional considerations, statutory duties and precedents may be relevant. This opinion also does not address whether a lawyer is ever permitted to make dissembling statements directly himself or herself.").

# Deception by Government Investigators

## Hypothetical 11

You have been placed in charge of a special prosecution unit focusing on illegal drug sales.

May you participate in setting up drug "sting" operations?

## YES

## Analysis

Even without explicit permission under the ethics rules or the official imprimatur of bar approval, government lawyers traditionally have engaged in certain types of deception.

By definition, lawyers who advise spy agencies such as the CIA advise their clients to engage in deception. The same is true of criminal "sting" operations.

Not surprisingly, bars everywhere have approved such conduct, often through a strained reading of the ethics rules that they choose not to apply in the same way to private lawyers.

- Virginia LEO 1845 (6/19/09) (explaining that Virginia State Bar staff lawyers may direct and supervise nonlawyer bar investigators, outside investigators, or volunteers who "engage in covert investigative techniques in the investigation of the unauthorized practice of law in any case in which no other reasonable alternative is available to obtain information against the person engaging in the unauthorized practice of law."; noting specifically, that they may undertake a covert investigation of a paralegal's reported preparation of wills and powers of attorney without a lawyer's direct supervision (which would amount to a criminal act); explaining that the Bar worried that "because of the absence of witnesses who can testify or produce substantive evidence," the Bar might not be able to undertake enforcement actions against the paralegal; noting that the Bar proposed to direct a nonlawyer to contact the paralegal "under the pretext of wanting a will and/or POA prepared, collect and pay for these services, and report back the results."; holding that lawyers directing and supervising such a covert operation would

not violate Virginia Rule 8.4(c), because such behavior would not reflect adversely on "the lawyer's fitness to practice law."; noting that Virginia's unique Comment [1] to its Rule 5.3 specifically approves "traditionally permissible activity" such as law enforcement investigations and housing discrimination tests; citing earlier LEO opinions, which have recognized a "law enforcement" exception to Rule 8.4(c)'s general prohibition on deception).

- Michael E. Ruane, FBI's Sham Candidate Crawled Under W. Va.'s Political Rock, Washington Post, Dec. 2, 2005, at A1 (explaining that the FBI had arranged for an accused criminal to engage in a sting operation in Logan County, West Virginia -- which involved the man pretending to run for the West Virginia House of Delegates; explaining that "[t]he current case began in 2003, when Esposito, a lawyer who had been mayor of the City of Logan for 16 years, entered a plea agreement with the government in a corruption case, according to court papers. He had been accused of paying the $6,500 bar tab of a local magistrate for reasons not specified and then paying the magistrate to keep quiet about the arrangement. The magistrate was later indicted on an extortion charge. Under the plea agreement, Esposito began helping the Justice Department in its investigation of county political corruption, which the department described as 'commonplace and widespread.'"; "The small-town lawyer and former mayor [Thomas Esposito] was just bait. And when the FBI lowered him into the murky waters of southern West Virginia politics last year, it dangled him like a shiny lure. The whole affair landed yesterday in a Charlestown courtroom, where a defense attorney cried foul, accusing the government of 'outrageous' conduct and of violating the sanctity of the election process. He said the charade robbed 2,175 citizens who voted for Esposito -- unaware he wasn't for real -- of a constitutional right. But a federal judge sided with the government, ruling after a 30-minutes hearing that corruption in Logan County had been endemic 'for longer than living memory' and that the bogus election campaign might have been the only way to root it out."; interestingly, noting that "[t]he FBI withdrew Esposito from the race two days after the meeting with Harvey and Mangus, and the Justice Department has said it took great pains to alert the public by way of the media [starting on April 14, approximately one month before the election]. But his name remained on the ballot, and on primary day -- May 11, 2004 -- he got more than 2,000 votes, placing last in the field."; rejecting the criminal defense lawyer's argument that the government had corrupted the political process in West Virginia by essentially encouraging voters to waste their vote on a sham candidate rather than on a real candidate).

- District of Columbia LEO 323 (3/29/04) ("Rule 8.4(c) of the Rules of Professional Responsibility makes it professional misconduct for a lawyer to 'engage in conduct involving fraud, deceit, or misrepresentation.' This prohibition applies to attorneys in whatever capacity they are acting -- it is not limited to conduct occurring during the representation of a client and is,

therefore, facially applicable to the conduct of attorneys in a non-representational context. See ABA Formal Op. No. 336 (1974) (lawyer must comply with applicable disciplinary rules at all times). The prohibition on misrepresentation would, therefore, facially apply to attorneys conducting certain activities that are part of their official duties as officers or employees of the United States when the attorneys are employed in an intelligence or national security capacity." (footnote omitted); "But, clearly, it does not encompass all acts of deceit -- for example, a lawyer is not to be disciplined professionally for committing adultery, or lying about the lawyer's availability for a social engagement."; "[W]e are convinced that the anti-deceit provisions of Rule 8.4 do not prohibit attorneys from misrepresenting their identity, employment or even allegiance to the United States if such misrepresentations are made in support of covert activity on behalf of the United States and are duly authorized by law." (footnote omitted); "Lawyers employed by government agencies who act in a non-representational official capacity in a manner they reasonably believe to be authorized by law do not violate Rule 8.4 if, in the course of their employment, they make misrepresentations that are reasonably intended to further the conduct of their official duties.").

- Virginia LEO 1765 (6/13/03) (lawyers working for a federal intelligence agency may ethically perform such undercover work as use of "alias identities" and non-consensual tape recordings).

- Utah LEO 02-05 (3/18/02) ("Rule 8.4(c) was intended to make subject to professional discipline only illegal conduct by a lawyer that brings into question the lawyer's fitness to practice law. It was not intended to prevent state or federal prosecutors or other government lawyers from taking part in lawful, undercover investigations. We cannot, however, throw a cloak of approval over all lawyer conduct associated with an undercover investigation or 'covert' operation. Further, a lawyer's illegal conduct or conduct that infringes the constitutional rights of suspects or targets of an investigation might also bring into question the lawyer's fitness to practice law in violation of Rule 8.4(c). The circumstances of such conduct would have to be considered on a case-by-case basis. Nor do we provide a license to ignore the Rules' other prohibitions on misleading conduct. We do hold, however, that a state or federal prosecutor's or other governmental lawyer's otherwise lawful participation in a lawful government operation does not violate Rule 8.4(c) based upon any dishonesty, fraud, deceit or misrepresentation required in the successful furtherance of that government operation." (footnote omitted)).

- United States v. Parker, 165 F. Supp. 2d 431, 476 (W.D.N.Y. 2001) (adopting magistrate's order, which noted: "First, undercover 'sting' investigations initiated without probable cause have been held not to constitute a due process violation.").

- North Carolina LEO 97-10 (1/16/98) ("Opinion rules that a prosecutor may instruct a law enforcement officer to send an undercover officer into the prison cell of a represented criminal defendant to observe the defendant's communications with other inmates in the cell.").

Criminal defendants (and foreign spies) routinely lose challenges to this type of government behavior.

The common law has created one defense -- the "entrapment" defense -- which allows criminal defendants to argue that they would not have engaged in the wrongful conduct but for the government's invitation to do so.

As the Ninth Circuit recently explained,

> [e]ntrapment has two elements: "government inducement of the crime and the absence of predisposition on the part of the defendant." Inducement is "any government conduct creating a substantial risk that an otherwise law-abiding citizen would commit an offense."

United States v. Sandoval-Mendoza, 472 F.3d 645, 648 (9th Cir. 2006) (footnotes omitted). Of course, the criminal defendant often can prove the first element -- but the defendant's entrapment defense usually founders on the second element.

For instance, in the Sandoval-Mendoza case, the court rejected the defendant's attempt to prove "absence of predisposition."

> The government presented evidence Sandoval-Mendoza was predisposed to sell drugs, including wiretap recordings of him talking as though he were an experienced drug dealer. Offering to buy drugs from a drug dealer is not entrapment, even if the government "sets the dealer up" by providing an informant pretending to be a customer, because the dealer is already predisposed to sell.

Id. at 649. Accord United States v. Al-Shahin, 474 F.3d 941, 948 (7th Cir. 2007) (rejecting criminal defendants' entrapment defense, and describing the following factors that the court can consider in analyzing a criminal defendant's predisposition: "(1) the

defendant's character or reputation; (2) whether the government initially suggested the criminal activity; (3) whether the defendant engaged in the criminal activity for profit; (4) whether the defendant evidenced a reluctance to commit the offense that was overcome by government persuasion; and (5) the nature of the inducement or persuasion by the government," quoting United States v. Blassingame, 197 F.3d 271, 281 (7th Cir. 1999) (citations omitted).

In one recent (and rare) victory for a criminal defendant on the entrapment issue, a Florida court found that the government had entrapped the defendant -- with perhaps the oldest temptation known to man.

> The defendant was 37 years old with absolutely no criminal history, unknown to law enforcement officers, and gainfully employed in lawful activity at the time the confidential informant first approached him. The defendant became romantically interested in the CI and she led him to believe that she was similarly interested in him. She first brought up the topic of illegal drug use and continually asked the defendant if he knew where to buy drugs or if he could obtain drugs for her. The defendant repeatedly told her that he did not use or sell illegal drugs, and that, being new to the area, he did not know anyone who used or sold drugs.
>
> The CI made promises of an intimate relationship, to include sexual relations, if the defendant would assist her in obtaining drugs. She discussed her personal medical problems with the defendant and played on his sympathy, indicating that she needed the drugs to cope with the pain and the stress of cancer. The CI was herself a convicted drug trafficker who had recently received a below guidelines suspended sentence and probation. Unbeknownst to the defendant at the time, the CI was involved in similar transactions with several other individuals, who she also pretended to befriend.

Madera v. State, 943 So. 2d 960, 962 (Fla. Dist. Ct. App. 2006) (emphasis in original).

Courts have taken a somewhat more balanced attitude toward deception by government lawyers that is not part of a classic "sting" operation. Two cases provide interesting examples -- one of which is somewhat surprising.

In In re Friedman, 392 N.E.2d 1333 (Ill. 1979), the chief of the criminal division of the Cook County State's Attorney's office suspected a local lawyer of attempting to bribe police officers in connection with DUI matters. The government lawyer arranged for police officers to lie in court in favor of the suspected lawyer's client, and then accept $50 from the lawyer in a "washroom adjacent to the courtroom." The Illinois Supreme Court succinctly described its dilemma in determining whether to sanction the government lawyer.

> This case presents the questions whether disciplinary action is merited and, if so, the nature of the sanction to be imposed when a prosecutor admittedly engages in conduct violative of the Code of Professional Responsibility for the purpose of developing evidence to be used in a subsequent prosecution. The parties have not cited nor has our research disclosed any analogous cases previously considered by either a court or disciplinary committee.

Id. at 1334. The Illinois Supreme Court ultimately declined to sanction the lawyer, but criticized the lawyer for needlessly engaging in deceptive conduct.

The Colorado Supreme Court dealt with a gruesome situation in In re Pautler, 47 P.3d 1175 (Colo. 2002).

The story began on June 8, 1998, when Chief Deputy District Attorney Mark Pautler arrived at the scene of several murders -- three women had "died from blows to the head with a wood splitting maul." Id. at 1176. Pautler learned that there might be witnesses at another location, and quickly traveled there. One of the witnesses described what she had been through at the scene of the murders.

> One of the witnesses at the Belleview apartment, J.D.Y., was the third woman abducted. Neal [William Neal, the killer] also took her to the Chenango apartment where he tied her to a bed using eyebolts he had screwed into the floor specifically for that purpose. While J.D.Y. lay spread-eagled on the bed, Neal brought a fourth woman to the Chenango apartment. He taped her mouth shut and tied her to a chair within J.D.Y.'s view. Then, as J.D.Y. watched in horror, Neal split the fourth victim's skull with the maul. That night he raped J.D.Y. at gunpoint.

Id. at 1177.

By the time Pautler had arrived at the second apartment, Neal was gone, but police there had already established contact with him (he was using his cell phone). Neal at one point indicated that he would surrender to the police, but only if he could speak to a lawyer first. Pautler tried to contact Neal's former lawyer, but the former lawyer's number was no longer in service. Neal also mentioned the possibility of being represented by a public defender, but Pautler did not try to find a public defender.

Pautler worried that a public defender might tell Neal to stop talking with the law enforcement officials -- all of whom were trying to continue the dialogue until the police could identify Neal's cell phone location.

Pautler decided to impersonate a public defender and speak with Neal. After Pautler and Neal spoke for some time, Neal eventually surrendered without incident. When a real public defender began to represent Neal, Pautler did not explain the deception to the public defender. The public defender learned of the deception several weeks later while listening to the tape of his client Neal speaking with Pautler (the public defender recognized Pautler's voice).

Neal eventually dismissed the public defender's office, represented himself at the trial and was sentenced to death for the murders.

The Colorado Bar then charged Pautler with violations of the Colorado ethics rules. In defending against the ethics charges,

> Pautler testified that given the same circumstance, he would not act differently, apart from informing Neal's defense counsel of the ruse earlier.

Id. at 1178. Pautler also put on a witness that described a similarly acute situation.

> Pautler requests this court to craft an exception to the Rules for situations constituting a threat of "imminent public harm." In his defense, Pautler elicited the testimony of an elected district attorney from a metropolitan jurisdiction. The attorney testified that during one particularly difficult circumstance, a kidnapper had a gun to the head of a hostage. The DA allowed the kidnapper to hear over the telephone that the DA would not prosecute if the kidnapper released the hostage. The DA, along with everyone else involved, knew the DA's representation was false and that the DA fully intended to prosecute the kidnapper. Pautler analogizes his deceptive conduct to that of the DA in the hostage case and suggests that both cases give cause for an exception to Rule 8.4(c).

Id. at 1180. The Colorado Supreme Court found the analogy unconvincing, noting that despite Neal's earlier murders "nothing indicated that any specific person's safety was in imminent danger." Id. The Colorado Supreme Court also noted that Pautler could have called a public defender. The Colorado Supreme Court explained that

> Pautler also had the option of exploring with Neal the possibility that no attorney would be called until after he surrendered.

Id.

After all of this, the Colorado Supreme Court took an unforgiving view.

> In sum, we agree with the hearing board that deceitful conduct done knowingly or intentionally typically warrants suspension, or even disbarment. . . . We further agree that the mitigating factors present in Pautler's case outweigh the aggravating factors, and affirm the imposition of a

> three-month suspension, which shall be stayed during twelve months of probation. This sanction reaffirms for all attorneys, as well as the public, that purposeful deception by lawyers is unethical and will not go unpunished. At the same time, it acknowledges Pautler's character and motive.

Id. at 1184. In an en banc decision, the Colorado Supreme Court affirmed a disciplinary hearing board's punishment.[1] The Colorado Supreme Court suspended Pautler's license for 3 months. The court also stayed the suspension and placed Pautler on probation 12 months.[2] The court also ordered Pautler to pay the costs of the proceeding.

Despite this somewhat surprising case, it seems clear beyond a doubt that government lawyers may freely participate in blatant deception as part of their governmental responsibilities.

## Best Answer

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

---

[1] Only one disciplinary hearing board member dissented when the hearing board punished Pautler.

[2] Although the opinion is somewhat ambiguous, presumably Pautler could continue practicing law during the probation period, and the three-month suspension would be imposed only if he engaged in some wrongdoing during the 12 months of probation.

# Responsibility for Investigators' Conduct

## Hypothetical 12

You are trying to compile as much information as possible about a plaintiff. One of your partners has recommended a private investigator.

**(a)** Before allowing the private investigator to start her work, must you instruct her on the ethical and legal limits on her activities?

**NO (PROBABLY)**

**(b)** May you use the fruits of the private investigator's work without assuring yourself that the private investigator has not used illegal means to obtain it?

**YES (PROBABLY)**

**(c)** May you use the fruits of the private investigator's work when the only conceivable way she could have obtained the information involved wrongful conduct (such as violation of health privacy laws)?

**NO (PROBABLY)**

## Analysis

This hypothetical raises the difficult issue of lawyers deciding whether they can use the fruits of an investigation that might have involved violation of the ethics rules had the lawyer engaged in the same conduct to obtain the evidence.[1]

Under ABA Model Rule 5.3,

> [w]ith respect to a nonlawyer employed or retained by or associated with a lawyer: . . . a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to insure that the person's conduct is compatible with the professional obligations of the lawyer.

[1] ABA Model Rule 1.2(d) "prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud." ABA Model Rule 1.2 cmt. [9]. The obligation obviously applies during litigation. ABA Model Rule 3.3 cmt. [3].

ABA Model Rule 5.3(b). In addition, a law firm's management must make "reasonable efforts to insure that the firm has in effect measures giving reasonable assurance that the [nonlawyer's] conduct is compatible with the professional obligations of the lawyer." ABA Model Rule 5.3(a).

ABA Model Rule 5.3(c) governs a lawyer's ethical liability for a nonlawyer's unethical conduct.

> With respect to a nonlawyer employed or retained by or associated with the lawyer . . . a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:
>
> (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ABA Model Rule 5.3(c).

Comment [1] provides more detailed guidance.

> Lawyers generally employ assistants in their practice, including secretaries, investigators, law student interns, and paraprofessionals. Such assistants, whether employees or independent contractors, act for the lawyer in rendition of the lawyer's professional services. A lawyer must give such assistants appropriate instruction and supervision concerning the ethical aspects of their employment, particularly regarding the obligation not to disclose information relating to representation of the client, and should be responsible for their work product. The measures employed in supervising nonlawyers should take account of the fact that they do not have legal training and are not subject to professional discipline.

ABA Model Rule 5.3 cmt. [1].

The ABA dealt with this issue in ABA LEO 396.

> Under these provisions, if the lawyer has direct supervisory authority over the investigator, then in the context of contacts with represented persons, the lawyer would be ethically responsible for such contacts made by the investigator if she had not made reasonable efforts to prevent them (Rule 5.3(b)); if she instructed the investigator to make them (Rule 5.3(c)(1)); or if, specifically knowing that the investigator planned to make such contacts she failed to instruct the investigator not to do so (Rule 5.3(c)(2)). The Committee believes, however, that if, despite instruction to the contrary, an investigator under her direct supervisory authority (or one not under such authority) made such contacts, she would not be prohibited by Rule 5.3 from making use of the result of the contact. . . . Rule 8.4(a) imposes similar, albeit narrower, ethical limits on what a lawyer can direct an investigator to do. . . . Although the question is a close one, the Committee does not believe that a lawyer's making use of evidence offered by an investigative agent by means that would have been forbidden to the lawyer herself but in which she was not complicitous would constitute "ratification" under Rule 5.3(c)(1). "Ratify" is defined by Black's Law Dictionary (6th ed. 1990) as: "To approve and sanction; to make valid; to confirm; to give sanction to. To authorize or otherwise approve, retroactively, an agreement or conduct either expressly or by implication."

ABA LEO 396 (7/28/95). Thus, the ABA did not require the hypothetical lawyer to forego using the evidence -- unless the lawyer has actual knowledge of the investigator's misconduct.

The Restatement provides some guidance.

> 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 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).

Several recent ethics opinions highlight the difficulty of knowing where to draw the line.

Some bars and courts take the fairly aggressive ABA approach, generally allowing lawyers to use the fruits of investigators' or clients' misconduct, which would have been unethical had the lawyer engaged in the misconduct herself.

- Philadelphia LEO 2001-10 (11/2001) (addressing evidence uncovered during a surveillance of a worker's compensation claimant by a hired investigator; noting that the investigator spoke directly with the claimant, which would have violated Rule 4.2 had the conduct been engaged in by the lawyer; "The investigator in this case was not employed by counsel, but was instead employed by the TPA [third-party administrator], and his existence was unknown to counsel at the time of the disputed conduct. Thus, there is no basis to impute to the lawyer a violation of the Rules by the conduct of someone wholly unrelated to him. A different conclusion may result, however, if the TPA had advised counsel of its retention of the investigator, and the assignment given to him, or if counsel either had actual knowledge,

or had reason to believe from prior dealings with the TPA that the conduct was occurring."; noting that "the attempted proffer of the surveillance evidence does not constitute a ratification of the conduct by counsel," because the lawyer fully described to the court how the surveillance evidence was obtained).

- Kearney v. Kearney, 974 P.2d 872 (Wash. Ct. App. 1999) (allowing use of an illegally obtained tape in a child custody dispute; noting that the children's mother had taped conversations between her former husband and the children to show the former husband's emotional abuse).

- Maryland LEO 97-5 (10/11/96) (addressing a tape illegally made by a child's father of the mother threatening to kill herself and the child; ordering the lawyer to maintain the tape but not transfer it to a third party).

- Maryland LEO 96-38 (6/19/96) ("You ask whether a lawyer who represents a client suing a corporate defendant may review documents of the corporation which were obtained from the dumpsters on the corporation's premises by a third party. The third party gave the documents to the client, who then delivered them to the lawyer. You state that: (a) the lawyer did not solicit the retrieval of the documents; (b) the client believes that the documents are relevant to the pending suit; and (c) as a result of the pending suit and a related suit you believe the corporation may be disposing of sensitive information adverse to it. We are of the opinion that you are under no obligation to reveal the matter to the court in which the litigation is pending documents, and regardless whether they are privileged or confidential. . . . However, if the documents are originals, you may be obliged to return them to the owner.").

Some slightly older bar analyses went even farther. Virginia LEO 1141 (10/17/88) (a lawyer representing a widow in a medical malpractice/wrongful death action may use files taken by the widow from the treating physician's office; the files are not "fruits of a crime" but the lawyer should advise the widow to return the original of the file; the lawyer could keep and use a copy of it); Virginia LEO 278 (1/29/76) (a client's wife stole a document from the client's employer to use in a lawsuit; as long as the client's lawyer was not involved in the theft, the lawyer may continue to represent the client and use the document; overruled in LEO 1702, which would require lawyer to return stolen document).

Other bar and court analyses seem to require much more from the lawyers.

- Bratcher v. Ky. Bar Ass'n, 290 S.W.3d 648, 648-49, 649 (Ky. 2009) (imposing a public reprimand based on the following situation: "Movant [lawyer] represented Dennis D. Babbs in a wrongful termination action against his former employer, R.C. Components, Inc. After suit was filed, Movant learned of a company called Documented Reference Check ('DRC'), which could be hired to determine the type of reference being given by a former employer. Movant obtained an application form from DRC and provided it to her client. Movant also paid DRC's fee on behalf of her client. An employee of DRC subsequently called the owner of R.C. Components, identified herself as a prospective employer of Mr. Babbs, and requested information about him. The telephone conversation was transcribed and provided to Movant."; "Movant sent a copy of the transcript to defense counsel as a part of discovery in the case. After receiving the transcript, R.C. Components sought to have Movant disqualified as Mr. Babb's counsel and to have the DRC transcript suppressed."; "Then Circuit Judge John Minton presided over the case. He entered an order disqualifying Movant and suppressing the transcript. He also found that Movant's conduct violated SCR 3.130-4.2, which prohibits a lawyer from communicating about the subject of the representation with a party the lawyer knows to be represented by counsel, and SCR 3.130-8.3(a), which prohibits a lawyer from violating the Rules of Professional Conduct through the conduct of another.").

- Florida LEO 07-1 (9/7/07) (addressing the ethics issues involved in a client's removal of documents from her husband's car, including privileged documents; noting that the wife gave the documents to her lawyer, who immediately put them in a sealed envelope; explaining that Rule 4.4(b) did not apply because the wife had "deliberately obtained" the documents from her adversary husband; holding that the lawyer "would have to produce the documents in response to a valid discovery request for the documents," and "may also have an obligation under substantive law to turn over the documents" if they were stolen -- because they would amount to "'evidence of a crime'" (citations omitted); also explaining that the lawyer could not disclose the client's past removal of the documents, but cannot assist the client in any future wrongdoing; "If the client possibly committed a criminal act, it may be prudent to have the client obtain advice from a criminal defense attorney if the inquiring attorney does not practice criminal law. The inquiring attorney should advise the client that the inquiring attorney is subject to disqualification by the court as courts, exercising their supervisory power, may disqualify lawyers who receive or review materials from the other side that are improperly obtained. . . . The inquiring attorney should also advise the client that the client is also subject to sanction by the court for her conduct. . . . Finally, the inquiring attorney must inform the client that the materials cannot be retained, reviewed or used without informing the opposing party that the inquiring attorney and client have the documents at issue. . . . If the client

refuses to consent to disclosure, the inquiring attorney must withdraw from the representation.").

- Allen v. International Truck & Engine, No. 1:02-cv-0902-RLY-TAB, 2006 U.S. Dist. LEXIS 63720, at *1-2, *25 (S.D. Ind. Sept. 6, 2006) (as a result of defendant's inadvertent filing one of its law firm's billing records in court, the plaintiffs discovered that the defendant had hired a "private investigation company to conduct an undercover investigation into allegations of racial hostility at its Indianapolis facility"; the court criticized defendant's lawyer Littler Mendelson, who knew or should have known that the investigator was engaging in improper ex parte contacts with represented adversaries; describing "Defendant's ostrich-styled defense"; explaining this "Defendant's counsel's culpability is compounded by their failure to affirmatively advise, instruct or otherwise act to prevent contact with represented employees or to prevent contact with unrepresented employees under false pretenses").

- North Carolina LEO 2003-4 (7/25/03) (explaining that a lawyer may not use a private investigator's testimony about conversations the investigator had with the plaintiff in a workers' compensation case, which tended to show that the plaintiff was not as severely injured as he claimed; explaining that the lawyer "instructed the private investigator not to engage Plaintiff in conversation," but that "[d]uring the surveillance, the investigator ignored Attorney's instructions and engaged Plaintiff in a conversation"; concluding that "to discourage unauthorized communications by an agent of a lawyer and to protect the client-lawyer relationship, the lawyer may not proffer the evidence of the communication with the represented person, even if the lawyer made a reasonable effort to prevent the contact, unless the lawyer makes full disclosure of the source of the information to opposing counsel and to the court prior to the proffer of the evidence"; also concluding that the lawyer may still use evidence "gained through the investigator's visual observations of Plaintiff" -- because "[v]isual observation is not a direct contact or communication with a represented person and does not violate Rule 4.2(a)").

- District of Columbia Bar LEO 321 (6/2003) ("Counsel for a respondent may send an investigator to interview an unrepresented petitioner in preparation for a contempt proceeding in which the petitioner has alleged that the respondent has violated the terms of a domestic violence civil protection order, provided that respondent's counsel makes reasonable efforts to ensure that the investigator complies with the requirements of the D.C. Rules of Professional Conduct. These obligations include ensuring that the investigator does not mislead the petitioner about the investigator's or the lawyer's role in the matter and that investigators do not state or imply that unrepresented petitioners must or should sign forms such as personal statements or releases of medical information. Counsel should also take reasonable steps to ensure that, where an investigator reasonably should know that the unrepresented person misunderstands the investigator's role,

the investigator makes reasonable affirmative efforts to correct the misunderstanding.").

- North Carolina LEO 192 (1/13/95) (addressing the lawyer's obligation upon receiving from a client an illegal tape recording of the client's spouse and paramour; holding that the lawyer may not even listen to the tape; "The tape recording is the fruit of Client W's illegal conduct. If Attorney listens to the tape recording in order to use it in Client W's representation, he would be enabling Client W to benefit from her illegal conduct. This would be prejudicial to the administration of justice in violation of Rule 1.2(D). See also Rule 7.2(a)(8). Attention is directed to the Federal Wiretap Act, 18 U.S.C. Section 2510, et seq., particularly Sections 2511 and 2520, regarding criminal penalties for endeavoring to use or using the contents of an illegal wire communication.").

Finally, several bars try to "thread the needle" in providing guidance to lawyers receiving the fruits of investigative techniques that might not be proper.

- See, e.g., Virginia LEO 1786 (12/10/04) (analyzing a series of hypotheticals in which a lawyer receives documents about an adversary that might be useful; explaining that: lawyers may not direct clients to obtain evidence via a method that the lawyers themselves may not engage in; determining whether lawyers must return documents that their clients have removed from the client's employer's office depends on a number of factors, including the client's authorization to handle the documents and the absence or presence of privileged communications in the documents; although the ABA has changed the Model Rules to replace a "return unread" policy with a notice requirement in the case of inadvertent transmission of privileged communications, Virginia has not changed its rules -- so under LEO 1702 lawyers should return unread an adversary's privileged documents given to the lawyer by clients, even if the client "had the documents as part of his employment"; lawyers are not required to notify the opposing party of such receipt of privileged documents if a whistleblower statute permits the lawyer to refrain from providing notice; an additional exception to the "return unread" rule applies if the client/employee made a copy of the employer's documents rather than took originals; LEO 1702 applies only to documents containing privileged communications of an adversary -- thus, lawyers may review and use non-privileged documents as long as the lawyer has not obtained the documents through the use of methods "that violate the legal rights of a third person" under Rule 4.4; determining whether Rule 4.4 would prohibit the lawyer's use of the documents "depends on whether the documents are originals or copies, whether any litigation is foreseen, how the employee acquired the materials, and their relevancy to the potential litigation"; lawyers should remember that stolen documents might amount to "fruits or instrumentalities of a crime" and thus have to be turned over to law

> enforcement authorities; all of these rules would not prohibit government lawyers from engaging in the collection of documents that is "part of the lawful operation" of a U.S. Attorney's investigation).

Interestingly, the Philadelphia Bar indicated in a 2008 legal ethics opinion that a lawyer may not summarily refuse to take advantage of evidence that his or her client might have wrongfully obtained. In Philadelphia LEO 2008-2 (3/08), the Philadelphia Bar dealt with a lawyer whose client obtained access to the client's ex-wife's e-mails through a computer that the couple once jointly owned. The husband had told his lawyer that the e-mails included communications between his ex-wife and her lawyer, and that the e-mails "would devastate her case against" the husband.

The lawyer asking for the opinion clearly did not want to use the e-mails, but the Philadelphia Bar explained that the lawyer had to at least examine the issue in detail. As the Philadelphia Bar explained,

> [I]f, after vetting these questions with the client, the inquirer is satisfied that there is no risk of civil and/or criminal liability to the client, it is the Committee's opinion that the inquirer cannot rest on the conclusion expressed in the inquiry that the e-mails are 'privileged communications' and merely ignore them.

Philadelphia LEO 2008-2 (3/2008). The Philadelphia Bar pointed to Pennsylvania Rule 4.4(b), which indicates only that the receiving lawyer's duties upon obtaining inadvertently transmitted privileged communications "are limited to notifying the sender" -- so that "the question of whether and to what extent use can thereafter be made of those e-mails will be a matter of substantive and procedural law."

The Philadelphia Bar also pointed to Pennsylvania Rule 1.4's duty to communicate with clients, and ultimately found

> that the inquirer cannot rule out -- at least without being aware of their content -- the possibility that the content of the e-mails may be such as to impose an affirmative duty on the inquirer's part to employ them in pursuing the client' s claims and defenses if they will significantly advance the client's interests.

Philadelphia LEO 2008-2 (3/2008).[2]

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[2] Philadelphia LEO 2008-2 (3/2008) (assessing a situation involving an ex-husband's desire to use e-mail between his ex-wife and her lawyer; "The inquirer has a client whose ex-wife has sued the client regarding an estate matter. The client has revealed to the inquirer that he, the client, has access to the ex-wife's e-mail through the computer in his home which she used while they were married. She never changed her password until recently. The client has told the inquirer that he has e-mails between his ex-wife and her attorney that would devastate her case against the client. The inquirer does not know anything further because he advised his client that the e-mails were privileged communications and that he, the inquirer did not want to know anything further. The client wants to reveal the e-mails to the Orphans Court. The inquirer asks if he is correct that these communications should not be revealed and cannot be subpoenaed. The issues of whether the communications are, in fact, privileged and are or are not accessible via subpoena are mixed questions of fact and law which are beyond the purview of the Committee (however see discussion of the privilege below). However, the Committee understands this inquiry to be whether the inquirer is constrained by the Pennsylvania Rules of Professional Conduct (the "Rules") from (a) reviewing these e-mails and/or (b) making use of them in the litigation between the inquirer's client and the client's ex-wife."; noting that a Pennsylvania law renders illegal use of e-mail communications in certain circumstances, but explaining that there were insufficient facts to determine that law's applicability; "[I]f, after vetting these questions with the client, the inquirer is satisfied that there is no risk of civil and/or criminal liability to the client, it is the Committee's opinion that the inquirer cannot rest on the conclusion expressed in the inquiry that the e-mails are 'privileged communications' and merely ignore them. There are several reasons for this. First, the mere fact that the e-mail communications in question are between the client's ex-wife and her attorney does not render them privileged, per se. The scope of the privilege is statutory in nature; see, 42 Pa.C.S. § 5928, as well as case law interpreting the statute, and extends, inter alia, only to those communications that are 'for the purpose of securing primarily either an opinion of law or legal services. . . .' Accordingly, the Committee feels that the inquirer may not be able to make any judgments on the privilege issue without subjecting the e-mails to some kind of review. The Committee appreciates the inquirer's concern about coming into possession of e-mails between the client's ex-wife and her lawyer that may turn out to have been inadvertently sent. In the event that the inquirer should determine that the e-mails came into the client's possession inadvertently the inquirer's ethical duties are limited to notifying the sender as provided by Rule 4.4(b). As previously stated, the question of whether and to what extent use can thereafter be made of those e-mails will be a matter of substantive and procedural law. However, should use of the e-mail be a possibility several other ethical issues must be examined."; holding that the lawyer must deal with the e-mails rather than just indicate to the client that the lawyer will not analyze or possibly use them; "In the present case, the client clearly wishes the inquirer to use the subject e-mails. Because the inquiry does not make the nature of the litigation between the client and his ex-wife entirely clear, the Committee cannot guess at the objectives of the representation. The Committee notes that the inquirer and the client, if they have not done so already, should clarify those objectives and at least discuss how and whether the e-mails can or should be used. This is entirely consistent with the inquirer's duty under Rule 1.4 Communication specifically, Rule 1.4(a)(2) which obligates a lawyer to 'reasonably consult with the client about the means by which the client's objectives are to be accomplished.' The Committee finds that the inquirer cannot rule out -- at least without being aware of their content -- the possibility that the content of the e-mails may be such as to impose an affirmative duty on the inquirer's part to employ them in pursuing the client' s claims and defenses if they will significantly advance the client's interests.").

## Best Answer

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

# Exploiting an Adversary's Mistakes

## Hypothetical 13

You just won a jury trial for your client. You and your client are justifiably curious about whether your adversary will file an appeal. You have a cordial relationship with the adversary's lawyer, so you call her on the Thursday before the filing deadline to ask whether she intends to file an appeal. In a friendly conversation, the other lawyer laughingly "thanks" you for ruining her weekend. You instantly realize that the other lawyer must have miscalculated the appellate filing deadline -- which is Friday rather than Monday.

**(a)** May you refrain from telling the adversary's lawyer about her miscalculation?

**YES**

**(b)** Must you advise the adversary of the calculation error?

**NO**

**(c)** Without your client's consent, may you advise the adversary of the calculation error?

**NO**

## Analysis

Every ethics code requires lawyers to diligently represent their clients. For instance, ABA Model Rule 1.3 indicates that

> a lawyer shall act with reasonable diligence and promptness in representing a client.

ABA Model Rule 1.3; Illinois Rule 1.3; Virginia Rule 1.3.

Comment [1] explains this duty, and how it interacts with notions of professionalism.

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the

> interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2. The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

ABA Model Rule 1.3 cmt. [1].

The old ABA Model Code used the word "zealous" in describing a lawyer's duty to act on the client's behalf. The word "zeal" still appears in the ABA Model Rules, but only in Comment [1]. At least in a linguistic sense, the ABA Model Rules therefore seem to require less than "scorched earth" tactics on the client's behalf.

In this situation, lawyers are ethically free to cooperate with adversaries on such matters as short extensions, minor violations of brief page limits, etc. On the other hand, they have a duty to communicate with their client before agreeing to an important concession. ABA Model Rule 1.2(a).

In all of these situations, the duty of diligence would seem to outweigh whatever ill-defined "duty" of courtesy a lawyer might perceive.

## Best Answer

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

# Inadvertent Transmission of Communications

## Hypothetical 14

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]

[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.").

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 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

[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.").

> 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 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]

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[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).

[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

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 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]

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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.").

[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.").

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.

- 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").

- American 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 ordinarily 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 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.

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[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.").

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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# Inadvertent Production of Privileged Documents in Litigation: Ethics Issues

## Hypothetical 15

Last week you received and reviewed ten boxes of documents produced by a litigation adversary. This morning you received a letter from the adversary, demanding that you return three documents it claims to have "inadvertently" included in the production.

Must you return the following documents your adversary claims to have "inadvertently" included in the production?

**(a)** A memorandum from your adversary's trial lawyer to its president, marked "privileged and confidential" and analyzing the litigation risks in this case?

**MAYBE**

**(b)** A memorandum to the adversary's president which does not list an author, but which discusses this litigation (your adversary's lawyer claims that she just learned that the memorandum was written by a former in-house lawyer).

**MAYBE**

**(c)** A chart of customer complaints that could be very useful in the litigation, but which falls outside the scope of your discovery request.

**NO**

## Analysis

The original ABA Legal Ethics Opinion dealing with this issue did not apply to privileged or confidential documents produced during a litigation document production, although the newest version of ABA Model Rule 4.4(b) also provides guidance for documents accidentally produced in a litigation document production. Under current ABA Model Rule 4.4(b), a lawyer receiving a document that the lawyer "knows or reasonably should know" was inadvertently provided to the lawyer "shall promptly notify the sender."

Most courts dealing with the inadvertent production of privileged documents during a litigation document production do not address the ethics issue, but instead limit their analysis to assessing the possible waiver of the attorney-client privilege or work product doctrine protection.

Of course, a litigant claiming that it "inadvertently" produced a document in discovery must be prepared to establish that its mistake was physical rather than conceptual. One court discussed this distinction.

> In contrast, the facts here demonstrate that defendant's counsel specifically reviewed the Criteria Document and knowingly and intentionally produced that document after determining that paragraphs 9 and 10 should be redacted and that the remainder of the document should be produced to plaintiffs. According to defendant, its disclosure is nonetheless "inadvertent" because the disclosure was based on a mistake of counsel, who reviewed the document outside the context of Ms. Ferrell's cover memorandum and, without the benefit of that memorandum, did not realize that the document was authored by defendant's in-house counsel and could not otherwise ascertain from the face of the document that it was entitled to protection from disclosure. . . . There is a distinction, however, between an "inadvertent" disclosure and a disclosure that is "advertent and intended where the person making discovery was merely unaware of the legal consequences or nature of the document produced."

Williams v. Sprint/United Mgmt. Co., No. 03-2200-JWL, 2007 U.S. Dist. LEXIS 768, at *14-15 (D. Kan. Jan. 5, 2007) (citation omitted).

Some courts explicitly hold that the "return unread" and similar approaches to inadvertently transmitted documents outside the litigation context simply do not apply to document productions.

> We emphasize that these factors apply only when a lawyer receives an opponent's privileged materials outside the normal course of discovery. If a lawyer receives privileged

> materials because the opponent inadvertently produced them in discovery, the lawyer ordinarily has no duty to notify the opponent or voluntarily return the materials. Rather, the producing party bears the burden of recovering the documents by establishing that the production was involuntary.

In re Meador, 968 S.W.2d 346, 352 (Tex. 1998).

Ironically, the Northern District of Illinois pointed to a change in the Illinois ethics rules from the "return unread" to the "simply notify the sender" concept in prohibiting the receiving lawyer in a document production from using arguably inadvertently produced protected documents.

- Coburn Group, LLC v. Whitecap Advisors LLC, 640 F. Supp. 2d 1032, 1043 (N.D. Ill. 2009) (providing an extensive analysis of Rule 502, and ultimately concluding that defendant had not waived privilege protection for two documents totaling sixteen pages that were inadvertently produced in a 40,000 page document production; finding that some documents at issue did not deserve work product protection; pointing to newly revised Illinois ethics rules (effective January 1, 2010); "The recently revised Illinois Rules of Professional Conduct added a new subsection requiring a lawyer who receives a document that the lawyer knows was inadvertently sent to notify the sender promptly. Ill. Rule of Prof. Conduct 4.4(b) (effective Jan. 1, 2010). The commentary states that the purpose of the notification is to allow the sender to take protective measures, although whether the privileged status of the document has been waived is beyond the scope of the rule. (*Id.* comment P 2) Requiring 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."; "Under Rule 502, Whitecap may assert work-product protection for the e-mail notwithstanding the inadvertent disclosure. Coburn's counsel is not under a duty to use the e-mail and, indeed, is not permitted to use the e-mail.").

A number of courts have addressed the ethics issue. One court indicated that lawyers receiving inadvertently produced documents may use them,[1] while other courts require lawyers to return such documents.[2]

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[1] Kondakjian v. Port Auth. of N.Y. & N.J., No. 94 CIV. 8013 (AGS)(DFE), 1996 WL 139782, at *7 (S.D.N.Y. Mar. 28, 1996) (relying on an October, 1995, report from the Bar of the City of New York in

Several courts have sanctioned lawyers for taking advantage of an adversary's accidental production of a protected document in litigation.

- Bak v. MCL Fin. Group, Inc., 88 Cal. Rptr. 3d 800 (Cal. Ct. App. 2009) (upholding an arbitration panel's $7,500 sanction imposed on defendants' lawyer for copying privileged documents plaintiffs inadvertently delivered to him, and then sending a copy to the arbitration panel).

- Atlas Air, Inc. v. Greenberg Traurig, P.A., 997 So. 2d 1117, 1119 (Fla. Dist. Ct. App. 2008) (disqualifying a defense law firm because several of its lawyers read and relied upon privileged documents belonging to the adversary which had been accidentally delivered to the defense lawyer by a third party contractor "retained by the parties to copy and produce documents

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following the ABA approach; declining to apply the approach to documents mistakenly produced in document productions "since there is a presumption those documents are not inadvertently produced").

[2] Brandt v. FDIC (In re Southeast Banking Corp. Sec. & Loan Loss Reserve Litig.), 212 B.R. 386, 396 (Bankr. S.D. Fla. 1996) (in a magistrate judge's opinion, applying the ABA approach to documents inadvertently produced during a document production; "It should have been blatantly obvious to [counsel] that he had accidentally come into possession of privileged materials. . . . [He] knew or should have known that the [adversary] would not voluntarily turn over the very documents they were attempting to keep away from him in the proceeding, which was pending at that time. . . . [W]hen he noticed the boxes of [privileged] documents, and was skeptical as to whether he was being permitted to copy them, he had an obligation to notify the [adversary's] attorney and follow her instructions."; enforcing the parties' protective order non waiver provision and ordering the documents returned; later affirmed by the U.S. District Judge except for the rescission of lawyer's pro hac vice status); Transportation Equip. Sales Corp. v. BMY Wheeled Vehicles, 930 F. Supp. 1187, 1188 (N.D. Ohio 1996) (applying the ABA approach in the context of privileged documents inadvertently produced during a document production; requiring the offending lawyer to return the documents and "any additional documents containing direct or indirect reference to the document," provide a list of all people who learned of the documents and describe steps that will be taken to avoid information in the documents from being used; warning that "noncompliance with this Order by any person affiliated with the plaintiff may lead to dismissal with prejudice of the plaintiff's complaint and an award of attorney's fees and costs to the defendant"); State Compensation Ins. Fund v. WPS, Inc., 82 Cal. Rptr. 2d 799, 807-08 (Cal. Ct. App. 1999) (finding that a party who accidentally sent 273 pages of clearly marked privileged and confidential material as part of three boxes of documents produced in litigation had not waived the privilege; noting that the lawyer who received the documents should have alerted the adversary of its mistake, but would not be sanctioned or disqualified; distinguishing Aerojet-General Corp., and adopting ABA Formal Op. 92-368 as a "standard for future application to instances similar to that presented here "; "Accordingly, we hold that the obligation of an attorney receiving privileged documents due to the inadvertence of another is as follows: When a lawyer who receives materials that obviously appear to be subject to an attorney-client privilege or otherwise clearly appear to be confidential and privileged and where it is reasonably apparent that the materials were provided or made available through inadvertence, the lawyer receiving such materials should refrain from examining the materials any more than is essential to ascertain if the materials are privileged, and shall immediately notify the sender that he or she possesses material that appears to be privileged. The parties may then proceed to resolve the situation by agreement or may resort to the court for guidance with the benefit of protective orders and other judicial intervention may be justified. We do, however, hold that whenever a lawyer ascertains that he or she may have privileged attorney-client material that was inadvertently provided by another, that lawyer must notify the party entitled to the privilege of the fact.").

examined by the parties lawyers"; noting that the lower court had only disqualified the individual lawyers, and instead disqualifying the entire firm).

- Lazar v. Mauney, 192 F.R.D. 324, 328, 330, 331 (N. D. Ga. 2000) (addressing a situation in which plaintiff's lawyer mistakenly produced a privileged letter; "The letter in question is a communication made by plaintiff to his attorneys in this case regarding the instant litigation. It is clear to the court that the primary purpose of the letter was to communicate plaintiff's thoughts about and responses to defendants' counterclaims. In the letter, plaintiff also requested his counsel to inform him of the potency of his case against defendants. He did so with colorful and distasteful expressions. Nevertheless, the letter clearly was a communication confidentially made to counsel for the purpose of securing legal advice and assistance and therefore is protected by the attorney-client privilege under Georgia law." (footnote omitted); noting that defendant returned the document, but used a copy of the document in a later motion; explaining that under Georgia law only the client can waive the privilege; "The inadvertent disclosure of plaintiff's counsel does not waive the plaintiff's attorney-client privilege because the privilege can be waived only by the intentional relinquishment of the privilege by the client."; also noting that mistakes are likely in a large document production; concluding that defendant's lawyers had "implicitly if not explicitly, behaved dishonestly" by exploiting plaintiff's lawyer's mistake and by "deceiv[ing] her into believing that the situation had been rectified and resolved"; noting that "Mr. Allen's [defendant's lawyer] excuse that Ms. Anderson [plaintiff's lawyer] did not ask if he retained a copy and that he never said he did not keep a copy is entirely inadequate"; "Let the court be perfectly clear: it will not tolerate unethical, dishonest, or unprofessional conduct by the attorneys before it, lest the honor of this profession be blemished and placed in disrepute. When attorneys behave as Mr. Gary and Mr. Allen did, it is no wonder that 'the public, and perhaps the profession itself, seem increasingly convinced that lawyers are simply a plague on society[]' instead of professionals who behave with honesty and integrity. Geoffrey Hazard, Jr., The Future of Legal Ethics, 100 YALE L.J. 1239, 1240 (1991)."; prohibiting defendants from any "further use or distribution of the letter or its contents"; "The court is of the opinion that defense counsel's conduct and the publication of the letter has irreparably violated the attorney-client privilege with regards to the letter and that ordering the letter's return is akin to trying to retrieve feathers scattered to the wind from a burst pillow. Nonetheless, it is proper, and this court so ORDERS defendants to return to plaintiff's counsel all copies of the inadvertently produced privileged letter along with a list of every distribution made thereof. Defendants are to do so within twenty-four (24) hours of the receipt of this order.").

Changes in the pertinent ethics rules might affect this analysis -- so it is unclear whether these courts facing the same situation today (or in the future) would reach the same conclusion.

As the courts begin to apply Federal Rule of Evidence 502, they probably will find document production incidents governed as much by that rule (and its underlying principle) as by earlier state precedents.

**(c)** No bar or court seems to have applied the "return unread" doctrine to non-privileged but non-responsive documents.

## Best Answer

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

# Evidence of an Adversary's Wrongdoing Transmitted Inadvertently or by an Unauthorized Person

## Hypothetical 16

From the beginning of this important case, your client warned you that your adversary and its lawyers were "sleaze balls." Two recent incidents confirmed your client's characterization, and created dilemmas for you.

**(a)** This morning you opened up a large brown envelope addressed to you in unfamiliar handwriting. The first page is a short note in the same handwriting saying simply "You need to see these. Don't tell anyone how you got them." The envelope contains three documents. From your very quick review, you can see that they are copies of e-mails from the adversary's lawyer to her CFO. In the first e-mail you quickly scan, the lawyer chastised the CFO for having destroyed several responsive documents after the litigation began, and advised her of the severe penalties for spoliation.

Must you refrain from reading the other e-mails and using them in the litigation?

## NO (PROBABLY)

**(b)** About an hour after you open the plain brown envelope, you received an e-mail from the adversary's lawyer. When you opened the e-mail, you saw that the lawyer intended it for her CFO. It is marked "privileged and confidential," and the first line reads: "I just learned that you destroyed more documents even though I told you never to do that again."

Must you refrain from reading the remainder of the e-mail and using it in the litigation?

## MAYBE

## Analysis

This hypothetical involves two related but distinct scenarios.

**(a)** In ABA LEO 382 (7/5/94), the ABA indicated that lawyers who received unsolicited privileged or confidential materials from a third party should refrain from reviewing the documents, notify the adversary that the lawyer received them and either return them or ask a court to rule on their disposition. The ABA justified this approach

(which differed from the "return unread" approach applied to inadvertently transmitted privileged documents) because the documents described in this LEO were not inadvertently sent to the lawyer -- but rather were intentionally sent by a third party who might or might not have been authorized to deal with the documents. The ABA indicated that a court might have to examine this issue, because the intentional transmission of the documents could have been motivated by such varying intentions as a disloyal employee's attempt to hurt a corporation by purloining documents, or a well-intentioned whistleblower's attempt to stop corporate misconduct. Given this uncertainty, the ABA called for the court's involvement.

Unlike its "return unread" policy governing inadvertently transmitted privileged communications, the ABA has not explicitly rejected its approach to a third party's intentional transmission of privileged communications. If anything, the "keep the documents but notify the court" approach follows the new ABA attitude toward inadvertently transmitted privileged communications. ABA Model Rule 4.4(b).

Still, the ABA recently took the unusual step of withdrawing ABA LEO 382.[1] In the years between the ABA's promulgation and withdrawal of ABA LEO 382, several state bars endorsed the ABA approach.

- New York LEO 700 (5/7/98) ("A lawyer who receives an unsolicited and unauthorized communication from a former employee of an adversary's law firm may not seek information from that person if the communication would exploit the adversary's confidences or secrets. Where the information communicated involves alleged criminal or fraudulent conduct in which opposing counsel may be assisting, the receiving lawyer should communicate

[1] ABA LEO 440 (5/13/06) (withdrawing ABA LEO 382; reciting the standards under revised ABA Model Rule 4.4(b); noting that "if the providing of the materials is not the result of the sender's inadvertence," Model Rule 4.4(b) does not apply, and determining "[w]hether a lawyer may be required to take any action in such an event is a matter of law beyond the scope" of the ABA Model Rules).

with a tribunal or other appropriate authority to get further direction as to the use of the information.").

**(b)** This scenario involves an inadvertent transmission of privileged communications, but one which confirms clearly improper (if not illegal) conduct.

It is unclear how most bars would react to this situation. As explained elsewhere, the ABA would now permit the receiving lawyer to use this inadvertently transmitted e-mail, although the lawyer would have to notify the other side of the inadvertent transmission.

States continuing to follow the old ABA "return unread" policy would have the most difficult time dealing with this scenario. Literal language of some states' legal ethics opinions would preclude the receiving lawyer's reading, retention or use of this e-mail -- but common sense and concern for the institutional integrity of the court system would weigh in favor of allowing use of this e-mail.

## Best Answer

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

# Inadvertent Production of Privileged Documents in Litigation: Waiver Rules

## Hypothetical 17

Last week you received and reviewed ten boxes of documents produced by a litigation adversary. This morning you received a letter from the adversary, demanding that you return three documents it claims to have "inadvertently" included in the production.

Is the court likely to find that the adversary has waived any attorney-client privilege or work product doctrine protection that might have protected the three documents?

## MAYBE

## Analysis

The waiver effect of an inadvertent production of documents in litigation traditionally involved courts' application of various common law rules -- but now focuses on a federal rule of evidence that all federal courts must follow, and which appears to be creating a consensus approach even among those courts not bound to follow it.

### Common Law Analysis

Courts traditionally took one of three positions when analyzing the waiver effect of a litigant's inadvertent production of protected documents during litigation. Simon Prop. Group L.P. v. mySimon, Inc., 194 F.R.D. 644 (S.D. Ind. 2000).

First, a small number of courts took a very forgiving view. Mendenhall v. Barber-Greene Co., 531 F. Supp. 951, 955 (N.D. Ill. 1982). These courts held that a lawyer's mistake should not jeopardize the privilege that belongs to the client. Under this approach, a lawyer's inadvertent production protection never causes a waiver. The receiving party presumably must return the protected document each time.

Second, a slightly larger number of courts took exactly the opposite position. Al Odah v. United States, 346 F. Supp. 2d 1, 11 (D.D.C. 2004). These courts were completely unforgiving. They reason that the disclosure of the protected documents necessarily means that the producing party did not adequately protect the documents. In these courts, the producing party always lost the protection.

Third, the vast majority of courts took what is called the "middle ground" approach. Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103 (S.D.N.Y. 1985). See, e.g., Chase v. City of Portsmouth, 236 F.R.D. 263 (E.D. Va. 2006). These courts conducted a fact-intensive analysis of various factors to determine if the inadvertent production of a protected document triggers a waiver. Among other things, these courts looked at: (1) whether the producing party established a procedure that was likely to detect and withhold protected documents; (2) whether the party followed the procedure that it established; (3) whether the documents were marked in some way (although this is not dispositive, it is a relevant factor); (4) how many documents slipped through; (5) how quickly did the producing party ask for them back.

**New Federal Rules**[1]

The most dramatic change comes from new Federal Rule of Evidence 502 (discussed immediately below).

Although Rule 502 adopted the majority view of the key waiver issues, the Rule changed the analysis in jurisdictions that had followed the minority position. For instance, in Amobi v. District of Columbia Department of Corrections, 262 F.R.D. 45

[1] States are also revising their rules. See, e.g., Va. Sup. Ct. R. 4:1(b)(6)(ii) (allowing a post-production protection claim, and requiring the receiving party to hold the documents until the parties agree on their disposition or a court rules on the protection claim).

(D.D.C. 2009), the court addressed the effect of an inadvertent production. The court acknowledged that "[j]ust over a year ago," a litigant inadvertently producing a privileged document "would have no argument to protect against waiver; they would simply be dead in the water with an inadverten[t] disclosure." Id. at 52. The court explained that Rule 502 "overrides the long-standing strict construction of waiver in this Circuit." Id. Similarly, the court noted that "an inadvertent disclosure no longer carries with it the cruel cost of subject-matter waiver." Id. at 53.

**Federal Rule of Evidence 502.** Federal Rule of Evidence 502:

(1) Does not change any substantive attorney-client privilege rules.

(2) Although disclaiming any intent to change the work product doctrine, follows the majority rule in extending work product protection to intangible work product.

(3) Does not alter the current law governing implied waiver (which can occur without the disclosure of protected documents or information, such as with pleading an "advice of counsel" defense).

(4) Adopts the majority "multi-factor" standard in analyzing the waiver effect of inadvertent disclosure (which focuses on the producing person's review process, the number of disclosures, and the promptness of attempted remedial measures).

(5) Adopts the majority view that an inadvertent disclosure does not trigger a subject matter waiver.

(6) Requires that all federal and state courts comply with a federal court's non-waiver order.

(7) Explains that a federal court's non-waiver order may require the return of protected documents "irrespective of the care taken by the disclosing party."

(8) Warns that a federal court's non-waiver order may not enforce parties' agreement to allow a selective waiver, "such as to a federal agency conducting an investigation, while preserving the privilege as against other parties seeking information" (such a disclosure is treated "as under current

law" -- although Rule 502's legislative history does not explain whether such a disclosure would trigger a subject matter waiver).

(9) Assures that disclosure in a state proceeding does not trigger a waiver allowing use of the protected material in a federal proceeding, if the disclosure would not have triggered a waiver in either the state or federal proceeding.

(10) Applies when a party in federal or state proceedings offers material based on its earlier inadvertent disclosure in any federal context (including in a proceeding or to the federal government outside a proceeding), but apparently does not apply when a party in a federal proceeding offers material based on its earlier inadvertent disclosure in a state context other than a state proceeding, or when a party in a state proceeding offers material based on its earlier inadvertent disclosure in another state court proceeding.

**"Scope of a Waiver."** Disclosure of privileged or work product "communication or information" in a "Federal proceeding" or "to a Federal office or agency" triggers a subject matter waiver only if (1) the disclosure is intentional; (2) the undisclosed protected communications or information "concern the same subject matter" as those disclosed; and (3) the disclosed and undisclosed communications or information "ought in fairness to be considered together."[2]

The rule "does not alter the substantive law regarding when a party's strategic use in litigation of otherwise privileged information" triggers a subject matter waiver.[3]

The rule protects against a subject matter waiver "except where privileged information is being intentionally used to mislead the fact finder to the disadvantage of the other party."[4]

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[2] Fed. R. Evid. 502(a).

[3] 154 Cong. Rec. H7817, H7818 (daily ed. Sept. 8, 2008) (Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence).

[4] 154 Cong. Rec. H7817, H7819 (daily ed. Sept. 8, 2008).

A subject matter waiver "is limited to situations in which a party intentionally puts protected information into the litigation in a selective, misleading and unfair manner."[5]

Thus, under the rule "an inadvertent disclosure of protected information can never result in a subject matter waiver."[6]

To "assure protection and predictability," the rule governs "subsequent state court determinations on the scope of the waiver" caused by disclosure at the "federal level."[7]

**"Inadvertent Disclosure."** An "inadvertent" disclosure in a "Federal proceeding" or "to a Federal office or agency" does not cause a waiver in a "Federal or State proceeding" if the holder took "reasonable steps to prevent disclosure" and "promptly took reasonable steps to rectify the error."[8]

The rule follows the "majority rule" in the federal courts governing the waiver effect of an inadvertent disclosure. However, the rule's "distillation" of the majority rule "is not intended to foreclose notions of fairness from continuing to inform application of the standard" applicable in any particular case. For example, courts can examine

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[5] Explanatory Note on Evidence Rule 502 prepared by the Judicial Conference Advisory Comm. on Evidence Rules (Revised 11/28/07), Subdivision (a) (adopted by Congress Sept. 8, 2008, 154 Cong. Rec. H7817, H7820) (emphasis added).

[6] Explanatory Note on Evidence Rule 502 prepared by the Judicial Conference Advisory Comm. on Evidence Rules (Revised 11/28/07), Subdivision (a) (adopted by Congress Sept. 8, 2008, 154 Cong. Rec. H7817, H7820).

[7] Explanatory Note on Evidence Rule 502 prepared by the Judicial Conference Advisory Comm. on Evidence Rules (Revised 11/28/07), Subdivision (a) (adopted by Congress Sept. 8, 2008, 154 Cong. Rec. H7817, H7820).

[8] Fed. R. Evid. 502(b).

whether the producing party's remedial measures were "sufficiently prompt" in situations "where the receiving party has relied on the information disclosed."[9]

The rule covers an "inadvertent disclosure" to a federal office or agency in any setting, "including but not limited to an office or agency that is acting in the course of its regulatory, investigative or enforcement authority."[10]

The Explanatory Note praises the majority "multi-factor" standard for inadvertent disclosure, citing Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 104 F.R.D. 103, 105 (S.D.N.Y. 1985).[11]

The rule does not require the producing party "to engage in a post-production review," but does require the producing party "to follow up on any obvious indications that a protected communication or information has been produced inadvertently."[12]

**"Disclosure Made in a State Proceeding."** A disclosure in a "State proceeding" (which is not subject to a "State-court order concerning waiver") does not cause a waiver in a federal proceeding, if the disclosure (1) would not have caused a waiver if made in a federal proceeding, or (2) does not cause a waiver under the law of the state "where the disclosure occurred."[13]

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[9] 154 Cong. Rec. H7817, H7818 (daily ed. Sept. 8, 2008) (Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence).

[10] Explanatory Note on Evidence Rule 502 prepared by the Judicial Conference Advisory Comm. on Evidence Rules (Revised 11/28/07), Subdivision (b) (adopted by Congress Sept. 8, 2008, 154 Cong. Rec. H7817, H7820) (emphasis added).

[11] Explanatory Note on Evidence Rule 502 prepared by the Judicial Conference Advisory Comm. on Evidence Rules (Revised 11/28/07), Subdivision (b) (adopted by Congress Sept. 8, 2008, 154 Cong. Rec. H7817, H7820).

[12] Explanatory Note on Evidence Rule 502 prepared by the Judicial Conference Advisory Comm. on Evidence Rules (Revised 11/28/07), Subdivision (b) (adopted by Congress Sept. 8, 2008, 154 Cong. Rec. H7817, H7820).

[13] Fed. R. Evid. 502(c).

A federal court dealing with a litigant's argument that its adversary's earlier disclosure in a state court caused a waiver (allowing introduction of the communication or information in the federal proceeding) should apply "the law that is most protective of privilege and work product" -- state or federal law.[14]

**"Controlling Effect of Court Order."** A federal court's non-waiver order in connection with "litigation pending before the court" applies in all federal or state proceedings.[15]

The rule "does not alter the law regarding waiver of privilege resulting from having acquiesced in the use of otherwise privileged information." Thus, a disclosing party's "acquiescence" to a federal agency's use of information would be treated "as under current law."[16]

For example, the rule "does not provide a basis for a court to enable parties to agree to a selective waiver of the privilege, such as to a federal agency conducting an investigation, while preserving the privilege as against other parties seeking information."[17]

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[14] Explanatory Note on Evidence Rule 502 prepared by the Judicial Conference Advisory Comm. on Evidence Rules (Revised 11/28/07), Subdivision (c) (adopted by Congress Sept. 8, 2008, 154 Cong. Rec. H7817, H7820).

[15] Fed. R. Evid. 502(d).

[16] 154 Cong. Rec. H7817, H7818-19 (daily ed. Sept. 8, 2008) (Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence).

[17] 154 Cong. Rec. H7817, H7818 (daily ed. Sept. 8, 2008) (Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence).

Instead, the rule allows court orders permitting the parties to respond to discovery "without the need for exhaustive pre-production privilege reviews," while preserving the right to claim privilege protection.[18]

The court order may include "claw-back" and "quick peek" arrangements, and may "provide for return of documents without waiver irrespective of the care taken by the disclosing party."[19]

**"Controlling Effect of a Party Agreement."** The parties' agreement about the "effect of disclosure" binds the parties, but does not bind anyone else unless it is incorporated into a court order.[20]

**"Controlling Effect of This Rule."** Any waiver protection in the rule applies in all state proceedings, in all federal proceedings (even if "state law provides the rule of decision"), and in all federal court-annexed and court-mandated arbitrations.[21]

**No Effect on the Initial Protections.** The rule "does not alter the substantive law regarding attorney-client privilege or work-product protection" other than that related to the "effect of disclosure."[22]

The rule "does not alter the law regarding when the attorney-client privilege or work-product protection applies in the first instance."[23]

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[18] 154 Cong. Rec. H7817, H7819 (daily ed. Sept. 8, 2008) (Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence).

[19] Explanatory Note on Evidence Rule 502 prepared by the Judicial Conference Advisory Comm. on Evidence Rules (Revised 11/28/07), Subdivision (d) (adopted by Congress Sept. 8, 2008, 154 Cong. Rec. H7817, H7820).

[20] Fed. R. Evid. 502(e).

[21] Fed. R. Evid. 502(f).

[22] 154 Cong. Rec. H7817, 7818 (daily ed. Sept. 8, 2008) (Statement of Congressional Intent Regarding Rule 502 of the Federal Rules of Evidence).

[23] 154 Cong. Rec. H7817, 7819 (daily ed. Sept. 8, 2008).

The rule "makes no attempt to alter federal or state law" governing the privilege's or work product doctrine's applicability to "a communication or information" as "an initial matter."[24]

**Intangible Work Product.** Although disclaiming any intent to alter existing work product doctrine law, the rule defines "work-product protection" to include the "intangible equivalent" of "tangible material" protected by applicable law.[25]

**Implied Waiver.** The rule "is not intended to displace or modify federal common law concerning waiver of privilege or work product protection where no disclosure has been made."[26]

**Predictability.** The rule "seeks to provide a predictable, uniform set of standards" under which litigants can act. For example, litigants should know that a federal court's confidentiality order governing the production of "privileged information" will be enforceable in all federal and state courts.[27]

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In sum, Federal Rule of Evidence 502:

- Applies when a party in a federal or state court proceeding offers material based on its earlier inadvertent disclosure in a federal context (either a federal proceeding or to a federal office or agency).

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[24] Explanatory Note on Evidence Rule 502 prepared by the Judicial Conference Advisory Comm. on Evidence Rules (Revised 11/28/07) (adopted by Congress Sept. 8, 2008, 154 Cong. Rec. H7817, H7820).

[25] Fed. R. Evid. 502(g)(2).

[26] Explanatory Note on Evidence Rule 502 prepared by the Judicial Conference Advisory Comm. on Evidence Rules (Revised 11/28/07) (adopted by Congress Sept. 8, 2008, 154 Cong. Rec. H7817, H7820).

[27] Explanatory Note on Evidence Rule 502 prepared by the Judicial Conference Advisory Comm. on Evidence Rules (adopted by Congress Sept. 8, 2008, 154 Cong. Rec. H7817, H7820).

- Applies when a party in a federal proceeding offers material based on its earlier inadvertent disclosure in a state court proceeding.
- Does not apply when a party in a federal proceeding offers material based on its earlier inadvertent disclosure in other state contexts (not a state court proceeding).
- Does not apply when a party in a state court proceeding offers material based on its earlier inadvertent disclosure in an earlier state court proceeding.

## Other Federal Rules Changes

Several other fairly recent federal rules changes affect both the logistics and the substance of these issues.

**Fed. R. Civ. P. 26.** A party producing "information" may now make a post-production claim of privilege or work product protection by sending a notice to the receiving party.[28] The notice must specify the information claimed to be protected, describe the protection claim and the "basis for it."[29]

The party receiving such a notice "must promptly return, sequester, or destroy" the information and any copies of it.[30] The receiving party may not "use or disclose" the information until the protection claim is resolved.[31] If the receiving party had disclosed the information before receiving the notice, it "must take reasonable steps to retrieve it." The receiving party "may" present the information to a court under seal for a determination of the protection claim.[32] The producing party must "preserve the information until the claim is resolved."[33]

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28 Fed. R. Civ. P. 26(b)(5)(B).

29 Fed. R. Civ. P. 26(b)(5)(B).

30 Fed. R. Civ. P. 26(b)(5)(B).

31 Fed. R. Civ. P. 26(b)(5)(B).

32 Fed. R. Civ. P. 26(b)(5)(B).

33 Fed. R. Civ. P. 26(b)(5)(B).

This rule does not address whether the production has waived any protection.[34] Any agreements reached under Fed. R. Civ. P. 26(f)(4) and any orders entered under Fed. R. Civ. P. 16(b)(6) "may be considered when a court determines whether a waiver has occurred."[35]

**Fed. R. Civ. P. 16.** A scheduling order may include agreements among the litigants for post-production claims of privilege or work product protection.[36]

The litigants may agree to the "initial provision of requested materials" without a waiver [called a "quick peek" procedure under Advisory Comm. Notes on 2006 Amendment to Fed. R. Civ. P. 26(f)] or a requirement that the receiving party return inadvertently produced protected materials upon a "timely" post-production notice of protection [called a "clawback" procedure under Advisory Comm. Notes on 2006 Amendment to Fed. R. Civ. P. 26(f)].[37]

"In most circumstances," a party receiving "information" under such an arrangement cannot claim a waiver.[38]

Litigants should meet and confer about such items as a post-production privilege or work product claim, and whether to include such an agreement in a court order.[39] The parties can agree to protocols that include "quick peek" and "clawback" provisions.[40]

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34 Advisory Comm. Note on 2006 Amendment to Fed. R. Civ. P. 26(b)(5).

35 Advisory Comm. Note on 2006 Amendment to Fed. R. Civ. P. 26(b)(5).

36 Fed. R. Civ. P. 16(b)(3)(B)(iv).

37 Advisory Comm. Notes on 2006 Amendment to Fed. R. Civ. P. 16(b).

38 Advisory Comm. Notes on 2006 Amendment to Fed. R. Civ. P. 16(b).

39 Advisory Comm. Notes on 2006 Amendment to Fed. R. Civ. P. 26(f).

40 Advisory Comm. Notes on 2006 Amendment to Fed. R. Civ. P. 26(b)(5).

## Best Answer

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

# Metadata

## Hypothetical 18

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").

**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

[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).

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.

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[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 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."

**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.

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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).

> 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]

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[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

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

metadata in those electronic documents with the intent to find privileged material or if finding privileged material is likely to occur from the search.").

[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.").

**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:

> 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

[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.").

> 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]

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.

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[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 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.").

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 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,

[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 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.").

> 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).

**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.

[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").

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 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]

[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).

**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.

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."

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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.").

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 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

[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.").

> 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.

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."

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

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[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).

> 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:

> 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 . . . .

[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.").

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]

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.

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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 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.

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 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 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

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 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.

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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.").

> 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.

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

- 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.

## Best Answer

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

B 4/17