

ELECTRONIC ERA ETHICS

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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Introduction

Starting in the 1990s and accelerating rapidly since then, all of us have increasingly used electronic forms of communication, such as email, texting, etc. More recently, folks have communicated more widely through social media such as Facebook, blogs and Tweets. These new forms of communication dramatically change the legal and ethical landscape in which lawyers practice.

Substance

First, the substance of electronic communications differs from our previous ways of communicating with each other. Electronic communications present an unprecedented combination of our two traditional means of communication. From even before the dawn of civilization, humans communicated orally. This type of communication involves words, but also includes body language, voice inflection and emotion. We traditionally have expected this type of communication to be fleeting, and therefore have tended to be less careful with its substance. Our instinct would often prevent us from writing down and therefore permanently memorializing the sort of things we might say to each other in a private conversation. This traditional approach manifests itself in some continuing rules that upon reflection make little sense. For instance, many states continue to prohibit one participant in a telephone call from recording the conversation, even though there could be no expectation of confidentiality.

The other tradition of human communication began later. We began to write each other, first with clay tablets and eventually with all the other forms of impersonal written communications. We expect these to last, so in most (although not all) situations we tend to be more careful when we write.

Electronic communications combine these two traditions, in a way that significantly affects lawyers and their clients. Emails and other forms of electronic communications combine the informality of the oral tradition with the permanence of the written tradition. We began to use "smiley faces"¹ to indicate a joke -- which would have been clear if we had smiled while saying something face to face, or used a voice inflection to indicate a joke if talking on the telephone. We react defensively if someone sends an all-caps email, because it seems like the sender is yelling at us.²

Some studies have shown the way people communicate electronically can show something about their mental state.

- Sue Shellenbarger, Email Enigma: When the Boss's Reply Seems Cryptic, Wall St. J., Mar. 11, 2014 ("Many employees labor over emails seeking guidance from the boss, only to receive a cryptic reply such as 'Great!' or 'Sounds good' -- or no answer at all. The result: Confusion and frustration.");

¹ Jennifer Harper, Smiley Face Wins, The Washington Times, Apr. 15, 2014 ("The top trending word of the year so far? The Global Language Monitor declares the current winner to be those wordlike entities and 'smilies' done up with numbers and markings that are so common in social media. The Texas-based research group bases its conclusions on computerized analysis of word frequency in some 300,000 print and electronic global media, and makes a final declaration of top words at year's end. 'Emojis' and 'emoticons' win, at least at this point. 'Not only is the English language adding a new word every 98 minutes, but it is also expanding the basis of word creation. The alphabet itself is now expanding beyond letters to numbers and diacritical marks,' explains chief analyst Paul JJ Payack, who notes that futeball, ghostplane and blood moon are also trending on the list.").

² Aversa v. Unemployment Comp. Bd. of Review, 52 A.3d 565, 569, 571 & n.8 (Pa. Commw. Ct. 2012) (reversing a decision by the Pennsylvania Unemployment Compensation Board that a claimant was not entitled to benefits because he had threatened a co-worker; noting that "[t]he Referee found that Claimant violated Employer's workplace violence prevention policy. Specifically, the Referee stated: 'Claimant's email was intentional and deliberate to warn the co-worker that the Claimant considered the co-worker had 'set me up pretty good.' The tone of the message was strong with the Claimant capitalizing the letters in the phrase. 'I WON'T FORGET IT'. The Claimant's message was clearly hostile and intimidating.'"; "The Referee concluded that Claimant committed willful misconduct, rendering him ineligible for benefits under Section 402(e) of the Law, 43 P.S. §802(e)."; reversing this finding; "Adams believed that because 'I won't forget it' was written in capitalized letters, it conveyed a threat. Adams did not consider the fact that capitalized letters in an e-mail are still quite small. The context of a remark is also relevant. . . . A message transmitted through cyberspace does not contain the same force of immediacy of an in-person exchange; it is absent of voice or hand gesture. Further, there is nothing threatening about the words 'I won't forget it.' The use of capitalized letters adds emphasis, but it did not transform a four-word declarative sentence into a threat of violence. The message was not sent anonymously. Adams' subjective construction is not itself substantial evidence of Claimant's intent."; "In his on-line application for benefits, Claimant used all capitalized letters. It seems unlikely that he meant to intimidate the government in his application.").

"The potential for email misfires between bosses and subordinates is mounting, as the volume of email grows and more people read it on the fly on mobile devices. Sometimes the boss is too rushed to read. Employees fuel the problems by sending poorly written emails. Deeper issues can arise if bosses' and employees' communication styles clash."; "The number of emails sent or received daily by the typical corporate employee is expected to rise to 136 by 2017 from 121 this year, based on projections released last November by the Radicati Group, a Palo Alto, California, market-research firm. Managers, who receive the most, are 'flooded by email,' says Nancy Ancowitz, a New York business communications coach. Many a manager multitasks to get through it all, 'emailing from a mobile device at a stoplight, typing with his thumbs,' Ms. Ancowitz says."; "Some bosses don't answer at all. Nearly one-third of 700 employees surveyed by researchers at Florida State University said their bosses had given them 'the silent treatment' in the preceding year, according to the 2006 study."; "In other cases, bosses scroll over employees' messages because they have vague or misleading subject lines, says Jack Appleman, a corporate writing instructor in Monroe, New York. If an employee uses the same subject line on an email string long after the topic has changed, the boss's response is likely to be, 'I thought this was already done,' says Mr. Appleman, author of 10 Steps to Successful Business Writing. Subject lines should say exactly what is needed, such as, 'Report: Approval needed by 5 p.m.,' he says."; "Some emailers annoy bosses with a long windup, such as 'If it's not too much trouble, I was just wondering . . . ,' says Barbara Pachter, a Cherry Hill, New Jersey, communications consultant and trainer. They're usually trying to be polite but come off as passive, Ms. Pachter says. Reading an email aloud before sending it is a good way to ensure the tone is neither wishy-washy nor too harsh."; "Other employees ramble on in 'one huge paragraph' of 30 lines or more, like 'a sheet of black ice,' and then bury their question at the end, Ms. Pachter says."; "Emails covering multiple subjects can be confusing, says Mike Consol, a Livermore, California, writing and corporate-communication coach; sticking to one issue is usually best. Some matters may be too complicated to handle on email, such as personnel issues or developing new policies."; "Understanding your communication style -- and those of your co-workers -- can help avert miscues. At an engineering firm she headed several years ago, Allison Tabor realized she sometimes came across as curt in emails to certain employees who preferred warmer or more detailed communication. 'I've had employees say, 'Ouch, that stings,' says Ms. Tabor, now founder and owner of Coppia Communications, a San Ramon, California, coaching and business consulting firm. She began tailoring her emails to suit individual employees' style.").

- Karen Farkas, Those Who Spend Hours On Their Cell Phones Are More Anxious and Less Happy, College Researchers Say, Plain Dealer, Dec. 9, 2013, at A2 ("College students who spend hours each day online, texting or talking on their cell phones are more anxious, less happy and get lower

- grades, according to a new study by Kent State University researchers.";
- "While studies have shown a correlation between high cell phone use and academics this appears to be the first to show that it is related to anxiety and happiness, said Andrew Lepp, an associate professor who conducted the research with fellow faculty members Jacob Barkley and Aryn Karpinski in the university's College of Education, Health and Human Services. 'The lower frequency users use their phone to keep in touch, check the web and update Facebook but they can put it away and get on with other tasks,' Lepp said. 'The higher users are not able to control it and are glued to the cell phone. They need to unplug and find some personal time where they can disconnect from the network. You need time to be alone with your thoughts, recover from the daily stressors in a way that doesn't involve electronic media.'";
- "Lepp said he and his colleagues purposely have chosen college students for their studies because they are the first generation to grow up immersed in the technology. The current research grew out of a study published last summer by Lepp and Barkley on the relationship between cell phone use and cardiorespiratory fitness. Those results showed that students who had higher cell phone use were less fit. 'As part of that study we interviewed students and some said that after a day of 100 texts they felt stressed out,' Lepp said. 'They said they felt a sense of obligation to remain constantly connected to the social network.'").
- News Release, Brigham Young Univ., People Who Lie While Texting Take Longer to Respond (Sept. 5, 2013), <http://news.byu.edu/archive13-sep-lyingchats.aspx> ("Ever been trading a flurry of text messages when there's an awkward pause? Well, new research shows you probably should be suspicious."; "A Brigham Young University (BYU) study finds when people lie in digital messages -- texting, social media or instant messaging -- they take longer to respond, make more edits and write shorter responses than usual."; "'Digital conversations are a fertile ground for deception because people can easily conceal their identity and their messages often appear credible,' says Tom Meservy, BYU professor of information systems. 'Unfortunately, humans are terrible at detecting deception. We're creating methods to correct that.'"; "According to Meservy, humans can detect lies about 54 percent of the time accurately -- not much better than a coin flip. It's even harder to tell when someone is lying through a digital message because you can't hear a voice or see an expression.").
 - John Caher, Mom's Facebook Posts Show 'Lack of Insight,' Panel Finds in Granting Father Full Custody, N.Y. L. J., Feb. 19, 2013 ("A mother who swears and yells at her 10-year-old son and called him an 'asshole' on Facebook because that is what 'he is' and said it is important that her Facebook friends know the truth demonstrated a 'lack of insight,' an Albany appellate panel has held in awarding a father sole custody.").

A few studies have even shown that electronic communications can have a mass effect on peoples' emotions.

- Reed Albergotti and Elizabeth Dvoskin, Facebook Study Sparks Soul-Searching and Ethical Questions, Wall St. J., June 30, 2014 ("A Facebook Inc. study on users' emotions sparked soul-searching among researchers and calls for better ethical guidelines in the online world. 'I do think this whole incident will cause a lot of rethinking' about the relationship between business and academic researchers, said Susan T. Fiske, the study's editor and a professor of psychology and public affairs at Princeton University. Researchers from Facebook and Cornell University manipulated the news feed of nearly 700,000 Facebook users for a week in 2012 to gauge whether emotions spread on social media. They found that users who saw more positive posts tended to write more positive posts themselves, and vice versa. The study was published in the Proceedings of the National Academy of Sciences earlier in June, but sparked outrage after a blog post Friday said the study used Facebook users as 'lab rats.' Facebook said on Monday that the study may have included users younger than 18. The company said it had revised its guidelines since the research was conducted, and proposed studies now undergo three internal reviews, including one centered on privacy for user data. The incident shines a light on how companies and researchers tap the vast amount of data created online. Internet companies including Facebook and Google Inc. routinely test adjustments to their sites for reasons including prompting users to click on more links, or more ads, which are the companies' main source of revenue.").
- Robert Lee Hotz, Emotions Vented Online Are Contagious, Study Finds, Wall St. J., Mar. 12, 2014 ("In the digital swirl of Facebook status updates, emotions expressed online can be contagious, according to a new study encompassing more than 100 million people in the United States and a billion messages they posted."; "Moreover, upbeat messages were far more likely than negative ones to affect the mood of others online, researchers at the University of California, San Diego, Yale University and Facebook Inc. reported Wednesday in one of the largest public studies of the social network to date. "; "[T]he researchers found that a rainy day directly influenced the emotional tenor of a person's Facebook posts. The effect was small but significant -- the number of negative posts rose 1.16%, while the number of positive comments fell 1.19%."; "That, in turn, affected the Facebook status of one or two friends in other cities where it wasn't raining. Each additional positive post resulted in a further 1.75 positive posts among friends; while each negative post yielded 1.29 more negative posts by friends, the researchers said.").

To make matters worse, the way we communicate electronically gives us little time to reflect, meaning that these communications often lack the sort of self-control that we would use when communicating in some other written form. Unfortunately, the immediacy of electronic communications often results in unprofessional and discourteous emails that sometimes go viral.

- Elizabeth Bernstein, Why We Are So Rude Online, Wall St. J., Oct. 2, 2012 ("Why are we so nasty to each other online? Whether on Facebook, Twitter, message boards or websites, we say things to each other that we would never say face to face. Shouldn't we know better by now? Anonymity is a powerful force. Hiding behind a fake screen name makes us feel invincible, as well as invisible. Never mind that, on many websites, we're not as anonymous as we think -- and we're not anonymous at all on Facebook. Even when we reveal our real identities, we still misbehave.").

A few examples highlight this issue.

- Brian Baxter, Reed Smith Responds to Partner's Crude SCOTUS Tweet, AmLaw Daily, Oct. 23, 2013 ("We've all had bad days at the office. Reed Smith commercial real estate partner Steven Regan, it seems, had one out of the office last week. And now the Am Law 100 firm is trying to make amends."; "On October 15 Regan, who is based in the firm's Pittsburgh headquarters, took to Twitter to opine on the United States Supreme Court's decision to hear challenges to Environmental Protection Agency regulations related to greenhouse gas emissions."; "As first noted by Above The Law, Regan -- presumably thinking he was communicating with an official Supreme Court Twitter account, but instead directing his message to the Twitter handle linked to the high court--watching SCOTUSblog -- tweeted '@SCOTUSblog -- Don't screw up this like [Affordable Care Act]. No such thing as greenhouse gas. Carbon is necessary for life.'"; "The trouble began when SCOTUSblog replied with a sardonic two-word tweet: 'Intelligent life?' To that, Regan offered an angry 'Go f@ck yourself and die.' (SCOTUSblog capped the exchange with an extra shot of sarcasm: 'Being an expert climatologist/real estate attorney is very stressful. Breathe.'"); "Though Regan, who was elevated to the Reed Smith partnership in 2007, deleted his Twitter account shortly after sending out the offending tweet, the 1,800-lawyer firm recognized that the five-word outburst merited an official response."; "The posting of offensive commentary or language on social media is inappropriate and inconsistent with Reed Smith's social media policy,' the firm said in a statement initially given to the United Kingdom blog Roll on Friday and provided Monday to The AmLaw Daily. 'We are addressing this matter internally.'").

- Email from Paul Giacomo of The Law Offices of Paul J. Giacomo, Jr. to Marshall Beil of McGuireWoods LLP on September 20, 2012 ("We both know what was stated between us and Justice Oing's Clerk at the last conference reserving our right to challenge the redactions of any and all redacted documents by a Motion to Compel. You intentionally and solely to obtain a litigation advantage inaccurately reported those facts to Justice Gammerman. Your actions were disgusting, ethically reprehensible and indicative of someone completely corrupt and devoid of any sense of professional decency. If you find your behavior acceptable I can only pity you. I intend to pursue this matter with Justice Oing's Clerk and make available to the Court the truth of what occurred. It is no surprise that you do not have the guts to partake in a telephone conversation that will expose your lies and deception which took place today. In my opinion you are a pathetic excuse for a lawyer and officer of the Court. You disgust me. In my 34 years of practice I have never experienced such actions as I witnessed from you today. How do you even sleep at night. In the end I am sure you will discover like so many others I have dealt with in the past that your lack of a moral compass will doom you. In my opinion people like you deserve to rot in Hell. Paul J. Giacomo Esq." (emphasis added)).
- Fla. Bar v. Mitchell, 46 So. 3d 1003 (Fla. 2010) (unpublished opinion) (suspending a lawyer for ten days and directing him to attend a Florida Bar's Anger Management Workshop for engaging in e-mail communications that violated Rule 3.3; the bar's complaint showed the following e-mail exchanges: "(Mooney to Mitchell) This is the most horrifying email I have ever read - the fact that you are married means that there truly is someone for everyone, even a short/hairless jerk!!! Moreover, the fact that you have pro-created is further proof for the need of forced sterilization!!!" (emphasis added); (Mooney to Mitchell) "Hey Junior, [w]ow you are delusional!!!! What kind of drugs are you on??? I can handle ANYTHING a little punk like you can dish out, remember, I have been doing this for 20+ years and have not had a single heart attack, as a prosecutor for 15 years, I have handled case loads in excess of 200 cases, many of which were more important/significant than these little Mag Moss claims that are handled by bottom feeding/scum sucking/loser lawyers like yourself. . . . I have actually done a jury trial and am looking forward to teaching you a lesson (please call Patrick Cousins, he is still hurting from the ass whooping I gave him more than 1 year ago), while I know that you have a NOTHING life, other people do have more important thing to worry about than little Kurtie Boy file what you want -- does not matter to me. I will get you MORE dates as I see fit, otherwise, go back to your single wide trailer in the dumps of Pennsylvania and get a life!!!!"; (Mitchell to Mooney) "Three things Corky: (1) While I am sorry to hear about your disabled child; that sort of thing is to be expected when a retard produces, it is a crap shoot sometimes retards can produce normal kids, sometimes they produce F***** up kids. Do not hate me, hate your genetics. However, I would look at the bright side at least you definitely know the kid is yours.

(2) You are confusing realities again the retard love story you describe taking place in a pinto and trailer is your story. You remember the other lifetime movie about your life: 'Special Love' the Corky and Marie story; a heartwarming tale of a retard fighting for his love, children, pinto and trailer and hoping to prove to the world that a retard can live a normal life (well kinda). (3) Finally, I am done communicating with you; your language skills, wit and overall skill level is at a level my nine-year could successfully combat; so for me it is like taking candy from well a retard and I am now bored. So run along and resume your normal activity of attempting to put a square peg into a round hole and come back when science progresses to a level that it can successfully add 50, 75 or 100 points to your I.Q."; (Mooney to Mitchell) "Thanks Sparky . . . more evidence of the jerk you are . . . the fact that I have a son with a birth defect really shows what type of a weak minded, coward you truly are . . . I am sure your parents, if you even know who they are, are very proud of the development of their sperm cells . . . if you need to find the indications of 'retardism' you seek, I suggest that you look into a mirror, then look at your wife -- she has to be a retard to marry such a loser like you. . . . Then check your children (if they are even yours Better check the garbage man that comes by your trailer to make sure they don't look like him) Unfortunately, it looks like the better part of you was the sperm cells left on the back seat of the Ford Pinto . . . too bad they didn't have a rear end impact/explosion before you were born that would have made the world a better place . . . See you soon If you don't wimp out again!!!" (emphasis added); (Mitchell to Mooney) "You should already have my response a notice of hearing for November 13, 2008. Moreover, anticipating dilatory conduct on your part; you know I am sure you will come up with something like my 4 cousin twice removed is having an ultra-sound that day and needs my emotional support. I will be filing a motion and setting for UMC to enforce the hearing date. Ahh, yes the joys of working with a lying, dilatory mentally handicapped person. By the way, I do not think I deserve the jerk comment, I was actually on the internet trying to find out what type of retardism you have by checking your symptoms e.g. closely spaced eyes, dull blank stare, bulbous head, lying and inability to tell fiction from reality so I could donate money for research for a cure. However, apparently those symptoms are indicative of numerous types of retardism and so my search was unsuccessful. Have a great day Corky I mean; Mr. Mooney."; (Mitchell to Mooney & another party) "This guy is an absolute ass clown and what he is not going to use his retarded son with 300+ surgeries (must look just like Mooney so they must be all plastic surgeries) to get out of the trial? I can see already your Honor my retarded is having surgery for the 301st time so there is no way I can try the case I need a continuance. Absolute joke and ass clown. If this is what a 20 year attorney looks like, then I feel sorry for the profession. Yea, that is exactly what I want to do go watch a jester perform at the Court. How pathetic of a life must you have to run around every day talking about how great a trial attorney you are. Especially, when everybody can see you are an ass clown. After all if I am running

around to hearings after 20 years lying to courts and using my time to send childish emails to a third-year attorney, the last thing I am going to do is run around saying what a great attorney I am. This guy has to go home every night and get absolutely plastered to keep from blowing his huge bulbous head off. Alright, enough about the ass clown. Later."; (Mitchell to Mooney) "You are an ass clown absolutely and completely an ass clown. Shouldn't you be tending to your retarded son and his 600th surgery or something instead of sending useless emails. In fact, I think I hear the little retards monosyllabic grunts now; Yep, I can make just barely make it out; he is calling for his ass clown. How sweet.").

As indicated above, electronic communications combine this oral tradition with another attribute that can create enormous problems. Electronic communications capture in permanent form (and therefore make vulnerable to discovery) the type of unguarded communications that would previously have been unavailable. For some unknown psychological reason, people communicate electronically in a way that they would never communicate orally. There is one story (perhaps apocryphal) that one email included an assurance that "I would never put this in writing." Some electronic communications that might have seemed funny at the time can appear sinister in retrospect.

For this reason, perhaps the greatest danger triggered by electronic communications' strange similarity to our oral communication tradition involves many senders' seeming unawareness that they are writing something down that will last forever.

Some remarkably intelligent people who should know better seem to forget this. One example involves emails exchanged within the well-known Dewey and LeBouef law firm as it struggled to avoid violating bank covenants.

- Complaint at 8, 14, 11, 15, 16, 16-17, 13-14, SEC v. Davis, No. 14 CV 1528 (S.D.N.Y. Mar. 6, 2014) (signed by SEC Regional Director Andrew Calamari) (accusing Dewey & LeBouef LLP's Chairman Davis, Executive Director

DiCarmine, Chief Financial Officer Sanders, Director of Finance Canellas and Controller Mullikin of misconduct; alleging that beginning in 2008, the defendants "orchestrated and executed a bold and long-running accounting fraud intended to conceal the firm's precarious financial condition" (¶2), including "a wide-ranging campaign to manufacture fake revenue by manipulating various entries in Dewey's internal accounting system." (¶3); "Among other gimmicks, the Defendants reclassified salaried partners' and of counsels' compensation as equity distributions in the amount of \$13.8 million, improperly reversed millions of dollars of uncollectible disbursements, mischaracterized millions of dollars of credit card debt owed by the firm as bogus disbursements owed by clients, and improperly accounted for significant lease obligations held by the firm." (¶4); also alleging that the law firm engaged in similar conduct in connection with its 2009 financial statements, which were then used in its April 2010 "fraudulent bond offering." (¶5, 7); quoting from the following emails, among others: (1) December 31, 2008, email from a Collections Manager to the Director of Finance: "Great job dude. We kicked ass! Time to get paid." (¶27); "Hey man, I don't know where you come up with some of this stuff, but you saved the day. It's been a rough year but it's been damn good. Nice work dude. Let's get paid!" (¶28); (2) December 29, 2008, email from the CFO to the Executive Director about the firm's year-end attempt to satisfy bank covenants: "We came up with a big one: Reclass the disbursements." (¶54); (3) December 29, 2008, email response from the CFO to the Executive Director: "You always do in the last hours. That's why we get the extra 10 or 20% bonus. Tell [Sander's wife], stick with me! We'll buy a ski house next. Just need to keep the ship a float [sic] and take care of the top and bottom, the middle can move." (¶55); (4) December 31, 2008, email from the CFO to the Executive Director about what he did in the year-end effort: "Don't even ask -- you don't want to know."; (5) January 7, 2009, email from the Controller to the Director of Finance, referring to reversing a write-off: "That would be less visible." (¶41); (6) June 27, 2009, email from the CFO to the Director of Finance, noting there will be a new auditor; "I assume you [k]new this but just in case. Can you find another clueless auditor for next year?", to which the Director of Finance responded: "That's the plan. Worked perfect this year." (¶61); (7) January 11, 2011, email from the Controller to the Director of Finance: "I don't see how we'll get past the auditors another year." (¶42); (8) May 28, 2009, schedule prepared by the Director of Finance and sent to the CFO, which included a \$7,500,000 reduction entitled "Accounting Tricks" (¶65); (9) November 10, 2009, email from the CFO to the Chairman, Executive Director, COO and Director of Finance: "Keep in mind though that at these levels we will not have the cash to pay the partners by Jan. 31 since \$25M is fake income." (¶68); (10) December 4, 2008, email from the CFO to the COO commenting on January 2009 bills: "I don't know anything about [the contracts] and I don't want to cook the books anymore. We need to stop doing that." (¶53), <http://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540889964> (click on "SEC complaint").

It is difficult to imagine a more pointed lesson supporting the philosophy of the nineteenth century Boston politician Martin Lomasney.

- Susan Minchiello, The life, legend and lessons of Martin Lomasney, Boston Globe, June 5, 2012 ("From the late 1800s well into the first half of the 20th century, Boston's political landscape was combative at best, and corrupt at worst. Such was the arena a young Martin Lomasney entered when he stepped onto the city's political stage at the tender age of 16. But far from falling victim to this lion's den, Lomasney endured and went on to wield substantial political power, primarily as a ward boss."; "He was a man of few words, unless a particular occasion, like a highly contested election, required more. Lomasney's best known quote exemplifies his affinity for pithiness as well as his advice to fellow politicians, 'Never write if you can speak; never speak if you can nod; never nod if you can wink.' (Also attributed to Lomasney in abbreviated form as 'Don't write when you can talk; don't talk when you can nod your head.')" (emphasis added)).

For these reasons, nearly every important trial or political event has involved the exposure of embarrassing or damaging electronic communications. Those are the first objects of an adversary's discovery requests, because they tend to be more frank, self-critical or easily misinterpreted.

Ease of Transmission

Second, the ease of transmission is dramatically different for electronic communications. It often is nearly as easy to send an email or other electronic communication to numerous recipients as it is to send the email to one recipient.

In some situations, this widespread transmission is intentional. This has changed the way we practice law. Lawyers compulsively check emails. The ease of transmission has also affected the role of lawyers in their clients' affairs. For instance, one court explained that the difficulty of determining whether an in-house lawyer has acted in a primarily legal (rather than primarily business) role

has been exacerbated by the advent of e-mail that has made it so convenient to copy legal counsel on every

communication that might be seen as having some legal significance at some time, regardless of whether it is ripe for legal analysis.

In re Vioxx Prods. Liab. Litig., 501 F. Supp. 2d 789, 798 (E.D. La. 2007).

Because of the attorney-client privilege's fragility, the ease of transmission also makes it more likely that clients will waive their privilege protection through widespread circulation of privileged electronic communications.

The ease of transmission can also result in the accidental transmission of electronic communications. To be sure, it has always been possible to accidentally communicate to the wrong person. One newspaper reminded readers that General Robert E. Lee's battle plans were accidentally disclosed to Union General George McClellan just before the Battle of Antietam.

However, electronic communications have dramatically exacerbated both the frequency and the scope of these accidents. Such transmissions can disclose the substance of communications to unintended recipients, and also affect the attorney-client privilege.

A few examples serve as frightening reminders.

- Nate Delesline III, University of Virginia Law School Official Inadvertently Sends Grade Point Averages, Class Rank Data To 160 Students, The Daily Progress, June 5, 2014 ("A University of Virginia (UVA) School of Law School administrator accidentally sent an email Wednesday with a spreadsheet attached to 160 law students that contained their grade point averages (GPAs), class ranks and personal biographical information, officials confirmed Thursday. This week's error is the most recent in a string of accidental disclosures of personal information at UVA in the last several years. Last summer, the Social Security numbers of about 18,700 UVA students were erroneously included on health insurance brochures sent via postal mail nationwide. The university apologized, blamed a third-party mail vendor for the mistake, and provided students with a free year of credit monitoring following that incident. Between 2009 and 2012, the university phased out the use of Social Security numbers as a means of primary identification, but

the numbers are still kept in a central database, UVa spokesman McGregor McCance said following last summer's incident. Students who apply for federal financial aid or use student health services are still required to provide Social Security numbers, McCance said. In December 2012, a hand-held device disappeared from the UVa Medical Center that hospital officials said might have contained patients' personal information and Social Security numbers. In June 2012, as many as 350 grade transcripts -- some containing full Social Security numbers -- were inadvertently posted to a UVa website. In 2007, the university discovered that about 5,700 records of current and former faculty members had been hacked. And in 2006, a spreadsheet listing the social security numbers of 632 students was sent in error to other unintended student recipients.").

- Oliver Staley, Massachusetts Institute of Technology Mistakenly Tells Some Applicants They've Been Admitted, Bloomberg News, Feb. 12, 2014 ("The Massachusetts Institute of Technology (MIT) sent an e-mail to prospective students, erroneously telling them in a line at the bottom that they had been admitted. The university doesn't know how many people received the e-mail, although the number who noticed the line was probably 'very small,' Chris Peterson, an admissions officer at the Cambridge, Massachusetts-based school, said on the admission department's blog last week."; "In 2012, the University of California at Los Angeles sent an e-mail to 894 students that had been wait-listed for admission, inadvertently suggesting they had been admitted. The same year, 76 applicants to Vassar College received an e-mail letter from the college that erroneously stated they had been accepted.").
- Lori Pilger, Attorney accidentally copies email to Nebraska Supreme Court chief justice, Lincoln [Neb.] J. Star, Oct. 8, 2013 ("An Omaha attorney [sent] a September 30 email congratulating two other attorneys on oral arguments heard by the [Nebraska] Supreme Court earlier that same day."; "In his email, Whitted [Omaha lawyer], a former [Nebraska] bar association president, congratulated the two on arguments that morning."; "'You did a great job and dealt with some ill-conceived and uninformed questions very well,' he wrote to Kinney and Fenner, president-elect of the association. 'It's now in the hands of the court and we have done all we can.'"; "But he also copied the email to 24 others, including [Nebraska's Chief Justice] Heavican and a Nebraska Court of Appeals judge.").
- Butt Dial Leads To Texas Drug Arrests, Associated Press, July 23, 2013 ("An inadvertent 911 cellphone call to Central Texas police has led to drug charges against two teenagers."; "College Station police on Monday said the phone was in the pocket of one of two men at a home where marijuana allegedly was being smoked."; "Sergeant Danny Junek says responding officers found no emergency but smelled marijuana at the residence. Officers obtained a search warrant and seized cocaine, marijuana and more than \$4,100.").

- Carli Teproff, "Murder Plot Recorded On Phone After Man Butt-Dials 911," Miami Herald, May 22, 2013 ("Tip: If you're plotting to kill somebody, try not to 'pocket dial' 911 and have your plans recorded. That's exactly what Scott Simon did after getting into a fight with another man at a Waffle House in the early hours of May 5, the Broward Sheriff's Office (BSO) said Wednesday. On a recorded line, Simon can be heard telling someone else that he's going to follow the victim home and kill him. Minutes later, 33-year-old Nicholas Walker was shot and killed while driving his car onto Interstate 95 in Oakland Park. 'This is a first for me,' said BSO spokeswoman Dani Moschella. 'Criminals say crazy things all the time, but I've never seen anyone call a recorded line.'"; "As for the call, Moschella said Simon's apparent butt-dial helped police. 'He had no idea he called 911,' Moschella said. 'He basically told on himself.'").
- Matt Stevens, Robbers Arrested After Pocket-Dialing 911 During Crime, Police Say, L.A. Times, May 20, 2013 ("The robbers allegedly broke into a car, took what they wanted and drove away. So they very well might have gotten away with the crime -- had it not been for pesky pocket dialing. Fresno residents Carson Rinehart and Nathan Teklemariam, both 20 years old, were talking about their plan as they prepared to rob a vehicle on May 9, Fresno police officials said. About 11:30 p.m., a 911 dispatcher got a call from a cellphone, and after listening for about a minute, realized that the people on the other end planned to commit a crime, Fresno police Sergeant Jaime Rios said. The dispatcher stayed on the line, and sent a patrol unit out to the location. Meanwhile, the dispatcher heard the suspects plot out what they would take from the vehicle. Later, the dispatcher heard glass break. And as the suspects attempted to get away, the dispatcher listened to the chatter about being chased by police, Rios said. When officers finally confronted the suspects, Rios said they denied their involvement, and one lied about how he had cut his hand. 'The crooks were pretty shocked when the officer told them that they had essentially butt-dialed 911,' Rios said. 'They had no clue.' One of the embarrassed suspects even felt compelled to explain that his phone sometimes acted up. Rios said it was an officer who finally ended the minutes-long call, taking possession of the phone, and hanging it up.").
- Pocket Dial, Low Battery Led To Ohio Burglar, The Associated Press, Feb. 7, 2013 ("Authorities in Ohio say a pocket-dialing prowler got himself arrested after his cellphone turned informant. Twice."; "Investigators say an emergency operator traced an accidental 911 call on Tuesday night to a home in Sidney, about 60 miles northwest of Columbus."; "Shelby County sheriff's deputies dispatched to check on the house found a window forced open. They arrested Douglas Wolaver, of Piqua, inside."; "The sheriff's office says Wolaver was found in a bathroom after his phone's low-battery alert led deputies to his hiding place."; "Wolaver is charged with breaking and entering. A phone listing for him was disconnected.").

- Karen Sloan, Baylor's Accidental Document Dump Provides Grist For Bias Suit, Nat'l L. J., July 25, 2012 ("Baylor University School of Law garnered some unwanted attention in April when an administrator accidentally emailed a spreadsheet containing names, undergraduate grade-point averages, Law School Admission Test (LSAT) scores and scholarship awards to about 400 admitted students."; "Now, those data are fuel for an age discrimination lawsuit by a would-be Baylor law student who claims admissions officials wrongfully denied him a seat in the fall class and a full-ride scholarship."; "In a pro se federal lawsuit filed on July 19 in Austin, Texas, C. Michael Kamps, 55, alleges that admissions officials repeatedly refused to take into account that grade inflation over time has significantly depressed the value of his 3.2 grade point average from Texas A&M University, from which he graduated in 1979."; "He claims that administrators relaxed the requirement for a full-ride scholarship to ensure that it would be denied him, and retaliated against him for filing complaints about the handling of his application."; "As for the mistakenly released data, Kamps claims they proved that his 'Baylor index' -- a formula that takes into account undergraduate grade point average (GPA) and LSAT scores -- surpassed 68 percent of the applicants who were admitted, according to the complaint. Kamps is on the waiting list for a spot the fall 2012 class."; "The inescapable conclusion is that Defendants, in retaliation for Plaintiff's complaint, admitted scores, even hundreds, of candidates with inferior credentials while retaining Plaintiff's application on the wait list," the complaint reads.").
- Krista Gjestland, Officials say system error caused dismissal emails to be sent to entire student body, Ypsilanti Courier, May 5, 2012, http://heritage.com/articles/2012/05/09/ypsilanti_courier/news/doc4fa582ffe5b60239294556.prt ("The dismissal emails sent to students read: 'As a result of your Winter 2012 academic performance, you have been dismissed from Eastern Michigan University,' and then goes on to explain the dismissal appeals process.").
- Noah Buhayar, Aviva Mistakenly Fires 1,300 Employees At Investment Unit, Bloomberg News, Apr. 20, 2012, <http://www.bloomberg.com/news/2012-04-20/aviva-mistakenly-fires-1-300-employees-at-investment-unit.html> ("Aviva Plc (AVI), the United Kingdom's second-biggest insurer by market value, said the company's investment unit mistakenly sent an e-mail dismissing its entire staff before retracting the message.").
- Karen Sloan, Baylor Overshares About Incoming Law Class, Nat'l L.J., Apr. 4, 2012, http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202547961362&Baylor_overshares_about_incoming_law_class&slreturn=20120729142516 ("File this one under 'Whoops!' Incoming students at Baylor University School of Law will perhaps know more than they ought to about their future classmates, because administrators accidentally sent them a spreadsheet detailing each of their scores on the Law School Admission Test,

undergraduate grade-point averages and the amounts of any scholarship awards. The data also included prospective student's names, addresses, telephone numbers, undergraduate institutions and ethnicities. The spreadsheet was attached to an e-mail the admissions office sent out on April 3 to inform the class about an extension of the deadline for sending tuition deposits, said Frank Raczkiwicz, vice president of media communications for Baylor University. The deadline to pay the deposit was April 1, but a computer glitch prompted the law school to extend it until April 6, he said. About seven hours after the e-mail was sent, the school sent a second message apologizing for the mistake, Raczkiwicz said, asking that recipients act professionally and delete the information from their computers. 'Last night we sent out an e-mail to a small group and apologized to them for the unfortunate mistake,' he said on April 4. 'Fortunately, there were no Social Security numbers or anything else like that in the e-mail.' The e-mail was sent to 400 applicants accepted by the law school, Raczkiwicz said.").

- Ian Thoms, Skadden's Flubs Shows Potential Pitfalls Of Securities and Exchange Commission E-Filing, Law360, Mar. 13, 2012, <http://www.law360.com/securities/articles/318435/skadden-s-flub-shows-potential-pitfalls-of-sec-e-filing> ("When Skadden Arps Slate Meagher & Flom LLP jumped the gun earlier this month and announced a highly anticipated land deal for its client Wynn Resorts Limited before the deal was actually finalized, other firms probably breathed a sigh of relief -- but as experts warn, it could just as easily have been them. Skadden was preparing in early March to announce the deal for Wynn, prepping press material and readying regulatory filings, when someone -- a clerk, the firm says -- prematurely posted a disclosure online, prompting Wall Street to rejoice and begin buying up shares of the casino company. Skadden quickly admitted its mistake and vowed never to do it again, but the blunder highlights how easy it is to make an error like this, especially at the dawn of the e-filing era, experts say. 'A lot of times, no one is looking at these things before they go out,' said Tim Loughran, professor of finance at the University of Notre Dame's Mendoza College of Business. 'It's kind of sad. There's a lot of little mistakes going on. This is a big one.' On March 2, Skadden filed a Form 8-K with the United States Securities and Exchange Commission (SEC), announcing that Wynn had sealed the deal with the government of Macau to use 51 acres of land for a planned 2,000-room casino and resort. The filing satisfied the requirement that Wynn, like all public companies, notify shareholders whenever a material event occurs. The only problem was Macau's government hadn't, and still hasn't, actually approved the deal. Wynn admitted the 8-K was a mistake about two hours after it was filed, and Skadden promptly followed with a brief statement accepting blame for the error. 'We learned earlier today that a clerk in our filing department inadvertently made an unauthorized filing with respect to Wynn Resorts Limited,' the firm said. 'We apologize that this mistake occurred. We have taken steps to rectify the situation as quickly as possible and are reviewing what occurred to ensure that it cannot happen in

the future.' The mistake was compounded by the fact that it was immediately made public by the SEC's online filing procedures -- the Electronic Data Gathering, Analysis and Retrieval, or EDGAR, system. The SEC accepts only online filings now, shunning snail mail in most instances, and it posts nearly all documents as soon as it receives them. With no safety net built in at the SEC's end, companies and their law firms must be especially careful before submitting documents. They also need to avoid the temptation to pawn SEC filings off on associates or staff members without giving them a proper review, law professors said. 'These types of things reflect worse on the law firm,' Loughran said. 'It's sloppy.'").

- Tom Wagner, Babette's errant email cripples German parliament, Reuters, Jan. 26, 2012, available at <http://www.reuters.com/article/2012/01/26/us-germany-emails-idUSTRE80P14A20120126> ("The German parliament's email system was hampered for several hours for more than 4,000 staffers and deputies when hundreds of workers responded to an errant email sent by one staffer named 'Babette' to all 4,032 co-workers. The flood of emails began when 'Babette' accidentally replied to 'all' on the Bundestag email list with a short answer to a colleague: 'Please bring me a copy of the new directory.' Their exchange quickly multiplied when hundreds of colleagues responded with comments ranging from please 'remove my name from your list' to 'I'd like to take this opportunity to say hello to my mother.'").
- Christopher S. Stewart, New York Times Newspaper Trips Twice With Mistaken Blast Email, Wall St. J., Dec. 29, 2011, at B5 ("The New York Times conceded on Wednesday that it mistakenly sent an email blast to millions of readers with a surprising message about canceled print subscriptions -- but not before erroneously blaming computer spammers. The email, which was originally intended for 300 subscribers, ended up going out to 8.6 million people, according to the Times. In it, readers were asked to 'reconsider' their decision to cancel their subscriptions and offered an 'exclusive rate of 50 percent off for 16 weeks.' The paper's phone lines were suddenly overloaded. The message led to an immediate uproar online, with some speculating that the Times's database had been hacked. In an emailed statement with the subject line 'Spam message,' a spokeswoman for the Times wrote, 'If you received an email today about canceling your New York Times subscription, ignore it. It's not from us.' A couple hours later, however, the Times reversed itself, saying the email was accidentally sent by the paper and not by a spammer. The Times, the flagship newspaper of New York Times Co., wouldn't comment on why it took so long for it to figure out that it was its own error.").
- Jenna Johnson, 200 students have the shortest GWU career ever; Erroneous e-mail 'welcomes' rejected early-decision applicants, Wash. Post, Feb. 18, 2010, at B05 ("About 200 students who had sought early-decision admission to George Washington University received an e-mail last week that

proclaimed 'Congratulations' and welcomed them to the Class of 2014 -- for several hours. Then came every college applicant's nightmare. 'This afternoon, you received an e-mail from me titled "Important GW Information,"' wrote Kathryn Napper, executive dean of undergraduate admissions. 'Unfortunately, this e-mail was sent to you in error. We are truly sorry for this confusion regarding your application to GW.'").

- Debra Cassens Weiss, Did Lawyer's E-Mail Goof Land \$1B Settlement on New York Time's Front Page?, ABA J., Feb. 6, 2008 ("An outside lawyer for Eli Lilly & Company apparently has two people named 'Berenson' in her e-mail address book. One is a reporter for the New York Times and the other is her co-counsel assisting in confidential negotiations on a possible \$1 billion settlement between the pharmaceutical company and the government." (emphasis added); "The question is whether her e-mail to the wrong Berenson spurred last week's front-page New York Times story revealing talks to resolve criminal and civil investigations into the company's marketing of the anti-psychotic drug Zyprexa, as Portfolio.com reports."; "The unidentified lawyer who wrote the e-mail works at Pepper Hamilton in Philadelphia, the story says. She was trying to e-mail Bradford Berenson of Sidley Austin rather than Times reporter Alex Berenson." (emphasis added); "Eli Lilly had initially believed that federal officials leaked the information. 'As the company's lawyers began turning over rocks closer to home, however, they discovered what could be called A Nightmare on E-mail Street,' the Portfolio story says." (emphasis added); "A Lilly spokeswoman told *Portfolio.com* that the company will continue to retain Pepper Hamilton. A search for the words 'Eli Lilly' on the firm's Web site shows that two of the firm's lawyers are scheduled to speak on the subject of Resolving Ethical Concerns and Preserving Attorney-Client Privilege When Faced With Fraud and Abuse Charges at an April conference." (emphasis added); analyzing the source of information included in the following article: Alex Berenson, Lilly in Settlement Talks With U.S., N.Y. Times, Jan. 30, 2008 ("Eli Lilly and federal prosecutors are discussing a settlement of a civil and criminal investigation into the company's marketing of the antipsychotic drug Zyprexa that could result in Lilly's paying more than \$1 billion to federal and state governments."; "If a deal is reached, the fine would be the largest ever paid by a drug company for breaking the federal laws that govern how drug makers can promote their medicines."; "Lilly may also plead guilty to a misdemeanor criminal charge as part of the agreement, the people involved with the investigation said. But the company would be allowed to keep selling Zyprexa to Medicare and Medicaid, the government programs that are the biggest customers for the drug. Zyprexa is Lilly's most profitable product and among the world's best-selling medicines, with 2007 sales of \$4.8 billion, about half in the United States."; "Lilly would neither confirm nor deny the settlement talks.").

Of course, courts deal with such accidental transmissions when they impact someone's legal rights. Some courts have noted this development with humorous comments.

- Order at 1, Crockett Capital Corp. v. Inland Am. Winston Hotels, Inc., Civ. A. No. 08-CVS-000691 (N.C. Super. Ct. June 25, 2009) ("Technology multiplies the opportunities for man to do dumb things and increases the speed at which he can do them.").
- United States v. Carelock, 459 F.3d 437, 443 (3d Cir. 2006) ("[A] computer lets you make more mistakes faster than any invention in human in human history-with the possible exceptions of handguns and tequila.' Mitch Ratcliffe (quoted in Herb Brody, *The Pleasure Machine: Computers, Technology Review*, Apr. 1992, at 31).").

Volume

Third, the volume of electronic communications has become a staggering torrent. People send millions (if not billions) of electronic communications to each other every day.

This has resulted in dramatically increased discovery costs, among other things. It would be easy to attribute several federal rules changes (including Federal Rule of Evidence 502) to this increased volume of potentially discoverable communications.

Danger of Third Party Intrusion

Fourth, the easy transmission of such a high volume of electronic communications comes with a potentially heavy price -- the increasing danger of devious third parties accessing electronic communications. Given the often sensitive and serious substance of those communications, many third parties find the temptation too hard to resist.

The possibility of such mischief has cast some doubt on lawyers' ability to comply with their ethical obligations when communicating electronically, and even on the availability of the attorney-client privilege.

- Kent Zimmermann, Monitoring of Firm Puts The Rule of Law at Risk, Nat'l L. J., Feb. 24, 2014 ("News recently broke that a top-secret document, obtained by the former National Security Agency (NSA) contractor Edward Snowden, showed that the Australian government monitored communications between the government of Indonesia and its United States lawyers. In the wake of the story, some United States law firms issued strong statements indicating their defenses against such monitoring are strong and that they will continue to do everything they can to protect the confidentiality of communications with clients. However, as Corporate America has already learned, there is only so much they can do. With government monitoring and other breaches inevitable, United States law firms should focus their collective attention on the fact that it is in their interests and their clients' interests for the United States government to develop better safeguards to protect the confidentiality of government-intercepted attorney-client communication. The new reality is that law firms are generally not in a position to comprehensively protect the confidentiality of their communications with clients. As one Washington lawyer told The National Law Journal affiliate The AmLaw Daily, "Every domestic industry trade lawyer in Washington has had their systems hacked by the government of China." Also speaking to The AmLaw Daily, Washington attorney Bart Fisher, who represents the government of Sudan, was more blunt: "In this day and age, it would be idiotic not to assume conversations aren't being listened to by the government.").
- Juan Carlos Rodriguez, ABA Asks NSA To Explain Attorney-Client Privilege Policies, Law360, Feb. 21, 2014 ("Concerned about alleged spying on a U.S. law firm, the American Bar Association on Thursday asked the National Security Agency (NSA) to clarify how it protects attorney-client privileged information that it intercepts.").
- Allison Grande, NSA Spying Leaves Law Firms Vulnerable To Litigation, Law360, Feb. 20, 2014 ("A recent report that the National Security Agency (NSA) spied on Mayer Brown LLP has stoked fears that client communications and data at a host of law firms may be vulnerable to prying eyes, leaving attorneys susceptible to lawsuits claiming they failed to take reasonable steps to protect sensitive information. Although the government's surveillance tactics have faced intense scrutiny since former NSA contractor Edward Snowden began leaking classified documents in June, the issue hit close to home for attorneys on Saturday, when The New York Times reported that one of the Snowden documents indicated an Australian intelligence agency had offered to share with the NSA communications it had intercepted between Indonesian officials and the American law firm the officials had hired to represent their government in a trade dispute with the United States. "There's not a lawyer who read this article over the weekend and has clients abroad who was not thinking, "What are the chances that our privileged communications were picked up where they were not supposed to be?" said Scott Vernick, Fox Rothschild LLP's privacy and data security practice leader.

Their clients likely had similar thoughts, attorneys say, which could not only lead to enhanced scrutiny of a firm's data security practices but also open the door to lawsuits alleging that lawyers and their firms breached their ethical, contractual and legal obligations to take reasonable steps to protect their sensitive data from unauthorized access.").

Several articles have noted the particular susceptibility of law firms to nefarious interference.

- Rachel M. Zahorsky, Firms are at risk of security breaches inside and out, ABA J., (June 1, 2013) ("Most major U.S. law firms have been victims of security breaches, and the unwelcome threats likely operated covertly for up to nine months before they were discovered. For many, the first whiff of insidious action comes from a knock on the firm's door by the FBI. In 2011, the U.S. government labeled New York City's 200 largest law firms 'the soft underbelly' of hundreds of corporate clients, two experts warned at a Techshow session on data security.").
- Catherine Dunn, Outside Law Firm Cybersecurity Under Scrutiny, Corporate Counsel (June 6, 2013) ("Bank of America Merrill Lynch is auditing the cybersecurity policies at its outside law firms, partly under pressure from government regulators to do so, according to the bank's assistant general counsel Richard Borden. Borden, a panelist at Corporate Counsel's 25th Annual General Counsel Conference on Wednesday, said that Bank of America is 'one of the largest targets in the world' for cyber-attacks, and that law firms are 'considered one of the biggest vectors that the hackers, or others, are going to go at to try to get to our information.' Bank of America is the second-largest United States bank by assets."; "As cyber-attacks directed at United States business have grown more prevalent, the Federal Bureau of Investigation and others have flagged concerns over cybersecurity at law firms -- given the value of their corporate clients' information to potential attackers, and law firms' often slow adaptation to new technologies. For a major financial services company like Bank of America, being considered part of the United States' critical infrastructure -- the subject of an executive order issued earlier this year -- presents additional pressure to examine their contractors and supply chain, including law firms. 'It's been really interesting dealing with the law firms, because they're not ready,' said Borden, who is the bank's in-house cybersecurity lawyer and is assisting the group that's reviewing Bank of America's outside counsel. 'Some of them are, I should say, but there are many that aren't. And it actually does pose a threat.' CorpCounsel.com asked Borden what the company is looking for law firms to demonstrate in the audit of their information security policies and practices. 'One, we're looking for them to have an information security plan,' he said. Next, Borden said, Bank of America wants to see that the firms 'actually follow' that plan. For example, he asked, 'How are they dealing with mobile

devices? Is our information going onto mobile devices in an encrypted way?' And the bank isn't simply relying on the law firms' own audits of their information security practices. 'We're really looking at their whole structure and focus on information security, and we test it. We send in people to test it,' Borden said.").

Communist China seems to be the main culprit.

- Jessica Seah, [China Hacking Report Raises Data Security Alarm at Firms](#), Asian Lawyer (Mar. 1, 2013) ("The blockbuster report on Chinese hacking released last week by United States cybersecurity firm Mandiant has focused attention on the security of data held by governments and big corporations -- and by law firms. The report linked hacking of 141 entities, mainly in the United States, to a Chinese military unit based in a suburban Shanghai neighborhood. Four of those entities were law firms. Mandiant general counsel Shane McGee declined to name them, but says law firms, which store all kinds of sensitive information for a wide variety of clients, make ideal targets for hackers. 'By targeting large law firms, hackers can obtain information about hundreds or thousands of companies by breaching a single network,' says McGee. 'To some extent, it's a one-stop shop for the attackers.'").

Beginning of an Attorney-Client Relationship

Hypothetical 1

Your law firm website bio has a link allowing visitors to send you an email. This morning you opened an email from someone seeking a lawyer to file a wrongful discharge case against a local company. You instantly recognized the company's name -- because your firm handles all of its employment work.

What do you do with the information you gained by reading the email?

- (A) You must tell your client about what you read.
- (B) You may tell your client about what you read, but you don't have to.
- (C) You cannot tell your client about what you read, but instead must maintain its confidentiality.

(B) YOU MAY TELL YOUR CLIENT WHAT YOU READ, BUT YOU DON'T HAVE TO (PROBABLY)

Analysis

The ethics rules deal with lawyers' confidentiality duty in three phases of a relationship between a would-be client and a lawyer: (1) when a would-be client communicates unilaterally to the lawyer, and the lawyer has not responded; (2) when the would-be client and the lawyer consult about the possibility of the former retaining the latter; and (3) after the would-be client and the lawyer agree to create an attorney-client relationship.

ABA Model Rules 1.18 addresses the first two scenarios. In the third setting, the lawyer must comply with all the ethics rules, including the duty of confidentiality.

This hypothetical addresses the first phase.

Application of Confidentiality and Loyalty Duties

In the first two phases, the key issues involve lawyers' duties of confidentiality and loyalty. Lawyers owe both of those duties to clients. So the question is whether and when those duties begin. There are three possibilities.

First, such a would-be client might be treated for ethics and fiduciary duty purposes as a client. Of course, they would be treated as a former client should the initial communication never ripen into an actual attorney-client relationship. To the extent that such a person is considered a former client (1) the lawyer may not disclose confidences gained from that person, or use to that person's detriment any confidential information, unless it becomes generally known; and (2) the lawyer may not represent other clients adverse to that person on any matter "substantially related" to the matter about which the person and the lawyer communicated, or any other matter even unrelated to the matter they discussed, if the lawyer acquired confidential information that the lawyer could use to the person's detriment. ABA Model Rule 1.9.

Thus, the duty of confidentiality would seal the lawyer's lips, and the duty of loyalty would prevent the lawyer from taking matters adverse to the would-be client, despite the absence of any consummated attorney-client relationship. Because the person would be considered a "former" rather than current client, the lawyer would be presumably free to take matters adverse to the person that are unrelated to the matter they discussed. However, the more common scenario is for the lawyer to belatedly discover that he or she already represents the potential adversary. In that fact pattern, the lawyer cannot represent that adversary in the matter that the lawyer and person discussed, without the person's consent. That consent is nearly impossible to obtain,

because the person has now retained another lawyer to represent him or her in the matter, and therefore has nothing to gain and much to lose by granting such a consent.

Second, such a would-be client might be considered a former client for confidentiality purposes, but not for loyalty purposes. In that case, the lawyer would have to keep secret what the lawyer learned during any communications with the person, but could freely represent the person's adversary even in the matter about which they communicated. This sort of "threading of the needle" could be very difficult, if the same lawyer who learned information from the would-be client wants to participate on behalf of the adversary. However, that lawyer might be screened from others in the law firm, thus both preserving the would-be client's confidences and allowing the law firm to represent the adversary.

Third, the lawyer might owe no duties at all to such a would-be client, other than the normal tort duties that we all owe to each other. In that scenario, the lawyer could disclose to anyone confidences that the lawyer obtained from the would-be client. Given a lawyer's duty to diligently represent clients (ABA Model Rule 1.3) and keep clients "reasonably informed about the status of the matter" (ABA Model Rule 1.4(a)(3)), it is easy to envision that such a lawyer would have a duty to advise the current client what the lawyer has just learned from its potential adversary. Similarly, the lawyer could represent the adversary even in the matter about which the lawyer received information from the person, because the lawyer would have no duty of loyalty to the person.

The principles applicable in all three of these phases depend on the would-be client's reasonable expectation. In turn, this essentially puts the burden on the lawyer to control such expectation.

Effect of Electronic Communications

It is easy to see how the increasing use of electronic communications affects the analysis.

Would-be clients traditionally made appointments to meet face-to-face with a lawyer, the purpose of which is to discuss the possibility of hiring the lawyer. This time lapse allowed the lawyer to (1) check for conflicts, and (2) decide whether to disclaim any duty of confidentiality. Because diligent and competent lawyers always took the first step, they never normally had to deal with the second possible step. In other words, the lawyer would cancel the appointment if there was a conflict, so the would-be client never had the opportunity to impart any confidential information to the lawyer. In essence, the lawyer could control the information flow by checking for conflicts first.

When would-be clients began to use the telephone to contact a lawyer, the lawyer could use the same basic approach -- although the lawyer had to be a bit quicker in doing so. Such a lawyer might have to interrupt the would-be client's narrative, so the lawyer could run a conflicts check before acquiring any material information from the would-be client. Thus, the lawyer could still control the information flow, although it was more difficult.

Lawyers knowingly participating in a "beauty contest" could follow the same steps. Here, however, it was far more likely that a lawyer would disclaim any duty of confidentiality. This is because the lawyer knew the would-be client was looking to retain a lawyer, thus giving a lawyer who might lose the "beauty contest" an incentive to preserve the lawyer's ability to represent the other side. A "beauty contest" participant might also arrange for a prospective consent from the would-be client, which would

allow the lawyer to represent the other side if the would-be client retained another participant. Of course, all of this was possible because the lawyer had time to control the information flow.

Some of these principles apply in exactly the same way to lawyers' participation in certain electronic communications. Lawyers who communicate with someone online can create an attorney-client relationship if the lawyer receives confidences and provides advice. Even this sort of informal communication can trigger all of the lawyer's traditional duties to clients, as well as render the lawyer vulnerable to malpractice for any improper advice.

Most articles about Facebook, blogs, and other forms of social media warn lawyers not to accidentally establish an attorney-client relationship by communicating with a potential client using such media. Any sort of a dialogue between a lawyer and a potential client might trigger a relationship that a court or bar could find sufficient to trigger all of the lawyer's responsibilities that come with representing a client.

Would-Be Clients' Unilateral Communications to a Lawyer

It is much more difficult to control the receipt of information in the electronic age. A 2010 New Hampshire legal ethics opinion used a quaint term in describing this phenomenon.

Before the advent of the information superhighway, law firms had an easier time controlling the flow of potentially disqualifying information. Initial interviews with prospective clients were conducted in person or over the phone. Lawyers could more easily set the ground rules. They could control the prospective clients' expectations that the lawyer would or could maintain the confidentiality of any information disclosed during the initial consultation, and discourage the unilateral disclosure of compromising confidences by limiting

disclosure to information needed to complete a conflicts check and confirm the lawyer's subject matter competence.

New Hampshire LEO 2009-2010/1 (6/2010) (emphasis added).

The first ethics opinions to have dealt with this issue described the situation in which "a prospective client simply transmits information to a law firm providing no real opportunity to the law firm to avoid its receipt." New York City LEO 2001-1 (3/2001) (discussed below).

So the question is whether the difficulty (or near impossibility) of preventing the receipt of unsolicited confidential information affects the duties of confidentiality and loyalty that arise when a lawyer receives information from a would-be client.

Most of the opinions have dealt with unsolicited emails sent by a would-be client using a law firm's website link. However, the same basic question arises if a would-be client simply looks up a lawyer's email address and sends an email without using a website link, finds the lawyer's telephone number and leaves an unsolicited detailed voicemail message on the lawyer's voicemail, etc.

A few bars have imagined scenarios involving the second alternative discussed above (requiring the lawyer to keep the information confidential, but allowing the lawyer to represent the adversary). But most bars have settled on the third scenario -- in which the lawyer does not have either a confidentiality or loyalty duty.

State Bar Opinions

Because several state bars dealt with this issue before they adopted the 2002 ABA Model Rule governing this scenario, it makes sense to start with a discussion of those state bar opinions.

In 2001, the New York City Bar essentially adopted the approach later taken by ABA Model Rule 1.18 (discussed below).¹ The New York City Bar took a very lawyer-friendly approach.

In dealing with the confidentiality issue, the New York City Bar acknowledged that a lawyer would have to maintain the confidentiality of information acquired even from an unsolicited would-be client, absent some disclaimer of confidentiality. However, the Bar then provided a crystal clear roadmap for lawyers wishing to disclaim such a duty. The New York City Bar assured lawyers that a law firm website disclaimer which

¹ New York City LEO 2001-1 (3/2001) (essentially adopting the approach of ABA Model Rule 1.18; "Information imparted in good faith by a prospective client to a lawyer or law firm in an e-mail generated in response to an internet web site maintained by the lawyer or law firm where such information is adverse to the interests of the prospective client generally would not disqualify the law firm from representing another present or future client in the same matter. Where the web site does not adequately warn that information transmitted to the lawyer or firm will not be treated as confidential, the information should be held in confidence by the attorney receiving the communication and not disclosed to or used for the benefit of the other client even though the attorney declines to represent the potential client."; "The law firm in this case did not request or solicit the transmission to it of any confidential information by the prospective client. The fact that the law firm maintained a web site does not, standing alone, alter our view that the transmitted information was unsolicited. The fact that a law firm's web site has a link to send an e-mail to the firm does not mean that the firm has solicited the transmission of confidential information from a prospective client. The Committee believes that there is a fundamental distinction between a specific request for, or a solicitation of, information about a client by a lawyer and advertising a law firm's general availability to accept clients, which has been traditionally done through legal directories, such as [Martindale Hubbell](#), and now is also routinely done through television, the print media and web sites on the internet. Indeed, Martindale Hubbell has put its directory on-line, with links to law firm web sites and e-mail addresses, facilitating unilateral communications from prospective clients."; "We believe . . . that there is a vast difference between the unilateral, unsolicited communication at issue here by a prospective client to a law firm and a communication made by a potential client to a lawyer at a meeting in which the lawyer has elected voluntarily to participate and is able to warn a potential client not to provide any information to the lawyer that the client considers confidential."; "[W]here, as here, a prospective client simply transmits information to a law firm providing no real opportunity to the law firm to avoid its receipt, the Committee concludes that the law firm is not precluded from representing a client adverse to the prospective client in the matter."; quoting Professor Hazard, who explained that a prospective client "who tells a lawyer that he wants to sue XYZ . . . can properly be charged with knowledge that lawyers represent many different clients, and hence that there is a possibility that the immediate lawyer or her law firm already represents XYZ."; explaining that a law firm website disclaimer that "prominently and specifically warns prospective clients not to send any confidential information in response to the web site because nothing will necessarily be treated as confidential until the prospective client has spoken to an attorney who has completed a conflicts check -- would vitiate any attorney-client privilege claim with respect to information transmitted in the face of such a warning" (footnote omitted); further explaining that a lawyer receiving confidential information in such an email from a prospective client should not disclose its contents to the existing client if the law firm did not have an adequate disclaimer, or if there is some other reason to think that the prospective client sent the confidential information in good faith).

prominently and specifically warns prospective clients not to send any confidential information in response to the web site because nothing will necessarily be treated as confidential until the prospective client has spoken to an attorney who has completed a conflicts check -- would vitiate any attorney-client privilege claim with respect to information transmitted in the face of such a warning. If such a disclaimer is employed, and a prospective client insists on sending confidential information to the firm through the website, then no protection would apply to that information and the lawyer would be free to use it as she sees fit.

New York City LEO 2001-1 (3/1/01) (footnotes omitted).

In dealing with the duty of loyalty, the New York City Bar essentially concluded that a lawyer who receives unsolicited confidential information may represent the adversary even if the lawyer must keep the information confidential (because the lawyer has not taken the steps to disclaim the confidentiality duty).

Information imparted in good faith by a prospective client to a lawyer or law firm in an e-mail generated in response to an internet web site maintained by the lawyer or law firm where such information is adverse to the interests of the prospective client generally would not disqualify the law firm from representing another present or future client in the same matter.

Id.

Following the New York City Bar's lead, bars in several states then adopted the same basic approach -- finding that a lawyer receiving an uninvited email from a would-be client had no duty of confidentiality.

- Arizona LEO 02-04 (9/2002) ("An attorney does not owe a duty of confidentiality to individuals who unilaterally e-mail inquiries to the attorney when the e-mail is unsolicited. The sender does not have a reasonable expectation of confidentiality in such situations. Law firm websites, with attorney e-mail addresses, however, should include disclaimers regarding whether or not e-mail communications from prospective clients will be treated as confidential.").

- California LEO 2005-168 (2005) (addressing the ramifications of a law firm's receipt of an unsolicited email from a woman seeking a divorce lawyer; noting that the law firm's website included the statement: "I agree that I am not forming an attorney-client relationship by submitting this question. I also understand that I am not forming a confidential relationship."; explaining that the law firm already represented the husband in domestic relations matters; holding that the law firm's web site's warnings "were not adequate to defeat her reasonable belief that she was consulting Law Firm for the purpose of retaining Law Firm"; "Wife's agreement that she would not be forming a 'confidential relationship' does not, in our view, mean that Wife could not still have a reasonable belief that Law Firm would keep her information confidential. We believe that this statement is potentially confusing to a lay person such as Wife, who might reasonably view it as a variant of her agreement that she has not yet entered into an attorney-client relationship with Law Firm. . . . Without ruling out other possibilities, we note that had Wife agreed to the following, she would have had, in our opinion, no reasonable expectation of confidentiality with Law Firm: 'I understand and agree that Law Firm will have no duty to keep confidential the information I am now transmitting to Law Firm.' Another way in which Law Firm could have proceeded that would have avoided the confidentiality issue entirely would have been to request from web site visitors only that information that would allow the firm to perform a conflicts check." (footnote omitted); "A lawyer who provides to web site visitors who are seeking legal services and advice a means for communicating with him, whether by e-mail or some other form of electronic communication on his web site, may effectively disclaim owing a duty of confidentiality to web-site visitors only if the disclaimer is in sufficiently plain terms to defeat the visitors' [sic] reasonable belief that the lawyer is consulting confidentially with the visitor. Simply having a visitor agree that an 'attorney-client relationship' or 'confidential relationship' is not formed would not defeat a visitor's reasonable understanding that the information submitted to the lawyer on the lawyer's web site is subject to confidentiality. In this context, if the lawyer has received confidential information from the visitor that is relevant to a matter in which the lawyer represents a person with interests adverse to the visitor, acquisition of confidential information may result in the lawyer being disqualified from representing either.").
- Nevada LEO 32 (3/25/05) (holding that a prospective client generally cannot create an attorney-client relationship through a "unilateral act" such as "sending an unsolicited letter containing confidential information to the attorney"; warning that such a relationship might arise if a lawyer solicits such information; explaining that "[a]n attorney who advertises or maintains a web-site may be deemed to have solicited the information from the prospective client, thereby creating a reasonable expectation on the part of the prospective client that the attorney desires to create an attorney-client relationship"; "Most attorneys have addressed this issue by posting disclaimers to the effect that nothing contained on the web-site or

communicated through it by the prospective client will create an attorney-client relationship. . . . This should be effective, since no one responding to the web-site could -- in the face of such an express disclaimer -- reasonably believe that an attorney-client relationship had been created."; explaining that "[i]t is presently unclear, however, whether the duty of confidentiality also attaches to communications which are unsolicited where no attorney-client relationship (either express or implied) exists. A recent opinion of the State Bar of Arizona ethics committee states that unsolicited communications to an attorney (not in response to an advertisement or web-site) are not confidential, since the sender could not have a reasonable expectation of privacy in the communication. Arizona State Bar Committee on the Rules of Professional Conduct, Op. No. 02-04. The opinion contains a well-reasoned dissent which argues otherwise, however."; noting that Nevada was considering a new rule based on ABA Model Rule 1.18, which deals with such a situation).

- San Diego County LEO 2006-1 (2006) (addressing the ethical duties of a lawyer who receives an unsolicited email from a potential client, which includes harmful facts about the potential client; noting initially that the hypothetical lawyer did not have a website and did not advertise, although the state bar published her email address; concluding that: " (1) Vicky Victim's [prospective client] unsolicited e-mail is not confidential. Private information received from a non-client via an unsolicited e-mail is not required to be held as confidential by a lawyer, if the lawyer has not had an opportunity to warn or stop the flow of non-client information at or before the communication is delivered. (2) Lana [lawyer who received the unsolicited e-mail] is not precluded from representing Henry [other client whom the lawyer had already begun to represent when she received the unsolicited e-mail, and who has a claim against the potential client] and may use non-confidential information received from Vicky in that representation. (3) If Lana cannot represent Henry, she cannot accept representation of Vicki [sic] Victim since Lana had already received confidential information from Henry material to the representation."; explaining that "Vicky's admission that she had had 'a few drinks' prior to the accident which injured Henry is relevant and material to Henry's case and therefore constitute[s] a 'significant' development which must be communicated to Henry"; explaining that it would be a "closer question" if the lawyer "had placed an e-mail address at the bottom of a print advertisement for legal services or in a yellow page telephone listing under an 'attorney' category, without any disclaimers"; noting that in such a circumstance there would be an "inference" that "private information divulged to the attorney would be confidential"; a dissenting opinion argues that "I would err on the side of the consumer and find that there is a reasonable expectation of confidentiality on behalf of the consumer sending an e-mail to an attorney with the information necessary to seek legal advice").

In 2007, the Massachusetts Bar took a dramatically different approach.² In direct contrast to the New York City analysis, the Massachusetts Bar indicated that a lawyer could control the flow of information -- by using a click-through disclaimer.

[W]hen an e-mail is sent using a link on a law firm's web site, the firm has an opportunity to set conditions on the flow of information. Using readily available technology, the firm may require a prospective client to review and "click" his assent to terms of use before using an e-mail link. Such terms of use might include a provision that any information communicated before the firm agrees to represent the prospective client will not be treated as confidential. Or the terms of use could provide that receipt of information from a prospective client will not prevent the firm from representing someone else in the matter.

² Massachusetts LEO 07-01 (5/23/07) (addressing a situation in which a company seeking to retain a lawyer to sue another company used a law firm's web site biography link to email one of the firm's lawyers and provide information about its claim; noting that the lawyer who received the email declined to represent the company after determining that the law firm represented the proposed target on unrelated matters; explaining that "[w]hen a visitor to Law Firm's web site uses the link to send an e-mail, there is no warning or disclaimer regarding the confidentiality of the information conveyed"; concluding that the company's email "did not result in the formation of an attorney-client relationship," but nevertheless created a duty of confidentiality -- which arises "when the lawyer agrees to consider whether a client-lawyer relationship shall be established" (quoting Massachusetts Rule 1.6); explaining that "[i]f ABC Corporation had obtained the lawyer's e-mail address from the internet equivalent of a telephone directory, we would have no hesitation in concluding that the lawyer had not 'agreed to consider' whether to form an attorney-client relationship"; ultimately concluding that "[a] prospective client, visiting Law Firm's website, might reasonably conclude that the Firm and its individual lawyers have implicitly 'agreed to consider' whether to form an attorney-client relationship"; explaining that "when an e-mail is sent using a link on a law firm's web site, the firm has an opportunity to set conditions on the flow of information. Using readily available technology, the firm may require a prospective client to review and 'click' his assent to terms of use before using an e-mail link. Such terms of use might include a provision that any information communicated before the firm agrees to represent the prospective client will not be treated as confidential. Or the terms of use could provide that receipt of information from a prospective client will not prevent the firm from representing someone else in the matter."; also concluding that the law firm might be prohibited from representing the target in the action being considered by the company seeking a lawyer, because the law firm's obligations to preserve the confidences of the company which sent the email might "materially limit" the law firm's ability to represent the target -- depending on the substance of the email sent to the Law Firm; "[T]he information that ABC disclosed in the e-mail may have little long-term significance, especially once ABC has made its claim known to XYZ"; explaining that "[o]n the other hand, ABC's e-mail may contain information, such as comments about ABC's motives, tactics, or potential weaknesses in its claim, that has continuing relevance to the prosecution and defense of ABC's claim. In that case, the obligation of the lawyer who received ABC's email to maintain the confidentiality of its contents would materially limit his ability to represent XYZ, with the result that both the lawyer and the Law Firm would be disqualified."; explaining that "the Committee believes that a law firm can avoid disqualification by requiring prospective clients to affirmatively indicate their consent to appropriate terms of use before using an e-mail link provided on the firm's web-site").

Massachusetts LEO 07-01 (5/23/07). The Massachusetts Bar explained that depending on the kind of information conveyed in the unsolicited email, a law firm's receipt of confidential information from a law firm client's adversary might "materially limit" the law firm's ability to represent its client -- thus resulting in the law firm's disqualification. The Massachusetts Bar concluded

that a law firm can avoid disqualification by requiring prospective clients to affirmatively indicate their consent to appropriate terms of use before using an e-mail link provided on the firm's web-site.

Id.

The 2007 Massachusetts legal ethics opinion did not start a trend. Only neighboring New Hampshire seems to have taken such a narrow approach -- in its version of Rule 1.18.

A person who provides information to a lawyer regarding the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

New Hampshire Rule 1.18(a). Several comments explain New Hampshire's unique approach.

The New Hampshire rule expands upon the ABA Model Rule in one area. The ABA Model Rule 1.18(a) defines a prospective client as one who 'discusses' possible representation with an attorney. Similarly, ABA Model Rule 1.18(b) establishes a general rule for protection of information received in 'discussions' or 'consultations'.

In its version of these provisions, New Hampshire's rule eliminates the terminology of 'discussion' or 'consultation' and extends the protections of the rule to persons who, in a good faith search for representation, provide information unilaterally to a lawyer who subsequently receives and reviews the information. This change recognizes that persons frequently initiate contact with an attorney in writing, by e-mail, or in other unilateral forms, and in the process disclose confidential information that warrants protection.

Not all persons who communicate information to an attorney unilaterally are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship (see ABA Model Rule comment No. 2); or for the purpose of disqualifying an attorney from participation in a matter; or through contemporaneous contact with numerous attorneys; is not a 'prospective client' within the meaning of paragraph (a).

New Hampshire Rule 1.18(a) cmts. [1], [2].

In contrast, every other state seems to have taken the same approach as the 2001 New York City legal ethics opinion -- finding that lawyers had no duty of confidentiality upon receiving an unsolicited email from a would-be client.

- Iowa LEO 07-02 (8/8/07) (assessing the effect of lawyers receiving unsolicited emails from prospective clients; noting that "[g]one are the days when professional relationships begin with an in person consultation"; warning lawyers to consider whether any communication on their website or otherwise would lead a reasonable person to believe that the lawyer will maintain the confidentiality of any information that the prospective clients sends the lawyer; advising lawyers considering their "public marketing strategy" to "consider some form of notice from which would could [sic] be used to set the confidentiality expectation level of potential clients"; "For example, an Internet web page which markets the lawyer's services and gives contact details does not in and of itself support a claim that the lawyer somehow requested or consented to the sharing of confidential information. However, an Internet web page that is designed to allow a potential client to submit specific questions of law or fact to the lawyer for consideration would constitute bilateral communication with an expectation of confidentiality. A telephone voice mail message that simply ask [sic] the caller for their contact details would not in and of it self [sic] rise to the level of a bilateral communication but a message that encouraged the caller to leave a detailed message about their case could in some situations be considered bilateral.").
- Virginia LEO 1842 (9/30/08) (because the duty of confidentiality attaches (according to the Virginia Rules Preamble) "when the lawyer agrees to consider whether a client-lawyer relationship shall be established," lawyers may use to their client's advantage (and represent the adversary of a prospective client who sent) a prospective client's (1) unsolicited voicemail message containing confidential information, sent to a lawyer who advertises in the local Yellow Pages and includes his office address and telephone

- number; (2) unsolicited email containing confidential information, sent to a law firm which "maintains a passive website which does not specifically invite consumers to submit confidential information for evaluation or to contact members of the firm by e-mail"; someone submitting such confidential information does not have a reasonable basis for believing that the lawyer will maintain the confidentiality of the information, simply because the lawyer uses "a public listing in a directory" or a passive website; the lawyer in that situation had "no opportunity to control or prevent the receipt of that information" and "it would be unjust for an individual to foist upon an unsuspecting lawyer a duty of confidentiality, or worse yet, a duty to withdraw from the representation of an existing client"; lawyers might create a reasonable expectation of confidentiality if they include in advertisements or in their website language that implies "that the lawyer is agreeing to accept confidential information" in contrast to lawyers who merely advertise in the Yellow Pages or maintain a passive website; a lawyer would have to keep confidential (and would be prohibited from representing a client adverse to a prospective client which supplies) information provided by a prospective client who completes an on-line form on a law firm website which "offers to provide prospective clients a free evaluation of their claims"; law firms "may wish to consider" including appropriate disclaimers on their website or external voicemail greeting, or including a "click-through" disclaimer "clearly worded so as to overcome a reasonable belief on the part of the prospective client that the information will be maintained as confidential").
- Florida LEO 07-3 (1/16/09) ("A person seeking legal services who sends information unilaterally to a lawyer has no reasonable expectation of confidentiality regarding that information. A lawyer who receives information unilaterally from a person seeking legal services who is not a prospective client within Rule 4-1.18, has no conflict of interest if already representing or is later asked to represent an adversary, and may use or disclose the information. If the lawyer agrees to consider representing the person or discussed the possibility of representation with the person, the person is a prospective client under Rule 4.1.18, and the lawyer does owe a duty of confidentiality which may create a conflict of interest for the lawyer. Lawyers should post a statement on their websites that the lawyer does not intend to treat as confidential information sent to the lawyer via the website, and that such information could be used against the person by the lawyer in the future.").
 - Wisconsin LEO EF-11-03 (7/29/11) ("A person who sends a unilateral and unsolicited communication has no reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship. Consequently, the duties a lawyer owes prospective clients are not triggered by an unsolicited e-mail communication that 'the lawyer receives out of the blue from a stranger in search of counsel, as long as the lawyer did not do or publish anything that would lead reasonable people to believe that they could

share private information with the lawyer without first meeting [the lawyer] and establishing a lawyer-client relationship.' To avoid creating ethical duties to a person in search of counsel, a lawyer who places advertisements or solicits email communications must take care that these advertisements or solicitations are not interpreted as the lawyer's agreement that the lawyer-client relationship is created solely by virtue of the person's response and that the person's response is confidential. The most common approach is the use of disclaimers. These disclaimers must have two separate and clear warnings: that there is no lawyer-client relationship and that the e-mail communications are not confidential. Moreover, these warnings should be short and easily understood by a layperson. Use of nonlawyer staff to screen or communicate with prospective client will not relieve a lawyer of responsibilities arising under SCR 20:1.18." (citation omitted); providing several examples of appropriate disclaimer language at the end of the opinion).

ABA Model Rule 1.18

In trying to deal with lawyers' duties in this context, the ABA added a Model Rule in 2002.

ABA Model Rule 1.18 (called "Duties to Prospective Client") now starts with the bedrock principle: lawyers owe duties only to someone who is a "prospective client."

And a would-be client will be considered a "prospective client" only if he or she

consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter.

ABA Model Rule 1.18(a).

The rule formerly used the word "discusses" rather than "consults." On August 6, 2012, the House of Delegates adopted the ABA 20/20 Commission's recommendation to change the word to "consults." ABA, House of Delegates Resolution 105B (amending Model Rules 1.18 and 7.3, and 7.1, 7.2 and 5.5). Interestingly, this change undoubtedly reflects would-be clients' increasing (if not nearly universal) use of electronic communications rather than telephonic or in-person communications. The

word "discusses" implies the latter, while the word "consults" can include both electronic or in-person/telephonic communications.

A revised comment provides more guidance.

A person becomes a prospective client by consulting with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter. Whether communications, including written, oral, or electronic communications, constitute a consultation depends on the circumstances. For example, a consultation is likely to have occurred if a lawyer, either in person or through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response. . . . In contrast, a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest. Such a person communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client lawyer relationship, and is thus not a "prospective client." Moreover, a person who communicates with a lawyer for the purpose of disqualifying the lawyer is not a "prospective client."

ABA Model Rule 1.18 cmt. [2] (emphases added).

Effect of Unsolicited Communications if They Ultimately Result in an Attorney-Client Relationship

The state legal ethics opinions and ABA Model Rule 1.18 usually focus on communications between would-be clients and lawyers whom the would-be clients never retain, and who have an interest in disclosing or using the information they have received.

But what if the unsolicited communications come from a would-be client who eventually becomes a client?

Significantly, the ABA Model Rules extend confidentiality protection to "information relating to the representation of a client" -- without limiting that definition to information the lawyer gains during an attorney-client relationship. ABA Model Rule 1.6(a). This contrasts with the ABA Model Code, which protected privileged communications or certain other information "gained in the professional relationship." ABA Model Code DR 4-101(A).

Authorities seem to agree that the ABA Model Rules' confidentiality definition includes information relating to the representation "[r]egardless of when the lawyer learned of the information -- even before or after the representation." Nevada LEO 41 (6/24/09). The Restatement also takes this position. Restatement (Third) of Law Governing Lawyers § 59 cmt. c (2000) "[i]nformation acquired during the representation or before or after the representation is confidential as long as it is not generally known . . . and relates to the representation."

Cases have also extended lawyers' confidentiality duty to information acquired during a social setting from an acquaintance who later retained the lawyer's law firm. In re Anonymous, 932 N.E.2d 671 (Ind. 2010).

Thus, the ABA Model Rules' confidentiality duty seems to apply to information acquired before an attorney-client relationship begins -- as long as it eventually begins.

These principles raise another question. If a law firm's website contains the type of disclaimer envisioned under ABA Model Rule 1.18 as precluding any confidentiality duty or privilege protection, can an adverse third party later rely on that disclaimer in seeking discovery of the unsolicited communications from a would-be client to a

lawyer -- even if the client ultimately hires the lawyer? Somewhat surprisingly, the answer seems to be no.

In 2005, a California legal ethics opinion dealt with such a disclaimer, and found it ineffective -- because it simply disclaimed an attorney-client relationship, rather than disclaimed any confidentiality duty.

- California LEO 2005-168 (2005) (holding that a lawyer must maintain the confidentiality of a visitor to the lawyer's website, because the lawyer had not adequately warned visitors that the lawyer would not maintain the confidentiality of what they submitted to the law firm; explaining the scenario "[a] lawyer who provides to web site visitors who are seeking legal services and advice a means for communicating with him, whether by e-mail or some other form of electronic communication on his web site, may effectively disclaim owing a duty of confidentiality to web-site visitors only if the disclaimer is in sufficiently plain terms to defeat the visitors' reasonable belief that the lawyer is consulting confidentially with the visitor. Simply having a visitor agree that an "attorney-client relationship" or "confidential relationship" is not formed would not defeat a visitor's reasonable understanding that the information submitted to the lawyer on the lawyer's web site is subject to confidentiality. In this context, if the lawyer has received confidential information from the visitor that is relevant to a matter in which the lawyer represents a person with interests adverse to the visitor, acquisition of confidential information may result in the lawyer being disqualified from representing either." (emphasis added); explaining that the visible "Terms" listed on the law firm's website included the following: "I agree that I am not forming an attorney-client relationship by submitting this question. I also understand that I am not forming a confidential relationship. I further agree that I may only retain Law Firm or any of its attorneys as my attorney by entering into a written fee agreement, and that I am not hereby entering into a fee agreement. I understand that I will not be charged for the response to this inquiry."; noting that a visitor had to click his or her agreement with the terms before sending the inquiry; explaining that the law firm was already representing the visitor's husband; "Upon receiving Wife's inquiry, the law firm discovered that Husband had already retained Law Firm to explore the possibility of a divorce from Wife. The next day, an attorney in Law Firm sent Wife an e-mail, which stated: 'We regret we will be unable to accept you as a client because there is a conflict with one of our present clients. Good luck with your case.' We address whether Law Firm may be precluded from representing Husband as a result of the firm's contact with Wife on the ground that Law Firm has obtained material confidential information."; concluding that the law firm's effort to avoid a confidentiality duty was unsuccessful "We do not believe that a prospective client's agreement to Law Firm's terms

prevented a duty of confidentiality from arising on the facts before us, because Law Firm's disclosures to Wife were not adequate to defeat her reasonable belief that she was consulting Law Firm for the purpose of retaining Law Firm. First, our assumption that Law Firm did not form an attorney-client relationship with Wife is not conclusive concerning Law Firm's confidentiality obligations to Wife. An attorney-client relationship is not a prerequisite to a lawyer assuming a duty of confidentiality in such a situation." (emphasis added); A lawyer can owe a duty of confidentiality to a prospective client who consults the lawyer in confidence for the purpose of retaining the lawyer. Thus, that an attorney-client relationship did not arise from Wife's consultation with Law Firm did not prevent Law Firm from taking on a duty of confidentiality to Wife. Second, Wife's agreement that she would not be forming a 'confidential relationship' does not, in our view, mean that Wife could not still have a reasonable belief that Law Firm would keep her information confidential. We believe that this statement is potentially confusing to a lay person such as Wife, who might reasonably view it as a variant of her agreement that she has not yet entered into an attorney-client relationship with Law Firm."; "Regardless of the precise language used, it is important that lawyers who invite the public to submit questions on their web sites, and do not want to assume a duty of confidentiality to the inquirers, plainly state the legal effect of a waiver of confidentiality."; "A lawyer may avoid incurring a duty of confidentiality to persons who seek legal services by visiting the lawyer's web site and disclose[ing] confidential information only if the lawyer's web site contains a statement in sufficiently plain language that any information submitted at the web site will not be confidential." (emphasis added); "After typing in her contact information, Wife explained that she was interested in obtaining a divorce. She related that her Husband, a Vice-President at Ace Incorporated in Los Angeles, was cohabiting with a co-worker. She also stated that her 13-year-old son was living with her and asked if she could obtain sole custody of him. She noted that Husband was providing some support but that she had to take part-time work as a typist, and was thinking about being re-certified as a teacher. She revealed that she feared Husband would contest her right to sole custody of her son and that, many years ago, she had engaged in an extra-marital affair herself, about which Husband remained unaware. Wife stated that she wanted a lawyer who was a good negotiator, because she wanted to obtain a reasonable property settlement without jeopardizing her goal of obtaining sole custody of the child and keeping her own affair a secret. She concluded by noting she had some money saved from when she was a teacher, and stating, "I like your web site and would like you to represent me.").

In the same year, the Ninth Circuit applied the same rule to a website that seemed to come closer to the effective type of disclaimer envisioned in Rule 1.18.

Although dealing with privilege protection rather than the confidentiality duty, the Ninth

Circuit's analysis would presumably apply to both. Given the setting, perhaps the Ninth Circuit's conclusion should have come as no surprise -- the court prohibited a pharmaceutical company defendant from discovering communications from a would-be client to a plaintiff's law firm.

- Barton v. United States Dist. Court for Cent. Dist. of Cal., 410 F.3d 1104, 1106, 1107 & n.5, 1108, 1110, 1111, 1112 (9th Cir. 2005) (finding that defendants could not obtain access to plaintiffs' electronic communications to their law firm, despite the law firm's website's warnings that prospective clients' communications to the law firm would not be treated as confidential; "Plaintiffs sued SmithKline Beecham Corporation, which does business as GlaxoSmithKline. They claim injury from Paxil, a medication manufactured by SmithKline. Plaintiffs did not initiate contact with their lawyers by walking into the law office. Instead, the law firm posted a questionnaire on the internet, seeking information about potential class members for a class action the law firm contemplated. The district court ordered plaintiffs to produce the four plaintiffs' answers to the questionnaire. Plaintiffs seek, and we grant, a writ of mandamus vacating the district court's order compelling production." (footnotes omitted) (emphasis added); explaining that the law firm's website included the following warning: "I agree that the above does not constitute a request for legal advice and that I am not forming an attorney client relationship by submitting this information. I understand that I may only retain an attorney by entering into a fee agreement, and that I am not hereby entering into a fee agreement. I agree that any information that I will receive in response to the above questionnaire is general information and I will not be charged for a response to this submission. I further understand that the law for each state may vary, and therefore, I will not rely upon this information as legal advice. Since this matter may require advice regarding my home state, I agree that local counsel may be contacted for referral of this matter." (emphasis added); essentially finding that the law firm's disclaimer did not destroy privilege protection; "More important than what the law firm intended is what the clients thought. Here, there is ambiguity. On the one hand, the form can be filled out by 'a loved one' rather than by the potential client, and the person sending it in has to acknowledge that he is not requesting legal advice and is not forming an attorney client relationship by sending it in. The form also states that the person will not have retained an attorney until he signs a fee agreement and that 'local counsel may be contacted for referral of this matter.' The form states that its purpose is to 'gather information about potential class members,' not to consider accepting them as clients. On the other hand, the stated purpose of gathering 'information about potential class members' suggests that the firm is indeed trolling for clients."; "The district court concluded that the attorney-client privilege did not apply because the disclaimer established that the communications were not 'confidential' and

that checking the 'yes' box waived the privilege." (emphasis added); "The opponent of the privilege in this case is GlaxoSmithKline, and it thus has the burden of showing that the answers to the questionnaires were not intended to be confidential. The district court found that GlaxoSmithKline had met this burden because of the disclaimer at the bottom of the questionnaire which disclaimed any formation of an attorney-client relationship. The district court clearly erred in treating the disclaimer of an attorney-client relationship as a disclaimer of confidentiality." (emphasis added); "The check box on the law firm's website protected the law firm by requiring the questionnaire submitter to disclaim a purpose of 'requesting legal advice,' and to acknowledge that the submitter is not 'forming an attorney client relationship' by sending in the answers. But the box does not disclaim the purpose of 'securing legal service.' The questionnaire is designed so that a person filling it out and submitting it is likely to think that he is requesting that the law firm include him in the class action mentioned at the beginning of the form. Prospective clients' communications with a view to obtaining legal services are plainly covered by the attorney-client privilege under California law, regardless of whether they have retained the lawyer, and regardless of whether they ever retain the lawyer." (emphasis added); "There is nothing anomalous about applying the privilege to such preliminary consultations. Without it, people could not safely bring their problems to lawyers unless the lawyers had already been retained. 'The rationale for this rule is compelling,' because 'no person could ever safely consult an attorney for the first time with a view to his employment if the privilege depended on the chance of whether the attorney after hearing his statement of the facts decided to accept the employment or decline it.' . . . The privilege does not apply where the lawyer has specifically stated that he would not represent the individual and in no way wanted to be involved in the dispute, but the law firm did not do that in this case -- it just made it clear that it did not represent the submitter yet." (footnote omitted); "We are influenced by how fundamental the lawyer-client privilege is to the operation of an adversarial legal system. Potential clients must be able to tell their lawyers their private business without fear of disclosure, in order for their lawyers to obtain honest accounts on which they may base sound advice and skillful advocacy. There would be no room for confusion had the communication been in the traditional context of a potential client going into a lawyer's office and talking to the lawyer. The changes in law and technology that allow lawyers to solicit clients on the internet and receive communications from thousands of potential clients cheaply and quickly do not change the applicable principles." (footnote omitted) (emphasis added); "GlaxoSmithKline cannot be permitted access to a communication that a plaintiff made confidentially to his lawyer in order to compare it to what the same individual said at a deposition. But that is exactly what GlaxoSmithKline seeks. It must be conceded that if a plaintiff says one thing to his lawyer, and says another at his deposition, keeping the first disclosure secret creates a risk to the honest and accurate resolution of the dispute. That risk is mitigated by the plaintiffs' lawyers [sic] ethical duties of candor

toward the tribunal and fairness to the opposing party and counsel. The privilege does not mean that the plaintiffs may lie about their symptoms, or that their lawyers may allow them to lie. A lawyer can be disbarred for offering evidence that the lawyer knows to be false, failing to disclose a material fact when disclosure is necessary to prevent a fraud by the client, or assisting a witness to testify falsely. Most lawyers' sense of honor would prevent them from doing these things even if they were not at risk of losing their licenses if they did. These restraints of honor and ethics, rather than court-ordered disclosure of confidential communications, are the means that our system uses to deal with the risk of clients saying one thing to their lawyers and another to opposing counsel, the judge, or the jury." (footnotes omitted)).

Conclusion

The timing of the ABA Model Rules' 2002 adoption of Rule 1.18 seems to reinforce the conclusion that new forms of electronic communication required a relatively new approach. The ABA's 2012 switch from the term "discusses" to "consults" clearly reflects the ubiquitous use of impersonal electronic communication.

The ABA Model Rules' rejection of any confidentiality (or loyalty) duty in this initial phase of dealings between a would-be client and a lawyer might seem counterintuitive, but also unavoidable -- given the possibility of mischief. If a would-be client could burden the recipient with a confidentiality duty (and perhaps a loyalty duty), clever would-be clients could try to "knock out" numerous lawyers in a single widely-sent email. The ease of transmitting electronic communications increases that possibility.

The same Rule provides limited confidentiality protection during the next phase of the relationship -- when would-be clients and lawyers begin to consult about a possible attorney-client relationship. And all of the ethics rules apply if an attorney-client relationship actually ensues.

Best Answer

The best answer to this hypothetical is **YOU MAY TELL YOUR CLIENT WHAT YOU READ, BUT YOU DON'T HAVE TO (PROBABLY).**

Ethical Propriety of Electronic Communications

Hypothetical 2

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

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

YES

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

YES

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

YES

(d) May a lawyer ethically communicate with a client using WIFI?

YES

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

YES

Analysis

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

Introduction

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

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

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

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

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

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

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

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

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

determining the method of disposition, the instructions and wishes of the client should be a dominant consideration.

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

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

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

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

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

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

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

Two comments describe predictable requirements.

Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision. . . . The unauthorized access to, or the inadvertent or unauthorized disclosure of, information relating to the representation of a client does not constitute a violation of paragraph (c) if the lawyer has made reasonable efforts to prevent the access or disclosure. Factors to be considered in determining the reasonableness of the lawyer's efforts

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

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

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

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

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

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

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

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

ABA Model Rule 1.9 cmt. [1].

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

The Restatement takes essentially the same approach.

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

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

A lawyer who acquires confidential client information has a duty to take reasonable steps to secure the information against misuse or inappropriate disclosure, both by the

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

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

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

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

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

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

For instance, in ABA LEO 398 (10/27/95), the ABA indicated that a lawyer who allows a computer maintenance company access to the law firm's files must ensure that the company establishes reasonable procedures to protect the confidentiality of the

information in the files. The ABA also indicated that the lawyer would be "well-advised" to secure the computer maintenance company's written assurance of confidentiality.

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

Several ABA legal ethics opinions have described lawyers' duties (and warned of missteps) when communicating electronically.

- ABA LEO 477 (5/11/17) (Because communication technology, its accompanying risks and the ethics rules have changed since ABA LEO 413 (3/10/99), lawyers must take the following steps when communicating with their clients using new technology: comply with the ABA Model Rules 2012 "technology amendments"; assess what "reasonable efforts" a lawyer must

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

- make when protecting client confidentiality (which "is not susceptible to a hard and fast rule, but rather is contingent upon a set of factors"); consider using encryption for sensitive client communications, although "the use of unencrypted routine email generally remains an acceptable method of lawyer-client communication"; recognize that for "certain highly sensitive information" lawyers might have to "avoid" the use of electronic methods or any technology to communicate with the client altogether"; understand the nature of threats to client confidentiality, including how client information is transmitted, stored -- and the vulnerability of security at "[e]ach access point"; understand and use reasonable "electronic security measures"; recognize that "'deleted' data may be subject to recovery," so it may be necessary to "consider whether certain data should ever be stored in an unencrypted environment, or electronically transmitted at all"; carefully label client confidential information; train lawyers and non-lawyers in the use and risk of electronic communications and storage; undertake reasonable due diligence on communication technology vendors; inform clients about the risks of communicating sensitive information; comply with clients' requirements for special protective measures.).
- ABA LEO 480 (3/6/18) (Lawyers blogging, tweeting, and otherwise engaging in public commentary through social media or otherwise must comply with the ABA Model Rules' confidentiality duties – which extend beyond the attorney-client privilege and include all information relating to a representation, even if it is in a public document or generally known. Lawyers may violate this rule even if they communicate in a "hypothetical" – if "there is a reasonable likelihood that a third party may ascertain the identity or situation of the client from the facts set forth in the hypothetical" (because both the client's identity and the situation deserve confidentiality protection).).
 - ABA LEO 498 (3/10/21) (Providing guidance for lawyers' virtual practice, defined as follows: "This opinion defines and addresses virtual practice broadly, as technologically enabled law practice beyond the traditional brick-and-mortar law firm. A lawyer's virtual practice often occurs when a lawyer at home or on-the-go is working from a location outside the office, but a lawyer's practice may be entirely virtual because there is no requirement in the Model Rules that a lawyer have a brick-and-mortar office."; addressing: (1) competence, diligence and communication; (2) confidentiality; (3) supervision; also providing advice about "virtual practice technologies": (1) "Hard/Software Systems"; (2) "Accessing Client Files and Data; (3)"Virtual meeting platforms and video conferencing" (including the following advice: "Access to accounts and meetings should be only through strong passwords, and the lawyer should explore whether the platform offers higher tiers of security for business/enterprises (over the free or consumer platform variants). Likewise, any recordings or transcripts should be secured. If the platform will be recording conversations with the client, it is inadvisable to do so without client consent, but lawyers should consult the professional conduct rules, ethics

opinions, and laws of the applicable jurisdictions. Lastly, any client-related meetings or information should not be overheard or seen by others in the household, office, or other remote location, or by other third parties who are not assisting with the representation, to avoid jeopardizing the attorney-client privilege and violating the ethical duty of confidentiality."; (4) "Virtual Document and Data Exchange Platforms"; (5) "Smart Speakers, Virtual Assistants, and Other Listening - Enabled Devices" (including the following advice: "Unless the technology is assisting the lawyer's law practice, the lawyer should disable the listening capability of devices or services such as smart speakers, virtual assistants, and other listening-enabled devices while communicating about client matters. Otherwise, the lawyer is exposing the client's and other sensitive information to unnecessary and unauthorized third parties and increasing the risk of hacking."; also providing advice about lawyers' supervision duties over their subordinates/assistants and their vendors; concluding with a reminder that: (1) "lawyers practicing virtually must make sure the trust accounting rules, which vary significantly across states, are followed;" (2) "lawyers still need to make and maintain a plan to process the paper mail, to docket correspondence and communications, and to direct or redirect clients, prospective clients, or other important individuals who might attempt to contact the lawyer at the lawyer's current or previous brick-and-mortar office."; and (3) "[i]f a lawyer will not be available at a physical office address, there should be signage (and/or online instructions) that the lawyer is available by appointment only and/or that the posted address is for mail deliveries only. Finally, although e-filing systems have lessened this concern, litigators must still be able to file and receive pleadings and other court documents.").

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

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

the work performed by the outside copying service."; refusing to order the adversary to return the inadvertently produced documents).

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

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

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

- Max Stendahl, Tipsy Lawyer Disclosed Secret \$3.6B Pfizer Deal, Securities and Exchange Commission Says, Law360, Sept. 20, 2013 ("A Washington attorney drunkenly passed confidential information to a friend about Pfizer Inc.'s planned \$3.6 billion acquisition of a pharmaceutical industry client in 2010, the United States Securities and Exchange Commission (SEC) said in a Friday complaint." (emphasis added); "The SEC filed an insider trading suit in Florida federal court against Tibor Klein, an investment adviser who allegedly bought shares of King Pharmaceuticals Inc. shortly before the firm was acquired by Pfizer Inc. for \$3.6 billion. Klein learned about the planned acquisition in August 2010 from an attorney and investment advisory client named Robert M. Schulman, according to the SEC. Schulman, who was not named as a defendant in the suit, learned about the deal because he represented King Pharmaceuticals in separate litigation, the SEC said." (emphasis added); "Hunton & Williams LLP employs a partner in its Washington office named Robert M. Schulman who represented King Pharmaceuticals in a patent case in Virginia federal court. That case was dismissed in August 2010 following a settlement." (emphasis added); "When reached by phone Friday afternoon, the Hunton & Williams partner said, 'I can't talk to you.'" (emphasis added); "The complaint alleged that Schulman and Klein, a Long Island resident, 'enjoyed a close professional and personal

relationship.' Beginning in 2002, Klein made a habit of visiting Schulman and Schulman's wife at their home at least three to four times a year, the complaint said. During those visits, Klein enjoyed meals with the Schulmans and reviewed their investment accounts, and Klein often stayed overnight as a guest, according to the SEC."; "In early August 2010, Schulman learned about the planned Pfizer deal through his work as an attorney representing King, the SEC alleged. Shortly thereafter, Klein visited the Schulmans at their Washington, D.C., home, the SEC said. That is allegedly when the improper disclosure took place."; "During a meal with Klein at their home that weekend, Schulman drank several glasses of wine and became intoxicated. He blurted out to Klein, 'It would be nice to be King for a day.' Schulman intended to imply he was a 'big shot' who knew 'some kind of information' about King Pharmaceuticals,' the complaint said." (emphasis added); "Following that weekend visit, Klein purchased thousands of shares of King Pharmaceuticals for himself and his clients, including Schulman, the SEC alleged. Klein also allegedly tipped off a friend named Michael Shechtman who purchased his own King Pharmaceutical shares." (emphasis added)).

- Jill Lawless, J.K. Rowling's Law Firm Leaks Her Alter Ego, Associated Press, July 19, 2013 ("The mystery has been solved. A British law firm admitted Thursday that one of its partners inadvertently revealed that J.K. Rowling had authored a mystery novel, 'The Cuckoo's Calling.'"; "The Sunday Times newspaper revealed over the weekend that the 'Harry Potter' author had penned the book under the pseudonym Robert Galbraith. The newspaper said it had received a tip-off on Twitter, and there was speculation that Rowling or her publisher were behind the revelation - which has sent sales of the thriller skyrocketing."; "But law firm Russells said Thursday that one of its partners, Chris Gossage, had let the information slip to his wife's best friend, Judith Callegari - the woman behind the tweet. Her Twitter account has now been deleted. A phone message left for Callegari was not immediately returned."; "Russells said in a statement that 'we apologize unreservedly' to Rowling. It said that while Gossage was culpable, 'the disclosure was made in confidence to someone he trusted implicitly.'"; "Rowling said that 'only a tiny number of people knew my pseudonym and it has not been pleasant to wonder for days how a woman whom I had never heard of prior to Sunday night could have found out something that many of my oldest friends did not know.'" (emphasis added); "To say that I am disappointed is an understatement,' she added. 'I had assumed that I could expect total confidentiality from Russells, a reputable professional firm, and I feel very angry that my trust turned out to be misplaced.'" (emphasis added)).
- Richard Vanderford, Ex-BakerHostetler Atty's Hubby Traced On Pillow Talk: SEC, Law360, Feb. 6, 2013 ("The U.S. Securities and Exchange Commission (SEC) on Wednesday sued a Houston man who allegedly traded ahead of Texas Instruments Inc.'s [TI] 2011 purchase of National Semiconductor Corporation using inside information from his wife, then a partner at

- BakerHostetler."; "The SEC claims James W. Balchan, 48, made \$30,000 in illicit profits trading ahead of TI's acquisition of National after his wife tipped him that National's general counsel had canceled an appearance at a social function to work on the deal." (emphasis added); "The SEC alleges that the very next morning, Balchan misappropriated the confidential information he learned about the acquisition and purchased 2,000 National Semiconductor shares,' the commission said in a statement."; "The commission did not name Balchan's wife or her firm, but marriage records and an engagement announcement in a Houston-area newspaper identify her as Tonya Jacobs, a University of Houston Law Center graduate who worked at BakerHostetler from 1994 until January 2012." (emphasis added); "Balchan has agreed to pay about \$60,000 to resolve the SEC action."; "According to the SEC complaint, which outlines the claims against Balchan but omits the names of the other parties, the tip originated in the cancellation of weekend social events. Another partner at BakerHostetler was organizing 'wine and dine' functions to honor National's then-general counsel, Todd Duchene. The partner was close to Jacobs and was acquainted with Balchan, and invited both of them to the parties, which had been slated for the first weekend in April 2011." (emphasis added); "A few days before the big weekend, Duchene allegedly called the partner to cancel his appearances, saying he was tied up working on the TI deal. The partner allegedly passed the information on to Jacobs, who mentioned it to Balchan when they were discussing weekend plans." (emphasis added)).
- Brian Baxter, Associate's Failure to Keep Secrets a Cautionary Tale for Young Lawyers, AmLaw Daily, Nov. 30, 2012 ("Call it a cautionary tale for young corporate lawyers who might be inclined to discuss their work in what they think is an innocent fashion." (emphasis added); "On Thursday, federal prosecutors in Manhattan charged two former stockbrokers, Thomas Conradt of Denver and David Weishaus of Baltimore, with running an insider trading scheme that yielded more than \$1 million in illicit profits based on confidential information about International Business Machines' (IBM's) \$1.2 billion acquisition of analytics software maker SPSS in 2009." (emphasis added); "According to the complaints filed by the Justice Department and the SEC, the scheme allegedly hatched by Conradt and Weishaus began in May 2009 when the unnamed lawyer met an individual identified by federal prosecutors as 'CC-3' and the SEC as the 'Source' for what is variously described as brunch or lunch. The source, identified as an Australian citizen who worked as a research analyst at a major international financial services firm in Stamford, Connecticut, is described by the SEC as the associate's 'closest friend in New York.'" (emphasis added); "During the get-together in late May 2009, the lawyer, who had been at his firm [identified elsewhere as Cravath, Swaine & Moore] for eight months and had just been assigned to work on the IBM-SPSS deal, discussed with his friend his new role on the looming transaction as part of a broader conversation about what working on such a major M&A deal might mean for his career at the firm." (emphasis added); "It

was not an uncommon exchange between the two—or one that the lawyer had any reason to think might lead to wrongdoing, according to the government's complaints against Conradt and Weishaus."; "Indeed, the associate and the source 'frequently shared both personal and professional confidences with one another and had a history of maintaining and not betraying those confidences,' according to the SEC's civil complaint. 'Based on their history, pattern, and practice of sharing confidences, each knew or reasonably should have known that the other expected such information to be maintained in confidence.'" (emphasis added); "The SEC states that over the course of their friendship, the associate never revealed or traded on any confidential information that the source shared.").

- In re Woodward, 661 N.Y.S.2d 614, 615, 616, 615-616, 616, 615 (N.Y. App. Div. 1997) (suspending for three years lawyer improperly disclosed client confidences to his brother, who then traded on those confidences; "Respondent committed the underlying misconduct between May 1990 and December 1994, while an associate in the corporate department at the firm Cravath, Swaine & Moore. During the time, respondent provided material, nonpublic information about merger and acquisition activities of firm clients to his brother, John Woodward, and to his friend, Warren Eizman." (emphasis added); "Respondent . . . testified on his own behalf, expressing sincere remorse for his wrongdoing and admitting that he should have 'kept his mouth shut'. While respondent was unable to give a conclusive explanation for why he disclosed the information, he denied having done so intentionally or for the purpose of illegal trading. He suggested that his indiscretions were prompted by his own 'awe' and 'amazement' at the financial magnitude of the cases on which he was working He also stated that he was initially unaware that the men were using the information for illegal trades and, on one occasion, after learning that they had done so, asked them both to rescind the trades." (emphasis added); "The Federal investigation into this matter revealed that the insider information that respondent divulged was actually used for illegal trading and proved highly profitable to both his brother and his friend. John Woodward earned about \$255,000 while Warren Eizman earned about \$132,000 and passed the information on to 11 of his friends and relatives, who earned another \$165,000 collectively. However, there was no finding that respondent ever personally traded with the information or profited from the illegal trading." (emphasis added); "[R]espondent, informed the Panel that he is a Mormon and is actively involved in church activities, such as teaching Sunday school and working with youth programs. Respondent added that the church has played a major role in his life since college, which he spent two years working as a voluntary missionary near Seattle, Washington."; "Respondent was sentenced to five months' home detention, two years' probation, 150 hours of community service, and a special assessment of \$50. Respondent also paid \$25,000 in restitution as a result of a civil proceeding commenced by the United States Securities and Exchange Commission (SEC) relating to his criminal conduct." (emphasis added)).

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

- Debra Cassens Weiss, Did Lawyer's E-Mail Goof Land \$1B Settlement on New York Time's Front Page?, ABA J., Feb. 6, 2008 ("An outside lawyer for Eli Lilly & Company apparently has two people named 'Berenson' in her e-mail address book. One is a reporter for the New York Times and the other is her co-counsel assisting in confidential negotiations on a possible \$1 billion settlement between the pharmaceutical company and the government." (emphasis added); "The question is whether her e-mail to the wrong Berenson spurred last week's front-page New York Times story revealing talks to resolve criminal and civil investigations into the company's marketing of the anti-psychotic drug Zyprexa, as Portfolio.com reports."; "The unidentified lawyer who wrote the e-mail works at Pepper Hamilton in Philadelphia, the story says. She was trying to e-mail Bradford Berenson of Sidley Austin rather than Times reporter Alex Berenson." (emphasis added); "Eli Lilly had initially believed that federal officials leaked the information. 'As the company's lawyers began turning over rocks closer to home, however, they discovered what could be called A Nightmare on E-mail Street,' the Portfolio story says." (emphasis added); "A Lilly spokeswoman told *Portfolio.com* that the company will continue to retain Pepper Hamilton. A search for the words 'Eli Lilly' on the firm's Web site shows that two of the firm's lawyers are scheduled to speak on the subject of Resolving Ethical Concerns and Preserving Attorney-Client Privilege When Faced With Fraud and Abuse Charges at an April conference." (emphasis added); analyzing the source of information included in the following article: Alex Berenson, Lilly in Settlement Talks With U.S., N.Y. Times, Jan. 30, 2008 ("Eli Lilly and federal prosecutors are discussing a settlement of a civil and criminal investigation into the company's marketing of the antipsychotic drug Zyprexa that could result in Lilly's paying more than \$1 billion to federal and state governments."; "If a deal is reached, the fine would be the largest ever paid by a drug company for breaking the federal laws that govern how drug makers can promote their medicines."; "Lilly may also plead guilty to a misdemeanor criminal charge as part of the agreement, the people involved with the investigation said. But the company would be allowed to keep selling Zyprexa to Medicare and Medicaid, the government programs that are the biggest customers for the drug. Zyprexa is Lilly's most profitable product and among the world's best-selling medicines, with 2007 sales of \$4.8 billion, about half in the United States."; "Lilly would neither confirm nor deny the settlement talks.").

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

- Megan Leonhardt, Ex-Dewey Attorneys May Be Liable For Client Privacy Breaches, Law360, July 16, 2012 ("Former Dewey & LeBoeuf LLP partners could face malpractice suits should clients experience privacy breaches as the bankrupt firm starts to look for ways to cut costs by quickly disposing of hundreds of thousands of client files, experts said Monday." (emphasis added); "While the issue of storage costs may seem like small potatoes in a bankruptcy with listed debts of \$245 million and assets of \$193 million, experts said Monday that the issue could have gigantic privacy and liability consequences for clients and former partners if handled improperly."; "'If you [incorrectly] disposed of a single file, it could result in a multimillion[-dollar] malpractice suit,' said Steven J. Harper, a retired Kirkland & Ellis LLP partner and adjunct professor at Northwestern University's School of Law."; "On Friday, United States Bankruptcy Judge Martin Glenn partially approved a move by Dewey's attorneys to start notifying former clients and partners of the processes in place in order to retrieve their files, but refused to approve any measures regarding the future disposal of client files currently in storage."; "Dewey has faced initial opposition from clients, former partners and its file storage facilities over who would be required to take on the responsibility of disposing of the files, including paying for the continued storage of files or future shredding. And while the order failed to resolve the issue of who was responsible for the cost and associated liability with getting rid of the files, Judge Glenn said the firm should retain an expert in legal ethics to submit a document verifying that it had gone through the proper procedures for dealing with such a task."; "In its petition seeking court approval for its plan, Dewey said the continued storage of thousands of client files was unnecessary and burdened the collapsed firm with fees of up to \$20,000 a month from a single storage facility. The firm cited previous law firm bankruptcies and ethical codes in order to come up with a plan that would 'strike an appropriate balance' between its duties to its creditors and to former clients, according to the motion.").
- Disciplinary Counsel v. Shaver, 904 N.E.2d 883, 884 (Ohio 2009) (issuing a public reprimand against a lawyer (and Mayor of Pickerington, Ohio) for discarding client files in a dumpster, and leaving approximately 20 boxes of other client files next to the dumpster; noting that the tenant who had moved into the office that was vacated by the lawyer "had misgivings about the propriety of respondent's disposal method," "examined the contents of several of the boxes left by the dumpster," and moved the boxes back into a garage that the lawyer continued to lease; also explaining that "[n]either of the property owners nor the new tenant contacted respondent again about his failure to remove all the contents of the garage. An anonymous tipster, however, contacted a television station about the incident, and the tip led to television news and newspaper stories."; publicly remanding the lawyer for violations of Rules 1.6(a) and 1.9(c)(2) -- which prohibit lawyers from revealing client confidences).

- United States v. Scott, 975 F.2d 927, 929, 930 (1st Cir. 1992) (explaining that a criminal defendant argued that the government violated his Fourth Amendment rights by conducting a warrantless seizure and reconstruction of shredded documents from trash bags he had left outside his home; concluding that the defendant could have no expectation of privacy after placing the shredded documents "in a public area accessible to unknown third parties."; holding that "[i]n our view, shredding garbage and placing it in a public domain subjects it to the same risks regarding privacy, as engaging in a private conversation in public where it is subject to the possibility that it may be overheard by other persons."), cert. denied, 507 U.S. 1042 (1993).
- Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254 (N.D. Ill. 1981) (explaining that the plaintiff sifted through the defendant's trash dumpster for two years, which yielded hundreds of discarded privileged documents; holding that the defendants had not taken reasonable steps to ensure complete obliteration of the documents -- such as shredding -- and, therefore, had expressly waived the privilege.).

Other courts have taken a more forgiving approach.

- Sparshott v. Feld Entm't, Inc., Civ. A. No. 99-0551 (JR), 2000 U.S. Dist. LEXIS 13800, at *2-3 (D.D.C. Sept. 21, 2000) (finding that a discharged employee had not waived the attorney-client privilege covering a dictaphone tape recording of conversations with his lawyer by failing to take the tape from his office after he was fired; "A reasonable analysis of the record compels the conclusion that Smith simply forgot the tape on March 7 and, under pressure (and under scrutiny) to clear out his office a few days later, forgot it then as well. That set of facts does not amount to a waiver of Smith's attorney-client privilege. Smith's ejection from the building and lockout from his office was indeed involuntary, and his neglect or failure to recall that the tape was in the dictaphone was not an affirmative act such as, for example, throwing a confidential document into the garbage").
- McCafferty's, Inc. v. Bank of Glen Burnie, 179 F.R.D. 163, 169-70 (D. Md. 1998) (finding that client had not waived the attorney-client privilege by discarding a privileged document by tearing it into sixteen pieces and throwing it in the trash; "To be sure, there were additional precautions which Joyner could have taken. . . . BGB could have used a paper shredder. . . . Joyner could have burned the pieces of the memo before throwing the ashes away. She could have torn it into smaller pieces, or distributed the pieces into several trash cans in different locations. However, the issue is not whether every conceivable precaution which could have been taken was taken, but whether reasonable precautions were taken. Under the facts of this case, Joyner would have had to anticipate that someone would trespass onto BGB's private property, look through an entire dumpster of trash, remove sealed bags of garbage, sift through them looking for torn up documents, and

then piece them together. Even in an age where commercial espionage is increasingly common, the likelihood that someone will go to the unseemly lengths which Mariner did to obtain the Serotte memo is not sufficiently great that I can conclude that the precautions Joyner took were not reasonable. Although the precautions taken in this case were not perfect, they were sufficient to preserve the attorney-client privilege against the clandestine assault by Mariner's 'dumpster diver.'" (citation omitted)).

Several states have moved in the direction of requiring technical competence training.

And law firms have learned to their horror the risk of cyberattacks.

The ABA has provided guidance of what law firm victims must or should do.

- ABA LEO 483 (In addition to complying with the guidance in ABA LEO 477R (5/11/17) lawyers dealing with a databreach or cyberattack ("a data event where material client confidential information is misappropriated, destroyed, or otherwise compromised, or where a lawyer's ability to perform legal services for which the lawyer is hired is significantly impaired"): (1) must comply with their competence duty, including monitoring for databreaches (making "reasonable efforts," because not immediately detecting a databreach may not constitute an ethics violation); (2) "act reasonably and promptly to stop the breach and mitigate damage resulting from the breach" (and "should consider proactively developing an incident response plan"); (3) make "reasonable attempts to determine whether electronic files were accessed, and if so, which ones"; (4) comply with their confidentiality duty (although lawyers' competence in preserving client confidences "is not a strict liability standard and does not require the lawyer to be invulnerable or impenetrable"), including considering any implied authorization to disclose client confidences to law enforcement to the reasonably necessary to assist in "ending" the breach or recovering stolen information," in light of considerations such as the disclosure's harm to the client); (5) advise current clients about such databreach or cyberattack (whether or not client data deserves protection under Rule 1.15 – which remains an "open question"); (6) in responding to a databreach or cyberattack involving former clients' data, consider "reach[ing] agreement with clients before conclusion, or at the termination, of the relationship about how to handle the client's electronic information that is in the lawyer's possession" (noting that "the Committee is unwilling to require notice [of a databreach or cyberattack] to a former client as a matter of legal ethics in the absence of a black letter provision requiring such notice"); (7) consider their obligation to notify clients depending on the type of breach (for instance, lawyers need not alert their clients of a ransomware attack if "no information relating to the representation of a client was inaccessible for any material amount of time, or was not accessed by or

disclosed to unauthorized persons"; (8) must comply with state and federal law if "personally identifiable information or others is compromised as a result of a data breach.).

Interestingly, at least one state bar has taken a broader view than the ABA of lawyers' disclosure duty after a cyberattack.

- Maine LEO 220 (4/11/19) (generally adopting the articulation of lawyers' duties upon discovering a data breach cyberattack adopted by ABA LEO 483 (10/17/18) with one exception; "While the Commission agrees with the analysis contained in ABA Form Opinion No. 483 concerning notification of a current client, the Commission departs from the ABA with respect to a former client. The ABA reviewed Model Rules 1.9 and 1.16 and concluded that notice to a former client is not required. However, Maine's Rule 1.9 provides that 'a lawyer who has formerly represented a client shall not thereafter: (2) reveal confidences or secrets of a former client except as these rules would permit or require with respect to a client.' The duty of confidentiality survives the termination of the client-lawyer relationship. M.R. Prof. Conduct 1.6 cmt. (18). Indeed, trust is the 'hallmark of the client-lawyer relationship,' *id.*, cmt. (2), whether for a current or a former client. The Commission concludes that a former client is entitled to no less protection and candor than a current client in the case of compromised secrets and confidences. A former client must be timely notified regarding a cyberattack or data breach that has, or may have, exposed the client's confidences or secrets.").

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

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

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

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

- Iowa LEO 96-01 (8/29/96) ("[W]ith sensitive material to be transmitted on E-mail counsel must have written acknowledgment by client of the risk of violation of DR 4-101 which acknowledgment includes consent for communication thereof on the Internet or non-secure Intranet or other forms of proprietary networks, or it must be encrypted or protected by

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

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

- New Hampshire LEO 1991-92/6 (4/19/92) ("In using cellular telephones or other forms of mobile communications, a lawyer may not discuss client confidences or other information relating to the lawyer's representation of the client unless the client has consented after full disclosure and consultation. (Rule 1.4; Rule 1.6; Rule 1.6(a)). An exception to the above exists [sic], where a scrambler-descrambler or similar technological development is used. (Rule 1.6).").
- Iowa LEO 96-01 (8/29/96), as amended by Iowa LEO 97-01 (9/18/97) ("[W]ith sensitive material to be transmitted on E-mail counsel must have written acknowledgment by client of the risk of violation of DR 4-101 which acknowledgment includes consent for communication thereof on the Internet or non-secure Intranet or other forms of proprietary networks, as agreed between counsel and client.").

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

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

conveyed in the communication. Second, if the lawyer knows or has reason to believe that the communication is over a telecommunication device that is susceptible to interception, the lawyer must advise the other parties to the communication of the risks of interception and the potential for confidentiality to be lost." (emphasis added)).

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

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

- Arizona LEO 97-04 (1997) ("Lawyers may want to have the e-mail encrypted with a password known only to the lawyer and the client so that there is no inadvertent disclosure of confidential information. Alternatively, there is encryption software available to secure transmissions. E-mail should not be considered a 'sealed' mode of transmission. See American Civil Liberties Union v. Reno, 929 F. Supp. 824, 834 (E.D. Pa. 1996). At a minimum, e-mail transmissions to clients should include a cautionary statement either in the 're' line or beginning of the communication, indicating that the transmission is 'confidential' 'Attorney/Client Privileged', similar to the cautionary language currently used on facsimile transmittals. Lawyers also may want to caution clients about transmitting highly sensitive information via e-mail if the e-mail is not encrypted or otherwise secure from unwanted interception.").
- South Carolina LEO 97-08 (6/1997) ("A lawyer should discuss with a client such options as encryption in order to safeguard against even inadvertent disclosure of sensitive or privileged information when using e-mail.").
- Pennsylvania Informal Op. 97-130 (9/26/97) ("A lawyer may use e-mail to communicate with or about a client without encryption; the lawyer should advise a client concerning the risks associated with the use of e-mail and obtain the client's consent either orally or in writing."; "A lawyer should not use unencrypted e-mail to communicate information concerning the representation, the interception of which would be damaging to the client, absent the client's consent after consultation."; "A lawyer may, but is not required to, place a notice on client e-mail warning that it is a privileged and confidential communication."; "If the e-mail is about the lawyer or the lawyer's services and is intended to solicit new clients, it is lawyer advertising similar to targeted, direct mail and is subject to the same restrictions under the Rules of Professional Conduct.").

- Alaska LEO 98-2 (1/16/98) ("In the Committee's view, a lawyer may ethically communicate with a client on all topics using electronic mail. However, an attorney should use good judgment and discretion with respect to the sensitivity and confidentiality of electronic messages to the client and, in turn, the client should be advised, and cautioned, that the confidentiality of unencrypted e-mail is not assured. Given the increasing availability of reasonably priced encryption software, attorneys are encouraged to use such safeguards when communicating particularly sensitive or confidential matters by e-mail, i.e., a communication that the attorney would hesitate to communicate by phone or by fax. . . . While e-mail has many advantages, increased security from interception is not one of them. However, by the same token, e-mail in its various forms is no less secure than the telephone or a fax transmission. Virtually any of these communications can be intercepted, if that is the intent. The Electronic Communications Privacy Act (as amended) makes it a crime to intercept communications made over phone lines, wireless communications, or the Internet, including e-mail, while in transit, when stored, or after receipt. See 18 U.S.C. § 2510 et seq. The Act also provides that '[n]o otherwise privileged wire, oral or electronic communication intercepted in accordance with, or in violation of, the provisions of this chapter shall lose its privileged character.' 18 U.S.C. § 2517(4). Accordingly, interception will not in most cases result in a waiver of the attorney-client privilege." (footnotes omitted)).

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

- New York City LEO 1994-11 (10/21/94) ("Lawyers should consider taking measures sufficient to ensure, with a reasonable degree of certainty, that communications are no more susceptible to interception than standard land-line telephone calls. At a minimum, given the potential risks involved, lawyers should be circumspect and discreet when using cellular or cordless telephones, or other similar means of communication, to discuss client matters, and should avoid, to the maximum reasonable extent, any revelation of client confidences or secrets. . . . A lawyer should exercise caution when engaging in conversations containing or concerning client confidences or secrets by cellular or cordless telephones or other communication devices readily capable of interception, and should consider taking steps sufficient to ensure the security of such conversations.").
- Vermont LEO 97-5 (1997) ("[T]he Committee decides that since (a) e-mail privacy is no less to be expected than in ordinary phone calls, and (b) unauthorized interception is illegal, a lawyer does not violate DR 4-101 by communicating with a client by e-mail, including the internet, without encryption. In various instances of a very sensitive nature, encryption might

be prudent, in which case ordinary phone calls would obviously be deemed inadequate.").

- Illinois LEO 96-10 (5/16/97) ("In summary, the Committee concludes that because (1) the expectation of privacy for electronic mail is no less reasonable than the expectation of privacy for ordinary telephone calls, and (2) the unauthorized interception of an electronic message subject to the ECPA is illegal, a lawyer does not violate Rule 1.6 by communicating with a client using electronic mail services, including the Internet, without encryption. Nor is it necessary, as some commentators have suggested, to seek specific client consent to the use of unencrypted e-mail. The Committee recognizes that there may be unusual circumstances involving an extraordinarily sensitive matter that might require enhanced security measures like encryption. These situations would, however, be of the nature that ordinary telephones and other normal means of communication would also be deemed inadequate.").
- South Carolina LEO 97-08 (6/1997) ("There exists a reasonable expectation of privacy when sending confidential information through electronic mail (whether direct link, commercial service, or Internet). Use of electronic mail will not affect the confidentiality of client communications under South Carolina Rule of Professional Conduct 1.6. . . . The Committee concludes, therefore, that communication via e-mail is subject to a reasonable expectation of privacy. Because the expectation is no less reasonable that [sic] the expectation of privacy associated with regular mail, facsimile transmissions, or land-based telephone calls and because the interception of e-mail is now illegal under the Electronic Communications Privacy Act, 18 U.S.C. §§2701(a) and 2702(a), use of e-mail is proper under Rule 1.6.").
- North Dakota LEO 97-09 (9/4/97) ("More recent and, in the view of this Committee, more reasoned opinions, have concluded that a lawyer may communicate routine matters with clients, and/or other lawyers jointly representing clients, via unencrypted electronic mail (e-mail) transmitted over commercial services . . . or the Internet without violating the aforesaid rule [1.6] unless unusual circumstances require enhanced security measures.").
- Philadelphia LEO 98-6 (3/1998) ("A thoughtful practitioner can communicate with persons on the Internet as the inquirer intends and steer clear of ethical violations as long as he or she is mindful of the rules.").
- District of Columbia LEO 281 (9/18/98) ("In most circumstances, transmission of confidential information by unencrypted electronic mail does not per se violate the confidentiality rules of the legal profession. However, individual circumstances may require greater means of security.").
- Maine LEO 195 (6/30/08) ("The Commission concludes that, as a general matter and subject to appropriate safeguards, an attorney may utilize

unencrypted e-mail without violating the attorney's ethical obligation to maintain client confidentiality.").

In 1999, the ABA settled on this position.

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

As technology improved, the risks of being overheard or intercepted diminished.

More importantly, the law caught up with the technology, and now renders illegal most interception of such electronic communications. These changes have created a legal expectation of confidentiality, which renders ethically permissible the use of such communications.

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

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

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

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

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

- New Jersey LEO 701 (4/24/06) (allowing law firms to keep their files in an electronic format as long as the law firm exercises reasonable care to preserve the confidences of its clients; "What the term 'reasonable care' means in a particular context is not capable of sweeping characterizations or broad pronouncements. But it certainly may be informed by the technology reasonably available at the time to secure data against unintentional disclosure"; "when client confidential information is entrusted in unprotected form, even temporarily, to someone outside the firm, it must be under a circumstance in which the outside party is aware of the lawyer's obligation of confidentiality, and is itself obligated, whether by contract, professional standards, or otherwise, to assist in preserving it. Lawyers typically use messengers, delivery services, document warehouses, or other outside vendors, in which physical custody of client sensitive documents is entrusted to them even though they are not employed by the firm. The touchstone in using 'reasonable care' against unauthorized disclosure is that: (1) the lawyer has entrusted such documents to an outside provider under circumstances in which there is an enforceable obligation to preserve confidentiality and security, and (2) use is made of available technology to guard against reasonably foreseeable attempts to infiltrate the data. If the lawyer has come to the prudent professional judgment he has satisfied both these criteria, then 'reasonable care' will have been exercised. In the specific context presented by the inquirer, where a document is transmitted to him by email over the Internet, the lawyer should password a confidential document (as is now possible in all common electronic formats, including PDF), since it is not possible to secure the Internet itself against third party access.").
- North Carolina LEO 2008-5 (7/18/08) (explaining that lawyers may store confidential client files in a website that can be accessed by the internet, but must be careful to protect confidentiality).

- Missouri LEO 127 (5/19/09) ("Rule 4-1.15(j) requires attorneys to maintain the file for a period of ten years, or for such other period as agreed upon with the client. However, no rule or previous opinion addresses the issue of whether the file may be maintained in electronic form.").
- Arizona LEO 09-04 (12/2009) ("Lawyers providing an online file storage and retrieval system for client access of documents must take reasonable precautions to protect the security and confidentiality of client documents and information. Lawyers should be aware of limitations in their competence regarding online security measures and take appropriate actions to ensure that a competent review of the proposed security measures is conducted. As technology advances over time, a periodic review of the reasonability of security precautions may be necessary.").
- Alabama LEO 2010-02 (2010) (analyzing various issues relating to client files; allowing lawyers to retain the client files in the "cloud" as long as they take reasonable steps to maintain the confidentiality of the data; "The Disciplinary Commission . . . has determined that a lawyer may use 'cloud computing' or third-party providers to store client data provided that the attorney exercises reasonable care in doing so.").
- California LEO 2010-179 (2010) ("Whether an attorney violates his or her duties of confidentiality and competence when using technology to transmit or store confidential client information will depend on the particular technology being used and the circumstances surrounding such use. Before using a particular technology in the course of representing a client, an attorney must take appropriate steps to evaluate: 1) the level of security attendant to the use of that technology, including whether reasonable precautions may be taken when using the technology to increase the level of security; 2) the legal ramifications to a third party who intercepts, accesses or exceeds authorized use of the electronic information; 3) the degree of sensitivity of the information; 4) the possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product; 5) the urgency of the situation; and 6) the client's instructions and circumstances, such as access by others to the client's devices and communications."; "Attorney takes his laptop computer to the local coffee shop and accesses a public wireless Internet connection to conduct legal research on the matter and email Client. He also takes the laptop computer home to conduct the research and email Client from his personal wireless system."; "[A]n attorney should consider the following before using a specific technology: . . . Whether reasonable precautions may be taken when using the technology to increase the level of security. As with the above-referenced views expressed on email, the fact that opinions differ on whether a particular technology is secure suggests that attorneys should take reasonable steps as a precautionary measure to protect against disclosure. For example, depositing confidential client mail in a secure postal box or handing it directly to the postal carrier or courier is a

reasonable step for an attorney to take to protect the confidentiality of such mail, as opposed to leaving the mail unattended in an open basket outside of the office door for pick up by the postal service. Similarly, encrypting email may be a reasonable step for an attorney to take in an effort to ensure the confidentiality of such communications remain so when the circumstance calls for it, particularly if the information at issue is highly sensitive and the use of encryption is not onerous. To place the risks in perspective, it should not be overlooked that the very nature of digital technologies makes it easier for a third party to intercept a much greater amount of confidential information in a much shorter period of time than would be required to transfer the same amount of data in hard copy format. In this regard, if an attorney can readily employ encryption when using public wireless connections and has enabled his or her personal firewall, the risks of unauthorized access may be significantly reduced. Both of these tools are readily available and relatively inexpensive, and may already be built into the operating system. Likewise, activating password protection features on mobile devices, such as laptops and PDAs, presently helps protect against access to confidential client information by a third party if the device is lost, stolen or left unattended." (footnotes omitted); "The greater the sensitivity of the information, the less risk an attorney should take with technology. If the information is of a highly sensitive nature and there is a risk of disclosure when using a particular technology, the attorney should consider alternatives unless the client provides informed consent. As noted above, if another person may have access to the communications transmitted between the attorney and the client (or others necessary to the representation), and may have an interest in the information being disclosed that is in conflict with the client's interest, the attorney should take precautions to ensure that the person will not be able to access the information or should avoid using the technology. These types of situations increase the likelihood for intrusion." (footnote omitted); "If use of the technology is necessary to address an imminent situation or exigent circumstances and other alternatives are not reasonably available, it may be reasonable in limited cases for the attorney to do so without taking additional precautions."; "With regard to the use of a public wireless connection, the Committee believes that, due to the lack of security features provided in most public wireless access locations, Attorney risks violating his duties of confidentiality and competence in using the wireless connection at the coffee shop to work on Client's matter unless he takes appropriate precautions, such as using a combination of file encryption, encryption of wireless transmissions and a personal firewall. Depending on the sensitivity of the matter, Attorney may need to avoid using the public wireless connection entirely or notify Client of possible risks attendant to his use of the public wireless connection, including potential disclosure of confidential information and possible waiver of attorney-client privilege or work product protections, and seek her informed consent to do so." (footnote omitted); "Finally, if Attorney's personal wireless system has been configured with appropriate security features, the Committee does not believe that Attorney would violate his duties of

confidentiality and competence by working on Client's matter at home. Otherwise, Attorney may need to notify Client of the risks and seek her informed consent, as with the public wireless connection." (footnotes omitted)).

- New York LEO 842 (9/10/10) ("A lawyer may use an online data storage system to store and back up client confidential information provided that the lawyer takes reasonable care to ensure that confidentiality will be maintained in a manner consistent with the lawyer's obligations under Rule 1.6. In addition, the lawyer should stay abreast of technological advances to ensure that the storage system remains sufficiently advanced to protect the client's information, and should monitor the changing law of privilege to ensure that storing the information online will not cause loss or waiver of any privilege.").
- Florida LEO 10-2 (9/24/10) ("The Professional Ethics Committee has been asked by the Florida Bar Board of Governors to write an opinion addressing the ethical obligations of lawyers regarding information stored on hard drives. An increasing number of devices such as computers, printers, copiers, scanners, cellular phones, personal digital assistants ('PDAs'), flash drives, memory sticks, facsimile machines and other electronic or digital devices (collectively, 'Devices') now contain hard drives or other data storage media . . . (collectively, 'Hard Drives' or 'Storage Media') that can store information. . . . Because many lawyers use these Devices to assist in the practice of law and in doing so intentionally and unintentionally store their clients' information on these Devices, it is important for lawyers to recognize that the ability of the Devices to store information may present potential ethical problems for lawyers."; "For example, when a lawyer copies a document using a photocopier that contains a hard drive, the document is converted into a file that is stored on the copier's hard drive. This document usually remains on the hard drive until it is overwritten or deleted. The lawyer may choose to later sell the photocopier or return it to a leasing company. Disposal of the device without first removing the information can result in the inadvertent disclosure of confidential information."; "If a lawyer chooses to use these Devices that contain Storage Media, the lawyer has a duty to keep abreast of changes in technology to the extent that the lawyer can identify potential threats to maintaining confidentiality. The lawyer must learn such details as whether the Device has the ability to store confidential information, whether the information can be accessed by unauthorized parties, and who can potentially have access to the information. The lawyer must also be aware of different environments in which confidential information is exposed such as public copy centers, hotel business centers, and home offices. The lawyer should obtain enough information to know when to seek protection and what Devices must be sanitized, or cleared of all confidential information, before disposal or other disposition. Therefore, the duty of competence extends from the receipt, i.e., when the lawyer obtains control of the Device, through the Device's life cycle, and until disposition of the Device, including

- after it leaves the control of the lawyer."; "A lawyer has a duty to obtain adequate assurances that the Device has been stripped of all confidential information before disposition of the Device. If a vendor or other service provider is involved in the sanitization of the Device, such as at the termination of a lease agreement or upon sale of the Device, it is not sufficient to merely obtain an agreement that the vendor will sanitize the Device upon sale or turn back of the Device. The lawyer has an affirmative obligation to ascertain that the sanitization has been accomplished, whether by some type of meaningful confirmation, by having the sanitization occur at the lawyer's office, or by other similar means."; "Further, a lawyer should use care when using Devices in public places such as copy centers, hotel business centers, and outside offices where the lawyer and those under the lawyer's supervision have little or no control. In such situations, the lawyer should inquire and determine whether use of such Devices would preserve confidentiality under these rules."; concluding that when a lawyer "chooses to use Devices that contain Storage Media such as printers, copiers, scanners, and facsimile machines must take reasonable steps to ensure that client confidentiality is maintained and that the Device is sanitized before disposition, including: (1) identification of the potential threat to confidentiality along with the development and implementation of policies to address the potential threat to confidentiality; (2) inventory of the Devices that contain Hard Drives or other Storage Media; (3) supervision of nonlawyers to obtain adequate assurances that confidentiality will be maintained; and (4) responsibility of sanitization of the Device by requiring meaningful assurances from the vendor at the intake of the Device and confirmation or certification of the sanitization at the disposition of the Device.").
- District of Columbia LEO 357 (12/2010) ("As a general matter, there is no ethical prohibition against maintaining client records solely in electronic form, although there are some restrictions as to particular types of documents. Lawyers and clients may enter into reasonable agreements addressing how the client's files will be maintained, how copies will be provided to the client if requested, and who will bear what costs associated with providing the files in a particular form; entering into such agreements is prudent and can help avoid misunderstandings. Assuming no such agreement was entered into prior to the termination of the relationship, however, a lawyer must comply with a reasonable request to convert electronic records to paper form. In most circumstances, a former client should bear the cost of converting to paper form any records that were properly maintained in electronic form. However, the lawyer may be required to bear the cost if (1) neither the former client nor substitute counsel (if any) can access the electronic records without undue cost or burden; and (2) the former client's need for the records in paper form outweighs the burden on the lawyer of furnishing paper copies. Whether (1) a request for electronic files to be converted to paper form is reasonable and (2) the former client's need for the files in paper form outweighs the lawyer's burden of providing them (such that the lawyer should bear the cost)

- should be considered both from the standpoint of a reasonable client and a reasonable lawyer and should take into account the technological sophistication and resources of the former client."; "Even if the lawyer must bear the cost of converting the electronic records to paper form, however, the lawyer may charge the former client for the reasonable time and labor expense associated with locating and reviewing the electronic records where such time and expense results from special instructions or requests from the former client. See D.C. Legal Ethics Op. 283 (1998) ('review of the files is being undertaken for the benefit of the client and, like other forms of client services, may be compensated by a reasonable fee').").
- Vermont LEO 2010-6 (2011) ("The Vermont Bar Association Professional Responsibility Section agrees with the consensus view that has emerged with respect to use of SaaS [Software as a Service]. Vermont lawyers' obligations in this area include providing competent representation, maintaining confidentiality of client information, and protecting client property in their possession. As new technologies emerge, the meaning of 'competent representation' may change, and lawyers may be called upon to employ new tools to represent their clients. Given the potential for technology to grow and change rapidly, this Opinion concurs with the views expressed in other States, that establishment of specific conditions precedent to using SaaS would not be prudent. Rather, Vermont lawyers must exercise due diligence when using new technologies, including Cloud Computing. While it is not appropriate to establish a checklist of factors a lawyer must examine, the examples given above are illustrative of factors that may be important in a given situation. Complying with the required level of due diligence will often involve a reasonable understanding of: (a) the vendor's security system; (b) what practical and foreseeable limits, if any, may exist to the lawyer's ability to ensure access to, protection of, and retrieval of the data; (c) the material terms of the user agreement; (d) the vendor's commitment to protecting confidentiality of the data; (e) the nature and sensitivity of the stored information; (f) notice provisions if a third party seeks or gains (whether inadvertently or otherwise) access to the data; and (g) other regulatory, compliance, and document retention obligations that may apply based upon the nature of the stored data and the lawyer's practice. In addition, the lawyer should consider: (a) giving notice to the client about the proposed method for storing client data; (b) having the vendor's security and access systems reviewed by competent technical personnel; (c) establishing a system for periodic review of the vendor's system to be sure the system remains current with evolving technology and legal requirements; and (d) taking reasonable measures to stay apprised of current developments regarding SaaS systems and the benefits and risks they present.").
 - Pennsylvania LEO 2011-200 (2011) (describing the steps that a lawyer should take when dealing with "cloud" computing, including detailed lists of required steps and descriptions of what other states have held on this issue;

- "If an attorney uses a Smartphone or an iPhone, or uses web-based electronic mail (e-mail) such as Gmail, Yahoo!, Hotmail or AOL Mail, or uses products such as Google Docs, Microsoft Office 365 or Dropbox, the attorney is using 'cloud computing.' While there are many technical ways to describe cloud computing, perhaps the best description is that cloud computing is merely 'a fancy way of saying stuff's not on your computer.'"; "The use of 'cloud computing,' and electronic devices such as cell phones that take advantage of cloud services, is a growing trend in many industries, including law. Firms may be eager to capitalize on cloud services in an effort to promote mobility, flexibility, organization and efficiency, reduce costs, and enable lawyers to focus more on legal, rather than technical and administrative issues. However, lawyers must be conscientious about maintaining traditional confidentiality, competence, and supervisory standards."; "This Committee concludes that the Pennsylvania Rules of Professional Conduct require attorneys to make reasonable efforts to meet their obligations to ensure client confidentiality, and confirm that any third-party service provider is likewise obligated."; "Accordingly, as outlined above, this Committee concludes that, under the Pennsylvania Rules of Professional Conduct an attorney may store confidential material in 'the cloud.' Because the need to maintain confidentiality is crucial to the attorney-client relationship, attorneys using 'cloud' software or services must take appropriate measures to protect confidential electronic communications and information. In addition, attorneys may use email but must, under appropriate circumstances, take additional precautions to assure client confidentiality.").
- Oregon LEO 2011-188 (11/2011) ("Lawyer may store client materials on a third-party server so long as Lawyer complies with the duties of competence and confidentiality to reasonably keep the client's information secure within a given situation. To do so, the lawyer must take reasonable steps to ensure that the storage company will reliably secure client data and keep information confidential. Under certain circumstances, this may be satisfied though a third-party vendor's compliance with industry standards relating to confidentiality and security, provided that those industry standards meet the minimum requirements imposed on the Lawyer by the Oregon RPC's. This may include, among other things, ensuring the service agreement requires the vendor to preserve the confidentiality and security of the materials. It may also require that vendor notify Lawyer of any nonauthorized third-party access to the materials. Lawyer should also investigate how the vendor backs up and stores its data and metadata to ensure compliance with the Lawyer's duties." (footnote omitted); "Although the third-party vendor may have reasonable protective measures in place to safeguard the client materials, the reasonableness of the steps taken will be measured against the technology 'available at the time to secure data against unintentional disclosure.' As technology advances, the third-party vendor's protective measures may become less secure or obsolete over time. Accordingly, Lawyer may be

required to reevaluate the protective measures used by the third-party vendor to safeguard the client materials." (footnotes omitted)).

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

Best Answer

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

b 2/14

Lawyers Systematically and Continuously Practicing Law in a State Where They Are Not Licensed

Hypothetical 3

Your landlord just terminated your lease, so you are looking for new office space. You have always lived near the border of two states, and are used to crossing the border on a nearly daily basis as you shop, try new restaurants, etc. You are licensed only in the state where you live -- focusing your practice on elder-law issues. You just read about a small office that would be perfect for your practice. It is actually closer to your home than your current office, and just a few minutes away from a large retirement community. However, the office is in the neighboring state, where you are not licensed to practice law.

- (a) May you continuously practice in the neighboring state, as long as you very carefully explain in all of your marketing materials and to your clients that you are not licensed there?

NO (PROBABLY)

- (b) May you continuously practice in the neighboring state, as long as you follow the step discussed above, and also work under the direct supervision of a partner who is licensed in that neighboring state?

NO (PROBABLY)

Analysis

ABA Model Rules

The ABA Model Rules contain two flat prohibitions on lawyers' activities in states where they are not licensed.

First, a lawyer not licensed in a jurisdiction

shall not . . . except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law.

ABA Model Rule 5.5(b)(1) (emphasis added).

Second, such a lawyer may not

hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

ABA Model Rule 5.5(b)(2) (emphasis added).

A single comment provides a fairly meager explanation.

Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here. Such a lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

ABA Model Rule 5.5 cmt. [4].

Lawyers should not have any difficulty complying with the second of these requirements. They must always describe the limits of their ability to practice in all of their marketing, during communications with clients and prospective clients, etc.

The first requirement presents a greater challenge. It can be very difficult to draw the line between an impermissible "systematic and continuous presence" in a state, and the type of permissible activity that lawyers can conduct "on a temporary basis" in a state where they are not licensed.

Restatement

The Restatement similarly indicates that it "would be impermissible for a lawyer to set up an office for the general practice of non-litigation law in a jurisdiction in which the lawyer is not admitted." Restatement (Third) of Law Governing Lawyers § 3 cmt. e (2000) (emphasis added).

The Restatement then provides an additional explanation of this restriction.

The extent to which a lawyer may practice beyond the borders of the lawyer's home state depends on the circumstances in which the lawyer acts in both the lawyer's home state and the other state. At one extreme, it is clear that a lawyer's admission to practice in one jurisdiction does not authorize the lawyer to practice generally in another jurisdiction as if the lawyer were also fully admitted there. Thus, a lawyer admitted in State A may not open an office in State B for the general practice of law there or otherwise engage in the continuous, regular, or repeated representation of clients within the other state.

Id. (emphasis added).

The Restatement also includes a condemnation of state rules that take a parochial attitude toward multijurisdictional practice.

The rules governing interstate practice by nonlocal lawyers were formed at a time when lawyers conducted very little practice of that nature. Thus, the limitation on legal services threatened by such rules imposed little actual inconvenience. However, as interstate and international commerce, transportation, and communications have expanded, clients have increasingly required a truly interstate and international range of practice by their lawyers. (To a limited extent, many states recognize such needs in the international realm by providing for limited practice in the state by foreign consultants. . . .) Applied literally, the old restrictions on practice of law in a state by a lawyer admitted elsewhere could seriously inconvenience clients who have need of such services within the state. Retaining locally admitted counsel would often cause serious delay and expense and could require the client to deal with unfamiliar counsel.

Id. (emphasis added).

The Restatement then moves to a recognition that these archaic state rules also fly in the face of modern developments in communications.

Modern communications, including ready electronic connection to much of the law of every state, makes concern about a competent analysis of a distant state's law unfounded. Accordingly, there is much to be said for a rule

permitting a lawyer to practice in any state, except for litigation matters of law or for the purpose of establishing a permanent in-state branch office. Results approaching that rule may arguably be required under the federal interstate commerce clause and the privileges and immunities clause. The approach of the Section is more guarded. However, its primary focus is appropriately on the needs of clients.

Id. (emphases added).

(a) Perhaps the purest type of improper multijurisdictional practice of law involves a lawyer simply moving to another state and "hanging out a shingle" to practice there.

Of course, some states have specific statutes or regulations allowing out-of-state lawyers to set up shop in those states. Most states have adopted such regulations for in-house lawyers, government lawyers and military spouses.

Absent such permission, courts and bars throughout the United States have forbidden and frequently punished such conduct.

- District of Columbia UPL Op. 22-17 (3/2/17) ("The Committee concludes that the terms 'associate' or 'counsel,' when used in a legal context, convey to members of the public that an individual is authorized to practice law. The Committee therefore concludes that, unless an individual is authorized to practice law in the District of Columbia as a member of the District of Columbia Bar or pursuant to one of Rule 49(c)'s exceptions, the individual, in a legal context, cannot describe himself or herself as an 'associate' or as 'counsel' in connection with an office or location within the District of Columbia. Individuals who identify themselves, in a legal context, as associates or as counsel in the District of Columbia must satisfy all of the requirements of one of Rule 49(c)'s exceptions unless enrolled as active members of the District of Columbia Bar." (emphases added); "Rule 49(a) provides, subject to specific exceptions in Rule 49(c), that no person shall 'in any manner hold out as authorized or competent to practice law' in the District of Columbia unless that person is an active member of the District of Columbia Bar. Rule 49(b)(4) defines '[h]old out as authorized . . . to practice law' as 'to indicate in any manner to any other person that one is competent, authorized, or available to practice law from an office or location in the District of Columbia.' The Rule explains that, '[a]mong the characteristics which give such an indication' are 'Esq.,' 'lawyer,' 'attorney at law,' 'counselor

at law,' 'contract lawyer,' 'trial or legal advocate,' 'legal representative,' and 'judge.'" (alteration in original) (emphasis added); "By way of example, an individual who is a member of another state's bar and who has submitted an application for admission to the District of Columbia Bar may describe himself or herself as an 'associate' or 'counsel' if he or she is authorized to practice law in the District of Columbia by Rule 49(c)(8), which sets forth certain requirements. That individual must also indicate in a prominent manner that the individual is not a member of the District of Columbia Bar and is practicing under the supervision of members of the District of Columbia Bar. See Rule 49(c)(8); D.C. Committee on Unauthorized Practice of Law Opinion 20-08, Limitations on Notice of Bar Status Under Rule 49(c)(8), issued on January 18, 2008. The Committee notes that many law firms use the title 'law clerk,' and limit employees to summer associate functions or other functions that are authorized by Rule 49(c) exceptions, until the employees are admitted to a bar. And the term 'summer associate' is well-understood in the legal community to mean a law student, not an attorney authorized to practice law." (emphasis added)).

- Gerber v. Disciplinary Bd. of N.D. Sup. Ct., 868 N.W.2d 861, 866, 868 (N.D. 2015) (issuing an admonition of a Minnesota lawyer holding himself out as a "staff attorney" in the law firm's North Dakota office despite the lawyer's failure to be admitted into practice in North Dakota; "[W]e conclude clear and convincing evidence establishes that Gerber and his law firm held him out as someone authorized to practice law in North Dakota. The Fredrikson firm's news release plainly states Gerber was hired as an attorney in the firm's Bismarck office, identifying him as a 'government relations specialist' and a 'staff attorney.' The release also states Gerber's 'energy practice focuses on title examination and oil and gas law.' The news release contained no disclaimers alerting the public to the fact that Gerber was not admitted to practice in North Dakota."; "[I]n addition to the law firm's news release, evidence establishes that Gerber identified himself as a 'staff attorney' while working in Bismarck. Gerber self-identified as a 'staff attorney' on his application for admission to the North Dakota Bar. He also identified himself as a 'staff attorney' and a 'government relations attorney' in an affidavit clarifying his duties to the State Board of Law Examiners. Gerber admittedly worked as a 'staff attorney' or 'government relations attorney' in Fredrikson's Bismarck office for over a year, logging 2,476.40 billable hours, of which 1,686.34 hours were billed to clients. Based on this record, we conclude clear and convincing evidence establishes that Gerber violated N.D.R. Prof. Conduct 5.5(d).").
- Stewart Bishop, Md. Appeals Court Disbars Unlicensed Atty Who Helmed Firm, Law360, August 7, 2015 ("A Maryland appeals court on Thursday preemptively disbarred a lawyer who acted as managing attorney for a Maryland law firm despite being unlicensed to practice law in the state, saying the attorney failed to ensure client matters were correctly handled.");

"The divided Court of Appeals of Maryland said Tawana D. Shephard should be disbarred in the state for her work at Glenmore Law Firm LLC in the Washington, D.C., suburb of Beltsville, Maryland."; "While Shephard is admitted to the Virginia and D.C. bars and is admitted to the bar of the U.S. District Court for the District of Maryland, she was never licensed in the state of Maryland, according to the opinion."; "The court said by acting as managing attorney for the Glenmore firm, meeting with clients in Maryland and representing clients in the state, she misled clients and the general public since she never disclosed that she wasn't licensed to practice law in the state."; "Further, during [Shephard's] tenure as 'managing attorney,' several clients paid fees to [Glenmore] and did not receive the services that they were promised,' the judges wrote. 'As an attorney with 18 years of experience, albeit practicing in other states, we would expect [Shephard] to understand the nature of her actions and the responsibilities related thereto.'").

- Zoe Tillman, District of Columbia Man Convicted of Unauthorized Practice of Law for Two Decades, Nat'l L.J., May 10, 2012 ("District of Columbia Superior Court Judge José López today convicted Benoit Brookens, 62, of contempt of court for engaging in the unauthorized practice of law."; "Brookens has never been a member of the District of Columbia Bar [a press release indicated that he had been admitted to practice in Wisconsin and Pennsylvania], but, according to court filings, maintained an office in Washington starting in the late 1970s. In a 1988 ruling, the District of Columbia Court of Appeals ordered Brookens to stop practicing law and advertising himself publicly as an attorney licensed to practice in the District."; "Brookens, who could face up to four years in prison and a \$4,000 fine, is scheduled for sentencing on June 22." (emphasis added)).
- Ky. Bar Ass'n v. Moeves, 297 S.W.3d 552 (Ky. 2009) (punishing a Kentucky lawyer for the unauthorized practice of law in Ohio).
- Ramirez v. England, 320 F. Supp. 2d 368 (D. Md. 2004) (explaining that a lawyer who is a member of the Mississippi Bar but not the Maryland Bar could not practice out of a home office in Maryland; noting that the lawyer included a Maryland address on her letterhead, without an indication that she was not a member of the Maryland Bar).
- Servidone Constr. Corp. v. St. Paul Fire & Marine Ins. Co., 911 F. Supp. 560, 569, 570, 572 (N.D.N.Y. 1995) (Maryland lawyer could not recover fees for work in federal contract action pending in New York; "[A]n attorney who is not licensed to practice in New York may not establish an office in New York from which he advises clients about legal matters, whether this advice concerns New York law or the law of another jurisdiction."; "Mr. Goddard maintains an office in New York City, which is the only office from which he engages in the practice of law. Moreover, although Mr. Gemayel's phone

calls to his New York client apparently were made only to inform her of the progress of the case, Mr. Goddard met with representatives of Servidone in his New York office to discuss issues which, arguably, were only tangentially related to the prosecution of the Servidone/Texas matter; i.e., the effects of a power of attorney and the drafting of a confession of judgment -- both of which concerned his fee rather than the merits of the litigation itself. "; "[A]n attorney who is not licensed to practice law in New York, even if he is associated with a properly constituted law firm in New York, may not 'practice' law in this state." (emphases added)).

- Unauthorized Practice of Law Comm. v. Bodhaine, 738 P.2d 376, 377 (Colo. 1987) (lawyer not licensed in Colorado could not practice law there; "An attorney licensed to practice law in another state may not engage in the practice of law in Colorado without obtaining a license or authorization from the Colorado Supreme Court.").

Lawyers' accurate marketing of their license status does not justify multijurisdictional violations. Describing the limitation on his or her license does not allow a lawyer to move to another state and "hang out a shingle." It is the practice of law that violates the UPL statute.

- Illinois LEO 12-09 (3/2012) (explaining that a non-Illinois lawyer may not practice physically or "virtually" in Illinois even if the law firm's co-owner is licensed in Illinois and directly supervises the non-Illinois lawyer on matters involving Illinois clients; "Two attorneys wish to establish a law practice owned 50/50 between them. One is licensed only in Illinois, one is licensed only in State X."; "Both live and primarily work in Illinois. However, the attorney licensed in State X makes frequent visits to State X for networking and to cultivate a client base there. The attorneys agree that the Illinois-licensed attorney will have direct supervision and ultimate authority over matters involving Illinois clients, although the State X-licensed attorney will interact with Illinois clients and dispense legal advice to them from time to time."; "The Illinois-licensed attorney will sign all pleadings in Illinois courts, make all Illinois court appearances, and conduct any Illinois real estate closings personally. The State X-licensed attorney will engage in networking and market himself in Illinois as an attorney, but will take precautions to ensure that potential clients do not get the impression that he is licensed in Illinois. All letterheads and business cards will clearly and correctly indicate the jurisdictions in which each attorney is licensed to practice. Both attorneys agree to make sure, at the time any client is acquired, that the client understands that the State X-licensed attorney is not licensed in Illinois. Retainer agreements will contain bold-type disclosures to this effect."; "[T]he State X lawyer would work primarily in Illinois, which means that he would

have a systematic and continuous presence (presumably including an office) in Illinois for the practice of law, in violation of paragraph (b)(1). The fact that the state of admission is accurately displayed does not vitiate that violation, as Rule 5.5(b)(1) prohibits the systematic and continuous presence, independent of the lawyer's representation as to his bar admission.").

(b) The general prohibition on lawyers' continuous practice of law in a state where they are not licensed prohibits such activity even if a lawyer practices law under the supervision of a fully-licensed lawyer.

- Illinois LEO 12-09 (3/2012) (explaining that a non-Illinois lawyer may not practice physically or "virtually" in Illinois even if the law firm's co-owner is licensed in Illinois and directly supervises the non-Illinois lawyer on matters involving Illinois clients; "Two attorneys wish to establish a law practice owned 50/50 between them. One is licensed only in Illinois, one is licensed only in State X."; "Both live and primarily work in Illinois. However, the attorney licensed in State X makes frequent visits to State X for networking and to cultivate a client base there. The attorneys agree that the Illinois-licensed attorney will have direct supervision and ultimate authority over matters involving Illinois clients, although the State X-licensed attorney will interact with Illinois clients and dispense legal advice to them from time to time." (emphasis added); "The Illinois-licensed attorney will sign all pleadings in Illinois courts, make all Illinois court appearances, and conduct any Illinois real estate closings personally. The State X-licensed attorney will engage in networking and market himself in Illinois as an attorney, but will take precautions to ensure that potential clients do not get the impression that he is licensed in Illinois. All letterheads and business cards will clearly and correctly indicate the jurisdictions in which each attorney is licensed to practice. Both attorneys agree to make sure, at the time any client is acquired, that the client understands that the State X-licensed attorney is not licensed in Illinois. Retainer agreements will contain bold-type disclosures to this effect." (emphasis added); "[T]he State X lawyer would work primarily in Illinois, which means that he would have a systematic and continuous presence (presumably including an office) in Illinois for the practice of law, in violation of paragraph (b)(1). The fact that the state of admission is accurately displayed does not vitiate that violation, as Rule 5.5(b)(1) prohibits the systematic and continuous presence, independent of the lawyer's representation as to his bar admission.").
- Servidone Constr. Corp. v. St. Paul Fire & Marine Ins. Co., 911 F. Supp. 560, 569, 570, 572 (N.D.N.Y. 1995) (Maryland lawyer could not recover fees for work in federal contract action pending in New York; "[A]n attorney who is not licensed to practice in New York may not establish an office in New York from which he advises clients about legal matters, whether this advice

concerns New York law or the law of another jurisdiction. "; "Mr. Goddard maintains an office in New York City, which is the only office from which he engages in the practice of law. Moreover, although Mr. Gemayel's phone calls to his New York client apparently were made only to inform her of the progress of the case, Mr. Goddard met with representatives of Servidone in his New York office to discuss issues which, arguably, were only tangentially related to the prosecution of the Servidone/Texas matter; i.e., the effects of a power of attorney and the drafting of a confession of judgment -- both of which concerned his fee rather than the merits of the litigation itself. "; "[A]n attorney who is not licensed to practice law in New York, even if he is associated with a properly constituted law firm in New York, may not 'practice' law in this state." (emphasis added)).

Significantly, locally licensed lawyers assisting in such an arrangement put themselves at risk of assisting another lawyer in the unauthorized practiced of law.

- ABA Model Rule 5.5(a) ("A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so." (emphasis added)).

Best Answer

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

B 2/13, 3/17

Establishing a "Virtual" Presence in Another State

Hypothetical 4

You have practiced for a number of years in Pennsylvania (where you are licensed), and primarily handle trust and estate matters. With the recent economic downturn, you have tried to expand your client base. Thanks to your good reputation and "word of mouth" from satisfied clients, you have begun to attract a number of clients who live in Delaware -- where you are not licensed. You communicate electronically and by telephone with these clients, and carefully avoid traveling into Delaware to meet with any of the clients.

May you continue to represent Delaware trust and estate clients as long as you avoid spending any time in Delaware providing those services?

MAYBE

Analysis

Multijurisdictional practice issues arise when lawyers practice law in a state where they are not licensed. States' jealous hold over the practice of law within their borders has led to a somewhat counter-intuitive result: lawyers fully licensed in another jurisdiction are guilty of the unauthorized practice of law by practicing law in another state just as if the lawyers had never spent a day in law school, passed a bar exam, or met the rigorous standards for joining the professional. Although such lawyers might face less severe sanctions than non-lawyers for practicing in a state where they are not licensed, the conduct can still trigger even criminal penalties.

This harsh principle makes some sense when applied to a lawyer who moves to another state and "hangs shingle" without taking some steps to join the new state's bar. But the increasing ability of lawyers to practice "virtually" anywhere raises numerous multijurisdictional practice issues -- with enormous stakes for the lawyers.

Lawyers' Temporary "Virtual" Practice Where They Are Not Licensed

Although ABA Model Rule 5.5 and state parallel ethics rules take a fairly generous approach to lawyers temporarily practicing in states where they are not licensed, there are lines -- which temporary "virtual" practice might cross.

States have severely punished (and even disbarred) lawyers who have virtually practiced improperly in other states. Some of those states have considered such virtual practice to have moved from "temporary" to "systematic and continuous."

- In re Velahos, Dkt. No. DRB 15-109, at 6 (N.J. Sup. Ct. Disciplinary Review Bd. May 23, 2016) (suspending for six months a lawyer for various ethics violations; noting the disciplinary review board's findings from 3/23/16; "In fact, respondent represented clients in multiple matters in jurisdictions in which he was not authorized to practice, without the assistance of local counsel. Respondent conducted no less than eighteen mortgage modifications in the States of Georgia, Washington, New York, Pennsylvania, Virginia, Maryland, Connecticut, Texas, or Florida. Respondent misrepresented to several of these out-of-state clients in the fee agreements that FLA 'has been retained as 'Of Counsel' to Loan Law Center.' Moreover, respondent engaged in credit and debt adjustment services in Maryland over a two-year period, even after the Commissioner of Financial Regulation for the State of Maryland issued a summary order, followed by a final order to Cease and Desist. When questioned by the OAE about the orders, respondent denied that he had 'taken any money' from Maryland. However, the OAE's review of respondent's records disclosed that, during that period, respondent actively represented several Maryland clients in that state and collected fees from them. Respondent's conduct in this respect violated RPC 1.16(a)(1), RPC 5.5(a), RPC 8.1(a), RPC 8.4(c), and RPC 8.4(d)." (emphasis added), aff'd, 137 A.3d 500 (N.J. May 25, 2016)).
- In re Lenard, Cal. Bar Court Review Dep't Case No. 09-O-11175 (Apr. 15, 2013) (disbarring a lawyer for engaging in the unauthorized practice of law by providing "credit repair" services to debtors in several states where the lawyer was not licensed; "Lenard contracted with three California consumer debt relief companies: Freedom Financial Management; Beacon Debt Service; and Pathway Financial Management (the Settlement Companies). These companies paid Lenard a flat fee to provide limited legal services for clients regarding their consumer debt. Lenard testified that he customarily charged the Settlement Companies between \$75 to \$100 per client and spent 15 to 20

minutes on each file. He also estimated that he had over 1,000 clients 'in credit repair' among all three companies. The Settlement Companies advertised through television and radio ads in a number of states. Clients who retained one of the Settlement Companies agreed to pay retainer fees of up to 12% of the balance of their debts, contingency fees of 8% of the amount by which their debts were reduced, and monthly maintenance fees of between \$15 to \$25. Clients also were required to make monthly payments into the Companies' 'client trust account,' and those funds were to be used to settle their debts. The Settlement Companies represented that the clients' accounts would be 'handled by our legal counsel.'"; "Lenard practiced law and held himself out as an attorney with the authority and knowledge to settle consumer debts to Wisconsin and New York clients Burgess and Manfredi, respectively. He also represented to their creditors that they should follow debt collection laws or his clients were prepared to take legal action. In addition, Lenard claims he reviewed their files to determine whether they should file bankruptcy, although he admitted he was 'not licensed to do a bankruptcy out of state.' Wisconsin and New York have both considered conduct similar to Lenard's to constitute UPL."; "The hearing judge found that Lenard established a systematic and continuous presence in each of the jurisdictions listed in the NDCs [Notice of Disciplinary Charge]. Based on the limited record, we do not find clear and convincing evidence of this proscription. However, we find that Lenard committed UPL by holding himself out as entitled to practice law in each of the seven states for a total of ten willful violations of rule 1-300(B)" (emphasis added) (footnote omitted); "By implying he was licensed in the relevant states, Lenard gave the false impression to his clients and their creditors that he held an advantage over a non-attorney debt negotiator. He explicitly represented to the clients that he would provide legal services, and informed creditors that he was representing each client utilizing his law office letterhead. The written communications Lenard provided to clients (and their creditors) in those states are evidence that he violated the applicable rules of professional conduct, as well as relevant case law and advisory authority."; "He [Lenard] contends that all work was done in California and any legal opinions rendered were based on California law. However, the factors defined in comment 14 of the ABA Model Rule compel our conclusion that Lenard was not entitled to practice law even on a temporary basis in these states. Analyzing those factors, we find that he had no prior contact with the clients and they never lived in California or had substantial contact with this state. There is no evidence that California law would be relevant to any of the consumer debts in these matters. Further, Lenard has no knowledge of the specific laws of the states in which the clients resided, where they faced state collection actions and may have had assets. As such, the contact with these out-of-state clients was not reasonably related to Lenard's practice in California, and he was not authorized to provide legal services on a temporary basis under the states' versions of ABA Model Rule 5.5(c)." (emphasis added) (footnote omitted); "[W]e reject any contention by Lenard that ABA Model Rule 5.5(d)(2) enabled

him to provide legal services related to bankruptcy law. Primarily, Lenard's proposed services were not limited to issues of bankruptcy.").

Such lawyers may face other threats.

- Angela Morris, Linebarger Goggan Law Firm Settles Class Action For \$3.4 Million, Tex. Lawyer, Jan. 12, 2016 ("A federal judge has approved a settlement that requires Austin-based law firm Linebarger Goggan Blair & Sampson, LLC to pay \$3.4 million -- including nearly \$904,000 in attorney fees and expenses -- to settle a class action that alleged it engaged in the unauthorized practice of law in California."; "The settlement ends litigation spanning back to May 2013, when plaintiff 4EC Holdings sued Linebarger, a firm that contracts with governmental agencies to collect debts. 4EC alleged that Linebarger sent debt collection demand letters to California residents, even though the firm did not employ lawyers in California, as allegedly required under California law. Linebarger denied the allegations.")

Lawyers' Systematic And Continuous "Virtual" Practice Where They Are Not Licensed

The ABA Model Rules contain two flat prohibitions on lawyers' provisions of legal services in states where they are not licensed.

First, a lawyer not licensed in a jurisdiction

shall not . . . except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law.

ABA Model Rule 5.5(b)(1) (emphasis added).

Second, such a lawyer may not

hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

ABA Model Rule 5.5(b)(2).

A comment to the ABA Model Rules includes a twist -- which complicates the analysis.

Other than as authorized by law or this Rule, a lawyer who is not admitted to practice generally in this jurisdiction violates paragraph (b)(1) if the lawyer establishes an office or other systematic and continuous presence in this jurisdiction for

the practice of law. Presence may be systematic and continuous even if the lawyer is not physically present here.

ABA Model Rule 5.5 cmt. [4] (emphasis added).

The Restatement also deals with the rise in electronic communications, and the resulting ability of lawyers to engage in a "virtual" practice. In fact the Restatement points to this trend as a grounds for allowing lawyers licensed in one state to continuously practice in other states.

The Restatement essentially follows the ABA Model Rules standard.

The extent to which a lawyer may practice beyond the borders of the lawyer's home state depends on the circumstances in which the lawyer acts in both the lawyer's home state and the other state. At one extreme, it is clear that a lawyer's admission to practice in one jurisdiction does not authorize the lawyer to practice generally in another jurisdiction as if the lawyer were also fully admitted there. Thus, a lawyer admitted in State A may not open an office in State B for the general practice of law there or otherwise engage in the continuous, regular, or repeated representation of clients within the other state.

Restatement (Third) of Law Governing Lawyers § 3 cmt. e (2000) (emphasis added).

However, the Restatement clearly takes a more liberal view than the ABA Model Rules of the type of "virtual" presence in a state that lawyers should be able to arrange.

It is also clearly permissible for a lawyer from a home-state office to direct communications to persons and organizations in other states (in which the lawyer is not separately admitted), by letter, telephone, telecopier, or other forms of electronic communication.

Restatement (Third) of Law Governing Lawyers § 3 cmt. e (2000) (emphasis added).

The ABA Ethics 20/20 Commission primarily focused on the rising use of electronic communications in the practice of law, and the increasing mobility of lawyers.

Thus, one would think that the issue of a "virtual" continuous presence in another state would have been an obvious choice for proposed rules changes.

The Commission tiptoed into the issue. In its June 19, 2012, Issue Paper, the ABA Ethics 20/20 Commission described the earlier circulation of a draft proposed rules change.

The Commission previously circulated a draft proposal that would have addressed this ambiguity in a general way by adding new sentences to Comment [4] to Rule 5.5. The new sentences would have provided as follows:

For example, a lawyer may direct electronic or other forms of communications to potential clients in this jurisdiction and consequently establish a substantial practice representing clients in this jurisdiction, but without a physical presence here. At some point, such a virtual presence in this jurisdiction may be come [sic] systematic and continuous within the meaning of Rule 5.5(b)(1).

In response to this proposal, several commenters suggested that the sentences not only provide little additional guidance, but that they might have the unintended effect of deterring lawyers from engaging in forms of virtual practice that should be permissible.

Based on this response, the Commission asked its Uniformity, Choice of Law, and Conflicts of Interest Working Group to evaluate whether it is possible to provide enhanced guidance on this issue, and if so, how. The Working Group has identified several possible approaches.

Am. Bar Ass'n Comm'n on Ethics 20/20, Issue Paper (June 19, 2012).

The Commission tentatively floated the following "trial balloon" as a way to assess such a "virtual" presence.

One possible approach is to identify the factors that lawyers and disciplinary authorities should consider when deciding whether a lawyer's presence has become sufficiently systematic and continuous to trigger Rule 5.5(b)'s

requirement that the lawyer become licensed. For example, those factors might include:

- the nature and volume of communications directed to potential clients in the jurisdiction;
- whether the purpose of the communications is to obtain new clients in the jurisdiction;
- the number of the lawyer's clients in the jurisdiction;
- the proportion of the lawyer's clients in the jurisdiction;
- the frequency of representing clients in the jurisdiction;
- the extent to which the legal services have their predominant effect in the jurisdiction; and
- the extent to which the representation of clients in the jurisdiction arises out of, or is reasonably related to, the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

A second possibility is for the Commission to make no proposal in this area and to refer the issue to the Standing Committee on Ethics and Professional Responsibility for an opinion on the meaning of "systematic and continuous presence" in the context of virtual law practice.

A third possibility is for the Commission to make no proposal in this area, but identify the relevant issues in an informational report that the Commission could file with the ABA House of Delegates to help educate the profession about this issue.

Id. at 2-3.

The ABA 20/20 Commission eventually chose option No. 2 -- essentially punting the issue to the ABA Standing Committee on Ethics and Professional Responsibility.

The Commission described its decision in a February 2013 release.

Currently, Model Rule 5.5(b)(1) requires a lawyer to obtain a license in a jurisdiction if the lawyer has an office or a "systematic and continuous" presence there, unless the lawyer's work falls within one of the exceptions identified in

Rule 5.5(d). The increased demand for cross-border practice and related changes in technology have raised new questions about the meaning of the phrase "systematic and continuous presence" in Rule 5.5(b). In particular, technology now enables lawyers to be physically present in one jurisdiction, yet have a substantial virtual practice in another. The problem is that it is not always clear when this virtual practice in a jurisdiction is sufficiently "systematic and continuous" to require a license in that jurisdiction.

Currently, Comment [4] to Model Rule 5.5 identifies these issues, but provides limited guidance as to how to resolve them. The Comment states that a lawyer's "[p]resence may be systematic and continuous even if the lawyer is not physically present" in the jurisdiction. Neither the Rule nor the Comment provides any clarity as to when a lawyer who is "not physically present" in a jurisdiction nevertheless has a systematic and continuous presence there.

The Commission released an issues paper, seeking feedback on a number of possible options for addressing these issues, including the identification of relevant factors when analyzing when a presence becomes "systematic and continuous" and referring the issue to the Standing Committee on Ethics and Professional Responsibility for a Formal Opinion on the meaning of "systematic and continuous presence" in the context of virtual law practice.

The Commission, after considerable deliberations, concluded that these issues may be best addressed in the future as the nature of virtual law practice becomes clearer and as relevant technology continues to evolve.

Am. Bar Ass'n Comm'n on Ethics 20/20, Introduction and Overview (Feb. 2013)

(emphasis added).

It might be fair to conclude that such "virtual" practice possibilities represent a huge threat to states' somewhat parochial and often "turf protecting" view of their power to regulate the legal profession. This may be one reason that the ABA Ethics 20/20 Commission abandoned its efforts.

Just as the ABA has recognized but not dealt with this issue, courts and bars have wrestled with it too.

The 1988 California decision that arguably triggered the national multijurisdictional practice debate definitely moved away from an exclusive reliance on a lawyer's physical presence in a state, but without offering any concrete guidance about where to draw the line between permissible and impermissible conduct.

Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1, 5-6 (Cal. 1998) ("Our definition does not necessarily depend on or require the unlicensed lawyer's physical presence in the state. Physical presence here is one factor we may consider in deciding whether the unlicensed lawyer has violated section 6125, but it is by no means exclusive. For example, one may practice law in the state in violation of section 6125 although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means. Conversely, although we decline to provide a comprehensive list of what activities constitute sufficient contact with the state, we do reject the notion that a person automatically practices law 'in California' whenever that person practices California law anywhere, or 'virtually' enters the state by telephone, fax, e-mail, or satellite." (emphases added)).

The August 2002 ABA Commission on Multijurisdictional Practice's report recognized the impact of the Birbrower decision.¹

As "virtual" practice became easier and more tempting for lawyers, bars initially continued to focus on lawyers' continued presence in a jurisdiction when determining whether they met the multijurisdictional practice standards.

¹ Am. Bar Ass'n Ctr. for Prof'l Responsibility, Report on Multijurisdictional Practice, at *3-4 (Aug. 2002) ("This concern was sharpened by the California Supreme Court decision, Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court of Santa Clara County, 949 P.2d 1 (Cal. 1998), which held that lawyers not licensed to practice law in California violated California's misdemeanor UPL provision when they assisted a California corporate client in connection with an impending California arbitration under California law, and were therefore barred from recovering fees under a written fee agreement for services the lawyers rendered while they were physically or 'virtually' in California. Although the state law was subsequently and temporarily amended to allow out-of-state lawyers to obtain permission to participate in certain California arbitrations, concerns have persisted.").

- Illinois LEO 02-04 (4/2003) (addressing the following situation: "An attorney licensed in State X who negotiates, from his office in State X, his clients' claim for medical matters in State Y, where no lawsuit has been filed and where the attorney is not licensed, does not engage in the unauthorized practice of law, and need not associate with an attorney in State Y to conduct this negotiation."; holding as follows: "[T]he Committee assumes that no lawsuit has been filed in State Y, and that the only services the attorney would provide would be to negotiate, from the attorney's office in State X, the couple's claim for medical matters in State Y. The Committee also assumes that the attorney is not habitually engaged in such negotiations, and that the attorney is merely doing so in this instance to assist a couple known to him, as set forth in the facts. Under this scenario, it is the Committee's opinion that while the attorney may be engaging in the practice of law, it is not the 'unauthorized' practice of law in State Y because the attorney is conducting the negotiation from State X, where he is licensed to practice law. Accordingly, under the facts presented, the Committee believes the attorney may settle the couple's claim for medical matters in State Y without associating with an attorney in State Y, and that doing so does not violate Rule 5.5(a) of the Illinois Rules of Professional Conduct. To the extent the attorney leaves State X, where he is licensed, and enters State Y to conduct the negotiation, the issue becomes less clear. See Lozoff v. Shore Heights, Ltd., 66 Ill. 2d 398, 362 N.E. 2d 1047 (1977) (holding that a lawyer licensed only in Wisconsin who had rendered legal services in connection with an Illinois real estate transaction had engaged in the unauthorized practice of law and could not recover fees)." (emphases added)).
- Philadelphia LEO 2007-4 (8/2007) (addressing a request by a Pennsylvania lawyer about how to respond to a request by someone outside Pennsylvania that the lawyer provide legal services; directing the lawyer to research the UPL laws of the other jurisdiction; explaining that the other jurisdiction's UPL rules would also govern the permissibility of the lawyer providing "advice and consultation on matters of federal law, general legal principles and common law"; explaining that the other pertinent state might find that actions taken in Pennsylvania violated the UPL laws of that other state; "The inquirer also specifically asks if it makes a difference whether he performs legal services in Pennsylvania or in the subject jurisdiction. The answer to this question again depends on the law of that jurisdiction. See, e.g., Comment 4 to ABA Model Rule 5.5, which states that a lawyer may violate Model Rule 5.5(b) (which proscribes a lawyer who is not admitted in a jurisdiction from systematic and continuous presence in that jurisdiction) even if the lawyer is not physically present in the jurisdiction. Most recently the Delaware Supreme Court took action against an attorney not even admitted in Delaware see In re Tonwe, Del., No. 584, 2006, 5/25/07." (emphasis added)).

- Virginia UPL Op. 215 (3/18/08) (holding that in-house lawyers who work for a financial institution and are based outside of Virginia and not licensed in Virginia may provide advice to Virginia employees; "When these lawyers provide advice and counsel regarding Virginia law to employees of the financial institution employer located in branches in Virginia, they are not engaged in unauthorized practice. When they are providing the advice either from their offices outside of Virginia or when they visit the branches in-person in Virginia, this constitutes advising their regular employer which is permitted under Part 6, §I (B)(1) of the Rules of the Virginia Supreme Court. Should they have to prepare documents in either situation, again, these lawyers are providing this legal service only to their regular employer which is permitted under Part 6, §I (B)(2). These lawyers also fall within the scope of the temporary practice provisions of Part 6, §I (C). They represent the employer elsewhere and have occasion to have to come into Virginia in relation to that representation. This occurs only on a temporary or occasional basis. Nothing in this inquiry suggested that these lawyers were attempting to appear before any tribunal in Virginia on behalf of the employer, which would require association with Virginia-licensed counsel. Finally, two earlier opinions from the Committee, UPL Opinions 93 and 99[,] are also instructive on the issues presented in this inquiry. In these opinions the Committee found that it was not the unauthorized practice of law for a non-Virginia-licensed attorney to prepare legal documents for a Virginia client relating to a Virginia matter when the attorney did so from his/her office in the jurisdiction where he/she is licensed. Similarly, if any attorney is providing legal advice to or on behalf of a Virginia client while located in his/her licensing jurisdiction, this will not be the unauthorized practice of law in Virginia. The Committee cautions that an attorney licensed other than in Virginia must also be aware of any applicable rules and/or limitations of his/her licensing jurisdiction and/or the jurisdiction where he/she is practicing regarding the practice of another jurisdiction's law where the attorney is not licensed." (emphases added)).

Eventually, states began to de-emphasize lawyers' physical presence and acknowledge that lawyers can practice "virtually" and permanently in a state where they are not licensed -- a scenario the ABA acknowledged about the same time but never resolved.

The continuing uncertainty of these issues has generated warnings to lawyers to be careful when they "virtually" cross state lines.

- Samuel C. Stretton, Pennsylvania Lawyers Should Be Cautious About Offering Legal Advice in Delaware, Legal Intelligencer (Online), Sept. 9, 2014) ("Is it permissible for a Pennsylvania lawyer to represent people in Delaware if the lawyer has local counsel or an office with a Delaware lawyer in it?"; "Any Pennsylvania lawyer who wants to provide legal advice in Delaware, even with local counsel or an office that has a Delaware lawyer as a paid employee, should be very cautious. Unless a Pennsylvania lawyer is moved in pro hac vice or sits for the bar exam and passes it, there is an excellent chance a lawyer practicing down there with some regularity, even though there are no court appearances, will receive professional discipline."; "Delaware's disciplinary system is extremely vigorous in tracking down and prosecuting Pennsylvania lawyers who are not licensed in Delaware, even though their activities seem to be acceptable, at least from a Pennsylvania viewpoint. There are several lawyers in Delaware who seem to make it an avocation of reporting Pennsylvania lawyers in a vigorous fashion to the Delaware disciplinary authorities."; "The problem started about six or seven years ago when an attorney was licensed in Pennsylvania with an office in southern Chester County and was handling a number of first-party benefits insurance cases in Delaware. She had local counsel, but was settling these cases. Many of these cases had little third-party value and, therefore, were not of interest to members of the Delaware bar. The attorney was a black woman, and many people felt comfortable going to her since there were not a large number of minority lawyers actively practicing in Delaware. The cases came to her through her husband's medical practice and the church that she and her husband attended in Delaware."; "The problem in Delaware is that the Delaware Supreme Court will suspend or disbar a lawyer even if he or she is not admitted in Delaware. This is what happened in these cases. This was challenged in Pennsylvania, but the Pennsylvania Supreme Court will grant reciprocal discipline, as will the federal courts in Pennsylvania. A Pennsylvania lawyer disciplined in Delaware will lose his or her license in Pennsylvania under reciprocal discipline. The fact that the lawyer was never licensed in Delaware is not a defense to the reciprocal discipline, at least in Pennsylvania."; "Of great interest is the fact that many Delaware lawyers provide advice in Pennsylvania and other states on a regular basis, particularly through transactional, tax and other types of corporate law. The Delaware Supreme Court seems somewhat shortsighted. If Pennsylvania courts would be just as vigorous, there would be a large number of major law firms and lawyers in Delaware who would be under suspension if the same rationale applied."; "In conclusion, particularly in Delaware, lawyers who are licensed in Pennsylvania but providing advice across state lines should be very careful. It has always been risky to do that, though with modern availability of legal research for various state laws, it is not as dangerous as it used to be, because one can check relevant state law on issues. But any lawyer providing advice or writing wills or other matters

for people in another state should have local counsel. If a lawyer does it with regularity, he or she should be careful about being cited for unauthorized practice of law. In states like Delaware, the unauthorized practice of law results in major suspensions, which will then be ordered in Pennsylvania under a reciprocal system."; "Unless the bar leaders in Delaware and Pennsylvania can reach some understanding or accommodation, any lawyer who wants to provide advice across the Delaware state line should do so very cautiously. The best practice would be to move for pro hac vice admission." (emphases added)).

All in all, lawyers should be very wary of attracting most of their clients from states where they are not licensed, and representing those clients "virtually." Although the ABA has certainly abandoned (at least in the short run) its goal of determining when such activities becomes the illegal unauthorized practice of law in those other states, it has recognized that there is a line somewhere.

In 2012, an Illinois legal ethics opinion provided a more precise analysis -- holding that an Illinois lawyer could not partner with an out-of-state lawyer for the practice of law in Illinois, even if the out-of-state lawyer did not hold himself out as an Illinois lawyer and always acted under the direct supervision of the Illinois lawyer. Among other things, the Illinois Bar recognized that the out-of-state lawyer might violate Illinois Rule 5.5 through a "virtual" presence in Illinois.

In the context of a virtual law office involving lawyers from different states, each lawyer should take care that any out-of-state practice is not systematic and continuous. The proposed practice involves a lawyer from State X who wishes to practice regularly in Illinois, whether through a physical presence or a virtual presence. 'Presence may be systematic and continuous even if the lawyer is not physically present here.' RPC 5.5, Comment [4]. So even if the virtual office were not based in Illinois, the fact that the State X lawyer would do work for Illinois clients and would seek legal work in Illinois establishes a systematic and continuous presence. . . . Because the State X lawyer wishes to practice regularly in Illinois, the Committee is of the opinion that Rule 5.5(b) bars the proposed practice,

regardless of whether the lawyer's presence in Illinois is physical or virtual. Additionally, because the Illinois lawyer would be part and parcel of the project, he or she would be subject to discipline under Rule 5.5(a) for assisting the State X lawyer.

Illinois LEO 12-09 (3/2012) (emphases added).² The Illinois legal ethics opinion explained that both the out-of-state lawyer and the Illinois lawyer assisting in the arrangement put themselves in harm's way.

Interestingly, the ramifications of a lawyer's "virtual" presence have arisen in several disciplinary cases. In some situations, lawyers establishing a largely "virtual" practice have also occasionally entered the state to meet with clients -- giving state disciplinary authorities a "hook" to punish the lawyers under the traditional emphasis on physical location. Not surprisingly, these generally involve lawyers practicing near a state border, and drawing clients from a neighboring state where the lawyer is not licensed to practice law.

In 2007, the Delaware Supreme Court punished such a lawyer.

² Illinois LEO 12-09 (3/2012) (explaining that a non-Illinois lawyer may not practice physically or "virtually" in Illinois even if the law firm's co-owner is licensed in Illinois and directly supervises the non-Illinois lawyer on matters involving Illinois clients; "Two attorneys wish to establish a law practice owned 50/50 between them. One is licensed only in Illinois, one is licensed only in State X."; "Both live and primarily work in Illinois. However, the attorney licensed in State X makes frequent visits to State X for networking and to cultivate a client base there. The attorneys agree that the Illinois-licensed attorney will have direct supervision and ultimate authority over matters involving Illinois clients, although the State X-licensed attorney will interact with Illinois clients and dispense legal advice to them from time to time."; "The Illinois-licensed attorney will sign all pleadings in Illinois courts, make all Illinois court appearances, and conduct any Illinois real estate closings personally. The State X-licensed attorney will engage in networking and market himself in Illinois as an attorney, but will take precautions to ensure that potential clients do not get the impression that he is licensed in Illinois. All letterheads and business cards will clearly and correctly indicate the jurisdictions in which each attorney is licensed to practice. Both attorneys agree to make sure, at the time any client is acquired, that the client understands that the State X-licensed attorney is not licensed in Illinois. Retainer agreements will contain bold-type disclosures to this effect."; "[T]he State X lawyer would work primarily in Illinois, which means that he would have a systematic and continuous presence (presumably including an office) in Illinois for the practice of law, in violation of paragraph (b)(1). The fact that the state of admission is accurately displayed does not vitiate that violation, as Rule 5.5(b)(1) prohibits the systematic and continuous presence, independent of the lawyer's representation as to his bar admission.").

Glover says that she did not provide legal services 'in Delaware' because she worked out of an office in Pennsylvania. Moreover, because she reasonably believed that the predominant effect of her legal work was in Pennsylvania, she should be protected by the 'safe harbor' provision in Rule 8.5(b). Glover's argument fails for several reasons. First, the record establishes that on three occasions she was physically present in Delaware, representing her Delaware clients. Second, physical presence is not required to establish that a person is providing, or offering to provide, legal services in this state. For several years, Glover accepted new clients who were: (1) Delaware residents, (2) involved in Delaware car accidents, and (3) seeking recovery under Delaware insurance policies. Glover did everything short of appearing in Delaware courts, and engaged Delaware attorneys as co-counsel only if she could not resolve the matter without litigation. We are satisfied that this regular pattern of representation of Delaware clients constituted the practice of law 'in Delaware' for purposes of Rule 8.5. (footnote omitted).; Glover may not have engaged in formal advertising to attract clients, but she certainly cultivated a network of Delaware contacts who accomplished the same result. After carefully reviewing the record, we are satisfied that there is substantial evidence to support the Board's finding that Glover established a systematic and continuous presence in Delaware for the practice of law in violation of Rule 5.5(b).

In re Tonwe, 929 A.2d 774, 778, 779-80 (Del. 2007) (emphases added). To be sure, the Delaware court might have been influenced by the lawyer's unsavory practice history and questionable representations during the disciplinary process.³

³ In re Tonwe, 929 A.2d 774, 776 (Del. 2007) (disbarring a lawyer for the unauthorized practice of law in Delaware; explaining the Delaware Office of Disciplinary Counsel had filed a petition alleging that the Pennsylvania-licensed lawyer had practiced law in Delaware; explaining that "Glover graduated from law school in 1985 and was admitted to the Ohio bar shortly thereafter. She moved to Delaware a few years later. In 1989, Glover was admitted to practice in Pennsylvania and the District of Columbia. She took the Delaware bar examination, but did not pass. In 1990, Glover opened a law office in her home in Milford, Delaware. Glover's practice included federal immigration law and personal injury cases."; "The ODC first learned about Glover's Delaware legal practice as a result of an ongoing federal investigation. In 1991, Glover was convicted of bribing a federal immigration official, and served 37 months in prison. Following her conviction, Glover was disbarred in Pennsylvania, Ohio and the District of Columbia. She was reinstated in Pennsylvania in 2002."; rejecting the lawyer's argument that she had not practiced law

A year later, the Delaware Supreme Court applied the same basic principle.

In re Kingsley, No. 138, 2008 Del. LEXIS 255, at *13 (Del. June 4, 2008) (holding that a lawyer licensed in Pennsylvania and New Jersey committed the unauthorized practice of law in Delaware by accepting a monthly retainer to draft estate planning documents for clients of a Delaware accountant; concluding that the lawyer established a "systematic and continuous presence" in Delaware by engaging in these activities; prohibiting the lawyer from practicing law in Delaware).

Lawyers' Systematic and Continuous "Virtual" Practice Where They Are Licensed -- While Physically In A State Where They Are Not Licensed

Most lawyers analyzing "virtual" practice focus on the scenario discussed above - remaining physically in a state where they are licensed but "virtually" representing clients located in states where the lawyers are not licensed.

But lawyers might instead choose to live in a state where they are not licensed, while continuously practicing -- "virtually" -- in a state where they are licensed. There are several scenarios in which such an arrangement might be attractive. For instance, lawyers might want to continue practicing "big city" law while living in more attractive or less expensive rural settings. They might want to be near aging parents, or follow a spouse who will be attending graduate school for several years, etc.

One might wonder why the state where such lawyers will be physically present would care about any multijurisdictional implications. Presumably, that state has an interest in protecting its own citizens from lawyers representing them without local knowledge, without any supervision from that state's bar, etc. So why would that state be concerned, as long as those lawyers do not hold themselves out to practice in the state, do not represent any citizens of that state, etc.?

in Delaware; noting that the lawyer's husband and children live in Delaware, but she claims to sleep in her Pennsylvania office – but denying that she and her husband are separated).

In this scenario, the lawyers rather than the bar would have an interest in rejecting the old "physical presence" standard, and instead focus on the "virtual" practice factors.

A February 2013 release of the ABA Ethics 20/20 Commission noted this issue, but without reaching any conclusions.

Conversely, a lawyer may be licensed in one jurisdiction, but live in a jurisdiction where the lawyer is not licensed. If the lawyer conducts a virtual practice from the latter jurisdiction and serves clients only in the jurisdiction where the lawyer is actually licensed, there is a question of whether the lawyer has a "systematic and continuous" presence in the jurisdiction where the lawyer is living and thus violates Rule 5.5(b) in that jurisdiction. The Rule is unclear in this regard as well.

Am. Bar Ass'n Comm'n on Ethics 20/20, Introduction and Overview, at 10 n.27 (Feb. 2013).

But other states continue to focus on lawyers' physical presence – generally barring lawyers domiciled in the state from practicing law in that state without a license - even if they do not provide advice about their host state's law.

Such states consider such an arrangement to be the illegal systematic and continuous practice of law. That could result in the lawyers' discipline in that state, which in turn can trigger discipline in the lawyers' home state.

Predictably, Florida takes such a protective approach. A Florida Rules comment prohibits lawyers from establishing "an office or regular presence" in Florida – even if they limit their practice to the law of a state where they are licensed.

- Florida Rule 4-5.5 cmt ("[A] lawyer licensed to practice law in New York could not establish an office or regular presence in Florida to practice New York law. Such activity would constitute the unlicensed practice of law. However, for purposes of this rule, a lawyer licensed in another jurisdiction who is in

Florida for vacation or for a limited period of time, may provide services to their clients in the jurisdiction where admitted as this does not constitute a regular presence. The lawyer must not hold out to the public or otherwise represent that the lawyer is admitted to practice law in Florida. Presence may be regular even if the lawyer is not physically present here." (emphasis added)).

Florida is among the most jealous of all states about out-of-state lawyers practicing there (especially on a systematic basis). The reference to New York lawyers trying to horn in on Florida lawyers' practice is a blatant shot across the bow of New York lawyers seeking a warmer climate.

Some states have adopted the same approach, but in a more subtle fashion.

For instance, Colorado prevents lawyers domiciled in that state from taking advantage of the ethics provisions permitting non-Colorado lawyers to temporarily practice in the state.

- Rules Governing Admission To The Practice Of Law In Colorado; Rule 205.1 (Revised 2014) ("(1) Eligibility. An attorney who meets the following conditions is an out-of-state attorney for the purpose of this rule: (a) The attorney is licensed to practice law and is on active status in another jurisdiction in the United States; (b) The attorney is a member in good standing of the bar of all courts and jurisdictions in which he or she is admitted to practice; (c) The attorney has not established domicile in Colorado; and (d) The attorney has not established a place for the regular practice of law in Colorado from which the attorney holds himself or herself out to the public as practicing Colorado law or solicits or accepts Colorado clients." (emphasis added)).

In 2015, some New York lawyers unsuccessfully sought to move New York in the direction of allowing such practice.

- ABA/BNA Lawyers' Manual on Professional Conduct, Vol. 31, No. 26 (Dec. 30, 2015) ("While characterizing the new temporary practice rule as a 'huge advance' for New York, Davis [Anthony Davis of Hinshaw & Culbertson LLP] pointed out that the court of appeals did not adopt a recommendation made by a group of large law firms that have offices in New York and other jurisdictions."; "That recommendation took aim at the situation where a lawyer lives in one state but practices law remotely from an office in another state

where the lawyer is admitted to practice. For example, a lawyer may live in New York and commute to New Jersey or Connecticut. In this situation, Davis said, it's a stretch to say the lawyer is temporarily in New York, and the lawyer arguably may be engaging in unauthorized practice there."; "In comments on the proposed temporary practice rule, the large firms recommended additional language that would allow a lawyer authorized to practice law in a U.S. jurisdiction to provide legal services that exclusively involve federal law, the law of another jurisdiction or tribal law, provided the lawyer does not hold himself out in any way as having an office for the practice of law in New York."; "This language, the firms said, would prevent UPL accusations against lawyers who live in New York and use technology to practice remotely as if they were physically in their state of admission, provided they do not practice New York law or hold themselves out as doing so.).

One court has taken what seems to be a ridiculously overbroad approach to this issue -- holding that even a lawyer's triage of matters that the lawyer can and cannot handle amounts to the unauthorized practice of law, if the lawyer is physically in that state.

The issue came up in connection with a lawyer's practice of federal law in Maryland. Of course, the Supremacy Clause allows lawyers to practice purely federal law even if they are not licensed in the state where they are physically present.

In Kennedy v. Bar Ass'n, 561 A.2d 200 (Md. 1989), the court acknowledged the possibility that a lawyer could properly draw the line between the permissible offering of federal law advice and the impermissible offering of Maryland law advice. But the court found as a practical matter that the lawyer could not adequately serve clients by trying to do so.

We will not go so far as to say that it is theoretically impossible for Kennedy to maintain a principal office in Maryland exclusively for engaging in a practice before the federal court in Maryland and the courts in the District of Columbia. It seems, however, that it would be practically impossible to do so. Nevertheless, we shall not foreclose the possibility of Kennedy's presenting to the Circuit Court of

Montgomery County, in the exercise of its continuing jurisdiction over the injunction, any proposal whereby Kennedy, without holding himself out as practicing law in Maryland, could first pinpoint clients whose specific matters actually required counsel before those courts where Kennedy is currently admitted to practice, and thereby could limit his legal representation in Maryland to those specific matters.

Id. at 211 (emphases added).

Significantly, the court did not focus on what the lawyer would do for the clients he represented. Instead, the court noted that the lawyer would be engaging in the practice of law (in Maryland) when deciding whether he could represent them. The court explained that

advising clients by applying legal principles to the client's problem is practicing law. When Kennedy, who is unadmitted in Maryland, set up his principal office for the practice of law in Maryland and began advising clients and preparing legal documents for them from that office, he engaged in the unauthorized practice of law. This is so whether the legal principles he was applying were established by the law of Montgomery County, the State of Maryland, some other state of the United States, the United States of America, or a foreign nation. . . . He is not permitted to sort through clients who may present themselves at his Maryland office and represent only those whose legal matters would require suit or defense in a Washington, D.C. court or in the federal court in Maryland because the very acts of interview, analysis and explanation of legal rights constitute practicing law in Maryland. For an unadmitted person to do so on a regular basis from a Maryland principal office is the unauthorized practice of law in Maryland.

Id. at 208-10 (emphases added). The District of Columbia Bar later suspended

Kennedy for nine months because of this infraction in Maryland. In re Kennedy, 605

A.2d 600 (D.C. 1992).

This is a frightening holding that could theoretically subject to criminal penalties even non-lawyers who handle some tasks for clients, but not other tasks (which would amount to the practice of law). For instance, a non-lawyer tax preparer's client might ask if the tax preparer can write the client's will. Under the Maryland court's approach, the tax preparer would presumably be committing the criminal unauthorized practice of law by explaining to the client that the tax preparer could not write the will because it would be the unauthorized practice of law. And as that unfortunate Maryland lawyer discovered after being punished by the D.C. Bar, the stakes are high.

A few states have allowed lawyers to systematically and continuously practice within a state without being licensed there -- as long as they do not give any clients advice about the law of that state. This approach does not focus specifically on "virtual" practice. For instance, a new associate might work in a large law firm's office without being licensed in that state, and exclusively conduct research into New York and Delaware corporate law, etc. But focusing on the type of legal advice that such lawyers can give opens up the possibility of lawyers physically present in states where they are not licensed "virtually" representing clients in states where they are licensed.

In 2011, Virginia indicated that such practice does not run afoul of the MJR rules -- as long as the lawyer physically present in Virginia limits her legal advice to federal law or to the law of states where she is licensed.

- Virginia LEO 1856 (9/19/11) (explaining that under Virginia Rule 5.5, non-Virginia lawyers "may not practice Virginia law on a 'systematic and continuous' basis," unless they (1) limit their practice to the "law of the jurisdiction/s where they are licensed"; (2) practice "exclusively federal law" under the federal supremacy clause (such as "lawyers with practices limited to immigration or military law or who practice before the Internal Revenue Service, the United States Tax Court, or the United States Patent and Trademark Office," although lawyers such as bankruptcy, patent or federal

procurement lawyers must abide by courts' possible limitation of practice before the courts to members of the Virginia Bar, and may provide advice "such as the debtor's homestead exemption and status or priority of claims or liens" or "the assignment of the patent to a third party or the organization of a corporate entity to market or franchise the invention" only under the conditions mentioned immediately below; (3) "provide advice about Virginia law or matters peripheral to federal law (described immediately above) only if they do so on a "temporary and occasional" basis and (as stated in UPL Opinion 195) "under the direct supervision of a Virginia licensed lawyer before any of the [non-Virginia] lawyer's work product is delivered to the client" or if they "associate with an active member of the Virginia State Bar."; noting that Rule 5.5 overrules an earlier UPL Opinion about which law applies to a non-Virginia lawyer's practice of another state's law while physically in Virginia; thus, "New York law should govern whether a foreign lawyer not authorized to practice in New York may advise New York clients on matters involving New York law. The [non-Virginia] lawyer's physical presence in Virginia may not be a sufficient basis to apply Virginia's rules over New York's rules governing foreign lawyer practice." Contract lawyers hired to "work on a matter involving Virginia law" must either "be licensed in Virginia or work in association with a Virginia licensed lawyer in the firm on a temporary basis" although such a lawyer's practice "could be regarded as 'continuous and systematic'" if the non-Virginia contract lawyer is hired "to work on several and various Virginia matters/cases over a period of time."; concluding that such contract lawyers need not be licensed in Virginia if the lawyer is "hired to work only on matters involving federal law or the law of the jurisdiction in which the [non-Virginia] contract lawyer is admitted.").

More recently, Arizona amended its ethics rules to permit lawyers to practice continuously in Arizona (without a license there) as long as they give advice only about the law of a state where they are licensed (or federal or tribal law).

A lawyer admitted in another United States jurisdiction, or a lawyer admitted in a jurisdiction outside the United States, not disbarred or suspended from practice in any jurisdiction may provide legal services in Arizona that exclusively involve federal law, the law of another jurisdiction, or tribal law.

Arizona Rule 5.5(d) (emphasis added). The rules change reversed a 2010 legal ethics opinion that had taken the restrictive approach.

- Arizona UPL Advisory Op. 10-02 (02/2010) (explaining out-of-state lawyers may not reside in Arizona and practice virtually in a state where they are licensed; "An out-of-state lawyer admitted to practice law in states other than

Arizona wishes to relocate to Arizona and to practice law of the states in which he is admitted while physically present in Arizona. The lawyer seeks an advisory opinion regarding whether a lawyer may practice the law of states in which he is admitted while physically present in Arizona if the lawyer clearly discloses the jurisdictional limitations of his practice on his letterhead and business cards, does not solicit or advertise to Arizona residents, and does not practice Arizona law. The lawyer further inquires whether such work may be performed in an Arizona office of record, either that of the lawyer admitted to practice out of state or that of an attorney admitted to practice in Arizona."; "An out-of-state lawyer, not admitted to practice in Arizona but living in Arizona, may not practice law limited to the law of jurisdictions in which he is licensed. The out-of-state lawyer may not perform the practice of law in an Arizona office of record, either the office of the out-of-state lawyer or an admitted Arizona attorney."; "Consistent with the Supremacy Clause and preemption doctrine, Rule 31 exemptions and MJP rules at ER 5.5 permit out-of-state lawyers to practice federal law as authorized by federal law and rules. The Supremacy Clause does not extend to laws of other states. Neither the exceptions to Rule 31 nor the MJP rules at ER 5.5 permit the out-of-state lawyer to engage in the practice of law of the out-of-state lawyer's jurisdiction while s/he resides in Arizona."; "Rule 31(a)(2)(A) defines the 'Practice of law' as providing legal advice or services to or for another . . .' The rules do not limit the term 'practice of law' to Arizona law. ER 5.5(d)(2) assumes the practice of law is not limited to Arizona law. The multijurisdictional rule carves out a 'safe harbor' in 5.5(d) for practice of law by an out-of-state lawyer stating the 'lawyer admitted in another United States jurisdiction . . . may provide legal services in this jurisdiction that . . . are services that the lawyer is authorized to provide by federal law or other law of this jurisdiction.' The rule permits that lawyer to provide legal services authorized by federal law and the law of Arizona, and does not permit the out-of-state lawyer to provide legal services authorized by another state's jurisdiction. One can not [sic] extend the authorization to engage in the practice of federal law to an authorization to engage in the practice of the out-of-state lawyer's state of admission.").

If non-Arizona lawyers can practice law under those limitations "in Arizona," they clearly can practice "virtually" in a state where they are licensed. That other state presumably would not object to such a practice, because the lawyer is licensed there (although that other state might have some archaic requirements that the lawyer have a physical office in that state, etc.).

The Arizona rule change is more significant than Virginia's 2011 legal ethics opinion -- both because it is a formal rule, and because Arizona made the change in the

midst of the nationwide debate about the multijurisdictional practice implications of a "virtual" practice.

In one encouraging sign, even some turf-protecting states have respected other states' liberal approach.

- Smith v. Hewlett-Packard Co., Case No. 2:15-cv-484-GMN-VCF, 2016 U.S. Dist. LEXIS 75938, at *4, *4-5, *5, *5-6 (D. Nev. June 9, 2016) (rejecting plaintiff's motion to disqualify and sanction defendant's lawyer based on plaintiff's argument that defendant's lawyer lied about her practice of law in Pennsylvania; "Although the 'practice of law' may be difficult to define, it most assuredly encompasses: advising clients regarding the law; preparing documents for client which require a familiarity with legal principles beyond the ken of the ordinary layman such as wills and contracts; and appearing for client before public tribunals charged with the power of determining liberty or property rights." Gmerek v. State Ethics Com'n, 751 A.2d 1241, 1251 (Pa. Commw. Ct. 2000). "However, it is important to stress that the 'practice of law' is not limited to a lawyer's appearance in court." Id."; "Plaintiffs argue that Elam's [lawyer] two appearances in Pennsylvania District Court do not constitute the 'regular practiced law.' Plaintiffs' argument adopts an extremely narrow definition of the term 'practice of law.' Pennsylvania courts have addressed and rejected Plaintiffs' definition."; "Furthermore Plaintiffs' definition is out of place in a modern legal market. In the era of the legal specialist, Plaintiffs' definition leads to the absurd conclusion that every transactional lawyer or in-house counsel does not 'practice law' simply because they do not regularly appear in court. Since this court does not accept Plaintiffs' definition of 'practice of law,' it finds that Elam made no misrepresentation on her pro hac vice petition."; "Plaintiffs argue that Elam engaged in the unauthorized practice of law when she continued to work for HP in Virginia despite not being admitted to the Virginia state bar and without a corporate counsel certificate. Smith's argument ignores that fact that the Virginia Rules of Professional Conduct permit attorneys like Elam to provide legal services to out-of-state clients while residing in Virginia. Furthermore Elam promptly obtained a Virginia corporate counsel certificate once Plaintiff's counsel had brought this oversight to her attention. . . . Elam's conduct in Virginia does not constitute the unauthorized practice of law." (emphases added)).
- New York LEO 1054 (4/10/15) (Virginia ethics rules governing a New York-licensed lawyer's "virtual" practice in Virginia; "The inquirer is an attorney licensed to practice in both the State of New York and the Commonwealth of Pennsylvania. He now intends to open a solo law office in Virginia, for the sole purpose of representing veterans and their dependents in the United States Court of Appeals for the Fourth Circuit, the United States District

Courts in Virginia, and the Administrative Board of Veterans Appeals."; "The inquirer seeks to practice in Virginia by using a physical office two days per month, using the street address of the office as his mailing address, having access to a private mailbox at that address five days a week; answering phone calls personally when in the office; forwarding calls to the inquirer's cell phone or to a personal voicemail account attached to the cell phone when he is not in the physical office; and using a recorded message when he is not available to answer a phone call."; "The inquirer formerly worked for the federal government, working on rulemakings pertaining to veterans' benefits and representing the government on appellate briefs."; "The inquirer states that he has obtained an advisory opinion from the Virginia State Bar Association's ethics committee, advising that he is permitted to practice from an office address in Virginia, as long as the inquirer (a) limits his practice to federal court and (b) indicates on his letterhead, business cards and website that he is licensed to practice law only in New York and Pennsylvania. The inquirer also states that such opinion would permit the inquirer to operate using a 'virtual office.'"; "Here, the inquirer is not formally admitted to the bar in Virginia, the jurisdiction in which he intends to principally practice. However, in N.Y. State 815 (2007), we determined that, if a New York lawyer is permitted to engage in conduct in another jurisdiction without being formally admitted in that jurisdiction, then the lawyer should be deemed to be 'licensed to practice' in the other jurisdiction, even though such conduct would constitute the practice of law if the lawyer were practicing in New York. According to the inquirer, the Virginia State Bar Association has opined that he may practice from an office address in Virginia, as long as he limits his practice to federal court, and indicates on his letterhead, business cards and website that he is licensed to practice law only in New York and Pennsylvania. Consequently, the inquirer is deemed 'licensed to practice' in Virginia, and the New York disciplinary authorities would ordinarily apply the Virginia Rules of Professional Conduct to his conduct. However, an exception will arise if the inquirer solicits business in New York or Pennsylvania. In that case, the lawyer's conduct regarding the solicitation would clearly have its 'predominant effect' in the admitting jurisdiction to which the solicitations are directed, and the disciplinary authorities would apply the rules of that jurisdiction to the solicitations. . . . Whether any ensuing business would also be subject to the rules of such admitting jurisdiction depends upon where such business has its 'predominant effect.' That is a factual question on which we do not opine." (footnote omitted); "If a New York lawyer has been admitted to practice (generally, or for purposes of a proceeding) before the Virginia courts, when the lawyer represents a client in a proceeding in a court in Virginia, the rules to be applied ordinarily will be the rules of Virginia, unless the court rules provide otherwise. If the lawyer does not represent a client in a proceeding in a court, the rules to be applied will be those of the 'admitting jurisdiction' in which the inquirer principally practices, unless the conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice. If the lawyer is permitted to practice

in Virginia without being formally admitted there, the lawyer should be deemed to be 'licensed to practice' in Virginia for purposes of Rule 8.5(b)(2). However, if the lawyer solicits business in New York, the lawyer's conduct in connection with such solicitation would have its principal effect in New York and the disciplinary authorities would apply the rules of New York." (emphases added)).

As "virtual" practice became easier, some lawyers planned to establish law firms structured so lawyers would practice physically in one state but serve clients "virtually" in other states. It would be easy to see the attractiveness in such an arrangement in some circumstances. For instance, lawyers wishing to live in attractive locations where they attended law school (such as Palo Alto, Chapel Hill, Boston, etc.) could physically remain in those locations, but practice "virtually" in locations where their talents would be useful -- such as New York, Chicago, Los Angeles, Washington, etc. And those law firms could take advantage of the frequently lower cost of living in those college towns, compared to the high-price cities where sophisticated legal services would be more marketable.

It is difficult to gauge whether such law firm models have succeeded. A 2014 article described the demise of one such law firm.

- Andrew Strickler, 'Virtual' Firm Clearspire Dissolves, Sells Tech Platform, Law360, June 9, 2014 ("'Virtual' law firm Clearspire, which launched five years ago with a promise of a high-tech online platform and no hourly fees, has dissolved its legal branch, a firm founder confirmed Friday, with the firm's technology sold to a group of investors looking to bring it to market."; "From the beginning, we knew we ultimately wanted this thing to be a 21st century platform that could scale to many lawyers and law firms," Clearspire co-founder Bryce Arrowood said. "We've had a very strong proof of concept."; "A Texas-based investment group with experience in legal technology purchased the firm's cloud-based platform, known as Coral, with the goal of marketing the technology to other firms, Arrowood said."; "As part of that sale completed in May, Clearspire's legal branch, known as Clearspire Law Company PLLC, was dissolved, with about two dozen attorneys moving on to other firms or businesses."; "The technology side of the company will continue under the Clearspire name and will be led by Eyal Iffergan,

Clearspire's former chief investment officer and the chief architect of the platform."; "Clearspire launched in 2009 under a non-partnership business model in which employee-lawyers working remotely would collaborate and share work products with clients and others in a secure online environment."; "The Washington, D.C.-based firm at one time had a few dozen lawyers and a range of service offerings, including corporate, banking and finance, and employment.").

Lawyers Moving Permanently To Another State

Some but not all states allow lawyers to be admitted by motion to those states' bar without taking a bar examination. Among other things, such states normally limit such admission by motion to lawyers practicing in jurisdictions which offer reciprocal rights to the state's lawyers.

In a somewhat analogous scenario, many federal courts limit their bar admission to lawyers practicing in the federal courts' host state.

Both of these admissions analyses normally require a state or the federal court to determine where the lawyers seeking admission are practicing law. This begs the questions of whether lawyers practicing "virtually" in a jurisdiction meet the admissions standards of state or federal courts considering the motions from such lawyers to be admitted to their bars.

This can therefore raise the familiar "virtual" practice issue.

- In re Carlton, 708 F. Supp. 2d 524, 526, 525, 526, 527 (D. Md. 2010) (holding that a lawyer who sometimes visits her firm's D.C. office and uses that office's computer for her work and conference rooms for client meetings can claim that a D.C. office is her "principal law office" when applying for admission to the District of Maryland bar, even though she does not physically work full-time in that office; explaining the factual background; "Ms. Carlton advised that from her home in Cambridge, she accesses a computer in the Washington, D.C. office of the firm that is designated for her use. She is thus able to use the firm's computer network and access all programs used by the firm's attorneys, including the internal firm email and firm time-keeping program. Thus, even though she is physically located in Cambridge, Massachusetts, she works off a computer and server located in Washington,

D.C., and, just as when she physically worked in Washington, D.C., and, all of her correspondence is sent to the Washington, D.C. address and forwarded to her by the firm's office staff. Clients communicate with her by calling the firm's Washington, D.C. phone number which forwards those calls to her in Cambridge in the same manner as would be the case at an extension in the District of Columbia office. All of her outgoing client correspondence is sent from the D.C. office and all court pleadings are also prepared for filing and filed from the District of Columbia office, unless she is filing a pleading electronically which she can do from Cambridge. Finally, she stated that she only meets with clients when she is in Washington, D.C., and that she has traveled there several times over the past year to complete large projects and meet with clients."; noting that "Local Rule 701.1 (a) provides that 'in order for an attorney to be qualified for admission to the bar of this district, the attorney must be, and continuously remain, a member in good standing of the highest court of any state (or the District of Columbia) in which the attorney maintains his or her principal law office, or the Court of Appeals of Maryland.' (emphasis added)."; explaining that "[i]n recent years, the concept of a 'principal law office' has evolved somewhat as a result of significant advances in technology which provide an attorney with the flexibility to carry out a variety of activities at different locations and under varying circumstances. The term does not necessarily mean continuous physical presence but, at a minimum it requires some physical presence sufficient to assure accountability of the attorney to clients and the Court."; noting that the Washington, D.C., office was more than just a "mail drop" in this situation, and that the lawyer was occasionally physically present in Washington, D.C. (emphasis added)).

"Virtual Offices"

Bars and courts have had to assess whether "virtual" offices constitute offices in several contexts where that concept is important.

First, can lawyers advertise such a "virtual" office as an office?

- New York City LEO 2014-2 (6/2014) (approving lawyer's principal law office a "virtual" office; "A New York lawyer may use the street address of a virtual law office ('VLO') located in New York state as the 'principal law office address' for the purposes of Rule 7.1(h) of the New York Rules of Professional Conduct (the 'New York Rules' or the 'Rules'), even if most of the lawyer's work is done at another location. In addition, a New York lawyer may use the address of a VLO as the office address on business cards, letterhead and law firm website. Given the lower overhead, improved encryption systems, expansion of mobile communication options, availability of electronic research, and the ease of storing and transmitting digital documents and information, VLOs are becoming an increasingly attractive option for attorneys throughout the country. A New York lawyer who uses a VLO must also comply with other

- New York Rules, including Rules 1.4, 1.6, 5.1, 5.3, 8.4(a) and 8.4(c)."; "A New York lawyer (the 'Lawyer') is considering becoming a solo practitioner and plans to do most of her work at her home. The Lawyer does not intend to maintain a separate physical office. Instead, she plans to use a VLO in New York State, as defined below, to meet with clients, hold 'office hours,' receive mail, or otherwise be present and available at various times. For privacy and security reasons, she does not wish to identify her home address as her business address. She would like to use the address of the VLO as her 'principal office address' for purposes of advertising her legal services under Rule 7.1(h). She would also like to use the VLO address on her letterhead, business cards and law firm website."; "The VLO, as used herein, has a physical street address where the Lawyer plans to make herself available for meetings with clients and where the Lawyer can receive service and delivery of legal papers. Accordingly, we conclude that the use of a VLO address in attorney advertising complies with the requirement of 7.1(h) to disclose a physical street address."; "[L]awyers who use VLOs may need to take additional precautions to ensure that they are fulfilling their supervisory obligations. Notwithstanding the differences between VLOs and traditional law firms, the '[a]ttorney must take reasonable measures to ascertain that everyone under her supervision is complying with the Rules of Professional Conduct, including the duties of confidentiality and competence.'" (citation omitted); "A lawyer who uses the shared services and office space of a VLO to perform legal services and to meet with clients, witnesses, or other third parties must take reasonable steps to ensure that she does not expose or put the client's confidential information at risk. This should include, as appropriate, training and educating staff at the VLO on these obligations."; "Lawyers who use VLOs must be particularly mindful of these ethical obligations, given that the lawyers may frequently be away from the physical location that serves as their business address. Lawyers who use VLOs should also take steps to ensure that they are available to meet with and communicate with their clients and respond promptly to their requests for information." (emphasis added)).
- Michigan LEO RI-355 (10/26/12) ("Maintaining a part-time presence at an alternate law office, which is not staffed during normal business hours on a regular basis and occupies office space not reserved for use solely by the lawyer and shared with nonlawyers, raises a number of ethical issues—communication, confidentiality, safeguarding client property, competent and diligent representation, advertising, impermissible multidisciplinary practice, and facilitation of the unauthorized practice of law. The potential for the concern may be heightened by the fact that the lawyer's presence in the location is sporadic, rendering what transpires in the lawyer's absence largely unobserved."; "Lawyers seeking to add an alternate law office to their law practice must comply with the applicable Rules of Professional Conduct, which includes disseminating any information about their practice in a manner that is not false, fraudulent, misleading, or deceptive contrary to MRPC 7.1. A

lawyer cannot communicate the existence of a physical office location unless the lawyer maintains dedicated office space, appropriately separate and distinct from other businesses."; "Lawyers are not precluded from meeting with clients or prospective clients at locations other than a permanent office maintained during normal business hours. However, in communications governed by MRPC 7.1, a lawyer cannot identify a physical location as a law office without having a dedicated office space that has the necessary separation from other businesses.").

Second, may lawyers admitted pro hac rely on local counsel with only a "virtual" office in the pertinent jurisdiction? Several courts have rejected that approach.

- Suevon Lee, Edelson DQ'd In False Ad Row For Using 'Virtual Office,' Law360, Apr. 20, 2016 ("A California federal judge on Wednesday disqualified Edelson PC as counsel in a putative class action accusing TP-Link USA Corporation of deceptive marketing of its network adapters, saying an out-of-state attorney's use of a virtual office address amounted to bad faith conduct."; "United States District Judge Percy Anderson also imposed sanctions against the leading Chicago-based technology class action litigation firm in the amount of \$5,265 and denied a partner's pro hac vice application to the Central District of California in the false advertising suit brought against the California-based United States subsidiary of China's network adapter manufacturer, TP-Link Technologies Co."; "Judge Anderson's ruling cast a strict gaze on Edelson's long-held practice of applying for out-of-state court admission by using a so-called 'virtual office' address for designated local counsel, in light of the fact that the court considering such applications cannot discern from the address alone if it's for a bona fide office or not."; "Edelson has abused this blind spot for more than six years, securing multiple pro hac vice admissions in flagrant violation of the court's local rules," Judge Anderson wrote in a nine-page order dated April 19."; "In this instance, Chicago-based Edelson partner Ari J. Scharg applied to appear pro hac vice in the Central District -- which includes Los Angeles -- designating an associate, Thomas Logan, as his local counsel. But attorneys for TP-Link USA filed an objection to that application last month, saying Logan lives in Chicago, practices out of the firm's San Francisco and Chicago offices, and that his listed office address in the Central District is actually for a virtual office in a downtown Los Angeles office building operated by Regus Business Center, which provides mail-and call-forwarding services and in-person meeting space."; "TP-Link's counsel at LTL Attorneys LLP also referenced the number of times Scharg had been admitted to practice in California on a pro hac vice basis -- 28 times over the last six years, with nine of those cases in the Central District."; "Over the last six years, Judge Anderson's ruling said, Edelson has maintained a virtual office in the Central District -- in Santa Margarita, California, from January 2010 to January 2014 and in the downtown Los Angeles location since January 2014 to present."; "While the Chicago plaintiffs' firm, which

frequently litigates cases in California due to its tech industry-gearred focus, argued that the Central District's local rules permit use of a 'virtual office' by designated local counsel, the judge said the law firm failed to establish it could satisfy the rules' additional prong that this local counsel, through use of the virtual office, is someone with whom opposing counsel can 'readily communicate regarding the conduct of the case and upon whom documents may be served.'"; "The judge pointed out how Edelson 'readily admits that no Edelson attorney or staff operate from the Los Angeles virtual office.'"; "Thus, it appears that the Los Angeles virtual office is not 'maintain[ed] . . . for the practice of law' so much as it is maintained for the purpose of facilitating pro hac vice admissions for Edelson attorneys,' the judge held." (emphasis added)).

- Arroyo v. TP-Link USA Corp., No. CV 16-1044 PA (KKx), 2016 U.S. Dist. LEXIS 38952, at *2, *2-3, *3-4, *4-5 (C.D. Cal. Mar. 24, 2016) (denying lawyer's pro hac vice motion and issuing a show-cause order why the lawyer should not be sanctioned for improperly providing a required local counsel's address on what turned out to be a "virtual office"; "The Local Rules for the Central District of California govern who may appear before the Court pro hac vice."; "An attorney is disqualified under L.R. 83-2.1.3.2 if he or she: '(a) resides in California; (b) is regularly employed in California; or (c) is regularly engaged in business, professional, or other similar activities in California.' L.R. 83-2.1.3.2. Applicants seeking to appear pro hac vice must also designate local counsel pursuant to Local Rule 83-2.1.3.4, which provides: 'Every attorney seeking to appear pro hac vice must designate as Local Counsel an attorney with whom the Court and opposing counsel may readily communicate regarding the conduct of the case and upon whom documents may be served. An attorney may be designated as Local Counsel only if he or she: (1) is a member of the Bar of this court; and (2) maintains an office within the District.' L.R. 83-1.2.1.3.2."; "[O]n March 18, 2016, Ari J. Scharg filed an Application to Appear Pro Hac Vice (Docket No. 119), which also designated Mr. Logan as local counsel. In this application, Mr. Logan represented that his office was located at 555 West Fifth Street, 31st Floor, Los Angeles, California 90013. Additionally, Mr. Scharg declared, under penalty of perjury, that he had designated local counsel who 'maintains an office in the Central District of California for the practice of law.' Defendant's Opposition points out the inconsistency in the location of Mr. Logan's office, and asserts that the Los Angeles office is only a 'virtual office' which does not comply with the Local Rule's requirements."; "The Court therefore orders Plaintiff's counsel to show cause, in writing, no later than April 4, 2016, why they should not be sanctioned for abusing the pro hac vice application process. Plaintiff's response to this Order to Show Cause must include: (1) a declaration under penalty of perjury from Mr. Logan as to how many hours per week he physically spends in the Los Angeles office; how many Edelson employees, including other attorneys, are physically present at the Los Angeles office; and the city in which Mr. Logan maintains his permanent

residence; [and] whether he maintains a residence in Los Angeles The Court warns that potential sanctions include the imposition of monetary sanctions, including Defendant's attorneys' fees incurred in bringing this matter before the Court, as well as the disqualification of any Edelson attorney from serving as either Plaintiff's individual counsel or as class counsel for the putative class.").

Third, do "virtual" offices satisfy specific state statutory rules requiring an "office"?

New York has taken a predictably narrow approach.

- Platinum Rapid Funding Grp. V. HDW of Raleigh, Inc., No. 605890-17, 2017 NYLJ LEXIS 3734, at *4, *5, *5-6, *7-8 (N.Y. Sup. Ct. Jan. 9, 2018) (disqualifying a California law firm from acting as counsel of record in a New York case because a "virtual" firm did not satisfy New York's requirement that lawyers practicing in New York have a physical office there; "Pursuant to Judiciary Law §470 entitled 'Attorneys having offices in this state may reside in adjoining state.'"; "A person, regularly admitted to practice as an attorney and counsellor, in the courts of record of this state, whose office for the transaction of law business is within the state, may practice as such attorney or counsellor, although he resides in an adjoining state." (citation omitted); "That is, this statutory directive that nonresident attorneys maintain an office within the State 'for the transaction of law business' requires nonresident attorneys to maintain a physical office in New York Indeed, an attorney or firm that has appeared in an action while violating Judiciary Law §470 must be disqualified from continuing to appear or represent any of the parties in the action."; "Based upon the papers submitted herewith, this Court finds that, in this case, neither Higbee & Associates ('Higbee') nor Raymin L. Ngo ('Ngo') had a physical office in the State of New York at the time that they appeared in this action on behalf of the defendants (Id). Thus, said entities are all non-residents and have failed to comply with the Judiciary Law §470. Indeed, the papers herein establish that Ngo and Higbee's pleading – the Verified Answer and Counterclaims – identified their principal office to be located in Santa Ana, California"; "In the end, this Court finds that there is no evidence on this record that Ngo and Higbee had physical addresses in New York. Moreover, this Court cannot overlook the fact that the defendants have failed to offer any competing evidence against the sworn affidavits of Steven Pena and Jakeen Penss, Sr., process servers who attest that they physically went to the 48 Wall Street and or 605 West Genesee addresses, respectively, and confirmed that neither Ngo nor Higbee had physical offices at these locations. Accordingly, this court herewith awards the plaintiff its instant motion to disqualify the defendants' attorneys of record – Raymin L. Ngo and Higbee & Associates.").
- New York LEO 1054 (4/10/15) (Virginia ethics rules govern a New York-licensed lawyer's "virtual" practice in Virginia; "If a New York lawyer has been

admitted to practice (generally, or for purposes of a proceeding) before the Virginia courts, when the lawyer represents a client in a proceeding in a court in Virginia, the rules to be applied ordinarily will be the rules of Virginia, unless the court rules provide otherwise. If the lawyer does not represent a client in a proceeding in a court, the rules to be applied will be those of the 'admitting jurisdiction' in which the inquirer principally practices, unless the conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice. If the lawyer is permitted to practice in Virginia without being formally admitted there, the lawyer should be deemed to be 'licensed to practice' in Virginia for purposes of Rule 8.5(b)(2). However, if the lawyer solicits business in New York, the lawyer's conduct in connection with such solicitation would have its principal effect in New York and the disciplinary authorities would apply the rules of New York."; "Assuming the inquirer is soliciting business in New York, another question arises: must he have a local office in New York? This question is governed by law and not by the Rules. In N.Y. State 1025 (2014), we noted that Judiciary Law §470 has been interpreted by New York courts to require that attorneys have an office in New York if they practice, but do not live, in New York. See Lichtenstein, 251 A.D.2d 64; Haas, 237 A.D.2d 729; Matter of Larsen, 182 A.D.2d 149 (2d Dept 1992). We also determined that Rule 7.1(h), which requires that every lawyer advertisement include the 'principal law office address and telephone number of the lawyer or law firm whose services are being offered,' does not provide an independent basis for requiring a physical office in New York."; "In N.Y. State 1025, we noted the case of Schoenefeld v. New York, 748 F.3d 464 (2d Cir. 2014). There, the Northern District of New York found unconstitutional the interpretation of § 470 requiring a physical office. On appeal, the Second Circuit referred a certified question to the New York Court of Appeals, asking about the minimum requirements necessary to satisfy the requirement for a local office for the transaction of law business. Although the Court of Appeals had not responded when we published N.Y. State 1025, on March 31, 2015, it issued its response, confirming that the statute requires a physical office for the conduct of business. The Second Circuit must now decide whether enforcement of §470 as so interpreted would be constitutional."; "Assuming the inquirer is soliciting business from New York residents, the inquirer must comply with various duties imposed by the Rules. See N.Y. State 1025 (2014) (listing duties under various Rules, and noting that there is no 'virtual law office exception' to any of the Rules)." (emphasis added)).

Best Answer

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

B 2/13, 11/16, 3/17

Lawyers “Invisibly” Practicing Law In A State Where They Are Not Licensed

Hypothetical 5

Your elderly father lives in Utah. You are considering whether you can move from Los Angeles (where you practice in a medium-sized firm) to Utah, where you can take care of your dad. You would work remotely from Utah – not representing any clients in that state, or practicing Utah law. In essence, you would be “invisible” in Utah, and continue your normal practice.

May you continuously practice in Utah under these conditions?

YES (PROBABLY)

Analysis

Lawyers might seek to live in a state where they are not licensed, while continuously practicing -- "virtually" -- in a state where they are licensed.

There are several scenarios in which such a arrangement might be attractive. For instance, lawyers might want to continue practicing "big city" law while living in more attractive or less expensive rural settings. They might want to be near aging parents, follow a spouse who will be attending graduate school for several years, etc.

One might wonder why the state where such lawyers will be physically present would care about any multijurisdictional implications. Presumably, that state has an interest in protecting its own citizens from lawyers representing them without local knowledge, without any supervision from that state's bar, etc. But why would that state be concerned with such a scenario, as long as those lawyers do not hold themselves out to practice in the state, do not represent any citizens of that state, etc.?

A February 2013 release of the ABA Ethics 20/20 Commission noted this issue, but without reaching any conclusions.

Conversely, a lawyer may be licensed in one jurisdiction, but live in a jurisdiction where the lawyer is not licensed. If the lawyer conducts a virtual practice from the latter jurisdiction and serves clients only in the jurisdiction where the lawyer is actually licensed, there is a question of whether the lawyer has a "systematic and continuous" presence in the jurisdiction where the lawyer is living and thus violates Rule 5.5(b) in that jurisdiction. The Rule is unclear in this regard as well.

Am. Bar Ass'n Comm'n on Ethics 20/20, Introduction and Overview, at 10 n.27 (Feb. 2013) (emphases added).

Most states continue to focus on lawyers' physical presence – generally barring lawyers domiciled in the state from representing that state's citizens without a license in that state -- even if they do not provide advice about the state's law.

Predictably, Florida has traditionally taken such a protective approach. A Florida Rules comment prohibits lawyers from establishing "an office or regular presence" in Florida – even if they limit their practice to the law of a state where they are licensed.

- Florida Rule 4-5.5 cmt. (" . . . a lawyer licensed to practice law in New York could not establish an office or regular presence in Florida to practice New York law. Such activity would constitute the unlicensed practice of law. However, for purposes of this rule, a lawyer licensed in another jurisdiction who is in Florida for vacation or for a limited period of time, may provide services to their clients in the jurisdiction where admitted as this does not constitute a regular presence.") (emphasis added).

Some states have adopted the same narrow approach, but in a more subtle fashion.

For instance, Colorado prevents lawyers domiciled in that state from taking advantage of the ethics provisions permitting non-Colorado lawyers to temporarily practice in the state.

- Rules Governing Admission To The Practice Of Law In Colorado; Rule 205.1 (Revised 2014) ("(1) Eligibility. An attorney who meets the following conditions is an out-of-state attorney for the purpose of this rule: (a) The attorney is licensed to practice law and is on active status in another jurisdiction in the United States; (b) The attorney is a member in good standing of the bar of all courts and jurisdictions in which he or she is admitted to practice; (c) The attorney has not established domicile in Colorado; and (d) The attorney has not established a place for the regular practice of law in Colorado from which the attorney holds himself or herself out to the public as practicing Colorado law or solicits or accepts Colorado clients." (emphasis added)).

In 2015, some New York lawyers unsuccessfully sought to move New York in the direction of allowing such practice.

- ABA/BNA Lawyers' Manual on Professional Conduct, Vol. 31, No. 26 (12/30/15) ("While characterizing the new temporary practice rule as a 'huge advance' for New York, Davis [Anthony Davis of Hinshaw & Culbertson LLP] pointed out that the court of appeals did not adopt a recommendation made by a group of large law firms that have offices in New York and other jurisdictions."; "That recommendation took aim at the situation where a lawyer lives in one state but practices law remotely from an office in another state where the lawyer is admitted to practice. For example, a lawyer may live in New York and commute to New Jersey or Connecticut. In this situation, Davis said, it's a stretch to say the lawyer is temporarily in New York, and the lawyer arguably may be engaging in unauthorized practice there."; "In comments on the proposed temporary practice rule, the large firms recommended additional language that would allow a lawyer authorized to practice law in a U.S. jurisdiction to provide legal services that exclusively involve federal law, the law of another jurisdiction or tribal law, provided the lawyer does not hold himself out in any way as having an office for the practice of law in New York."; "This language, the firms said, would prevent UPL accusations against lawyers who live in New York and use technology to practice remotely as if they were physically in their state of admission, provided they do not practice New York law or hold themselves out as doing so.).

However, states have gradually begun to accept the concept that lawyers from other states may practice systematically and continuously in a state where they are not licensed – as long as they are essentially “invisible” in that state.

For instance, Arizona amended its ethics rules to permit lawyers to practice continuously in Arizona (without a license there) as long as they give advice only about the law of a state where they are licensed (or federal or tribal law).

A lawyer admitted in another United States jurisdiction, or a lawyer admitted in a jurisdiction outside the United States, not disbarred or suspended from practice in any jurisdiction may provide legal services in Arizona that exclusively involve federal law, the law of another jurisdiction, or tribal law.

Arizona Rule 5.5(d) (emphasis added).

Other states have not amended their rules (yet), but have indicated in legal ethics opinions that lawyers practicing “invisibly” within the state have not really established a “systematic and continuous” presence there.

This approach appears to have begun in a 2005 Maine LEO, and has accelerated since then.

- Maine LEO 189 (11/15/05) (a lawyer who is not licensed in Maine does not engage in the unauthorized practice of law if that lawyer practices from her “vacation home in Maine” or even “live[s] in Maine and work[s] out of his or her home for the benefit of a law firm and clients located in some other jurisdiction” - as long as the lawyer does not “hold herself out to the public as admitted in Maine”).
- Virginia LEO 1856 (9/11/11) (Under Virginia Rule 5.5, non-Virginia lawyers “may not practice Virginia law on a ‘systematic and continuous’ basis,” unless they (1) limit their practice to the “law of the jurisdiction/s where they are licensed”; (2) practice “exclusively federal law” under the federal supremacy clause (such as “lawyers with practices limited to immigration or military law or who practice before the Internal Revenue Service, the United States Tax Court, or the United States Patent and Trademark Office,” although lawyers such as bankruptcy, patent or federal procurement lawyers must abide by courts’ possible limitation of practice before the courts to members of the

Virginia Bar, and may provide advice "such as the debtor's homestead exemption and status or priority of claims or liens" or "the assignment of the patent to a third party or the organization of a corporate entity to market or franchise the invention" only under the conditions mentioned immediately below; (3) "provide advice about Virginia law or matters peripheral to federal law (described immediately above) only if they do so on a "temporary and occasional" basis and (as stated in UPL Opinion 195) "under the direct supervision of a Virginia licensed lawyer before any of the [non Virginia] lawyer's work product is delivered to the client" or if they "associate with an active member of the Virginia State Bar." This liberal multijurisdictional practice approach (allowing non-Virginia lawyers to practice systematically and continuously in Virginia as long as they limit their practice to the law of jurisdictions where they are licensed) "embrac[es]" the approach of two earlier Virginia Supreme Court-approved Virginia UPL opinions (UPL Opinions 195 (2000) and 201 (2001)). Rule 5.5 overrules an earlier UPL Opinion about which law applies to a non Virginia lawyer's practice of another state's law while physically in Virginia; thus, "New York law should govern whether a foreign lawyer not authorized to practice in New York may advise New York clients on matters involving New York law. The [non Virginia] lawyer's physical presence in Virginia may not be a sufficient basis to apply Virginia's rules over New York's rules governing foreign lawyer practice." Contract lawyers hired to "work on a matter involving Virginia law" must either "be licensed in Virginia or work in association with a Virginia licensed lawyer in the firm on a temporary basis" although such a lawyer's practice "could be regarded as 'continuous and systematic'" if the non Virginia contract lawyer is hired "to work on several and various Virginia matters/cases over a period of time." Such contract lawyers need not be licensed in Virginia if the lawyer is "hired to work only on matters involving federal law or the law of the jurisdiction in which the [non Virginia] contract lawyer is admitted." [Approved by the Supreme Court of Virginia 11/2/16]).

- Utah LEO 19-03 (5/14/19)(holding that non- Utah lawyers physically present in Utah on a non-temporary basis may practice law as long as they do not hold themselves out as Utah lawyers and only represent clients in states where they are licensed; describing two scenarios that do not amount to the in authorized practice of law in Utah; "An attorney from New York may decide to semi-retire in St. George, Utah, but wish to continue providing some legal services for his established New York clients."; "An attorney from California may relocate to Utah for family reasons (e.g., a spouse has a job in Utah, a parent is ill and needs care) and wish to continue to handle matters for her California clients."; explaining that "The Utah Rules of Professional Conduct do not prohibit an out-of-state attorney from representing clients from the state where the attorney is licensed even if the out-of-state attorney does so from his private location in Utah. However, in order to avoid engaging in the unauthorized practice of law, the out-of-state attorney who lives in Utah must not establish a public office in Utah or solicit Utah business."; "[i]t seems

clear that the out-of-state attorney who lives in Utah but continues to handle cases for clients from the state where the attorney is licensed has not established an office or 'other systemic and continuous presence' for practicing law in [Utah] a jurisdiction in which the lawyer is not licensed," and is not in violation of Rule 5.5 of the Utah Rules of Professional Conduct."; "The question posed here is just as clear as the question before the Ohio Supreme Court [In re Application of Jones, 2018 WL 5076017 (Ohio Oct. 17, 2018)]: what interest does the Utah State Bar have in regulating an out-of-state lawyer's practice for out-of-state clients simply because he has a private home in Utah? And the answer is the same – none." (emphases added).

Thus, this gradual movement started before the COVID-19 pandemic. But, the pandemic undoubtedly caused states to revisit the issue, because many lawyers moved out of cities or states with a high COVID-19 risk – to work “remotely” from safer and perhaps cheaper locations (such as a vacation home or their parent’s home).

In 2020, the ABA joined the trend.

- ABA LEO 495 (12/16/20)(A lawyer’s “physical presence in the local jurisdiction [where she is physically located while representing clients in other jurisdictions] is incidental; it is not for the practice of law” – as long as the lawyer “is for all intents and purposes invisible as a lawyer to a local jurisdiction where the lawyer is physically located, but not licensed.” Thus, such a lawyer does not violate ABA Model Rule 5.5 as long as she does not hold out to the public that she is authorized to practice in that jurisdiction, and does not practice that jurisdiction’s law. Although a jurisdiction might consider that conduct to be the unauthorized practice of law, and has an interest in ensuring that such a lawyer is “competent,” such a “local jurisdiction has no real interest in prohibiting a lawyer from practicing the law of a jurisdiction in which that lawyer is licensed and therefore qualified to represent clients in that jurisdiction.” Maine LEO 189 (2005) and Utah LEO 19-03 agree with this analysis. Among the various ABA Model Rule 5.5 provisions allowing lawyers to practice in a jurisdiction where they are not licensed, lawyers can also rely on ABA Model Rule 5.5 (c)(4’s) provision permitting “temporary” practice under specified conditions where they are not licensed – and “[h]ow long that temporary period lasts could vary significantly based on the need to address the pandemic.”) (emphases added).

Since ABA LEO 495 (12/16/20), several other bars have adopted the same forgiving approach.

- San Francisco LEO 2021-1 (8/21) (holding that non-California lawyers may practice law in San Francisco as long as they “will not advertise otherwise hold [themselves] out as admitted to practice law in California and will make clear that [they are] only licensed” in their home state, and limit their practice “to representing clients in accord with the rules of [the state] where [they are] licensed”; emphasizing California law’s emphasis on protecting California residents; “Lawyer must not (1) ‘practice law in California’ within the meaning of B&P Code Section 6125; (2) establish an office or a ‘systematic or continuous presence’ in California’ for ‘the practice of law’ in violation of CRPC Rule 5.5(b)(1); or (3) ‘hold out to the public or otherwise represent that the lawyer is admitted to practice law in California ‘in violation of CRPC Rule 5.5(b)(2). The determination of these questions depends on a number of factors, including the extent to which Lawyer’s activities require the protection of California persons or entities from incompetent or unethical attorneys.”; noting that states taking a more restrictive view focus on lawyers’ representation of clients in states where they are physically practicing and not licensed; “Consistent with this analysis, other jurisdictions have found violations of versions of ABA Model Rule 5.5 when out-of-state lawyers systematically reached out to ‘create’ multiple relationships with individual clients in a state where the lawyer was not admitted, and to represent those clients in matters centered in that state. See, e.g., In re Tonwe, 929 A. 2d 774, 778, 778-89 (Del. 2007) (out-of-state lawyer, who regularly represented in-state clients in in-state matters, and ‘cultivated a network of in-state contacts’ to attract clients, took steps to establish a systematic and continuous presence); In re Kingsley, 2008 Del. Lexis 255, 950 A.2d 659 at *13 (Del. 2008) (out-of-state lawyer, who had monthly retainer with in-state accountant to draft documents for in-state clients, established a systematic and continuous presence); Illinois LEO 12-09 (March 2012) (out-of-state lawyer sought work from in-state clients and sought to perform work while present in the state). These cases support the view that versions of ABA Model Rule 5.5, such as CRPC rule 5.5, are centrally aimed at preventing harm to clients in the jurisdiction where the lawyer is not admitted.”; favorably mentioning Florida LEO 2019-4 (5/20/21), without mentioning that the Florida LEO involved a lawyer practicing purely federal law; also favorably mentioning Utah and Maine LEOs; “The Utah Ethics Advisory Committee Opinion 19-03 (2019) puts it this way: ‘what interest does the Utah State Bar have in regulating an out-of-state lawyer’s practice for out-of-state clients simply because he has a private home in Utah? And the answer is the same – none.’ See also Maine Ethics Opinion 189 (2005).” (emphasis added).
- New Jersey LEO 742 (jointly issued as New Jersey UPL 59) (10/6/21) (explaining that non-New Jersey lawyers may work remotely from their New Jersey home; “Non-New Jersey licensed lawyers may practice out-of-state law from inside New Jersey provided they do not maintain a ‘continuous and systematic presence’ in New Jersey by practicing law from a New Jersey office or otherwise holding themselves out as being available for the practice

of law in New Jersey. A ‘continuous and systematic presence’ in New Jersey requires an outward manifestation of physical presence, as a lawyer, in New Jersey.”; “Such outward manifestations of physical presence include, most significantly, practicing from a law office located in New Jersey. See Jackman, supra, 165 N.J. at 558 (Massachusetts lawyer practicing from a New Jersey law firm office). Other outward manifestations include, but are not limited to, any advertisement or similar communication stating that the non-New Jersey licensed lawyer engages in a legal practice in New Jersey; any advertisement or similar communication referring to a location in New Jersey for the purpose of meeting with clients or potential clients; any advertisement or similar communication stating that mail or deliveries to the lawyer should be directed to a New Jersey location; and otherwise holding oneself out as available to practice law in New Jersey. Accordingly, non-New Jersey licensed lawyers who are associated with an out-of-state law firm, or are in-house counsel for an out-of-state company, and who simply work remotely from their New Jersey homes but do not exhibit such outward physical manifestations of presence, are not considered to have a ‘continuous and systematic presence’ for the practice of law in New Jersey. Such non-New Jersey licensed lawyers are not considered to be engaging in the unauthorized practice of New Jersey law.” (emphases added).

Not surprisingly, all eyes have been on Florida – which is among the most defensive of states in resisting non-Florida lawyers’ presence there.

In May 2021, the Florida Bar issued a lengthy legal ethics opinion that seems to follow this new approach.

- Fla. Bar re Advisory Op.—Out-of-State Attorney Working Remotely, 318 So. 3d 538, 539-40, 541-42, 542 (Fla. 2021) (analyzing Florida’s multijurisdictional Rule 5.5; explaining that a New Jersey lawyer domiciled in Florida may practice federal law without being a Florida Bar member, under certain circumstances; not explaining whether the opinion would have reached the same favorable conclusion about the non-Florida lawyer’s systematic and continuous presence in Florida if the lawyer had not been practicing purely federal law, and thus unable to rely on the Supremacy Clause for the freedom to practice in Florida without being a member of the Florida Bar; describing the lawyer’s situation: “[h]e is licensed to practice law in New Jersey, New York, and before the United States Patent and Trademark Office (hereinafter ‘USPTO’). He is not licensed to practice law in Florida. He recently retired from his position as chief IP counsel for a major U.S. Corporation. That position was in New Jersey. He moved from New Jersey to Florida. He started working as an attorney with a New Jersey law firm specializing in federal IP law. The firm has no offices in Florida and has no plans to expand its business in Florida. His professional office will be

located at the firm's business address in New Jersey, although he will do most of his work from his Florida home using a personal computer securely connected to the firm's computer network. In the conduct of his employment with the firm, he will not represent any Florida persons or entities and will not solicit any Florida clients. While working remotely from his Florida home, he will have no public presence or profile as an attorney in Florida. Neither he nor his firm will represent to anyone that he is a Florida attorney. Neither he nor his firm will advertise or otherwise inform the public of his remote work presence in Florida. The firm's letterhead and website, and his business cards will list no physical address for him other than the firm's business address in New Jersey and will identify him as 'Of Counsel – Licensed only in NY, NJ and the USPTO.' The letterhead, website, and business cards will show that he can be contact ted by phone or fax only at the firm's New Jersey phone and fax number. His professional email address will be the firm's domain. His work at the firm will be limited to advice and counsel on federal IP rights issues in which no Florida law is implicated, such as questions of patent infringement and patent invalidity. He will not work on any issues that involve Florida courts or Florida property, and he will not give advice on Florida law." (footnotes omitted); endorsing the reasoning of Utah LEO 18-03 (May 2019); "In paragraph 16 of its opinion, the UEAOC posed the following question: '[W]hat interest does the Utah State Bar have in regulating an out-of-state lawyer's practice for out-of-state clients simply because he has a private home in Utah? . . . [T]he answer is . . . none.'; Like the UEAOC, the Standing Committee's concern is that the Petitioner does not establish an office or public presence in Florida for the practice of law. As discussed above, neither is occurring here. And in answering the same question posed by the UEAOC, it is the opinion of the Standing Committee that there is no interest that warrants regulating Petitioner's practice for his out-of-state clients under the circumstances described in his request simply because he has a private home in Florida." (alterations in original); pointing to the pandemic in supporting its conclusion: "In light of the current COVID-19 pandemic, the Standing Committee finds the written testimony of Florida-licensed attorney, Salomé J. Zikakis, to be particularly persuasive: 'I believe the future, if not the present, will involve more and more attorneys and other professionals working remotely, whether from second homes or a primary residence. Technology has enabled this to occur, and this flexibility can contribute to an improved work/life balance. It is not a practice to discourage. There are areas of the law that do not require being physically present, whether in a courtroom or a law office. Using the attorney's physical presence in Florida as the definitive criteria [sic] is inappropriate. So long as the attorney is not practicing Florida law, is not advertising that he practices Florida law, and creates no public presence or profile as a Florida attorney, then there is no UPL simply because the attorney is physically located in Florida. There is no harm to the public. These facts do not and should not constitute UPL in Florida.'" (alteration in original); concluding as follows: "[i]t is the opinion of the Standing Committee that the Petitioner who simply

establishes a residence in Florida and continues to provide legal work to out-of-state clients from his private Florida residence under the circumstances described in this request does not establish a regular presence in Florida for the practice of law. Consequently, it is the opinion of the Standing Committee that it would not be the unlicensed practice of law for Petitioner, a Florida domiciliary employed by a New Jersey law firm (having no place of business or office in Florida), to work remotely from his Florida home solely on matters that concern federal intellectual property rights (and no Florida law) and without having or creating a public presence or profile in Florida as an attorney." (emphases added)).

Unfortunately for anyone seeking clarity, this seemingly dramatic new Florida approach might have a catch. The non-Florida lawyer described in the legal ethics opinion would: (1) essentially be "invisible" in Florida; and (2) would limit his practice to purely federal intellectual property law. Of course, under the Supremacy Clause, Florida could not stop him from doing that anyway – even if he was not "invisible" while practicing in Florida. The Florida legal ethics opinion would have been great news for those favoring liberalization of the multijurisdictional practice rules if the lawyer was not so limiting his practice, but instead intended to conduct a regular practice of transactional or litigation law governed by the state or states where the lawyer was licensed.

Best Answer

The best answer to this hypothetical is PROBABLY YES.

Ex Parte Communications with Represented Adversaries

Hypothetical 6

You have been representing a company for about 18 months in an effort to negotiate the purchase of a patent from a wealthy individual inventor. The negotiations have been very cordial at times, but occasionally turn fairly contentious. You and your company's vice president have met several times with the inventor and his lawyer, both at the inventor's home and in a conference room in your company's headquarters. After some of the fruitful meetings, you and the other lawyer have exchanged draft purchase agreements, with both of you normally copying the vice president and the inventor. Last week things turned less friendly again, and you heard that the inventor's lawyer might be standing in the way of finalizing a purchase agreement. This morning you received a fairly cool email from the other lawyer, rejecting your latest draft purchase agreement and essentially threatening to "start all over again" in the negotiations given what he alleges to be your client's unreasonable position. As in earlier emails, the other lawyer showed a copy of the email to his client, the inventor.

May you respond to the other lawyer's email using the "Reply All" function, and defending your client's positions in the negotiations?

YES (PROBABLY)

Analysis

Introduction

The ABA Model Rules contain a fairly simple prohibition that generates a nearly endless series of issues.

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

ABA Model Rule 4.2.

This prohibition rests on several basic principles.

This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the

matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation.

ABA Model Rule 4.2 cmt. [1].

As one analyzes application of the basic prohibition, it becomes apparent that the more important principle underlying the rule is the need to avoid interference between a client's and lawyer's relationship. For instance, the prohibition extends to many types of communications that could not possibly involve a lawyer's "overreaching."

The Restatement follows essentially the same approach, although with a few more variations.

A lawyer representing a client in a matter may not communicate about the subject of the representation with a nonclient whom the lawyer knows to be represented in the matter by another lawyer or with a representative of an organizational nonclient so represented as defined in § 100, unless:

(a) the communication is with a public officer or agency to the extent stated in § 101;

(b) the lawyer is a party and represents no other client in the matter;

(c) the communication is authorized by law;

(d) the communication reasonably responds to an emergency; or

(e) the other lawyer consents.

Restatement (Third) of Law Governing Lawyers § 99(1) (2000). The Restatement recognizes the two same basic principles underlying the prohibition.

The rules stated in §§ 99-103, protect against overreaching and deception of nonclients. The rule of this Section also protects the relationship between the represented nonclient and that person's lawyer and assures the confidentiality of the nonclient's communications with the lawyer

Restatement (Third) of Law Governing Lawyers § 99 cmt. b (2000).

The language of ABA Model Rule 4.2 and the Restatement involves several important issues.

First, courts and bars might have to determine whether there is a "matter" sufficient to trigger the Rule 4.2 prohibition.

For instance, in Alaska LEO 2006-1, the Alaska Bar dealt with situations in which a lawyer has a consumer complaint about a local company, disagrees with a local newspaper's editorial policy, or has concerns as a homeowner with a municipal government's decision on a building permit. Among other things, the Alaska Bar discussed whether any of the scenarios involved a "matter" in which the store, newspaper or government is represented.

In the three examples set forth above, the key question posed in each instance is whether there is a "matter" that is "the subject of the representation." An initial contact to attempt to obtain information or to resolve a conflict informally rarely involves a matter that is known to be the subject of representation. Consequently, lawyers, representing clients or themselves, ordinarily are free to contact institutions that regularly retain counsel in an attempt to obtain information or to resolve a problem informally. These sorts of contacts frequently resolve a potential dispute long before it becomes a "matter" that is "the subject of representation." The above examples are all worded to suggest the inquiry occurs at the early stage of a consumer or citizen complaint. Inquiries directed to employees and managers would be proper in each instance.

.....

The line between permitted contacts at the early stage of a potential matter and forbidden contacts after a dispute has sharpened and become a "matter that is the subject of representation" depends on the question discussed in the preceding section: Until the lawyer knows that an opposing counsel has been asked by the party to

deal with the particular new matter, the lawyer is not prohibited from dealing directly with representatives of the party.

Alaska LEO 2006-1 (1/27/06).

Second, courts and bars might have to determine whether a lawyer engaging in such an ex parte contact is doing so "in representing a client." ABA Model Rule 4.2 (emphasis added).

In some situations involving ex parte contacts, lawyers are not acting as client representatives. For instance, Maryland LEO 2006-7 (2006) held that a lawyer appointed by the court as guardian of the property of a disabled nursing home resident may communicate directly with the nursing facility, even though the facility is represented by a lawyer. The Maryland Bar contrasted the role of a guardian with that of a lawyer.

"A guardian is not an agent of a ward, because guardians are not subject to the ward's control; rather, the guardians serve a unique role as agents of the court. In reality the court is the guardian; an individual who is given that title is merely an agent or arm of that tribunal in carrying out its sacred responsibility. Thus, a ward may not select, instruct, terminate, or otherwise control his guardian."

In contrast, an attorney-client relationship is "an agent-principal relationship." . . . "A client's right to select and direct his or her attorney is a fundamental aspect of attorney-client relations. Thus, the principal-agent relationship between a client and an attorney is always a consensual one."

From this explication, it does not appear that the member appointed by the court as Guardian "represents" the Resident. From your recitation of the facts, no attorney-client relationship exists, only a guardian-ward relationship. Accordingly, MRPC 4.2 is not applicable to communications between the Guardian and the Nursing Facility.

Maryland LEO 2006-7 (2006) (citations omitted). Other bars have taken the same approach.

- Ohio LEO 2006-5 (6/9/06) ("The DR 7-104(A)(1) restraint on communication with represented persons and parties applies to an attorney who is appointed to serve in a dual role as guardian ad litem and attorney for a minor child. Thus, it is improper for an attorney, appointed to serve in a dual role as a child's attorney and guardian ad litem, to communicate on the subject of the representation with a represented person or party unless there is consent by counsel or authorization by law, such as through a court rule or court order. Communication that is administrative in nature, such as scheduling appointments or meetings, is not communication on the subject of the representation.").
- Arizona LEO 03-02 (4/2003) (addressing ex parte contact with debtors by lawyers who are acting as bankruptcy trustees; "The lawyer-trustee may communicate directly with persons who are represented by counsel concerning the subject matter of the bankruptcy case. This direct communication is limited to situations where an attorney is appointed to act exclusively as a bankruptcy trustee. If the attorney has dual appointment to act also as attorney for the trustee, then ER 4.2 applies and prohibits ex parte contacts and communications, unless otherwise authorized by law.").

The restriction on ex parte communications to situations in which a lawyer is "representing a client" also allows clients to seek "second opinions" from other lawyers -- because those other lawyers are not "representing a client" in that matter.

A lawyer who does not represent a person in the matter and who is approached by an already-represented person seeking a second professional opinion or wishing to discuss changing lawyers or retaining additional counsel, may, without consent from or notice to the original lawyer, respond to the request, including giving an opinion concerning the propriety of the first lawyer's representation.

Restatement (Third) of Law Governing Lawyers § 99 cmt. c (2000); ABA Model Rule 4.2 cmt. [4] ("[N]or does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter.").

Third, as in other situations involving conflicts of interests, courts and bars might have to determine whether the other person is "represented by another lawyer." ABA Model Rule 4.2 (emphasis added).

In class action situations, this issue normally involves a debate about whether the attorney-client relationship has begun. The Restatement explains the majority position on this issue.

A lawyer who represents a client opposing a class in a class action is subject to the anticontact rule of this Section. For the purposes of this Section, according to the majority of decisions, once the proceeding has been certified as a class action, the members of the class are considered clients of the lawyer for the class; prior to certification, only those class members with whom the lawyer maintains a personal client-lawyer relationship are clients. Prior to certification and unless the court orders otherwise, in the case of competing putative class actions a lawyer for one set of representatives may contact class members who are only putatively represented by a competing lawyer, but not class representatives or members known to be directly represented in the matter by the other lawyer.

Restatement (Third) of Law Governing Lawyers § 99 cmt. I (2000); Debra L. Bassett, Pre-Certification Communication Ethics in Class Actions, 36 Ga. L. Rev. 353, 355-56 (Winter 2002) ("The majority view, embraced by most courts, the Restatement, and the leading class action treatise, holds that before class certification, putative class members are not 'represented' by class counsel." (footnotes omitted)); Philadelphia LEO 2006-6 (9/2006) (holding that a defense lawyer may engage in ex parte communications with purported class members before a class certification; "The majority rule in most jurisdictions is that, after a class action is filed but prior to certification of a class, contact between counsel for a defendant and members of the putative class is permitted."; citing the Restatement; noting that the ex parte contact

would be with sophisticated corporations rather than unsophisticated individuals; warning that the lawyer must make the recipients of the communications aware of the pending class action); Blanchard v. Edgemark Fin. Corp., No. 94 C 1890, 1998 U.S. Dist. LEXIS 15420, at *19 (N.D. Ill. Sept. 11, 1998) (recognizing that class members are represented "[o]nce a class has been certified").

The ABA has also taken this approach.

- ABA LEO 445 (4/11/07) (in the class action context, "[a] client-lawyer relationship with a potential member of the class does not begin until the class has been certified and the time for opting out by a potential member of the class has expired"; thus, Model Rules 4.2 and 7.3 "do not generally prohibit counsel for either plaintiff or defendant from communicating with persons who may in the future become members of the class"; both lawyers must comply with Model Rule 4.3 if they communicate with potential class members; plaintiffs' lawyer must comply with Model Rule 7.3 if they are soliciting membership in the class, but those restrictions "do not apply to contacting potential class members as witnesses"; "Both plaintiffs' counsel and defense counsel have legitimate need to reach out to potential class members regarding the facts that are the subject of the potential class action, including information that may be relevant to whether or not a class should be certified."; "Restricting defense communication with potential plaintiffs could inhibit the defendant from taking remedial measures to alleviate a harmful or dangerous condition that has led to the lawsuit. A defendant in a class action lawsuit also would be prevented from attempting to reach conciliation agreements with members of the potential class without going through a lawyer whom the potential class member may have no interest in retaining."; of course, "the court may assume control over communications by counsel with class members").

In other situations, the debate focuses on whether the attorney-client relationship has ended. See, e.g., K-Mart Corp. v. Helton, 894 S.W.2d 630, 631 (Ky. 1995) ("The Court of Appeals correctly observed that the continued representation of an individual after the conclusion of a proceeding is not necessarily presumed and that the passage of time may be a reasonable ground to believe that a person is no longer represented by a particular lawyer. Rule 4.2 is not intended to prohibit all direct contact in such

circumstances. Here counsel for plaintiffs had reasonable grounds to believe that the petitioners were not represented by counsel when he took the Pittman statement. In considering the fact that no contact was made by an attorney on behalf of K-Mart until more than one year after the incident which gave rise to this action and almost one year after plaintiffs' counsel took the statement, we believe that the communication with the K-Mart employee was not with a party the attorney knew was represented by another attorney in the matter.").

Fourth, courts and bars might have to determine if the lawyer making ex parte contacts "knows" that the other person is represented by another lawyer in the matter.

ABA Model Rule 1.0 defines "knows" as denoting

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

ABA Model Rule 1.0(f). A comment to ABA Model Rule 4.2 explains that

[t]he prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed. This means that the lawyer has actual knowledge of the fact of the representation; but such actual knowledge may be inferred from the circumstances. See Rule 1.0(f). Thus, the lawyer cannot evade the requirement of obtaining the consent of counsel by closing eyes to the obvious.

ABA Model Rule 4.2 cmt. [8] (emphasis added).

The ABA has also explained that

Rule 4.2 does not, like Rule 4.3 [governing a lawyer's communications with an unrepresented person], imply a duty to inquire. Nonetheless, it bears emphasis that, as stated in the definition of "knows" . . . , actual knowledge may be inferred from the circumstances. It follows, therefore, that a lawyer may not avoid Rule 4.2's bar against communication

with a represented person simply by closing her eyes to the obvious.

ABA LEO 396 (7/28/95).

Fifth, courts and bars might have to determine if an ex parte contact constitutes a "communication" for purposes of Rule 4.2.

For instance, in Hill v. Shell Oil Co., 209 F. Supp. 2d 876 (N.D. Ill. 2002), plaintiffs filed a class action suit against Shell gas stations, claiming that they discriminated against blacks. The previous six years, plaintiffs had arranged for assistants posing as consumers to interact with Shell gas station managers, videotaping what they alleged to be racial discrimination. Plaintiffs arranged for the interactions to be videotaped. When Shell discovered this type of investigation, it moved for a protective order to prohibit any further such contacts. The court denied the protective order, finding that the gas station managers were in the Rule 4.2 "off-limits" category, but that the contacts between the investigators and the gas station employees did not constitute "communications" sufficient to trigger the Rule 4.2 prohibition.

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. These interactions do not rise to the level of communication protected by Rule 4.2. To the extent that employees and plaintiffs have substantive conversations outside of normal business transactions, we will consider whether to bar that evidence when and if it is offered at trial.

Id. at 880.

Courts take Rule 4.2 very seriously. For instance, in In re Conduct of Knappenberger, 108 P.3d 1161 (Or. 2005), four law firm employees filed an employment-related lawsuit against a lawyer. After the lawyer they sued received service of the Summons and Complaint late on a Friday afternoon, he confronted one of the employees and "ask[ed], in an angry tone, what it was and whose idea it had been." Id. at 1163. It was apparently undisputed that "[t]he entire conversation lasted between 30 seconds and one minute." Id. (emphasis added). The lawyer spoke the next day to another plaintiff who had sued him -- in a conversation that lasted between 5 and 20 minutes. Both of these plaintiffs reported these contacts to their lawyers, who amended the Complaint to add a retaliation claim.

The Oregon Supreme Court found that the lawyer had violated the ex parte contact prohibition, and suspended him for 120 days. The court noted in passing (but apparently found irrelevant) the fact that the lawyer ultimately won the lawsuit brought by his employees.

The general rule applies even to lawyers sending copies of pleadings to represented adversaries.

Under the anti-contact rule of this Section, a lawyer ordinarily is not authorized to communicate with a represented nonclient even by letter with a copy to the opposite lawyer or even if the opposite lawyer wrongfully fails to convey important information to that lawyer's client . . . such as a settlement offer.

Restatement (Third) of Law Governing Lawyers § 99 cmt. f (2000).

ABA Model Rule 4.2 and every state's variation require the other person's lawyer's consent. The other person's consent does not suffice. ABA Model Rule 4.2 cmt. [3] ("The Rule applies even though the represented person initiates or consents to

the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.").

The Restatement takes the same approach. Restatement (Third) of Law Governing Lawyers § 99 cmt. b (2000) ("[t]he general exception to the rule . . . requires consent of the opposing lawyer; consent of the client alone does not suffice"); Restatement (Third) of Law Governing Lawyers § 99 cmt. f (2000) ("[t]he anti-contact rule applies to any communication relating to the lawyer's representation in the matter, whoever initiates the contact and regardless of the content of the ensuing communication").

For instance, in N.Y. City LEO 2005-04 (4/2005), the New York City Bar applied the ex parte prohibition even to communications initiated by a "sophisticated non-lawyer insurance adjuster."

Ignoring this rule can cause real damage. In Inorganic Coatings, Inc. v. Falberg, 926 F. Supp. 517 (E.D. Pa. 1995), for instance, a lawyer for Inorganic Coatings sent a letter to an International Zinc official (Falberg) threatening to sue his company for certain conduct. Inorganic's lawyer later spoke with International Zinc's lawyer about a possible settlement, but the conversation was unsuccessful. Later the same day, the lawyer received a telephone call from Falberg. Inorganic's lawyer advised Falberg that "it would be best" if the communication took place between the lawyers, but did not terminate the conversation. Id. at 520. The lawyer spoke with Falberg for about ninety minutes and took twenty-four pages of notes. Among other things, he used the information to revise his draft complaint.

The court found that Inorganic's lawyer had violated the ethics code's prohibition on such ex parte contacts, and disqualified the lawyer and his firm from representing Inorganic even though they had been engaged for over one year in investigating and preparing the lawsuit.

It may seem counter-intuitive, but a lawyer takes an enormous risk by accepting at face value even a highly sophisticated person's assurance that the person's lawyer has consented to an ex parte communication. N.Y. City LEO 2005-04 (4/2005) ("A lawyer who proceeds on the basis of other evidence of consent, such as the opposing client's assurance that its counsel has consented, runs the risk of violating the rule if opposing counsel did not in fact consent.").

Courts and bars have wrestled with the lawyer's obligations if the person indicates that she has fired her lawyer.

The ABA has explained that a lawyer may proceed with an ex parte communication with a person only if the lawyer has "reasonable assurance" that the representation has ended. ABA LEO 396 (7/28/95).

On the other hand, the Texas Supreme Court has held that

Rule 4.02 does not require an attorney to contact a person's former attorney to confirm the person's statement that representation has been terminated before communicating with the person. Confirmation may be necessary in some circumstances before an attorney can determine whether a person is no longer represented, but it is not required by Rule 4.02 in every situation, and for good reason. The attorney may not be able to provide confirmation if, as in this case, he and his client have not communicated. And while a client should certainly be expected to communicate with his attorney about discontinuing representation, the client in some circumstances may have reasons for not doing so immediately.

In re Users Sys. Servs., Inc., 22 S.W.3d 331, 334-35 (Tex. 1999).

Using "Reply to All"

Analyzing the use of the "Reply to All" function highlights the unique nature of email communications.

Every bar prohibits sending hardcopy correspondence to a client shown as a copy recipient of her lawyer's communication. In other words, a lawyer's display of a copy to her client does not amount to the type of consent permitting the adversary's lawyer to communicate directly with the client.

In contrast, a lawyer attending a conference with his client, the adversary's lawyer and the adversary presumably may communicate directly with the adversary -- the presence of all of the participants in the meeting amounts to consent by the adversary's lawyer for such direct communications (although it would be best even in that setting to explicitly obtain the other lawyer's consent to direct communications).

Email communications fall somewhere between these two examples. In 2009, a New York City ethics opinion¹ explained that a lawyer's inclusion of her client as a copy

¹ New York City LEO 2009-1 (2009) (explaining that lawyers might be permitted ethically to use the "reply to all" function on an email that the lawyer receives from a lawyer representing an adversary, and on which the other lawyer has copied his or her client; "The no-contact rule (DR 7-104(A)(1)) prohibits a lawyer from sending a letter or email directly to a represented person and simultaneously to her counsel, without first obtaining 'prior consent' to the direct communication or unless otherwise authorized by law. Prior consent to the communication means actual consent, and preferably, though not necessarily, express consent; while consent may be inferred from the conduct or acquiescence of the represented person's lawyer, a lawyer communicating with a represented person without securing the other lawyer's express consent runs the risk of violating the no-contact rule if the other lawyer has not manifested consent to the communication."; "We agree that in the context of group email communications involving multiple lawyers and their respective clients, consent to 'reply to all' communications may sometimes be inferred from the facts and circumstances presented. While it is not possible to provide an exhaustive list, two important considerations are (1) how the group communication is initiated and (2) whether the communication occurs in an adversarial setting."; explaining a few considerations that affect the analysis; "Initiation of communication: It is useful to consider how the group communication is initiated. For example, is there a meeting where the lawyers and their clients agree to await a communication to be circulated to all participants? If so, and no one objects to the circulation of correspondence to all in attendance, it is reasonable to infer that the lawyers have consented by their silence to inclusion of their

recipient on an email might amount to a consent to such direct communications. As the New York City Bar explained,

in the context of group email communications involving multiple lawyers and their respective clients, consent to "reply to all" communications may sometimes be inferred from the facts and circumstances presented.

New York City LEO 2009-1 (2009). The New York City Bar explained that one key element is how the communication was initiated.

For example, is there a meeting where the lawyers and their clients agree to await a communication to be circulated to all participants? If so, and no one objects to the circulation of correspondence to all in attendance, it is reasonable to infer that the lawyers have consented by their silence to inclusion of their clients on the distribution list. Similarly, a lawyer may invite a response to an email sent both to her own client and to lawyers for other parties. In that case, it would be reasonable to infer counsel's consent to a "reply to all" response from any one of the email's recipients.

Id. The other key element is the adversarial nature of the communication.

[I]n a collaborative non-litigation context, one could readily imagine a lawyer circulating a draft of a press release

clients on the distribution list. Similarly, a lawyer may invite a response to an email sent both to her own client and to lawyers for other parties. In that case, it would be reasonable to infer counsel's consent to a 'reply to all' response from any one of the email's recipients."; "Adversarial context: The risk of prejudice and overreaching posed by direct communications with represented persons is greater in an adversarial setting, where any statement by a party may be used against her as an admission. If a lawyer threatens opposing counsel with litigation and copies her client on the threatening letter, the 'cc' cannot reasonably be viewed as implicit consent to opposing counsel sending a response addressed or copied to the represented party. By contrast, in a collaborative non-litigation context, one could readily imagine a lawyer circulating a draft of a press release simultaneously to her client and to other parties and their counsel, and inviting discussion of its contents. In that circumstance, it would be reasonable to view the email as inviting a group dialogue and manifesting consent to 'reply to all' communications."; "Because the rule requires the consent of opposing counsel, the safest course is to obtain that consent orally or in writing from counsel. A lawyer who proceeds on the basis of other evidence of consent, such as the opposing client's assurance that its counsel has consented, runs the risk of violating the rule if opposing counsel did not in fact consent."; "We are mindful that the ease and convenience of email communications (particularly 'reply to all' emails) sometimes facilitate inadvertent contacts with represented persons without their lawyers' prior consent. Given the potential consequence of violating DR 7-104(A)(1), counsel are advised to exercise care and diligence in reviewing the email addressees to avoid sending emails to represented persons whose counsel have not consented to the direct communication.").

simultaneously to her client and to other parties and their counsel, and inviting discussion of its contents. In that circumstance, it would be reasonable to view the email as inviting a group dialogue and manifesting consent to "reply to all" communications.

Id. The New York City Bar warned that the "safest course is to obtain that consent orally or in writing from counsel." Id.

The New York City Bar's analysis highlights the complexity of email communications. As indicated above, no bar has ever conducted a similar analysis in the case of hardcopy communications.

In 2011, a California legal ethics opinion also recognized the possibility of a lawyer's implied consent to the adversary's lawyer's ex parte communications with the lawyer's client.

- California LEO 2011-181 (2011) ("Consent under the 'no contact' rule of California Rule of Professional Conduct 2-100 may be implied. Such consent may be implied by the facts and circumstances surrounding the communication with the represented party. Such facts and circumstances may include the following: whether the communication is within the presence of the other attorney; prior course of conduct; the nature of the matter; how the communication is initiated and by whom; the formality of the communication; the extent to which the communication might interfere with the attorney-client relationship; whether there exists a common interest or joint defense privilege between the parties; whether the other attorney will have a reasonable opportunity to counsel the represented party with regard to the communication contemporaneously or immediately following such communication; and the instructions of the represented party's attorney."); finding in certain circumstances that a lawyer can impliedly consent to ex parte communications with his or her client; "Tacit consent to communications with a represented party may be found more often in transactional matters as compared with adversarial matters. Under certain circumstances, for example, transactional matters may be more collaborative or neutral than litigation matters. As a result, based on the totality of the facts and circumstances, the nature of the matter may be a relevant factor."; "The more formal the communication, the less likely it is that consent may be implied. For example, whereas under the proper circumstances, a 'Reply to All' email communication might be acceptable, copying the represented party in a demand letter to the other attorney would be difficult to justify." (emphasis

added); "The existence of a common interest or joint defense privilege between the parties may be indicative of an implicit understanding that the attorneys be permitted to communicate with both parties."; "Where, for example, the communication is unilateral, coming from the other attorney to the represented party, and if such party's attorney has the opportunity to promptly dispel misinformation and otherwise counsel the client, there may be little impact on the attorney-client relationship and administration of justice."; "Certainly consent should not be inferred where the attorney expressly withholds such consent and/or instructs the other attorney not to communicate with his or her client.").

In 2013, the North Carolina Bar wrestled with this issue. After initially proposing an ethics opinion that would have always required the other lawyer's explicit consent to the use of "reply to all" communications, the North Carolina Bar ultimately issued a legal ethics opinion that paralleled the earlier New York and California opinions.

- North Carolina LEO 2012-7 (10/25/13) ("The fact that Lawyer B copies her own client on the electronic communication to which Lawyer A is replying, standing alone, does not permit Lawyer A to 'reply all.' While Rule 4.2(a) does not specifically provide that the consent of the other lawyer must be 'expressly' given, the prudent practice is to obtain express consent. Whether consent may be 'implied' by the circumstances requires an evaluation of all of the facts and circumstances surrounding the representation, the legal issues involved, and the prior communications between the lawyers and their clients. The Restatement of the Law Governing Lawyers provides that an opposing lawyer's consent to communication with his client 'may be implied rather than express.' Rest. (Third) of the Law Governing Lawyers § 99 cmt. J. The Association of the Bar of the City of New York Committee on Professional and Judicial Ethics ('New York Committee') and the California Standing Committee on Professional Responsibility & Conduct ('California Committee') have examined this issue. Both committees concluded that, while consent to 'reply to all' communications may sometimes be inferred from the facts and circumstances presented, the prudent practice is to secure express consent from opposing counsel. Ass'n of the Bar of the City of NY Comm. on Prof'l and Judicial Ethics, Formal Op. 2009-1; CA Standing Comm. on Prof'l Responsibility & Conduct, Formal Op. 2011-181. There are scenarios where the necessary consent may be implied by the totality of the facts and circumstances. However, the fact that a lawyer copies his own client on an electronic communication does not, in and of itself, constitute implied consent to a 'reply to all' responsive electronic communication. Other factors need to be considered before a lawyer can reasonably rely on implied consent. These factors include, but are not limited to: (1) how the communication is initiated; (2) the nature of the matter (transactional or adversarial); (3) the

prior course of conduct of the lawyers and their clients; and (4) the extent to which the communication might interfere with the client-lawyer relationship. These factors need to be considered in conjunction with the purposes behind Rule 4.2. Comment [1] to Rule 4.2 provides: '[Rule 4.2] contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounselled disclosure of information relating to the representation.' After considering each of these factors, and the intent of Rule 4.2, Lawyer A must make a good faith determination whether Lawyer B has manifested implied consent to a 'reply to all' responsive electronic communication from Lawyer A. Caution should especially be taken if Lawyer B's client responds to a 'group' electronic communication by using the 'reply to all' function. Lawyer A may need to reevaluate the above factors before responding further. Under no circumstances may Lawyer A respond solely to Lawyer B's client. Because of the ease with which 'reply to all' electronic communications may be sent, the potential for interference with the attorney-client relationship, and the potential for inadvertent waiver by the client of the client-lawyer privilege, it is advisable that a lawyer sending an electronic communication, who wants to ensure that his client does not receive any electronic communication responses from the receiving lawyer or parties, should forward the electronic communication separately to his client, blind copy the client on the original electronic communication, or expressly state to the recipients of the electronic communication, including opposing counsel, that consent is not granted to copy the client on a responsive electronic communication. To avoid a possible incorrect assumption of implied consent, the prudent practice is for all counsel involved in a matter to establish at the outset a procedure for determining whether it is acceptable to 'reply to all' when a represented party is copied on an electronic communication.").

After this initial series of state legal ethics opinions acknowledging courses of dealing and normal e-mail exchange patterns, several states took a very different approach. These recent legal ethics opinions essentially adopted a per se requirement that responding lawyers obtain consent from sending lawyers to use "Reply All," if the sending lawyer has included her client as a "cc" to her email.

In 2017, Kentucky LEO E-442 (11/17/17) took a fairly unforgiving approach to both sending lawyers' practice and receiving lawyers' practice.

Kentucky LEO E-442 (11/17/17) answered “yes” to the question whether “the act of sending the client a copy of the e-mail revealed “information” related to the representation of the client?”

Showing another lawyer that a copy of an email is being sent to a lawyer’s client reveals the following information relating to a lawyer’s representation: 1) the identity of the client; 2) the client received the email including attachments, and 3) in the case of a corporate client, the individuals the lawyer believes are connected to the matters and the corporate client’s decision makers. Hence, it is best to avoid a problematic result by not sending and showing a copy of the sending lawyer’s email to the sending lawyer’s client. Of course, “cc”ing a client does not violate Rule 1.6, if the client expressly or impliedly consents to the limited disclosure of “information related to the representation.”

Kentucky LEO E-442 (11/17/17) (emphasis added).

Turning to the receiving lawyers’ use of “Reply All,” Kentucky LEO E-442 (11/17/17) left a little running room based on course of dealing, but generally condemned receiving lawyers’ use of “Reply All” without the sending lawyers’ consent.

In Formal Opinion 2009-1 the Association of The Bar of the City Of New York Committee on Professional and Judicial Ethics opined that the no-contact rule (DR 7-104(A) (1)) prohibits a lawyer from sending a letter or email directly to a represented person and simultaneously to her counsel, without first obtaining “prior consent” to the direct communication or unless otherwise authorized by law. Further, prior consent to the communication means actual consent. The New York Bar advised that while consent may be inferred from the conduct of the represented person’s lawyer, a lawyer communicating with a represented person without first securing the other lawyer’s express consent runs the risk of violating the no-contact rule. (Emphasis added.) This Committee agrees with the opinions of North Carolina and New York and endorses their use for Kentucky lawyers.

Id.

Kentucky LEO E-442 (11/17/17) seemed to take a more strict approach in providing the blunt answer “No” to the following question:

“[w]hen an attorney (Lawyer A) sends an email to another lawyer (Lawyer B) and Lawyer A sends a copy of such communication to Lawyer A’s client, should Lawyer A’s action be regarded as giving Lawyer B consent to use the ‘reply all’ function when replying to Lawyer A?”

In 2018, Alaska LEO 2018-1 (1/18/18), the Alaska Bar acknowledged that sending lawyers should be wary of including their clients as copy or blind copy recipients.

We also recommend that lawyers not “cc” their clients on electronic communications with opposing counsel, but instead, forward the communication to the client. The ease of “reply all” increases the risk of unauthorized communication with a party who has been “cc’d” on the electronic “conversation”. While all lawyers must be vigilant in following the ethics rules in e-mail correspondence, the primary responsibility with the lawyer who has chosen to “cc” the lawyer’s own client.

Alaska LEO 2018-1 (1) (1/18/18) (emphases added).

Turning to the receiving lawyers’ duty, Alaska LEO 2018-1 (1/18/18) adopted a strict requirement that the receiving lawyer check with the sending lawyer before using the “Reply All” function.

A lawyer who responds to an e-mail where opposing counsel has “cc’d” the opposing counsel’s client has a duty to inquire whether the client should be included in the reply. A lawyer may “bcc” the lawyer’s own client on electronic communications; however, the better practice is to forward the communication to the client to avoid inadvertent responsive communications by the client to opposing counsel.

Id. (emphasis added).

In 2019, the Illinois Bar took the same approach, which presumably would be more significant given the large size of the Illinois Bar. In Illinois LEO 19-05 (10/19), the Illinois Bar suggested that sending lawyers should carefully consider the risk of copying their clients on their e-mail communications.

Of course, the best ways to avoid the problem entirely are to establish the ground rules with opposing counsel early on, or simply to refrain from copying one's own client on an e-mail to opposing counsel. Given the informal and instantaneous nature of such communications, Lawyer could not have been surprised by his clients' receipt of reply e-mails.

Illinois LEO 19-05 (10/19). But then, like the Kentucky and Alaska LEOs, the Illinois Bar adopted what seems to be a per se requirement that the receiving lawyer refrain from using 'Reply All' without the sending lawyers' consent.

It does not contravene a rule of professional conduct for a lawyer to cc the client when corresponding with another lawyer by e-mail. But unless a lawyer has an agreement or understanding with opposing counsel that a reply e-mail may be sent to the client, the Committee believes that the better practice is for the lawyer to avoid sending a cc to that client. At the same time, and for the reasons stated above, a recipient attorney violates Rule 4.2 if he or she, having received an e-mail with such a cc and knowing the person cc'd to be a represented party, includes that party in an e-mailed reply in the absence of some form of consent from the sending lawyer.

Illinois LEO 19-05 (10/19) (emphasis added)).

In 2020, the Pennsylvania Bar took a slightly less draconian approach, but continued the basic theme of the previous few legal ethics opinions.

In Pennsylvania LEO 2020-100 (1/22/20), the Pennsylvania Bar warned sending lawyers that copying their clients on an e-mail to a third party (including an adversary's

lawyer) might violate the sending lawyers' confidentiality duty because it discloses her client's email address, among other things.

Pennsylvania LEO 2020-100 (1/22/20) explained that in some situations the receiving lawyer's use of "Reply All" would be permissible based on a course of dealing or on the response's harmless content.

This Committee agrees with the cited opinions to the effect that a reply to all does not create a per se violation of Rule 4.2. In order to determine if consent to respond to a represented client in a transactional matter may be implied, lawyers should consider (1) how the communication is initiated; (2) the prior course of conduct between or among the lawyers and their clients; (3) potential that the response might interfere with the client-lawyer relationship; and (4) whether the specific content of the email is appropriate to send directly to a represented client. For example, in the transactional context, there may be circumstances where the lawyer and client are part of a working group on a commercial transaction and replying to all may be appropriate, particularly where there is a tight timeline and the respective clients need to review iterations of documents simultaneously with their respective counsel. Although a better practice is to obtain express consent to this type of email exchange at the outset, a response which includes a represented client does not necessarily violate Rule 4.2.

On the other hand, circumstances rarely exist in the context of litigation or other disputes where replying to all (including the opposing client) is appropriate, and therefore such a direct communication should ordinarily be avoided absent opposing counsel's express consent. Consent to respond to a communication that includes a represented opposing client may be implied where the response is a non-substantive communication. For example, if a lawyer sends a group email including her client that says, "Let's all meet in the court cafe before the hearing and see if we can reach agreement on some of the issues to be addressed at the 2 p.m. hearing," a response to all from the opposing lawyer along the lines of "OK, see you there at 1:45," should not be deemed a violation of Rule 4.2, even though the communication concerns "the subject of the representation."

Pennsylvania LEO 2020-100 (1/22/20) (emphases added).

But Pennsylvania LEO 2020-100 (1/22/20) concluded with a warning that absent these acceptable scenarios, the responding lawyer would violate the ethics rules by using “Reply All”.

Attorneys risk divulging attorney client confidential information and privileged information when they communicate with opposing counsel and include their clients on the same email. Attorney recipients of such email communications may be deemed to violate the no contact rule if they, in turn, reply to all or otherwise directly contact an adverse client without the other attorney’s express consent except in situations where it is objectively reasonable to infer consent from the circumstances.

Id. (emphasis added).

In 2021, New Jersey issued a common sense legal ethics opinion that may end up reversing the trend toward prohibiting use of “Reply All” absent the sending lawyer’s explicit content.

- New Jersey LEO 739 (3/10/21) (holding that a lawyer who receives an email from another lawyer who has copied her client on the email may freely use “Reply all” without obtaining the sending lawyer’s consent; warning of the “gotcha” nature of this scenario; “Reply all” in a group email should not be an ethics trap for the unwary or a ‘gotcha’ moment for opposing counsel. The Committee finds that lawyers who include their clients in group emails are deemed to have impliedly consented to opposing counsel replying to the entire group, including the lawyer’s client.”; contrasting emails’ “conversational element” from hard copy letters when applying Rule 4.2; “There is no question that a lawyer who receives a letter from opposing counsel on which the sending lawyer’s client is copied may not, consistent with Rule of Professional Conduct 4.2, send a responding letter to both the lawyer and the lawyer’s client. In contrast, if a lawyer were to initiate a conference call with opposing counsel and include the client on the call, the lawyer would be deemed to have impliedly consented to opposing counsel speaking on the call and thereby communicating both with the opposing lawyer and that lawyer’s client. Email is an informal mode of communication. Group emails often have a conversational element with frequent back-and-forth responses. They are more similar to conference calls than to written letters. When lawyers copy their own clients on group emails to opposing

counsel, all persons are aware that the communication is between the lawyers. The clients are mere bystanders to the group email conversation between the lawyers. A 'reply all' response by opposing counsel is principally directed at the other lawyer, not at the lawyer's client who happens to be part of the email group. The goals that Rule of Professional Conduct 4.2 are intended to further – protection of the client from overreaching by opposing counsel and guarding the clients' right to advice from their own lawyer – are not implicated when lawyers 'reply all' to group emails."; explaining that a sending lawyer who does not want his client to receive a response should not copy his client on his email: "the initiating lawyer who does not consent to a response to the client should bear the burden of omitting the client from the group email or blind copying the client."; explicitly rejecting other states' legal ethics opinions that require the sending lawyer's consent before the receiving lawyer can use "Reply all"; "The Committee finds that these opinions from other jurisdictions do not fully appreciate the informal nature of group email or recognize the unfairness of exposing responding lawyers to ethical sanctions for this conduct." (emphases added).

Virginia joined the chorus in late 2022.

- Virginia LEO 1897 (9/19/2022) (Lawyers do not violate Virginia Rule 4.2 when responding with "Reply All" to an email from another lawyer who has copied his or her client on the email. The sending lawyer's copying of her client amounts to an "implied consent to a reply-all response." "[T]he onus should be on the sending lawyer to blind copy all recipients, or separately forward the email to the client, if they do not want a 'reply-all' conversation." However, any "reply must not exceed the scope of the email to which the lawyer is responding . . .").

The ABA adopted this approach a few months later.

- ABA LEO 503 (11/2/22) (Given the "inclusive nature and norms of . . . group electronic communications," a lawyer may ethically use the "Reply All" option upon receiving an email from a represented party's lawyer who copies her client – because "the sending lawyer is essentially inviting a reply all response." The sending lawyer should have the burden of avoiding such responses by not copying her client on the email. However, "reply all" responses must cover "only the specific topics in the initial email," and not include any "unrelated topics." The sending lawyer can avoid this implied consent presumption by an explicit oral or written communication. The presumption does not apply to a "traditional letter printed on paper and mailed," because in that situation "a different set of norms currently exists.").

Best Answer

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

N 8/12; B 7/14

Inadvertent Transmission of Communications

Hypothetical 7

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 accidentally 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?

(B) 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?

(A) YES (PROBABLY)

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

(A) 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 aware that disclosure is being made in breach of trust by a

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.").

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, the Illinois Rules contain 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 The ABA Model Rules' and all or nearly

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 moved from a variation of the "return unread" approach beyond the ABA "simply notify the sender"

all states' ethics rules define "no" as denoting "actual knowledge." ABA Model Rule 1.0(f).

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 by adopting the "stop reading and return unread" approach that the ABA took from 1992 until 2002. Even among these states, there are variations. 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

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.").

and abide by the instructions of the sending party regarding the return or destruction of the writing.").⁶

Fifth, some jurisdictions have explicitly retained a higher duty for the receiving lawyer -- but limit that duty to privileged communications. Those obviously represent a subset of the type of communication that might be inadvertently sent. But they are the likeliest to disclose potentially damaging content. Even among these states, there are variations. For instance, in 2019, Virginia adopted (for the first time) a Rule 4.4(b).⁷

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.").

⁷ Virginia adopted its guidance on December 1, 2019 – when Virginia adopted its first-ever version of Rule 4.4(b).

Virginia's Rule 4.4(b) follows the minority view of lawyers' duty upon receiving an inadvertently transmitted communication. ABA Model Rule 4.4(b) requires only that such lawyers "shall promptly notify the sender." Presumably, this limited disclosure duty does not prevent the receiving lawyer from reading and using the inadvertently transmitted communication.

Virginia Rule 4.4 instead takes the general approach that the ABA followed from 1992 until 2002 – requiring such lawyers to stop reading such inadvertently transmitted communications.

But Virginia adopted a somewhat narrower and unique view – triggering this duty to stop reading such communications only if the lawyer also "knows or reasonably should know" that the inadvertently transmitted communication deserves attorney-client privilege protection.

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 is privileged and was inadvertently sent shall immediately terminate review or use of the document or electronically stored information, promptly notify the sender, and abide by the sender's instructions to return or destroy the document or electronically stored information.

Virginia Rule 4.4(b).

Thus, Virginia rejects the ABA Model Rule 4.4(b) approach to this scenario, but does not go as far as the other states that also reject the ABA Model Rule approach. Virginia applies its "stop reading" standard only to a subset of inadvertently transmitted communications.

That Rule memorializes an approach that Virginia had earlier taken only in legal ethics opinions. It applies to a lawyer who receives a document or electronically stored information "relating to the representation of the lawyer's client and who "knows or reasonably should know": (1) that the document or electronically stored information is privileged, and (2) that the document or electronically stored information "was inadvertently sent." Such lawyers must "immediately terminate review or use of the document or electronically stored information, promptly notify the sender, and abide by the sender's instructions to return or destroy the document or electronically stored information."

Virginia Rule 4.4 cmt. [2] explains that receiving lawyers' duty to comply with Virginia Rule 4.4(b)'s provisions requires that the receiving lawyers know or reasonably should know that both conditions apply.

If the receiving lawyer lacks actual or constructive knowledge that the document or the electronically stored information was inadvertently sent, then [Virginia Rule 4.4(b)] does not apply. Similarly, the lawyer may know that the document or electronically stored information was inadvertently sent but not that it is privileged; in that case, the receiving lawyer has no duty under this rule.

Virginia Rule 4.4 cmt. [2].

Presumably, such lawyers do not even have a duty to notify the sender.

Not surprisingly, Virginia also applies its unique approach to metadata.

Metadata in electronic documents creates an obligation under this [Virginia Rule 4.4(b)] only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer and that it contains privileged information.

Virginia Rule 4.4 cmt. [2].

Virginia Rule 4.4 and its Comments do not provide any guidance about how a lawyer would know or "reasonably should know" that metadata was inadvertently sent along with the visible electronic communication. Presumably, the metadata's content would play the main role. For instance, a lawyer receiving an obviously intentionally sent settlement offer would know or reasonably should know that accompanying metadata was inadvertently sent (and privileged) if the receiving lawyer saw metadata of obviously private comments about the offer's provisions, earlier draft passages that had been deleted or revised, etc.

Those lawyers explicitly have "no duty under this rule" if they do not know or reasonably should know that the document is "privileged" -- (which on its face does not include work product-protected documents that are not also privileged).

Interestingly, in Virginia Rule 4.4 cmt. [3] assures that the prohibition on receiving lawyers' use of such inadvertently transmitted privileged documents does not include the receiving lawyers' permissible (by rule, law or agreement) "contest[ing] the sender's claim of privilege." One might wonder how the receiving lawyer could "contest" a privilege claim after having "actual knowledge" that the document is privileged. Presumably such a "contest" could focus only on the sloppiness of the production or inadvertent transmission rather than the documents' content – although the receiving lawyer could likewise not challenge the "inadvertent" factor in that analysis (after having "actual knowledge" that the document was inadvertently sent).

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."; "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." (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).⁸

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)

⁸ 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.").

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

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

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

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

ABA Model Rule 1.4(a)(3).

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

- In re Kieler, 227 P.3d 961, 962, 965 (Kan. 2010) (suspending for one year a lawyer who had not advised the client of the lawyer's malpractice in missing the statute of limitations; "The Respondent told Ms. Irby that the only way she could receive any compensation for her injuries sustained in that accident was to sue him for malpractice. He told her that it was "not a big deal," that he has insurance, and that is why he had insurance. The Respondent was insured by The Bar Plan." (internal citation omitted); "In this case, the Respondent violated KRPC 1.7 when he continued to represent Ms. Irby after her malpractice claim ripened, because the Respondent's representation of Ms. Irby was in conflict with his own interests. Though the Respondent admitted that Ms. Irby's malpractice claim against him created a conflict, he failed to cure the conflict by complying with KRPC 1.7(b). Accordingly, the Hearing Panel concludes that the Respondent violated KRPC 1.7.").
- Texas LEO 593 (2/2010) (holding that a lawyer who has committed malpractice must advise the client, and must withdraw from the representation, but can settle the malpractice claim if the client has had the opportunity to seek independent counsel but has not done so; "Although Rule 1.06(c) provides that, if the client consents, a lawyer may represent a client in certain circumstances where representation would otherwise be prohibited, the Committee is of the opinion that, in the case of malpractice for which the consequences cannot be significantly mitigated through continued legal representation, under Rule 1.06 the lawyer-client relationship must end as to the matter in which the malpractice arose."; "[A]s promptly as reasonably possible the lawyer must terminate the lawyer-client relationship and inform

the client that the malpractice has occurred and that the lawyer-client relationship has been terminated."; "Once the lawyer has candidly disclosed both the malpractice and the termination of the lawyer-client relationship to the client, Rule 1.08(g) requires that, if the lawyer wants to attempt to settle the client's malpractice claim, the lawyer must first advise in writing the now former client that independent representation of the client is appropriate with respect to settlement of the malpractice claim: 'A lawyer shall not . . . settle a claim for . . . liability [for malpractice] with an unrepresented client or former client without first advising that person in writing that independent representation is appropriate in connection therewith.'").

- California 12009-178 (2009) ("An attorney must promptly disclose to the client the facts giving rise to any legal malpractice claim against the attorney. When an attorney contemplates entering into a settlement agreement with a current client that would limit the attorney's liability to the client for the lawyer's professional malpractice, the attorney must consider whether it is necessary or appropriate to withdraw from the representation. If the attorney does not withdraw, the attorney must: (1) [c]omply with rule 3-400(B) by advising the client of the right to seek independent counsel regarding the settlement and giving the client an opportunity to do so; (2) [a]dvice 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 **(B) PROBABLY NO**; the best answer to (d) is **(A) PROBABLY YES**; the best answer to (e) is **(A) PROBABLY YES**.

N 1/13

Metadata

Hypothetical 8

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.

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.

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

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 documents of sensitive metadata where appropriate to prevent the disclosure of confidential information.

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.").

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.

Pennsylvania LEO 2009-100 (2009).

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.").

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, 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

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.").

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.

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:

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").

[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

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.

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

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

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

The North Carolina Bar did not explain why the receiving lawyer must do anything more than notify the sending lawyer of the inadvertently included confidential metadata -- which is all that is required in the North Carolina Rule 4.4(b). Like other

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.").

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

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

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

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

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.").

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."

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."

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 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."

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.

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).

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

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

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

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

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.").

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.

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.

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>.

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

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 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

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.

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

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.").

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.

Virginia. Virginia adopted its guidance about metadata on December 1, 2019 – when Virginia adopted its first-ever version of Rule 4.4(b).

Virginia's Rule 4.4(b) follows the minority view of lawyers' duty upon receiving an inadvertently transmitted communication. ABA Model Rule 4.4(b) requires only that such lawyers "shall promptly notify the sender." Presumably, this limited disclosure duty does not prevent the receiving lawyer from reading and using the inadvertently transmitted communication.

Virginia Rule 4.4 instead takes the general approach that the ABA followed from 1992 until 2002 – requiring such lawyers to stop reading such inadvertently transmitted communications.

But Virginia adopted a somewhat narrower and unique view – triggering this duty to stop reading such communications only if the lawyer also "knows or reasonably should know" that the inadvertently transmitted communication deserves attorney-client privilege protection.

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 is privileged and was inadvertently sent shall immediately terminate review or use of the document or electronically stored information, promptly notify the sender, and abide by the sender's instructions to return or destroy the document or electronically stored information.

Virginia Rule 4.4(b).

Thus, Virginia rejects the ABA Model Rule 4.4(b) approach to this scenario, but does not go as far as the other states that also reject the ABA Model Rule approach. Virginia applies its "stop reading" standard only to a subset of inadvertently transmitted communications.

Virginia Rule 4.4 cmt. [2] explains that receiving lawyers' duty to comply with Virginia Rule 4.4(b)'s provisions requires that the receiving lawyers know or reasonably should know that both conditions apply.

If the receiving lawyer lacks actual or constructive knowledge that the document or the electronically stored information was inadvertently sent, then [Virginia Rule 4.4(b)] does not apply. Similarly, the lawyer may know that the document or electronically stored information was inadvertently sent but not that it is privileged; in that case, the receiving lawyer has no duty under this rule.

Virginia Rule 4.4 cmt. [2].

Presumably, such lawyers do not even have a duty to notify the sender. Not surprisingly, Virginia also applies its unique approach to metadata.

Metadata in electronic documents creates an obligation under this [Virginia Rule 4.4(b)] only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer and that it contains privileged information.

Virginia Rule 4.4 cmt. [2].

Virginia Rule 4.4 and its Comments do not provide any guidance about how a lawyer would know or “reasonably should know” that metadata was inadvertently sent along with the visible electronic communication. Presumably, the metadata’s content would play the main role. For instance, a lawyer receiving an obviously intentionally sent settlement offer would know or reasonably should know that accompanying metadata was inadvertently sent (and privileged) if the receiving lawyer saw metadata of obviously private comments about the offer’s provisions, earlier draft passages that had been deleted or revised, etc.

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**

2019

Virginia Rules change (12/1/19) – **NO** (but only if the receiving lawyer "knows or reasonably should know" that the metadata was inadvertently sent and contains privileged information).

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

Interestingly, neighboring states have taken totally different positions. For instance, in late 2008, the Maine Bar prohibited such mining -- finding it "dishonest" and prejudicial to the administration of justice -- because it "strikes at the foundational principles that protect attorney-client confidences." Maine LEO 196 (10/21/08).

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

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

Basis for States' Differing Positions

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

On the other hand, some of these bars' rulings seem to contradict their own ethics rules. For instance, Florida has adopted ABA Model Rule 4.4(b)'s approach to inadvertent transmissions (requiring only notice to the sending lawyer), but the Florida Bar nevertheless found unethical the receiving lawyer's "mining" of metadata.¹⁷

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

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

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

¹⁷ Florida LEO 06-2 (9/16/06).

- 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.

Working with Service Providers

Hypothetical 9

Your firm just purchased several new servers, and they have given you nothing but trouble for the past two weeks. You have been unable to send or receive email at least several hours each day. The supplier from whom you purchased the servers seems incapable of fixing the problem, and you want to quickly retain another consultant to fix the problem.

Must you include a confidentiality provision in whatever agreement you enter into with the new consultant?

YES (PROBABLY)

Analysis

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

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

In its legal ethics opinion generally approving outsourcing of legal services, the ABA reminded lawyers that they should consider conducting due diligence of the foreign legal providers -- such as "investigating the security of the provider's premises,

computer network, and perhaps even its recycling and refuse disposal procedures."

ABA LEO 451 (7/9/08).¹

Lawyers must be very careful even when dealing with service providers such as copy services. Universal City Dev. Partners, Ltd. v. Ride & Show Eng'g, Inc., 230 F.R.D. 688, 698 (M.D. Fla. 2005) (assessing a litigant's efforts to obtain the return of inadvertently produced privileged documents; noting that the litigant had sent the documents to an outside copy service after putting tabs on the privileged documents, and had directed the copy service to copy everything but the tabbed documents and send them directly to the adversary; noting that the litigant had not reviewed the copy service's work or ordered a copy of what the service had sent the adversary; emphasizing what the court called the "most serious failure to protect the privilege" -- the litigant's "knowing and voluntary release of privileged documents to a third party --

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

the copying service -- with whom it had no confidentiality agreement. Having taken the time to review the documents and tab them for privilege, RSE's counsel should have simply pulled the documents out before turning them over to the copying service. RSE also failed to protect its privilege by promptly reviewing the work performed by the outside copying service."; refusing to order the adversary to return the inadvertently produced documents).

Best Answer

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

B 8/12

Outsourcing

Hypothetical 10

In an effort to cut expenses in an upcoming document collection, privilege review and log creation project, you are considering a number of options. One of your newest lawyers recommends that you use a cost-saving measure that her previous firm frequently used -- relying on lawyers and paralegals in Bangalore, India, to handle those tasks.

(a) May you outsource these tasks to lawyers in India?

YES

(b) What ethics considerations will you have to address?

**DISCLOSURE TO THE CLIENT; DEGREE OF NECESSARY SUPERVISION;
ASSURANCES OF CONFIDENTIALITY; CONFLICTS OF INTEREST**

Analysis

More and more law firms and corporate law departments are relying on foreign outsourcing for large projects like this.

Lawyers analyzing these issues must protect their clients from real risks, while avoiding the sort of "guild mentality" that will prevent the lawyer from exploring all of the options that might save the client money.

(a) No ethics rules prohibit such outsourcing. Just as lawyers may arrange for co-counsel from Indiana, so they can arrange for co-counsel or other assistance from India.

(b) The ABA and state bars are still wrestling with the ethics implications of foreign outsourcing.

The ABA has explicitly explained that lawyers may hire "contract" lawyers to assist in projects -- although the ABA focused on billing questions.¹

State bars have also dealt with ethics issues implicated by lawyers employing "temps"² and "independent contractor" lawyers.³

¹ ABA LEO 420 (11/29/00) (a law firm hiring a contract lawyer may either bill his or her time as: (1) fees, in which case the client would have a "reasonable expectation" that the contract lawyer has been supervised, and the law firm can add a surcharge without disclosure to the client (although some state bars and courts require disclosure of both the hiring and the surcharge); or (2) costs, in which case the law firm can only bill the actual cost incurred "plus those costs that are associated directly with the provision of services" (as explained in ABA LEO 379)); ABA LEO 356 (12/16/88) (temporary lawyers must comply with all ethics rules arising from a lawyer's representation of a client, but depending on the facts (such as whether the temporary lawyer "has access to information relating to the representation of firm clients other than the clients on whose matters the lawyer is working") may not be considered "associated" with law firms for purposes of the imputed disqualification rules (the firm should screen such temporary lawyers from other representations); lawyers hiring temporary lawyers to perform "independent work for a client without the close supervision of a lawyer associated with the law firm" must obtain the client's consent after full disclosure; lawyers need not obtain the client's consent to having temporary lawyers working on the client matters if the temporary lawyers are "working under the direct supervision of a lawyer associated with the firm"); lawyers need not advise clients of the compensation arrangement for temporary lawyers "[a]ssuming that a law firm simply pays the temporary lawyer reasonable compensation for the services performed for the firm and does not charge the payments thereafter to the client as a disbursement").

² Virginia LEO 1712 (7/22/98) (this is a comprehensive opinion dealing with temporary lawyers ("Lawyer Temps"); a lawyer temp is treated like a lateral hire for conflicts purposes (although lawyer temps who are not given "broad access to client files and client communications" could more easily argue that they had not obtained confidences from firm clients for which they had not directly worked); as with lateral hires, screening lawyer temps does not cure conflicts; lawyer temps may reveal the identity of other clients for which they have worked unless the clients request otherwise or the disclosure would be embarrassing or detrimental to the former clients; paying a staffing agency (which in turn pays the lawyer temp) does not amount to fee-splitting because the agency has no attorney-client relationship with the client and is not practicing law (the New York City Bar took a different approach, suggesting that the client separately pay the lawyer temp and agency); if a firm lawyer closely supervises the lawyer temp, the hiring of lawyer temps need not be disclosed to the client; a lawyer must inform the client before assigning work to a lawyer other than one designated by the client; because "[a] law firm's mark-up of or surcharge on actual cost paid the staffing agency is a fee," the firm must disclose it to the client if the "payment made to the staffing agency is billed to the client as a disbursement, or a cost advanced on the client's behalf"; on the other hand, the firm "may simply bill the client for services rendered in an amount reflecting its charge for the Lawyer Temp's time and services" without disclosing the firm's cost, just as firms bill a client at a certain rate for associates without disclosing their salaries; in that case, the "spread" between the salary and the fees generated "is a function of the cost of doing business including fixed and variable overhead expenses, as well as a component for profit"; because the relationship between a lawyer temp and a client is a traditional attorney-client relationship, the agency "must not attempt to limit or in any way control the amount of time a lawyer may spend on a particular matter, nor attempt to control the types of legal matters which the Lawyer Temp may handle"; agencies may not assign lawyer temps to jobs for which they are not competent).

³ Virginia LEO 1735 (10/20/99) (a law firm may employ independent contractor lawyers under the following conditions: whether acting as independent contractors, contract attorneys or "of counsel," the

Law firms hiring such lawyers and those lawyers themselves must also follow the unauthorized practice of law rules of the jurisdiction in which they will be practicing.

See, e.g., District of Columbia UPL Op. 16-05 (6/17/05) (holding that contract lawyers who are performing the work of lawyers rather than paralegals or law clerks must join the D.C. Bar if they work in D.C. or "regularly" take "short-term assignments" in D.C.).

The ABA and a number of state bars have explicitly approved foreign outsourcing of legal services as long as the lawyers take common-sense precautions.

- Virginia LEO 1850 (12/28/10) (in a compendium opinion, providing advice about lawyers outsourcing, defined as follows: "Outsourcing takes many forms: reproduction of materials, document retention database creation, conducting legal research, drafting legal memoranda or briefs, reviewing discovery materials, conducting patent searches, and drafting contracts, for example."; explaining that, among other things, a lawyer engaging in such outsourcing must: (1) "exercise due diligence in the selection of lawyers or nonlawyers"; (2) avoid the unauthorized practice of law (explaining that the Rules: "do not permit a nonlawyer to counsel clients about legal matters or to engage in the unauthorized practice of law, and they require that the delegated work shall merge into the lawyer's completed work product" and direct that "the initial and continuing relationship with the client is the responsibility of the employing lawyer," ultimately concluding that "in order to avoid the unauthorized practice of law, the lawyer must accept complete responsibility for the nonlawyer's work. In short, the lawyer must, by applying professional skill and judgment, first set the appropriate scope for the nonlawyer's work and then vet the nonlawyer's work and ensure its quality."); (3) "obtain the client's informed consent to engage lawyers or nonlawyers who are not directly associated with or under the direct supervision of the

lawyers must be treated as part of the law firm for confidentiality and conflicts of interest purposes; the firm must advise clients of any "mark-up" between the amount billed for the independent contractor lawyers' services and the amount paid to them if "the firm bills the amount paid to Attorney as an out-of-pocket expense or disbursement," but need not make such disclosure to the clients if the firm bills for the lawyers' work "in the same manner as it would for any other associate in the Firm" and the independent contractor lawyer works under another lawyer's "direct supervision" or the firm "adopts the work product as its own"; the independent contractor lawyers may be designated as "of counsel" to the firm if they have a "close, continuing relationship with the Firm and direct contact with the firm and its clients" and avoid holding themselves out as being partners or associates of the firm; the firm must disclose to clients that an independent contractor lawyer is working on the client's matter if the lawyers "will work independently, without close supervision by an attorney associated with the Firm," but need not make such disclosure if the "temporary or contract attorney works directly under the supervision of an attorney in the Firm"; the firm may pay a "forwarding" or "referral" fee to the independent contractor lawyers for bringing in a client under the new Rules).

- lawyer or law firm that the client retained"; (4) assure client confidentiality; noting that "if payment is billed to the client as a disbursement," the lawyer must pass along any cost without mark-up unless the client consents (although the lawyer may also pass along any overhead costs -- which in the case of outsourced services "may be minimal or nonexistent"), and that "if the firm plans to bill the client on a basis other than the actual cost which can include a reasonable allocation of overhead charges associated with the work," the client must consent to such a billing arrangement "in cases where the nonlawyer is working independently and outside the direct supervision of a lawyer in the firm"; explaining that a lawyer contemplating outsourcing at the start of an engagement "should" obtain "client consent to the arrangement" and provide "a reasonable explanation of the fees and costs associated with the outsourced project." [The remainder of the opinion appears to allow a law firm hiring outsourced service providers working under the direct supervision of a lawyer associated with the firm to treat them as if they were lawyers in the firm -- both for client disclosure and consent purposes, as well as for billing purposes.]; acknowledging that a lawyer can treat as inside the firm for disclosure and billing purposes an outsourced service provider who handles "specific legal tasks" for the firm while working out of her home (although not meeting clients there), who has "complete access to firm files and matters as needed" and who "works directly with and under the direct supervision" of a firm lawyer, but that a law firm may not treat (for consent and billing purposes) outsourced service providers as if they are in the firm who are working in India and, who conduct patent searches and prepare applications for firm clients, but who "will not have access to any client confidences with the exception of confidential information that is necessary to perform the patent searches and prepare the patent applications"; explaining that the same is true of lawyers whom the law firm occasionally hire, but who also work "for several firms on an as needed contract basis"; noting that a lawyer does not need to inform the client when a lawyer outsources "truly tangential, clerical or administrative" legal supports services, or "basic legal research or writing" services (such as arranging for a "legal research 'think tank' to produce work product that is then incorporated into the work product" of the firm). [The Bar's hypotheticals do not include the possibility of an overseas lawyer or a lawyer working for several U.S. law firms on an "as needed contract basis" -- but who work under the "direct supervision" of a lawyer associated with the firm.]; concluding that lawyers "must advise the client of the outsourcing of legal services and must obtain client consent anytime there is disclosure of client confidential information to a nonlawyer who is working independently and outside the direct supervision of a lawyer in the firm, thereby superseding any exception allowing the lawyer to avoid discussing the legal fees and specific costs associated with the outsourcing of legal services").
- Ohio LEO 2009-6 (8/14/09) (offering guidance for lawyers outsourcing legal services; defining "legal services" as follows: "[L]egal services include but are not limited to document review, legal research and writing, and preparation of

- briefs, pleadings, legal documents. Support services include, but are not limited to ministerial services such as transcribing, compiling, collating, and copying."; ultimately concluding that a lawyer was not obligated to advise the client if a "temp" lawyer was working inside the firm under the direct supervision of a firm lawyer; also ultimately concluding that a lawyer can decide whether to bill for outsourced services as a fee, but that the lawyer must advise the client of how the lawyer will bill for those services; "[P]ursuant to Prof. Cond. Rules 1.4(a)(2), 1.2(a), and 1.6(a), a lawyer is required to disclose and consult with a client and obtain informed consent before outsourcing legal or support services to lawyer or nonlawyers. Disclosure, consultation, and informed consent is not necessary in the narrow circumstance where a lawyer or law firm temporarily engages the services of a nonlawyer to work inside the law firm on a legal matter under the close supervision and control of a lawyer in the firm, such as when a sudden illness of an employee requires a temporary replacement who functions as an employee of the law firm. Outside this narrow circumstance, disclosure, consultation, and consent are the required ethical practice."; explaining how the lawyer may bill for the outsourced services; explaining how the duty of confidentiality applies; "[P]ursuant to Prof. Cond. Rules 1.5(a) and 1.5(b), a lawyer is required to establish fees and expenses that are reasonable, not excessive, and to communicate to the client the basis or rate of the fee and expenses; these requirements apply to legal and support services outsourced domestically or abroad. The decision as to whether to bill a client for outsourced services as part of the legal fee or as an expense is left to a lawyer's exercise or professional judgment, but in either instance, if any amount beyond cost is added, it must be reasonable, such as a reasonable amount to cover a lawyer's supervision of the outsourced services. The decision must be communicated to the client preferably in writing, before or within a reasonable time after commencing the representation, unless the lawyer will charge a client whom the lawyer has regularly represented on the same basis as previously charged.").
- ABA LEO 451 (8/5/08) (generally approving the use of outsourcing of legal services, after analogizing them to such "[o]utsourced tasks" as reliance on a local photocopy shop, use of a "document management company," "use of a third-party vendor to provide and maintain a law firm's computer system" and "hiring of a legal research service," or "foreign outsourcing"; lawyers arranging for such outsourcing must always "render legal services competently," however the lawyers perform or delegate the legal tasks; lawyers must comply with their obligations in exercising "direct supervisory authority" over both lawyers and nonlawyers, "regardless of whether the other lawyer or the nonlawyer is directly affiliated with the supervising lawyer's firm"; the lawyer arranging for outsourcing "should consider" conducting background checks of the service providers, checking on their competence, investigating "the security of the provider's premises, computer network, and perhaps even its recycling and refuse disposal procedures"; lawyers dealing with foreign

- service providers should analyze whether their education and disciplinary process is compatible with that in the U.S. -- which may affect the level of scrutiny with which the lawyer must review their work product; such lawyers should also explore the foreign jurisdiction's confidentiality protections (such as the possibility that client confidences might be seized during some proceedings, or lost during adjudication of a dispute with the service providers); because the typical outsourcing arrangement generally does not give the hiring lawyer effective "supervision and control" over the service providers (as with temporary lawyers working within the firm), arranging for foreign outsourced work generally will require the client's informed consent; lawyers must also assure the continued confidentiality of the client's information (thus, "[w]ritten confidentiality agreements are . . . strongly advisable in outsourcing relationships"); to minimize the risk of disclosure of client confidences, the lawyer should verify that the service providers are not working for the adversary in the same or substantially related matter; explaining that (among other things) lawyers can charge "reasonable" fees for the outsourced lawyer's work by deciding whether to treat the outsourced lawyer in one of two ways: (1) like a contract lawyer (noting that "a law firm that engaged a contract lawyer [and directly supervises the contract lawyer] could add a surcharge to the cost paid by the billing lawyer provided the total charge represented a reasonable fee for the services provided to the client," and that "the lawyer is not obligated to inform the client how much the firm is paying a contract lawyer" as long as the fee is reasonable); or (2) as an expense to be passed along to the client (noting that "[i]f the firm decides to pass those costs through to the client as a disbursement," the lawyer cannot absent client consent add any markup other than "associated overhead" -- which in the case of outsourced legal services "may be minimal or nonexistent" to the extent that the outsourced work is "performed off-site without the need for infrastructural support").
- Colorado LEO 121 (adopted 5/17/08) (approving outsourcing of legal services to lawyers licensed only in other states or only in other countries; ultimately concluding that paying a "temp" lawyer does not amount to a fee-split for ethics rules purposes; also concluding that the lawyer can add a markup when billing the client for the foreign lawyer's outsourced services, and does not have to disclose that markup to the client even if it is "substantial"; warning Colorado lawyers that they must undertake certain steps; "Reasonable efforts include: (a) confirming that the Domestic or Foreign Lawyer is licensed and in good standing in his or her home jurisdiction; (b) confirming that the Domestic or Foreign Lawyer is competent to undertake the work to be assigned; and (c) supervising the work of any nonlawyer hired by the Colorado lawyer to assist in assigned tasks."; also warning that "in general, the Colorado lawyer must determine whether the activities of the Domestic or Foreign Lawyer constitute the practice of law in Colorado, and, if so, whether and to what extent those activities are authorized by virtue of the Colorado lawyer's supervision of and responsibility for the Domestic or

- Foreign Lawyer's work."; advising the Colorado lawyer to assure that the temporary lawyer does not have a conflict of interest; finding that the fee-splitting rules do not apply "if the firm is responsible for paying the Domestic or Foreign Lawyer regardless of whether the client pays the firm, and if the Domestic or Foreign Lawyer's compensation is not a percentage or otherwise directly tied to the amount paid by the client. If the payment to a Domestic or Foreign Lawyer under this analysis constitutes the division of a fee, then the hiring Colorado Lawyer must comply with Colo. RPC 1.5(d)."; "Whether the delegation of tasks to a Domestic or Foreign Lawyer constitutes a significant development that the Colorado Lawyer must disclose to the client depends on the circumstances. If the lawyer reasonably believes that a client expects its legal work to be performed exclusively by Colorado Lawyers, the Colorado Lawyer may be required to disclose the fact of delegation, as well as its nature and extent. The Committee continues to conclude that a Colorado lawyer is not required to affirmatively disclose the amount of fees paid to, and profits made from, the services of Domestic and Foreign Lawyers, even where the mark-up is substantial."; "[W]hether the Colorado Lawyer must inform a client of the use of Foreign or Domestic Lawyers will depend upon the facts of the matter, particularly the client's expectations. At least as of this writing, the Committee is of the opinion that most clients of Colorado Lawyers do not expect their legal work to be outsourced, particularly to a foreign county. Thus in the vast majority of cases, a Colorado Lawyer outsourcing work to a Foreign Lawyer who is not affiliated with the Colorado law firm would constitute a 'significant development' in the case and disclosure to the client would be required.").
- North Carolina LEO 2007-12 (4/25/08) (analogizing foreign outsourcing and lawyers' reliance on the services of "any nonlawyer assistant"; concluding that a lawyer in that circumstance must advise the client of any foreign outsourcing; indicating that lawyers may arrange for foreign outsourcing, as long as the lawyers: "determine that delegation is appropriate"; make "'reasonable efforts' to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer"; "exercise due diligence in the selection of the foreign assistant" (including taking such steps as investigating the assistant's background, obtaining a resume and work product samples, etc.); "review the foreign assistant's work on an ongoing basis to ensure its quality"; "review thoroughly" the foreign assistant's work; make sure that "[f]oreign assistants may not exercise independent legal judgment in making decisions on behalf of the client"; "ensure that procedures are in place to minimize the risk that confidential information might be disclosed" (including the selection of a mode of communication); obtain the client's "written informed consent to the outsourcing," because absent "a specific understanding between a lawyer and client to the contrary, the reasonable expectation of the client is that the lawyer retained by the client, using the resources within the lawyer's firm, will perform the requested legal services").

- Florida LEO 07-2 (1/18/08) (addressing foreign outsourcing; concluding that a lawyer might be obligated to advise the client of such foreign outsourcing; "A lawyer is not prohibited from engaging the services of an overseas provider to provide paralegal assistance as long as the lawyer adequately addresses ethical obligations relating to assisting the unlicensed practice of law, supervision of nonlawyers, conflicts of interest, confidentiality, and billing. The lawyer should be mindful of any obligations under law regarding disclosure of sensitive information of opposing parties and third parties."; "The committee believes that the law firm should obtain prior client consent to disclose information that the firm reasonably believes is necessary to serve the client's interests. Rule 4-1.6 (c)(1), Rules Regulating The Florida Bar. In determining whether a client should be informed of the participation of the overseas provider an attorney should bear in mind factors such as whether a client would reasonably expect the lawyer or law firm to personally handle the matter and whether the non-lawyers will have more than a limited role in the provision of the services."; "The law firm may charge a client the actual cost of the overseas provider, unless the charge would normally be covered as overhead."; explaining the lawyer's obligation to deal with conflicts of interest; "Attorneys who use overseas legal outsourcing companies should recognize that providing adequate supervision may be difficult when dealing with employees who are in a different country. Ethics opinions from other states indicate that an attorney may need to take extra steps to ensure that the foreign employees are familiar with Florida's ethics rules governing conflicts of interest and confidentiality. See Los Angeles County Bar Association Professional Responsibility and Ethics Committee Opinion 518 and Association of the Bar of the City of New York Committee on Professional and Judicial Ethics Formal Opinion 2006-3. This committee agrees with the conclusion of Los Angeles County Bar Association Professional Responsibility and Ethics Committee Opinion 518, which states that a lawyer's obligation regarding conflicts of interest is as follows: [T]he attorney should satisfy himself that no conflicts exist that would preclude the representation. [Cite omitted.] The attorney must also recognize that he or she could be held responsible for any conflict of interest that may be created by the hiring of Company and which could arise from relationships that Company develops with others during the attorney's relationship with Company.").
- San Diego County LEO 2007-1 (undated) (assessing a situation in which a lawyer in a two-lawyer firm was retained to defend a "complex intellectual property dispute" although he was not experienced in intellectual property litigation; noting that the lawyer hired an Indian firm "to do legal research, develop case strategy, prepare deposition outlines, and draft correspondence, pleadings, and motions in American intellectual property cases at a rate far lower than American lawyers could charge clients if they did the work themselves"; also noting that the lawyer had not advised his client that he had retained the Indian firm; explaining that the lawyer

- eventually was successful on summary judgment in the case; holding that: (1) the lawyers did not assist in the unauthorized practice of law; explaining that it is not necessary for a non-lawyer to be physically present in California to violate the UPL Rules, as long as the non-lawyer communicated into California; concluding that "[t]he California lawyer in this case retained full control over the representation of the client and exercised independent judgment in reviewing the draft work performed by those who were not California attorneys. His fiduciary duties and potential liability to his corporate client for all of the legal work that was performed were undiluted by the assistance he obtained from Legalworks [the Indian firm]. In short, in the usual arrangement, and in the scenario described above in particular, the company to whom work was outsourced has assisted the California lawyer in practicing law in this state, not the other way around. And that is not prohibited."; (2) the lawyer had a duty to inform the client of the firm's retention of the Indian firm, because the work was within the "reasonable expectation under the circumstances" that the client would expect the lawyer to perform (citation omitted); (3) whether the lawyer violated his duty of competence depended on whether he was capable of adequately supervising the Indian firm; "The Committee concludes that outsourcing does not dilute the attorney's professional responsibilities to his client, but may result in unique applications in the way those responsibilities are discharged. Under the hypothetical as we have framed it, the California attorneys may satisfy their obligations to their client in the manner in which they used Legalworks, but only if they have sufficient knowledge to supervise the outsourced work properly and they make sure the outsourcing does not compromise their other duties to their clients. However, they would not satisfy their obligations to their clients unless they informed the client of Legalworks' anticipated involvement at the time they decided to use the firm to the extent stated in this hypothetical.").
- New York City LEO 2006-3 (8/2006) (assessing the ethics ramifications of New York lawyers outsourcing legal support services overseas; distinguishing between the outsourcing of "substantive legal support services" (and "administrative legal support services" such as transcriptions, accounting services, clerical support, data entry, etc.; holding that New York lawyers may ethically outsource such substantive services if they: (1) avoid aiding non-lawyers in the unauthorized practice of law, which requires that the lawyer "must at every step shoulder complete responsibility for the non-lawyer's work. In short, the lawyer must, by applying professional skill and judgment, first set the appropriate scope for the non-lawyer's work and then vet the non-lawyer's work and ensure its quality."; (2) adequately supervise the overseas workers, which requires that the "New York lawyer must be both vigilant and creative in discharging the duty to supervise. Although each situation is different, among the salutary steps in discharging the duty to supervise that the New York lawyer should consider are to (a) obtain background information about any intermediary employing or

engaging the non-lawyer, and obtain the professional résumé of the non-lawyer; (b) conduct reference checks; (c) interview the non-lawyer in advance, for example, by telephone or by voice-over-internet protocol or by web cast, to ascertain the particular non-lawyer's suitability for the particular assignment; and (d) communicate with the non-lawyer during the assignment to ensure that the non-lawyer understands the assignment and that the non-lawyer is discharging the assignment according to the lawyer's expectations."; (3) preserve the client's confidences, suggesting "[m]easures that New York lawyers may take to help preserve client confidences and secrets when outsourcing overseas include restricting access to confidences and secrets, contractual provisions addressing confidentiality and remedies in the event of breach, and periodic reminders regarding confidentiality"; (4) avoid conflicts of interest, advising that "[a]s a threshold matter, the outsourcing New York lawyer should ask the intermediary, which employs or engages the overseas non-lawyer, about its conflict-checking procedures and about how it tracks work performed for other clients. The outsourcing New York lawyer should also ordinarily ask both the intermediary and the non-lawyer performing the legal support service whether either is performing, or has performed, services for any parties adverse to the lawyer's client. The outsourcing New York lawyer should pursue further inquiry as required, while also reminding both the intermediary and the non-lawyer, preferably in writing, of the need for them to safeguard the confidences and secrets of their other current and former clients." [Inexplicably failing to explain whether a lawyer may rely on overseas nonlawyer to assist the lawyer even if the overseas nonlawyer is also assisting the lawyer's adversary]; (5) bill appropriately, noting that "[b]y definition, the non-lawyer performing legal support services overseas is not performing legal services. It is thus inappropriate for the New York lawyer to include the cost of outsourcing in his or her legal fees. . . . Absent a specific agreement with the client to the contrary, the lawyer should charge the client no more than the direct cost associated with outsourcing, plus a reasonable allocation of overhead expenses directly associated with providing that service."; (6) obtain the client's consent when necessary, as "there is little purpose in requiring a lawyer to reflexively inform a client every time that the lawyer intends to outsource legal support services overseas to a non-lawyer. But the presence of one or more additional considerations may alter the analysis: for example, if (a) non-lawyers will play a significant role in the matter, e.g., several non-lawyers are being hired to do an important document review; (b) client confidences and secrets must be shared with the non-lawyer, in which case informed advance consent should be secured from the client; (c) the client expects that only personnel employed by the law firm will handle the matter; or (d) non-lawyers are to be billed to the client on a basis other than cost, in which case the client's informed advance consent is needed.").

Although there are some variations among these bars' analyses, all of them take the same basic approach.

First, lawyers must avoid aiding non-lawyers in the unauthorized practice of law. This requires the lawyers to take responsibility for all of the outsourced work. The lawyers must ultimately adopt the outsourced work as their own.

Second, lawyers must provide some degree of supervision -- although the exact nature and degree of the supervision is far from clear. Lawyers should consider such steps as researching the entity that will conduct the outsourced work, conducting reference checks, interviewing the folks who will handle the outsourced work, specifically describing the work the lawyers require, and reviewing the work before adopting it as their own.

Third, lawyers must assure that the organization they hire adequately protects the client's confidences. This duty might involve confirming that the foreign lawyers' ethics are compatible with ours, and might also require some analysis of the confidentiality precautions and technologies that the foreign organization uses.

Fourth, the lawyers arranging for such outsourcing should avoid conflicts of interest. At the least the lawyers should assure that the organization handling the outsourced work is not working for the adversary. Some of the bars warn lawyers to take this step to avoid the inadvertent disclosure of confidential communications rather than to avoid conflicts.

Fifth, lawyers must bill appropriately. As explained above, if the lawyers are not "adding value" to the outsourced workers, they should pass along the outsourcing bill directly to their client as an expense. In that situation, the lawyer generally may add

overhead expenses to the bill (although the ABA noted that there will be very few overhead expenses in a foreign outsourcing operation).

Sixth, lawyers usually must advise their clients that they are involving another organization in their work. As the various legal ethics opinions explain, such disclosure may not be required if the contract or temporary lawyers act under the direct supervision of the law firm -- but disclosure is always best, and almost surely would be required in a situation involving a foreign law organization. For instance, the ABA indicated that the lawyer's lack of immediate supervision and control over foreign service providers means that they must obtain the client's consent to send work overseas. The North Carolina Bar indicated that lawyers arranging for outsourcing must always obtain their clients' written informed consent.

Best Answer

The best answer to (a) is **YES**; the best answer to (b) is **DISCLOSURE TO THE CLIENT; DEGREE OF NECESSARY SUPERVISION; ASSURANCES OF CONFIDENTIALITY; CONFLICTS OF INTEREST.**

B 8/12, 9/15

Discovery of a Party's or Witness's Social Media

Hypothetical 11

You represent an automobile manufacturer which has just been sued in a product liability case. The plaintiff claims to have suffered serious back injuries in an accident. One of the newest lawyers at your firm suggests that you check the plaintiff's Facebook page to see what the plaintiff has to say about the accident and her injuries.

May you check the plaintiff's Facebook page (and perhaps other social media sites on which the plaintiff is active) without the plaintiff's lawyer's consent?

YES

Analysis

As long as there is no "communication" with the party or witness whose social media sites are being checked, such research does not violate the prohibition on ex parte communications with a represented party. ABA Model Rule 4.2. Some bars would prohibit arguably deceptive conduct designed to gain access to such social media sites.

A party's or witness's postings on social media sites can be a rich source of useful evidence.

- RJ Vogt, \$10K Sanctions For Late-Filing Atty Exposed By Instagram, Law360, Apr. 30, 2018) ("A New Jersey federal judge has imposed a \$10,000 sanction on a lawyer whose excuse for missing a court filing deadline in an employment suit was later refuted by photos on her Instagram account, writing that she deliberately misled the court and other attorneys about a trip she took to Mexico."; "Lina M. Franco of Lina Franco Law PC had told the court she was 'forced to leave the country due to a family emergency in Mexico City' on Thursday Nov. 21, 2016, two days before she was due to file a collective certification bid on behalf of her clients Siu Ching Ha and Pak Chuan Leong in their Fair Labor Standards Act suit against four cafes and their owners."; "But after the defense counsel presented pictures from her public Instagram feed that showed she was actually celebrating Thanksgiving in New York City the day after missing the deadline, Franco attempted to explain that she fibbed about the date range of the Mexico City trip because she felt ashamed for allowing the 'emotional distraction' of her mother's recent diagnosis with cancer to delay her

filing.”; “In granting the defendants' bid for sanctions against the now-withdrawn attorney, U.S. Magistrate Judge Michael A. Hammer said her actions clearly constitute bad faith and ‘were unreasonable and vexatious, not simply a misunderstanding.’ He also noted her flight itinerary somehow indicated Nov. 21 as a Thursday, even though the date was ‘indisputably a Monday.’”).

- Casey Anthony: Did She Do A Google Search For "Fool-Proof Suffocation"?, Associated Press, Nov. 26, 2012 ("The Florida sheriff's office that investigated the disappearance of Casey Anthony's 2-year-old daughter overlooked evidence that someone in their home did a Google search for 'fool-proof suffocation methods on the day the girl was last seen alive."; "Orange County sheriff's Captain Angelo Nieves said Sunday that the office's computer investigator missed the June 16, 2008, search. The agency's admission was first reported by Orlando television station WKMG. It's not known who performed the search. The station reported it was done on a browser primarily used by the 2-year-old's mother, Casey Anthony, who was acquitted of the girl's murder in 2011."; "Anthony's attorneys argued during trial that Casey Anthony helped her father, George Anthony, cover up the girl's drowning in the family pool."; "WKMG reports that sheriff's investigators pulled 17 vague entries only from the computer's Internet Explorer browser, not the Mozilla Firefox browser commonly used by Casey Anthony. More than 1,200 Firefox entries, including the suffocation search, were overlooked."; "Whoever conducted the Google search looked for the term 'fool-proof suffocation,' misspelling 'suffocation,' and then clicked on an article about suicide that discussed taking poison and putting a bag over one's head."; "The browser then recorded activity on the social networking site MySpace, which was used by Casey Anthony but not her father.").
- Bill Archer, "Like" button leads to obstruction of justice charge, Bluefield Daily Telegraph, Sept. 14, 2012 ("A Tazewell County, Va., woman was charged with obstruction of justice Thursday morning, after lying to Tazewell County Sheriff's deputies who were searching for her boyfriend who was wanted in Maryland on sex offender charges."; "Samantha Nicole Dillow, 22, of Bluefield, Va., visited the Tazewell County Sheriff's Office Facebook Page, and pressed the like button according to Tazewell County Sheriff Brian Hieatt, who speculated that Dillow wanted to receive alerts of any developments related to the search for her boyfriend, Dyllan Otto Naecker, 29."; "We have been working with our Facebook page for quite a while now,' Hieatt said. "We use it to post pictures of missing persons, or fugitives we were looking for. It was very helpful when we tracked Chris Sturgill to Texas."; "Major (Harold) Heatley looks at the page regularly, and when he saw that she had pressed the like button, he looked at the photos on her page, and thought the male she was pictured with might have been the person Maryland authorities were looking for."; "Major Heatley emailed a photograph of the male subject to Maryland, and they responded back that he was the fugitive they were searching for,' Hieatt said. "We were able to trace her post back to her

home. We felt that he was in hiding there with her so several deputies went to her residence.""; "Hieatt said that Dillow denied that Naecker was in the residence. He said there were enough deputies to surround the residence while one of the deputies returned to Tazewell to obtain a search warrant. 'Before the deputy returned with the search warrant, Mr. Naecker walked outside the residence, and we took him into custody. I think he was surprised.'"; "'All of that came from Facebook,' Hieatt said.").

- Lev Kalman, Web Searches Serve as a Litigation Tool, Legal Intelligencer, Mar. 1, 2010 ("In the defense context, a critical component of litigating personal injury lawsuits is determining the extent to which a plaintiff has been injured, if at all. While use of a private investigator is often employed to make this determination, photographs posted on Facebook, which may show vacations, activities and interactions with friends, may also provide insight. In this day and age, a picture really can speak a thousand words -- and it may tell a story that the user may never have intended. Current digital camera technology provides a tremendous amount of information on the context of a digital photograph. For example, Samsung unveiled a global positioning system camera in the summer of 2009 that automatically geo-tags digital images, recording the latitude and longitude of where in the world each photo is taken. The location data is then automatically embedded into each image's digital file. A party may become excited about the technology lauded by the camera manufacturer without realizing how that technology may be used against him or her. Photographs posted on Facebook have very real consequences in litigation. In January 2010, a welder's claim against manufacturers of welding consumables in multidistrict litigation pending in Cleveland, Ohio, was dismissed after photographs of him were discovered on Facebook in which he was racing high-speed powerboats. Although the plaintiff had been claiming a severe disability, the Facebook photos clearly showed otherwise and were instrumental in achieving dismissal of his claims.").

Simply researching a party's or witness's social media sites seems permissible in every state.

- Womack v. Yeoman, 83 Va. Cir. 401, 405 (Va. Cir. Ct. 2011) (finding nothing inappropriate with a defendant's lawyer gathering information about the plaintiff; "At no time did Defendant's counsel ever 'hack' into any private accounts, breach any law, or engage in unethical conduct. The Defendant's counsel was able to gather information by conducting a Google search of numerous family members. Further, Defendant's counsel did nothing wrong when accessing public Facebook accounts. Information posted on Facebook is a forward [sic] the results to the Plaintiff's counsel. Plaintiff's counsel objected to the information, during an emotional conversation at the courthouse, and stated Defendant's attorney had engaged in unethical and

illegal conduct by 'hacking' into the various social networking online accounts. Plaintiff's counsel advised him the information was from public sites, like Google.").

- 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." (footnote omitted)).

Best Answer

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

B 8/12; B 7/14

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

Hypothetical 12

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.

- Oregon LEO 2013-189 (2/2013) (recognizing that a lawyer may search witnesses' social media sites for evidence; finding that a lawyer may not engage in misrepresentation in undertaking such an investigation, but noting Oregon's unique and limited exception permitting such deception under certain circumstances; "Lawyer may access publicly available information on a social networking website."; "Lawyer's request for access to non-public information does not in and of itself make a representation about the Lawyer's role. In the context of social networking websites, the holder of the account has full control over who views the information available on his or her pages. The holder of the account may allow access to his or her social network to the general public or may decide to place some, or all, of that information behind 'privacy settings,' which restrict who has access to that information. The account holder can accept or reject requests for access. Accordingly, the holder's failure to inquire further about the identity or purpose of unknown access requestors is not the equivalent of misunderstanding Lawyer's role in the matter."; "Lawyer may not engage in subterfuge designed to shield Lawyer's identity from the person when making the request. As an exception

- to Oregon RPC 8.4(a)(3), Oregon RPC 8.4(b) allows a lawyer 'to advise clients and 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.' For purposes of the rule 'covert activity' means: '[A]n 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.' In the limited instances allowed by Oregon RPC 8.4(b) (more fully explicated in OSB Formal Ethics Op No 2005-173), Lawyer may advise or supervise another's deception to access a person's nonpublic information on a social networking website." (footnote omitted)).
- New Hampshire LEO 2012-13/5 (2012) ("The Rules of Professional Conduct do not forbid use of social media to investigate a non-party witness. However, the lawyer must follow the same rules which would apply in other contexts, including the rules which impose duties of truthfulness, fairness, and respect for the rights of third parties. The lawyer must take care to understand both the value and the risk of using social media sites, as their ease of access on the internet is accompanied by a risk of unintended or misleading communications with the witness. The Committee notes a split of authority on the issue of whether a lawyer may send a social media request which discloses the lawyer's name -- but not the lawyer's identity and role in pending litigation -- to a witness who might not recognize the name and who might otherwise deny the request. The Committee finds that such a request is improper because it omits material information. The likely purpose is to deceive the witness into accepting the request and providing information which the witness would not provide if the full identity and role of the lawyer were known." (footnote omitted)).
 - 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 took the opposite approach.

- 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.").

Since then, the New York City Bar has reiterated its position -- apparently only prohibiting misrepresentations rather than requiring affirmative disclosure.

- New York County LEO 745 (7/2/13) ("Lawyers should comply with their ethical duties in dealing with clients' social media posts. The ethical rules and concepts of fairness to opposing counsel and the court, under RPC 3.3 and 3.4, all apply. An attorney may advise clients to keep their social media privacy settings turned on or maximized and may advise clients as to what should or should not be posted on public and/or private pages, consistent with the principles stated above. Provided that there is no violation of the rules or substantive law pertaining to the preservation and/or spoliation of evidence, an attorney may offer advice as to what may be kept on 'private' social media pages, and what may be 'taken down' or removed."; "Recent ethics opinions have concluded that accessing a social media page open to all members of a public network is ethically permissible. New York State Bar Association Eth. Op. 843 (2010); Oregon State Bar Legal Ethics Comm., Op. 2005-164 (finding that accessing an opposing party's public website does not violate the ethics rules limiting communications with adverse parties). The reasoning behind these opinions is that accessing a public site is conceptually no different from reading a magazine article or purchasing a book written by that adverse party. Oregon Op. 2005-164 at 453."; "But an attorney's ability to access social media information is not unlimited. Attorneys may not make misrepresentations to obtain information that would otherwise not be obtainable. In contact with victims, witnesses, or others involved in opposing counsel's case, attorneys should avoid misrepresentations, and, in the case of a represented party, obtain the prior consent of the party's counsel. New York Rules of Professional Conduct (RPC 4.2). See, NYCBA Eth. Op., 2010-

2 (2012); NYSBA Eth. Op. 843. Using false or misleading representations to obtain evidence from a social network website is prohibited." (emphasis added)).

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; B 7/14

Researching Jurors' Social Media

Hypothetical 13

You have read about lawyers and their representatives researching adverse parties' and witnesses' social media sites. One of your partners about to begin a jury trial just asked if he could conduct the same research of potential jurors.

May a lawyer research potential jurors' social media sites?

YES

Analysis

Several bars have addressed the ethical propriety and appropriate guidelines for lawyers' research into jurors' social media.

The first two bars to have examined this issue indicated that lawyers generally could undertake such research, coupling that assurance with a dire warning of serious misconduct -- but without giving any guidance to lawyers about whether their social media research would amount to the serious misconduct described in the opinions.

- New York County Law. Ass'n LEO 743 (5/18/11) (explaining that a lawyer can investigate jurors by using their publicly-available social network information, although such a search might an improper "communication" if the juror knows that the lawyer has searched; "It is proper and ethical under RPC 3.5 for a lawyer to undertake a pretrial search of a prospective juror's social networking site, provided that there is no contact or communication with the prospective juror and the lawyer does not seek to 'friend' jurors, subscribe to their Twitter accounts, send tweets to jurors or otherwise contact them. During the evidentiary or deliberation phases of a trial, a lawyer may visit the publicly available Twitter, Facebook or other social networking site of a juror, but not 'friend,' email, send tweets to jurors or otherwise communicate in any way with the juror, or act in any way by which the juror becomes aware of the monitoring. Moreover, the lawyer may not make any misrepresentation or engage in deceit, directly or indirectly, in reviewing juror social networking sites."; "[U]nder some circumstances a juror may become aware of a lawyer's visit to the juror's website. If a juror becomes aware of an attorney's efforts to see the juror's profiles on websites, the contact may well consist of an

impermissible communication, as it might tend to influence the juror's conduct with respect to the trial." (footnote omitted)).

- New York City LEO 2012-2 (2012) ("Attorneys may use social media websites for juror research as long as no communication occurs between the lawyer and the juror as a result of the research. Attorneys may not research jurors if the result of the research is that the juror will receive a communication. If an attorney unknowingly or inadvertently causes a communication with a juror, such conduct may run afoul of the Rules of Professional Conduct. The attorney must not use deception to gain access to a juror's website or to obtain information, and third parties working for the benefit of or on behalf of an attorney must comport with all the same restrictions as the attorney. Should a lawyer learn of juror misconduct through otherwise permissible research of a juror's social media activities, the lawyer must reveal the improper conduct to the court.").

These legal ethics opinions highlight the frequent difficulty that lawyers face when using new technologies. The opinions mention almost in passing that jurors may become aware of a lawyer's visit to the juror's website -- which would then constitute an impermissible communication and presumably an ethics violation. Yet few if any lawyers would have a clue whether a juror could learn that a lawyer has visited the juror's website.

In 2014, the ABA also approved such research, but rejected the earlier New York ethics opinions' conclusion that lawyers would violate the ethics rules if jurors knew that they were being researched.

- ABA LEO 466 (4/24/14) (explaining that although the line between "properly investigating jurors and improperly communicating with them" is "increasingly blurred," lawyers may (and in some states must) engage in a "passive review" of jurors' electronic social media (which is similar to "driving down the street where the prospective juror lives to observe the environs in order to glean publicly available information that could inform the lawyer's jury-selection decisions"); concluding that an electronically sent electronic source media ("ESM") feature notifying a juror that a lawyer has conducted such a search is not a prohibited "communication" to the juror (instead it "is akin to a neighbor's recognizing a lawyer's car driving down the juror's street and telling the juror that the lawyer had been seen driving down the street"); noting in contrast that lawyers may not send an "access request" to a juror, because that would be a

prohibited communication ("akin to driving down the juror's street, stopping the car, getting out, and asking the juror for permission to look inside the juror's house because the lawyer cannot see enough when just driving past"); explaining that trial judges can "dispel any juror misperception that a lawyer is acting improperly" when conducting such a search by discussing with jurors "the likely practice of trial lawyers reviewing jurors' ESM."; advising that lawyers learning through a search of jurors' ESM that a juror has engaged in "criminal or fraudulent conduct related to the proceeding" must take remedial action, including reporting the misconduct to the court; explaining that the Ethics 2000 Commission apparently intended to expand the disclosure duty to such a person's "improper conduct," but Model Rule 3.3(b) is still limited to "criminal or fraudulent" conduct; concluding that lawyers' disclosure duty upon learning of a juror's misconduct such as improper communications during jury service "will depend on the lawyer's assessment of those postings in light of court instructions and the elements of the crime of contempt or other applicable criminal statutes.").

Of course, there are practical considerations too.

- Ben Hancock, [Should You 'Facebook' The Jury? Yes. No. Probably](#), N.J. L.J., Apr. 26, 2017 ("Any good trial lawyer these days is keenly aware that jurors are revealing valuable tidbits about their lives, their interests, and social and political leanings on such services as Facebook and Twitter. But while social media profiles can present a trove of data points for jury selection—one that legal tech companies are eager to mine—researching jurors online while keeping on the right side of the judge and local ethics rules is hardly a straightforward exercise."; "It's really an issue that I see developments on a weekly basis," said John Browning, a trial attorney at Passman Jones in Dallas and author of 'Legal Ethics and Social Media: A Practitioner's Handbook,' set to be published next month. At the end of the day, Browning said, most opinions out there would steer attorneys toward doing more research about their panel over less. Even so, there are nuances depending on what state you're in, and who the judge is."; "This past January, U.S. District Judge James Robart of the Western District of Washington (who came into the [national spotlight](#) for his order blocking President Donald Trump's travel ban) offered a cautionary tale: research jurors all you want, but think twice before asking about what you learn. Robart said that in a case before a colleague on the bench, the lawyers had run a Facebook search on each of the jurors. 'And when they got to Juror No. 5 and the lawyer said, 'And so how did your daughter do in the horse competition?' there was a revolt among the jury,' Robart recalled, according to a transcript. 'They really do not expect that you're going to inquire into their personal lives. That's just a word from experience.'").

Best Answer

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

N 1/13; B 7/14

Juror's Independent Research

Hypothetical 14

You just won a large intellectual property case. Your celebration was cut short when you learned that one of the jurors had used her smartphone to research the meaning of some terms in the jury instructions.

Does a juror's personal investigation provide grounds for reversing a judgment?

YES

Analysis

Not surprisingly, jurors are supposed to consider only that evidence which has been tested by the crucible of the trial. In some situations, judges specifically instruct jurors to ignore evidence that has been improperly admitted.

Despite being explicitly warned not to do so, some jurors cannot resist the temptation to conduct their own research while serving on a jury. Inappropriate juror research can have a wide-ranging impact.

- People v. Pizarro, 216 Cal. App. 4th 658, 663-64, 664, 665 (Cal. Ct. App. 2013) (reversing a murder conviction based on a juror's improper research, which included reading an earlier appellate decision overturning an earlier conviction of the same criminal defendant; "Tragically, in 1989, 13-year-old Amber Dawn Barfield was sexually assaulted and murdered. In 1990, defendant Michael Antonio Pizarro, Amber's older half-brother, was convicted of her first degree murder with special circumstances. In the first appeal in 1992, this court reversed and remanded for a Kelly [People v. Kelly, 549 P.2d 1240 (Cal. 1976)] hearing regarding the DNA evidence. On remand, the trial court ruled that the DNA testing was generally accepted within the scientific community and reinstated the conviction. In the second appeal in 2003, this court found that the scientific evidence failed to satisfy the third prong of Kelly and reversed the judgment. In 2008, a second jury convicted defendant of first degree murder with a special circumstance finding. This is the third appeal in this case. Defendant again raises challenges to the DNA evidence, contends the trial judge erred in denying his motion for a new trial based on jury misconduct, and argues unanimity was required on the murder theory." (footnotes omitted); "After the second trial verdicts were received and the jury

- had been discharged, the parties and trial court learned that Juror No. 9 had read, during the trial, an earlier appellate opinion in this case. That opinion revealed several items of information that were not presented during the second trial, including: defendant had previously been convicted on all counts by another jury; defendant had been sentenced to life in prison without the possibility of parole; the appellate court's review of the evidence established that defendant had consumed beer throughout the afternoon and continued to drink at a party; defendant testified at his first trial in which he contradicted portions of his statement to the police and admitted that 'alcohol made him violent'; the Federal Bureau of Investigation (FBI) analysis presented at the first trial concluded that the DNA from the semen on the vaginal swabs matched the known blood sample of defendant; the case had been appealed twice; and the appellate court determined that the evidence against defendant was a 'strong circumstantial case' and that the DNA evidence clearly 'sealed [his] fate.'" (footnote omitted); "During the second trial, the trial judge regularly admonished the jury not to consider anything other than the evidence presented in the courtroom. Juror No. 9 repeatedly violated that instruction during the trial. The parties and the trial court agree that Juror No. 9 committed misconduct. They disagree whether that misconduct amounted to juror bias, warranting a new, and third, trial."; "We conclude that the extraneous material (the appellate opinion) read by Juror No. 9, judged objectively, is inherently and substantially likely to have influenced the juror, warranting a new trial. Accordingly, we reverse the conviction.").
- United States v. Lawson, 677 F.3d 629, 639-40, 651 (4th Cir. 2012) (granting the defendant a new trial after he was convicted by a jury of violating animal fighting prohibition laws; "Juror 177 used a computer printer at his home to reproduce the Wikipedia entry for the term 'sponsor,' and later brought the printout to the jury room when the deliberations resumed. Juror 177 shared the printout with the jury foreperson, Juror 185, and also attempted to show the material to other jurors, but was stopped when some of them told him it would be inappropriate to view the material. These actions violated the explicit instructions of the district court, which had admonished the jurors not to conduct any outside research about the case, including research on the internet."; "In this case, we are unable to say that Juror 177's use of Wikipedia did not violate the fundamental protections afforded by the Sixth Amendment. Accordingly, we vacate the appellants' convictions under the animal fighting statute, and we award them a new trial with respect to those charges.").
 - Brian Grow, As Jurors Go Online, United States Trials Go Off Track, Reuters Legal, Dec. 8, 2010 ("A Reuters Legal analysis found that jurors' forays on the Internet have resulted in dozens of mistrials, appeals and overturned verdicts in the last two years. For decades, courts have instructed jurors not to seek information about cases outside of evidence introduced at trial, and jurors are routinely warned not to communicate about a case with anyone before a

verdict is reached. But jurors these days can, with a few clicks, look up definitions of legal terms on Wikipedia, view crime scenes via Google Earth, or update their blogs and Facebook pages with snide remarks about the proceedings. The consequences can be significant. A Florida appellate court in September overturned the manslaughter conviction of a man charged with killing his neighbor, citing the jury foreman's use of an iPhone to look up the definition of "prudent" in an online dictionary. In June, the West Virginia Supreme Court of Appeals granted a new trial to a sheriff's deputy convicted of corruption, after finding that a juror had contacted the defendant through MySpace. Also in September, the Nevada Supreme Court granted a new trial to a defendant convicted of sexually assaulting a minor, because the jury foreman had searched online for information about the types of physical injuries suffered by young sexual assault victims." (emphasis added); "Over a three-week period in November and December, Reuters Legal monitored Twitter, reading tweets that were returned when "jury duty" was typed into the site's search engine. Tweets from people describing themselves as prospective or sitting jurors popped up at the astounding rate of one nearly every three minutes. Many appeared to be simple complaints about being called for jury duty in the first place, or about the boredom of sitting through a trial. But a significant number included blunt statements about defendants' guilt or innocence. "Looking forward to a not guilty verdict regardless of evidence," one recent message stated. Read another: "Jury duty is a blow. I've already made up my mind. He's guilty. LOL." Last month, a person using the Twitter name @JohnnyCho wrote that he was in a pool of potential jurors in Los Angeles Superior Court, and tweeted, "Guilty! He's guilty! I can tell!" In later tweets, @JohnnyCho said he was picked for the jury and that the defendant was convicted."; "In another recent case, Susan Dennis, a Seattle blogger, posted in late October that she was a prospective juror in the Superior Court of King County, Washington. The prosecutor during jury selection, she wrote, was 'Mr. Cheap Suit' and 'annoying,' while the defense attorney 'just exudes friendly. I want to go to lunch with him. And he's cute.' She also wrote that the judge had instructed jurors not to tweet about the robbery case but had 'made no mention' of blogging. Reached by email, Dennis responded that she had no comment. Reuters Legal described the circumstances to a jury consultant, who independently notified the court about the blog. That day, the judge dismissed Dennis from the jury pool for ignoring his instruction not to communicate online about the case, according to Amy Montgomery, one of the prosecutors. 'We believe, probably stupidly, that jurors follow judges' instructions,' said public defender Jonathan Newcomb. 'They don't.' Complications caused by Internet-surfing jurors have arisen in major corporate disputes. In September, Exxon Mobil Corp challenged a verdict awarding \$104 million to New York City in a ground-water contamination case, in part because two jurors allegedly looked up information online. U.S. District Court Judge Shira Scheindlin denied a new trial, but she acknowledged in her ruling that 'search engines have indeed created significant new dangers for the judicial system.'" (emphasis added)).

Some courts have criticized jurors, but not taken any harsh measures.

- In re Toppin, [No Number in Original], 2011 N.J. Super. Unpub. LEXIS 2573, at *5-6, *15-17, *25, *26, *30 (N.J. Super. Ct. Crim. Div. Oct. 11, 2011) (criticizing but declining to punish a juror who had researched various legal terms on the internet despite being advised not to do so; "With the assistance of a Sheriff's Officer, the materials were retrieved. The materials, printed from the internet, included a definition of 'preponderance' and 'preponderance of the evidence.' Also included were Wikipedia articles regarding 'legal burden of proof,' 'reasonable doubt,' 'beyond the shadow of a doubt,' 'jurisprudence,' and 'critical thinking,' as well as an article by Jim Hopper, Ph.D., entitled 'Recovered Memories of Sexual Abuse.'"; citing other examples of similar jury misconduct; "Anecdotal evidence, unsurprisingly, seems to support Bell's research, as there appear to be countless examples of jurors conducting internet research. Among them is a South Dakota juror who, in a seat belt product liability case, 'googled' the defendant and informed five other jurors the defendant had not been sued previously. . . . Additionally, a juror in a federal corruption trial in Pennsylvania posted his progress during deliberations on the internet, resulting in a motion for mistrial. . . . Jurors were running searches in Google for lawyers and parties involved in a case, finding news articles about the case, researching definitions and information in Wikipedia, and looking for evidence excluded from the case presented. . . . As disconcerting as it is, while those transgressions happened to be discovered, they probably represent just the tip of the iceberg of juror (mis)behavior."; noting courts' efforts to avoid problems; "A San Diego Superior Court Judge has recently adopted a novel policy requiring jurors to sign declarations stating they will not use the internet or other media to conduct research. . . . Should a juror violate his or her signed declaration, the juror is subject to punishment by a fine, probation, or incarceration."; "Instructions and warnings have, at times, failed to prevent jurors from discussing cases on the internet, and, as a result, some courts have adopted various forms of punishment for disobedience. . . . Some judges use relatively minor penalties as a reprimand for misconduct, as was the case when a Michigan judge fined a juror \$250 for sharing her belief the defendant was guilty on her Facebook page. . . . The judge also required the juror to write a short essay on the Sixth Amendment. . . . Others have called for a harsher financial penalty, thereby holding jurors who have engaged in misconduct on the internet financially accountable for the costs of retrial."; "A Florida judge chose to 'remove [the] distraction and temptation' of cell phones, iPods, and other such devices by requiring jurors to leave the devices on the table by the witness stand when court is in session and during jury deliberations."; "An assembly bill in California, signed by the Governor on August 5, 2011, added an admonishment to ward off independent electronic research by jurors.").

Some judges have issued more severe punishment.

- John Barry, Tampa Judge Sentences Misbehaving Juror To More Jury Service, Tampa Bay Times, Jan. 12, 2013 ("Confronted Friday with an errant yet remorseful juror whose misbehavior could have ruined a death-penalty murder trial, a judge chose a punishment that fit the crime."; "But it could be argued that the judge's order for the offender -- report for jury duty one week a month for the next three months -- was a more cruel punishment than jail."; "Back in October, would-be juror Vishnu P. Singh was caught researching a highly publicized murder case during jury selection. Over lunch, he told other jurors what he'd done. One of them reported him."; ". . . when Singh googled the Jackson case, Fuente was clearly fed up. He had Singh thrown out of the courthouse after telling him to prepare for jail when he was summoned back."; "On Friday, Singh, an engineer for Bright House Networks, begged Fuente's forgiveness, telling him, 'Curiosity got the better of me.'"; "Fuente told Singh that if he had been caught after the trial started, it would have caused a mistrial. The jurors who were chosen eventually convicted Jackson and recommended the death penalty."; "The judge said he had no doubt that other jurors disobey orders and research cases. Singh's punishment, he said, could serve as an example."; "'It's important that this be brought to the public's attention.'"; "But the judge had something other than jail in mind. Instead, he said Singh would receive a summons for jury duty one week per month for the next three months. Or else."; "'Failing that,' the judge said, 'you will serve five days in jail.'").

Best Answer

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

N 1/13; B 7/14

Jurors' Communications

Hypothetical 15

You recently finished a rare court-appointed criminal case, and were disappointed that your client was convicted of armed robbery. You just discovered that one of the jurors had been posting comments on her Facebook page during the trial. You wonder whether this will give you grounds for an appeal.

May you base an appeal on a juror's postings on a social media site?

YES

Analysis

Numerous articles have noted the dramatic increase in improper juror communications, as well as the legal impact of such misconduct.

- Dan M. Clark, Court of Appeals Grants New Murder Trial Based On Juror's Text Messages, N.Y. L.J., Oct. 22, 2019 ("Dr. Robert Neulander, who was convicted of a [sic] murdering his wife in their home seven years ago, was granted a new trial Tuesday by the New York Court of Appeals, which concluded that a juror's text messages to friends and family may have tainted the verdict in the 2015 trial."; "New York state's highest court decided unanimously that the actions of that juror, which included communications and possible research about the trial, were improper."; "Associate Judge Rowan Wilson, in a strongly worded opinion for the high court, criticized the juror's misconduct while granting Neulander a new trial."; "'We agree that the extensiveness and egregiousness of the disregard, deception, and dissembling occurring here leave no alternative but to reverse the judgment of conviction and remit for a new trial and compel us to affirm publicly the importance of juror honesty,' Wilson wrote.").
- Jenna Greene, What Happened When Juror No. 10 Went Rogue, The AmLaw Litig. Daily, Apr. 16, 2019 ("Jurors are supposed to be like old-fashioned children: Seen but not heard."; "That is, sit quietly, pay attention—and for heaven's sake, don't email a lawyer during trial."; "I'm looking at you, Juror Number 10 in Riverside County, California superior court"; "During a nine-week trial --- a \$25 million fight over the luxury Glen Ivy Hot Springs resort in Corona, California – the juror allegedly sent at least nine emails to plaintiff's counsel, offering opinions on court proceedings and testimony such as 'That little p#nk is a freaking liar.'"; "Still, plaintiff's counsel Paul Derby of Skiermont Derby in Los Angeles didn't report the emails until the third day of

- jury deliberations, prompting opposing counsel from Venable to cry foul.”; “Mr. Derby attempts to whitewash plaintiff’s stunning delay in disclosing the worst juror conduct imaginable, by explaining that he was too busy to read all of his emails during trial, and was uncertain that the emails came from a juror,” wrote Venable partners Elynn Garofalo and Jessica Grant in court papers. “However, even a cursory review of the subject emails would lead anyone to conclude – particularly a lawyer in the courtroom – that they were sent by a juror.”).
- Jason M. Gonder, Courts Atwitter With Juror Social Media Use, Law360, Sept. 24, 2012 (“With the ubiquity of social media and mobile devices, how do you prevent jurors from improperly using social media during trial? For many judges, the answer is simple: You admonish them early and often.”; “The Judicial Conference Committee on Court Administration and Case Management has updated its model jury instructions on the improper use of social media. While the previous instructions were to be provided to jurors before trial and again just prior to deliberations, the revised instructions are also to be provided ‘at the end of each day before jurors return home, and other times, as appropriate.’”; “This change follows a Federal Judicial Center report citing the practice of most federal district court judges to instruct jurors on the improper use of social media at multiple points throughout trial.”; “The updated instructions also include an express expectation that a juror will inform the judge as soon as the juror ‘become[s] aware of another juror’s violation of these instructions.’ Also added to the instructions are the consequences of improper social media use: ‘You may not use these electronic means to investigate or communicate about the case because it is important that you decide this case based solely on the evidence presented in this courtroom. Information on the internet or available through social media might be wrong, incomplete, or inaccurate. You are only permitted to discuss the case with your fellow jurors during deliberations because they have seen and heard the same evidence you have. In our judicial system, it is important that you are not influenced by anything or anyone outside of this courtroom. Otherwise, your decision may be based on information known only by you and not your fellow jurors or the parties in the case. This would unfairly and adversely impact the judicial process.’”).
 - Deborah Elkins, It’s Just Google!, Va. Law. Wkly, May 18, 2012 (“At the outer limits of juror misconduct, a juror in England actually posted information on a trial on her Facebook page, and asked people to vote for a verdict.”).
 - Michael Tarm, Courtroom Clash Over Tweets, Associated Press, Apr. 17, 2012 (“Getting news from a big trial once took days, moving at the speed of a carrier pigeon or an express pony. The telegraph and telephone cut that time dramatically, as did live TV.”; “Now comes Twitter with more changes, breaking up courtroom journalism into bite-size reports that take shape as fast as a reporter can tap 140 characters into a smartphone. But the

- micro-blogging site is putting reporters on a collision course with judges who fear it could threaten a defendant's right to a fair trial."; "The tension was highlighted recently by a Chicago court's decision to ban anyone from tweeting or using other social media at the trial of a man accused of killing Oscar winner Jennifer Hudson's family. Reporters and their advocates insist the practice is essential to providing a play-by-play for the public as justice unfolds."; "The judge in the Illinois case fears that feverish tweeting on smartphones could distract jurors and witnesses."; "'Tweeting takes away from the dignity of a courtroom,' said Irv Miller, media liaison for Cook County Judge Charles Burns. 'The judge doesn't want the trial to turn into a circus.'"; "Burns is allowing reporters to bring cellphones and to send e-mails periodically, a notable concession in a state that has only recently announced it will begin experimenting with cameras in court and where cellphones are often barred from courtrooms."; "There's also an overflow courtroom where reporters can tweet freely. But there will be no audio or video of proceedings in the room, just live transcripts scrolling across a screen."; "In their request for a new trial, attorneys for Texas financier R. Allen Stanford, who was convicted of fraud last month, argued that tweeting by reporters distracted jurors and created other risks. The federal judge denied the request."; "And a Kansas judge recently declared a mistrial after a [Topeka Capital-Journal](#) reporter tweeted a photo that included the grainy profile of a juror hearing a murder case. The judge had permitted camera phones in court but said no photos were to be taken of jurors."; "Reporter Ann Marie Bush hadn't realized one juror was in view, Publisher Gregg Ireland said, adding that the company 'regrets the error and loss of the court's time.'"; "Journalists understand judges' concerns, Dalglish [director, Reporters Comm. for Freedom of the Press] said. But the better solution is for courts to do what they have done for decades -- tell jurors not to follow news on their case, including by switching off their Twitter feeds."; "One obstacle to reaching a consensus is that no one agrees on what Twitter is or does. Some judges say it's broadcasting, like television, which is banned from courtrooms in some states. [Radio journalist] Fuller says tweets are more like notes that get shared.").
- Steve Eder, [Jurors' Tweets Upend Trials](#), Wall St. J., Mar. 5, 2012 ("Judges typically instruct jurors not to do any independent research or communicate with anyone about the case they are hearing, either through social media or in person. Courts are concerned about what users might say online, because it could be construed as having a bias about the case or reveal information about a trial or deliberations before they becomes public. Even postings that seem benign could lead to questions about the juror's ability to follow directions or whether he has communicated about the case elsewhere. 'It is a whole new world,' said Dennis Sweeney, a retired judge in Maryland, who in late 2009 presided over the corruption trial of former Baltimore Mayor Sheila Dixon. Some called it the 'Facebook Five' case, when members of the jury communicated with one another about the case on the site, prompting the mayor to seek a new trial. The parties reached a plea before that, and the

jurors in the case weren't punished. A challenge for courts is that use of social media is difficult to detect. Late last year, 79% of judges who responded to a survey question by the Federal Judicial Center said they had no way of knowing whether jurors had violated a social-media ban. Legal experts say someone would need to have access to a juror's postings and flag it to the court. In the Baltimore case, a newspaper reporter detected the Facebook posts. In the Arkansas case, someone working with the defense detected the juror's tweets. Judges are taking stiffer measures when they do find out. Last month, Florida juror Jacob Jock was held in contempt of court and sentenced to three days in jail after he used Facebook to 'friend' a defendant in a personal-injury case. (Mr. Jock said the friend request was accidental.). Last summer, a Texas man was sentenced to two days of community service for 'friending' a plaintiff in a car-wreck case. Later this month, a state appeals court in Sacramento, California, will hear arguments in a case that will examine whether a juror empaneled for a gang-beating case should have to divulge Facebook records to defense attorneys seeking to overturn their clients' 2010 convictions in light of the juror's posting during the trial.").

- Brian Grow, As Jurors Go Online, United States Trials Go Off Track, Reuters Legal, Dec. 8, 2010 ("A Reuters Legal analysis found that jurors' forays on the Internet have resulted in dozens of mistrials, appeals and overturned verdicts in the last two years. For decades, courts have instructed jurors not to seek information about cases outside of evidence introduced at trial, and jurors are routinely warned not to communicate about a case with anyone before a verdict is reached. But jurors these days can, with a few clicks, look up definitions of legal terms on Wikipedia, view crime scenes via Google Earth, or update their blogs and Facebook pages with snide remarks about the proceedings. The consequences can be significant. A Florida appellate court in September overturned the manslaughter conviction of a man charged with killing his neighbor, citing the jury foreman's use of an iPhone to look up the definition of "prudent" in an online dictionary. In June, the West Virginia Supreme Court of Appeals granted a new trial to a sheriff's deputy convicted of corruption, after finding that a juror had contacted the defendant through MySpace. Also in September, the Nevada Supreme Court granted a new trial to a defendant convicted of sexually assaulting a minor, because the jury foreman had searched online for information about the types of physical injuries suffered by young sexual assault victims."; "Over a three-week period in November and December, Reuters Legal monitored Twitter, reading tweets that were returned when "jury duty" was typed into the site's search engine. Tweets from people describing themselves as prospective or sitting jurors popped up at the astounding rate of one nearly every three minutes. Many appeared to be simple complaints about being called for jury duty in the first place, or about the boredom of sitting through a trial. But a significant number included blunt statements about defendants' guilt or innocence. 'Looking forward to a not guilty verdict regardless of evidence,' one recent message

stated. Read another: 'Jury duty is a blow. I've already made up my mind. He's guilty. LOL.' Last month, a person using the Twitter name @JohnnyCho wrote that he was in a pool of potential jurors in Los Angeles Superior Court, and tweeted, 'Guilty! He's guilty! I can tell!' In later tweets, @JohnnyCho said he was picked for the jury and that the defendant was convicted."; "In another recent case, Susan Dennis, a Seattle blogger, posted in late October that she was a prospective juror in the Superior Court of King County, Washington. The prosecutor during jury selection, she wrote, was 'Mr. Cheap Suit' and 'annoying,' while the defense attorney 'just exudes friendly. I want to go to lunch with him. And he's cute.' She also wrote that the judge had instructed jurors not to tweet about the robbery case but had 'made no mention' of blogging. Reached by email, Dennis responded that she had no comment. Reuters Legal described the circumstances to a jury consultant, who independently notified the court about the blog. That day, the judge dismissed Dennis from the jury pool for ignoring his instruction not to communicate online about the case, according to Amy Montgomery, one of the prosecutors. 'We believe, probably stupidly, that jurors follow judges' instructions,' said public defender Jonathan Newcomb. 'They don't.' Complications caused by Internet-surfing jurors have arisen in major corporate disputes. In September, Exxon Mobil Corp challenged a verdict awarding \$104 million to New York City in a ground-water contamination case, in part because two jurors allegedly looked up information online. U.S. District Court Judge Shira Scheindlin denied a new trial, but she acknowledged in her ruling that 'search engines have indeed created significant new dangers for the judicial system.'" (emphases added)).

Not surprisingly, such juror misconduct occasionally results in dramatic legal consequences.

- Dimas-Martinez v. State, No. CR-11-5, 2011 Ark. LEXIS 593, at *7, *21, *25-26 (Ark. Dec. 8, 2011) (overturning a death row inmate's conviction for murder because jurors slept during the trial and one juror tweeted about the trial contrary to the judge's instruction; "Appellant points to the facts that one juror fell asleep during the guilt phase of the trial, a fact that was brought to the circuit court's attention, and a second juror was posting on his Twitter account during the case, and continued to do so even after being questioned by the circuit court, as evidence of juror misconduct that calls into question the fairness of his trial." (footnote omitted); "In his motion for new trial, Appellant stated that Juror 2 tweeted two different times on April 1, 2010, during the time the jury was deliberating in the sentencing phase. Specifically, at 1:27 p.m., Juror 2 tweeted: 'If its wisdom we seek . . . We should run to the strong tower.' Then, again at 3:45 p.m., he tweeted, 'Its over.' But, the jury did not announce that it had reached a sentence until 4:35 p.m. The circuit court denied Appellant's motion for a new trial, finding that Appellant suffered no prejudice."; "Finally, we take this opportunity to recognize the wide array of

possible juror misconduct that might result when jurors have unrestricted access to their mobile phones during a trial. Most mobile phones now allow instant access to a myriad of information. Not only can jurors access Facebook, Twitter, or other social media sites, but they can also access news sites that might have information about a case. There is also the possibility that a juror could conduct research about many aspects of a case. Thus, we refer to the Supreme Court Committee on Criminal Practice and the Supreme Court Committee on Civil Practice for consideration of the question of whether jurors' access to mobile phones should be limited during a trial.").

Courts have taken aggressive steps to warn jurors against such improper communications while they serve.

- Revised Jury Instructions Hope to Deter Juror Use of Social Media During Trial, Third Branch News, Aug. 21, 2012 ("A Judicial Conference Committee has updated the model set of jury instructions federal judges use to deter jurors from using social media to research or communicate about cases on which they serve. The new guidelines provide detailed explanations of the consequences of social media use during a trial, along with recommendations for repeated reminders of the ban on social media usage."; "The update comes in response to a national survey of federal trial judges by the Federal Judicial Center (FJC) at the request of the Conference Committee on Court Administration and Case Management (CACM)."; "'The overwhelming majority of judges take steps to warn jurors not to use social media during trial, but the judges surveyed said additional steps should be taken,' said Judge Julie A. Robinson, CACM Committee chair. 'The judges recommended that jurors frequently be reminded about the prohibition on social media before the trial, at the close of a case, at the end of each day before jurors return home, and other times, as appropriate. Jurors should be told why refraining from use of social media promotes a fair trial. Finally, jurors should know the consequences of violations during trial, such as mistrial and wasted time. Those recommendations are now part of the guidelines.'"; "The FJC study also found that when juror use of social media was detected, it was most often through the report of a fellow juror. So the updated instructions to jurors by the presiding judge now pointedly note, 'You can only discuss the case in the jury room with your fellow jurors during deliberations. I expect you will inform me as soon as you become aware of another juror's violation of these instructions.'"; "Along with the guidelines, trial judges are provided with a poster stressing the importance of jurors making decisions based on information presented only in the courtroom. The poster is designed to be displayed in the jury deliberation room or other areas where jurors congregate."; "'The Committee believes that the more frequently jurors are reminded of the prohibition on social media, whether the reminders are visually or orally given, the more likely they are to refrain from social media use during trial and deliberations,' said Robinson.").

- Adolfo Pesquera, Florida Jurors Banned From Blogging About Criminal Cases, Daily Bus. Rev., May 21, 2012 ("Trial judges must tell jurors they 'must not use electronic devices or computers to talk about this case, including tweeting, texting, blogging, emailing, posting information on a website or chat room, or any other means at all.'"; "A 2010 Reuters Legal survey found at least 90 verdicts subject to challenge from 1999 to 2010 because of internet-related juror misconduct. More than half the cases cited occurred from 2008 to 2010. Despite instructions, jurors continue to misuse Google and their Facebook and Twitter accounts."; "Earlier this month, Miami-Dade Circuit Judge Jose Fernandez heard a challenge to an armed robbery conviction based on the jury foreman's social media use. Miami filmmaker Billy Corben, the accused tweeter, was singled out by the defense attorney for flouting the 'repeated and clear command of this court.'"; "The March 23 drunken-driving manslaughter conviction of Wellington polo mogul John Goodman also is in doubt in part because a juror wrote an e-book based on his involvement in the trial.").
- Most Federal Judges Warn Jurors About Social Media, Third Branch Newsletter, Mar. 2012 ("Most federal judges have taken steps to ensure that jurors do not use social media to discuss the trial in which they are involved, a survey of trial judges in all of the nation's 94 judicial districts indicates. The Federal Judicial Center was asked by the Judicial Conference Committee on Court Administration and Case Management (CACM) to survey federal judges on the issue. Its report said that 94 percent of the 508 judges who responded said they formally have warned jurors about any case-connected use of social media. 'The most common strategy is incorporating social media use into jury instructions — either the model jury instructions provided by CACM or judges' own personal jury instructions,' the report said. 'Also common are the practices of reminding jurors on a regular basis not to use social media to communicate during trial or deliberations, explaining the reasons behind the ban on social media, and confiscating electronic devices in the courtroom,' the report added. As a result of the survey, CACM has asked a subcommittee to consider whether the model jury instructions the committee issued in December 2009 should contain additional language. The subcommittee also was asked to explore additional options mentioned by some judges, such as having jurors sign a pledge promising to avoid social media. The survey, conducted in October 2011, found that the detected use of social media by jurors during trials and deliberations is not a common occurrence. Of the 508 responding judges, only 30 reported any detected instances. Twenty-eight of those 30 judges said they discovered social media use in only one or two trials. Of the 17 judges who described the type of social media used by jurors, three judges reported that a juror 'friended' or attempted to 'friend' one or more participants in the case, and three reported that a juror communicated or attempted to communicate directly with participants in the case. One judge reported that a juror revealed identifying information about other jurors. Two judges described situations in which a

juror contacted a party with case-specific information. In one, the juror contacted the plaintiff's former employee to reveal a likely verdict. In the other, an alternate juror contacted an attorney during jury deliberations to provide feedback and the likely verdict. Action taken by judges who learned of jurors' social media use varied. Nine judges reported that they removed a juror from the jury; eight said they cautioned the wayward juror but allowed them to remain on the jury. Four judges declared mistrials because of such juror conduct; one judge held a juror in contempt of court; and one judge reported fining a juror.").

- Erin L. Burke, Erik K. Swanholt & Jessica M. Sawyer, Twelve Angry Tweets, Law360, Mar. 6, 2012 ("In late 2011, California's Judicial Council revised California's Criminal Jury Instruction 100, a pretrial jury instruction in which the judge explains to a jury the prohibition on allowing anything outside the courtroom to influence their decisions, to read: 'Do not share information about the case in writing, by email, by telephone, on the Internet, or by any other means of communication. . . . Do not use the Internet . . . in any way in connection with this case, either on your own or as a group.' The Judicial Council was even more direct with its changes to Civil Jury Instruction 100 (CAC) (amended effective January 1, 2012). That instruction was amended to include a generic list of prohibited electronic media, warning jurors not to use 'any electronic device or media, such as a cell phone or smart phone, PDA, computer, the Internet, any Internet service, any text or instant-messaging, any Internet chat room, blog, or Website, including social networking websites or online diaries, to send or receive any information to or from anyone about this case or your experience as a juror until after you have been discharged from your jury duty.' (footnotes omitted)).

Courts have not been reluctant to use these new statutes or other provisions to deter such juror misconduct.

- Juror Number One v. Superior Court, 142 Cal. Rptr. 3d 151, 161-62 (Cal. Ct. App. 2012) (finding that a juror being investigated for Facebook posting during a trial could not resist the court's discovery of the posting; "[I]n the present matter, Juror Number One does not claim respondent court exceeded its inherent authority to inquire into juror misconduct. Just as the court may examine jurors under oath . . . it may also examine other evidence of misconduct. In this instance, the court seeks to review in camera the very items -- the Facebook posts -- that constitute the misconduct. Juror Number One contends such disclosure violates the SCA, but it does not. Even assuming the Facebook posts are protected by the SCA, the SCA protects against disclosure by third parties, not the posting party. Juror Number One also contends the order is not authorized, because the court has completed its investigation of misconduct. But such investigation obviously has not been completed. Juror Number One also contends the compelled disclosure

violates his Fourth and Fifth Amendment rights. However, beyond asserting this to be so, he provides no argument or citation to authority. Thus, those arguments are forfeited. Finally, Juror Number One argues forced disclosure of his Facebook posts violates his privacy rights. However, Juror Number One has not shown he has any expectation of privacy in the posts and, in any event, those privacy rights do not trump real parties in interest's rights to a fair trial free from juror misconduct. The trial court has the power and the duty to inquire into whether the confirmed misconduct was prejudicial.").

- Cheryl Miller, Facebooking Juror Sets Fair Trial Rights Against Privacy Concerns, The Recorder, Mar. 27, 2012 ("A three-justice panel on Friday appeared split over whether a former jury foreman should be forced to hand over months of Facebook postings he made during a 2010 felony trial in Sacramento. In a case with the potential to set the boundaries between social media privacy and fair-trial rights, five defendants convicted in a gang-related beating want to see what the foreman, known only as Juror Number 1, told his Facebook friends about the trial.").
- Ben Zimmer, Juror Could Face Jail Time for 'Friending' Defendant, USA Today, Feb. 7, 2012 ("A man accused of 'friending' a defendant in a case while serving on her jury could face jail time next week. Jacob Jock was selected for the jury in a car-wreck case in December and told the usual prohibitions. But when the judge learned Jock looked up the female defendant on Facebook and sent her a friend request, Jock was kicked off the jury and admonished.").

However, the California experience highlights the risk of institutions moving too quickly to deal with the increasing use of social media.

In 2011, California moved aggressively to punish jurors' research and communications.

- New California Law Bans Jurors' Texting, Tweeting, Associated Press, Aug. 6, 2011 ("A new state law clarifies that jurors are prohibited from texting, tweeting and using smart phones to discuss or research cases. The bill by Democratic Assemblyman Felipe Fuentes of Sylmar also clarifies that jurors cannot use electronic or wireless communications to contact court officials. Governor Jerry Brown signed AB 141 on Friday. The bill adds to existing jury instructions. It specifies that jurors consider only facts presented to them in court without doing their own research or communicating outside the jury room. The system's Judicial Council says jurors' use of electronic devices has become 'an increasingly significant threat to the integrity of the justice system.' The law, which takes effect in January, makes it a misdemeanor for

jurors to use electronic or wireless devices to research or communicate with others.").

However, in 2013, the California legislature realized that it had gone too far.

- Cheryl Miller, Judges Rethinking Threat for Jurors Who Tweet, Google Recorder, June 28, 2013 ("Two years ago, California's judicial leaders backed a bill that threatened with a misdemeanor those mischievous jurors who hop online to research a defendant or to post some Nancy Grace-like case commentary for pals. And who could blame supportive judges? It seemed like every week there were new reports of a threatened verdict or a jury pool drained because some juror couldn't resist the lure of easy access to e-information. 'The [Judicial] Council is extremely concerned that jurors' use of electronic devices during the course of a trial is becoming an increasingly significant threat to the integrity of the justice system,' according to a 2011 council statement backing the legislation." The bill sailed through the Legislature with nary a no vote. Governor Jerry Brown signed it into law in August 2011. Now, though, those once supportive judges are experiencing buyers' remorse. It seems that the threat of a misdemeanor charge hanging over a tweeting juror's head has raised a messy constitutional issue. Consider a judge who wants to get to the bottom of misconduct accusations. Can he or she informally question a juror now without invoking that juror's rights against compelled testimony or self-incrimination? A prosecutor could offer immunity to encourage the juror to talk. But, as one judge told The Recorder, that gives one side in the case the power to control the inquiry. The dilemma is worrisome enough that a Judicial Council committee is now pondering sponsoring legislation that would delete the misdemeanor language from the law. The Judicial Council's Criminal Law Advisory Committee 'believes that the proper remedy for this category of juror misconduct is civil -- not criminal -- contempt of court,' committee staff wrote in a recent report.").

In 2014, California retreated from its earlier position.

- Cheryl Miller, State Unwinds Law To Penalize Jurors, The Recorder, July 18, 2014 ("Exhale, web-surfing jurors. Governor Jerry Brown has signed legislation that will nix a law threatening jurors with misdemeanor charges if they research a case, or opine about it, online. The law, enacted less than two years ago, attempted to put some teeth into judges' admonitions to the civically impaneled not to Google case details or to share their judicial experiences via Facebook or Twitter. But judges found that the law just puts them in a weird position. Judges investigating accusations of juror misconduct must respect that juror's right not to self-incriminate, so informal questioning is not a real option. Prosecutors can offer the juror immunity, but that can give one party in the ongoing case the appearance of unfair leverage over a verdict-renderer. So the Judicial Council sponsored legislation this

year to repeal the misdemeanor language. It breezed through the Legislature without a no vote. Brown signed it without comment. Jurors should still stay away from social media, however. While the legislation eliminates the misdemeanor provisions, it continues to allow the court to slap wayward jurors with civil contempt proceedings.").

Best Answer

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

N 1/13; B 7/14

Judges' Independent Research

Hypothetical 16

You are handling a criminal case in which one key issue is whether a witness properly identified your client. Your client allegedly was wearing a yellow hat, so an important issue was the availability of yellow hats in New York City. To your surprise, the judge announced in court this morning that he had conducted some Internet research last evening, and discovered that there were many types of yellow hats on sale in New York City. You wonder whether the judge's investigation amounted to improper conduct that gives you ground for a mistrial.

Is it permissible for judges to conduct their own research using the Internet?

MAYBE

Analysis

Introduction

The ABA Model Judicial Code severely restricts judges' personal factual investigations.

A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

ABA Model Code of Judicial Conduct, Rule 2.9(C) (2007). Not surprisingly, this prohibition explicitly extends to electronic sources (such as the Internet). ABA Model Code of Judicial Conduct, Rule 2.9 cmt. [6] (2007) ("The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic.").

The ABA Model Judicial Code even finds it necessary to include a limited permission for judges to consult with court staff and officials. ABA Model Code of Judicial Conduct, Rule 2.9(A)(3) (2007) ("A judge may consult with court staff and court officials whose functions are to aid the judge in carrying out the judge's adjudicative

responsibilities, or with other judges, provided the judge makes reasonable efforts to avoid receiving factual information that is not part of the record, and does not abrogate the responsibility personally to decide the matter.").

In 2017, the ABA issued a legal ethics opinion addressing this issue.

- ABA LEO 478 (12/8/17) (Judges may independently research background information and may "judicially notice" facts under court rules, but may not independently investigate material facts involved in their adjudicative function. "The key inquiry here is whether the information to be gathered is of factual consequence in determining the case. If it is, it must be subject to testing through the adversary process." "[E]ven general subject-area research is not permissible . . . if the judge is acquiring information to make an adjudicative decision of material fact." Judges may not investigate through online research (or otherwise) information about jurors or parties, but may investigate lawyers -- unless the investigation "is done to affect the judge's weighing or considering adjudicative facts.").

Background

In appellate courts, the line between factual investigation and background reading seems to blur. Although there is no reason to think that the ABA Model Code of Judicial Conduct applies any differently to appellate judges than it does to trial judges, appellate courts routinely examine such extraneous material that has not been tested through cross-examination.

To be sure, there is an important difference between a judge conducting her own research and the judge relying on material presented by one of the parties to an appeal (or an amicus). Still, it is interesting to consider the role of material presented on appeal that has not survived the crucible of cross-examination at trial.

Many academic writers urge courts to accept such extrajudicial sources of information, as a way to advance basic social justice. For instance, in her article [Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs](#), 34

U.S.F. L. Rev. 197 (2000), Temple University School of Law Professor Ellie Margolis defended use of such materials.

As long as appellate courts decide cases and write opinions that rely upon non-legal materials, lawyers should learn to use these materials effectively. . . . Lawyers are missing a golden opportunity for advocacy by allowing judges alone to research non-legal materials and draw their own connections, often unsupported, between the legal arguments presented and the factual information thought to be supportive of the judge's conclusion. It is particularly important for lawyers to do this when making policy arguments, for which non-legal information may often provide the best support. For all of these reasons, lawyers not only can, but should use non-legal information in support of arguments in appellate briefs.

. . . .

. . . In cases which require the formulation of a new legal rule, policy-based reasoning is extremely important, and the appellate lawyer should present policy arguments as effectively as possible to the court. Non-legal materials can often be the best, and sometimes the only support for these policy arguments. Indeed, non-legal materials serve a unique function in supporting policy arguments that is different from other uses of legislative facts. Because of this, the appellate court is the appropriate forum to use them.

Id. at 202-03 & 210-11 (emphases added; footnotes omitted).

Most commentators point to the case of Muller v. Oregon, 208 U.S. 412 (1908) as initiating this process of judicial reliance on extrajudicial sources. In that case, the Supreme Court upheld the constitutionality of an Oregon law limiting to ten hours the amount of time that women may work in certain establishments.

The state of Oregon was represented in that case by Louis Brandeis, who filed what became known as a "Brandeis Brief" in support of the Oregon statute. Brandeis's brief consisted of a two-sentence introduction, a few transition sentences, a one-

sentence conclusion, and 113 pages of statutory citations and (primarily) social science study reports and academic treatises about how women cannot tolerate long work hours. For example, the Brandeis Brief contained the following passages:

Long hours of labor are dangerous for women primarily because of their special physical organization. In structure and function women are differentiated from men. Besides these anatomical and physiological differences, physicians are agreed that women are fundamentally weaker than men in all that makes for endurance: in muscular strength, in nervous energy, in the powers of persistent attention and application.

Brandeis Brief at 18 (emphasis added), available at <http://www.law.louisville.edu/library/collections/brandeis/sites/www.law.louisville.edu.library.collections.brandeis/files/brief3.pdf>.

The various social science study reports quoted in the Brandeis Brief have some remarkable conclusions and language.

"You see men have undoubtedly a greater degree of physical capacity than women have. Men are capable of greater effort in various ways than women."¹

...

"Woman is badly constructed for the purposes of standing eight or ten hours upon her feet."²

...

"It has been declared a matter of public concern that no group of its women workers should be allowed to unfit themselves by excessive hours of work, by standing, or

¹ Brandeis Brief at 19 (quoting Report of Committee on Early Closing of Shops Bill, British House of Lords, 1901) (emphasis added), available at <http://www.law.louisville.edu/library/collections/brandeis/sites/www.law.louisville.edu.library.collections.brandeis/files/brief3.pdf>.

² Id. (quoting Report of the Maine Bureau of Industrial and Labor Statistics, 1888).

other physical strain, for the burden of motherhood, which each of them should be able to assume."³

. . .

"The children of such mothers -- according to the unanimous testimony of nurses, physicians, and others who were interrogated on this important subject -- are mostly pale and weakly; when these in turn, as usually happens, must enter upon factory work immediately upon leaving school, to contribute to the support of the family, it is impossible for a sound, sturdy, enduring race to develop."⁴

Based on all of this social science, the Brandeis Brief ends with the following conclusion:

We submit that in view of the facts above set forth and of legislative action extending over a period of more than sixty years in the leading countries of Europe, and in twenty of our States, it cannot be said that the Legislature of Oregon had no reasonable ground for believing that the public health, safety, or welfare did not require a legal limitation on women's work in manufacturing and mechanical establishments and laundries to ten hours in one day.

Brandeis Brief at 113 (emphasis added), available at

<http://www.law.louisville.edu/library/collections/brandeis/sites/www.law.louisville.edu.library.collections.brandeis/files/brief11.pdf>.

Incidentally, an article published approximately 100 years after Brandeis filed his brief pointed out that Brandeis's dramatic conclusion stated exactly the opposite of what

³ Id. at 49-50 (quoting Legislative Control of Women's Work, by S.P. Breckinridge, Journal of Political Economy, p. 107, vol. XIV, 1906) (emphases added), available at <http://www.law.louisville.edu/library/collections/brandeis/sites/www.law.louisville.edu.library.collections.brandeis/files/brief5.pdf>.

⁴ Id. at 58 (quoting The Working Hours of Female Factory Hands. From Reports of the Factory Inspectors, Collated by the Imperial Home Office, p. 113, Berlin, 1905) (emphasis added), available at <http://www.law.louisville.edu/library/collections/brandeis/sites/www.law.louisville.edu.library.collections.brandeis/files/brief5.pdf>.

he intended to argue. Clyde Spillenger, Revenge of the Triple Negative: A Note on the Brandeis Brief in Muller v. Oregon, 22 Const. Comment. 5 (Spring 2005).

In its decision upholding Oregon's statute, the United States Supreme Court explicitly relied on Brandeis's Brief -- emphasizing women's physical weakness and their importance in bearing and raising children. Emphasizing "the difference between the sexes," the Supreme Court quoted from one of the sources that Brandeis had included in his brief.

"The reasons for the reduction of the working day to ten hours -- (a) the physical organization of women, (b) her maternal functions, (c) the rearing and education of the children, (d) the maintenance of the home -- are all so important and so far reaching that the need for such reduction need hardly be discussed."

Muller v. Oregon, 208 U.S. at 419 n.1. The court took "judicial cognizance of all matters of general knowledge" -- including the following:

That woman's physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence is obvious. This is especially true when the burdens of motherhood are upon her. Even when they are not, by abundant testimony of the medical fraternity continuance for a long time on her feet at work, repeating this from day to day, tends to injurious effects upon the body, and as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race.

Still again, history discloses the fact that woman has always been dependent upon man.

...

[S]he is not an equal competitor with her brother.

...

It is impossible to close one's eyes to the fact that she still looks to her brother and depends upon him.

. . .

[S]he is so constituted that she will rest upon and look to him for protection; that her physical structure and a proper discharge of her maternal functions -- having in view not merely her own health, but the well-being of the race -- justify legislation to protect her from the greed as well as the passion of man.

. . .

The two sexes differ in structure of body, in the functions to be performed by each, in the amount of physical strength, in the capacity for long-continued labor, particularly when done standing, the influence of vigorous health upon the future well-being of the race, the self-reliance which enables one to assert full rights, and in the capacity to maintain the struggle for subsistence. This difference justifies a difference in legislation and upholds that which is designed to compensate for some of the burdens which rest upon her.

Id. at 421, 422, 422-23 (emphases added).

The United States Supreme Court continues to debate reliance on such extrajudicial sources.

In Roper v. Simmons, 543 U.S. 551 (2005), for instance, the Supreme Court found unconstitutional states' execution of anyone under 18 years old, however horrible their crime. Justice Kennedy's majority relied heavily on social science sources (presented for the first time to the court, and therefore not subjected to cross-examination) indicating that people under 18 are not fully capable of making rational decisions, and therefore should never be subject to execution.

Justice Scalia's dissent severely criticized the majority's reliance on such studies.

Today's opinion provides a perfect example of why judges are ill equipped to make the type of legislative judgments the Court insists on making here. To support its

opinion that States should be prohibited from imposing the death penalty on anyone who committed murder before age 18, the Court looks to scientific and sociological studies, picking and choosing those that support its position. It never explains why those particular studies are methodologically sound; none was ever entered into evidence or tested in an adversarial proceeding.

Id. at 616-17 (emphasis added) (Scalia, J., dissenting). Justice Scalia said that by selecting favorable extrajudicial and untested social science articles means that "all the Court has done today, to borrow from another context, is to look over the heads of the crowd and pick out its friends." Id. (emphasis added).

Justice Scalia provided a concrete example.

We need not look far to find studies contradicting the Court's conclusions. As petitioner points out, the American Psychological Association (APA), which claims in this case that scientific evidence shows persons under 18 lack the ability to take moral responsibility for their decisions, has previously taken precisely the opposite position before this very Court. In its brief in [another case], the APA found a "rich body of research" showing that juveniles are mature enough to decide whether to obtain an abortion without parental involvement. . . . The APA brief, citing psychology treatises and studies too numerous to list here, asserted: "[B]y middle adolescence (age 14-15) young people develop abilities similar to adults in reasoning about moral dilemmas, understanding social rules and laws, [and] reasoning about interpersonal relationships and interpersonal problems."

Id. at 617-18 (emphases added; citation omitted) (Scalia, J., dissenting).

The Supreme Court (and other appellate courts) nevertheless continues to rely on extrajudicial sources that have never been subjected to cross-examination.

The Supreme Court continues to deal with this issue.

- Robert Barnes, Should Supreme Court Justices Google?, Wash. Post, July 8, 2012 ("Justice Antonin Scalia's angry dissent from the Supreme Court's decision to strike down parts of Arizona's tough anti-illegal-immigrant law outraged liberals even more than his biting words normally do."; "As part of

his argument, that the decision imposed on the sovereignty of the states, Scalia reached outside the briefs and the oral arguments to mention President Obama's recent decision to allow some illegal immigrants who were brought here as children to remain in the country."; "That Arizona contradicts federal law by enforcing applications of federal immigration law that the president declines to enforce boggles the mind,' Scalia said in reading part of his dissent from the bench."; "If the framers had proposed that all immigration decisions will be made by the federal government and 'enforced only to the extent the president deems appropriate,' Scalia thundered, 'the delegates to the Grand Convention would have rushed to the exits from Independence Hall.'"; "For our purposes, let's leave aside Scalia's excoriation from the left and defense from the right and focus on a different lesson: Supreme Court justices Google just like the rest of us."; "Well known is the story of Justice Harry Blackmun hunkering down in the medical library of the Mayo Clinic to research abortion procedures before he wrote the 1973 majority opinion in Roe v. Wade."; "[Allison Orr] Larsen, a former clerk to retired Justice David Souter, studied 15 years of Supreme Court decisions for her paper. She found more than 100 examples of asserted facts from authorities never mentioned in any of the briefs in the case. And in the 120 cases from 2000 to 2010 rated the most salient — judged largely by whether they appeared on the front pages of newspapers — nearly 60 percent of them contained facts researched in-house."; "A 2011 decision in which the court found a California law forbidding the sale of violent video games to minors violated the First Amendment provided a good example. Justice Stephen G. Breyer in a dissent provided 13 pages of studies on the topic of psychological harm from playing violent video games."; "Justice Clarence Thomas cited 59 sources to support his view that the Founding Fathers believed that parents had absolute control over their children's development; 57 of them were not in the briefs submitted in the case."; "In Graham v. Florida, for instance, the court invalidated life-without-parole sentences for juveniles who commit non-homicide offenses. Justice Anthony M. Kennedy relied on a letter from the Bureau of Prisons (BOP), solicited at his request by the Supreme Court library, about the number of such prisoners."; "After the decision, the government submitted a letter to the court saying the bureau had been wrong: None of the six inmates listed in the BOP's letter was actually serving a life sentence for a crime committed as a juvenile."; "Do I think that factual information would have changed Justice Kennedy's mind?' Larsen asked. 'Probably not.'"; "But she says the practice undermines the adversary process."; "Asked whether she had engaged in in-house fact-finding as a clerk to Souter, she laughed and declined to comment. But she added: 'I will tell you Justice Souter didn't own a computer.'").

- Jimmy Hoover, Kennedy Scolds Sotomayor At Abortion Case Arguments, Law360, Mar. 20, 2018) ("Justice Anthony Kennedy chided Justice Sonia Sotomayor during Tuesday's U.S. Supreme Court arguments in a closely watched abortion case after she discussed what she found on the website of

one of the anti-abortion petitioners, scoffing that he himself didn't 'go beyond the record to look on the internet because I don't think we should do that.'").

Examples of Judges' Independent Investigations

Courts have criticized judges' improper personal research.

- United States v. Lawson, 677 F.3d 629, 639-40, 650, 650 n.28 (4th Cir. 2012) ("We observe that we are not the first federal court to be troubled by Wikipedia's lack of reliability. See Bing Shun Li v. Holder, 400 F. App'x 854, 857-58 (5th Cir. 2010) (expressing 'disapproval of the [immigration judge's] reliance on Wikipedia and [warning] against any improper reliance on it or similarly reliable internet sources in the future' (footnote omitted); Badasa v. Mukasey, 540 F.3d 909, 910-11 (8th Cir. 2008) (criticizing immigration judge's use of Wikipedia and observing that an entry 'could be in the middle of a large edit or it could have been recently vandalized'). . . ."; "We note, however, that this Court has cited Wikipedia as a resource in three cases.").
- North Carolina Judicial Standards Comm. Inquiry No. 08-234 (4/1/09) (publicly reprimanding a judge who engaged in ex parte communication with a party's lawyer on a judge's Facebook page, and also conducted an independent investigation of the other party using Google; "On or about the evening of September 10, 2008, Judge Terry checked Schieck's 'Facebook' account and saw where Schieck had posted 'how do I prove a negative.' Judge Terry posted on his 'Facebook' account, he had 'two good parents to choose from' and 'Terry feels that he will be back in court' referring to the case not being settled. Schieck then posted on his 'Facebook' account, 'I have a wise Judge.'"; "Sometime on or about September 9, 2008, Judge Terry used the internet site 'Google' to find information about Mrs. Whitley's photography business. Judge Terry stated he wanted to seek examples of Mrs. Whitley's photography work. Upon visiting Mrs. Whitley's web site, Judge Terry stated he viewed samples of photographs taken by Mrs. Whitley and also found numerous poems that he enjoyed."; explaining that Judge Terry later recited one of the mother's poems in court, "to which he had made minor changes"; finding Judge Terry's conduct improper; "Judge Terry had ex parte communications with counsel for a party in a matter being tried before him. Judge Terry was also influenced by information he independently gathered by viewing a party's web site while the party's hearing was ongoing, even though the contents of the web site were never offered as nor entered into evidence during the hearing.").
- Nick Muscavage, NJ Judge May Face Reprimand For Independent Research, Law360, Sept. 1, 2021 ("A New Jersey disciplinary official on Wednesday recommended that retired state Superior Court Judge Arthur Bergman be publicly reprimanded on ethics charges alleging that he conducted his own independent research in a trust dispute he presided over."; "The argument made by Maureen G. Bauman, disciplinary counsel for New Jersey's Advisory

Committee on Judicial Conduct, hinges on a phone call Judge Bergman made to a potential witness in the case.”).

Interestingly, in 2010 the Second Circuit found nothing improper in District Court Judge Denny Chin’s internet investigation of the availability of yellow hats for sale.

- United States v. Bari, 599 F.3d 176, 179, 180, 181 (2d Cir. 2010) (holding that then District Judge Denny Chin had not acted improperly in performing a Google search to confirm his understanding that there are many types of yellow hats for sale, so that a criminal defendant's possession of a particular kind of yellow hat was an important piece of evidence pointing to the criminal defendant's guilt; “[W]e now consider whether the District Court committed reversible error when it conducted an independent Internet search to confirm its intuition that there are many types of yellow rain hats for sale.”; “Common sense leads one to suppose that there is not only one type of yellow rain hat for sale. Instead, one would imagine that there are many types of yellow rain hats, with one sufficient to suit nearly any taste in brim-width or shade. The District Court’s independent Internet search served only to confirm this common sense supposition.” (emphasis added); “Bari argues in his reply brief that ‘Judge Chin undertook his internet search precisely because the fact at issue . . . was an open question whose answer was not obvious.’ . . . We do not find this argument persuasive. As broadband speeds increase and Internet search engines improve, the cost of confirming one’s intuitions decreases. Twenty years ago, to confirm an intuition about the variety of rain hats, a trial judge may have needed to travel to a local department store to survey the rain hats on offer. Rather than expend that time, he likely would have relied on his common sense to take judicial notice of the fact that not all rain hats are alike. Today, however, a judge need only take a few moments to confirm his intuition by conducting a basic Internet search.” (emphases added); “As the cost of confirming one’s intuition decreases, we would expect to see more judges doing just that. More generally, with so much information at our fingertips (almost literally), we all likely confirm hunches with a brief visit to our favorite search engine that in the not-so-distant past would have gone unconfirmed. We will not consider it reversible error when a judge, during the course of a revocation hearing where only a relaxed form of Rule 201 applies, states that he confirmed his intuition on a ‘matter[] of common knowledge.’”).

Coincidentally, exactly one month to the day after the Second Circuit issued its opinion, the Senate voted to confirm Judge Chin for a seat on the Second Circuit.

Best Answer

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

N 1/13; B 7/14

Judges' Use of Social Media

Hypothetical 17

You have been going through a long series of discovery fights in a case pending in one of your state's most rural areas. You suspect some "home cooking," because the judge has ruled against you on essentially every matter that has come before him. You just discovered that the judge is a Facebook "friend" with the adversary's lawyer, and you wonder whether this is proper.

Is it permissible for a judge to be a Facebook "friend" with a lawyer who appears before the judge?

YES (PROBABLY)

Analysis

Judges' use of social media implicates several judicial ethics issues.

For instance, a judge's social media postings must avoid inappropriate content.

- Jeff Overley, Endo Wins Reversal of Opioid Default And Judge Is DQ'd, Law360, Apr. 20, 2022 ("A Tennessee appeals court on Wednesday erased a trial judge's decision finding Endo Pharmaceuticals liable for opioid abuse because of discovery misconduct and disqualified the judge, saying he improperly approved the stunning sanction amid pending charges of bias against the drugmaker."); "In a seven-page opinion, a three-judge Tennessee Court of Appeals panel vacated the default judgment against Endo after finding that Circuit Court Judge Jonathan Lee Young appeared 'antagonistic to the interests of those in the pharmaceutical industry' when he discussed opioid litigation in Facebook posts and an interview with Law360.").
- Justice Daniel Crothers, Judges Who Use Social Media Must Know Their Ethical Limits, Law360, Sept. 9, 2022 ("Another week, another headline about a judge being sanctioned or removed from a case for using electronic social media, or ESM."; "What is the plot twist here? The posts were made before she was a judge or candidate for judicial office."; "Recently, the Kentucky Supreme Court's chief justice disqualified a trial judge, Judge Josephine Buckner, from presiding over a misdemeanor case, due in part to Facebook posts made before she was a judge."; "The chief justice concluded that Buckner's ESM posts, together with other potential conflicts stemming from the judge's

past employment and her response to the request for her disqualification, ‘clearly indicate prejudice’ and required disqualification under Kentucky’s version of Code of Judicial Conduct Rule 2.11.” (footnote omitted); “In Montana in 2020, District Judge Ashley Harada was suspended for 30 days without pay for several violations of judicial conduct rules. Two of those violations involved ESM posts made while running for office. The then-candidate publicly endorsed on her personal Facebook page two partisan candidates for nonjudicial offices, and posted and maintained on her campaign Facebook page endorsements of her by partisan candidates and a political organization.” (footnote omitted); “The Kentucky disqualification and Montana discipline cases are novel because they resulted from prejudicial service ESM posts. However, the general body of law surrounding judges using social media in violation of judicial conduct rules is becoming well established.”; “For instance, during the spring of 2022, Tennessee Circuit Court Judge Jonathan Lee Young’s Facebook posts caused the Court of Appeals of Tennessee at Knoxville to remove him from presiding over a high-profile case, *Clay County v. Purdue Pharma LP.*”; “According to a Legal Newsline article, ‘A Tennessee judge who ordered harsh sanctions against an opioid manufacturer and later boasted about it on Facebook should have recused himself for the appearance of bias, an appellate court ruled, reversing the sanctions and ordering the judge off the case.’” (footnote omitted); “His disqualification was followed by suspension from the bench for the rest of his term, in part for the ESM comments on the opioid case and in part for having an ‘inappropriate sexual relationship’ with a woman who had an adoption case before him, according to *The Tennessean.*”).

- Kevin Penton, [Ga. Judge Facing Ethics Charges Over Facebook Comments](#), Law360, July 27, 2021 (“A Georgia state court judge is facing ethics charges after he commented on social media in support of law enforcement investigating March’s Atlanta-area spa shootings, despite the possibility that aspects of the case could come before him.” . . . When later questioned by investigators, Judge Cannon stated that while he knew that he had not been assigned the case when he made the postings, he was also aware that he was one of only two judges in the county who could act on it, as the third judge is the captain’s brother, according to the formal charges.”).

Another commonly appearing issue involves judges’ “friending” of lawyers who appear before them.

Not surprisingly, there seems to be a generational aspect to this practice.

- Dorothy Atkins, Should Judges Tweet? 'Absolutely Not,' Retired Judge Warns, Law360, June 20, 2019 ("Retired California Supreme Court Justice Carlos Roberto Moreno told sitting judges attending an event at University of California, Berkeley School of Law on Wednesday that they should 'absolutely not' tweet."; "Judge Moreno said judges shouldn't use social media, because statements on the platforms are discoverable in litigation and could be used as evidence to disqualify a judge. But he agreed with other judges speaking at the event that it's important for judges to engage with the community and that it can be tricky to navigate public opinion.").

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

The bottom-line rule requires a judge to recuse himself or herself "in any proceeding in which the judge's impartiality[] might reasonably be questioned." ABA Model Code of Judicial Conduct, Rule 2.11(A)(1) (2007). Accord Code of Conduct for United States Judges, Canon 3(C)(1) (2009).

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

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

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

In 2013, the ABA issued an ethics opinion on this issue. ABA LEO 462 (2/21/13). This opinion recognized the difference between judges' "real" interactions with people and involvement in social networking sites. It also reflected attention between the benefits of judges' involvement in society and the requirement that they be impartial and appear to be impartial.

The ABA used the acronym "ESM" to refer to "internet-based electronic social networking sites that require an individual to affirmatively join and accept or reject connection with particular persons." The ABA recognized importance distinctions between judges' "real" in-person interactions with others, and such widely available and permanently recorded interactions.

There are obvious differences between in-person and digital social interactions. In contrast to fluid, face-to-face conversation that usually remains among the participants, messages, videos, or photographs posted to ESM may be disseminated to thousands of people without the consent or knowledge of the original poster. Such data have long, perhaps permanent, digital lives such that statements may be recovered, circulated or printed years after being sent. In addition, relations over the internet may be more difficult to manage because, devoid of in-person visual or vocal cues, messages may be taken out of context, misinterpreted, or relayed incorrectly.

Id. at 2.

The opinion noted that "[s]ocial interactions of all kinds, including ESM, can be beneficial to judges to prevent them from being thought of as isolated or out of touch."

Id. at 1. However, the opinion also noted that judges (among other things)

- "[A]re governed by the requirement that judges must at all times act in a manner 'that promotes public confidence in the independence, integrity, and impartiality of the judiciary,' and must 'avoid impropriety and the appearance of impropriety.'"
- "[B]e sensitive to the appearance of relationships with others."
- "[A]void both impropriety and the appearance of impropriety in their professional and personal lives."
- "[Refrain from] personally soliciting or accepting campaign contributions other than through a campaign committee authorized by Rule 4.4."
- "[Refrain from] from 'publicly endorsing or opposing a candidate for any public office.'"

Id. at 1, 3-4.

The opinion also dealt with judges' possible duty to disclose to litigants appearing before the judge that the judge has such ESM interactions. The opinion explained that judges should use the "same analysis" in dealing with such ESM interactions as with any other interactions -- noting that

[b]ecause of the open and casual nature of ESM communication, a judge will seldom have an affirmative duty to disclose an ESM connection. If that connection includes current and frequent communication, the judge must very carefully consider whether that connection must be disclosed.

Id. at 3.

The opinion noted that California and Florida have largely prohibited judges from having such social networking interaction with lawyers who appear before the judge, but

that other states (including Kentucky, New York, Ohio and South Carolina) essentially take the same-intensive approach as the opinion reflects.

The opinion's conclusion again identifies the possible benefits of judges' use of social networking sites to integrate themselves into society.

Judicious use of ESM can benefit judges in both their personal and professional lives. As their use of this technology increases, judges can take advantage of its utility and potential as a valuable tool for public outreach. When used with proper care, judges' use of ESM does not necessarily compromise their duties under the Model Code any more than use of traditional and less public forms of social connection such as U.S. Mail, telephone, email or texting.

Id at 4.

Most of the state bars and courts which have analyzed this issue found nothing inherently improper with a judge's "friending" of one of the lawyers who appears before the judge.

- New York Advisory Comm. on Judicial Ethics Op. 13-39 (5/28/13) ("Dear Justice: This responds to your inquiry (13-39) asking whether you must, at the request of the defendant and/or, his/her attorney, exercise recusal in a criminal matter because you are 'Facebook friends' with the parents or guardians of certain minors who allegedly were affected by the defendant's conduct. Despite the Facebook nomenclature (i.e., the word 'friend') used to describe these undefined relationships, you indicate that these parents are mere acquaintances and that you can be fair and impartial."; "The Committee believes that the mere status of being a 'Facebook friend,' **without more**, is an insufficient basis to require recusal. Nor does the Committee believe that a judge's impartiality may reasonably be questioned (see 22 NYCRR 100.3 [E][1]) or that there is an appearance of impropriety (see 22 NYCRR 100.2[A]) based solely on having previously 'friended' certain individuals who are now involved in some manner in a pending action."; "If, after reading Opinions 11-125 and 08-176, you remain confident that your relationship with these parents or guardians is that of a mere 'acquaintance' within the meaning of Opinion 11-125, recusal is not required. However, the Committee recommends that you make a record, such as a memorandum to the file, of the basis for your conclusion. This practice, although not mandatory, may be of practical assistance to you if similar circumstances arise in the future or if

anyone later questions your decision. Alternatively, if you need further assistance with your inquiry, please feel free to write or call us.").

- Youkers v. State, 400 S.W.3d 200, 204, 205, 206, 207 (Tex. Ct. App. 2013) (holding that the trial court did not err in denying a new trial to a criminal defendant sentenced to eight years in prison for assaulting his girlfriend, based on the defendant's argument that the trial judge should not have handled the case because he was a Facebook friend of the girlfriend's father; finding that the judge had properly handled the issue; "After the judge sentenced Youkers to an eight-year prison term, Youkers filed a motion for new trial complaining '[t]here was an undisclosed friendship' between the judge and the father of Youkers's girlfriend, improper communications between the two, and influence over the judge by the father. He asserted the communications and relationship created both actual and apparent bias. Youkers relied on a private message the judge received on the judge's Facebook page approximately one week before Youkers's original plea and the ongoing status of the judge and the father as Facebook 'friends.'"; "The Facebook communications began with a message from the father to the judge seeking leniency for Youkers. That message was posted just prior to Youkers's original plea. The judge responded online formally advising the father the communication was in violation of rules precluding ex parte communications, stating the judge ceased reading the message once he realized the message was improper, and cautioning that any further communications from the father about the case or any other pending legal matter would result in the father being removed as one of the judge's Facebook 'friends.' The judge's online response also advised that the judge was placing a copy of the communications in the court's file, disclosing the incident to the lawyers, and contacting the judicial conduct commission to determine if further steps were required. The father replied with a message apologizing for breaking any 'rules or laws' and promising not to ask questions or make comments 'relating to criminal cases' in the future."; "Allowing judges to use Facebook and other social media is also consistent with the premise that judges do not 'forfeit [their] right to associate with [their] friends and acquaintances nor [are they] condemned to live the life of a hermit. In fact, such a regime would . . . lessen the effectiveness of the judicial officer.' Comm. on Jud. Ethics, State Bar of Tex., Op. 39 (1978). Social websites are one way judges can remain active in the community."; "Merely designating someone as a 'friend' on Facebook 'does not show the degree or intensity of a judge's relationship with a person.' ABA Op. 462. One cannot say, based on this designation alone, whether the judge and the 'friend' have met; are acquaintances that have met only once; are former business acquaintances; or have some deeper, more meaningful relationship. Thus, the designation, standing alone, provides no insight into the nature of the relationship."; "A reasonable person in possession of all of the facts in this case likely would conclude the contact between the judge and the father did not cause the judge to abandon his judicial role of impartiality; besides the

evidence that the judge and the father's acquaintance was limited, any appearance of bias created by the Facebook communications was dismissed quickly by the judge's handling of the situation.").

- Tennessee Judicial Ethics Comm. Advisory Op. 12-01 (10/23/12) ("Judicial ethics committees of several states have addressed this question, with the majority concluding that judges may utilize social networking sites, but must do so with caution. See Maryland Judicial Ethics Committee Opinion No. 2012-07 ('While they must be circumspect in all of their activities, and sensitive to the impressions such activities may create, judges may and do continue to socialize with attorneys and others.[']'); Florida Judicial Ethics Advisory Opinion 2009-20 (while judges may participate in social media, they may not 'friend' lawyers who may appear before them); Oklahoma Judicial Ethics Advisory Opinion 2011-3 (judges may participate in social media, 'friending' those who do not 'regularly appear or [are] unlikely to appear in the Judge's court'); Massachusetts Judicial Ethics Committee Opinion 2011-6 (judges may participate in social media but 'may only "friend" attorneys as to whom they would recuse themselves when those attorneys appeared before them.')."; "[W]e conclude that, while judges may participate in social media, they must do so with caution and with the expectation that their use of the media likely will be scrutinized various reasons by others. Because of constant changes in social media, this committee cannot be specific as to allowable or prohibited activity, but our review, as set out in this opinion, of the various approaches taken by other states to this area makes clear that judges must be constantly aware of ethical implications as they participate in social media and whether disclosure must be made. In short, judges must decide whether the benefit and utility of participating in social media justify the attendant risks.").
- Massachusetts Judicial Ethics Op. 2011-6 (12/28/11) ("The Code does not prohibit judges from joining social networking sites, thus you may continue to be a member of Facebook, taking care to conform your activities with the Code. A judge's 'friending' attorneys on social networking sites creates the impression that those attorneys are in a special position to influence the judge. Therefore, the Code does not permit you to 'friend' any attorney who may appear before you. The pervasiveness of social media in today's society makes this situation one which requires a judge to 'accept restrictions on the judge's conduct that might be viewed as burdensome by the ordinary citizen.' Commentary to Section 2A." (footnote omitted)).
- Ohio LEO 2010-7 (12/3/10) (holding that a judge may "friend," on a social networking site, a lawyer who appears before the judge but must be careful not to violate other judicial rules; "A judge may be a 'friend' on a social networking site with a lawyer who appears as counsel in a case before the judge. As with any other action a judge takes, a judge's participation on a social networking site must be done carefully in order to comply with the

- ethical rules in the Ohio Code of Judicial Conduct. A judge who uses a social networking site should following these guidelines. To comply with Jud. Cond. Rule 1.2, a judge must maintain dignity in every comment, photograph, and other information shared on the social networking site. To comply with Jud. Cond. Rule 2.4(C), a judge must not foster social networking interactions with individuals or organizations if such communications erode confidence in the independence of judicial decision making. To comply with Jud. Cond. Rule 2.9(A), a judge should not make comments on a social networking site about any matters pending before a judge -- not to a party, not to a counsel for a party, not to anyone. To comply with Jud. Cond. Rule 2.9(C), a judge should not view a party's or witnesses' pages on a social networking site and should not use social networking sites to obtain information regarding the matter before the judge. To comply with Jud. Cond. Rule 2.10, a judge should avoid making any comments on a social networking site about a pending or impending matter in any court. To comply with Jud. Cond. Rule 2.11(A)(1), a judge should disqualify himself or herself from a proceeding when the judge's social networking relationship with a lawyer creates bias or prejudice concerning the lawyer for a party. There is no bright-line rule: not all social relationships, online or otherwise, require a judge's disqualification. To comply with Jud. Cond. Rule 3.10, a judge may not give legal advice to others on a social networking site. To ensure compliance with all of these rules, a judge should be aware of the contents of his or her social networking page, be familiar with the social networking site policies and privacy controls, and be prudent in all interactions on a social networking site.").
- California Judicial Ethics Comm. Advisory Op. 66 (11/23/10) ("To set out a per se rule barring all interactions with attorneys who may appear before the judge would ignore the realities of an increasingly popular and ubiquitous form of social interaction which is used in a wide variety of contexts. It is the nature of the interaction that should govern the analysis, not the medium in which it takes place. Although the committee has concluded it is permissible for a judge to be a member of an online social networking site and that under some limited circumstances it is permissible to interact with attorneys who may appear before the judge on an online social networking site, it is impermissible for judges to interact with attorneys who have cases pending before the judge, and judges who choose to participate in online social networks should be very cautious. A judge should not participate in an online social networking site without being familiar with that site's privacy settings and how to modify them. Also, a judge who chooses to participate must be aware of the affirmative obligations the Code places on the judge to monitor the site and whether it violates any of the many ethical rules which could apply."; "All the concerns involved in participating in the online social network generally are magnified when it includes attorneys who may appear before the judge. Moreover, even where disqualification is not required a judge must disclose the online relationship and it could raise questions in the minds of the litigants that would have never otherwise arisen. Judges should also bear in

mind that determining which attorneys may appear before them can be greatly complicated whenever reassignment of the judge is possible."; "Although not strictly an ethical concern, judges who choose to participate should be mindful of the significant security concerns that such participation entails. By their very nature social networking sites are the antithesis of maintaining privacy. It is frightening how much someone can learn about another person from a few Internet searches. The judge's site may be set with the most restrictive privacy settings, but his/her friends' sites might not. Data imbedded in photos posted on the Internet may be accessible to others. Used in connection with cellular phones, some sites let other participants know a participant's physical location at any given time.").

- Kentucky Judicial Ethics Op. JE-119 (1/20/10) ("The consensus of this Committee is that participation and listing alone do not violate the Kentucky Code of Judicial Conduct, and specifically do not 'convey or permit others to convey the impression that they are in a special position to influence the judge.' . . . However, and like the New York committee, this Committee believes that judges should be mindful of 'whether on-line connections alone or in combination with other facts rise to the level of 'a close social relationship' which should be disclosed and/or require recusal."; "In addition to the foregoing, the Committee is compelled to note that, as with any public media, social networking sites are fraught with peril for judges, and that this opinion should not be construed as an explicit or implicit statement that judges may participate in such sites in the same manner as members of the general public. Personal information, commentary and pictures are frequently part of such sites. Judges are required to establish, maintain and enforce high standards of conduct, and to personally observe those standards."; "Judges are generally prohibited from engaging in any ex parte communications with attorneys and their clients. Canon 3B(7). The Commentary to this section explicitly states that '[a] judge must not independently investigate facts in a case and must consider only the evidence presented.' In addition, a judge is disqualified from hearing a case in which the judge has 'personal knowledge of disputed evidentiary facts[.]' Canon 3E(1)(a). A North Carolina judge was publically reprimanded for conducting independent research on a party appearing before him and for engaging in ex parte communications, through Facebook, with the other party's attorney."; "While a proceeding is pending or impending in any court, judges are prohibited from making 'any public comment that might reasonably be expected to affect its outcome or impair its fairness. . . .' Canon 3B(9). Furthermore, full-time judges are prohibited from practicing law or giving legal advice. Canon 4G. Judges, therefore, must be careful that any comments they may make on a social networking site do not violate these prohibitions. While social networking sites may have an aura of private, one-on-one conversation, they are much more public than off-line conversations, and statements once made in that medium may never go away."; "[T]he Committee believes that a Kentucky judge or justice's participation in social

networking sites is permissible, but that the judge or justice should be extremely cautious that such participation does not otherwise result in violations of the Code of Judicial Conduct.").

- South Carolina Judicial Ethics Advisory Op. 17-2009 (2009) ("A judge may be a member of Facebook and be friends with law enforcement officers and employees of the Magistrate as long as they do not discuss anything related to the judge's position as magistrate.").
- New York Judicial Ethics Advisory Comm. Op. 08-176 (1/29/09) (allowing judges to participate in social network websites, as long as they otherwise comply with the judicial ethics rules; "Provided that the judge otherwise complies with the Rules Governing Judicial Conduct, he/she may join and make use of an Internet-based social network. A judge choosing to do so should exercise an appropriate degree of discretion in how he/she uses the social network and should stay abreast of the features of any such service he/she uses as new developments may impact his/her duties under the Rules."; "There are multiple reasons why a judge might wish to be a part of a social network; reconnecting with law school, college, or even high school classmates; increased interaction with distant family members; staying in touch with former colleagues; or even monitoring the usage of that same social network by minor children in the judge's immediate family."; "The Committee cannot discern anything inherently inappropriate about a judge joining and making use of a social network. A judge generally may socialize in person with attorneys who appear in the judge's court, subject to the Rules Governing Judicial Conduct."; warning judges that they must be careful to avoid such steps as linking to an advocacy group; crossing the line in any relationship sufficiently to create a "close social relationship" requiring disclosure or disqualification; or engaging in improper ex parte communications).

Because Florida courts went both ways on this issue, lawyers waited for the Florida Supreme Court to weigh in – which it finally did in 2018.

- Law Offices of Herssein & Herssein, P.A. v. United Services Automobile Ass'n, 271 So. 3d 889, 891, 894, 896, 897 (Fla. 2018) ("We hold that an allegation that a trial judge is a Facebook 'friend' with an attorney appearing before the judge, standing alone, does not constitute a legally sufficient basis for disqualification."; "It follows that the mere existence of a friendship between a judge and an attorney appearing before the judge, without more, does not reasonably convey to others the impression of an inherently close or intimate relationship. No reasonably prudent person would fear that she could not receive a fair or impartial trial based solely on the fact that a judge and an attorney appearing before the judge are friends of an indeterminate nature. It is for this reason that Florida

courts—including this Court—have long recognized the general principle of law that an allegation of mere friendship between a judge and a litigant or attorney appearing before the judge, standing alone, does not constitute a legally sufficient basis for disqualification.”; “A Facebook ‘friend’ may or may not be a ‘friend’ in the traditional sense of the word. But Facebook ‘friendship’ is no—as a categorical matter—the functional equivalent of traditional ‘friendship.’ The establishment of a Facebook ‘friendship’ does not objectively signal the existence of the affection and esteem involved in a traditional ‘friendship.’ Today it is commonly understood that Facebook ‘friendship’ exists on an even broader spectrum than traditional ‘friendship.’ Traditional ‘friendship’ varies in degrees from the greatest intimacy to casual acquaintance; Facebook ‘friendship’ varies in degree from greatest intimacy to ‘virtual stranger’ or ‘complete stranger.’”; “It is therefore undeniable that the mere existence of a Facebook ‘friendship,’ in and of itself, does not inherently reveal the degree or intensity of the relationship between the Facebook ‘friends.’ Since the creation of a Facebook ‘friendship’ in itself does not signal the existence of a traditional ‘friendship,’ it certainly cannot signal the existence of a close or intimate relationship.”; “In short, the mere fact that a Facebook ‘friendship’ exists provides no significant information about the nature of any relationship between the Facebook ‘friends.’ Therefore, the mere existence of a Facebook ‘friendship’ between a judge and an attorney appearing before the judge, without more, does not reasonably convey to others the impression of an inherently close or intimate relationship. No reasonably prudent person would fear that she could not receive a fair and impartial trial based solely on the fact that a judge and an attorney appearing before the judge are Facebook ‘friends’ with a relationship of an determinate nature.”).

Best Answer

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

B 8/12; B 7/14

End of an Attorney-Client Relationship

Hypothetical 18

Folks in charge of your law firm's marketing effort have urged you to send email "alerts," "law updates," etc. to one-time clients, even those who have not sent your firm any work for the last year or so. They reason that maintaining some link with these arguably former clients might prompt them to hire you again. You worry about the conflicts of interest ramifications, because a former client might point to the communication as indicia of a continuing attorney-client relationship -- and try to disqualify you from representing another client adverse to it.

Is it risky to send a continuing stream of electronic communications to arguably former clients?

YES

Analysis

As in so many other aspects of practice, electronic communication can affect liability and conflicts of interest analyses.

Lawyers' duties to current clients differ dramatically from duties to former clients. Although maintaining an arguably current attorney-client relationship with a client might bring marketing benefits, it carries other risks.

Determining When an Attorney-Client Relationship Ends

Given this difference in the conflicts rules governing adversity to current and former clients, lawyers frequently must analyze whether a client is still "current" or can be considered a "former" client for conflicts purposes.

Absent some adequate termination notice from the lawyer, it can be very difficult to determine if a representation has ended for purposes of the conflicts analysis.

Interestingly, the meager guidance offered by the ABA Model Rules appears in the rule governing diligence, not conflicts.

Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.

ABA Model Rule 1.3 cmt. [4].

In one legal ethics opinion, the ABA provided an analysis that adds to the confusion rather than clarifies.

[T]he Committee notes that if there is a continuing relationship between lawyer and client, even if the lawyer is not on a retainer, and even if no active matters are being handled, the strict provisions governing conflicts in simultaneous representations, in Rule 1.7, rather than the more permissible former-client provisions, in Rule 1.9, are likely to apply.

ABA LEO 367 (10/16/92). Thus, the ABA did not provide any standard for determining when a representation terminates in the absence of some ongoing matter.

The ACTEC Commentaries provide an analysis, but also without any definitive guidance.

[T]he lawyer may terminate the representation of a competent client by a letter, sometimes called an 'exit' letter, that informs the client that the relationship is terminated. The representation is also terminated if the client informs the lawyer that another lawyer has undertaken to represent the client in trusts and estates matters. Finally, the representation may be terminated by the passage of an extended period of time during which the lawyer is not consulted.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.4, at 57 (4th ed. 2006),

http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf

(emphasis added).

The case law is equally ambiguous, although some cases require some dramatic event or affirmative action by the lawyer before finding the representation to have ended.

- Johnson v. Riebesell (In re Riebesell), 586 F.3d 782, 789 (10th Cir. 2009) (holding that a lawyer had an attorney-client relationship with a client until the client terminated the relationship; "[W]e agree with the bankruptcy court, which held otherwise - an attorney-client relationship did exist because (1) the relationship did not formally terminate until March or April 2003, when Johnson terminated it.").
- Comstock Lake Pelham, L.C. v. Clore Family, LLC, 74 Va. Cir. 35, 37-38 (Va. Cir. Ct. 2007) (opinion by Judge Thacher holding that a law firm which had last performed work for a client in August 2005 should be considered to still represent the client, because the law firm "never communicated to [the client] that [the law firm's] representation had been terminated. Regardless of who initiated the termination or representation, the Rules place the burden of communication squarely upon the lawyer. . . . Because the burden is upon the lawyer to communicate with the client upon the termination of representation, the lack of communication of same from [law firm] could lead one to reasonably conclude that the representation was ongoing. It was [law firm's] burden to clarify the relationship, and they failed to satisfy that burden.").
- GATX/Airlog Co. v. Evergreen Int'l Airlines, Inc., 8 F. Supp. 2d 1182, 1186, 1187 (N.D. Cal. 1998) (disqualifying the law firm of Mayer, Brown & Platt upon the motion of the Bank of New York; explaining that the law firm's "use of the word 'currently' to describe the MBP/BNY relationship evidences its longstanding and continuous nature. Some affirmative action would be needed to sever that type of relationship, and MBP assumed the relationship had not been severed." (emphasis added); also concluding that the Bank was a current client because "MBP [the firm] assisted BNY [the Bank] on a repeated basis whenever matters arose over a three-year period. Although MBP may or may not still have been working on matters for BNY when the January 30 complaint was filed, it is undisputed that MBP billed BNY through January 12."), vacated as moot, 192 F.3d 1304 (9th Cir. 1999).

- Mindscape, Inc. v. Media Depot, Inc., 973 F. Supp. 1130, 1132-33 (N.D. Cal. 1997) (finding that a law firm's attorney-client relationship with a client was continuing as long as the lawyer had a "power of attorney" in connection with a patent, was listed with the Patent & Trademark Office as the addressee for correspondence with the client, and had not yet corrected a mistake in a patent that had earlier been discovered).
- Research Corp. Techs., Inc. v. Hewlett-Packard Co., 936 F. Supp. 697, 700 (D. Ariz. 1996) ("The relationship is ongoing and gives rise to a continuing duty to the client unless and until the client clearly understands, or reasonably should understand that the relationship is no longer depended on." (emphasis added; citation omitted); denying Hewlett-Packard's motion to disqualify plaintiff's counsel).
- Shearing v. Allergan, Inc., No. CV-S-93-866-DWH (LRL), 1994 U.S. Dist. LEXIS 21680 (D. Nev. Apr. 4, 1994) (noting that the law firm had not performed any work for the client for over one year, but pointing to a letter that the law firm sent to the client indicating that they were a valuable client and that the firm remained ready to respond to the client's needs; granting motion to disqualify plaintiff's counsel).
- Alexander Proudfoot PLC v. Federal Ins. Co., Case No. 93 C 6287, 1994 U.S. Dist. LEXIS 3937, at *10 (N.D. Ill. Mar. 30, 1994) (holding that the insurance company could "assume" that the firm would continue to act as its lawyer if and when the need arose based on the law firm's prior service to the party and stating that "any perceived disloyalty to even a 'sporadic' client besmirches the reputation of [the] legal profession"), dismissed on other grounds, 860 F. Supp. 541 (N.D. Ill. July 27, 1994).
- Lemelson v. Apple Computer, Inc., Case No. CV-N-92-665-HDM (PHA), 1993 U.S. Dist. LEXIS 20132, at *12 (D. Nev. June 2, 1993) (quoting an earlier decision holding that "the attorney-client relationship is terminated only by the occurrence of one of a small set of circumstances" and listing those circumstances as one of three occurrences -- first, an express statement that the relationship is over, second, acts inconsistent with the continuation of the relationship, or third, inactivity over a long period of time (citation omitted); concluding that "[n]one of these events occurred in the instant action").
- SWS Fin. Fund A v. Salomon Bros., Inc., 790 F. Supp. 1392, 1398, 1403 (N.D. Ill. 1992) (finding that an attorney-client relationship existed between Salomon Brothers and a law firm which had periodically answered commodity law questions, and had finished its last billable project about two months before attempting to take a representation adverse to Salomon; finding that the law firm had the "responsibility for clearing up any doubt as to whether the client-lawyer relationship persisted" (emphasis added); ultimately concluding disqualification was inappropriate).

At least one court has taken a more forgiving approach.

- Banning Ranch Conservancy v. Superior Court, 123 Cal. Rptr. 3d 348, 352 (Cal Ct. App. 2011) (holding that a lawyer's open-ended retainer agreement with the city entered into six years earlier did not render the city a current client when the lawyer had not provided services to the city under the agreement; "The 2005 agreements provide that the Shute firm would provide legal services to the City, on an 'as requested' basis, in connection with 'public trust matters of concern to [the City].' The agreements, however, conditioned such representation on the Shute firm's confirmation of its 'ability to take on the matter.' If such representation was requested and accepted, the agreed-upon rates were to be \$250 per hour for partners and \$215 per hour for associates. The City's supporting declarations showed the 2005 agreements never had been terminated."; "The Shute firm continued doing some minor legal work on another matter, but that matter concluded in early 2006. Other than the initial matter concerning mooring permit regulations, the City never requested that the Shute firm undertake any other legal work pursuant to the 2005 letter agreements."; overturning the trial court's disqualification order).

Thus, the safest (and in some courts, the only) way to terminate an attorney-client relationship is to send a "termination letter" explicitly ending the relationship.

Some lawyers (especially those who practice in the domestic relations area) routinely send out such letters.

Conflicts of Interest Risks

Every state's ethics rules recognize an enormous dichotomy between a lawyer's freedom to take matters adverse to a current client and a former client.

Absent consent, a lawyer cannot take any matter against a current client -- even if the matter has no relationship whatever to the representation of that client. ABA Model Rule 1.7. In stark contrast, a lawyer may take a matter adverse to a former client unless the matter is the "same or . . . substantially related" to the matter the lawyer handled for the client, or unless the lawyer acquired material confidential information

during the earlier representation that the lawyer could now use against the client. ABA Model Rule 1.9.

Liability Risks

This scenario raises both ethics issues and (more ominously) malpractice issues.

The ABA Model Rules generally recognize that a client should be characterized either as a current client or former client. Lawyers obviously owe many duties to current clients, but very few duties to former clients (most of which involve protection of the client at the end of the representation, and confidentiality thereafter).

The Restatement takes the same basic position, although it acknowledges that in certain circumstances a lawyer might have some obligation to relay pertinent communications to former clients.

After termination a lawyer might receive a notice, letter, or other communication intended for a former client. The lawyer must use reasonable efforts to forward the communication. The lawyer ordinarily must also inform the source of the communication that the lawyer no longer represents the former client The lawyer must likewise notify a former client if a third person seeks to obtain material relating to the representation that is still in the lawyer's custody.

A lawyer has no general continuing obligation to pass on to a former client information relating to the former representation. The lawyer might, however, have such an obligation if the lawyer continues to represent the client in other matters or under a continuing relationship. Whether such an obligation exists regarding particular information depends on such factors as the client's reasonable expectations; the scope, magnitude, and duration of the client-lawyer relationship; the evident significance of the information to the client; the burden on the lawyer in making disclosure; and the likelihood that the client will receive the information from another source.

Restatement (Third) of Law Governing Lawyers § 33 cmt. h (2000) (emphasis added).

This comment seems to focus on "information" other than new legal developments, some changes in the law, etc.

Neither the ABA Model Rules nor the Restatement discusses lawyers' possible duty to keep former clients updated on any legal developments.

The ACTEC Commentaries recognize a strange "dormant" representation -- in which clients apparently can continue to receive the benefit of the lawyer's duties normally owed only to current clients (even though the lawyer is not then handling any matters for such "dormant" clients).

The execution of estate planning documents and the completion of related matters, such as changes in beneficiary designations and the transfer of assets to the trustee of a trust, normally ends the period during which the estate planning lawyer actively represents an estate planning client. At that time, unless the representation is terminated by the lawyer or client, the representation becomes dormant, awaiting activation by the client. At the client's request, the lawyer may retain the original documents executed by the client. See ACTEC Commentary on MRPC 1.7 (Conflict of Interest: Current Clients). Although the lawyer remains bound to the client by some obligations, including the duty of confidentiality, the lawyer's responsibilities are diminished by the completion of the active phase of the representation. As a service the lawyer may communicate periodically with the client regarding the desirability of reviewing his or her estate planning documents. Similarly, the lawyer may send the client an individual letter or a form letter, pamphlet or brochure regarding changes in the law that might affect the client. In the absence of an agreement to the contrary, a lawyer is not obligated to send a reminder to a client whose representation is dormant or to advise the client of the effect that changes in the law or the client's circumstances might have on the client's legal affairs.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.4, at 57 (4th ed. 2006),

http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf

(emphasis added).

The ACTEC Commentaries provide an illustration of this point.

Example 1.4-1. Lawyer (L) prepared and completed an estate plan for Client (C). At C's request, L retained the original documents executed by C. L performed no other legal work for C in the following two years but has no reason to believe that C has engaged other estate planning counsel. L's representation of C is dormant. L may, but is not obligated to, communicate with C regarding changes in the law. If L communicates with C about changes in the law, but is not asked by C to perform any legal services, L's representation remains dormant. C is properly characterized as a client and not a former client for purposes of MRPCs 1.7 (Conflict of Interest: Current Client) and 1.9 (Duties to Former Clients).

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.4, at 58 (4th ed. 2006),

http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf.

The ACTEC Commentaries repeat this approach in a later section.

[S]ending a client periodic letters encouraging the client to review the sufficiency of the client's estate plan or calling the client's attention to subsequent legal developments does not increase the lawyer's obligations to the client. See ACTEC Commentary on MRPC 1.4 (Communication) for a discussion of the concept of dormant representation.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.8, at 113-14 (4th ed. 2006),

http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf

(emphasis added).

The ACTEC Commentaries clearly hope to avoid burdening trust and estate lawyers with liability for not updating the estate plans of arguably former clients. Thus, the answer probably is not as clear as the ACTEC Commentaries would like it to be.

There seem to be few if any malpractice cases against lawyers for failing to advise former clients of changes in the law. This lack of case law seems somewhat surprising, given both lawyers' increasing use of emails and other forms of electronic communications to send "alerts" and "updates" to former clients, as well as the incentives for former clients to sue the "deep pockets" that lawyers frequently represent.

Effect of Lawyer Marketing

Lawyer marketing can affect both lawyers' willingness to clearly terminate an attorney-client relationship, and courts' analysis.

Most lawyers would find "termination letters" contrary to their marketing instincts. In fact, many lawyers continue to send email alerts to former clients (usually addressed to "Clients and Friends"), inviting former clients to firm events, etc. All of these steps are designed to bring future business, but of course they also provide evidence of a continuing attorney-client relationship. Lawyer marketing has always tended to have this possible impact, but the ease of electronic marketing has certainly exacerbated the potential risks.

The widespread availability of lawyers' electronic marketing can also provide fertile grounds for an adversary seeking to prove a continuing attorney-client relationship. A 2011 Western District of Texas Bankruptcy decision highlighted this risk.

Crescent Resources

In In re Crescent Resources, LLC, 457 B.R. 506 (Bankr. W.D. Tex. 2011), the Litigation Trust for bankrupt Crescent Resources sought the files of the Robinson, Bradshaw & Hinson law firm.

The Litigation Trust claimed that Robinson, Bradshaw had jointly represented Crescent and its parent Duke Ventures, LLC -- in a transaction that allegedly left Crescent insolvent after a transfer of over \$1 billion to Duke. If there had been a joint representation, universally recognized principles would entitle either of the jointly represented clients to the law firm's files. As the undeniable successor to Crescent Resources, the Litigation Trust would therefore be entitled to the law firm's files -- including all communications between the law firm and Duke about the transaction, even if no Crescent representative participated in or received a copy of those communications.

The court succinctly stated the issue.

The major issue before the Court is whether the Trust is to be considered a joint or sole client, or no client at all, of RBH [Robinson, Bradshaw & Hinson] with respect to the Project Galaxy files.

Id. at 516.

The court also teed up the parties' positions.

The Trust argues that RBH did represent Crescent Resources, while Duke would have the Court believe that RBH jointly represented Crescent Resources before the 2006 Duke Transaction and after the 2006 Duke Transaction, but not during the 2006 Duke Transaction. Duke further alleges that Crescent Resources was not represented by counsel at all during the 2006 Duke Transaction. Duke is arguing, essentially, that for the purposes of the 2006 Duke Transaction only, RBH did not

represent Crescent Resources. So the issue to be resolved is whether RBH represented Crescent Resources with respect to the 2006 Duke Transaction.

Id.

Duke and Robinson, Bradshaw staked out a firm position, and both

provided sworn testimony that Duke was RBH's sole client for Project Galaxy. Mr. Torning ["Duke's in-house attorney responsible for Project Galaxy and attorney in charge of outside counsel for Duke for Project Galaxy"] testified that it was his understanding "that at all times during Project Galaxy, RBH represented Duke, not Crescent."

Id. at 520. Thus, both Duke and Robinson, Bradshaw stated under oath that the law firm represented only Duke -- and did not represent Crescent.

The court looked at all the obvious places in assessing whether Robinson, Bradshaw solely represented Duke in the transaction, or jointly represented Duke and Crescent in the transaction.

First, the court found that a 2004 Robinson, Bradshaw retainer letter was somewhat ambiguous.

"The Firm is retained to represent Duke Energy (or any of its subsidiaries or affiliates) and to render legal advice or representation as directed and specified by a Duke Energy attorney . . . with respect to a given matter . . . However, the Duke Energy Office of General Counsel has the ultimate responsibility and authority for handling all decisions in connection with the Services."

Id. at 519. A Robinson, Bradshaw lawyer testified that the firm "was unable to locate any engagement letter . . . in which Crescent Resources was a signatory." Id. Thus, there was no specific retainer letter for the pertinent transaction, but the earlier general retainer letter was not inconsistent with Robinson, Bradshaw's joint representation of Crescent in the transaction.

Second, the court pointed to Duke's payment of Robinson, Bradshaw's invoices.

Id. at 520. The court explained that Duke's payment of Robinson, Bradshaw's legal fees did not necessarily preclude the firm's joint representation of Duke and Crescent.

The evidence shows that Duke, not Crescent, paid for the legal services provided in connection with Project Galaxy. However, that is not dispositive, as there can still be an implied attorney-client relationship independent of the payment of a fee.

Id. at 522.

Third, the court noted Duke's argument that Robinson, Bradshaw "took direction from, reported to, and provided legal services to Duke." Id. at 520. In analyzing the direction issue, the court pointed to a Robinson, Bradshaw lawyer's testimony.

Mr. Buck testified that neither he nor any RBH attorneys represented Crescent in the Project Galaxy transaction. . . . Mr. Buck additionally testified that he did not report to Crescent nor take direction from Crescent during Project Galaxy.

Id. at 521. Of course, the Robinson, Bradshaw lawyers had interacted with Crescent employees in connection with the transaction.

Duke acknowledged that RBH worked with Crescent Resources on Project Galaxy, but downplayed that by stating that "of course [RBH interacted with Crescent], because they're representing Duke in the sale of . . . its 49 percent sharehold interest in Crescent. And of course, when you're providing information to the buyer--the prospective buyer--you're going to work with the company in which you're selling a portion of your shares." . . . Duke argues that this contact between RBH and Crescent Resources is not the same as RBH representing Crescent Resources with respect to Project Galaxy.

Id. at 519.

Thus, Duke and Robinson, Bradshaw argued that the firm had not jointly represented Duke and Crescent in the transaction, relying on sworn statements to that effect from both Duke and the law firm; the lack of a specific retainer letter with Crescent; Duke's payment of the legal bills; and Duke's direction to the law firm in connection with the transaction.

The court then turned to contrary evidence presented by the Litigation Trust.

First, the court pointed to evidence clearly establishing that Robinson, Bradshaw had represented Crescent before the transaction. Id. at 518. The court also noted the firm's failure to run conflicts when undeniably representing Crescent in a number of matters before the transaction.

Ironically, the court also pointed to Crescent's own application to retain Robinson, Bradshaw as its law firm in the bankruptcy -- which described the law firm's long-standing representation of Crescent.

The Trust presented the Application to Employ RBH submitted to this Court on June 11, 2009 (the "Application") That document details RBH's pre-petition relationship with the Debtors. "RB&H has been representing Crescent and many of its debtor and non-debtor subsidiaries since 1986 and has served as Crescent's primary corporate counsel for several years." The Application states that "RB&H represented Crescent in connection with the formation, in 2006, of its current parent holding company, incident to a change in Crescent's historical ownership structure as a wholly-owned, indirect subsidiary of Duke Energy Corporation." The Application also contains the Declaration of Robert C. Sink in Support of Application to Employ (the "Sink Declaration") Mr. Sink is a shareholder with RBH and the declaration was made on RBH's behalf. In the Sink Declaration, Mr. Sink echoes the Application and states that "RB&H has represented Crescent Resources and many of its debtor and non-debtor subsidiaries in various matters since 1986 and has served as Crescent's primary corporate counsel for several years."

Id. at 517-18 (emphasis added). The court concluded that

RBH represented both Crescent and Duke prior to Project Galaxy. There was no end to the attorney-client relationship and RBH attorneys were going through Crescent files in performing the due diligence for Project Galaxy. It is reasonable that a current client would believe that an attorney was representing them if the attorney showed up to that current client's office and started going through files.

Id. at 522 (emphasis added).

The court also noted Robinson, Bradshaw's representation of Crescent after the transaction.

Duke provided no evidence which would have given RBH cause to terminate their relationship with Crescent, nor did Duke provide any evidence that RBH gave notice to Crescent that RBH was terminating their relationship. Further, Duke acknowledges that RBH and Crescent continued to maintain an attorney-client relationship post Project Galaxy, which would negate any potential argument by Duke that RBH and Crescent's relationship may have terminated by implication.

Id. at 523.

Second, the court noted that Crescent did not have any other law firms represent it in connection with the transaction.

RBH had a long-term relationship with Crescent before Project Galaxy. Additionally, there was no other representation of Crescent during Project Galaxy.

Id. at 521 (emphasis added).

Third, the court pointed to several Robinson, Bradshaw lawyers' website bios boasting that they had represented Crescent in the transaction.

The Trust also discussed statements made by various RBH lawyers on RBH's website. Stephan J. Willen's page, under "Representative Experience" includes "Representing a real estate developer, as borrower, in connection with a \$1.5

billion revolving and term loan letter of credit facility used to recapitalize the developer." The Trust stated that this represents the 2006 Duke Transaction and shows Mr. Willen's understanding that Crescent Resources was RBH's client with respect to the 2006 Duke Transaction. Additionally, William K. Packard's page, under "Representative Experience" states "Representation of Crescent Resources, as borrower, in connection with a \$1.5 billion revolving and term loan letter of credit facility."

Id. at 518 (emphases added).

After examining both side's arguments, the court turned to the legal standard.

The court pointed to the Third Circuit's extensive analysis of this very issue in Teleglobe Communications Corp. v. BCE, Inc. (In re Teleglobe Communications Corp.), 493 F.3d 345 (3d Cir. 2007).¹ The court noted that

Teleglobe, relied on by both parties, reads almost as an instructional manual to in-house counsel on how to avoid tangled joint-client issues. Teleglobe instructs that a court should consider the testimony from the parties and their attorneys on the areas of contention.

Id. at 524. The court also pointedly noted that

RBH and in-house counsel for Duke should have heeded the warnings in Teleglobe and taken greater care to have in place an information shielding agreement or ensured that Crescent was represented by outside counsel.

Id.

¹ In re Crescent Res., 451 B.R. at 516 ("The various cases cited by both the Trust and Duke involve cases where a parent corporation and subsidiary were represented by the same attorney during a spin-off, sale, or divestiture. See e.g. In re Teleglobe Communications Corp., 493 F.3d 345 (3rd Cir. 2007) (in-house counsel of the parent corporation represented both the subsidiary and parent companies); Polycast Tech. Corp. v. Uniroyal, Inc., 125 F.R.D. 47 (S.D.N.Y. 1989) (in-house counsel of the parent corporation represented both the subsidiary and parent in the sale of the subsidiary); Medcom Holding Co. v. Baxter Travenol Labs., Inc., 689 F. Supp. 841 (N.D. Ill. 1988); In re Mirant Corp.[.] 326 B.R. 646 (Bankr. N.D. Tex. 2005) (same law firm representing both parent and subsidiary in a public stock offering of the subsidiary). In those cases, the courts determined the parties were joint clients. The issue remaining before this Court is whether RBH represented Crescent Resources with respect to the 2006 Duke Transaction.").

The court ultimately concluded that Robinson, Bradshaw had jointly represented Duke and Crescent in the transaction. The court therefore held that the Litigation Trust was entitled to Robinson, Bradshaw's files generated during the firm's joint representation of Duke and Crescent in the transaction.²

In looking ahead to litigation between Litigation Trust and Duke, the court also held found that

Duke cannot invoke an attorney-client privilege to stop the Trust from using the joint-client files in adversary proceedings between Duke and the Trust.

Id. at 528. In contrast, the court held that

the Trust may not unilaterally waive the joint-client privilege and use jointly privileged information in proceedings involving third parties, absent a waiver from Duke.

Id. at 530.³ The court's conclusions follow the majority rule when joint clients become adversaries. The law generally allows either joint client access to their common law firm's files, and permits either joint client to use any of those documents in litigation with another joint client.

Best Answer

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

N 1/13; B 7/14

² Id. at 524.

³ Id. at 529-30 ("The Restatement [Restatement (Third) of Law Governing Lawyers § 75 cmt. e (2000)] says co-client communication is not privileged as between the co-clients. The Trust's reading of the Restatement appears to state that if co-client communication is then used in an adversary [sic] between the former co-clients, it would then waive the privilege as to third parties. This would effectively make the privilege superfluous. Protections can be placed on any future hearings between Duke and the Trust, and any co-client privileged information can remain privileged as to third parties even if used in a future adversary proceeding between Duke and the Trust.").