

# LAW FIRM BREAK UP

## 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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## Law Firm Non-Compete Arrangements

### Hypothetical 1

You are starting your own law firm, and want to avoid some of the troubles that you have seen at larger law firms for whom you have worked. Among other things, you would like to have every lawyer joining the firm agree not to work for another law firm in the same city for two years after leaving your firm.

May you include such a provision in your partnership or employment agreements?

**NO**

### Analysis

The ABA Model Rules indicate that

[a] lawyer shall not participate in offering or making . . . a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except in an agreement concerning benefits upon retirement.

ABA Model Rule 5.6(a).

The Restatement has essentially the same prohibition.

A lawyer may not offer or enter into a law-firm agreement that restricts the right of the lawyer to practice law after terminating the relationship, except for a restriction incident to the lawyer's retirement from the practice of law.

Restatement (Third) of Law Governing Lawyers § 13(1) (2000). A comment explains this provision.

[A] lawyer may not offer or enter into a restrictive covenant with the lawyer's law firm or other employer if the substantial effect of the covenant would be to restrict the right of the lawyer to practice law after termination of the lawyer's relationship with the law firm. The rationale for the rule is to prevent undue restrictions on the ability to present and future clients of the lawyer to make a free choice of counsel. The rule applies to all lawyers of the firm and prohibits both making and accepting such a restriction.

Restatement (Third) of Law Governing Lawyers § 13 cmt. b (2000).

Every state has adopted such a restriction -- usually using the identical language.

The many court and bar analyses of this provision emphasize the clients' right to hire lawyers of their choice -- which the non-competition provision would inhibit. ABA/BNA Lawyers' Manual on Professional Conduct § 51:1201 ("The restrictions hinder the ability of clients to choose which lawyers they want to represent them, and impermissibly constrain the ability of lawyers to practice law.").

Only one state seemed to have taken an opposite approach (at least until the late 1990's). Maine LEO 126 (9/25/92) (explaining that a law firm could require that an associate sign a non-compete as a condition of employment; "It is not a violation of the Bar Rules for a law firm to require or utilize non-competition agreements."; explaining that most states specifically forbid non-competes, but that "no such provision in any form appears in the Maine Bar Rules"). Maine superseded this opinion in a February 1997 rules change.

The prohibition on law firm non-competition provisions is another example of how lawyers are treated differently from other professionals, most or all of whom may freely enter into non-competes.

**Best Answer**

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

n 2/12; b 10/14

## Other Law Firm Restrictions

### Hypothetical 2

As your firm's managing partner, you have asked for recommendations from a partnership committee about how to protect the firm and its clients from harm caused by lawyers suddenly leaving the firm (either individually or in groups).

May you include the following provisions in your partnership agreement:

- (a) Partners must provide a sixty-day written notice of their departure, and forfeit all of their capital in the firm if they leave before the end of the sixty days?

### YES (PROBABLY)

- (b) Partners who leave the firm and take clients with them must pay the firm a percentage of those clients' receipts for a one-year period after their departure?

### NO (PROBABLY)

- (c) Partners who leave the firm will be responsible for their pro rata share of any lease payments for the law firm's offices (unless the firm is able to replace the departed lawyers with others to occupy the space)?

### MAYBE

### Analysis

Imaginative law firms have tried numerous tactics to discourage lawyers from leaving their firms and taking business with them. In some cases, the motivation is purely pecuniary, but in other situations the firms act out of concern for the smooth transition of their clients' business.

Courts or bars nullify nearly every one of these creative techniques. These courts and bars apply the basic principle that law firms may not create a "financial disincentive" for lawyers who leave the firm and compete with it that is materially

different from whatever disincentive applies to lawyers who leave the firm for other reasons.

The Restatement explains how the general prohibition on noncompetes affects this analysis.

[A] lawyer may not offer or enter into a restrictive covenant with the lawyer's law firm or other employer if the substantial effect of the covenant would be to restrict the right of the lawyer to practice law after termination of the lawyer's relationship with the law firm. The rationale for the rule is to prevent undue restrictions on the ability to present and future clients of the lawyer to make a free choice of counsel. The rule applies to all lawyers of the firm and prohibits both making and accepting such a restriction.

Beyond professional discipline, such rules preclude enforcement of a provision of a firm agreement under which a departing lawyer is denied otherwise-accrued financial benefits on entering into competitive law practice, unless the denial applies to all departing firm lawyers, whether entering into competitive practice or not (including, for example, lawyers who become judges, government counsel, or inside legal counsel for a firm client or who change careers, such as by entering teaching).

Restatement (Third) of Law Governing Lawyers § 13 cmt. b (2000).<sup>1</sup>

(a) Bars and courts generally uphold provisions that apply the same way to lawyers who leave the firm and compete with the firm and lawyers who do not later compete with the firm.

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<sup>1</sup> Not surprisingly, the Restatement recognizes that law firms can restrict what their partners can do while in the firm.

Also distinguishable are law-firm requirements restricting a lawyer's right to practice law prior to termination, such as the common restriction that the lawyer must devote his or her entire practice to clients of the firm. Similarly, an organization employing a lawyer does not violate the rule of this Section in requiring that the lawyer's practice is limited to the affairs of the organization. For example, governmental practice is often so limited.

Restatement (Third) of Law Governing Lawyers § 13 cmt. b (2000).

- Pierce v. Morrison Mahoney LLP, 897 N.E.2d 562, 565 (Mass. 2008) ("In this case, we must decide whether that firm's amended partnership agreement, which imposes identical financial consequences on all partners who voluntarily withdraw from the firm, regardless of whether they compete with the firm after withdrawing, also violates [Supreme Judicial Court] rule 5.6. We conclude that it does not.").
- Hoffman v. Levstik, 860 N.E.2d 551 (Ill. Ct. App. 2006) (upholding a trial court's enforcement of a law firm's partnership agreement allowing the law firm to reduce repayment of the withdrawing partner's capital by up to \$50,000 if the partner voluntarily withdrew; also upholding a partnership agreement provision allowing some discretion by the law firm in determining the date of a withdrawing partner's termination for calculating the withdrawing partner's share of the firm's profits; finding that under the partnership agreement's provisions a large contingent fee award should have been considered in calculating the withdrawing partner's share).

However, this basic principle creates an awkward restriction for law firms. A law firm might have difficulty attracting lawyers who would fear enormous financial penalties if they ever leave the firm. In addition, law firms may want to avoid disappointing or angering those lawyers who leave for purposes other than to compete with the firm -- such as joining a client's law department, becoming judges, or even being gently squeezed out of the firm.

Thus, most courts or bars allow notice provisions such as this, but an uneven application of a notice provision might create ethics issues.

For instance, if a law firm routinely waived this penalty for lawyers that left the firm to enter public service, teach at a law school, etc. -- but enforced it against lawyers who joined competing law firms -- a court or bar might conclude that the notice requirement was intended to punish competitors rather than to protect clients.

More and more law firms are adding lengthier and lengthier notice provisions to their partnership and employment agreements. Few bars or courts seem to have dealt



with these, although some recent articles have described law firms' attempts to enforce them.

- Arthur J. Ciampi, Enforceability of Notice Provisions in Law Firm Agreements, N.Y. L.J. Online, May 23, 2014 ("Springtime is often the time of year when partners leave their firms for greener pastures. Making 'the move' is frequently a difficult process fraught with twists, turns and surprises that sometimes hinder and unnecessarily complicate the departure. Among the difficulties is that many partnership agreements contain a 'notice provision' which requires a partner to remain at the firm until the specified notice period expires. The enforceability and propriety of a notice provision frequently become a point of contention between a partner and his soon-to-be former firm. In this month's column, we analyze notice provisions in law firm partnership agreements and discuss their enforceability. . . . Most law firm agreements contain a notice provision which sets forth: (i) the manner in which notice of a partner's departure must be given; (ii) the length of time a partner must remain at the firm before departing; and (iii) the ability of the law firm, in its discretion, to waive or shorten the notice period."; "[A] long notice provision could conceivably run afoul of Rule 5.6 if determined to be a disguised restriction on the practice of law. An extreme example would be a one-year notice period. This would cause partners to remain at a firm for at least an additional year and could conceivably be viewed as an unethical restriction on the practice of law despite the label as a notice provision. In addition, if a partner who challenges the provision can demonstrate that its intent -- as written or applied -- is to restrict competition and not to provide a reasonable transition period, that fact could also undermine its viability. . . . Courts and commentators have opined that reasonable notice of departure is required when law firm partners leave a firm. Thus, a provision in a law firm agreement that merely embodies this duty should sustain scrutiny. At the same time, however, the sole court to address the enforceability of a notice provision in a law firm partnership agreement has maintained that, to be enforceable, such provisions should not unreasonably delay a partner's departure to another law firm. In Borteck v. Riker, Danzig, Scherer, Hyland & Perretti, [179 N.J. 246 (2004)] the departing partner, Robert Borteck, resigned from his firm after providing 'little or no formal notice' despite that the law firm agreement included a 90-day written notice provision. Borteck sued his former firm for declaratory relief, seeking to enforce the early retirement payment provision in the law firm agreement. The firm counterclaimed for, among other things, breach of the firm's 90-day notice provision. Borteck claimed, in part, that the 90-day notice provision violated Rule 5.6." (footnotes omitted); "Firms should also periodically review all of the provisions of their partnership agreements concerning the rights and obligations of the firm and its departing partners. Firms with notice provisions should evaluate whether the provision in place is necessary and whether it is reasonable or in need of amendment because it 'unreasonably delay[s] an attorney's orderly transition

- from one firm to another.' In this process, firms should further discern how they have addressed the notice issue with prior departing partners and whether the firm shortened the time period and if so for what reason.").
- Amaris Elliott-Engel, Kline & Specter Injunction Bars Ex-Associate From Practicing Elsewhere for 60 Days, Legal Intelligencer, July 21, 2011 (issuing a preliminary injunction barring the former lawyer from practicing for sixty days after he left a law firm, because he had not provided the required sixty days notice mandated in the employment agreement; "At the start of the hearing in Kline & Specter v. Englert, Kline & Specter's counsel, Richard A. Sprague, said that Englert, who joined the firm after his graduation from the University of Pennsylvania Law School, had violated his employment contract. Under that contract, Sprague said, Englert is required to give 60 days' notice before leaving the firm. Sprague, of Sprague & Sprague, argued that [Judge] Sheppard should uphold the employment contract by issuing a preliminary injunction that would bar Englert from practicing law anywhere else but at Kline & Specter for 60 days."; "While Sheppard initially stated that the firm's request sounded like a restrictive covenant for lawyers, Sprague said that a preliminary injunction would be valid because Englert was free to leave to work somewhere else eventually but he needed and had failed to give 60 days' notice."; "Frank D'Amore of Attorney Career Catalysts said that the norm in the legal industry is for notice provisions in legal employment contracts to go unenforced. Once client notification has been arranged to be carried out in an orderly fashion, in the 'vast majority of cases, even if there is some saber rattling, almost all firms back down,' said D'Amore, who said he does not have knowledge of this specific case."; "The reasons to not enforce notice provisions include helping the firm's morale by not requiring an attorney who wants to exit the firm to remain; helping the firm's recruiting of new legal talent by not gaining a reputation for making it hard to leave; and abiding by the principle that the client's best interest must be served above all else. D'Amore said.").
  - Brian Baxter, Waiting Game for Barnes & Thornburg Lateral Hires, Am. L. Daily, Oct. 13, 2010 ("So just how long will a group of litigators who gave notice at Wildman, Harrold, Allen & Dixon on October 1 have to wait before heading to their new home at Barnes & Thornburg? Maybe not as long as they claim they were initially told. On Tuesday, the Chicago Tribune reported that Wildman executive committee member H. Roderic Heard and five of his partners from the firm's Windy City office would be forced to wait out a 90-day-notice period after the attorneys tendered their resignations. The story quickly made its way around the legal blogosphere, with some poking fun at Wildman for delaying the move by insisting on enforcing a clause that's commonly found in partnership agreements but rarely raised. Wildman general counsel Stephen Landes, who chairs his firm's professional standards committee, claims that the furor over the six departures is much ado about nothing. 'We started this [process] on a Friday, it's moving right

along, and I expect that by sometime next week we'll have this thing done,' Landes says. 'It's not an event that's going to have an adverse effect on us.' However out of the ordinary it seems to be for the firm to enforce the notice period, Wildman maintains it's merely conducting due diligence and protecting its clients. As Landes explains it, the firm wants to go to its clients not only with news of the departures, but also with a plan of action for how client matters will be handled once the six lawyers depart. 'The rules require us to take care of the clients, and they're our clients until they decide they're not our clients,' he says. 'We have to make sure they have all the information and instructions they need to make a decision, so down the line we haven't created a problem by rushing the process.'").

While law firms generally justify such notices as protecting clients, the dampening effect of such provisions on lawyer departures renders them vulnerable to attack. Challengers might also try to determine if law firms have applied such notice requirements evenhandedly. For instance, a law firm which enforces a lengthy notice period against lawyers moving to a competitor but not to lawyers moving to an academic setting or to a client's law department might well lose a fight over such provisions.

**(b)** This type of restriction has been routinely nullified. See, e.g., ABA/BNA Lawyers' Manual on Professional Conduct § 51:1205 (noting that courts have routinely condemned an agreement that "requires the lawyer to pay his former firm a percentage of the fees he is paid by clients who leave with him").

The reporter's note for the Restatement recognizes this.

In the clear majority of jurisdictions a covenant in a partnership agreement that restricts the right of a former law-firm lawyer to practice by reason of a substantial financial penalty for competing with the former firm will be denied effect, on the ground that the covenant is unreasonable in that it violates the lawyer-code prohibition. In the majority of those decisions, the prohibition is applied only to income or other benefits accrued prior to departure from the firm.

Restatement (Third) of Law Governing Lawyers § 13 cmt. b, reporter's note (2000).

Courts and bars generally take this approach.

- In re Truman, 7 N.E.3d 260, 260, 261 (Ind. 2014) (issuing a public reprimand of a lawyer who hired an associate under terms of an employment agreement that restricted the associate's ability to practice after leaving the firm; "In October 2006, Respondent hired an associate ('Associate') to work in his law firm. As a condition of employment, Associate signed a Confidentiality/Non-Disclosure/Separation Agreement ('the Separation Agreement'). If Associate left the firm, the Separation Agreement provided that only Respondent could notify clients that Associate was leaving, prohibited Associate from soliciting and notifying clients that he was leaving, and prohibited Associate from soliciting and contacting clients after he left. The Separation Agreement also included provisions for dividing fees if Associate left the firm that were structured to create a strong financial disincentive to prevent Associate from continuing to represent clients he had represented while employed by the firm."; "The Separation Agreement hampered both Associate's right to practice law and Associate's Clients' freedom to choose a lawyer by restricting Associate's ability to communicate with the clients and creating an unwarranted financial disincentive for Associate to continue representing them." (emphasis added)).
- Cincinnati Bar Ass'n v. Hackett, 950 N.E.2d 969, 971-72 (Ohio 2011) (issuing a public reprimand against a partner who hired an associate only after the associate signed an agreement that the associate would pay back part of any money earned from case that the associate took with him if he left the firm; "[R]espondent sought to restrain his former associates from taking clients with them when they left his firm. His employment contract required a departing associate who continued to represent the firm's former clients to remit 95% of the fees generated in the clients' cases to respondent regardless of the proportion of the work that each attorney performed. If enforced, this clearly excessive fee would create an economic deterrent for the departing attorney that would adversely affect the clients' right to retain an attorney of their own choosing. Therefore, we agree that respondent has violated both Prof. Cond. R. 1.5 and 5.6.").
- Texas LEO 590 (12/2009) ("Under the Texas Disciplinary Rules of Professional Conduct, a law firm may not seek to enter into an agreement with a member of the firm that would require, if the lawyer later left the firm, that the lawyer would not solicit the firm's clients and would pay to the firm a percentage of any fees collected by the lawyer from the firm's clients for work after the lawyer left the firm.").
- Arizona LEO 09-01 (5/2009) ("A law firm may not employ associate lawyers using a contract that requires a departing associate to pay \$3,500 to the law firm for each instance in which the departing associate continued to represent a law firm client. This requirement would violate the policy underlying ER 5.6

- that puts the commercial interests of law firms secondary to the need to preserve client choice."; "[T]he fee 'acts as a disincentive to representing the client' and, thereby, 'limits the client's ability to retain counsel of choice.' Phil. Bar Assn. Op. 89-3. [2] Cf. Stevens v. Rooks Pitts & Poust, 682 N.E. 2d 1125, 1132 (Ill. App. 1997) (holding that 'no law partnership agreement should restrict a departing partner's ability to practice law.'). 'Financial disincentives may involve either forfeiting compensation that is due to the departing lawyer or requiring that the departing lawyer remit to the firm a part of profits earned from representing former clients of the firm.' Legal Ethics, Law. Deskbk. Prof. Resp. § 5.6-1 (2008-09 ed.) See ABA/BNA Lawyer's Manual on Professional Conduct 51:1205 (2004) (examining financial disincentives involved in Rule 5.6). The fee here surely has such an effect because it must be paid each time that the departing associate continues the representation of a Firm client.").
- Law Offices of Ronald J. Palagi, P.C. v. Howard, 747 N.W.2d 1, 13 (Neb. 2008) (holding that the ethics rules prohibit the enforcement of a law firm employment agreement requiring a lawyer withdrawing from the firm to pay back to the firm any fees earned by cases that the withdrawing lawyer takes with him; "Based upon similar ethics rules in effect throughout the country, '[c]ourts do not enforce any agreement involving the employment of lawyers that appears to have restrictive and thus anticompetitive tendencies.' This is so whether the restriction on competition is direct or indirect. The prohibition against restrictive covenants in agreements between lawyers is generally reasoned to be necessary to ensure the freedom of clients to select counsel of their choice. Courts and commentators note a distinction between the business principles which govern commercial enterprises and the ethical principles that govern the practice of law and find that because 'clients are not merchandise' and '[l]awyers are not tradesmen,' restrictive covenants may not 'barter in clients.' Because the client's freedom of choice is the paramount interest the ethics rules attempt to serve, courts reason that any disincentive to competition is as detrimental to the public interest as an outright prohibition on competition. Thus, cases almost uniformly hold that financial disincentive provisions in Attorney Agreements are unenforceable as against public policy." (citation & footnotes omitted).
  - North Carolina LEO 2001-10 (1/18/02) (condemning a provision in which a law firm ties deferred compensation to a withdrawing lawyer's competition with the firm; "The provision reduces the amount of deferred compensation payable to a shareholder if the shareholder decides to leave the firm. Deferred compensation is reduced by 75% if the departing shareholder engages in 'competitive activity' within a 50-mile radius of Law Firm's offices.").

At least one court has upheld an employment agreement requiring a withdrawing lawyer to pay his former firm a percentage of contingent fees he recovers at his new firm.

- Ruby v. Abington Mem'l Hosp., 50 A.3d 128, 129, 131, 135-36 (Pa. Super. Ct. 2012) (upholding a lawyer's employment agreement requiring the lawyer to give his old firm 75% of fees earned on cases that the lawyer takes with him to a new firm; "'The record reveals that in 1996 Mr. Erbstein signed an 'Employment Agreement' with Beasley [law firm], wherein Mr. Erbstein specifically agreed to immediately reimburse the Beasley Firm any outstanding case costs and pay 75% of any fees recovered thereon should he leave the firm for any reason.'" (internal citation omitted); quoting the employment agreement provision: "'Section 6 of the Employment Agreement (Exhibit 'C') states '[i]n the event that you leave this office for any reason and a client or clients choose(s) to continue with your representation, you will receive 25% of the net fee on any case you take with you regardless of its age, or the time spent on the file before or after you leave the office. You will immediately reimburse the office for all costs then expended on the file before the file(s) leave(s) the office.' (emphasis added)"; "By its terms, a restrictive covenant is simply a promise not to engage in some conduct otherwise permitted but for the presence of the covenant. YRCH [appellant law firm] proffers no evidence suggesting that either YRCH or Erbstein could not obtain its own clientele, successfully engage in the practice of law, or was either geographically or temporarily limited in their practice because Beasley receives a share of a recovery in the cases it formerly held. YRCH purports that somehow Erbstein was restricted because he could not continue representation of the Rubys without compensating Beasley. We are not persuaded by YRCH's argument that one's ability to procure clients is constrained by some ancillary obligation having no bearing on clients retained after the dismissal of the obliged attorney." (emphasis added); "[T]o the extent that YRCH argues that the employment agreement somehow negatively impacts a client's right to choose his or her attorney, we disagree.").

Interestingly, a North Carolina court and the North Carolina Bar both dealt with this issue about a year apart. The court seemed to indicate that the withdrawing lawyer and the old firm must address the issue on a quantum meruit basis.

- Crumley & Assocs., P.C. v. Charles Peed & Assocs., P.A., 730 S.E.2d 763, 765, 766, 767 (N.C. Ct. App. 2012) (analyzing the implications of a lawyer moving from one firm to another firm, having signed an employment agreement with the first firm that contained the following provision: "'Mr. Snyder agrees to pay to the firm 70% of the fees he may

receive from his continued representation of the client in the matter for which the firm was representing the client at the time of his departure.""; explaining that the North Carolina Bar found the provision unethical; "Snyder sought an opinion [2008 FEO 8] from the North Carolina State Bar regarding the enforceability of the pertinent sections of his compensation agreement with Crumley. . . . The opinion concluded the 70/30% fee-split and provision requiring repayment of advanced costs within thirty days did not comply with the provisions of Rule 5.6 of the Rules of Professional Conduct."; "We believe the law is settled in North Carolina that counsel, who has provided legal services pursuant to a contingency fee contract and is terminated prior to a resolution of the case and the occurrence of the contingency upon which the fee is based, has a claim in quantum meruit to recover the reasonable value of those services from the former client, or, where the entire contingent fee is received by the former client's subsequent counsel, from the subsequent counsel." (emphasis added); "[T]he fact that the fee-splitting agreement was determined to be in violation of the Rule of Professional Conduct and unenforceable is of no consequence to Crumley's right of recovery in quantum meruit."; "Costs advanced for a client are the client's financial responsibility; a departing lawyer may not be made liable to a prior law firm for this debt."; nevertheless allowing the former firm to recover under quantum meruit for the work it performed on the case before the case settled).

However, about a year later the North Carolina Bar seemed to approve a pre-arranged split of any contingent fee recovered.

- North Carolina LEO 2012-12 (1/25/2013) (finding that a lawyer who was leaving the firm could ethically enter into a settlement agreement at that time, in which the lawyer agreed to pay the law firm 50 percent of any fees collected on cases that the lawyer brought with him to a new firm; "Attorney B, an associate in Attorney A's firm, resigned from the firm effective February 28, 2005. At the time of his resignation, Attorney B signed an agreement with the firm. The agreement provided that Attorney B would take all of the active client files for which the clients had indicated a desire for Attorney B to continue to represent them. The agreement also contained the following provision: 'With respect to those files in which the client chooses Attorney B to conclude his or her active claim, upon recovery made by Attorney B on each such file, Attorney B shall forward to Attorney A, at the time of disbursement, 50% of the attorney's fee collected on each settlement. This will include medical payments fees as well. Attorney B will also pay to Attorney A upon recovery the total amount of expenses due to Attorney A in accordance with [a computer expense printout provided by Attorney A]. Finally, Attorney B will forward to Attorney A a copy of the settlement sheet signed by the client reflecting the disbursements on each such file. All settlements negotiated by Attorney B through February 28, 2005, will be handled through Attorney A's trust account."; "In the current inquiry, the

agreement was negotiated and entered into after Attorney B announced that he was leaving Attorney A's firm. The agreement was, apparently, part of a global settlement of all issues relative to Attorney B's departure. It was not entered into as a condition of continued employment, as were the agreements analyzed in 2008 FEO 8. It did not deter Attorney B from leaving the firm or from continuing to represent clients who chose to follow him to his new firm. In fact, the agreement specifically contemplated that Attorney B would continue to represent those clients. In light of the various stages of his cases at the time of his departure, a 50% split of the contingent fees to be earned on the cases cannot be viewed as 'onerous' or 'punitive.' Such a division of fees would favor Attorney B in some cases and disfavor him in others. A division of fees based upon a fixed percentage that fairly allocates, over the range of cases, the value of the time and work expended before and after a lawyer leaves a firm is a reasonable means of achieving an efficient equitable resolution of the fee division issues between a departing lawyer and the firm. Provided the lawyers deal fairly and honestly with each other without intimidation, threats, or misrepresentation, this type of agreement should be encouraged. The provision of the agreement addressing costs advanced is consistent with 2008 FEO 8, which provides that the agreement 'may require the departing lawyer to protect the firm's interest in receiving reimbursement for costs advanced from any final settlement or judgment received by the client.'" (emphasis added)).

(c) Courts and bars sometimes recognize that a lawyer's departure from a firm affects the firm's value -- and theoretically allows the law firm to take that diminution of value into account when determining what the law firm should pay the lawyer upon his or her withdrawal.

- North Carolina LEO 2008-8 (10/24/08) (analyzing several law firm employment agreements under which a withdrawing lawyer would have to pay certain amounts back to the law firm; finding the specific arrangement discussed in the opinion to be unethical, but recognizing that such arrangements might be acceptable; noting generally that "a lawyer may participate in the offering or making of an employment or other similar agreement that includes a provision for dividing fees following a lawyer's departure from a firm provided the formula or procedure for dividing fees is, at the time the agreement is made, reasonably calculated to compensate the firm for the resources expended by the firm on the representation as of the date of the lawyer's departure and will not discourage a departing lawyer from taking a case and thereby deny the client access to the lawyer of his choice"; explaining that some states (such as Ohio) find such arrangements unethical, but disagreeing with those states; "Although the opinion prohibits financial disincentives on the continued representation of the clients, it does not



prohibit an agreement for repurchasing the shares of a withdrawing lawyer if the agreement 'represents a fair assessment of the forecasted devaluation in the ownership interest in the firm engendered by a lawyer's departure and does not penalize the lawyer for taking clients with him.' . . . [S]uch agreements may not be so financially onerous or punitive as to deter a withdrawing lawyer from continuing to represent a client if the client chooses to be represented by the lawyer after the lawyer's departure from the firm. Any financial disincentive in an employment agreement that deters a lawyer from continuing to represent a client restricts the lawyer's right to practice in violation of Rule 5.6(a); 2007 FEO 6. Each employment agreement must be analyzed individually to determine whether it violates Rule 5.6(a); however, some general principles can be articulated. The procedure or formula for dividing a fee must be reasonably calculated to protect the economic interests of the law firm while not restricting the right to practice law. It should fairly reflect the firm's investment of resources in the client's representation as of the time of the lawyer's departure and the investment of resources that will be required for the departing lawyer to complete the representation. . . . The formula may take into account the work performed on the representation prior to the lawyer's departure, non-lawyer resources that the firm allocated to the representation not including costs advanced for the client, firm overhead that can be fairly allocated to the client's representation prior to departure, and the legal work, non-lawyer resources, and overhead that will be required of the withdrawing lawyer to complete the representation."; finding that an agreement calling for the withdrawing lawyer to pay 70 percent of any fee recovery back to the firm is unethical because the amount is too large; also concluding that such an agreement may require the withdrawing lawyer to compensate the law firm for goodwill "that initially induced the client to seek the legal services of the law firm" (as long as the "goodwill is valued fairly and reasonably and is not such a significant proportion of the fee that it creates a financial disincentive for the departing lawyer to continue the representation of clients who desire her services"); also concluding that such an agreement may not require the withdrawing lawyer to reimburse the firm for the costs advanced on behalf of the client, because such advance costs are the client's responsibility -- and that such a provision "would have a chilling effect on the departing lawyer's willingness to continue the representation of a client"; finding that such arrangements do not violate the general prohibition on fee-splitting between lawyers who are not in the same firm, because the agreements are reached when the lawyers practice in the same firm; also concluding that such employment agreements may include a mandatory arbitration clause if there is a disagreement about how to calculate the payments; "Lawyers are urged to include such provisions in employment agreements to foster early resolution of disputes without litigation and without drawing clients into the disputes.").

- North Carolina LEO 2007-6 (4/20/07) (analyzing the following provision in a law firm partnership or shareholder agreement describing a formula under

which the law firm's repurchase of the withdrawing lawyer's interest shall be reduced as follows: "The purchase price shall be reduced . . . by an amount equal to one hundred twenty-five Percent (125%) of the work in process generated by employees of the corporation during the twelve (12) months preceding the event requiring or permitting the stock purchase on behalf of clients of the corporation for whom the shareholder or law firm with whom the shareholder is or becomes associated, performs legal services during the twelve (12) month period following the event requiring or permitting the stock purchase."; explaining that "Rule 5.6 protects two important ethical principles: the right of clients to legal counsel of their choice and lawyer mobility. Although this provision is not like a typical covenant not to compete in that it does not have geographical or temporal restrictions, it does tie the decrease in share value to the fact that the departed lawyer represents former clients of the firm. By so doing, the provision provides a disincentive for the departing lawyer to represent clients with whom the lawyer has a prior relationship, penalizes the departing lawyer for representing former clients of the firm, and restricts the lawyer's right to practice. Moreover, the provision does not appear to measure the devaluation of the lawyer's shares in the firm due to the lawyer's departure. If a provision in a firm agreement penalizes a lawyer for taking clients, will dissuade a lawyer from continuing to represent firm clients after his departure, or does not otherwise fairly represent the devaluation of ownership interest in the firm engendered by the lawyer's departure, it violates Rule 5.6(a)."; "Nevertheless, Rule 5.6(a) does not prohibit a repurchase provision in a firm agreement that takes into account the financial effect of a lawyer's departure from a firm. However, the provision must include a more refined approach for evaluating the loss of value due to the lawyer's departure. For example, a provision that takes into account various economic factors that affect the value of the firm's shares, such as long-term financial commitments to staff and for space and equipment leases originally made by the firm in reliance upon the departing lawyer's continued contribution to the firm, may be acceptable under the rule. To the extent that a contractual provision represents a fair assessment of the forecasted devaluation in the ownership interest in the firm engendered by a lawyer's departure and does not penalize the lawyer for taking clients with him, the provision might not violate Rule 5.6(a).").

- Shuttleworth, Ruloff and Giordano, P.C. v. Nutter, 493 S.E.2d 364, 365, 367 (Va. 1997) (upholding an employment provision that required each lawyer to pay his or her "proportionate share" of lease payments for an eleven-year term of a lease; explaining that the agreement provided that the withdrawing lawyers would not have any obligations to share in the lease payments if they left the firm because of death or disability, if they were voluntarily terminated by the firm, or if they became a judge; explaining that this lease obligation would extend beyond the first five years of the lease only if the withdrawing lawyer was engaged in the private practice of law; reversing the lower court conclusion that the provision violated the ethics rules, and finding that the

provision "was to insure that Shuttleworth had the financial means with which to make the lease payments.").

A provision like this does not appear to run afoul of the ethics rules on its face -- because it simply requires lawyers leaving the firm to help cover the firm's out-of-pocket expenses incurred because the lawyers were practicing there.

**Best Answer**

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

n 2/12; b 10/14

## Restrictions in Connection with a Law Firm's Retirement Program

### Hypothetical 3

One of your firm's founders just left your firm to open up a competing boutique firm just across the street. Her departure was ugly, and as your firm's managing partner you are now being pressured to adopt a partnership provision to withhold retirement benefits from any of your partners who leave under such circumstances and compete with your firm.

- (a) May your law firm make the payment of retirement benefits contingent on the retirees' compliance with a non-compete?

YES

- (b) Does it matter at what age the retirement benefits begin?

YES

### Analysis

- (a) ABA Model Rule 5.6(a)'s prohibition on non-competes contains an explicit exception for "an agreement concerning benefits upon retirement."

An exception recognized in all the lawyer codes is for restriction of a lawyer's right to practice law that is to be enforced upon a lawyer's retirement. The restriction is supportable because it only minimally interferes with the ability of clients to choose counsel freely, given the lawyer's intent to retire from practice.

Restatement (Third) of Law Governing Lawyers § 13 cmt. b (2000).

Thus, law firms may condition the payment of retirement benefits on a retiree's compliance with a non-compete.

- (b) Because the ethics rules do not define "retirement," courts and bars have had to explain that a "retirement" under Rule 5.6(a) must meet the common-sense definition of that term.

An ABA legal ethics opinion has explained the effect of this general rule.

- ABA LEO 444 (9/13/06) (explaining that under Rule 5.6(a), lawyers and their employers have "significant latitude" in restricting lawyers' rights to engage in the practice of law if the restrictions are tied to a legitimate "retirement benefit"; further explaining that to constitute a legitimate "retirement benefit," "the benefit must be one that is available only to lawyers who are in fact retiring and thereby terminating or winding down their legal careers."; noting that normally, the benefit should be payable upon the satisfaction of some minimum age and minimum years of service, and include such indicia as "(i) the presence of benefit calculation formulas, (ii) benefits that increase as the years of service to a firm increase, and (iii) benefits that are payable over the lifetime of a retired partner," or interrelationship with other retirement or Social Security benefits; recognizing that other indicia include a separate partnership or other employment provision dealing with the benefit, and an extended pay-out period; warning that the term does not include a partner's capital account or previously earned income; acknowledging that if they are tied to a legitimate "retirement benefit," the restrictions can range from a permanent cessation of practicing law to geographic, temporal or practice limitations; concluding that lawyers willing to forfeit their retirement benefit will not be bound by the restrictions, although permissible arrangements could include forfeiture of future benefits or the disgorgement of previous benefits if a lawyer violates the restrictions.).

The Annotated ABA Model Rules also explain that "benefits upon retirement"

refers to amounts separately owed the departing lawyer out of the firm's retirement plan, over and above any other money due. It does not mean payment for the departing lawyer's interest in the firm's capital account or in its uncollected or undistributed earnings. . . . Retirement benefits are generally payable from future firm revenues, disbursed over an extended period, and conditioned upon age and length of service.

ABA Annotated Model Rules of Professional Conduct R. 5.6, at 494-95 (5th ed. 2003).

The Restatement takes the same approach.

The "retirement" exception has been held to apply only to bona fide retirements at the end of a career of practice. . . . The exception cannot properly be interpreted to apply to any departure from a firm to compete with it.

Restatement (Third) of Law Governing Lawyers § 13 reporter's note cmt. b (2000).

Accord Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering § 5.6:201 at

824-25 (2d ed. 1998 Supp.) ("[t]he 'benefits upon retirement' exception should therefore be triggered only where the firm is actually paying periodic retirement benefits to its former partner or associate.

The case law generally takes the same position.

- Sara Randazzo, Arbitrator Backs Stroock in Retirement Pay Fight, Orders Ex-Partner to Pay Firm's \$163,000 Legal Tab, AmLaw Daily, July 2, 2012 ("A New York arbitrator has sided with Stroock & Stroock & Lavan in a dispute with former Los Angeles partner Michael Perlis, ruling that Perlis is not entitled to retirement benefits under the firm's partnership agreement because he continues to practice law at a competing firm. The award, which would typically remain private, emerged in court documents filed last week in a related action in New York state court."; "To recap the events leading up to arbitrator Charlotte Moses Fischman's June 18 ruling: Perlis, who moved his securities litigation practice to Locke Lord last July after spending more than two decades with Stroock, sued his former firm in California state court two weeks later, claiming he should still be able to collect benefits under Stroock's retirement plan. Perlis amended the complaint in September to include allegations that the firm had retaliated against him for, among other things, speaking out about how it handled sexual harassment and hostile work environment claims filed against it. That same month, Stroock argued that in line with the firm's partnership agreement, the dispute should have been filed in New York and should be arbitrated there. In January, a judge agreed to uphold the arbitration clause. An arbitration hearing took place May 9—without Perlis in attendance—and ended with Fischman fully backing Stroock's position, but also ordering Perlis to pay the firm \$163,643 in attorney's fees."; referring to the award of arbitrator, which contained the following: "The 2006 Amended and Restated Partnership Agreement dated January 1, 2006 ('the Partnership Agreement') contains an arbitration provision, is governed by New York law and is the version currently in effect."; "There was no evidence that Perlis ever asserted that he was not bound by the Partnership Agreement, during the time he was a partner at Stroock."; "Stroock at all relevant times has maintained a Partners Supplement Retirement Plan (the 'Partners Retirement Plan') . . . , which was adopted and incorporated into the Partnership Agreement pursuant to Section 11 of the Partnership Agreement. The Partners Retirement Plan provides for lifetime benefits for equity partners who retire after age 59½ . The Plan was intended to provide an incentive for partners to finish their legal careers with the Firm and to transition clients to insure that the clients remain with the Firm even after the partners retire."; "Perlis did not retire upon his withdrawal from Stroock and has not retired to date."; "On August 5, 2011, Perlis filed suit against the Firm in California Superior Court seeking a declaratory judgment and alleging that he was 'entitled to certain retirement benefits' pursuant to

the Partners Retirement Plan."; "Section 6.01(i) of the Partners Retirement Plan sets forth, in relevant part, that a 'Pension Partner shall not otherwise be entitled to practice law except on behalf of the Firm, or on a pro bono basis, or the teaching of law, or as a judge, or as an employee of the Federal or a State or municipal government or as the Executive Committee may approve.'"; "The arbitration provision is valid and enforceable."; "Perlis is not entitled to retirement benefits pursuant to the Firm's Partnership Agreement and/or Partners Retirement Plan." (emphasis added); "Perlis is also not eligible for retirement benefits pursuant to Section 6.01(i) of the Partners Retirement Plan because he continues to practice law with another law firm. Thus, he is also precluded from receiving benefits by virtue of Section 6.01(i) of the Partners Retirement Plan." (emphasis added); "Stroock has requested that it be permitted to recover fees incurred not just by outside counsel, but also by in-house counsel for the Firm, citing authorities that appear to support that request in some judicial contexts. . . . However, in the absence of explicit language in the arbitration clause authorizing an award of in-house attorneys' fees or authorities in an arbitration context authorizing such an award, the Arbitrator declines to do so."; "Stroock is entitled to recover a total of \$147,513.76 as its reasonable attorneys' fees to Proskauer Rose LLP, incurred in the arbitration of this matter.").

- Hoffman v. Levstik, 860 N.E.2d 551, 553, 554 (Ill. App. Ct. 2006) (upholding a partnership agreement provision which allows withdrawing lawyers to receive a benefit known as "retirement capital" only if they retire from the practice of law when they leave the firm; noting that the plaintiff moved to another law firm and challenged the enforceability of the provision; upholding the provision because it is "not conditioned upon the departing partner's agreement to refrain from competing with" his former firm; also pointing to deposition testimony by the plaintiff that the provision did not interfere with any of his clients' decision to move with him to his new firm).
- Fearnow v. Ridenour, Swenson, Cleere & Evans, P.C., 138 P.3d 723, 724, 729 (Ariz. 2006) (upholding a law firm's shareholder agreement "requiring a departing lawyer to tender his stock to a professional corporation for no compensation if he thereafter competes with the corporation in the practice of law"; holding that Arizona Ethics Rule 5.6 only prohibits rules restricting the right of a lawyer to practice; "Although the rule prohibits -- and we will hold unenforceable -- agreements that forbid a lawyer to represent certain clients or engage in practice in certain areas or at certain times, its language should not be stretched to condemn categorically all agreements imposing any disincentive upon lawyers from leaving law firm employment. Such agreements, as is the case with restrictive covenants between other professionals, should be examined under the reasonableness standard.").
- Borteck v. Riker, Danzig, Scherer, Hyland & Perretti, LLP, 844 A.2d 521, 529 (N.J. 2004) (analyzing a situation in which Borteck withdrew from his law firm at the age of 53, and sought his retirement benefits despite competing with

- his former firm; reversing a trial court's ruling in Borteck's favor, but the New Jersey Supreme Court reversed; pointing to the following factors: (1) the retirement provision's requirement that the partner receiving the benefits be at least 55 years old; (2) the Partnership Agreement's handling of withdrawal and retirement in two separate sections; (3) the provision requiring that retirement benefits be paid to retired partners over a four-year period; (4) the fact that benefits were "funded at least in part from revenues 'that post-date the withdrawal of the partner.'").
- Hoff v. Mayer, Brown & Platt, 772 N.E.2d 263, 269 (Ill. App. Ct.) (analyzing a situation in which a partner withdrew from Mayer, Brown to found another law firm; noting that the partner sued Mayer, Brown for his retirement benefits, which the firm had denied because he was competing with it; explaining that the Mayer, Brown provision paid retirement benefits to partners who were at least 60 years old, and had practiced at the firm for at least 20 years [the opinion does not indicate the period over which the retirement benefits would be paid out]; analyzing numerous cases from other states, and ultimately concluding that the Mayer, Brown retirement plan was a "bona fide retirement plan."), appeal denied, 786 N.E.2d 183 (Ill. 2002).

### **Best Answer**

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

b 1/11; b 10/14



## Law Firms' Remedies Against Withdrawing Lawyers

### Hypothetical 4

You just became your firm's managing partner, and now face one of the biggest crises that your small firm has ever confronted. Three of your firm's ten lawyers just left, and took all of your firm's paralegals and two of your best secretaries with them. It has become obvious from the way events have unfolded that the withdrawing group had planned all of this many months in advance. The remaining lawyers in your firm are urging you to file a lawsuit against those who left.

Is there any cause of action you can pursue against the lawyers and staff who left your firm?

YES

### Analysis

Although law firms may not prohibit or even discourage their lawyers from leaving the firm and competing against it for clients, lawyers contemplating such withdrawal may not ignore their fiduciary duties to the firm.

### Law Firms' Actions Against Withdrawing Lawyers

Given the increasing mobility of lawyers and the recent demise of large law firms apparently triggered in part by lawyer defections, it should come as no surprise that some law firms consider and even pursue claims against lawyers who withdraw from the firm and against their new employers.

A 2013 article describes the increasingly complicated contractual negotiations between firms and withdrawing lawyers.

- Arthur J. Ciampi, Separation Agreement, N.Y. L.J., Jan. 25, 2013 (describing increasing use of contractual agreements between law firms and lawyers who withdraw; "Today, the topic of 'lawyer mobility' is boring. Twenty-five years ago, when this author began representing lawyers and law firms, the concept of lawyer mobility was novel if not revolutionary. The norm was for lawyers to begin and end their careers at the same firm, and law firms rarely asked

partners to leave."; "Today, the pendulum has swung to the other extreme. Lawyers routinely move firms to benefit their careers and provide better services to their clients. In addition, law firms, for good or bad, are run more like businesses (well sort of) and partners who are perceived as unproductive or whose practice is deemed not to be compatible with their current firms are often asked to leave."; "The bottom line is that lawyers change firms with regularity. Just like partners who are planning on sticking together should have a solid partnership agreement to govern them, partners who are moving on should have a solid separation agreement to govern their departure."; "Often the most contentious and important issue to negotiate in a separation agreement is exit compensation. The time of year, the circumstances surrounding the departure, and the type of practice often determine the complexity of the agreement and the difficulty of the negotiation in this regard."; "A related issue is the return of capital. A partner's capital account in a law firm is either the amount contributed by the partner as cash from an initial or periodic capital contributions or is a partner's accumulation of yearly undistributed earnings. Taxes are paid on these contributions and accordingly the return of capital to a partner is tax-free and the loss of capital is therefore the loss of tax-free money which should be avoided."; "Separation agreements should also set forth the nature and duration of so-called bounce back messages on the departing partner's email and voicemail. These messages are important and provide necessary information to clients and third parties that the partner is no longer a partner and to honor the client's choice of counsel and should provide the partner's new contact information or at a minimum direct the caller or email sender to someone at the firm who can direct the call as appropriate."; "Separation agreements sometimes include non-disparagement and confidentiality provisions. Depending on the relationship of the firm and departing partner, a non-disparagement agreement may be called for. In some circumstances it is not needed and in others the parties would prefer to speak freely about one another and such a provision is not included. In addition, at a large firm it is very difficult to monitor and enforce such a provision among all the partners nonetheless diluting the efficacy of such a provision. Confidentiality provisions are more common and typically require the reasons for the departure and the economic terms of the departure to not be disclosed."; "Separation agreements often contain provisions by which the departing partner will assist her former firm in collecting fees from clients of the former partner. Sometimes this cooperation includes a direct monetary component by which the former partner is paid a percentage of the fees collected. In other situations there is no direct correlation. Regardless, separation agreements often contain such provisions requiring reasonable cooperation in collection of client receivables including the finalizing of bills."; "It is not uncommon for separation agreements to not have releases. While it is desirable for the parties to move on with the protection of a release, it is often difficult to obtain a release concerning the departure of a partner from a firm. Often the parties, believing that their relationship is complex, cannot come to terms concerning a broad

general release. In the situations where such an agreement is reached, a broad general release should be included which carves out, among other things, the separation agreement, any pension plans, and insurance coverage.").

Legal publications frequently carry a number of stories about such threats or actions.

- Peter Vieth, A Salvo After Lawyers Jump Ship: Virginia law firm sues ex-associates after they start their own firm, Va. Laws. Wkly., Nov. 11, 2013 ("A Virginia law firm is trading charges in court with two former associates after the pair jumped ship and started their own competing law firm."; "The Boleman Law Firm PC filed suit October 10 demanding \$2.35 million from former employees Julia B. Adair and Deanna H. Hathaway, both of Richmond. The lawsuit in Richmond Circuit Court includes a demand for treble damages for statutory conspiracy."; "Boleman claims the two former employees used fraud and deceit to solicit clients for their new bankruptcy practice while still working at Boleman. In their answer to the lawsuit, the two former employees say the lawsuit is motivated by 'spite and ill will,' and they deny any impropriety."; "The case casts a light on thorny issues that arise when lawyers plan to leave a firm for greener pastures, from the handling of existing clients to the use of company resources."; "A prominent feature of the lawyers' employment contracts is hardly mentioned in the court papers."; "Attached to the Boleman lawsuit were the two contracts, both of which included explicit noncompete agreements barring work at a competing business for one year after termination."; "Such noncompete agreements generally are considered unethical -- there is even a provision in the Virginia Rules of Professional Conduct barring such practice restrictions after termination."; "It is improper for both a law firm and a lawyer to enter into a noncompete agreement," said Virginia State Bar Ethics Counsel James M. McCauley, speaking generally about the rule. "It's a pretty clear prohibition," he said."; "The Boleman lawsuit did not mention the noncompete clauses, but Adair and Hathaway contended their contracts were obtained unlawfully and for unlawful purposes by Boleman. They pointed specifically to Rule of Professional Conduct 5.6 (a) which generally bars lawyers from offering or making an agreement restricting the right of a lawyer to practice after termination.").
- Pete Brush, New York Plaintiffs Firm Says Attorney Schemed to Siphon Clients, Law360, Nov. 8, 2012 ("Antin Ehrlich & Epstein LLP hit one of its former lawyers with a \$1 million suit on Wednesday, accusing attorney Frank Trief of concocting a stealth plan to quit and solicit the New York City plaintiffs firm's clients under false pretenses."; "Trief, who recently set up his own law office in Midtown Manhattan, abruptly left the Garment District-based personal injury firm on October 15 and declined to tell Antin Ehrlich where he

- was going, according to the civil suit."; "A week after Trief left, Antin Ehrlich began receiving stop work letters as the defendant lawyer embarked on a campaign to grab clients using 'devious tactics to convince these clients to switch,' according to the complaint."; "With respect to at least some of those clients, 'it is evident that Trief solicited them before his departure in violation of his fiduciary duty to plaintiff,' according to the suit."; "In hindsight, according to the complaint, it was clear that Trief was 'acting in bad faith' in the run-up to his departure."; "'Trief would be in his office with the door closed talking on his cellphone much more often. During that time period, Trief would also stand outside in front of plaintiff's building, speaking on his cellphone,' the suit says."; "The suit says Trief unlawfully interfered with contracts between Antin Ehrlich and its clients, breached his fiduciary duty to his former law firm and misappropriated documents. It seeks an injunction blocking Trief from soliciting Anton Ehrlich clients and \$1 million in damages.").
- Dan Packel, Swartz Campbell Sues Rival Firm Over Loss Of Fla. Office, Law360, Sept. 12, 2012 ("Philadelphia-based law firm Swartz Campbell LLC has sued local rival The Chartwell Law Offices LLP in state court, alleging in a complaint filed Monday that Chartwell improperly poached employees, including one still bound to Swartz by a partnership agreement, and took over the firm's operations in Fort Myers, Florida."; "Swartz Campbell contended a former partner of the firm, James Myers, violated the partnership agreement when he shuttered a profitable Fort Myers office and immediately began an affiliation with Chartwell. Swartz Campbell is suing Chartwell on multiple claims of tortious interference, as well as unfair competition, misappropriation and civil conspiracy."; "'Chartwell benefited financially from the breach by Myers of the LLC agreement, because Chartwell gained a ready-made Fort Myers office without the startup costs, ended the Fort Myers operation and Florida presence of a competitor law firm, gained numerous Swartz Campbell clients by assisting Myers in communicating that they had no meaningful alternative for representation besides Chartwell, and gained additional fees and revenue which it is not entitled by causing the early and abrupt abandonment by Myers,' the complaint said."; "Swartz Campbell, which initiated the lawsuit in August with a writ of summons in Philadelphia's Court of Common Pleas, claimed its operations in Fort Myers came to an unexpected halt on July 24, when the three members of the office -- Myers, an associate and a paralegal -- announced their resignation."; "According to the complaint, Myers, who joined Swartz Campbell in 2001, had informed the firm earlier in July that he intended to resign as a partner and begin an affiliation with Chartwell, while retaining his existing clients. Shortly afterward, the managing partner of Swartz Campbell, Jeffrey McCarron, told Myers his actions violated a four-month notice provision in the partnership agreement and ordered him to cease notifying his clients about his intended transition, according to the complaint.").

- Zoe Tillman, Former Smith Currie Partners, Now At Fox Rothschild, Sue Over Split, Nat'l L.J., Apr. 19, 2012 ("Two former partners in the Washington office of Smith, Currie & Hancock filed suit against their old firm yesterday in District of Columbia Superior Court, accusing the firm of wrongfully refusing to return their capital contributions after they left for Fox Rothschild."; "The complaint offers a behind-the-scenes look at the August 2011 departure of Smith Currie's small Washington team to Fox Rothschild. Fox Rothschild not only took in Smith Currie attorneys and staff, but the lease for Smith Currie's old office space as well."; "Schwartz said that when Haire and Jones decided to leave, the five associates and five non-attorney staff working in the office at the time asked to come with them. 'They knew that without the office's two rainmakers, there wouldn't be any work and things would dry up and Smith Currie would be left with a whole lot of expense and not a lot of revenue coming in,' Schwartz said."; "Fox Rothschild agreed to take the team and also take over Smith Currie's building lease, paying Smith Currie about \$250,000 for other assets, such as furniture and equipment, according to the complaint. Haire and Jones not only contributed surplus revenues to the firm while they were working there, the complaint argues, but they saved Smith Currie money by helping to facilitate Fox Rothschild's takeover of the building lease. 'Smith Currie thus suffered no damages related to their departure,' the complaint states.").
- Zach Lowe, Sonnenschein Hit with \$30 Million Poaching Suit, Am. L. Daily, June 9, 2009 ("Sonnenschein Nath & Rosenthal was hit with a lawsuit Friday accusing the firm of illegally recruiting several lawyers from a Chicago-based consulting firm where a Sonnenschein partner used to work, court records show. The suit, which seeks injunctive relief and \$30 million, accuses Lisa Murtha, a partner in Sonnenschein's health care practice, of orchestrating the recruitment of three employees at her former company, Huron Consulting Group. In court records, Huron describes Sonnenschein as its 'direct competitor' in the health care consulting business.").
- Brian Baxter, Perkins Coie Sues Ex-Intellectual Property Associate Who Left Firm for Rival, Am. L. Daily, Feb. 11, 2009 ("While law firm layoffs have certainly been known to lead to lawsuits, it's not every day when a firm turns around and goes after a former employee -- especially when that individual is a former associate. That's the case with Perkins Coie. The firm filed a breach of contract suit against former IP associate David Xue in Alameda County Superior Court in Oakland on January 29. According to court documents, Xue left the firm for Goodwin Procter in September 2008. Now Perkins Coie wants to recoup \$36,334.25 it claims Xue owes the firm for advanced payments towards his law school tuition and related expenses.").
- Henry Gottlieb, Suit Over Ravin, Sarasohn's Collapse Tests Limits of Luring Other Firms' Lawyers, N.J. L.J., Feb. 2, 2009 ("Nine years after a 14-lawyer exodus led to the death of a prominent New Jersey bankruptcy firm, the

partners left behind are nearing a climax of their efforts to exact revenge on the firm that wooed the defectors, Lowenstein Sandler. An Essex County judge has scheduled an April trial in a suit charging that Lowenstein Sandler violated fair business practice rules and thieved financial secrets, knowing the recruitment would kill off Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen in Roseland, New Jersey. Within a month of the February 2000 defections by lawyers who had \$5 million in revenues the previous year, the remaining 50 or so attorneys and support staff scattered, leaving behind a shell firm that has been seeking damages. Lowenstein Sandler has denied it violated any legal or business ethics guidelines on the hiring of laterals and has evidence to support a defense that Ravin Sarasohn collapsed because of longstanding financial woes, not the recruitments. But barring a settlement or dismissal on summary judgment, the 260-lawyer firm -- New Jersey's second-largest -- will soon be in the uncomfortable position of having to defend its business practices to a jury with millions of dollars in damages at risk in the case, Ravin, Sarasohn v. Lowenstein Sandler, Esx-L-6327-00. The litigation also puts the spotlight on an issue all large firms face: What is permissible conduct for wooing practice groups, particularly when confidential financial data is exchanged and the recruitment is implicated in the collapse of the target firm? The case has lasted nine years because the claim against Lowenstein Sandler was put on hold, except for discovery, while Ravin Sarasohn pursued the three defecting equity partners on charges similar to the ones against Lowenstein Sandler in an arbitration that proceeded at glacial speed.").

- Jeremy Hodges, Cadwalader Threatens Legal Action Over Partner Walkout, LegalWeek, Jan. 27, 2009 ("Cadwalader, Wickersham & Taft has threatened seven departing London partners with legal action for breaching their partnership agreement. The group -- which includes former London office head Michelle Duncan -- handed in their notice at Cadwalader earlier this month to join rival United States firm Paul, Hastings, Janofsky & Walker. Cadwalader has issued the team with letters before action alleging that they have breached the confidence terms of their partnership deed. London firm Lewis Silkin sent the letters before action on behalf of Cadwalader. Under United Kingdom employment law, Paul Hastings may also be obliged to take on more of the Cadwalader associates than originally anticipated, as Cadwalader on Monday confirmed that it believes all of the associates connected to the departing partners are covered by the Transfer of Undertakings (Protection of Employment) Regulations (TUPE). There are currently 23 associates in Cadwalader's London office and it is thought that more than half will follow the team of partners.").
- Bud Newman, Fla. Law Firm Accuses Ex-Associate of Stealing Clients, Daily Bus. Review, Jan. 3, 2008 (noting that a West Palm Beach law firm filed a lawsuit against a former associate and his new law firm for unilaterally contacting the plaintiff law firm's clients before and after the associate left the

firm, in violation of the Florida Rule prohibiting such unilateral contact absent efforts to arrange for a joint communication with the law firm).

Interestingly, few if any of these threatened lawsuits or lawsuits has resulted in published decisions. It seems that law firms either do not carry through on their threats, or resolve any lawsuits that they file.

### **ABA Model Rules**

Interestingly, the ABA Model Rules do not address this issue -- apparently leaving it mostly up to the common law.

### **Restatement**

The Restatement recognizes that a lawyer's withdrawal from a firm can raise a number of issues.

A lawyer's departure from a law firm with firm clients, lawyers, or employees, unless done pursuant to agreement, can raise difficult legal issues. Departing a firm or planning to do so consistently with valid provisions of the firm agreement is not itself a breach of duty to remaining firm members. Thus, a lawyer planning a departure to set up a competing law practice may make such predeparture arrangements as leasing space, printing a new letterhead, and obtaining financing. It is also not a breach of duty to a former firm for a lawyer who has departed the firm to continue to represent former firm clients who choose such representation, so long as the lawyer has complied with the rules of Subsection (3). Delineating what other steps may permissibly be taken consistent with such duties requires consideration of the nature of the duties of the departing lawyer to the firm, the duty of the firm to the departing lawyer such as under the firm agreement, as well as the interests of clients in continued competent representation, in freely choosing counsel, and in receiving accurate and fair information from both the departing lawyer and the firm on which to base such a choice. . . . As a matter of the law of advertising and solicitation, under most lawyer codes in-person or telephonic contact with persons whom the lawyer has been or was formerly actively representing is not impermissible. Under decisions of the United States

Supreme Court, direct-mail solicitation is constitutionally protected against an attempt by the state generally to outlaw it.

However, as a matter of departing lawyer's duties to the law firm, the client is considered to be a client of the firm. . . . The departing lawyer generally may not employ firm resources to solicit the client, may not employ nonpublic confidential information of the firm against the interests of the firm in seeking to be retained by a firm client (when not privileged to do so, for example to protect the interests of the client), must provide accurate and reasonably complete information to the client, and must provide the client with a choice of counsel. As stated in Subsection (3), a departing lawyer accordingly may not solicit clients with whom the lawyer actually worked until the lawyer has either left the firm . . . or adequately informed the firm of the lawyer's intent to contact firm clients for that purpose . . . . Such notice must give the firm a reasonable opportunity to make its own fair and accurate presentation to relevant clients. In either event, the lawyer and the firm are in positions to communicate their interest in providing representation to the client on fair and equal terms. If a lawyer and firm agree that the lawyer is free to solicit existing firm clients more extensively than as provided in Subsection (3), their relationship is controlled by such agreement. For example, it might be agreed that a departing lawyer may seek to represent some clients as an individual practitioner or as a member of another firm.

Restatement (Third) of Law Governing Lawyers § 9 cmt. i (2000). The Restatement also emphasizes that the problem becomes even more complex if lawyers leave in groups.

With respect to other firm lawyers and employees, a lawyer may plan mutual or serial departures from their law firm with such persons, so long as the lawyers and personnel do nothing prohibited to either of them (including impermissibly soliciting clients, as above) and so long as they do not misuse firm resources (such as copying files or client lists without permission or unlawfully removing firm property from its premises) or take other action detrimental to the interests of the firm or of clients, aside from whatever detriment may befall the firm due to their departure.



Restatement (Third) of Law Governing Lawyers § 9 cmt. i (2000).

### **Permissible and Impermissible Actions by Withdrawing Lawyers**

A law firm's possible claims against a withdrawing lawyer obviously depends on the permissibility of the lawyer's steps before and after leaving the firm.

**First**, most states permit lawyers planning to leave a law firm to make logistical arrangements for competition (such as renting office space, opening bank accounts, etc.). Meehan v. Shaughnessy, 535 N.E.2d 1255, 1264 (Mass. 1989) (permitting lawyers' "logistical arrangements" made before they left their firm, but condemning the lawyers' secret arrangement among themselves to lure away law firm associates and clients). See Robert W. Hillman, Law Firms and Their Partners; The Law and Ethics of Grabbing and Leaving, 67 Tex. L. Rev. 1 (1988).

Not surprisingly, courts condemn lawyers whose "logistical" arrangements go beyond the appropriate steps. For example in Joseph D. Shein, P.C. v. Myers, 576 A.2d 985, 986 (Pa. Super. Ct. 1990), three withdrawing associates arrived at their firm at 6:00 a.m. with a rental truck, "entered the offices and removed approximately 400 case files." The breakaway lawyers then wrote their clients, announced the opening of their new firm and enclosed the documents necessary for their clients to transfer the representation to their new firm.

The trial court awarded \$10,000 in punitive damages against each of the three breakaway associates for the wrongful removal of the files, but declined to award any compensatory damages. Id. at 986-87. The appellate court reversed, noting that the three withdrawing associates had violated their fiduciary duties by the

surreptitious removal of four hundred files from Shein's offices, scurrilous statements about the Shein firm and

misleading letters to clients accompanied by forms to be used by clients to discharge the Shein firm.

Id. at 989. The appellate court remanded for a determination of damages, noting that the firm

must be awarded a money judgment reasonably equivalent to the anticipated revenue protected from outside interference [] that [it] would have received pursuant to the contracts had the cases remained in [the] firm.

Id. This case obviously involved conduct at the "bad" end of the spectrum, but it highlights the fiduciary duty all lawyers have to their colleagues.

In a similar case, In re Smith, 843 P.2d 449 (Or. 1992), an associate in an Oregon firm determined to leave his firm. In the next two and a half months, he met with thirty-one clients in his office and arranged for them to sign individual retainer agreements. He did not open files for these clients at his old firm. When the associate left, he took his secretary, the files pertaining to the thirty-one new clients who had retained him and files relating to fifty to seventy-five other cases. He then sent letters to other firm clients announcing that "we have changed the name and address of our law firm." Id. at 451. The Oregon Supreme Court found this conduct egregious enough to suspend the associate for four months.

Other courts are somewhat more generous.

- Winters v. Mulholland, 33 So. 3d 54, 55 (Fla. Ct. App. 2010) (holding that a lawyer's former associate was not liable under a "civil theft" statute because the law firm did not prove causation -- that the clients left the law firm and moved to the former associate's new firm because of the wrongful conduct).

**Second**, most bars traditionally prohibited lawyers from advising clients of their departure before the lawyers advised their own law firms.

The Restatement takes this strict approach.

Absent an agreement with the firm providing a more permissive rule, a lawyer leaving a law firm may solicit firm clients: (a) prior to leaving the firm: (i) only with respect to firm clients on whose matters the lawyer is actively and substantially working; and (ii) only after the lawyer has adequately and timely informed the firm of the lawyer's intent to contact firm clients for that purpose; and (b) after ceasing employment in the firm, to the same extent as any other nonfirm lawyer.

Restatement (Third) of Law Governing Lawyers § 9(3) (2000) (emphasis added).

However, in 1999, the ABA explained that in some situations departing lawyers may not only be permitted to provide such advance notice to the lawyers -- but also the lawyers may be required to do so.

- ABA LEO 414 (9/8/99) (a lawyer planning to leave a firm has an ethical obligation to inform the pertinent clients in a timely manner, but must comply with applicable restrictions on solicitation; any notice before the lawyer leaves the firm should be "limited to clients whose active matters the lawyer has direct professional responsibility at the time of the notice; should "not urge the client to sever its relationship with the firm, but may indicate the lawyer's willingness and ability to continue her responsibility for the matters upon which she currently is working," and should emphasize that the client may choose to stay with the firm or hire the withdrawing lawyer; despite implications to the contrary in earlier informal opinions [1457 and 1466], "we reject any implication . . . that the notices to current clients and discussions as a matter of ethics must await departure from the firm"; the departing lawyer "must ensure that her new law firm would have no disqualifying conflict of interest" preventing the new firm from representing the client; although it would be best for the firm and the departing lawyer to provide joint notice to the clients, the firm's failure to cooperate entitles the departing lawyer to send a separate notice; legal rules govern a departing lawyer's actions before the firm receives notice of the departure; "the departing lawyer may avoid charges of engaging in unfair competition and appropriation of trade secrets if she does not use any client lists or other proprietary information in advising clients of her new association, but uses instead only publicly available information and what she personally knows about the clients' matters"; citing the case of Graubard Mollen Dannett & Horowitz v. Moskovitz, 653 N.E.2d 1179 (N.Y. 1995) and providing helpful guidance on a departing lawyer's fiduciary duties, including the fact that "informing firm clients with whom the departing lawyer has a prior professional relationship about his impending withdrawal and reminding them of their right to retain counsel of their choice is permissible"; a withdrawing lawyer generally may retain documents the

lawyer prepared or which are in the public domain, although "principles of property law and trade secret law" govern these issues; "When the departing lawyer reasonably anticipates that the firm will not cooperate on providing such a joint notice, she herself must provide notice to those clients for whose active matters she currently is responsible or plays a principal role in the delivery of legal services"; a lawyer "does not violate any Model Rule in notifying the current clients of her impending departure by in-person or live telephone contact before advising the firm of her intentions to resign, so long as the lawyer also advises the client of the client's right to choose counsel and does not disparage her law firm or engage in conduct that involves dishonesty, fraud, deceit, or misrepresentation. After her departure, she also may send written notice of her new affiliation to any firm clients regardless of whether she has a family or prior professional relationship with them." (emphasis added)).

Cases and opinions decided since the 1999 ABA legal ethics opinion have continued the trend of permitting such advance word to clients.

- Arizona LEO 10-02 (3/2010) ("Termination of a lawyer's employment or partnership with a firm, for whatever reason, requires the lawyer and firm involved to (1) provide timely notice to affected clients to permit those clients to make informed decisions regarding their continued representation, (2) work to ensure the continued competent and diligent representation of the client, (3) avoid charging excessive fees in connection with any work done as a result of the departure and related transitions, and (4) share information as necessary to permit the firm, the lawyer, and his or her future law firm to comply with their duties to avoid conflicts. Neither the lawyer nor the firm may impede or prevent the other's fulfillment of any ethical obligations or duties to a client or the court."; "This duty to inform the client of a lawyer's departure arises because the client, not the lawyer or law firm, chooses which lawyer will continue to represent the client."; "This analysis assumes that the departing lawyer had a significant enough role in the representation of the client that informing the client would be reasonable and necessary. The departing lawyer may have been only one of a many-member team of lawyers handling a matter or may have done only a very small amount of work on a matter (such a few hours of legal research). Whether the client needs to be informed of the lawyer's departure and reminded of the client's right to choose counsel depends on whether, viewed from the perspective of the client, the client's decision about who should continue the representation might depend on the continued involvement of the departing lawyer.").
- Joint Pennsylvania & Philadelphia LEO 2007-300 (6/2007) (providing a comprehensive analysis of law firm's and lawyer's obligation when the lawyer withdraws from the law firm; holding that "[b]oth the departing lawyer and the old firm have independent ethical obligations to inform the client that its

lawyer is leaving the old firm." (emphasis added); "The clients entitled to notice are those for whom the departing lawyer is currently handling active matters or plays a principal role in the current delivery of legal services."; "The law firm should preferably be notified before the clients are notified." (emphasis added); "Joint notification of clients is preferable." (emphasis added; explaining that "[a]ny suggestion that the departing lawyer should not be permitted to communicate the fact of departure until after that departing lawyer has left the old firm must be rejected." (emphasis added); "[T]here is no ethical prohibition against the departing lawyer's giving notice to current clients (i.e., clients for whose active matters the departing lawyer currently is responsible or for whom the lawyer plays a principal role in the current delivery of legal services) in person or by telephone." (emphasis added); noting that the law firm's and the departing lawyer's initial notice to the client should not disparage the other; also explaining the law firm's duty when receiving calls for the withdrawing lawyer after the lawyer departs; "In our prior opinion we also concluded, relying upon Opinion 94-30 of the Philadelphia Professional Guidance Committee, that where, following a partner's departure a client for whom the partner had worked, telephoned the law firm asking for the former partner, the firm was obligated to provide the contact information for that former partner prior to engaging in any other discussion with the client. . . . That advice was based on the need to allow the client to make prompt contact with the former attorney in order to facilitate the client's freedom of choice in the selection of counsel. . . We also concluded that after providing the contact information, the firm's representative was permitted to inquire whether the call was related to a legal matter, and if so, the firm's representative could properly propose the firm's assistance in the matter. . . . This conclusion was based upon the analysis that a client represented by one lawyer in a firm is a client of the firm. . . . Under Rule 7.3(a), we acknowledged the firm's right to communicate with a prospective client with whom the firm had a prior professional relationship. . . . We noted, however, that if the caller resisted the invitation or indicated a desire to talk only to the former partner, continued persistence or heavy-handedness by the firm would run the risk of violating Rule 7.3(b) which prohibits direct solicitation of persons who display a disinclination to deal with the firm. . . . We believe this guidance remains appropriate today."; also analyzing the timing of the withdrawing lawyer's duty to advise the firm of her departure; explaining that the issue is fact-intensive; providing examples of situations that might trigger the withdrawing lawyer's duty to advise the firm of her departure; "if the lawyer were, for example, working on a client matter at the old firm and the new firm were on the other side, any personal interest conflict arising in that circumstance would be one that the old firm would have an interest and an obligation to address"; "Similarly, a duty to disclose a possible departure in advance of any binding commitment or agreement to join a new firm could arise under the law of fiduciary duty. For example, if a partner with a substantial practice were aware that the old firm was making significant investments or undertaking significant commitments in terms of

- personnel, space, equipment, financing or other resources, to support that partner's practice, a fiduciary duty of disclosure may arise if the partner were to engage in substantive discussion that reasonably could result in that partner and the practice being taken elsewhere after the investments and commitments were entered. Similarly, if a partner or an associate engaged in substantive discussions with another firm about joining that firm, the partner or associate could not ethically deny the existence of such discussion if asked by his current firm."; ultimately explaining that in the absence of some partnership agreement or other contractual arrangement requiring notice as of a certain time, "the departing lawyer should give such notice as is fair and reasonable under all the circumstances. In determining what is fair and reasonable in this context, the guiding principles should be to ensure that client freedom of choice is maintained and to allow the old firm in a responsible and orderly way to discharge its ethical obligations to clients, although other factors may also be relevant.").
- District of Columbia LEO 273 (9/17/97) (explaining the duties of a lawyer considering withdrawing from a law firm; explaining that the lawyer had the duty to advise the clients whose matters the lawyer was handling; "Under the Rules of Professional conduct, a lawyer responsible for a client's matter would be obligated to inform that lawyer's clients of his/her planned departure and of the lawyer's prospective new affiliation, and to advise the client whether the lawyer will be able to continue to represent it. . . . In most situations, a lawyer's change of affiliation during the course of a representation will be material to a client, as it could affect such client concerns as billing arrangements, the adequacy of resources to support the lawyer's work for the client, and conflicts of interest." (emphasis added); "Thus, not only does Rule 1.4 require the lawyer to communicate his prospective change of affiliation to the client, but such communication must occur sufficiently in advance of the departure to give the client adequate opportunity to consider whether it wants to continue the representation by the departing lawyer and, if not, to make other representation arrangements." (emphasis added); warning the lawyer that the notice to the clients should not include attempts to convince the client to move business to the new lawyer; "The lawyer's communication to the client should include the fact and date of the change in affiliation, and whether the lawyer wishes to continue the representation. The lawyer should also be prepared to provide to the client information about the new firm (such as fees and staffing) sufficient to enable the client to make an informed decision concerning continued representation by the lawyer at the new firm. The client would also need to be informed of any conflict of interest matters affecting its representation at the new firm. Any communication which exceeds that required by ethical rules -- for example, an active solicitation of the client to leave the lawyer's current firm and join the lawyer at the new firm -- could run afoul of the lawyer's obligations under partnership law (for departing partners), corporate law (for shareholders of a professional corporation) and the common law of obligations of employees (for lawyers who are employees

- of a firm). For example, solicitation of clients by a departing partner (i.e., activity going beyond neutrally informing a client of the lawyer's planned departure and new affiliation) may be a breach of a partner's fiduciary obligations to other partners and may constitute tortious interference with the law firm's business relations."; indicating that the lawyer's possible duty to advise the law firm of the withdrawal before advising the clients is of "no ethical significance"; "Under partnership or other law, a departing lawyer may also be obliged to inform the lawyer's firm, at or around the time the lawyer so notifies clients, of his/her planned departure from the firm. (There appears to be no ethical significance to whether the client or the law firm is first informed of the lawyer's planned departure)." (emphasis added); also explaining that lawyer must be careful in asserting a retaining lien over files; "Where the lawyer or law firm whose relationship with the client is being terminated in this process is owed money for legal services provided, a retaining lien against client files is available only to a very limited extent in the District of Columbia."; pointing to other law as governing the withdrawing lawyer's recruitment of law firm lawyers or employees to leave with the withdrawing lawyer; "Another question frequently posed to the Bar's ethics counsel is whether a departing lawyer may, prior to departure, recruit lawyers or non-lawyer personnel to accompany the lawyer to the new firm. We believe that this issue is resolved primarily, if not entirely, under law other than ethics law, such as the common law of interference with business relations and fiduciary obligations."; also dealing with the lawyer's use of a law firm name; "Where a lawyer has departed one firm to practice elsewhere, it would plainly be misleading for the law firm to continue to use that lawyer's name in written materials used for external communications.").
- Ky. Bar Ass'n v. Unnamed Attorney, 205 S.W.3d 204, 209 (Ky. 2006) ("[W]e adopt the ABA view that such a duty of notification arises when the departing attorney 'is responsible for the client's representation or . . . plays a principal role in the law firm's delivery of legal services currently in a matter[.]' . . . Clearly, the facts of this case show that the respondent was the only attorney responsible for the man's case and that he played a 'principal' role in delivering legal services to the respondent since no other attorneys from the firm were involved with the man's case until after the respondent left the firm.").
  - Alaska LEO 2005-2 (9/8/05) (addressing a lawyer's ethical obligations when changing firms; essentially adopting ABA LEO 414).

However, some courts are not so generous.

- Fla. Bar v. Winters, 104 So. 3d 299, 300, 301 (Fla. 2012) (suspending one lawyer for 91 days and another lawyer for 60 days for improperly taking clients and breaching their fiduciary duty when leaving their old law firm; "[T]he complaints alleged that in 2001, Winters and Yonkers made secret plans to leave the Mulholland Firm and begin practicing together, and that in

the process, Winters and Yonker: (1) themselves and through a former paralegal for the Mulholland Firm, solicited Mulholland Firm clients to terminate representation by the Mulholland Firm and be represented by Winters' and Yonker's new firm; (2) made misrepresentations to the Mulholland Firm and to Mulholland Firm clients; (3) made copies of and took possession of Mulholland Firm client files without authorization; and (4) improperly used a third attorney's name, who never actually joined the new firm, in their new firm name on documents. The complaints alleged that through this conduct, Respondents violated numerous Rules Regulating the Florida Bar." (footnote omitted); "The referee . . . found that when Winters and Yonker decided to leave the Mulholland Firm they 'began contacting clients who they had represented during the course of their employment with the Mulholland law firm.' He further found that Respondent Yonker took client files from the Mulholland Firm over a lunch period and had information from those files copied for his own personal use, and that such 'was not within the scope of his employment and was not done for advancing the good of the law firm,' and that Respondent Winters 'maintained control over less than ten files' after leaving the law firm, and that those files were recovered within a few days by the law firm.").

- Dowd & Dowd, Ltd. v. Gleason, 816 N.E.2d 754, 764 (Ill App. Ct.) (upholding a law firm's judgment against two former partners of the firm, who had solicited Allstate as a client before they left the firm; acknowledging that the head of Allstate's Claims Department and a manager in that Claims Department testified under oath that "they had not been solicited by [the withdrawing partner] to move their business to the new firm"; instead relying on a former paralegal, who testified that one of the withdrawing partners told her that they had lined up Allstate before they left the firm; pointing to various other breaches of fiduciary duty by the withdrawing partners, including the update and download of Allstate's service lists that the withdrawing partners took with them; upholding damages of nearly \$2.5 million, including all of the law firm's payments to the partners during the time when they were breaching their fiduciary duties, and profits the law firm would have earned had Allstate stayed with the firm.), appeal denied, 823 N.E.2d 964 (Ill. 2004).

**Third**, states have also condemned withdrawing lawyers' advance efforts to lure other lawyers or employees away from the firm.

- Feldman & Pinto, P.C. v. Seithel, Civ. A. No. 11-5400, 2011 U.S. Dist. LEXIS 147655, at \*30-31, \*31, \*32, \*33-34 (E.D. Pa. Dec. 22, 2011) (granting a law firm's motion for preliminary injunction to restrain a former lawyer from improperly recruiting a plaintiff's law firm's employees; also concluding that the former lawyer made false statements in marketing materials; "[B]ased on these facts alone, it is also evident that Seithel's [former lawyer] statement that she had a leadership role in the various drug litigation matters was false



for at least some of these cases. A person that took part in zero of twenty-five depositions, or who had absolutely no contact with certain clients, can hardly be said to have a leadership role in a litigation."; "Seithel stated that she had an 'experienced team in place with over twenty years of combined experience.' However, Seithel's 'team' consisted of one attorney with ten years of experience, a paralegal with ten years of experience, an administrative assistant, and a 'couple of interns.' The Court agrees with the Plaintiff's expert witness, Thomas Wilkinson ('Wilkinson'), that the unsophisticated client would assume that Seithel referred to twenty years of combined attorney experience, rather than twenty years of combined attorney and non-attorney experience."; "[T]he Court agrees with Plaintiff that Seithel's representation that she 'left the firm of Feldman & Pinto' was misleading, because it suggests that the separation was voluntary."; "It was also misleading for Seithel to have indicated in her letters, sent on July 7, 9, and 12, 2011, that she was now practicing under the law firm of Seithel Law, LLC, when in fact, the Articles of Organization for Seithel Law, LLC were not filed with the Secretary of State for South Carolina until July 20, 2011. . . . [T]he Court agrees with Wilkinson's testimony that omitting the fact that Seithel was not licensed to practice in Pennsylvania was also a misrepresentation that potentially mislead the clients who received her letter.").

- Reeves v. Hanlon, 95 P.3d 513 (Cal. 2004) (permitting a law firm to sue its former lawyers who improperly sought to hire away at-will law firm employees).

However, some courts and bars have taken a far more liberal approach --

undoubtedly balancing the normal fiduciary duty issues against the ethics rules'

emphasis on lawyer mobility.

- District of Columbia LEO 273 (9/17/97) (analyzing the ethics rules governing lawyers' withdraw from one firm and joining another firm; "Another question frequently posed to the Bar's ethics counsel is whether a departing lawyer may, prior to departure, recruit lawyers or non-lawyer personnel to accompany the lawyer to the new firm. We believe that this issue is resolved primarily, if not entirely, under law other than ethics law, such as the common law of interference with business relations and fiduciary obligations.").
- Kopka, Landau & Pinkus v. Hansen, 874 N.E.2d 1065, 1071-72 (Ind. Ct. App. 2007) (analyzing a situation in which one of six associates working at a law firm left the firm, and was immediately followed by all of the other associates and support staff; noting that the lawyer owed fiduciary duties to the law firm whether he was a partner or an associate; acknowledging that the lawyer discussed with the other associates the possibility that they would join him at his new firm; "Even when we construe this evidence in KLP's [law firm from which the lawyer withdrew] favor, we do not find that it establishes that

Hansen [lawyer who left the firm] was actively and directly competing with KLP while still employed there. He was certainly preparing to compete by questioning KLP employees about their desire, if any, to leave KLP and work for SHCD [new law firm] in the future. He was gathering information about Uptegraff's [other associate who eventually left the firm] salary requirement and Aspy's [other associate who eventually left the firm] willingness to quit his job. He expressed a desire to find positions for all of the KLP employees at SHCD. There is no evidence, however, that Hansen made formal offers of employment with SHCD to KLP employees or that he took actions that constituted anything more than mere preparation to compete with KLP. Consequently, we find that the trial court properly entered summary judgment in Hansen's favor on this count of KLP's complaint.").

**Fourth**, lawyers leaving their firms may not take with them client lists, trade secrets, etc.

Again, these rules mirror the general law in non-lawyer cases. As one ABA LEO explained,

the departing lawyer may avoid charges of engaging in unfair competition and appropriation of trade secrets if she does not use any client lists or other proprietary information in advising clients of her new association, but uses instead only publicly available information and what she personally knows about the clients' matters.

ABA LEO 414 (9/8/99).

**Fifth**, lawyers generally may solicit any firm client after the lawyer leaves the firm -- as long as the lawyer complies with applicable ethics rules about such marketing efforts.

Absent an agreement with the firm providing a more permissive rule, a lawyer leaving a law firm may solicit firm clients . . . after ceasing employment in the firm, to the same extent as any other nonfirm lawyer.

Restatement (Third) of Law Governing Lawyers § 9(3)(b) (2000).

One bar took a fairly restrictive approach.

- North Carolina LEO 2009-3 (1/15/10) (holding that a lawyer may not encourage a non-lawyer employee to disclose client confidences; "May a non-

lawyer employee of a law firm, who recently changed law firms, write to clients of his/her former employer with whom the non-lawyer had established relationships to inform the clients that the non-lawyer is employed with a new law firm and that the new law firm handles the same type of legal matters?"; "[A] lawyer has a professional obligation not to encourage or allow a non-lawyer employee to disclose confidences of a previous employer's clients for purposes of solicitation.").

**Sixth**, law firms considering merging with other firms generally may not engage in the type of "stand-still" agreements to which corporations often agree.

- Nixon Peabody LLP v. de Senilhes, Valsamdidis, Amsallem, Jonath, Flaicher Associes, No. 2008/10374, 2008 NY Slip Op 51885U, at 2, 8 (N.Y. Sup. Ct. Sept. 16, 2008) (analyzing an agreement between the Nixon Peabody law firm and a French law firm that the firms entered into while discussing a possible law firm merger; explaining that under the agreement neither firm would "for two years from the date of its agreement . . . employ or offer partnership directly or indirectly" to any lawyer at the other firm (citation omitted); holding that the French law firm could not enforce the provision after Nixon Peabody hired several of the French law firm's partners when the law firm merger negotiations broke down; finding that the "non-solicitation clause upon which [the French law firm] relies is unenforceable as it violates this state's public policy"; granting summary judgment to Nixon Peabody; also granting summary judgment on the French law firm's claim that Nixon Peabody aided and abetted several French partners' breach of fiduciary duty to their firm; granting summary judgment to Nixon Peabody on the French law firm's claim that it tortuously interfered with contractual relations among the French lawyers in the firm).

**Seventh**, and not surprisingly, law firms and any withdrawing lawyers must take all reasonable steps to protect clients. In 2014, the California Bar indicated that all lawyers from a dissolved law firm must take such "reasonable steps" -- even if they have not dealt with that client during the law firm's lifetime.

- California LEO 2014-190 (2014) ("Rule 3-700(A)(2) of the California Rules of Professional Conduct, provides that a member may not withdraw from the representation of a client until the member has taken reasonable steps to avoid reasonably foreseeable prejudice to the rights of the client. The requirements of rule 3-700(A)(2) apply when an attorney's withdrawal is prompted by the dissolution of the attorney's law firm. In the event of dissolution, all attorneys who are employed by or partners of the firm are required to comply with rule 3-700(A)(2) as to all clients of the firm, regardless

of their connection to any specific client or the specific nature of their affiliation with the firm. What 'reasonable steps' an attorney must take to protect a particular client's rights may vary considerably, however, depending on the circumstances, including the attorney's relationship to the client and its matter and the attorney's position within the firm.").

**Eighth**, law firms and withdrawing lawyers must address various logistical issues. For instance, in the pre-electronic communications age, mail arriving at the law firm addressed to the now-withdrawn lawyer might have involved clients remaining at the firm, but alternatively might have involved clients whom the withdrawing lawyer was now representing at a new firm. Theoretically, the law firm could not open and read the latter envelopes, but presumably they could do so to distinguish between the former and the latter type of correspondence.

In 2013, the Philadelphia Bar indicated that law firms could continue to examine a withdrawn lawyer's email account -- for the same purposes.

- Philadelphia LEO 2013-4 (09/2013) (finding that a law firm could examine a withdrawn lawyer's email account; "Additional fallout from B's departure from the firm relates to B's email account at the firm which the inquirer advises has been set up to reply that B is no longer with the firm. It appears that under this arrangement, the emails are received and read by the firm and forwarded to B if they relate to a matter B took with him. This practice is based on the Inquirer's position 'that any email that comes into the firm is presumptively firm email.' For his part, B has asked that the firm program his former address so that emails simply 'bounce back' (presumably unread) to the senders with a message that B's email account has been closed."; "[T]he Committee believes there is an obligation on the part of the law firm to immediately provide to inquiring clients and former clients sufficient information that would allow the client to make prompt contact with the ex-partner prior to offering the firm's services as an alternative.").

Similar issues arise when law firms of withdrawing lawyers discuss how long the withdrawing lawyer's email account or voicemail greetings will be left operative, what receptionists or secretaries should say if someone calls and asks for the now-withdrawn lawyer, etc. The apparent lack of case law and ethics opinions probably means that

lawyers and their former firms generally work out such logistics without having to seek a third party's involvement.

### **Practical Do's and Don'ts for Departing Lawyers and Their Firms**

Although some courts and bars take a different position, most of them have reached a general consensus on the acceptable and unacceptable behavior by departing lawyers and their firms.

It is useful to consider the obligations and prohibitions at different times during this process.

#### **Before the Departing Lawyer Advises the Firm**

Before the departing lawyer advises the firm, the departing lawyer should recognize the following do's and don'ts:

##### **Do**

- Comply with all partnership or employment agreement provisions (unless they are trumped by the ethics requirements).
- Continue spending full time working for the firm (it would be best to engage in the permissible type of pre-departure activities before or after regular working hours, and through personal computers, telephones, etc. -- although there appears to be no per se prohibition on acting otherwise).
- Be careful when making plans to later compete with the firm (permissible activities include renting space, ordering stationery, opening a bank account, etc.).
- Accumulate the information that might be requested by a potential new employer. Although generally even the identity of a lawyer's clients deserve confidentiality protection, every bar recognizes what amounts to an unstated principle allowing lawyers to disclose to potential new employers the type of information the employers might need when checking conflicts (this unstated principle allows disclosure of only the minimum amount of information required, and applies only when employment discussions become very serious).

## Don't

- Advise clients of the departure (although this may be permissible if it is in the client's best interests, and has become less unacceptable as the ethics rules have evolved in this area). If it is necessary to advise the client, be sure to emphasize that the client may choose whichever option is in the client's best interest.
- Seek to solicit others to leave the firm. Traditionally, the ethics rules frowned upon if not prohibited even advising colleagues of the departure, but the case law and bars' approach has become somewhat more liberal (for instance, the D.C. Bar indicates that this issue has little if any ethics ramifications). It would be best not to advise anyone else at the firm (either lawyers or staff) that you intend to leave. If you find it necessary to advise others of your intent, do not offer them a job at your new firm, or even hold out the promise of a job. At most, you should advise them that you cannot talk about that topic until you are at the new firm.
- Begin to compete with the firm (by advising clients not to open matters at the firm, but instead hold off -- either explicitly or implicitly encouraging the clients to retain the new firm).
- Take actions inconsistent with a fiduciary duty to the firm (for instance, a departing lawyer who is in a management position should not make hiring decisions, forecast profits, etc.; partners should not vote on expansion plans, office leases, etc.).
- Provide a false response if someone at the firm asks about future plans, including a possible departure.
- Disclose any information requested by a potential new employer if the disclosure would substantially harm a client (as with embarrassing information, future business plans, etc.). In some situations vague information might suffice, but in other situations the inability to disclose client information might scuttle a possible job offer.
- Transfer any files or other documents to personal computers, or otherwise use client or firm documents in preparing to compete (without notifying the firm and attempting to reach an amicable resolution of issues relating to the use and retention of client files and more generic documents prepared while at the firm). The off-limits firm information includes client lists, billing rates, client revenues, realization rates, etc.

### **After the Departing Lawyer Advises the Firm (but Before He Leaves)**

After the departing lawyer advises the firm (but before he leaves), the departing lawyer should recognize the following do's and don'ts:

#### **Do**

- Comply with partnership or employment agreement provisions such as notice provisions, etc.
- Offer to send a joint communication (with the firm) to the clients for whose matters you currently have a large degree of responsibility. The recipients of this communication should be determined on a matter-by-matter rather than a client-by-client basis. The communication should announce the departure and the date of departure, and emphasize the client's right to (1) stay with the firm; (2) move with the departing lawyer; or (3) choose another law firm.
- Consider sending a unilateral communication if the law firm balks at sending a joint communication (the unilateral communication must contain the same provisions as the preferable but not required joint communication).
- Respond in a neutral way to inquiries from clients who receive either a joint or unilateral communication about the departure.

#### **Don't**

- Begin to compete with the firm (in the ways described above). You can answer inquiries from clients, but should not actively solicit new business from them.
- Disparage the law firm.
- Violate any common law duties governing solicitation of colleagues to leave the firm. If you advise others of your intent to leave, or if anyone asks you about it, you should not offer a job at your new firm, or even hold out the hope of a job at your new firm.

During this time, the law firm should recognize the following do's and don'ts:

#### **Do**

- Try to agree on a joint communication to the clients (described above). It seems unlikely that the departing lawyer would balk at sending a joint communication, but if so the law firm may send a unilateral communication (which contains all of the provisions discussed above).

- Communicate with clients after the client receives the initial joint or unilateral communication offering the client the three choices discussed above (subject to the limitations discussed below).
- Try to amicably agree with the departing lawyer about the documents that he will take with him. Although files generally belong to clients and not law firms or lawyers, the ABA has indicated that departing lawyers generally may take "copies of documents that she herself has created for general use in her practice," and generally may "retain copies of client documents relating to her representation of former clients."

### **Don't**

- Disparage the departing lawyer.
- Communicate with clients before the clients receive either a joint or unilateral communication providing the three choices discussed above. Even after such communication, don't simply advise the client that the firm will continue to represent the client.
- Try to prohibit contact between the departing lawyer and the clients on whose matters the departing lawyer has been primarily responsible.
- Deny contact information about clients (identified on a matter-by-matter basis) with whom the departing lawyer might need to communicate about the departure.
- Insist that the departing lawyer advise the firm of the identity of clients with whom the departing lawyer has communicated about her departure.
- Deny the departing lawyer access to any documents, firm resources, etc., that the departing lawyer needs to adequately provide legal services to any clients.

### **After the Departing Lawyer Leaves the Firm**

After the departing lawyer leaves the firm, the departing lawyer should recognize the following do's and don'ts:

### **Do**

- Follow the ethics rules on solicitation, direct mail and other marketing when contacting any of the firm's clients (acceptable post-departure targets of ethical marketing including those clients to whom you never provided any legal services).



### **Don't**

- Disparage the law firm.

At this time, the law firm should recognize the following do's and don'ts:

### **Do**

- Advise clients seeking to communicate with the departing lawyer of her new contact information. It is generally permissible to offer as a first choice to put the client in touch with someone at the firm who can help the client, but the law firm must always provide contact information for the departing lawyer upon request.
- Try to arrange a protocol with the departing lawyer about handling mail directed to the lawyer. For instance, it generally would be appropriate for the law firm to (1) put junk mail aside until the lawyer can pick it up; (2) open mail directed to the lawyer which comes from clients that the firm will continue to represent or which the firm and the lawyer are both representing on separate matters; and (3) make mail available for pickup by the lawyer if it comes from clients that the law firm will no longer be representing.
- Comply with the ethics rules governing files requested by clients who have chosen to retain the departing lawyer. There is no single national rule on this, so it is important to follow the pertinent state's ethics rules.

### **Don't**

- Open mail directed to the departing lawyer if it relates to clients that the firm no longer represents.
- Disparage the departing lawyer.
- Try to condition release of a client's file or any other event on obtaining the client's release of liability.

### **Best Answer**

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

n 2/12; b 10/14

## File Ownership if Clients Have Fully Paid Lawyers

### Hypothetical 5

You represented a local car dealer in all of her estate planning work until she fired you. The client fully paid all of your bills, but hinted that she might sue your firm for malpractice. Your former client has now demanded a copy of your entire file. Your partners are urging you to at least bill the former client for making a copy of the materials if you are obligated to send them to her.

- (a) Must you give your former client the file?

**YES PROBABLY**

- (b) May you bill the former client for copying the file?

**YES**

- (c) May you retain a copy of the file over your former client's objections?

**YES**

### Analysis

Lawyers can face two separate scenarios involving the files they create while representing clients. First, lawyers must determine what portions of their file they must give clients or former clients who have fully paid them. Second, lawyers who have not been fully paid must assess whether they can withhold all or part of the file until their clients pay them (relying on what is called a "retaining" lien).

Although not involving lawyer files, it is worth mentioning two other types of liens that lawyers might assert.

Lawyers representing clients who may recover a judgment might assert a lien over that judgment (this is commonly called a "charging" lien). Lawyer most frequently assert a "charging" lien in contingent fee cases, because those lawyers generally are

not paid during the course of a representation. But lawyers representing clients under some alternative fee arrangement might assert a "charging" lien even if they have been paid an hourly rate through the representation (such as a lower-than-normal hourly rate, to be supplemented by a contingent fee payment upon recovery of a judgment).

The other type of lien involves something other than the file for a future judgment. For instance, lawyers might arrange for some security interest in the client's house or other asset -- and assert a lien over that asset if the client does not pay the underlying obligation. Those types of liens are generally governed by ABA Model Rule 1.8 or its state equivalent, which applies to business relationships between lawyers and their clients.

"Retaining" liens generate perhaps the most controversy, because they essentially involve the lawyers holding their files "hostage" until the clients pay them.

However, even lawyers whose clients have fully paid them must deal with file ownership issues.

### **Lawyers' Duty to Maintain Client Files**

ABA Model Rule 1.15 requires lawyers to safeguard the client's or a third person's property in the lawyer's possession. Although that rule generally focuses on money, it also extends to documents that clients give their lawyers.

General ABA rules governing diligence, communication, etc. implicitly recognize that lawyers will create files while representing clients. Some ABA Model Rules specifically require written communications with clients, such as those dealing with certain types of conflicts. Lawyers' general diligence duties presumably require lawyers to memorialize their work, which will involve file creation. And ABA Model Rule 1.16(d)

recognizes this file creation in addressing lawyers' obligations upon the representation's end. This is discussed below.

The Restatement addresses the lawyer's obligation to safeguard property that the client has given the lawyer, or which the lawyer has created during the representation.

- (1) A lawyer must take reasonable steps to safeguard documents in the lawyer's possession relating to the representation of a client or former client.
- (2) On request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse.
- (3) Unless a client or former consents to non-delivery or substantial grounds exist for refusing to make delivery, a lawyer must deliver to the client or former client, at an appropriate time and in any event promptly after the representation ends, such originals and copies of other documents possessed by the lawyer relating to the representation as the client or former client reasonably needs.

Restatement (Third) of Law Governing Lawyers § 46(1), (2), (3) (2000). A comment provides a further explanation of this duty.

A lawyer's duty to safeguard client documents does not end with the representation . . . . It continues while there is a reasonable likelihood that the client will need the documents, unless the client has adequate copies and originals, declines to receive such copies and originals from the lawyer, or consents to disposal of the documents.

The lawyer need take only reasonable steps to preserve the documents. For example, a law firm is not required to preserve client documents indefinitely and may destroy documents that are outdated or no longer of consequence. Similarly, a lawyer who leaves a firm may leave with that firm the documents of clients the lawyer represented while with the firm, provided that the lawyer reasonably believes that the firm has appropriate

safeguarding arrangements. So long as a lawyer has custody of documents, the lawyer must take reasonable steps in arrangements for storing, using, destroying, or transferring them. If the jurisdiction allows a lawyer's practice to be sold to another lawyer, the lawyer must comply with the rules governing the sale. If a firm dissolves, its members must take reasonable steps to safeguard documents continuing to require confidentiality, for example by entrusting them to a person or depository bound by appropriate restrictions.

Restatement (Third) of Law Governing Lawyers § 46(1), (2), (3) (2000).

### **Electronic Client Files**

State bars generally permit lawyers to essentially retain all of their files in electronic form -- as long as that way of maintaining the files does not prevent lawyers from complying with all of the applicable ethics rules.

- N.Y. City LEO 2008-1 (7/2008) ("With respect to the electronic documents that the lawyer retains, the lawyer is not under an ethical obligation to organize those documents in any particular manner, or to store those documents in any particular storage medium, so long as the lawyer ensures that the manner of organization and storage does not (a) detract from the competence of the representation or (b) result in the loss of documents that the client may later need and may reasonably expect the lawyer to preserve. To those ends, electronic documents other than e-mails present less difficulty because they are frequently stored in document management systems in which they are typically coded with several identifying characteristics, making it easier to locate and assemble them later. E-mails raise more difficult organizational and storage issues. Some e-mail systems automatically delete e-mails after a period of time, so the lawyer must take affirmative steps to preserve those e-mails that the lawyer decides to save. In addition, e-mails generally are not coded, or otherwise organized, to facilitate their later retrieval. Thus, a practice with much to commend it is to organize saved e-mails to facilitate their later retrieval, for example, by coding them or saving them to dedicated electronic files. Otherwise, it may be exceedingly difficult and expensive for the lawyer to retrieve those e-mails, and, as discussed in the Opinion, the lawyer must charge the client for retrieval costs that could reasonably have been avoided. In New York, a client has a presumptive right to the lawyer's entire file in connection with a representation, subject to narrow exceptions. The lawyer may charge the client a reasonable fee, based on the lawyer's customary schedule, for gathering and producing electronic documents. That fee may reflect the reasonable costs of retrieving

electronic documents from their storage media and reviewing those documents to determine the client's right of access. It is prudent for lawyer and client to discuss the retention, storage, and retrieval of electronic documents at the outset of the engagement and to consider memorializing their agreement in a retention letter.").

- Arizona LEO 07-02 (6/2007) ("In appropriate cases, a lawyer may keep current and closed client files as electronic images in an attempt to maintain a paperless law practice or to more economically store files. After digitizing paper documents, a lawyer may not, without client consent, destroy original paper documents that belong to or were obtained from the client. After digitizing paper documents, a lawyer may destroy copies of paper documents that were obtained from the client unless the lawyer has reason to know that the client wants the lawyer to retain them. A lawyer has the discretion to decide whether to maintain the balance of the file solely as electronic images and destroy the paper documents.").
- Florida LEO 06-1 (4/10/06) ("Lawyers may, but are not required to, store files electronically unless: a statute or rule requires retention of an original document, the original document is the property of the client, or destruction of a paper document adversely affects the client's interests. Files stored electronically must be readily reproducible and protected from inadvertent modification, degradation or destruction.").
- New Hampshire LEO 2005-06/3 (1/2006) ("Therefore, if a client requests a copy of her file, the firm has an obligation to provide all files pertinent to representation of that client, regardless of the burden that it might impose upon the firm to do so. . . . That burden can be managed, in any event, through computer word search functions or other means that are routinely used for discovery or other purposes. As in discovery-related matters, it is incumbent upon the firm to manage its electronic and other files in a way that will allow for release of a file to a client without releasing other information that might harm a third party.").
- North Carolina LEO 2002-5 (10/18/02) ("If a lawyer determines that an e-mail communication (whether in electronic format or hard copy) should be retained as a part of a client's file, at the time of the termination of the representation, the lawyer should provide the client with a copy of the retained e-mail communication, together with the other documents in the client's file, subject to the limitations set forth in CPR 3."; "Rule 1.16(d) requires the lawyer to take 'reasonably practicable' steps to protect the interests of the client upon termination. In light of the widespread availability of computers, this standard is met if Attorney provides Client with a computer disk containing the retained e-mail communications or otherwise transmits them to Client in an electronic format.").

- North Carolina RPC 234 (10/18/96) (holding that a lawyer can store clients files in electronic form; also noting that an earlier opinion required a lawyer to retain inactive client files for six years).
- New York LEO 680 (1/10/96) ("[A]ny lawyer who chooses to transfer existing paper records to computer images must insure that all required copies are in fact transferred before any paper records are disposed of; the lawyer who fails to do so acts at the peril of engaging in spoliation, and will be at risk to suffer the severe consequences of such conduct. DR 9-102(I) (failure to maintain and produce records as specified by disciplinary rules subjects lawyer to discipline)."; "Records required to be maintained by the Code in the form of 'copies' may be stored by reliable electronic means, as noted above, and records that are initially created by electronic means may be retained in that form, but other records that are specifically described by the Code must be retained in their original format.").

The increasing use of electronic files has generated its own issues. For instance, some bar have understandably concluded that lawyers do not need to retain hard copies of documents if those documents are available electronically.

- Arizona LEO 15-02 (06/2015) ("In general, a lawyer has an ethical obligation to provide, at the client's request upon termination of the representation, all documents reflecting work performed for the client. A lawyer's obligation to preserve documents reflecting work performed for the client does not, however, extend to electronic or other documents that are duplicative of other documents generated or received in the course of the representation, incidental to the representation, or not typically maintained by a working lawyer, unless the lawyer has reason to believe that, in all the circumstances, the client's interests require that these documents be preserved for eventual turning over to the client. To the extent Ops. 08-02 and 13-02, or earlier committee opinions, may be read to suggest otherwise, they are withdrawn."; "Where a client makes such a request, a lawyer does not act unethically by charging the client for additional copies of documents provided during the representation free of charge. Consistent with Comment 9 to ER 1.16, a lawyer may charge the client for additional copies provided the client has received a copy of the documents.").

Some bars have also wrestled with the length of time that a lawyer should keep a file after a matter has closed.

- Cruz v. Dollar Tree Stores, Inc., Case No. 07-04012-SC, 2012 U.S. Dist. LEXIS 68685, at \*3, \*6 (N.D. Cal. May 16, 2012) ("Rule 4-100(B)(3) requires an attorney to retain a complete record of all client funds and other properties

- coming into the possession of the attorney for at least five years after the conclusion of a litigation." (emphasis added); "Rule 4-100 deals primarily with preserving the identity of funds and other property held in trust for a client. While the scope of a client's property under Rule 4-100 may have been expanded to include attorney work product, . . . the Court is aware of no authority which has further broadened the rule so as to encompass the confidential information disclosed by an opposing party through discovery. Indeed, it strains credulity to suggest that another party's confidential materials become the property of a client when they are produced in discovery pursuant to a protective order. Further, reading Rule 4-100 so broadly would hamper the private resolution of discovery disputes. Parties might be unwilling to stipulate to protective orders or otherwise disclose confidential documents if they know that those documents could be retained by opposing counsel indefinitely.").
- Illinois LEO 12-06 (1/2012) ("A lawyer must maintain records that identify the name and last known address of each client, and reflect whether the client's representation is active or concluded, for an indefinite period of time. A lawyer must keep complete records of trust account funds and other property of clients or third parties held by the lawyer and must preserve such records for at least seven years after termination of the representation. A lawyer must also maintain all financial records related to the lawyer's practice for not less than seven years. For other materials, if appropriate steps are taken to return or preserve actual client property or items with intrinsic value, then it is generally permissible for a legal services program to dispose of routine case file materials five years after case closing. Other considerations, such as administrative expense and the six-year Illinois statute of repose, suggest a general retention period of most lawyers of at least seven years. Any method of disposal must protect the confidentiality of client information." (emphases added); "There appears to be no consensus on the minimum period for retention of lawyer file materials no longer needed for a client's representation, but at least two other state bar opinions agree that five years after the conclusion of a matter is a reasonable option. See Arizona Opinion 08-02 (December 2008) and West Virginia 2002-01 (March 2002)."; "Given that the statute of repose for professional liability claims against lawyers, 735 ILCS 5/13-214.3(c), is six years, retaining files for some reasonable period beyond six years seems prudent. A general retention period of at least seven years after termination of the representation would comply with two of the Supreme Court's three record-keeping rules and keep a lawyer's file available in the event of a claim." (emphasis added)).
  - 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." (emphasis added)).



- Arizona LEO 08-02 (12/2008) (holding that a lawyer's file belonged to the clients and not to the lawyer; indicating that a lawyer determining how long to maintain a client's files "should consider the general purposes of file retention stated above along with specific factors articulated in Op. 98-07: the client's foreseeable interests; the applicable statutes of limitations; the length of the client's sentence or probation in criminal cases; and the uses of the material in question to the former client"; noting an earlier Arizona opinion that recommended indefinite file retention for "probate or estate matters, homicide cases, life sentence cases and lifetime probation case."; "File retention can be costly due to the volume of cases to be stored and the sheer quantity of documents comprising each individual file. In an effort to minimize file-storage costs, lawyers have asked whether they can purge client files of nonessential or irrelevant documents prior to storage. Because the client is entitled to the file in its entirety, and not just those portions that the lawyer deems to be essential or relevant, lawyers should not conduct such a purge without first consulting the client. The file is for the benefit of the client and any decisions about which documents to keep and which documents to purge should focus on the client's future need for the documents and the possibility of future litigation to protect the interests of the client, not the lawyer's possible future use for the documents."; noting that lawyers may intend to give the entire file to the client upon termination of the representation; holding that "lawyers should not purge files of documents prior to storage without notice to the client and permission from the client"; "In the absence of a file-retention policy, a lawyer must make reasonable efforts to notify the client prior to destroying the file. If the lawyer is unsuccessful, the lawyer must then determine whether applicable law requires preserving the file. If the law does not require further preservation, the lawyer should safeguard the client file for a period of time equal to that under Arizona law for the abandonment of personal property. . . . After the file may be regarded as abandoned, then the lawyer must carefully review the file to confirm that no procedural or statutory requirements obligate the lawyer to retain the file further, that there will be no further litigation, and that there is no longer any substantial purpose served in retaining the file. Given these obligations, creating and implementing a policy for the retention and destruction may actually decrease the amount of time a file must otherwise be preserved." (emphasis added)).
- Iowa LEO 08-02 (3/4/08) ("Unless the lawyer's insurance carrier requires a longer period of retention: (a) a lawyer's written file destruction policy should be no shorter than six years after the last legal service was rendered as evidence by date of the file closing letter; or (b) in the event the lawyer does not have a written file destruction policy in place or it was not applicable to the matter in question, the file may be destroyed ten years after the date the last legal service was rendered in compliance with the protocol described in paragraph 5." (footnote omitted) (emphasis added); also advising lawyers to explain in their initial written fee arrangement how they will handle closed clients files).

- Colorado LEO 104 (4/17/99) "The Committee notes that there are certain circumstances in which the lawyer is required to maintain copies of certain documents for a period of time regardless of production to the client. See, e.g., C.R.C.P., Chapter 23.3, Rules Governing Contingent Fees, Rule 4(b) (retention of a copy of each contingent fee agreement for a period of six years); Colo. RPC 1.15(a), (complete records of [trust] account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation)." (emphasis added); "Preservation of drafts of documents in the ordinary course of the attorney's business is not a matter addressed by this opinion. However, if a lawyer does retain such drafts, they generally are papers to which the client is entitled.").
- New York City LEO 1999-05 (1999) ("[W]e conclude that a retiring lawyer -- or one whose firm is dissolving -- may communicate with clients to arrange the return of original Wills to them or to obtain consent to dispose of those Wills. However, as to those clients who cannot be located, the lawyer's obligation to retain the Wills in safekeeping continues indefinitely or in accordance with law. The original Wills remaining in the lawyer's possession could be placed in storage or in the custody of a successor attorney (indexed and stored in a manner that will protect client secrets and confidences), unless it is appropriate to use available procedures for filing original Wills with a court for safekeeping.").
- North Carolina RPC 234 (10/18/96) (holding that a lawyer can store clients files in electronic form; also noting that an earlier opinion required a lawyer to retain inactive client files for six years).

Bars have explained that clients and lawyers can agree in a retainer letter how long the lawyer will retain the file.

- N.Y. City LEO 2010-1 (2010) ("Retainer agreements and engagement letters may authorize a lawyer at the conclusion of a matter or engagement to return all client documents to the client or to discard some or all such documents, subject to certain exceptions."; offering the following sample provision: "Once our engagement in this matter ends, we will send you a written notice advising you that this engagement has concluded. You may thereafter direct us to return, retain or discard some or all of the documents pertaining to the engagement. If you do not respond to the notice within (60) days, you agree and understand that any materials left with us after the engagement ends may be retained or destroyed at our discretion. Notwithstanding the foregoing, and unless you instruct us otherwise, we will return and/or preserve any original wills, deeds, contracts, promissory notes or other similar documents, and any documents we know or believe you will need to retain to enforce your rights or to bring or defend claims. You should understand that 'materials' include paper files as well as information in other mediums of

storage including voicemail, email, printer files, copier files, facsimiles, dictation recordings, video files, and other formats. We reserve the right to make, at our expense, certain copies of all documents generated or received by us in the course of our representation. When you request copies of documents from us, copies that we generate will be made at your expense. We will maintain the confidentiality of all documents throughout this process."; "Our own files pertaining to the matter will be retained by the firm (as opposed to being sent to you) or destroyed. These firm files include, for example, firm administrative records, time and expense reports, personnel and staffing materials, and credit and account records. For various reasons, including the minimization of unnecessary storage expenses, we reserve the right to destroy or otherwise dispose of any documents or other materials retained by us within a reasonable time after the termination of the engagement.").

- Iowa LEO 08-02 (3/4/08) ("Unless the lawyer's insurance carrier requires a longer period of retention: (a) a lawyer's written file destruction policy should be no shorter than six years after the last legal service was rendered as evidence by date of the file closing letter; or (b) in the event the lawyer does not have a written file destruction policy in place or it was not applicable to the matter in question, the file may be destroyed ten years after the date the last legal service was rendered in compliance with the protocol described in paragraph 5." (footnote omitted) (emphasis added); also advising lawyers to explain in their initial written fee arrangement how they will handle closed clients files).

(a) Ethics and property law considerations affect states' approach to clients' ownership of files generated by their lawyers.

It is important to recognize the distinction between a lawyer's ethics duty to turn over all or part of a file to a former client (either with or without the former client's request) and a lawyer's obligation to produce documents in response to a discovery request in a dispute between the lawyer and the former client. The normal discovery rules generally define the latter duty.

### **ABA Model Rules**

In dealing with the ethics side of this issue, the ABA Model Rules takes a surprisingly neutral and state-specific approach.

Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled . . . . The lawyer may retain papers relating to the client to the extent permitted by other law.

ABA Model Rule 1.16(d) (emphasis added).

Presumably, such "other law" includes the ABA Model Rule governing any property that clients give their lawyers for safekeeping. ABA Model Rule 1.15. Lawyers generally must relinquish those to clients when the representation ends (or even before then, if the client requests return of that property).

The more complicated issue involves documents that the lawyers created or collected while representing the client.

### **ABA LEO 471 (7/1/15)**

In 2015, the ABA addressed fully paid lawyers' ethics obligations to provide portions of the lawyer's files to former clients. ABA LEO 471 (7/1/15).

The ABA largely rejected the majority "entire file" approach, under which lawyers must point to an exception when withholding any portion of their files requested by a client or former client. The ABA instead adopted the "end product," approach, although indicating lawyers may have a duty to surrender internal law firm documents, drafts, etc., if withholding those would prejudice former clients -- especially in the context of the lawyer's unfinished work.

Under ABA Model Rule 1.15, the lawyer must return documents received from the client -- because those documents constitute property that the client has given to the lawyer.

Under ABA Model Rule 1.16(d), lawyers must take "reasonably practicable" steps to protect former clients upon a representation's termination -- including "surrendering papers and property to which client is entitled." ABA LEO 471 (7/1/15). However, the rule does not describe which of the lawyer-created documents lawyers must surrender.

Most states follow the "entire file" approach, which

assumes that the client has an expansive general right to materials related to the representation and retains that right when the representation ends.

Id.

Under that standard, lawyers may withhold documents requested by clients or former clients only when a "specific exception applies."

Commonly recognized exceptions to surrender include: materials that would violate a duty of non-disclosure to another person; materials containing a lawyer's assessment of the client; materials containing information, which if released, could endanger the health, safety, or welfare of the client or others; and documents reflecting only internal firm communications and assignments.

Id. (footnotes omitted).

A minority of states follow the "end-product approach," which requires a more limited surrender of files to former clients. Under this approach, lawyers must surrender

correspondence by the lawyer for the benefit of the client; investigative reports and other discovery for which the client has paid; and pleadings and other papers filed with a tribunal. The client is also entitled to copies of contracts, wills, corporate records, and other similar documents prepared by the lawyer for the client.

Id. (footnotes omitted). Lawyers may decline to surrender other documents.

Administrative materials related to the representation, such as memoranda concerning potential conflicts of

interest, the client's creditworthiness, time and expense records, or personnel matters, are not considered materials to which the client is entitled under the end-product approach. Additionally, the lawyer's personal notes, drafts of legal instruments or documents to be filed with a tribunal, other internal memoranda, and legal research are viewed as generated primarily for the lawyer's own purpose in working on a client's matter, and, therefore, need not be surrendered to the client under the end product approach.

Id. (footnotes omitted). Under this "end-product" approach, "[f]inal documents supersede earlier drafts." Id.

The ABA endorsed the minority "end-product" approach, which it had articulated in ABA Informal LEO 1376 (1977).

However, lawyers in some circumstances may be required to surrender documents other than "end-product" documents,

For example, when the representation is terminated before the matter is concluded, protection of the client's interest may require the lawyer to provide the client with paper or property generated by the lawyer for the lawyer's own purpose.

Id. Although the determination of a matter before completion does not require lawyers to surrender all internal documents,

at a minimum a lawyer's obligation under the Rules reasonably gives rise to an entitlement to those materials that would likely harm the client's interest if not provided.

Id.

In applying these general principles to a hypothetical client municipality which terminated a ten-year representation, the ABA explained that the terminated lawyers must surrender -- for completed matters,

any materials provided to the lawyer by the municipality; legal documents filed with a tribunal -- or those completed, ready to be filed, but not yet filed; executed instruments like

contracts; orders or other records of a tribunal; correspondence issued or received by the lawyer in connection with the representation of the municipality on relevant issues, including email and other electronic correspondence that has been retained according to the firm's document retention policy; discovery or evidentiary exhibits, including interrogatories and their answers, deposition transcripts, expert witness reports and witness statements, and exhibits; legal opinions issued at the request of the municipality; and third party assessments, evaluations, or records paid for by the municipality.

Id. (footnotes omitted). On the other hand, the lawyers in the hypothetical scenario do not have to surrender

[d]rafts or mark-ups of documents to be filed with a tribunal; drafts of legal instruments; internal legal memoranda and research materials; internal conflict checks; personal notes; hourly billing statements; firm assignments; notes regarding an ethics consultation; a general assessment of the municipality or the municipality's matter; and documents that might reveal the confidences of other clients.

Id.

For "a matter that is not completed," the lawyer may be obligated to provide former clients

materials the lawyer generated for internal law office use primarily for the lawyer's own purpose in working on a client's matter.

Id.

For instance, the lawyer's must surrender the following documents for uncompleted matters:

(1) internal notes and memos that were generated primarily for the lawyer's own purpose in working on the municipality's [former client] matter, (2) for which no final product has emerged, and (3) the materials should be disclosed to avoid harming the municipality's interest, then the lawyer must also provide the municipality with these materials. For example, if in a continuing matter a filing deadline is imminent, and as

part of working on the municipality's matter the lawyer has drafted documents to meet this filing deadline, but no final document has emerged, then the most recent draft and relevant supporting research should be provided to the municipality.

Id.

A lawyer's earlier supplying of documents during the representation "is not dispositive" of whether the lawyer must provide the materials again upon termination.

Id.

Similarly, the lawyer's earlier furnishing of document is not dispositive

of who -- the lawyer or the client -- should pay for the time and cost of duplication of such materials upon termination of the representation.

Id.

In a footnote, the ABA encouraged lawyers "to explain in their retainer letters who is responsible for the costs of copying and under what circumstances." Id. n.35.

Similarly, the ABA agreed with the reasoning of D.C. LEO 357 -- which explained that "[l]awyers 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." D.C. LEO 357 (10/2012).

### **Restatement**

The Restatement deals with a lawyer's file in two sections -- articulating a general rule and also explaining a lawyer's right to retain the file under certain conditions.

As a general matter, the Restatement explains that



[o]n request, a lawyer must allow a client or former client to inspect and copy any document possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse.

. . . Unless a client or former consents to non-delivery or substantial grounds exist for refusing to make delivery, a lawyer must deliver to the client or former client, at an appropriate time and in any event promptly after the representation ends, such originals and copies of other documents possessed by the lawyer relating to the representation as the client or former client reasonably needs.

Restatement (Third) of Law Governing Lawyers § 46(2), (3) (2000) (emphasis added).

Another Restatement provision discusses the client's right to the documents.

As stated in Subsection (3), a client is entitled to retrieve documents in possession of a lawyer relating to representation of the client. That right extends to documents placed in the lawyer's possession as well as to documents produced by the lawyer, subject to the right to retain property under a valid lien . . . and to other justifiable grounds as discussed hereafter.

A client is ordinarily entitled to inspect and copy at reasonable times any document relating to the representation in the possession of the client's lawyer . . . . A client's failure to assert the right to inspect and copy files during the representation does not bar later enforcement of that right, so long as the lawyer has properly not disposed of the documents . . . .

Restatement (Third) of Law Governing Lawyers § 46 cmt. c (2000).

A comment describes the type of documents that a lawyer must furnish the client even without the client asking.

Even without a client's request or the discovery order of a tribunal, a lawyer must voluntarily furnish originals or copies of such documents as a client reasonably needs in the circumstances. In complying with that standard, the lawyer should consider such matters as the client's expressed concerns, the client's possible needs, customary practice, the number of documents, the client's storage facilities, and

whether the documents originally came from the client. The client should have an original of documents such as contracts, while a copy will suffice for such documents as legal memoranda and court opinions. Except under extraordinary circumstances -- for example, when a client retained a lawyer to recover and destroy a confidential letter -- a lawyer may keep copies of documents when furnished to a client.

If not made before, delivery must be made promptly after the representation ends. The lawyer may withhold documents to induce the client to pay a bill only as stated in § 43. During the representation, the lawyer should deliver documents when the client needs or requests them. The lawyer need not deliver documents when the client agrees that the lawyer may keep them or where there is a genuine dispute about who is entitled to receive them . . . .

Restatement (Third) of Law Governing Lawyers § 46 cmt. d (2000).

Another comment describes three situations in which a lawyer may refuse to provide the client access to the file.

First,

[a] lawyer may deny a client's request to retrieve, inspect, or copy documents when compliance would violate the lawyer's duty to another . . . . That would occur, for example, if a court's protective order had forbidden copying of a document obtained during discovery from another party, or if the lawyer reasonably believed that the client would use the document to commit a crime . . . . Justification would also exist if the document contained confidences of another client that the lawyer was required to protect.

Restatement (Third) of Law Governing Lawyers § 46 cmt. c (2000) (emphasis added).

Second,

[u]nder conditions of extreme necessity, a lawyer may properly refuse for a client's own benefit to disclose documents to the client unless a tribunal has required disclosure. Thus, a lawyer who reasonably concludes that showing a psychiatric report to a mentally ill client is likely to cause serious harm may deny the client access to the

report . . . . Ordinarily, however, what will be useful to the client is for the client to decide.

Id. (emphasis added).

Third,

[a] lawyer may refuse to disclose to the client certain law-firm documents reasonably intended only for internal review, such as a memorandum discussing which lawyers in the firm should be assigned to a case, whether a lawyer must withdraw because of the client's misconduct, or the firm's possible malpractice liability to the client. The need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved. Even in such circumstances, however, a tribunal may properly order discovery of the document when discovery rules so provide. The lawyer's duty to inform the client . . . can require the lawyer to disclose matters discussed in a document even when the document itself need not be disclosed.

Id. (emphasis added).

The Restatement also addresses the lawyer's right to be paid for this effort.

Because a lawyer's normal duties include collection and delivery of documents that came from the client or that the client should have, a lawyer paid by the hour should be compensated for time devoted to that task. Copying expenses may be separately billed when allowed under the principles stated in § 38(3)(a) and Comment e thereto. When the client seeks copies that the lawyer was not obliged to furnish in the absence of such a request, the lawyer may require the client to pay the copying costs.

Restatement (Third) of Law Governing Lawyers § 46 cmt. e (2000) (emphasis added).

Separate Restatement provisions deal with the lawyer's obligation to return the client's or a non-client's property.

(1) Except as provided in Subsection (2), a lawyer must promptly deliver, to the client or nonclient so entitled, funds or other property in the lawyer's possession belonging to a client or nonclient.

(2) A lawyer may retain possession of funds or other property of a client or nonclient if:

(a) the client or nonclient consents;

(b) the lawyer's client is entitled to the property, the lawyer appropriately possesses the property for purposes of the representation, and the client has not asked for delivery of the property;

(c) the lawyer has a valid lien on the property (see § 43);

(d) there are substantial grounds for dispute as to the person entitled to the property; or

(e) delivering the property to the client or nonclient would violate a court order or other legal obligation of the lawyer.

Restatement (Third) of Law Governing Lawyers § 45 (2000). A comment explains the timing of this requirement.

A lawyer's basic obligation under this Section is to deliver property of a client or nonclient promptly to that client or person unless an exception stated in Subsection (2) applies. The obligation covers all kinds of property. For example, a lawyer who has received a deposit against future fee bills must return the unearned portion of the deposit when the representation ends . . . .

How soon the delivery must occur depends on the circumstances . . . . When the owner asks for delivery of the property, the lawyer must comply with the request. If the lawyer knows that the owner has need to possess the property by a given time, the lawyer should if reasonably possible deliver it by that time. The lawyer ordinarily should not delay longer than necessary to record and transmit the funds . . . . A client entitled to proceeds of a judgment normally should not have to wait more than a few days to receive the property from the client's lawyer. When the representation ends, moreover, any delay in delivering the client's property can hamper the client's affairs . . . . On the other hand, during the representation a lawyer is not required, in the absence of client request, to deliver items that might turn out to be needed for the representation . . . .

Restatement (Third) of Law Governing Lawyers § 45 cmt. b (2000).

The next Restatement provision deals with the client's consent to the lawyer's continued possession of the property.

Clients and others often ask a lawyer to retain possession of property. No formal contract is required. Most clients would expect that during a representation the lawyer would keep property needed for further steps in the representation, unless the client indicates to the contrary. Thus, during the representation a lawyer need not return documents or court exhibits unless the client so requests. For treatment of documents after the representation ends, see § 46. In some circumstances, for example, when the client agrees that the lawyer will invest client funds, the arrangement constitutes a business transaction with the client subject to the requirements of § 126.

Restatement (Third) of Law Governing Lawyers § 45 cmt. c (2000).

The Restatement deals with the lawyer's obligation if there is a dispute about the property.

When it is unclear who is entitled to property in the lawyer's possession, the lawyer is not required to deliver the disputed property to either claimant; indeed, if the lawyer delivers the property to one claimant, the lawyer can later be held liable to the other. The lawyer should therefore safeguard the property until the disputants resolve it by contract or an appropriate procedure . . . . If a lawyer holds property belonging to one person and a second person has a contractual or similar claim against that person but does not claim to own the property or have a security interest on it, the lawyer is free to deliver the property to the person to whom it belongs. If a lawyer holds funds as an advance fee payment, the lawyer is not obliged to deliver those funds to the client when the client disputes the lawyer's good-faith claim that the sum withheld is due to the lawyer, but the lawyer may not transfer the disputed funds to the lawyer's personal account . . . .

Restatement (Third) of Law Governing Lawyers § 45 cmt. d (2000). Not surprisingly, lawyers must comply with any court order dealing with the property.

A court may order a lawyer to deposit property in court or in an interest-bearing account pending further court orders. A

court might also require a lawyer to surrender an object to another party or allow its inspection at the lawyer's office, regardless of the wishes of the lawyer's client. Such a court order ordinarily binds a client's lawyer even if only the client is named in the order. A lawyer might also be constrained by a legal obligation not arising from a court order, for example a lien asserted by a third party. A lawyer is not required by any supposed duty to a client to deliver property to a claimant when doing so would cause the lawyer to violate a court order or other legal obligation.

Restatement (Third) of Law Governing Lawyers § 45 cmt. e (2000).

Finally, the Restatement addresses the interesting situation in which a lawyer receives stolen property.

The lawyer's duties of confidentiality do not prevent a lawyer from complying with the requirement of this Section to return promptly to its owner property that a client has stolen and placed in the lawyer's possession. The client's transfer of the property as such is ordinarily not a communication subject to the attorney-client privilege . . . . Although the lawyer's knowledge that the goods are stolen from a given person will usually derive from confidential client information . . . , a lawyer who knowingly retains stolen goods is helping the thief conceal them from their proper owner, which is a crime. The same would be true were the lawyer, once having taken possession of the goods, to return them to the thief. By asking the lawyer to possess stolen goods, moreover, the client has lost the protection of the attorney-client privilege for any accompanying communications . . . .

Although the lawyer must return the goods, there is no requirement that the lawyer explain their provenance or name the thief. To do so voluntarily might well violate the lawyer's duties of confidentiality . . . , even though a tribunal might be able to require disclosure . . . . In representing the client in defending against a charge of crime, the lawyer may retain the goods long enough to test or inspect them in preparation for the client's defense, though this does not authorize keeping them secret until the trial. . . .

Finally, if a genuine dispute exists as to ownership of the property, the lawyer need not deliver it . . . , but must then notify each person having a substantial claim of the

lawyer's possession . . . so that the lawyer's possession does not conceal the property from its owner.

Restatement (Third) of Law Governing Lawyers § 45 cmt. f (2000).

The general Restatement requirement that lawyers provide documents in their possession is subject to lawyers' right to

decline to deliver to a client or former client an original or copy of any document under circumstance permitted by § 43(1) [which deals with the lawyer's ability to retain document until the lawyer is paid].

Restatement (Third) of Law Governing Lawyers § 46(4) (2000). This right involves what is commonly called "retaining liens."

### **State Courts and Bars**

The debate over a lawyer's obligation to provide the file to a former client involves several aspects.

**First**, states applying their Rule 1.15 generally require lawyers to return any documents or other items that the clients gave the lawyers in connection with the representation.

- Sacksteder v. Senney, 2014-Ohio-2678, at ¶¶ 10, 11, 12 (Ohio Ct. App. 2014) (analyzing a former clients' right to a lawyer's file under Ohio law; "A client has the right to any original paper or document that he gave the lawyer because these are the client's personal property. Here, there are no such papers or documents in the case files. According to the trial court, it is 'undisputed that none of the documents in defendants' possession include any original documents or papers which had been previously provided to defendants by plaintiffs.' Opinion and Judgment Entry, 4 (Aug. 2, 2013)."; "A client also has the right to any original paper or document that is reasonably necessary to the client's representation."; "As to any other original paper or document in the case files, Sacksteder fails to convince us that he either owns it or has the immediate right to possess it. We note that there is ongoing litigation and that the content of the case files could be in question. Also, we suspect that some of the documents in the case files were created, and are stored, electronically and therefore may have no physical form. An electronic document has no single original -- 'original' is any printed copy.").

If a lawyer cannot locate the client who has given the lawyer such documents, lawyers normally must try their best to locate the client. Lawyer who cannot successfully locate the client may have to apply their state's escheat statute.

- Alaska LEO 2015-2 (2015) ("Generally a lawyer does not have a responsibility to hold documents or property that a client has delivered unsolicited and that are not in connection with the representation, however the Ethics Committee recommends treating such items as abandoned property and following the guidelines set forth in Alaska Ethics Opinion 90-3."; "Even though the items may not be connected with the representation, and the lawyer may not have consented to hold anything -- in which case no true professional obligation arises -- the Ethics Committee recommends that, out of an abundance of caution and concern for the due process rights of the property owner, lawyers *may* follow the guidance set forth in Alaska Bar Association Ethics Opinion 90-3 (former rule DR 9-102(B)). This Opinion concerns the proper procedure when a lawyer cannot locate a former client for whom the lawyer is holding money in a trust account. The Ethics Committee concluded that the lawyer must exhaust reasonable efforts to locate the client, hold the funds for the requisite period of time, and then dispose of them as abandoned property pursuant to Alaska Statute 34.45.110-34.45.430. These statutes require periods of one to three years depending upon the type of property and the holder and this can impose a significant burden upon a lawyer who has not consented to hold the property and did not acquire the property for purposes of the representation, therefore the Committee recommends this only as precaution, but it is not required by any rule of professional responsibility.").

**Second**, states disagree about what portions of the file a lawyer must turn over to a former client. Case law and ethics opinions acknowledge and then choose between two approaches -- often called the "entire file" and the "end product" standards.

- Jones v. Comm'r, 129 T.C. 146, 157 (T.C. 2007) (noting the debate among the states about ownership of a lawyer's file; finding it unnecessary to decide how Oklahoma would address the issue, because the material at issue did not amount to work product and therefore belonged to the client; "Because the materials are not work product, it is not necessary for us to determine in this case whether Oklahoma would follow the majority or minority view with regard to ownership of case files. We are aware of no court that has held that clients have no ownership interests in their respective case files. Rather, as we have summarized above, all jurisdictions that have considered explicitly the issue of ownership of case files have held that clients have superior property rights in at least those items in the case file that are not the attorney's self-created work product. Those courts that have served a



property right to the attorney have done so only with regard to the attorney's personal notes, working drafts and papers, and internal memoranda. The materials in issue in this case fall outside of this work product exception. Thus, under either approach, the documents in issue in this case belong property to petitioner's client, McVeigh [Oklahoma City bomber], and not to petitioner.").

- District of Columbia LEO 333 (12/20/05) ("Upon the termination of representation, an attorney is required to surrender to a client, to the client's legal representative, or to a successor in interest the entire 'file' containing the papers and property to which the client is entitled. This includes copies of internal notes and memoranda reflecting the views, thoughts and strategies of the lawyer."; "The Committee has recognized that the surrender of all files to the client at the termination of a representation is the general rule and that the work-product exception applicable to liens for unpaid fees or expenses should be construed narrowly."; "Indeed, the Committee has explicitly recognized that the District of Columbia has rejected the 'end-product' approach of some jurisdictions -- where the client only owns the pleadings, contracts, and reports that reflect the final result of the attorney's work -- in favor of the majority, 'entire file' approach, 'which does not permit a lawyer to acquire a lien on any of the contents of the client file except that portion of work product within the file that has not been paid for.' D.C. Ethics Op. 283 n.3 (1988)." (footnote omitted); "A minority of courts and state bar legal ethics authorities distinguish between the 'end product' of an attorney's services -- e.g., filed pleadings, final versions of documents prepared for the client's use, and correspondence with the client, opposing counsel and witnesses -- and the attorney's 'work product' leading to the creation of those end product documents, which remains the property of the attorney (see, e.g., Federal Land Bank v. Federal Intermediate Credit Bank, 127 F.R.D. 473, aff'd in part and rev'd in part on other grounds, 128 F.R.D. 182 (S.D. Miss. 1989); Corrigan v. Armstrong, Teasdale, Schlafly, Davis & Dicus, 824 S.W. 2d 92 (Mo. Ct. App.); Alabama State Bar, Formal Ethics Op. RO 86-02; Arizona State Bar Comm. on Rules of Prof'l Conduct, Op. No. 92-1; Illinois State Bar Assn., Op. No. 94-13; North Carolina State Bar Ethics Comm., RPC 178 (1994); Rhode Island Supreme Ct. Ethics Advisory Panel, Op. No. 92-88 (1993); Wisconsin Ethics Opinion E-82-7 (1998))." (emphasis added).

Most states follow the majority "entire file" rule, which requires lawyers to turn over essentially their entire substantive file, unless some exception justifies withholding the documents.

- Virginia Rule 1.16(e) ("All original, client-furnished documents and any originals of legal instruments or official documents which are in the lawyer's possession (wills, corporate minutes, etc.) are the property of the client and,

therefore, upon termination of the representation, those items shall be returned within a reasonable time to the client or the client's new counsel upon request, whether or not the client has paid the fees and costs owed the lawyer. If the lawyer wants to keep a copy of such original documents, the lawyer must incur the cost of duplication. Also upon termination, the client, upon request, must also be provided within a reasonable time copies of the following documents from the lawyer's file, whether or not the client has paid the fees and costs owed the lawyer: lawyer/client and lawyer/third-party communications; the lawyer's copies of client-furnished documents (unless the originals have been returned to the client pursuant to this paragraph); transcripts, pleadings and discovery responses; working and final drafts of legal instruments, official documents, investigative reports, legal memoranda, and other attorney work product documents prepared or collected for the client in the course of the representation; research materials; and bills previously submitted to the client. Although the lawyer may bill and seek to collect from the client the costs associated with making a copy of these materials, the lawyer may not use the client's refusal to pay for such materials as a basis to refuse the client's request. The lawyer, however, is not required under this Rule to provide the client copies of billing records and documents intended only for internal use, such as memoranda prepared by the lawyer discussing conflicts of interest, staffing considerations, or difficulties arising from the lawyer-client relationship. The lawyer has met his or her obligation under this paragraph by furnishing these items one time at client request upon termination; provision of multiple copies is not required. The lawyer has not met his or her obligation under this paragraph by the mere provision of copies of documents on an item-by-item basis during the course of the representation.").

- Arizona LEO 15-02 (06/2015) ("In general, a lawyer has an ethical obligation to provide, at the client's request upon termination of the representation, all documents reflecting work performed for the client. A lawyer's obligation to preserve documents reflecting work performed for the client does not, however, extend to electronic or other documents that are duplicative of other documents generated or received in the course of the representation, incidental to the representation, or not typically maintained by a working lawyer, unless the lawyer has reason to believe that, in all the circumstances, the client's interests require that these documents be preserved for eventual turning over to the client. To the extent Ops. 08-02 and 13-02, or earlier committee opinions, may be read to suggest otherwise, they are withdrawn."; "Where a client makes such a request, a lawyer does not act unethically by charging the client for additional copies of documents provided during the representation free of charge. Consistent with Comment 9 to ER 1.16, a lawyer may charge the client for additional copies provided the client has received a copy of the documents.").

- Arizona LEO 08-02 (12/2008) (holding that a lawyer's file belonged to the clients and not to the lawyer; indicating that a lawyer determining how long to maintain a client's files "should consider the general purposes of file retention stated above along with specific factors articulated in Op. 98-07: the client's foreseeable interests; the applicable statutes of limitations; the length of the client's sentence or probation in criminal cases; and the uses of the material in question to the former client"; noting an earlier Arizona opinion that recommended indefinite file retention for "probate or estate matters, homicide cases, life sentence cases and lifetime probation case."; "File retention can be costly due to the volume of cases to be stored and the sheer quantity of documents comprising each individual file. In an effort to minimize file-storage costs, lawyers have asked whether they can purge client files of nonessential or irrelevant documents prior to storage. Because the client is entitled to the file in its entirety, and not just those portions that the lawyer deems to be essential or relevant, lawyers should not conduct such a purge without first consulting the client. The file is for the benefit of the client and any decisions about which documents to keep and which documents to purge should focus on the client's future need for the documents and the possibility of future litigation to protect the interests of the client, not the lawyer's possible future use for the documents."; noting that lawyers may intend to give the entire file to the client upon termination of the representation; holding that "lawyers should not purge files of documents prior to storage without notice to the client and permission from the client"; "In the absence of a file-retention policy, a lawyer must make reasonable efforts to notify the client prior to destroying the file. If the lawyer is unsuccessful, the lawyer must then determine whether applicable law requires preserving the file. If the law does not require further preservation, the lawyer should safeguard the client file for a period of time equal to that under Arizona law for the abandonment of personal property. . . . After the file may be regarded as abandoned, then the lawyer must carefully review the file to confirm that no procedural or statutory requirements obligate the lawyer to retain the file further, that there will be no further litigation, and that there is no longer any substantial purpose served in retaining the file. Given these obligations, creating and implementing a policy for the retention and destruction may actually decrease the amount of time a file must otherwise be preserved." (emphasis added)).
- N.Y. City LEO 2008-1 (7/2008) ("With respect to the electronic documents that the lawyer retains, the lawyer is not under an ethical obligation to organize those documents in any particular manner, or to store those documents in any particular storage medium, so long as the lawyer ensures that the manner of organization and storage does not (a) detract from the competence of the representation or (b) result in the loss of documents that the client may later need and may reasonably expect the lawyer to preserve. To those ends, electronic documents other than e-mails present less difficulty because they are frequently stored in document management systems in which they are typically coded with several identifying characteristics, making

it easier to locate and assemble them later. E-mails raise more difficult organizational and storage issues. Some e-mail systems automatically delete e-mails after a period of time, so the lawyer must take affirmative steps to preserve those e-mails that the lawyer decides to save. In addition, e-mails generally are not coded, or otherwise organized, to facilitate their later retrieval. Thus, a practice with much to commend it is to organize saved e-mails to facilitate their later retrieval, for example, by coding them or saving them to dedicated electronic files. Otherwise, it may be exceedingly difficult and expensive for the lawyer to retrieve those e-mails, and, as discussed in the Opinion, the lawyer must charge the client for retrieval costs that could reasonably have been avoided. In New York, a client has a presumptive right to the lawyer's entire file in connection with a representation, subject to narrow exceptions. The lawyer may charge the client a reasonable fee, based on the lawyer's customary schedule, for gathering and producing electronic documents. That fee may reflect the reasonable costs of retrieving electronic documents from their storage media and reviewing those documents to determine the client's right of access. It is prudent for lawyer and client to discuss the retention, storage, and retrieval of electronic documents at the outset of the engagement and to consider memorializing their agreement in a retention letter." (emphasis added)).

- California LEO 2007-174 (2007) ("An attorney is ethically obligated, upon termination of employment, promptly to release to a client, at the client's request: (1) an electronic version of e-mail correspondence, because such items come within a category subject to release; (2) an electronic version of the pleadings, because such items . . . come within a category subject to release; (3) an electronic version of discovery requests and responses, because such items are subject to release as reasonably necessary to the client's representation; (4) an electronic deposition and exhibit database, because such an item itself contains items that come within categories subject to release; and (5) an electronic version of transactional documents, because such items are subject to release as reasonably necessary to the client's representation. The attorney's ethical obligation to release any electronic items, however, does not require the attorney to create such items if they do not exist or to change the application (e.g., from Word (.doc) to WordPerfect (.wpd)) if they do exist. Prior to release, the attorney is ethically obligated to take reasonable steps to strip from each of these electronic items any metadata reflecting confidential information belonging to any other client.").
- Supreme Court Attorney Disciplinary Bd. v. Gottschalk, 729 N.W.2d 812, 819 (Iowa 2007) ("In general, there are two approaches for determining who owns the documents within a client's file -- the 'entire file' approach and the 'end product' approach. . . . The majority of jurisdictions that have addressed this issue conclude that a client owns his or her entire file, including attorney work product, subject to narrow exceptions. . . . We agree with the majority of

jurisdictions and adopt the 'entire file' approach to this issue." (emphasis added)).

- Hiatt v. Clark, 194 S.W.3d 324, 329, 330 (Ky. 2006) (holding that a criminal defendant can obtain his lawyer's files; acknowledging that the files deserve work product protection, but holding that the lawyer could not withhold them from his client; "It is meant to protect an attorney, but not from his own former client, and it does not override questions of ownership."; "For the reasons set forth herein, we hold that a writ of mandamus is the most appropriate form of remedy available to Appellant and find that he is entitled to the entirety of his client file from Mr. Eardley [staff attorney for Fayette County Legal Aid who represented defendant], including work product materials, and therefore we hereby grant the relief sought.").
- New Hampshire LEO 2005-06/3 (1/2006) ("Therefore, if a client requests a copy of her file, the firm has an obligation to provide all files pertinent to representation of that client, regardless of the burden that it might impose upon the firm to do so. . . . That burden can be managed, in any event, through computer word search functions or other means that are routinely used for discovery or other purposes. As in discovery-related matters, it is incumbent upon the firm to manage its electronic and other files in a way that will allow for release of a file to a client without releasing other information that might harm a third party." (emphasis added)).
- District of Columbia LEO 333 (12/20/05) ("Upon the termination of representation, an attorney is required to surrender to a client, to the client's legal representative, or to a successor in interest the entire 'file' containing the papers and property to which the client is entitled. This includes copies of internal notes and memoranda reflecting the views, thoughts and strategies of the lawyer."; "The Committee has recognized that the surrender of all files to the client at the termination of a representation is the general rule and that the work-product exception applicable to liens for unpaid fees or expenses should be construed narrowly."; "Indeed, the Committee has explicitly recognized that the District of Columbia has rejected the 'end-product' approach of some jurisdictions -- where the client only owns the pleadings, contracts, and reports that reflect the final result of the attorney's work -- in favor of the majority, 'entire file' approach, 'which does not permit a lawyer to acquire a lien on any of the contents of the client file except that portion of work product within the file that has not been paid for.' D.C. Ethics Op. 283 n.3 (1988)."; "A minority of courts and state bar legal ethics authorities distinguish between the 'end product' of an attorney's services -- e.g., filed pleadings, final versions of documents prepared for the client's use, and correspondence with the client, opposing counsel and witnesses -- and the attorney's 'work product' leading to the creation of those end product documents, which remains the property of the attorney (see, e.g., Federal Land Bank v. Federal Intermediate Credit Bank, 127 F.R.D. 473, aff'd in part and rev'd in part on other grounds, 128 F.R.D. 182 (S.D. Miss. 1989); Corrigan v. Armstrong, Teasdale, Schlafly,

Davis & Dicus, 824 S.W. 2d 92 (Mo. Ct. App.); Alabama State Bar, Formal Ethics Op. RO 86-02; Arizona State Bar Comm. on Rules of Prof'l Conduct, Op. No. 92-1; Illinois State Bar Assn., Op. No. 94-13; North Carolina State Bar Ethics Comm., RPC 178 (1994); Rhode Island Supreme Ct. Ethics Advisory Panel, Op. No. 92-88 (1993); Wisconsin Ethics Opinion E-82-7 (1998))." (emphasis added)).

- Loeffler v. Lanser (In re ANR Advance Transp. Co.), 302 B.R. 607, 614 (E.D. Wis. 2003) (assessing different states' approach to ownership of a lawyer's file upon termination of the attorney-client relationship; contrasting the majority rule (permitting the client access to all of the files) and the minority, which indicates that the client is only entitled to "end product" documents; finding that the bankruptcy trustee was entitled to files in the possession of the lawyer; acknowledging that lawyers may assert work product protection, but refusing to allow a lawyer to withhold documents from the client's successor).
- Swift, Currie, McGhee & Hiers v. Henry, 581 S.E.2d 37, 39 (Ga. 2003) ("A minority of courts have ruled that a document belongs to the attorney who prepared it, unless the document is sought by the client in connection with a lawsuit against the attorney. . . . A majority of courts have ruled that a document created by an attorney belongs to the client who retained him." (emphasis added); adopting the majority view).
- North Carolina LEO 2002-5 (10/18/02) ("If a lawyer determines that an e-mail communication (whether in electronic format or hard copy) should be retained as a part of a client's file, at the time of the termination of the representation, the lawyer should provide the client with a copy of the retained e-mail communication, together with the other documents in the client's file, subject to the limitations set forth in CPR 3."; "Rule 1.16(d) requires the lawyer to take 'reasonably practicable' steps to protect the interests of the client upon termination. In light of the widespread availability of computers, this standard is met if Attorney provides Client with a computer disk containing the retained e-mail communications or otherwise transmits them to Client in an electronic format.").
- Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn LLP, 689 N.E.2d 879, 881, 882 (N.Y. 1997) (requiring a client's former lawyer to turn over the files to the client as long as the client has paid the lawyer's fees; "A majority of courts and State legal ethics advisory bodies considering a client's access to the attorney's file in a represented matter, upon termination of the attorney-client relationship, where no claim for unpaid legal fees is outstanding, presumptively accord the client full access to the entire attorney's file on a represented matter with narrow exceptions."; "The American Law Institute, in its Restatement (Third) of the Law Governing Lawyers essentially embraced the majority position (see, Restatement [Third] of Law Governing Lawyers § 58 [Proposed Final Draft No. 1, 1996]). The draft Restatement provides that

a former client is to be accorded access to 'inspect and copy any documents possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse' (id., § 58 [2] [emphasis supplied]). Even without a request, an attorney is obligated to deliver to the client, not later than promptly after representation ends, 'such originals and copies of other documents possessed by the lawyer relating to the representation as the . . . [former] client reasonably needs' (id., § 58 [3], comment d.); "We conclude that the majority position, as adopted in the final draft of the American Law Institute Restatement (Third) of the Law Governing Lawyers, represents the sounder view. First, an expansive general right of the client to the contents of the attorney's file, upon termination of the attorney-client relationship, more closely conforms to the position taken by the courts of this State on the client's broad rights to the contents of the file when representation ceases on a matter still pending."; "Second, the minority position adopted by the courts below unrealistically and, in our view, unfairly places the burden on the client to demonstrate a need for specific work product documents in the attorney's file on the represented matter. Again, this case is illustrative that in a complex transaction where the file may be voluminous (commensurably increasing the likely usefulness of work product materials to advise the client concerning ongoing rights and obligations), the client's need for access to a particular paper cannot be demonstrated except in the most general terms, in the absence of prior disclosure of the content of the very document to which access is sought. The attorney in possession of the contents of the file is in a far better position to demonstrate that a particular document would furnish no useful purpose in serving the client's present needs for legal advice."; "Affording the client presumptive access to the attorney's entire file on the represented matter, subject to narrow exceptions, is also supported, although not necessarily dictated, by the lawyer's ethical obligations arising out of representation in a given matter." (emphasis added).

A minority of states follow the "end-product approach" -- under which lawyers may withhold from clients non-final documents such as drafts, legal memoranda, etc. As explained above, ABA LEO 471 (7/1/15) explicitly adopted this admittedly minority view.

- Citizens Development Corp. v. Cnty. of San Diego, Case No. 3:12-cv-0334-GPC-KSC, 2015 U.S. Dist. LEXIS 169001, at \*18-19 (S.D. Cal. Dec. 17, 2015) (holding that a lawyer hired by an insurance company to represent its insured did not act improperly; explaining among other things that the law firm had not improperly withheld from the insurance company the litigation file the firm created while representing the insured and the insurance company; "At issue appears to be what is meant by the 'complete litigation file.' CDC's lead counsel appears to take the position that the 'complete litigation file' includes

'a full and complete copy of ALL communications between your respective firms and the insured's carriers,' as well as the participation of C&J in 'ALL future oral and/or written communications between your law firms and the insurance carriers.' . . . The Court finds that CDC overstates the meaning of 'complete litigation file.' First, CA Bar Guidance 2 contemplates that the litigation 'file' refers to physical or written records, including records of oral communications, but not the oral communications themselves. . . . It does not appear to contemplate that the insured should have the right to participate in all oral communications between the counsel and the insurer. Second, CA Bar Guidance 2 states that '[a]ny communication between the insurer and the retained attorney concerning the defense of insured's claim is a matter of common interest to both insured and insurer [to which] insured has a right.' . . . Thus, WS [law firm] is not required to turn over communications between itself and the insurer that are unrelated to the case.")

- 625 Milwaukee, LLC v. Switch & Data Facilities Co., Case No. 06-C-0727, 2008 U.S. Dist. LEXIS 19943, at \*4 n.2, \*5 (E.D. Wis. Feb. 29, 2008) (analyzing implications of a joint representation by the law firms of Blank Rome and Quarles & Brady and a parent and its wholly owned subsidiary, which the parent sold to another company; noting that the change in the subsidiary's "ownership does not alter its existence"; explaining that the former subsidiary had now sued its former parent; "The parties agree that Wisconsin law governs the issues of document ownership and attorney-client privilege inasmuch as this is a diversity case. In Wisconsin, 'end product' documents such as filed pleadings, final versions of documents prepared for the client's use, and correspondence with the client or opposing counsel belong to the client." (emphasis added); ultimately concluding that the two law firms jointly represented the parent and the wholly owned subsidiary in the sales transaction, and therefore had to produce pre-transaction documents and some post-transaction documents that referred to the law firm's service before the transaction).
- Pennsylvania LEO 2007-100 (2007) (holding that the client owns the files created by a lawyer while representing the client; explaining that the client might not be entitled to some internal documents; "Examples of items that might fall outside the scope of the formal 'file' are internal memoranda and notes generated primarily for a lawyer's own purposes in working on the client's problem. Particularly in the context of complex litigation involving numerous lawyers, it is nearly impossible to define on an a priori basis what must be part of the client's file." (footnote omitted); noting the debate between states following the "entire file" approach and the "limited file" approach; following the latter, but with a proviso: "A substantial subset of the 'entire file' group of jurisdictions allow other 'non-substantive' items, generally those associated with law practice management, to be excluded from the 'file' that belongs to the client. Under this approach, the client would not ordinarily be entitled to internal assignment documents, internal billing records, or purely



private impressions of counsel."; noting that clients and lawyers can address file ownership in a retainer agreement, although "it is likely that any such agreement will undergo close scrutiny if a dispute arises between the client and the lawyer"; adopting the following guidelines: "A client is entitled to receive all materials in the lawyer's possession that relate to the representation and that have potential utility to the client and the protection of the client's interests. Items to which the client has a presumed right of access and possession include: (1) all filed or served briefs, pleadings, discovery requests and responses; (2) all transcripts of any type; (3) all affidavits and witness statements of any type; (4) all memoranda of law, case evaluations, or strategy memoranda; (5) all substantive correspondence of any type (including email), including correspondence with other parties or their counsel, all correspondence with the client, and correspondence with third parties; (6) all original documents with legal significance, such as wills, deeds and contracts; (7) all documents or other things delivered to the lawyer by or on behalf of the client; and (8) all invoices or statements sent to the client. The Committee's expectation is that the client would not normally need or want, and therefore would not typically be given, in response to a generalized request for access to or possession of the 'file', the following types of documents: (a) drafts of any of the items described above, unless they have some independent significance (such as draft chains relating to contract negotiations); (b) attorney notes from the lawyer's personal files, unless those notes have been placed by the attorney in the case file because they are significant to the representation; (c) copies of electronic mail messages, unless they have been placed by the attorney in the file because they are significant to the representation; (d) memoranda that relate to staffing or law office administration; (e) items that the lawyer is restricted from sharing with the client due to other legal obligations (such as 'restricted confidential' documents of a litigation adversary that are limited to counsel's eyes only). A client is entitled, however, to make a more specific request for items that are not generally put in the file, and the client is entitled to such items unless there are substantial grounds to decline the request. So long as the relevant considerations are fully discussed with the client, the lawyer and client may enter into a reasonable agreement that attempts to define the types or limit the scope of documents that will be retained in the client's file and defines the client's and lawyer's right to such contents, and the cost for providing access or possession.").

- Utah LEO 06-02 (6/2/06) ("An unexecuted legal instrument such as a trust or will, or an unfiled pleading, such as an extraordinary writ, is not part of the 'client's file' within the meaning of Rule 1.16(d). The lawyer is not required by Rule 1.16 to deliver these documents to the client at the termination of the representation."; "Comment 9 of Rule 1.16 states: 'It is impossible to set forth one all encompassing definition of what constitutes the client's file. However, the client file generally would include the following: all papers and property the client provides to the lawyer; litigation material such as pleadings,

motions, discovery, and legal memoranda; all correspondence; depositions; expert opinions; business records; exhibits or potential evidence; and witness statements. The client file generally would not include the following: the lawyer's work product such as recorded mental impressions; research notes; legal theories; internal memoranda; and unfiled pleadings."; "[D]epriving the client of unexecuted legal instruments (such as agreements, trusts and wills) will not normally prejudice the client's interests. The same is true of withholding from the client unfiled legal pleadings. The client is entitled to the client's own papers and property and the 'client's file,' and the client may deliver these to new counsel for the purpose of preparing the legal instruments and the legal pleadings in accordance with the instructions of the client."; "Our interpretation of Comment 9 also is consistent with public policy on two fronts: (i) lawyers should not be exposed to liabilities arising from a requirement that the lawyer deliver to the client upon termination of the representation legal instruments that are neither executed nor filed as such instruments may be incomplete drafts or unchecked final documents not appropriate for execution or filing by the client or the client's new counsel; and (ii) the Utah Rules of Professional Conduct should not be interpreted in a manner to encourage and facilitate unscrupulous clients in defrauding lawyers by requesting the preparation of legal instruments, then terminating the attorney-client relationship after the legal instruments are prepared, for the purpose of obtaining the lawyer's services without payment.").

- Kansas LEO 92-5 (7/30/92) ("When counsel has been paid in full and discharged by client and no action is pending on the case file, we opine 'client's property' under MRPC 1.16(d) includes (1) documents brought to the attorney by the client or client's agents, (2) deposition or other discovery documents pertinent to the case for which client was billed and has paid for (expert witness opinions, etc.) and (3) pleadings and other court papers and such other documents as are necessary to understand [sic] and interpret documents highlighted above. Such documents, being 'client property' must be returned unconditionally and additional photocopy fees as part of an unconditional return of such documents are inconsistent with MRPC 1.16(d). Other documents requested by client not amounting to this definition of 'client property' may be copied at a reasonable expense to the [sic] client, such 'expense' to represent actual costs, not a profit. Work product, as defined elsewhere in case law, is not client property under this rule.").

**Third**, under either the "entire file" or the "end-product" approach, most states permit lawyers to withhold from their former clients purely administrative internal law firm documents.

- Arizona LEO 15-02 (06/2015) ("In general, a lawyer has an ethical obligation to provide, at the client's request upon termination of the representation, all

documents reflecting work performed for the client. A lawyer's obligation to preserve documents reflecting work performed for the client does not, however, extend to electronic or other documents that are duplicative of other documents generated or received in the course of the representation, incidental to the representation, or not typically maintained by a working lawyer, unless the lawyer has reason to believe that, in all the circumstances, the client's interests require that these documents be preserved for eventual turning over to the client. To the extent Ops. 08-02 and 13-02, or earlier committee opinions, may be read to suggest otherwise, they are withdrawn."; "Where a client makes such a request, a lawyer does not act unethically by charging the client for additional copies of documents provided during the representation free of charge. Consistent with Comment 9 to ER 1.16, a lawyer may charge the client for additional copies provided the client has received a copy of the documents.").

- Ohio LEO 2010-2 (4/9/10) ("Internal office management memoranda such as personnel assignments or conflicts of interest checks will probably not be items reasonably necessary to a client's representation. But, a lawyer's notes regarding facts about the case will most likely be an item reasonably necessary to a client's representation. If a lawyer's note includes both items reasonably necessary to a client's representation and items not reasonably necessary, a lawyer may ethically redact from the note those items not reasonably necessary, or if more practical, a lawyer may prepare a note for the client that includes only the items reasonably necessary to the client's representation. Any expense, such as copying costs, incurred by a lawyer in turning over a client's file to a client upon request must be borne by the lawyer." (emphasis added); relying on a unique Ohio Rule 1.16(d): "As part of the termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to protect a client's interest. The steps include giving due notice to the client, allowing reasonable time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules. Client papers and property shall be promptly delivered to the client. 'Client papers and property' may include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client's representation."; explaining that "[i]n Ohio there is no common law lien on a client's files in a contingent fee case. . . . And, in Ohio there is no statutory lien on the client files. The legality of a lien is a question of law outside this Board's advisory authority."; noting that "[i]n Ohio, lawyers have violated Prof. Cond. Rule 1.16(d) (and other rules) by refusing to turnover [sic] client files to the client.").
- Saroff v. Cohen, No. E2008-00612-COA-R3-CV, 2009 Tenn. App. LEXIS 84, at \*19 (Tenn. Ct. App. Feb. 25, 2009) (holding that a lawyer did not have to make invoices available to the client; "We agree that the invoices are property of the law firm. . . . The invoices were accounts receivable records generated

for the purpose of memorializing the cost to the client of legal services rendered and were maintained in the general course of business. The invoices did not become part of the client file simply because they were placed in the client's file. In addition, the invoices are not considered work product because they were not prepared for the benefit of Mr. Saroff; rather the invoices were generated for the benefit of Mr. Cohen and the firm to ensure payment of legal services rendered." (emphasis added)).

- Arizona LEO 04-01 (1/2004) ("While an attorney may withhold internal practice management memoranda that does not reflect work done on the client's behalf, the burden is on the attorney claiming the lien to identify with specificity any other documents or materials in the file which the attorney asserts are subject to the retaining lien, and which would not prejudice the client's interests, if withheld from the client.").
- Wisconsin LEO E-00-03 (2003) ("It has generally been recognized that each client file is the client's property even though that file is maintained by the lawyer in the lawyer's office. . . . However, certain papers maintained by the lawyer in client files may be the work product of the lawyer and need not be produced to the client on demand. Where this line of demarcation is drawn has never been precisely defined. The Professional Ethics Committee finds the following definition of which papers the lawyer is not required to produce at the client's demand to be sound and instructive. There are two primary areas in which the lawyer properly retains papers and documents that do not constitute papers and property to which the client is entitled. One includes documents used by the attorney to prepare initial documents for the client, in which a third party, for example, another client, has a right to nondisclosure. A lawyer has the right to withhold pleadings or other documents related to the lawyer's representation of other clients that the lawyer used as a model on which to draft documents for the current client. However, the product drafted by the lawyer may not be withheld. A second area involves those documents that would be considered personal attorney work product and not papers and property to which the client is entitled. Certain materials may be withheld such as, for example, internal memoranda concerning the client file, conflict checks, personnel assignments, and lawyers' notes reflecting personal impressions and comments relating to the business of representing the client. This information is personal attorney work product that is not needed to protect the client's interests, and does not constitute papers or property to which the client is entitled."; also explaining that lawyers may charge the client for the cost of copying files that the client requests, and can also charge for "staff and professional time necessarily incurred to search databases to identify files that contain documents that may fall within the client's request" (emphasis added)).
- Colorado LEO 104 (4/17/99) ("There are two primary areas in which the lawyer properly retains papers and documents which do not constitute papers and property to which the client is entitled. One includes documents, used by

the attorney to prepare initial documents for the client, in which a third party, e.g., another client, has a right to non-disclosure. A lawyer has the right to withhold pleadings or other documents related to the lawyer's representation of other clients that the lawyer used as a model on which to draft documents for the present client. However, the product drafted by the lawyer may not be withheld."; "A second area involves those documents that would be considered personal attorney-work product, and not papers and property to which the client is entitled. Certain documents may be withheld: for example, internal memoranda concerning the client file, conflicts checks, personnel assignments, and lawyer notes reflecting personal impressions and comments relating to the business of representing the client. This information is personal attorney-work product that is not needed to protect the client's interests, and does not constitute papers and property to which the client is entitled."; "While there is some authority to the contrary, the majority of authority asserts that preliminary drafts, legal research, and legal research memoranda are not properly retained by the attorney as personal attorney-work product and must be surrendered. The Committee agrees with this view."; "Internal firm administration documents, such as conflicts checks and personnel assignments, properly are retained as personal attorney-work product. The lawyer may withhold certain firm documents that were intended for law office management or use. Production would not be needed to protect the client's interests in the matter."; "It is much more difficult to address personal lawyer notes, especially those notes containing personal impressions and comments. While recognizing that clear direction in this area depends on the specific facts encountered by a lawyer, the Committee reminds lawyers that the client's interests must be protected by the extent reasonably practicable. For example, if certain lawyer notes contain factual information, such as the content of client interviews, the information in those notes should be delivered to the client. In the event that certain personal impressions are intertwined with such factual information, those notes could be redacted or summarized to protect the interests of both the client and the lawyer."; "The Committee notes that there are certain circumstances in which the lawyer is required to maintain copies of certain documents for a period of time regardless of production to the client. See, e.g., C.R.C.P., Chapter 23.3, Rules Governing Contingent Fees, Rule 4(b) (retention of a copy of each contingent fee agreement for a period of six years); Colo. RPC 1.15(a)] (complete records of [trust] account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation)."; "Preservation of drafts of documents in the ordinary course of the attorney's business is not a matter addressed by this opinion. However, if a lawyer does retain such drafts, they generally are papers to which the client is entitled.").

- California LEO 2007-174 (2007) ("An attorney is ethically obligated, upon termination of employment, promptly to release to a client, at the client's request: (1) an electronic version of e-mail correspondence, because such

- items come within a category subject to release; (2) an electronic version of the pleadings, because such items . . . come within a category subject to release; (3) an electronic version of discovery requests and responses, because such items are subject to release as reasonably necessary to the client's representation; (4) an electronic deposition and exhibit database, because such an item itself contains items that come within categories subject to release; and (5) an electronic version of transactional documents, because such items are subject to release as reasonably necessary to the client's representation. The attorney's ethical obligation to release any electronic items, however, does not require the attorney to create such items if they do not exist or to change the application (e.g., from Word (.doc) to WordPerfect (.wpd)) if they do exist. Prior to release, the attorney is ethically obligated to take reasonable steps to strip from each of these electronic items any metadata reflecting confidential information belonging to any other client.").
- Illinois LEO 94-13 (1/1995) (explaining what materials a lawyer must provide to a former client; "With respect to the sixth category, internal administrative materials, the Committee does not believe that a client is entitled to copies of or access to such materials under either Rule 1.4(a) or Rule 1.15(b). These materials are not relevant to the status of the client's matter and are usually prepared only for the lawyer's internal use. Nor are these materials property of the client that a lawyer must deliver upon request. Thus the failure of the lawyer to deliver or provide access to such materials will not prejudice the client." (emphasis added); "A lawyer may refuse to disclose to the client certain law firm documents reasonably intended only for internal review, such as a memorandum discussing which lawyers in the firm should be assigned to a case, whether a lawyer must withdraw because of the client's misconduct, or the firm's possible malpractice liability to the client. The need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved."; "With respect to the seventh category, which comprises the lawyer's notes and factual or legal research material, including the type of investigative materials involved in the present inquiry, the Committee is aware that various courts and ethics committees have taken differing positions on the nature of such materials. In the absence of controlling Illinois authority or a clear majority in the other states, the Committee concludes that the better rule is that these materials are the property of the lawyer. As such, the materials generally need not be delivered to the client."; "In summary, the Committee concludes under the facts presented that the lawyer may properly refuse to provide or disclose the lawyer's materials to the client because the materials in question are the lawyer's property and disclosure to the client could lead to harm to the client and his former wife. The Committee also notes that the lawyer could, in the exercise of the lawyer's professional judgment, release the materials to the client, but the lawyer is not required to do so by the Rules of Professional Conduct.").

- North Carolina RPC 178 (10/21/94) (holding that a lawyer must provide the lawyer's files to multiple clients, although the lawyer can withhold personal notes before providing a copy to the clients).
- North Carolina RPC 169 (1/14/94) (explaining North Carolina's unique provision allowing a lawyer to withhold the lawyer's "personal notes" when providing a file to a former client (citation omitted)).

**Fourth**, not surprisingly, lawyers normally may also withhold other clients'

documents that have been placed in the file.

- California LEO 2007-174 (2007) ("An attorney is ethically obligated, upon termination of employment, promptly to release to a client, at the client's request: (1) an electronic version of e-mail correspondence, because such items come within a category subject to release; (2) an electronic version of the pleadings, because such items . . . come within a category subject to release; (3) an electronic version of discovery requests and responses, because such items are subject to release as reasonably necessary to the client's representation; (4) an electronic deposition and exhibit database, because such an item itself contains items that come within categories subject to release; and (5) an electronic version of transactional documents, because such items are subject to release as reasonably necessary to the client's representation. The attorney's ethical obligation to release any electronic items, however, does not require the attorney to create such items if they do not exist or to change the application (e.g., from Word (.doc) to WordPerfect (.wpd)) if they do exist.") (emphasis added).
- Wisconsin LEO E-00-03 (2003) ("It has generally been recognized that each client file is the client's property even though that file is maintained by the lawyer in the lawyer's office. . . . However, certain papers maintained by the lawyer in client files may be the work product of the lawyer and need not be produced to the client on demand. Where this line of demarcation is drawn has never been precisely defined. The Professional Ethics Committee finds the following definition of which papers the lawyer is not required to produce at the client's demand to be sound and instructive. There are two primary areas in which the lawyer properly retains papers and documents that do not constitute papers and property to which the client is entitled. One includes documents used by the attorney to prepare initial documents for the client, in which a third party, for example, another client, has a right to nondisclosure. A lawyer has the right to withhold pleadings or other documents related to the lawyer's representation of other clients that the lawyer used as a model on which to draft documents for the current client. However, the product drafted by the lawyer may not be withheld. A second area involves those documents that would be considered personal attorney work product and not papers and property to which the client is entitled. Certain materials may be withheld

such as, for example, internal memoranda concerning the client file, conflict checks, personnel assignments, and lawyers' notes reflecting personal impressions and comments relating to the business of representing the client.

This information is personal attorney work product that is not needed to protect the client's interests, and does not constitute papers or property to which the client is entitled." (emphasis added); also explaining that lawyers may charge the client for the cost of copying files that the client requests, and can also charge for "staff and professional time necessarily incurred to search databases to identify files that contain documents that may fall within the client's request").

- Colorado LEO 104 (4/17/99) ("There are two primary areas in which the lawyer properly retains papers and documents which do not constitute papers and property to which the client is entitled. One includes documents, used by the attorney to prepare initial documents for the client, in which a third party, e.g., another client, has a right to non-disclosure. A lawyer has the right to withhold pleadings or other documents related to the lawyer's representation of other clients that the lawyer used as a model on which to draft documents for the present client. However, the product drafted by the lawyer may not be withheld." (emphasis added); "A second area involves those documents that would be considered personal attorney-work product, and not papers and property to which the client is entitled. Certain documents may be withheld: for example, internal memoranda concerning the client file, conflicts checks, personnel assignments, and lawyer notes reflecting personal impressions and comments relating to the business of representing the client. This information is personal attorney-work product that is not needed to protect the client's interests, and does not constitute papers and property to which the client is entitled."; "While there is some authority to the contrary, the majority of authority asserts that preliminary drafts, legal research, and legal research memoranda are not properly retained by the attorney as personal attorney-work product and must be surrendered. The Committee agrees with this view."; "Internal firm administration documents, such as conflicts checks and personnel assignments, properly are retained as personal attorney-work product. The lawyer may withhold certain firm documents that were intended for law office management or use. Production would not be needed to protect the client's interests in the matter."; "It is much more difficult to address personal lawyer notes, especially those notes containing personal impressions and comments. While recognizing that clear direction in this area depends on the specific facts encountered by a lawyer, the Committee reminds lawyers that the client's interests must be protected by the extent reasonably practicable. For example, if certain lawyer notes contain factual information, such as the content of client interviews, the information in those notes should be delivered to the client. In the event that certain personal impressions are intertwined with such factual information, those notes could be redacted or summarized to protect the interests of both the client and the lawyer."; "The Committee notes that there are certain circumstances in which



the lawyer is required to maintain copies of certain documents for a period of time regardless of production to the client. See, e.g., C.R.C.P., Chapter 23.3, Rules Governing Contingent Fees, Rule 4(b) (retention of a copy of each contingent fee agreement for a period of six years); Colo. RPC 1.15(a), (complete records of [trust] account funds and other property shall be kept by the lawyer and shall be preserved for a period of seven years after termination of the representation)."; "Preservation of drafts of documents in the ordinary course of the attorney's business is not a matter addressed by this opinion. However, if a lawyer does retain such drafts, they generally are papers to which the client is entitled.").

- Delaware LEO 1997-5 (11/25/97) ("In the Committee's view, the Inquiring Attorney's obligations to his former client under Rule 1.16(d) do not, under the circumstances presented, include surrendering information which Inquiring Attorney received pursuant to the Joint Defense Agreement. First, it does not appear that the information is 'papers and property to which the client is entitled.' The information was provided to the Inquiring Attorney by counsel for B pursuant to express limitations set forth in the Joint Defense Agreement. Moreover, to the extent that the information includes the Inquiring Attorney's impressions and work product, it is not property to which A is automatically entitled."; "Second, Rule 1.16(d) requires an attorney whose engagement is terminated to take steps that are 'reasonably practicable' to protect the former client's interest. In the Committee's view, it would be 'reasonably practicable' for the Inquiring Attorney to breach the Joint Defense Agreement by providing the information to a person who is outside the scope of the Agreement. Doing so could be extremely prejudicial to B, who while not the client of the Inquiring Attorney, is still owed a duty of fairness. See Rule 3.4 (addressing fairness to opposing party in litigation setting) and Rule 4.4 (prohibiting a lawyer from using methods of obtaining evidence that would violate the rights of third parties including adverse parties in litigation). Indeed, if the Inquiring Attorney revealed the information to A's new attorney, the Inquiring Attorney would violate B's right under the Joint Defense Agreement."; "Third, A's new attorney presumably can gain access to the information by becoming a party to the Joint Defense Agreement. Thus, to the extent the new attorney needs the information, there appears to be a readily available way for him to get it without prejudicing B."; "Finally, the Committee does not believe that Inquiry Attorney's refusal to surrender the information constitutes a violation of Rule 1.9. The failure to turn over the information does not constitute using the information to the former client's disadvantage as contemplated by Rule 1.9.").

**Fifth**, some states allow lawyers to withhold other material.

- Ohio LEO 2010-2 (4/9/10) ("Whether a lawyer's notes of an interview with a current or former client are considered client papers to which the current or former client is entitled upon request pursuant to Prof. Cond. Rule 1.16(d)

depends upon whether the notes are items reasonably necessary to the client's representation. This determination requires the exercise of a lawyer's professional judgment. When a client makes a file request to a lawyer, the lawyer's decision as to whether to relinquish the lawyer's notes will require examination of the lawyer's notes in the file to determine whether the notes are items reasonably necessary to the client's representation pursuant to Prof. Cond. Rule 1.16(d). A lawyer's notes to himself or herself regarding passing thoughts, ideas, impression[s], or questions will probably not be items reasonably necessary to a client's representation. Internal office management memoranda such as personnel assignments or conflicts of interest checks will probably not be items reasonably necessary to a client's representation. But, a lawyer's notes regarding facts about the case will most likely be an item reasonably necessary to a client's representation. If a lawyer's note includes both items reasonably necessary to a client's representation and items not reasonably necessary, a lawyer may ethically redact from the note those items not reasonably necessary, or if more practical, a lawyer may prepare a note for the client that includes only the items reasonably necessary to the client's representation. Any expense, such as copying costs, incurred by a lawyer in turning over a client's file to a client upon request must be borne by the lawyer."; relying on a unique Ohio Rule 1.16(d); "As part of the termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to protect a client's interest. The steps include giving due notice to the client, allowing reasonable time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules. Client papers and property shall be promptly delivered to the client. 'Client papers and property' may include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client's representation."; explaining that "[i]n Ohio there is no common law lien on a client's files in a contingent fee case. . . . And, in Ohio there is no statutory lien on the client files. The legality of a lien is a question of law outside this Board's advisory authority."; noting that "[i]n Ohio, lawyers have violated Prof. Cond. Rule 1.16(d) (and other rules) by refusing to turnover [sic] client files to the client.").

- San Diego County LEO 1984-3 (1984) ("Upon withdrawal, an attorney is obligated to deliver to the client all papers and property to which the client is entitled. Accordingly, the attorney must provide the client with the original of all pleadings, correspondence, deposition transcripts, and similar papers and property contained in the client's file. Even with a consensually created possessory lien over the client's file, an attorney may not withhold the file if to do so would prejudice the client. Should the attorney desire to retain copies of such papers or property, any expenses incurred in producing those copies must be borne by the attorney."; "However, pursuant to statutory and decisional law, the client is not 'entitled' to any papers or property which constitute or reflect an attorney's impressions, opinions, legal research or

theories as defined by the 'absolute' work product privilege of the Code of Civil Procedure section 2016, subdivision (b). Although disclosure of the attorney's work product is not obligated, such disclosure is recommended as a matter of professional ethics and courtesy.").

(b) States differ in their approach to a lawyer's right to charge former clients for copying documents that lawyers surrender to those former clients.

The Restatement addresses a lawyer's right to charge the client for copying the file.

Because a lawyer's normal duties include collection and delivery of documents that came from the client or that the client should have, a lawyer paid by the hour should be compensated for time devoted to that task. Copying expenses may be separately billed when allowed under the principles stated in § 38(3)(a) and Comment e thereto. When the client seeks copies that the lawyer was not obliged to furnish in the absence of such a request, the lawyer may require the client to pay the copying costs.

Restatement (Third) of Law Governing Lawyers § 46 cmt. e (2000) (emphasis added).

Courts also disagree about lawyers' ability to bill former clients for copies of documents the former clients' request.

Some bars have explained that a lawyer may charge the client for such copies.

- Arizona LEO 15-02 (06/2015) ("In general, a lawyer has an ethical obligation to provide, at the client's request upon termination of the representation, all documents reflecting work performed for the client. A lawyer's obligation to preserve documents reflecting work performed for the client does not, however, extend to electronic or other documents that are duplicative of other documents generated or received in the course of the representation, incidental to the representation, or not typically maintained by a working lawyer, unless the lawyer has reason to believe that, in all the circumstances, the client's interests require that these documents be preserved for eventual turning over to the client. To the extent Ops. 08-02 and 13-02, or earlier committee opinions, may be read to suggest otherwise, they are withdrawn."; "Where a client makes such a request, a lawyer does not act unethically by charging the client for additional copies of documents provided during the representation free of charge. Consistent with Comment 9 to ER 1.16, a lawyer may charge the client for additional copies provided the client has received a copy of the documents.").

- Illinois LEO 94-14 (1/1995) ("All original papers delivered to the lawyer by the client must be returned to the client. The lawyer may make copies of such material, if desired, at the lawyer's expense. With respect to other parts of the lawyer's file to which the client is entitled to access, including copies of documents that the client has already received, the originals may be retained by the lawyer and the client should be permitted to have copies at the client's expense. Consistent with Opinion No. 94-13, the Committee does not believe that a lawyer is required to act as a storage facility for clients, and therefore the lawyer is entitled to compensation for the reasonable expense involved in retrieving the files in question and providing copies of materials that the client has already received. The lawyer is also entitled to compensation for the reasonable expense of providing copies of any materials, such as routine administrative correspondence with third parties, that the client may not have received because the lawyer had no duty to provide the client with copies of such materials in the normal course of the representation, but to which the client is entitled to access upon reasonable request.").
- North Carolina RPC 227 (7/18/97) (holding that under North Carolina ethics rules a lawyer does not have to supply the lawyer's personal notes to a client who asks for a copy of the file).
- Illinois LEO 94-13 (1/1995) (addressing the obligation of a lawyer to provide files to a former client; holding that the lawyer must provide "reasonable access" to correspondence between the lawyer and the client, but does not have to "recreate or provide new copies of correspondence previously provided the client unless the client is willing to compensate the lawyer for the reasonable expense involved"; also holding that the "Committee does not believe that Rule 1.4(a) requires a lawyer to provide clients with copies of routine administrative correspondence with third parties, such as correspondence with court reporters or other service providers. A client is entitled under Rule 1.4(a) to reasonable access to copies of correspondence that the client has already received as well as copies of routine administrative correspondence with third parties. However, the lawyer is not required to provide copies of such materials unless the client is willing to compensate the lawyer for the reasonable expense involved."; adopting the same approach to pleadings that have been filed in court or with administrative agencies; also holding that the "client is entitled under Rule 1.4(a) to reasonable access to copies of the final version (as distinguished from the lawyer's drafts or working copies) of such documents in the lawyer's files, but the Committee believes that a lawyer is not required to furnish a client with additional copies unless the client is willing to compensate the lawyer for the reasonable expense involved"; explaining that clients are not entitled to copies of "internal administrative materials" even for the lawyer's internal use; "A lawyer may refuse to disclose to the client certain law firm documents reasonably intended only for internal review, such as a memorandum discussing which lawyers in the firm should be assigned to a case, whether a lawyer must

withdraw because of the client's misconduct, or the firm's possible malpractice liability to the client. The need for lawyers to be able to set down their thoughts privately in order to assure effective and appropriate representation warrants keeping such documents secret from the client involved." (quoting Restatement (Third) of the Law Governing Lawyers § 58 cmt. d); "[T]he Committee concludes that the better rule is that these materials are the property of the lawyer. As such, the materials generally need not be delivered to the client"; reaching essentially the same conclusion about a lawyer's research materials).

- Kansas LEO 92-5 (7/30/92) ("When counsel has been paid in full and discharged by client and no action is pending on the case file, we opine 'client's property' under MRPC 1.16(d) includes (1) documents brought to the attorney by the client or client's agents, (2) deposition or other discovery documents pertinent to the case for which client was billed and has paid for (expert witness opinions, etc.) and (3) pleadings and other court papers and such other documents as are necessary to understand [sic] and interpret documents highlighted above. Such documents, being 'client property' must be returned unconditionally and additional photocopy fees as part of an unconditional return of such documents are inconsistent with MRPC 1.16(d). Other documents requested by client not amounting to this definition of 'client property' may be copied at a reasonable expense to the [sic] client, such 'expense' to represent actual costs, not a profit. Work product, as defined elsewhere in case law, is not client property under this rule.").

Other bars hold that lawyers must pay for such copies themselves.

- Ohio LEO 2010-2 (4/9/10) ("Any expense, such as copying costs, incurred by a lawyer in turning over a client's file to a client upon request must be borne by the lawyer."; relying on a unique Ohio Rule 1.16(d); "As part of the termination of representation, a lawyer shall take steps, to the extent reasonably practicable, to protect a client's interest. The steps include giving due notice to the client, allowing reasonable time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules. Client papers and property shall be promptly delivered to the client. 'Client papers and property' may include correspondence, pleadings, deposition transcripts, exhibits, physical evidence, expert reports, and other items reasonably necessary to the client's representation."; explaining that "[i]n Ohio there is no common law lien on a client's files in a contingent fee case. . . . And, in Ohio there is no statutory lien on the client files. The legality of a lien is a question of law outside this Board's advisory authority."; noting that "[i]n Ohio, lawyers have violated Prof. Cond. Rule 1.16(d) (and other rules) by refusing to turnover [sic] client files to the client.").
- Pennsylvania LEO 1996-157 (11/20/96) ("Consistent with the concept that the client is entitled to receive what he has paid for, it is my opinion that whatever

documents you conclude are 'papers and property to which the client is entitled,' that those original documents are your client's property and should be provided. I do not believe it would be appropriate to provide a 'copy' of the file at the client's expense. To the extent you wish to retain any portion of the file, the associated duplicating expense should be treated by you as 'a cost of doing business' and should not be billed to the client.").

- San Diego County LEO 1984-3 (1984) ("Upon withdrawal, an attorney is obligated to deliver to the client all papers and property to which the client is entitled. Accordingly, the attorney must provide the client with the original of all pleadings, correspondence, deposition transcripts, and similar papers and property contained in the client's file. Even with a consensually created possessory lien over the client's file, an attorney may not withhold the file if to do so would prejudice the client. Should the attorney desire to retain copies of such papers or property, any expenses incurred in producing those copies must be borne by the attorney."; "However, pursuant to statutory and decisional law, the client is not 'entitled' to any papers or property which constitute or reflect an attorney's impressions, opinions, legal research or theories as defined by the 'absolute' work product privilege of the Code of Civil Procedure section 2016, subdivision (b). Although disclosure of the attorney's work product is not obligated, such disclosure is recommended as a matter of professional ethics and courtesy.").

(c) One bar has indicated that lawyers may retain a copy of the client's file at the lawyer's expense -- even over the client's objection.

- New York LEO 780 (12/8/04) (assessing a lawyer's right to retain a copy of the client's file after termination of the attorney-client relationship; "Although the Code does not explicitly address the issue of whether the lawyer has an interest in the file that would permit the lawyer to retain copies of file documents, there can be little doubt that the lawyer has such an interest."; "In summary, we agree with the several ethics opinions from other jurisdictions that a lawyer may retain copies of the file at the lawyer's expense. This general rule may be subject to exceptions that we are not required to elaborate on in this opinion, such as where the client has a legal right to prevent others from copying its documents and wishes for legitimate reasons to ensure that no copies of a particular document be available under any circumstances." (footnote omitted); also holding that "[a] lawyer may generally retain copies of documents in the client's file at the lawyer's own expense, even over the client's objection. As a condition of foregoing this right, a lawyer may seek to have the client release the lawyer from malpractice liability.").

This principle could become important if the lawyer suspects that the client has used the lawyer's services to engage in some wrongdoing, and wants to retain a copy in case anyone challenges the lawyer's actions.

**Best Answer**

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

N 8/12 [I], B 10/15

## **File Ownership if Clients Have Not Paid the Lawyer**

### **Hypothetical 6**

You represented a local car dealer in a landlord-tenant dispute until she fired you. You probably should have seen this coming, because she did not pay the retainer she agreed to pay -- and actually has never paid any of her bills. Amazingly, the car dealer now wants the file that you created while representing her.

Must you give your former client the file you generated while representing her?

### **YES (PROBABLY)**

#### **Analysis**

States take different positions on a client's right to the file a lawyer generates while representing the client.

Lawyers can face two separate scenarios involving the files they create while representing clients. First, lawyers must determine what portions of their file they must give clients or former clients who have fully paid them. Second, lawyers who have not been fully paid must assess whether they can withhold all or part of the file until their clients pay them (relying on what is called a "retaining" lien).

Although not involving lawyer files, it is worth mentioning two other types of liens that lawyers might assert.

Lawyers representing clients who may recover a judgment might assert a lien over that judgment (this is commonly called a "charging" lien). Lawyer most frequently assert a "charging" lien in contingent fee cases, because those lawyers generally are not paid during the course of a representation. But lawyers representing clients under some alternative fee arrangement might assert a "charging" lien even if they have been



paid an hourly rate through the representation (such as a lower-than-normal hourly rate, to be supplemented by a contingent fee payment upon recovery of a judgment).

The other type of lien involves something other than the file for a future judgment. For instance, lawyers might arrange for some security interest in the client's house or other asset -- and assert a lien over that asset if the client does not pay the underlying obligation. Those types of liens are generally governed by ABA Model Rule 1.8 or its state equivalent, which applies to business relationships between lawyers and their clients.

"Retaining" liens generate perhaps the most controversy in case law, because they essentially involve the lawyers holding their files "hostage" until the clients pay them.

### **ABA Model Rules**

In dealing with the ethics side of this issue, the ABA Model Rules takes a surprisingly neutral and state-specific approach.

Upon termination of representative, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as . . . surrendering papers and property to which the client is entitled . . . . The lawyer may retain papers relating to the client to the extent permitted by other law.

ABA Model Rule 1.16(d) (emphasis added).

### **Restatement**

The Restatement also deals with this issue -- in much more detail than the ABA Model Rules.

At the end of the lengthy Restatement sections discussing lawyers' obligation to turn over their files to clients who have fully paid them, the Restatement notes an exception if the clients have not fully paid their lawyers.

The general Restatement requirement that the lawyer provides documents in the lawyer's possession is subject to the lawyer's right to

decline to deliver to a client or former client an original or copy of any document under circumstance permitted by § 43(1) [which deals with the lawyer's ability to retain document until the lawyer is paid].

Restatement (Third) of Law Governing Lawyers § 46(4) (2000).

Another expansive Restatement section deals with such retaining liens.

Except as provided in Subsection (2) or by statute or rule, a lawyer does not acquire a lien entitling the lawyer to retain the client's property in the lawyer's possession in order to secure payment of the lawyer's fees and disbursements. A lawyer may decline to deliver to a client or former client an original or copy of document prepared by the lawyer or at the lawyer's expense if the client or former client has not paid all fees and disbursements due for the lawyer's work in preparing the document and nondelivery would not unreasonably harm the client or former client.

Restatement (Third) of Law Governing Lawyers § 43(1) (2000).

Another Restatement section discusses a lawyer's general right to obtain a security interest in any property that the client owns or might acquire (not just a file).

Unless otherwise provided by statute or rule, client and lawyer may agree that the lawyer shall have a security interest in property of the client recovered for the client through the lawyer's efforts, as follows: (a) the lawyer may contract in writing with the client for a lien on the proceeds of the representation to secure payment for the lawyer's services and disbursements in that matter; (b) the lien becomes binding on a third party when the party has notice of the lien; (c) the lien applies only to the amount of fees and disbursements claimed reasonably and in good faith for the lawyer's services performed in the representation; and

(d) the lawyer may not unreasonably impede the speedy and inexpensive resolution of any dispute concerning those fees and disbursements or the lien.

Restatement (Third) of Law Governing Lawyers § 43(2) (2000).

Not surprisingly, the Restatement acknowledges tribunals' ability to deal with such liens.

A tribunal where an action is pending may in its discretion adjudicate any fee or other dispute concerning a lien asserted by a lawyer on property of a party to the action, provide for custody of the property, release all or part of the property to the client or lawyer, and grant such other relief as justice may require.

Restatement (Third) of Law Governing Lawyers § 43(3) (2000).

A comment provides more explanation.

Retaining liens are therefore not recognized under this Section except as authorized by statute or rule and to the extent provided under Subsection (4). Under this Section, lawyers may secure fee payment through a consensual charging lien on the proceeds of a representation . . . and through contractual security interests in other assets of the client . . . and other contractual arrangements such as a prepaid deposit. The lawyer may also withhold from the client documents prepared by the lawyer or at the lawyer's expense that have not been paid for . . . .

Restatement (Third) of Law Governing Lawyers § 43 cmt. b (2000).

A comment provides an explanation.

Under this Section a lawyer generally does not acquire a nonconsensual lien on property in the lawyer's possession or recovered by the client through the lawyer's efforts. The Section thus does not recognize retaining liens on the client's documents except as provided by statute or rule . . . , although a lawyer may retain possession of a document when the client has not paid the lawyer's fee for preparing the document . . . .

Security interests in property of nonclients, for example a mortgage on the house of a client's relative, are

not as such subject to this Section. However, the nonclient might have a close relationship with the client, such as that of parent or spouse, and thus might be subject to similar pressures. Such security arrangements must meet the requirements of general law, which might treat such transactions as subject to obligations similar to those stated in this Section.

Restatement (Third) of Law Governing Lawyers § 43 cmt. a (2000).

Another comment explains how a lawyer's "retaining" lien applies to the file.

A lawyer ordinarily may not retain a client's property or documents against the client's wishes . . . . Nevertheless, under the decisional law of all but a few jurisdictions, a lawyer may refuse to return to a client all papers and other property of the client in the lawyer's possession until the lawyer's fee has been paid . . . . That law is not followed in the Section; instead it adopts the law in what is currently the minority of jurisdictions.

While a broad retaining lien might protect the lawyer's legitimate interest in receiving compensation, drawbacks outweigh that advantage. The lawyer obtains payment by keeping from the client papers and property that the client entrusted to the lawyer in order to gain help. The use of the client's papers against the client is in tension with the fiduciary responsibilities of lawyers. A broad retaining lien could impose pressure on a client disproportionate to the size or validity of the lawyer's fee claim. The lawyer also can arrange other ways of securing the fee, such as payment in advance or a specific contract with the client providing security for the fee under Subsection (4). Because it is normally unpredictable at the start of a representation what client property will be in the lawyer's hands if a fee dispute arises, a retaining lien would give little advance assurance of payment. Thus, recognizing such a lien would not significantly help financially unreliable clients secure counsel. Moreover, the leverage of such a lien exacerbates the difficulties that clients often have in suing over fee charges . . . . Efforts in some jurisdictions to prevent abuse of retaining liens demonstrate their undesirability. Some authorities prohibit a lien on papers needed to defend against a criminal prosecution, for example. However[,] the very point of a retaining lien, if accepted at all, is to coerce payment by withholding papers the client needs.

Restatement (Third) of Law Governing Lawyers § 43 cmt. b (2000).

The next comment deals with a lawyer's right to retain particular documents that the client has not specifically paid for.

A client who fails to pay for the lawyer's work in preparing particular documents (or in having them prepared at the lawyer's expense, for example by a retained expert) ordinarily is not entitled to receive those documents. Whether a payment was due and whether it was for such a document depend on the contract between the client and the lawyer, as construed from the standpoint of a reasonable client . . . .

A lawyer may not retain unpaid-for documents when doing so will unreasonably harm the client. During a representation, nonpayment of a fee might justify the lawyer in withdrawing . . . , but a lawyer who does not withdraw must continue to represent the client diligently . . . . A lawyer who has not been paid a fee due may normally retain those documents embodying the lawyer's work . . . . Even then, a tribunal is empowered to order production when the client has urgent need. A lawyer must record or deliver to a client for recording an executed operative document, such as a decree or deed, even though the client has not paid for it, when the operative effective of the document would be seriously compromised by the lawyers retention of it.

Restatement (Third) of Law Governing Lawyers § 43 cmt. c (2000).

The Restatement provides two useful illustrations of how this principle works.

Client retains Lawyer to prepare a series of memoranda for an agreed compensation of \$100 per hour. Lawyer is to send bills every month. Client pays the first two bills and then stops paying. After five months, Client requests copies of all memoranda. Lawyer must deliver all memoranda prepared during the first two months, but need not deliver those thereafter prepared until Client makes the payments.

Restatement (Third) of Law Governing Lawyers § 43 cmt. c, illus. 1 (2000).

The same facts as in Illustration 1, except that Client and Lawyer have agreed that Lawyer is to send bills every six months. After five months, Client requests copies of all the memoranda. Lawyer must deliver them all, because Client

has not failed to pay any due bill. Had Client stated in advance that it would not pay the bill, the doctrine of anticipatory breach might allow Lawyer not to deliver.

Restatement (Third) of Law Governing Lawyers § 43 cmt. c, illus. 2 (2000).

### **State Courts and Bars**

States have also dealt with a lawyer's right to withhold the file from a client who has not fully paid the lawyer.

This issue involves the propriety of viewing a lawyer's relationship with a client as essentially the same as the relationship between an auto mechanic and a customer. Auto mechanics normally can keep a customer's car until the customer pays the bill. Traditionally, lawyers have had the same power. However, the trend is clearly in the opposite direction.

Bars (and to a lesser extent, courts) take one of three basic approaches. First, some still follow the traditional "auto mechanic" approach, allowing lawyers to retain essentially all of the file until they are paid. Second, some have softened that traditional approach, and compel lawyers to turn over files if the clients would suffer in some way without the file. Third, some have essentially eliminated lawyers' retaining liens.

It makes sense to address this issue in historical order, because the trend is moving from the traditional approach to the elimination of retaining liens.

First, some courts and bars have articulated the traditional approach -- essentially allowing lawyers to retain a file until the client fully pays for them (all lawyers should check the current status of the pertinent state's approach -- given the trend against lawyers' assertion of retaining liens).

- Grimes v. Crockrom, 947 N.E.2d 452, 454-55 (Ind. Ct. App. 2011) (holding that a lawyer could assert a retaining lien even if the lawyer did not provide a

detailed record of the lawyer's work to the client; "A common law retaining lien on records in the possession of an attorney arises on rendition of services by the attorney. . . . Crockrom does not direct us in any legal authority tying the validity of a retaining lien to the provision of an itemized bill to the client. Indeed, a retaining lien is complete and effective without notice to anyone. . . . And the reasonableness of a fee, as reflected by an attorney's lien, is irrelevant to the determination of whether the lien has been established. . . . We hold that Grimes has a valid retaining lien over the medical records.").

- Brickell Place Condo Ass'n v. Joseph H. Ganguzza & Assocs., P.A., 31 So. 3d 287, 289, 290 (Fla. Dist. Ct. App. 2010) (holding that a lawyer who had arranged to charge an condominium association a flat fee for collection and foreclosure matters was bound by the ethics rules governing contingent fees, because the law firm was not paid until collection; ultimately holding that the law firm could not refuse to turn over its files until the contingency had occurred; "[T]he law firm filed a retaining lien and refused to provide the Associations with a copy of their files unless the Associations paid the law firm for its services on the pending collection and foreclosure cases even though the delinquent unit owners had not brought their accounts current."; "The Associations, therefore, claimed that the law firm[] could only recover the reasonable value for its services, limited by the maximum contract fee, upon the successful occurrence of the contingency. Because the contingency upon which the services were based has not yet occurred (the collection of the delinquent unit owners' fees), the law firm is not yet entitled to be paid for its services and the retaining lien filed by the law firm cannot be legally or ethically maintained. We agree."; "It is well recognized, and the Associations do not dispute, that an attorney may file and maintain a retaining lien against a client or former client's legal files until the lawyer's fees have been paid or an adequate security for payment has been posted." (emphasis added); "American courts, with few exceptions, have held that in cases where the client, not the attorney, terminates the relationship, the client cannot compel his former attorney to deliver up papers or documents in the attorney's possession that are secured by a retaining lien. Wintter, 618 So. 2d at 377 [Wintter v. Fabber, 618 So. 2d 375 (Fla. Dist. Ct. App. 1993)]. The exceptions are where the client pays the fees due; the client furnishes adequate security for the payment which may be due or which is subsequently found to be due; there is a clear necessity in a criminal case and a defendant cannot post security; or a lawyer's misconduct caused his withdrawal. . . . An additional exception is in contingency fee cases where the contingency has not occurred."; "An attorney or law firm may not assert a retaining lien for fees allegedly owed in a contingent fee case unless and until the contingency has occurred. Because the contingency has not occurred, the law firm could not assert a retaining lien for fees it contends it is owed on collection matters that were still pending when it was discharged. If the law firm believes it is owed money for services it rendered in the collection of delinquent unit owner fees, it may file a charging lien and is entitled to the reasonable value of its services

on the basis of quantum meruit, limited by the contract flat fee the parties agreed to.").

- Moore v. Ackerman, 876 N.Y.S.2d 831, 833, 834, 835, 837, 838 (N.Y. Sup. Ct. 2009) (addressing a successor counsel's motion to compel former to turn over files; recognizing a retaining lien, and allowing replaced counsel to charge a copying fee as a condition to releasing the file to replacement counsel; "The three remedies of an attorney discharged without cause -- the retaining lien, the charging lien, and the plenary action in quantum meruit -- are not exclusive but cumulative." (citation omitted); "The authorities are uniform . . . that [a] court has discretion "to secure the fees and to order the files to be returned to the client before the fees have been paid.""; "Otherwise applicable law . . . does not clearly establish whether the outgoing attorney is entitled to be paid or reimbursed copying charges for reproducing the client's file before releasing the original to the incoming attorney."; "Neither the Disciplinary Rules nor the Rules of the Second Department make any exception to the retention requirements where the attorney withdraws from representation or is discharged."; "Payment of the reasonable cost of copying the file could be charged to the client as a condition to a release of the client's file to incoming counsel."; "Which is not to say that a charge of \$.75 per page is reasonable.").
- Johnson v. Cherry, 256 F. App'x 1, 4-5, 5 (7th Cir. 2007) (unpublished opinion) (holding that a lawyer had not forfeited her right to a quantum meruit recovery, although the lawyer had asserted a retaining lien and failed to turn over the files to the client or her replacement lawyer; noting that the client had not pointed to any particular documents in the file that were necessary or unavailable from other sources; "But there is no actual evidence in the record before us that supports these assertions. Green [client's new lawyer] has never identified, for example, what documents he needed from the file in Clinite's [discharged lawyer] custody that were not available from other sources: e.g., from the public court file, from the court reporter(s) who recorded the depositions that were taken in this case, or from the defendants' attorneys. In that regard, Clinite made two noteworthy representations at the fees hearing below that have never been contradicted. First, Clinite stated that Johnson [client] and her counsel had obtained copies of all of the discovery from defendants' counsel, and that Johnson herself retained the original copies of any documentary evidence she had provided to Clinite."; concluding that there was no showing that the withheld documents "were essential to Green's ability to resolve the case on terms favorable to Johnson"; reversing and remanding directions to award the discharged lawyer "fees in the amount of \$3,333 and costs in the amount of \$786.93").

Although courts and bars taking this traditional approach might provide some comfort to lawyers who want to withhold the file, those lawyers must also bear in mind



the possible liability issues. A client claiming some prejudice due to the lawyer's withholding the file might file a malpractice claim against the lawyer, or file a malpractice counterclaim if the lawyer sues the former client for payment of the lawyer's bills.

Withholding of the file might not violate the ethics rules, but it could support a malpractice claim or counterclaim, and at the least affect the "atmospherics" of the dispute over the lawyer's fees. In fact, those other issues normally "trump" the ethics consideration, and prompt lawyers to turn over the file even if the ethics rules do not require it.

Second, some courts and bars have moved away from the traditional "auto mechanic" approach to a retaining lien

These courts and bars sometimes articulate standards under which the client can obtain the file without paying the lawyer. These standards represent a spectrum of prejudice the client must claim (or prove) before the lawyer becomes ethically obligated to turn over the file even if the client has not paid the lawyers.

Such courts and bars have articulated the following standards.

### **Substantial Prejudice**<sup>1</sup>

- Pennsylvania LEO 1996-157 (11/20/96) ("There is a recognized exception to asserting a lien if the retention of the file would cause 'substantial prejudice' to your client. Under these circumstances, the requirement of Rule 1.16(d) would take precedence and you would be required to surrender the file to your client. 'Substantial prejudice' as contemplated by Opinion No. 94-35 means that prejudice to the client that is not permitted by the Rules. Rules

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<sup>1</sup> This is the Restatement standard. Restatement (Third) of Law Governing Lawyers § 43 cmt. c (2000) ("A lawyer may not retain unpaid-for documents when doing so will unreasonably harm the client. During a representation, nonpayment of a fee might justify the lawyer in withdrawing . . . , but a lawyer who does not withdraw must continue to represent the client diligently . . . . A lawyer who has not been paid a fee due may normally retain those documents embodying the lawyer's work . . . . Even then, a tribunal is empowered to order production when the client has urgent need. A lawyer must record or deliver to a client for recording an executed operative document, such as a decree or deed, even though the client has not paid for it, when the operative effect of the document would be seriously compromised by the lawyer's retention of it.") (emphasis added).

- 1.15(b) and 1.16(d) (first sentence); On the other hand, if retention of the file would merely result in 'prejudice' as that term is defined in Opinion No. 94-35, which would be prejudice which is tolerated by the Rules, the file would not have to be surrendered. Whether retaining a file would result in mere 'prejudice' or 'substantial prejudice' must be determined on a case by case basis."; "I should caution that there appears to be a trend in the law to favor a client's access to his file over an attorney's lien in certain circumstances. . . . Therefore, where a right to a retaining lien is arguable, and there is a doubt as to whether withholding the file would cause 'substantial prejudice' to a client, any doubt should be resolved in favor of relinquishment and the lawyer should consider returning the file without asserting a lien and subsequently bringing a civil action for recovery of the costs."; "However, the lawyer need not deliver his internal memos and notes which had been generated primarily for his own purposes in working on the client's problem."; "Consistent with the concept that the client is entitled to receive what he has paid for, it is my opinion that whatever documents you conclude are 'papers and property to which the client is entitled,' that those original documents are your client's property and should be provided. I do not believe it would be appropriate to provide a 'copy' of the file at the client's expense. To the extent you wish to retain any portion of the file, the associated duplicating expense should be treated by you as 'a cost of doing business' and should not be billed to the client.") (emphasis added).
- Pennsylvania LEO 94-35 (5/12/94) ("Except as provided herein, the Committee concludes that where the client has not paid for services rendered, the lawyer may retain papers and other things of the client relating to the unpaid services. No law prohibits the retention of such papers and things. Except as provided herein, it is the opinion of the Committee that a client is not entitled to papers and things in a pending matter where all fees have not been paid to the lawyer. The exception to the rule is that where retention of such papers and things would cause substantial prejudice to the client, then the lawyer must return the papers and things to the client. The Committee further concludes that where the lawyer has retained papers or other property for the convenience of the client and where the client has paid for the services relating to those papers or property, then the lawyer is obligated to return such property to the client promptly upon demand. For example, where a lawyer prepares a will and is paid for that service and, subsequently, a dispute arises regarding another matter, the lawyer cannot withhold the will from the client. The client is entitled to papers and property for which he or she has paid and such papers and property must be surrendered promptly to the client. In contingency matters, the lien may not be asserted until after the happening of the contingency. If the contingency has not occurred, then the attorney may not assert the lien and must return to the client anything in the lawyer's possession that is the property of the client. Additionally, in contingency matters, if retention of certain things that are not necessarily property of the client, such as exhibits or evidence, would cause

substantial prejudice to the client (as in the case where a matter is ready to go to trial or where a facet of the litigation requires the use of those things), then the lawyer must make such things available to the client. In certain circumstances, where a lawyer's right to a lien is arguable, a lawyer should not withhold client papers or other property, even though the lawyer, arguably, has a right to retain such property. Rule 1.16(d) makes it clear that, where withholding such property would cause substantial prejudice [sic] the client, then the lawyer may not assert a lien against that property and papers. In these circumstances, it is recommended that even where fees are owed to a lawyer, the lawyer consider returning to clients papers and other property and subsequently to bring suit for the recovery of such fees. The lawyer may contemplate the possibility of such an action in a retainer letter. Actions on a contract or in quantum meruit against the former client to recover the value of the services should be considered as an alternative to assertion of the lien."); Minnesota LEO 13 (6/15/89) ("A lawyer may not condition the return of client files, papers and property on payment of copying costs. Nor may the lawyer condition return of client files, papers or property upon payment of the lawyer's fee. . . . A lawyer may withhold documents not constituting client files, papers and property until the outstanding fee is paid unless the client's interests will be substantially prejudiced without the documents. Such circumstances shall include, but not necessarily be limited to, expiration of a statute of limitations or some other litigation imposed deadline. A lawyer who withholds documents not constituting client files, papers or property for nonpayment of fees may not assert a claim against the client for the fees incurred in preparing or creating the withheld document(s).").

## Prejudice

- Arizona LEO 04-01 (1/2004) ("The inquiring attorney's assertion of a retaining lien on the entire file is improper. Because the inquiring attorney's asserted retaining lien does not extend to materials given to inquiring attorney for use at trial, it is unethical to assert a lien as to such materials. As to the remaining items in the file against which the inquiring attorney desires to assert a lien, the inquiring attorney bears the burden of establishing that his lien attaches to identified items in the file based on a particularized inquiry into the circumstances, and the requirements of Arizona law. No lien can attach to documents when the attachment would prejudice the client's rights. The limited facts provided by the inquiring attorney do not establish that he is entitled to a lien on the documents in the file. Therefore, he should assert no lien on the documents, and should promptly return or provide to the client the documents on which he has no lien claim. Not only do the plain terms of ER 1.16 compel the documents' return upon the client's request, so do the requirements of ER 1.15(d), which states '[A] lawyer shall promptly deliver to the client or third person any . . . other property that the client . . . is entitled to receive and, upon request by the client . . . , shall promptly render a full accounting regarding such property." (emphasis added).

- San Diego County LEO 1984-3 (1984) ("Upon withdrawal, an attorney is obligated to deliver to the client all papers and property to which the client is entitled. Accordingly, the attorney must provide the client with the original of all pleadings, correspondence, deposition transcripts, and similar papers and property contained in the client's file. Even with a consensually created possessory lien over the client's file, an attorney may not withhold the file if to do so would prejudice the client. Should the attorney desire to retain copies of such papers or property, any expenses incurred in producing those copies must be borne by the attorney."; "However, pursuant to statutory and decisional law, the client is not 'entitled' to any papers or property which constitute or reflect an attorney's impressions, opinions, legal research or theories as defined by the 'absolute' work product privilege of the Code of Civil Procedure section 2016, subdivision (b). Although disclosure of the attorney's work product is not obligated, such disclosure is recommended as a matter of professional ethics and courtesy.") (emphasis added).

### Harm

- Mississippi LEO 144 (3/11/88) ("The right of a lawyer to withhold or retain a client's file to secure payment of the fee is a matter of law. However, ethically, a lawyer may not retain a client's file in a pending matter if it would harm the client or the client's cause. The ownership of specific items in a client's file is a matter of law. However, ethically, the lawyer should turn over to a client all papers and property of the client which were delivered to the lawyer, the end product of the lawyer's work, and any investigative reports paid for by the client. The lawyer is under no ethical obligations to turn over his work product to the client."; "This committee concludes that the better-reasoned opinions generally recognize that to the extent the client has a right to his file, then his file consists of the papers and property delivered by him to the lawyer, the pleadings or other end product developed by the lawyer, the correspondence engaged in by the lawyer for the benefit of the client, and the investigative reports which have been paid for by the client. . . . However, the lawyer's work product is generally not considered the property of the client, and the lawyer has no ethical obligation to deliver his work product.") (emphasis added).

Some courts and bars address the same issue, but from a different direction.

Rather than requiring clients to prove the harm they will suffer if deprived of the file, these courts and bars explain that clients must prove how much they need those files.

Such bars and courts have articulated the following standards:

## Pressing Necessity

- Conde & Cohen, P.L. v. Grandview Palace Condominium Assoc., No. 3D15-1109, 2015 Fla. App. LEXIS 11696 (Fla. Ct. App. 3d Aug. 5, 2015) ("It is well established that in this state any attorney has a right to a retaining lien on all of the client's property in the attorney's possession, whether related to only one specific matter, until the attorney is paid."; "In this case, no determination has been made as to the validity of any of the law firm's retainer agreements; no determination has been made as to the validity as to the law firm's retaining liens; and no determination has been made as to whether the law firm has been paid. Certainly, absent such determination, no order compelling the law firm to hand over its files may be entered without the requisite showing of pressing necessity and the posting of adequate security. Anything less amounts to a departure from the essential requirements of the law which will cause irreparable harm by nullifying the law firm's retaining liens.").

## Essential Need

- Alaska LEO 2004-1 (1/15/04) ("In summary, an expert or investigator's report is part of the client's file. . . . A lawyer may not withhold such reports to serve the lawyer's own interest in getting paid or reimbursed for the cost of the report if it will prejudice the client. Whether or not the client has paid for the report, the client's interests must be paramount. The lawyer's right to reimbursement for the expert's fee must give way to the client's needs if the material is essential to the client's case." (footnote omitted).

**Third**, at the other extreme, some states explicitly indicate that lawyers must relinquish all or a portion of the file even if the client has not paid them.

- Virginia Rule 1.16(e) (requiring Virginia lawyers to turn over certain portions of their file to clients "whether or not the client has paid the fees and costs owed the lawyer").
- Martin Bricketto, New Jersey Advisory Panel Backs Ban On Attorney Retaining Liens, Law360, Nov. 26, 2012 ("A New Jersey Supreme Court advisory committee has recommended prohibiting attorneys from clinging to client files and other property to collect on unpaid legal bills, despite arguments from the state bar association that the practice remains a legitimate avenue for pursuing payment."; "The Advisory Committee of Professional Ethics was charged with weighing the pros and cons of the common law retaining lien. As part of that process, the panel sought the participation of the New Jersey State Bar Association (NJSBA), which said the liens should continue to be an option for attorneys as long as clients' rights are protected."; "However, in a report made available on November 19, the committee found that the lien is most effective when it hurts clients."; "A

qualification that the lien should not be asserted when it causes prejudice to clients renders the lien ineffective as a method to obtain payment,' the committee said, recommending that the state Supreme Court amend the Rules of Professional Conduct to ban the practice."; "The committee said lawyers with "any sense of professionalism" rarely assert a common law retaining lien when a client urgently needs the file."; "Assertion of the lien at a time when it is effective -- when the inconvenience to the client in being denied access to his or her property is most intense -- is unduly destructive of the lawyer-client relationship and impacts the public confidence in the bar and the judicial system,' the committee said."; "A lawyer, often when he or she has withdrawn or been terminated from a case, can use the lien to keep a client's file or other property if the client refuses to pay up, the report said. However, a court can order a client's former attorney to turn over such papers if retaining them prejudices the client in continuing to pursue a legal claim or defense, according to the report."; "The Restatement of the Law has been advocating doing away with the common law lien, and some scholars have found that retaining liens can raise concerns such as potential overreaching and breach of fiduciary duty, the report said."; "According to the committee, declining use of the lien in recent years arguably reflects evolving public policy in the state to protect clients, the less powerful party in an attorney-client relationship."; "The state Supreme Court will ultimately decide the fate of the common law retaining lien, and comments are now being accepted on the advisory committee's report and recommendation. Any such feedback is due by January 31.").

- Mary Pat Gallagher, New Jersey Erects Ethical Bar to Common-Law Liens on Client Files, N.J. L.J., Mar. 26, 2013 ("As of April 1, lawyers no longer will be able to hold onto client files and papers to collect fees. An amendment to Rule of Professional Conduct (RPC) 1.16(d), effective that date, states flatly, 'No lawyer shall assert the common law retaining lien.'").
- Brussow v. Utah State Bar, 286 P.3d 1246, 1249, 1252, 1253, 1354 (Utah 2012) (relying on an explicit Utah ethics rule in holding that a Utah lawyer cannot retain a client's file under a retaining lien; "Mr. Brussow [lawyer] acknowledged that he had received requests for Ms. Langley's [client] file from Ms. Langley and her new attorney, but he argued that he was entitled to retain the file because Ms. Langley had failed to pay the fees for the deposition transcripts. He also argued that he had functionally provided the file to Ms. Langley by sending her copies of his work as he performed it. Finally, he claimed that retaining the file did not cause any harm to Ms. Langley."; "[T]he comments [to Utah Rule 1.16] state that '[t]he Utah rule differs from the ABA Model Rule in requiring that papers and property considered to be part of the client's file be returned to the client notwithstanding any other laws or fees or expenses owing to the lawyer.'"; "[T]he plain language of rule 1.16(d) does not allow attorneys to assert a lien on a client files to secure payments from a client."; "[A]lthough Mr. Brussow

may have sent Ms. Langley copies of his work as he performed it, her client file likely contained more than the documents that he drafted, such as documents submitted by the opposing party in the proceeding, discovery materials, depositions, or witness statements. Further, Ms. Langley testified at the hearing before the Screening Panel that she and her new lawyer had to 'try to catch up on what was going on without the file by getting copies of the court records.' This testimony indicates that Ms. Langley did not have the information that she needed from her client to move forward with her case. Thus, regardless of whether Mr. Brussow sent Ms. Langley copies of his work as he performed it, rule 1.16(d) required him to provide her file to her upon her request.").

Under this approach, lawyers essentially must treat their files as if they have been fully paid. This is not to say that they must automatically turn over all of their files. Even if they are fully paid, lawyers must determine what files the ethics rules require them to turn over to their clients or former clients. Most bars take what is called the "entire file" approach, which generally requires lawyers to turn over drafts of documents, etc. A minority of some bars use what is commonly called the "end-product" approach, under which they must give clients only the final version of documents, etc. Under either approach, lawyers generally may withhold purely internal administrative documents relating to staffing, etc.

Under any of these standards, other issues can arise. For instance, bars take different positions on whether certain types of documents are immune to otherwise permissible retaining liens.

- In re Attorney G., 302 P.3d 248, 252-53 (Colo. 2013) (holding that a lawyer could not assert an attorney lien over a client's passport; "[A] United States passport is a sui generis type of federal property that does not fall within a client's 'papers' on which a retaining lien may be asserted under section 12-5-120."). B 10/13

Bars also disagree about whether clients can charge their clients for copies of documents that the lawyers must turn over to the clients.

- New York City LEO 2008-1 (07/2008) ("In ABCNY Formal Op. 1986-4, we addressed a lawyer's obligations to retain paper documents relating to a representation. We now conclude that the guidelines articulated in ABCNY Formal Op. 1986-4 should also apply to a lawyer's obligations to retain e-mails and other electronic documents. With respect to the electronic documents that the lawyer retains, the lawyer is not under an ethical obligation to organize those documents in any particular manner, or to store those documents in any particular storage medium, so long as the lawyer ensures that the manner of organization and storage does not (a) detract from the competence of the representation or (b) result in the loss of documents that the client may later need and may reasonably expect the lawyer to preserve. To those ends, electronic documents other than e-mails present less difficulty because they are frequently stored in document management systems in which they are typically coded with several identifying characteristics, making it easier to locate and assemble them later. E-mails raise more difficult organizational and storage issues. Some e-mail systems automatically delete e-mails after a period of time, so the lawyer must take affirmative steps to preserve those e-mails that the lawyer decides to save. In addition, e-mails generally are not coded, or otherwise organized, to facilitate their later retrieval. Thus, a practice with much to commend it is to organize saved e-mails to facilitate their later retrieval, for example, by coding them or saving them to dedicated electronic files. Otherwise, it may be exceedingly difficult and expensive for the lawyer to retrieve those e-mails, and as discussed in this Opinion, the lawyer must not charge the client for retrieval costs that could reasonably have been avoided."; "In New York, a client has a presumptive right to the lawyer's entire file in connection with a representation, subject to narrow exceptions. The lawyer may charge the client a reasonable fee, based on the lawyer's customary schedule, for gathering and producing electronic documents. That fee may reflect the reasonable costs of retrieving electronic documents from their storage media and reviewing those documents to determine the client's right of access. It is prudent for lawyer and client to discuss the retention, storage, and retrieval of electronic documents at the outset of the engagement and to consider memorializing their agreement in a retention letter.").

### **Best Answer**

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

N 8/12 [I]



## Avoiding Commingling

### Hypothetical 7

Your law firm just hired a new finance director, who had previously worked in a corporate setting. After analyzing your firm's trust account procedures, she suggests that your law firm keep approximately \$5,000 of its own money in the trust account -- as a "cushion" to assure that no checks drawn on the trust account will bounce.

May your law firm keep \$5,000 of its own money in the trust account -- as a "cushion" to assure that no checks drawn on the trust account bounce?

**NO**

### Analysis

Very specific ethics rules govern lawyers' handling of any property (including any money) they obtain from clients or others.

As part of these stringent requirements, lawyers must very carefully segregate such property from their own property -- in a rule that seems counterintuitive at first but makes perfect sense upon some reflection.

### ABA Model Rules

The ABA Model Rules contain a somewhat surprisingly sparse provision dealing with safekeeping clients' and others' property.

A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Funds shall be kept in a separate account maintained in the state where the lawyer's office is situated, or elsewhere with the consent of the client or third person. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property shall be kept by the lawyer and shall be preserved for a period of [five years] after termination of the representation.

ABA Model Rule 1.15(a) (emphasis added).

Not surprisingly, lawyers must provide notice when they receive such property.

Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

ABA Model Rule 1.15(d).

If there is any dispute over the property's disposition, lawyers must continue the property's segregation until the dispute's resolution.

When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

ABA Model Rule 1.15(e). A comment provides a further explanation.

Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

ABA Model Rule 1.15 cmt. [4].

A comment to the ABA Model Rules explains that a lawyer providing services other than legal services might be governed by other rules as well.

The obligations of a lawyer under this Rule are independent of those arising from activity other than rendering legal services. For example, a lawyer who serves only as an escrow agent is governed by the applicable law relating to fiduciaries even though the lawyer does not render legal services in the transaction and is not governed by this Rule.

ABA Model Rule 1.15 cmt. [5].

The ABA Model Rules repeatedly warn against any "comingling" of the lawyer's property and anyone else's property. As explained above, lawyers must hold anyone else's property "separate from the lawyer's own property." ABA Model Rule 1.15(a). A comment reiterates this point.

A lawyer should hold property of others with the care required of a professional fiduciary. Securities should be kept in a safe deposit box, except when some other form of safekeeping is warranted by special circumstances. All property that is the property of clients or third persons, including prospective clients, must be kept separate from the lawyer's business and personal property and, if monies, in one or more trust accounts. Separate trust accounts may be warranted when administering estate monies or acting in similar fiduciary capacities. A lawyer should maintain on a current basis books and records in accordance with generally accepted accounting practice and comply with any recordkeeping rules established by law or court order.

ABA Model Rule 1.15 cmt. [1] (emphasis added).

The ABA Model Rules explain the one very minor exception to the general rule prohibition comingling.

A lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account, but only in an amount necessary for that purpose.

ABA Model 1.15(b) (emphasis added). A comment repeats the general rule before describing this minor exception.

While normally it is impermissible to commingle the lawyer's own funds with client funds, paragraph (b) provides that it is permissible when necessary to pay bank service charges on that account. Accurate records must be kept regarding which part of the funds are the lawyer's.

ABA Model Rule 1.15 cmt. [2] (emphasis added).

## **Restatement**

Like the ABA Model Rules, the Restatement prohibits lawyers from commingling their own funds and their clients' funds in a trust account.

A lawyer holding funds or other property of a client in connection with a representation, or such funds or other property in which a client claims an interest, must take reasonable steps to safeguard the funds or property. A similar obligation may be imposed by law on funds or other property so held and owned or claimed by a third person. In particular, the lawyer must hold such property separate from the lawyer's property, keep records of it, deposit funds in an account separate from the lawyer's own funds, identify tangible objects, and comply with related requirements imposed by regulatory authorities.

Restatement (Third) of Law Governing Lawyers § 44(1) (2000) (emphasis added).

The Restatement provides a fairly lengthy explanation of the rationale for this approach.

A lawyer often takes temporary possession of a client's property in the course of representing the client, for example as part of administering an estate, paying or collecting a judgment, or exchanging valuable documents at a closing. Precautions are required to assure safety of the property . . . . Requiring the property to be clearly identified and held separately reduces the danger of conversion, negligent misappropriation, or loss and protects the property from seizure by creditors of the lawyer or of other clients . . . . Notice to the client enables the client to obtain the property or to keep track of it while in the lawyer's possession . . . .

Those precautions are also generally appropriate for property belonging to a third person that comes into a lawyer's possession in the course of a representation. Thus, a lawyer must safeguard a deed of a client's spouse, as well as property received in the lawyer's capacity as a trustee, executor, escrow agent, or the like, unless that capacity is unrelated to a representation. Receiving property in such a capacity may also give rise to additional duties under law governing that capacity. This Section does not apply to property received otherwise than in connection with a representation, such as office equipment rented by a lawyer under a commercial lease or property the lawyer stores for a friend.

Restatement (Third) of Law Governing Lawyers § 44 cmt. b (2000) (emphasis added).

Another Restatement comment explains the broad reach of this governing principle.

This Section applies to all valuable objects including cash, jewelry, and the like, negotiable instruments, deeds, stock certificates, and other papers evidencing title. See also § 46, discussing documents in the lawyer's possession. This Section requires a lawyer to use reasonable measures for safekeeping such objects, for example by placing them in a safe-deposit box or office safe. The reasonableness of measures depends on the circumstances, including the market value of the property, its special value to the client or third person, and special difficulties that would be required to replace it if known to the lawyer, its transferability or convertibility, its susceptibility to loss or other damage, the reasonable customs of lawyers in the community, and the availability and cost of alternative methods of safekeeping.

The terms of an agreement under which the lawyer receives property can modify the obligations imposed by this Section. For example, an escrow contract might require the lawyer serving as escrowee to pay out the escrow funds upon the occurrence of a stated event. A lawyer's obligation to safeguard property may be relaxed by a contract only if any client or third person whose interests are affected gives informed consent, on terms that serve some purpose other than the convenience or profit of the lawyer . . . . On business dealing with a client, see § 126.

Restatement (Third) of Law Governing Lawyers § 44 cmt. e (2000).

The Restatement also notes states' different and specific rules governing this issue.

All jurisdictions have rules concerning a lawyer's responsibilities for client property, enforceable by disciplinary sanctions. Strong sanctions including disbarment have been imposed for converting or even commingling client funds. The rules often specify where the lawyer's bank account must be located, the records the lawyer must keep, and other matters. Many states provide for random audits of lawyer trust accounts, notification of bar authorities by banks when trust accounts are overdrawn, and client security funds to compensate clients injured by misappropriating lawyers.

A lawyer who violates this Section can be subject to civil liability as well as disciplinary sanctions. A lawyer who converts the property of another is of course liable as is one who negligently fails to safeguard against the conversion or loss of property entrusted to the lawyer. Under agency principles, the lawyer is subject to liability for failure to segregate client property and keep proper records and must account for any profits resulting from the lawyer's misuse of the property . . . . Criminal conviction for embezzlement or similar offenses is also possible.

Restatement (Third) of Law Governing Lawyers § 44 cmt. c (2000).

Also like the ABA Model Rules, the Restatement also requires lawyers to provide notification when they receive such property.

Upon receiving funds or other property in a professional capacity and in which a client or third person owns or claims an interest, a lawyer must promptly notify the client or third person. The lawyer must promptly render a full accounting regarding such property upon request by the client or third person.

Restatement (Third) of Law Governing Lawyers § 44(2) (2000). A comment provides some additional explanation.

A lawyer who receives property claimed by a client or third person to whom the lawyer owes a duty of safekeeping must inform the owner or claimant so that the latter can protect his or her rights . . . . Likewise, the lawyer must render account

of the property of others in the lawyer's possession when requested. . . .

When the claimant is a third person whose interests conflict with those of the lawyer's client but to whom the lawyer owes a duty of safekeeping or notification, the lawyer must notify that person of the lawyer's receipt of the property. That situation could exist, for example, where the lawyer is an executor and the third person a legatee, where the law designates the lawyer a constructive trustee for the person because the property has been converted . . . , or where other law imposes a duty on the lawyer to turn over property or funds directly to the third person. The lawyer's duties of confidentiality to the client do not bar such notice because the lawyer may not assist the client to conceal the property from the third person to whom the lawyer owes the duty of safekeeping . . . . Moreover, the arrangement under which the lawyer receives property of a third person of adverse interest -- for example, an escrow arrangement -- can imply that the client and third person have agreed that the lawyer is to protect the third person's interests.

Restatement (Third) of Law Governing Lawyers § 44 cmt. h (2000).

Another comment repeats the general prohibition on commingling, and describes lawyers' options when handling trust account funds.

A comment provides an explanation.

A lawyer must deposit funds of a client or a third person in an account, usually a trust or client account, separate from the lawyer's own funds, and including those of the lawyer's law practice. The trust account may contain funds of more than one person, but the records must adequately identify the share of each person. The lawyer may not receive interest on such funds. Most states now have arrangements under which certain client funds (usually small amounts) may or must be pooled in accounts, the interest from which is paid to a regulatory authority to fund legal services for the indigent and other similar activities. When trust accounts may bear interest for the benefit of an individual client and the amount and probable duration of the deposit justify the effort and expense involved, the lawyer should arrange for an interest-bearing account, with the interest to be transmitted to the clients. A lawyer holding client funds as a trustee or in other capacities may be required to invest them.

Restatement (Third) of Law Governing Lawyers § 44 cmt. d (2000) (emphasis added).

### **Case Law and Bar Opinion**

The prohibition on comingling is so strong that lawyers can be punished for comingling funds even if no client suffers any harm.

- In re Osborne, 713 A.2d 312, 312 (D.C. 1998) (issuing a public censure of a lawyer whose bookkeeper had improperly commingled funds between the lawyer's trust account and operating account; noting that the lawyer took no action to correct the problem despite knowing about it for approximately one year; issuing the censure despite finding that "the bookkeeper kept careful records of all funds, and no clients ever lost funds due to [the lawyer's] actions").

In fact, lawyers can be punished for not keeping the required trust account records, even if no client loses money, and for failing to supervise unfaithful assistants.

- In re Robinson, 74 A.3d 688, 695, 695-96 (D.C. Cir. 2013) (suspending for seven months a lawyer who allowed his son-in-law (another lawyer at the firm) to handle the firm's trust account, and he did not follow-up upon receiving notices of two bounced checks; "Prior to the overdraft that triggered Bar Counsel's investigation, respondent relied on Kourtesis to manage the firm's trust account. Both the Hearing Committee and the Board concluded it was reasonable for respondent to do so."; "The time period following the initial overdraft is altogether another matter. We agree that respondent acted negligently following the first overdraft, and his negligence left the funds in the trust account depleted such that the misappropriation continued and a second overdraft occurred. Given the importance placed upon the scrupulous care of client funds, the overdraft was a serious wake-up signal to the sole individual with ultimate responsibility for the trust account and a situation that mandated his personal continuing attention. The Board found that respondent's failure to pursue the matter in a more diligent fashion resulted in the second overdraft, which extended the misappropriation." (footnote omitted); "Respondent asked Kourtesis to look into the problem and wrote a check to cover the deficit, but admitted that he never followed up with the matter and essentially washed his hands of the matter. The check barely covered the overdraft and left the trust account in a continuing depleted state. Nearly one month later, the trust account was overdrawn a second time. Respondent again asked Kourtesis to investigate the matter, and wrote a check to cover the deficit. At the hearing, respondent did not recall following up with Kourtesis even on the second overdraft. And again, the check written to cover the overdraft was insufficient to make the trust account whole. In addition, respondent did not take control of the accounts away from Kourtesis



after the second overdraft occurred." (footnote omitted); noting in its factual discussion that the overdrafts occurred because a trust check was mistakenly deposited in the firm's operations account).

- Mike Frisch, For The Absence Of Records, Law Profession Blog, Sept. 21, 2012 ("The Iowa Supreme Court imposed a 30-day suspension (rejecting the Grievance Commission panel's proposed reprimand) in a disciplinary case in which the complainant was the attorney's former paralegal assistant. The court found two instances in which the attorney had mishandled advanced retainers. The attorney also failed to maintain required records. The court noted that the found misconduct might warrant a non-suspensory sanction. However, because the attorney's records were so deficient ' . . . we have no way of knowing whether the trust account violation outlined [in the opinion] was an isolated occurrence or a more frequent event.' Thus, the lack of records was treated as an aggravating factor.").

Every state seems to have different (and also very specific) rules governing trust accounts. In fact, this may be the reason why the ABA Model Rules are so general -- essentially conceding that every state will adopt its own detailed trust account provisions.

For instance, most states require lawyers to retain any disputed funds in a trust account until some court resolves the dispute (which is the approach adopted by the ABA Model Rules).

- Colorado LEO 118 (2/18/08) ("If a lawyer properly withdraws client funds from the lawyer's trust account to apply to the lawyer's fees, in accordance with Colo. RPC 1.5 and the lawyer's agreement with the client, and the client subsequently disputes the lawyer's fee, the lawyer is not required or permitted to return the disputed amount to the lawyer's trust account that holds funds of any clients. Although the lawyer is not required to, the lawyer may place the disputed amount in a separate trust account that holds only the disputed amount.").

Perhaps not surprisingly, California applies a different rule.

- California LEO 2006-171 (2006) ("Funds properly withdrawn from a CTA under rule 4-100(A)(2) and later disputed by the client neither retain nor regain their trust account status, and therefore do not need to be re-deposited into the attorney's CTA. Based on a plain reading of rule 4-100, such funds bear none of the indicia of trust account status at the moment of withdrawal, i.e., the withdrawn funds do not belong to the client, are not subject to a joint

interest of attorney and client, are not subject to a joint interest of the client and any third party, and are not being held by the Attorney as part of the subject representation. The fact that Client later expresses remorse, regret or other dissatisfaction with the amount of Attorney's fee is a matter of contract to be resolved by an analysis of the engagement agreement and the respective performance of the parties.").

To make matters more complicated, states sometimes change their trust account rules in very basic ways.

For instance, as recently as 1996, the District of Columbia Bar specifically indicated that retainer checks (representing a deposit to cover future fees) could not be deposited in a trust account, but rather had to be placed in the lawyer's operating account. D.C. LEO 264 (2/14/96) (prohibiting a lawyer from depositing a retainer check in a trust account and requiring the lawyer to deposit the money in the law firm's operating account; acknowledging that "other jurisdictions may take the opposite approach and require that fee advances be placed in a trust account until earned"). The District of Columbia has now changed its rules to follow the national standard on this issue. D.C. Rule 1.15(d).

As might be expected, law firms having offices in different states must deal with choice of laws issues.

- Arizona LEO 09-03 (11/2009) ("An Arizona-licensed lawyer who maintains an office in Arizona but whose law firm also has an office in another jurisdiction may keep trust funds in a trust account held outside of Arizona provided that the client (or third person, where relevant) consents and the account is held at an approved financial institution. If the account is a pooled trust account on which interest and dividends are not paid to clients, the interest and dividends on the funds from the Arizona-licensed lawyer must be paid to the Arizona Foundation for Legal Services and Education.").
- In re Disciplinary Action Against Overboe, 745 N.W. 2d 852 (Minn. 2008) (holding that the lawyer's abuse of trust account money would be governed by the ethics rules of the state where the bank is located, while the lawyer's

state's ethics rules apply to the lawyer's alleged misrepresentation to the state bar).

## **Conclusion**

Although it may seem counter-intuitive, every state's ethics rules prohibit lawyers from keeping a "cushion" of their own money in their trust accounts.

The main "evil" that the bar hopes to prevent is lawyers' theft of client money from a trust fund. Even though such a "cushion" might actually prevent harm to other clients in the case of a "bounced" check, the ethics rules insist that law firms leave only enough non-client money in trust accounts to cover ordinary bank service charges (as well as any disputed amounts).

This assures that any erroneous check will bounce -- triggering the bank's notification to the bar, and guaranteeing a prompt investigation. In essence, the ethics rules require every trust account to be on a "razor's edge," so that lawyer misconduct will raise a red flag.

For this reason, lawyers must immediately withdraw any amount of a "retainer" deposit that the lawyer has earned -- keeping the lawyer's money in the trust account violates the ethics rules just as surely as wrongfully taking a client's money out.

Given the ultimate goal of assuring that lawyers "bounce" checks from their trust accounts if there is any impropriety, states generally prohibit lawyers to assure for "overdraft" protection.

However, at least one bar has permitted such an arrangement.

- California LEO 2005-169 (2005) ("1. An attorney does not commit an ethical violation merely by obtaining or using overdraft protection on a Client Trust Account, so long as the protection in question does not entail the commingling of the attorney's funds with the funds of a client. Overdraft protection that compensates exactly for the amount that the overdraft exceeds the funds on deposit (plus funds reasonably sufficient to cover bank

charges) is permissible, whereas overdraft protection that automatically deposits an amount leaving a residue after the overdraft is satisfied is not. In all cases, banks must report to the State Bar any presentment of a check against a Client Trust Account without sufficient funds, whether or not the check is honored. Although overdraft protection will not avoid State Bar notification, nor exculpate any unethical conduct that caused the overdraft, it may avoid negative consequences to a client resulting from a dishonored check. 2. When a check is issued against a Client Trust Account with insufficient funds to cover the amount of the check, an attorney must deposit funds sufficient to clear the dishonored check or otherwise make payment, must take reasonably prompt action to ascertain the condition or event that caused the check to be dishonored, and must implement whatever measures are necessary to prevent its recurrence. In addition, if a client will experience negative consequences from the dishonoring of the check, the attorney may have to advise the client of the occurrence. 3. An attorney must withdraw earned fees from a Client Trust Account at the earliest reasonable time after they become fixed in order to comply with the attorney's ethical obligations, but need not do so immediately." (emphasis added)).

### **Best Answer**

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

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## Trust Account Ramifications of Client Retainers

### Hypothetical 8

Your new finance director has asked for some guidance on whether client retainer payments should be deposited into your firm's trust account or whether they should be deposited into the firm's operating account.

Should the following client retainer payments be deposited into the firm's trust account?

(a) A "true" retainer payment?

**NO**

(b) A fixed-fee payment for a real estate transaction?

**YES**

### Analysis

Not surprisingly, a lawyer's trust account obligations upon receipt of a retainer payment depends on the exact nature of the payment.

**(a)-(b)** Apart from any state-specific nuances, the general rule requires that lawyers (1) deposit into their operating account (not their trust account) any "true" retainer payments or other payments that the pertinent state considers the lawyers to have earned upon receipt; (2) place into their trust accounts any client deposit against future fees that the lawyers will bill; (3) not withdraw any amounts placed in their trust account until they have earned the amounts; and (4) keep in their trust account any disputed amounts.

To the extent that client payments can be characterized as deposits against which the lawyer will charge a fee when earned, the ABA Model Rules indicate that such an amount belongs in lawyers' trust accounts.

A lawyer shall deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.

ABA Model Rule 1.15(c).

A comment provides a further explanation, and warns lawyers not to take advantage of their clients.

Lawyers often receive funds from which the lawyer's fee will be paid. The lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention. The disputed portion of the funds must be kept in a trust account and the lawyer should suggest means for prompt resolution of the dispute, such as arbitration. The undisputed portion of the funds shall be promptly distributed.

ABA Model Rule 1.15 cmt. [3].

States' legal ethics opinions agree with this approach.

- D.C. LEO 355 (6/10) ("In its decision in In re Mance, 980 A.2d 1196 (D.C. 2009), the District of Columbia Court of Appeals held that, absent informed consent from the client to a different arrangement, a lawyer must deposit a flat or fixed fee paid in advance of legal services in the lawyer's trust account. Under Mance, such funds must remain in the lawyer's trust account until earned unless the client gives informed consent to a different arrangement." (emphasis added)).
- In re Mance, 980 A.2d 1196, 1203, 1204, 1206, 1207 (D.C. 2009) ("A corollary to the rule that a flat fee is an advance of unearned fees, is that the fee must be held as client funds in a client's trust or escrow account until they are earned by the lawyer's performance of legal services." (emphasis added); "Another important benefit to placing flat fees in a trust or escrow account is preservation of the client's right to choose his or her counsel, including the right to discharge an attorney."; "But we also note that, consistent with the general requirement that a lawyer must entrust flat fees in a trust or escrow account until earned, the client may consent otherwise . . . , and the fee agreement may specify how and when the attorney is deemed to earn the flat fee or specified portions of the fee."; "Although the default rule is that an attorney must hold flat fees in a client trust or escrow account until earned, we note that an attorney may obtain informed consent from the client to deposit all of the money in the lawyer's operating account or to deposit some of the

money in the lawyer's operating account as it is earned, per their agreement."; "Where there is no discussion regarding the fee arrangement besides merely stating the overall fee, and no mention of the escrow account option, a client cannot be said to have a sufficient basis to give informed consent to waive the requirements of a rule designed to protect the client's interests.").

- North Carolina LEO 2008-10 (10/24/08) (in a compendium opinion about fees, explain the four existing types of fees paid in advance, and creating a new type of permissible fee to be paid in advance -- called a "minimum fee"; identifying five types of fees that can be paid in advance, and providing additional details about all five: advance payment; general retainers, flat fee or prepaid flat fee; hybrid fees and minimum fees; providing additional information about "advance payment" fees, which the bar defines as: "a deposit by the client of money that will be billed against, usually on an hourly basis, as legal services are provided; not earned until legal services are rendered; deposited in the trust account; unearned portion refunded upon the termination of the client-lawyer relationship."; providing additional explanation of such an advance payment fee; "RPC 158 holds that an advance payment to a lawyer for services to be rendered in the future, in the absence of an agreement with the client that the payment is earned immediately, is a deposit securing the payment of a fee which is yet to be earned. As such, it remains the property of the client and must be deposited in the lawyer's trust account. See also 2005 FEO 13 (minimum fee that is collected at the beginning of a representation and will be billed against at a lawyer's regular hourly rate is neither a general retainer nor a flat fee; therefore, minimum fee remains the client's money until earned by the provision of legal services and must remain on deposit in the trust account until earned).").

In contrast, lawyers must deposit into their operating account any amounts that can be properly characterized as "true" retainers -- which lawyers earn at the moment that the client makes the payment.

- Arizona LEO 10-03 (6/2010) (explaining how non-refundable fees [which Arizona permits under certain circumstances] must be handled in connection with a lawyer's trust account: "A non-refundable fee becomes the property of the lawyer when paid. Such funds should not be placed in a trust account where they will commingle with client funds. ER 1.15(a). On the other hand, the client retains ownership of, or at least an equitable claim to, funds representing an advance payment of fees. Accordingly, those funds must be deposited in the lawyer's trust account. ER 1.15(c). The lawyer may withdraw the advanced fee from the trust account only when, and to the extent that, he or she earns the fee by the criteria specified in the fee agreement. In the case of the type of 'hybrid' fee at issue here -- in part

non-refundable, and in part earned on an hourly or other basis -- prepaid funds advanced to secure the hourly fee would go into the trust account, but funds earned on receipt would not." (emphasis added); ultimately finding that the non-refundable fee as not unethical; "The Committee believes that the fee arrangement at issue is not on its face unethical, if the total fee is reasonable. The Committee's concern centers around use of the term 'flat fee' for the proposed arrangement, because of the traditional understanding by clients of what the term 'flat fee' entails. The proposed arrangement would not pose this problem of confusion if the fee paid for the specified number of hours was termed a 'minimum fee.' In reality, the proposed fee arrangement is calling for the payment of a minimum fee, not what has been traditionally terms a 'flat fee.'"; "This minimum fee could be designated as 'earned on receipt' and 'non-refundable,' in which case the funds should be placed n the lawyer's operating account. If the minimum fee is not so designated, the funds should be placed in the trust account and transferred to the operating account when the funds have been earned." (footnote omitted)).

- North Carolina LEO 2008-10 (10/24/08) (in a compendium opinion about fees, explain the four existing types of fees paid in advance, and creating a new type of permissible fee to be paid in advance -- called a "minimum fee"; identifying five types of fees that can be paid in advance, and providing additional details about all five: advance payment; general retainers, flat fee or prepaid flat fee; hybrid fees and minimum fees; providing further explanation about a new fee that the bar calls a "minimum fee," which the bar defines as follows: "consideration paid at the beginning of a representation to reserve the exclusive services of a lawyer; lawyer provides legal services up to the value of the minimum fee; earned upon payment; paid to lawyer or deposited in firm operating account; some or all of the minimum fee is subject to refund if clearly excessive under the circumstances as determined upon the termination of the client-lawyer relationship." (emphasis added); explaining that "[i]f there is a seeming inconsistency in the ethics opinions it arises from the strict formulation of the general retainer. A lawyer is allowed to charge a general retainer as consideration for the reservation of the lawyer's services and to treat the money as earned immediately. But the client is not given a credit for future legal services up to the value of the retainer. This strikes many lawyers as detrimental to the client's interests and it has lead to the creation of hybrid fees. The strict formulation of the general retainer has been maintained by the Ethics Committee for three important reasons. It avoids the client confusion that is engendered if a client is told that a payment both reserves the lawyer's services and pays for future representation. In addition, requiring general retainers to be separate and distinct from advance fees means that, if an advance fee is charged for future legal services, there is no penalty to the client for deciding to change legal counsel before the advance fee is exhausted and, if a refund is owed to the client because expected services have not been performed, the money is readily available in the trust account."; "Upon further reflection, the Ethics



- Committee has, nevertheless, determined that it is in the client's interest to receive legal services up to the value of a general retainer provided the client fully understands and agrees that the payment the client makes at the beginning of the representation is earned by the lawyer when paid, will not be deposited in a trust account, and is only subject to refund if the charge for reserving the lawyer's services (as opposed to the charge for the legal services performed) is clearly excessive under the circumstances. This newly acknowledged form of fee payment made by a client at the beginning of a representation will be referred to as a minimum fee. . . ."; offering the following proposed (but not mandatory) model fee provision dealing with such a fee: "As a condition of the employment of Lawyer, Client agrees to pay \$\_\_\_\_ to Lawyer. This money is a minimum fee for the reservation of Lawyer's services; to insure that Lawyer will not represent anyone else relative to Client's legal matter without Client's consent; and for legal work to be performed for Client."; "Client understands and specifically agrees that: the minimum fee will be earned by Lawyer immediately upon payment and will be deposited in Lawyer's business account rather than a client trust account; Lawyer will provide legal services for Client on an hourly basis [or other appropriate basis] according to the schedule attached to this agreement until the value of those services is equivalent to the minimum fee; thereafter, Client will be billed for the legal work performed by Lawyer and his/her staff on an hourly basis [or other appropriate basis] according to the schedule attached to this agreement; and when Lawyer's representation ends, Client will not be entitled to a refund of any portion of the minimum fee, even if the representation ends before Lawyer has provided legal services equivalent in value to the minimum fee, unless it can be demonstrated that the minimum fee is clearly excessive fee under the circumstances." (emphasis added)).
- Dowling v. Chi. Options Assocs., Inc., 875 N.E.2d 1012, 1018, 1021, 1022 (Ill. 2007) (explaining that Illinois recognizes three different kinds of retainers, one of which is an "advance payment retainer" that must be placed in the lawyer's operating account even though the lawyer has not yet undertaken the work and might be obligated to pay the retainer back to the client; "Two types of retainers are generally recognized. The first is variously referred to as the 'true,' 'general,' or 'classic' retainer. Such a retainer is paid by a client to the lawyer to secure the lawyer's availability during a specified period of time or for a specified matter. This type of retainer is earned when paid and immediately becomes property of the lawyer, regardless of whether the lawyer ever actually performs any services for the client. . . . The second type of retainer is referred to as a 'security retainer.' Under this arrangement, the funds paid to the lawyer are not present payment for future services; rather, the retainer remains the property of the client until the lawyer applies it to charges for services that are actually rendered. Any unearned funds are refunded to the client. The purpose of a security retainer is to secure payment of fees for future services that the lawyer is expected to perform. . . . Pursuant to Rule 1.15(a) of the Illinois Rules of Professional Conduct, a

security retainer must be deposited in a trust account and kept separate from the lawyer's own property."; "There is yet a third type of retainer, called the 'advance payment retainer.' This type of retainer consists of a present payment to the lawyer in exchange for the commitment to provide legal services in the future. Ownership of this retainer passes to the lawyer immediately upon payment. . . . Accordingly, the lawyer deposits the retainer into his or her general account; in fact, an advance payment retainer may not be deposited into a trust account, since a lawyer may not commingle property of a client with the lawyer's own property." (emphasis added); explaining this type of retainer; "[W]e recognize advance payment retainers as one of three retainers available to lawyers and their clients in this state. The other retainers are the classic or general retainer and the security retainer."; "An appropriate use of advance payment retainers is illustrated by the circumstances of the instant case, where the client wishes to hire counsel to represent him or her against judgment creditors. Paying the lawyer a security retainer means the funds remain the property of the client and may therefore be subject to the claims of the client's creditors. This could make it difficult for the client to hire legal counsel. Similarly, a criminal defendant whose property may be subject to forfeiture may wish to use an advance payment retainer to ensure that he or she has sufficient funds to secure legal representation. We caution, however, that such fee arrangements, as well as those involving security retainers, are subject to a lawyer's duty to refund any unearned fees, pursuant to Rule 1.16(e) (134 Ill. 2d R. 1.16(e)). A client has an unqualified right to discharge a lawyer and, if discharged, the lawyer may retain only a sum that is reasonable in light of the services the lawyer performed prior to being discharged."; holding that an individual's payment to DLA Piper [plaintiff's lawyers] amounted to this kind of retainer, and therefore was properly placed in the law firm's operating account and unavailable to creditors of the individual).

- North Carolina LEO 2005-13 (1/20/06) (analyzing the following situation: "Partner C, who practiced family law litigation, typically used a fee contract referred to by the firm as a 'minimum fee' contract. The contract provides that the initial fee charged to the clients is the greater of (1) the flat fee established in the contract, or (2) an hourly rate applied to actual time that will be spent in representation of the client. A minimum fee paid by the client was deposited into the firm's general account. The contract, however, did not state that the fee was deemed earned and payable to the attorney upon receipt."; holding that lawyers remaining at the law firm (after Partner C left and took most of his clients with him) are required to refund unused funds to the clients; "In order for a payment made to an attorney to be earned immediately, the attorney must clearly inform the client that it is earned immediately, and the client must agree to this arrangement. See RPC 158. Even with the consent of the client, only true retainers and flat fees are deemed earned by the lawyer immediately and therefore can be deposited into the operating account upon receipt. A minimum fee that will be billed against at the lawyer's hourly

rate is client money and belongs in the trust account until earned. See Rule 1.15-2 (b). In the present case, at some point during the representation, Law Firm would calculate the number of hours C spent on the case and determine whether the client owed more money. The fee arrangement was therefore neither a true retainer nor a flat fee. Furthermore, Law Firm's fee contract did not make an allowance for the fee to be deposited into the firm's operating account. Therefore, those portions of the minimum fees that were not earned by C's labor while with Law Firm remain client funds and must be returned to the clients. See Rule 1.16(d). If Law Firm does not return the unearned portions of the funds to C's clients, they will have collected an excessive fee in violation of Rule 1.5(a)."

In some situations, a client's single payment may include both types of payments, and therefore must be split between the trust account and the lawyer's operating account.

- North Carolina LEO 2008-10 (10/24/08) (in a compendium opinion about fees, explain the four existing types of fees paid in advance, and creating a new type of permissible fee to be paid in advance -- called a "minimum fee"; identifying five types of fees that can be paid in advance, and providing additional details about all five: advance payment; general retainers, flat fee or prepaid flat fee; hybrid fees and minimum fees; providing additional explanation about a "hybrid fee," which the bar defines as follows: "fee paid at the beginning of a representation that is in part a general retainer or a flat fee and in part an advance payment to secure payment of fees yet to be earned; one portion of the fee is earned immediately and the other remains the client's property on deposit in the trust account; client must consent and agree to the portion that is a flat fee or a general retainer and earned immediately; unearned portion of the advance payment refunded upon termination of the client-lawyer relationship; flat fee/general retainer portion subject to refund if clearly excessive under the circumstances as determined upon the termination of the client-lawyer relationship." (emphasis added); explaining that "[t]he opinion recognizes that a lawyer may charge a client hybrid fees. Such hybrid fees include a payment that is part general retainer or flat fee and part advance to secure the payment of fees yet to be earned. With hybrid fees, one portion of the fee is earned immediately and the other portion remains the client's property and must be deposited in the trust account to be withdrawn as earned. 'There should be a clear agreement between the lawyer and the client as to which portion of the payment is a true general retainer, or a flat fee, and which portion of the payment is an advance. Absent such an agreement, the entire payment must be deposited into the trust account and will be considered client funds until earned.'" (emphasis added)).

With some types of client payments, the proper handling can be nearly impossible to assess.

For instance, in 2006 the North Carolina Bar explicitly indicated that "flat fees" must be deposited into an operating account.

- North Carolina LEO 2005-13 (1/20/06) (analyzing the following situation: "Partner C, who practiced family law litigation, typically used a fee contract referred to by the firm as a 'minimum fee' contract. The contract provides that the initial fee charged to the clients is the greater of (1) the flat fee established in the contract, or (2) an hourly rate applied to actual time that will be spent in representation of the client. A minimum fee paid by the client was deposited into the firm's general account. The contract, however, did not state that the fee was deemed earned and payable to the attorney upon receipt."; holding that lawyers remaining at the law firm (after Partner C left and took most of his clients with him) are required to refund unused funds to the clients; "In order for a payment made to an attorney to be earned immediately, the attorney must clearly inform the client that it is earned immediately, and the client must agree to this arrangement. See RPC 158. Even with the consent of the client, only true retainers and flat fees are deemed earned by the lawyer immediately and therefore can be deposited into the operating account upon receipt. A minimum fee that will be billed against at the lawyer's hourly rate is client money and belongs in the trust account until earned. See Rule 1.15-2 (b). In the present case, at some point during the representation, Law Firm would calculate the number of hours C spent on the case and determine whether the client owed more money. The fee arrangement was therefore neither a true retainer nor a flat fee. Furthermore, Law Firm's fee contract did not make an allowance for the fee to be deposited into the firm's operating account. Therefore, those portions of the minimum fees that were not earned by C's labor while with Law Firm remain client funds and must be returned to the clients. See Rule 1.16(d). If Law Firm does not return the unearned portions of the funds to C's clients, they will have collected an excessive fee in violation of Rule 1.5(a)." (emphasis added)).

Three years later, a District of Columbia court indicated exactly the opposite.

- In re Mance, 980 A.2d 1196, 1203, 1204, 1206, 1207 (D.C. 2009) ("A corollary to the rule that a flat fee is an advance of unearned fees, is that the fee must be held as client funds in a client's trust or escrow account until they are earned by the lawyer's performance of legal services." (emphasis added); "Another important benefit to placing flat fees in a trust or escrow account is preservation of the client's right to choose his or her counsel, including the right to discharge an attorney."; "But we also note that, consistent with the general requirement that a lawyer must entrust flat fees in a trust or escrow

account until earned, the client may consent otherwise . . . and the fee agreement may specify how and when the attorney is deemed to earn the flat fee or specified portions of the fee."; "Although the default rule is that an attorney must hold flat fees in a client trust or escrow account until earned, we note that an attorney may obtain informed consent from the client to deposit all of the money in the lawyer's operating account or to deposit some of the money in the lawyer's operating account as it is earned, per their agreement."; "Where there is no discussion regarding the fee arrangement besides merely stating the overall fee, and no mention of the escrow account option, a client cannot be said to have a sufficient basis to give informed consent to waive the requirements of a rule designed to protect the client's interests.").

Three years after that, an Alaska legal ethics opinion explained that determining the right place to deposit a "flat fee" is "not so obvious."

- Alaska LEO 2012-2 (4/30/12) (analyzing the trust account implications of a "security retainer"; "In the case of a security retainer, without question the funds must be deposited in the client trust account pursuant to ARPC 1.5(a). It is likewise clear that classic retainers, in which the client has agreed to pay to secure the lawyer's availability over a specific period of time, whether or not legal services are actually rendered, may not be deposited in the trust account because the funds are the property of the lawyer when paid and may not be commingled with the client's funds." (footnote omitted) (emphasis added); contrasting this with a flat fee; "The answer is not so obvious in the case of a flat fee. Whether the flat fee is treated as client funds or the property of the lawyer upon payment could have substantial consequences for the client. If the funds remain the client's property -- and are thus required by ARPC 1.14(a) to be segregated in a trust account -- they will be subject to claims of the client's creditors. A client facing determined creditors may need to ensure that she has the wherewithal to resist the creditors' claims by funding her legal defense in advance. Once the defense funds become the lawyer's property they are often beyond the reach of creditors and the lawyer is under an obligation to provide the legal services required to resist the creditor's claims." (emphasis added); "[I]n certain circumstances the client's interests would best be served by being able to prepay for legal services in a manner that allows the client to convey ownership of some or all of the funds to the lawyer at the time of the payment, most commonly when the client is funding legal resistance to creditors or government entities seeking forfeiture. In those circumstances a rule requiring prepaid fees to be placed in a client trust account would be contrary to the client's economic interest. Such a rule may also impinge on the client's ability to hire legal counsel and on the willingness of lawyers to undertake such representation. . . . For example, a lawyer taking on a client's case may be required to forego other representations because of potential conflicts or time constraints, so it may be

reasonable for a lawyer to require some or all of an advance payment to be denominated as earned (and thus the property of the lawyer on payment) to account for those eventualities.").

Unfortunately, despite this uncertainty lawyers can face severe punishment if they remove money from a trust account and move it into their operating account too early.

- Iowa Supreme Court Attorney Disciplinary Bd. v. Powell, 830 N.W.2d 355, 358, 359 (Iowa 2013) (suspending for three months a lawyer who had improperly removed money from a trust fund before he earned it; "We agree with the commission that Powell violated rule 32:1.15, and the Iowa Court Rules governing trust funds. However, the evidence failed to support a finding that Powell had no colorable claim to the funds he removed from his trust account or failed to place in his trust account. Instead, consistent with the charges brought by the Board, he repeatedly failed to comply with the rules and procedures governing trust accounts. The fighting question turns on the sanction that should result from the violations, largely in light of the temporary seven-month suspension served by Powell prior to and during the pendency of this proceeding."; "Broadly, this case involves conduct by a lawyer in improperly removing client funds from a trust account and failing to deposit advance fees into the trust account. Within this broad category of conduct, we recognize that a revocation normally results when the conduct of the offending lawyer constitutes conversion or theft."; "Yet, when the case involves client funds held as an advance fee and the conduct of the attorney involves the conversion of the funds before they were earned, we generally impose discipline in the form of a suspension.").

### **Best Answer**

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

B 11/14

## Timing of Trust Account Disbursements From a Trust Account

### Hypothetical 9

Your firm's commercial real estate practice is finally picking up a bit, and you have several questions about the timing of disbursements from a trust account following a real estate transaction.

- (a) If your best client gives you a check to deposit into your trust account, can you immediately disburse on that check?

**NO**

- (b) If a client gives you a cashier's check to deposit into your trust account, can you immediately disburse on that check?

**MAYBE**

- (c) If a client wire transfers money into your trust account, can you immediately disburse on that check?

**YES (PROBABLY)**

### Analysis

(a)-(c) Every state's ethics rules and every state's bar emphasize the prohibition on disbursing any funds until they are completely collected.

This obsession rests on the notion that disbursing any supposed funds that ultimately prove to be unavailable necessarily amounts to stealing another client's trust account funds and using it for the benefit of a different client.

Every state follows this approach.

Given lawyers' fertile imaginations (especially in matters involving money), one would expect that lawyers would propose elaborate arrangements to avoid this strict technical requirement -- while assuring in good faith that their clients are not harmed.

States, courts and bars universally reject such proposed arrangements.

Courts and bars have explicitly indicated that lawyers may not:

- Post-date checks drawn on trust accounts, to assure that the funds are collected when the check is presented.<sup>1</sup>
- Arrange for a bank handling a trust account to immediately credit deposited funds without waiting for clearance, and honor all trust account checks.<sup>2</sup>
- Arrange for a line of credit -- under which the firm might ultimately become responsible for the loan -- that would enable the firm to immediately disburse funds from a trust account upon personal injury settlements.<sup>3</sup>
- Deposit a check endorsed by the client and the lawyer in the firm's trust account, and write the client a check from the operating account for the amount that the client is due -- intending to reimburse the operating account from the trust account once the check clears.<sup>4</sup>

Of course, one key factor is how to determine when funds are actually present in the lawyer's trust account -- at which time the lawyer can safely disburse them without putting at risk any other clients' funds in the trust account.

Some states take a very strict approach.

- Virginia LEO 1835 (9/7/06) (explaining that although banking law defines when funds are "cleared" (meaning that they are "available for withdrawal and

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<sup>1</sup> New Jersey LEO 609 (12/10/87) (explaining that "it would be improper to draw upon these funds until the check is cleared . . . and this is true even where the instrument is certified or is a cashier's or bank check representing the settlement proceeds of a negligence case"; "[W]e hold that it is improper for an attorney to issue any checks drawn upon an attorney's trust account until the instrument representing the funds against which the check or checks are drawn has in fact cleared").

<sup>2</sup> Virginia LEO 1021 (1/7/88) (even if the bank handling a trust account has agreed to immediately credit deposited funds without waiting for clearance and honor all trust account check, a personal injury lawyer may not disburse funds from a trust account before the funds have cleared).

<sup>3</sup> Virginia LEO 1256 (7/25/89) (a law firm may not arrange for a line of credit (under which the firm might ultimately become responsible for the loan) that would enable the firm to immediately disburse funds from a trust account upon personal injury settlements, because: the firm would be acquiring an interest in the outcome of the litigation; the lawyer would be advancing money other than appropriate litigation expenses; and it would commingle the lawyer's funds and the client's funds).

<sup>4</sup> Virginia LEO 614 (10/30/84) (except as authorized by statute, a lawyer may not disburse funds from a trust account until the funds have cleared; a lawyer may not deposit a check endorsed by the client and the lawyer in the firm's trust account and write the client a check from the operating account for the amount the client is due (intending to reimburse the operating account from the trust account once the check clears)).



disbursement with no chance of revocation or recall by the financial institution"), Rule 1.15 prohibits lawyers from disbursing on funds until they are cleared; concluding that this per se rule applies even if the trust account holds only one client's funds, or has somehow been "securitized.").

Some states take a somewhat more liberal attitude toward the type of payments against which lawyers may immediately disburse.

- North Carolina LEO 2001-3 (4/27/01) ("[A] lawyer may settle a tort claim by making disbursements from a trust account in reliance upon the deposit of funds provisionally credited to the account if the deposited funds are in the form of a financial instrument that is specified in the Good Funds Settlement Act, G.S. Chap. 45A.").

The increasing frequency and sophistication of scam artists has magnified lawyers' exposure to sanctions and personal risks.

- Tam Harbert, Law Firm Flimflam Scam Continues, Law Tech. News, June 8, 2012 ("Despite repeated warnings from the Federal Bureau of Investigation (FBI), law firms continue to fall for an old internet scam."; "In the scam, the firm gets an e-mail requesting assistance with some form of debt collection, financial settlement, or real estate transaction. In some instances, the purported client negotiates with the law firm to take the matter to court. Before any lawsuits are filed, however, the law firm receives a large check from the alleged debtor, and the purported client instructs the firm to deposit the check, deduct its fee, and send the rest of the money to the client. The check turns out to be counterfeit and the firm is left holding the bag, usually for \$100,000 or more."; "According to the 2011 Internet Crime Report, the Internet Crime Complaint Center (IC3) has received more than 600 attorney collection scam complaints totaling more than \$16 million in losses. The complaints started in 2007, rose to an annual high of 250 in 2010 and subsided to 167 in 2011, according to FBI spokesperson Jennifer Shearer. The IC3 report notes that in August 2011 a Nigerian court granted extradition to the U.S. of Emmanuel Ekhator, who allegedly defrauded United States law firms of more than \$29 million. Ekhator will stand trial on the charges in the United States District Court for the Middle District of Pennsylvania."; "More recently, Milavetz, Gallop & Milavetz of Edina, Minn., is suing Wells Fargo Bank over a loss of nearly \$400,000 in a scam. The suit claims that Wells Fargo assured the law firm that the check had cleared, and that bank employees knew or should have known the check was fraudulent.").
- Fischer & Mandell LLP v. Citibank, N.A., 632 F.3d 793, 795, 799, 800 (2d Cir. 2011) (granting summary judgment for Citibank in a lawsuit brought by a law firm which had lost money in a scam involving a counterfeit check; explaining that Citibank had not represented to the law firm that the funds were available

- for disbursement; "In January 2009, pro se plaintiff-appellant Fischer & Mandell LLP ('F&M'), a law firm, deposited a check for \$225,351 into its account at defendant-appellee Citibank, N.A. ('Citibank'). The funds were made 'available' before the check cleared, and F&M wired most of the funds elsewhere. The check, however, turned out to be counterfeit and was dishonored. Citibank debited the account the amount of the check plus a \$10 returned check fee."; "The district court correctly rejected F&M's interpretation and accepted Citibank's. The Agreements clearly show that while Citibank gave its customers the ability to make use of check proceeds provisionally, that is, before checks cleared, that right was subject to a charge back if a check was returned. We hold, in the circumstances here, that 'available' meant only that account balances were 'available' for use on a provisional basis, subject to a charge back if a check was returned, and not that the account balance represented collected funds." (footnote omitted); "The obvious flaw with this argument is that Citibank did not advise F&M that the funds were 'available for withdrawal as of right.' Rather, Citibank advised only that the funds were 'available,' without representing that the Check had cleared or that the funds had been collected or that settlement had become final. 'Available' is different from 'available as of right.'").
- Peter Vieth, Beware of Phony Checks at Closing, Va. Laws. Wkly., Feb. 10, 2011, at 2 ("Scammers continue to target lawyers in Virginia and elsewhere with schemes involving counterfeit checks."; "The latest warning comes from leaders of the real estate bar who warn of phony checks being offered for real estate closings."; "The attempts at real estate fraud are similar to previous reported scams. The bad check comes with instructions to deposit it into a lawyer's trust account, with an excess amount to be wired as soon as possible to a foreign entity. Lawyers have been burned when they thought the check had cleared, only to find out it was fake. By then, the wired funds were gone."; "Charlottesville lawyer Larry J. McElwain, current chair of the Virginia Bar Association real estate section, said two attempts were made to use phony checks for real estate purchases while he served as closing attorney. In the first instance, a cashier's check apparently issued by a major national bank turned out to be counterfeit. The bank caught an error in the check number sequence and notified the law firm in time to prevent a loss, McElwain said."; "In the second incident, a foreign check was presented. McElwain said his office took it by hand to the bank. After several fruitless presentations for collection, the check proved to be worthless."; "Matt McDonald, a lawyer and president of a Tennessee real estate title firm, posted warnings about counterfeit check scams on his company's blog. According to his post, he received eight FDIC alerts about counterfeit checks in one day. His company has announced a policy of requiring wire transfers for any closing involving more than \$10,000."; "McMullan [sic] agreed with the advice to use wire transfers instead of cashier's checks for real estate closings. He adds an extra caveat -- to make sure the wire transfer has not been recalled at the last minute. He said wire transfers can be cancelled

within a day or two, and lawyers are wise to check with the bank to make sure there has not been a recall.").

- Deborah Elkins, Lawyer falls prey to Chinese "Check Scam," 25 VLW 891, Va. Laws. Wkly., Jan. 17, 2011, at 3 (describing how a well-known Richmond, Virginia lawyer was defrauded by what is called the Chinese "check scam"; "On May 7, 2009, Witmeyer was contacted by a person claiming to be Albert Chang, the CEO of Asia Pacific Microsystems. Through an e-mail, Chang asked Witmeyer to help his company collect a \$840,700 debt owed by Viar Electric Company of Lynchburg. Several days later, Witmeyer sent an e-mail agreeing to the representation subject to a proposed retainer agreement and deposit. Chang signed and returned the agreement May 18, indicating Witmeyer would soon receive a large check from Viar as a partial payment of the debt."; "Two weeks later, Witmeyer received what appeared to be an 'official check' issued by Citibank Investment Services N.A. for \$362,400.25, payable to 'Witmeyer & Allen PLC.' The check listed 'Viar Electric Company' as the remitter. Viar was purportedly located in Lynchburg, and a company with this name is listed in online directories of Lynchburg electricians. But the check came by overnight delivery from Ontario, Canada."; "As was his usual business practice, Witmeyer authorized his bookkeeper to endorse the check 'for deposit only' into his client trust account, which he had maintained at BB&T for some 20 years. The bookkeeper deposited the check at the drive-through window and got a receipt stating 'all items are to be credited subject to payment.'"; "Chang e-mailed Witmeyer instructions to complete a wire transfer of \$223,200 of the proceeds to the account of another entity, BECALM Co. Ltd. of Japan. The bookkeeper confirmed with the bank that the funds were available."; "Witmeyer personally completed the wire transfer. A bank employee chatted with Witmeyer about his recent business activity. The lawyer told the bank employee he was getting new clients through the Internet even though he had no website. She commented that it all sounded 'like a scam.' This transfer was the largest international wire transfer the bank employee had ever handled, the opinion said."; "The counterfeit check bounced with Citibank and BB&T charged the lawyer's trust account, leading to a \$160,114.95 overdraft. BB&T sued to collect the overdraft and Witmeyer counterclaimed for the value of the 'charge-back' of the amount transferred to BECALM.").

### **Best Answer**

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

B 11/14

## Client's Use of Credit Cards

### Hypothetical 10

Some new partners in your law firm have finally convinced you to start accepting credit card payments from clients. However, you wonder how clients' use of credit cards implicates various trust account rules.

- (a) Can you accept a client's credit card payment for an outstanding legal bill?

**YES**

- (b) Can you accept a client's credit card payment for a retainer?

**YES (PROBABLY)**

- (c) Can you accept a client's credit card payment that includes both payment of an outstanding bill and a retainer amount?

**YES**

- (d) If the bank with which you are dealing will only deposit such a combine payment into one account, should the payment go into your firm's trust account?

**YES**

- (e) What should you do if the bank issues a "charge back" (triggered by a client's complaint about your firm) that automatically draws money out of the trust account into which you directed the client's credit card payment?

**IMMEDIATELY REPLACE THAT AMOUNT WITH THE LAW FIRM'S OWN MONEY  
(PROBABLY)**

### Analysis

#### Introduction

Somewhat surprisingly, states take differing approaches to the trust account implications of clients using credit cards to pay their bills and retainers.

Just a few decades ago, many bars (including the ABA) prohibited or at least discouraged the use of credit cards for clients' payment of their bills. The bars' longstanding reluctance to allow clients' use of credit cards for paying their bills may have resulted from the very complicated issues that necessarily arise when clients use credit cards.

First, some banks insist on making just one payment to the lawyer when a client uses a credit card. This practice does not create a problem if the client is either paying an existing bill (the payment for which should go into the lawyer's operating account) or paying an unearned retainer (the payment of which should go into the lawyer's trust account). However, such a bank practice creates a difficult situation if the client uses a credit card to pay both an old bill and a retainer -- because those separate amounts must go into separate accounts.

Second, bars have had to wrestle with the service fees that banks charge vendors. To the extent that a bank moves into the lawyer's trust or operating account an amount less than the client has charged (retaining the difference as a service fee), there obviously will be a shortfall in either of the lawyer's accounts. In the case of a trust account, this could be an obvious problem.

Third, all banks insist that vendors allow what are called "chargebacks" -- pulling money back from the vendor after the bank pays the money, if the credit card user asks the bank to do so (because the credit card user is not satisfied with the service or product, disputes whether the bill is the appropriate amount, etc.). Such "chargebacks" create obvious problems if the lawyer has properly arranged for the bank's payment into a trust account, or moved such deposited money into an operating account as required

by the ethics rules. In either case, a bank pulling money back as a "chargeback" would be taking money directly out of the lawyer's trust account.

(a) Despite these troublesome issues, bars eventually moved in the direction of allowing clients to use credit cards to pay their outstanding bills. In 2000, the ABA switched its position. ABA LEO 419 (7/7/00) (withdrawing the following ABA LEOs dealing with advertising and the use of credit cards to pay a lawyer's bill: ABA LEOs 320, 338 and ABA Informal Ops. 1120, 1176).

One recurring issue triggered by clients' use of credit cards involves the service charges credit card companies assess. If the lawyer will pay the service charges, they should be treated like bank service charges -- which means that a lawyer may leave enough money in the trust account to pay the expected credit card service charges.

The Oregon Bar has acknowledged that some jurisdictions (including Colorado, Maryland and South Carolina) allow lawyers to pass the credit card transaction fees to the client, if there has been full disclosure and consent. Oregon LEO 2005-172 (8/2005). But the Oregon Bar warned that such a practice might implicate Regulation Z of the Truth in Lending Act (12 CFR § 226), thus "requiring that the lawyer make certain specific disclosures to the client and offer cash discounts to all clients." Oregon LEO 2005-172.

Most states follow this approach -- allowing lawyers to pass merchant fees along to their clients after full disclosure.

- Washington LEO 2214 (2012) (posing the following question: "A lawyer accepts payments from a client by credit card. The client pays the lawyer with a credit card and the credit card company then charges the lawyer a fee for the transaction. May the lawyer charge the client an additional amount to cover the fee charged the lawyer for the credit card transaction?"; providing the following answer: "It is not prohibited under the Rules of Professional

Conduct, PROVIDED that the lawyer notifies the client in advance of such charges and does not charge the client any more than a fee that reasonably reflects the actual cost incurred by the lawyer for the credit card transaction. HOWEVER, the attorney should consult the merchant services agreement from their credit card processor, as it is typically prohibited to charge these fees back to the customer.").

- Louisiana LEO 12-RPCC-019 (10/24/12) ("If the lawyer treats the transaction fee as an overhead expense, the lawyer must make arrangements to treat the remittance received from the credit card company as a remittance in satisfaction of the entire amount owed. If the lawyer intends that the client still must pay the difference between the original charge amount and the remittance received (i.e., the 'transaction fee'), then the lawyer must be certain to comply with Rule 1.8(e)(3) and obtain the informed consent of the client for such a charge.").
- Virginia LEO 1848 (4/14/09) (having received an opinion from Virginia's Attorney General, approving Virginia lawyers passing along to their client the transactional costs/merchant fees charged by a credit card company when the client uses a credit card -- as long as the lawyer explains the process to the client before the client uses the credit card; explaining that such transactional/service fees may be deducted from the lawyers' trust account, but lawyers using best practices should arrange for the fees to be deducted from the lawyers' operating account; warning that lawyers must "monitor and personally replace any escrow funds that are subject to a chargeback" by a credit card company -- and lawyers using best practices should arrange for any chargebacks to come from the lawyers' operating account rather than trust account).
- D.C. LEO 348 (3/09) (generally allowing lawyers to arrange for their clients' payment of bills by using a credit card; explaining the lawyer's duty of confidentiality; "A credit card company may require a lawyer to provide information about the nature of services, "A credit card may require a lawyer to provide information about the nature of services, with the amount of detail required determined by the particular credit card company. Therefore, a lawyer should make every effort to enter into an agreement with a credit card company that will allow her to provide generic descriptions of services rendered."; "A more troubling confidentiality problem is the requirement by some credit card companies that the lawyer cooperate with them in the event there is a dispute between the client and the company. The lawyer should first seek to enter into an agreement with a credit card company that relieves her of any obligation to cooperate with the company in the event of a dispute between the credit card company and the client. If that is not possible, the lawyer is obligated to inform the client of the ramifications of the lawyer cooperating with the credit card company in any dispute between the company and the cardholder, and to obtain the client's informed consent that he still wants to pay by using a credit card. In the event a dispute develops and the credit card company seeks the lawyer's cooperation, the lawyer must

comply with Rule 1.6."; also allowing lawyers to pass along any credit card fees to their clients; "[A] lawyer who incurs an additional cost for accepting credit cards may pass those costs on to the client who charged the legal services." (emphasis added); "Before passing on such fees, however, the lawyer must comply with Rule 1.5(b) by explaining to the client that the fee charged by the credit card company will be charged to the client as an expense. To guard against later misunderstanding, the Committee suggests that the lawyer go further and obtain the client's 'informed consent' to being charged an additional amount to recapture the fees that the lawyer must pay the credit card company."; "We conclude that there is no ethical bar to lawyers passing on the credit card processing fees to their clients, however, we note that as a matter of good business practice, lawyers may wish to follow the practice of other merchants and absorb the costs."; warning lawyers that they must understand the arrangement with a credit card company before accepting any retainer for future payments by a credit card; "Before accepting credit cards for an advance fee, the lawyer must have a complete and detailed understanding of the agreement imposed on her by credit card companies. In many cases it may prove impossible for the lawyer to deposit advance fees paid by credit card into trust accounts and adhere to the terms of the agreement. Funds in trust accounts belong to the clients, not to the lawyer. As such, they cannot be attached by the lawyer's creditors. But because many credit card agreements permit the credit card company to invade the merchant's bank account and charge back monies already paid the merchant if the customer disputes a bill, there is a danger that funds deposited in a lawyer's trust account might be 'clawed back.' Under some circumstances this could result in a situation where there are insufficient funds in the account."; specifically prohibiting an arrangement under which a credit card 'charge back' might be drawn from the lawyer's trust account; "[T]he lawyers must ensure that under no circumstances can the credit card company invade her trust account. If that possibility exists, a credit card may not be used. Moreover, the lawyer must understand all the provisions of her agreement with the credit card company to ensure that entrusted client funds are safe and secure. Absent that assurance, a credit card may not be used to advance entrusted funds."; explaining that D.C. allows the deposit of what the bar calls "advance fees" into the lawyer's operating rather than trust account; "Rule 1.15(d) permits the deposit of advance fees into a lawyer's operating account provided that the client provides informed consent. Such fees are treated as the lawyer's property, although she has the obligation to and must have the wherewithal to repay them promptly if she does not earn them. To ensure that the consent provided by a client is 'informed consent,' the lawyer must explain that, unlike fees deposited in a trust account, these fees can be attached by the lawyer's creditors because legally they are the lawyer's property. Moreover, the provisions of the agreement with the credit card company may raise other issues if credit cards are used to pay advance fees into an operating account, which the lawyer must not only understand, but explain to her client."; advising clients to wait until the time has expired for a



client's dispute of a charge before moving funds into the lawyer's operating account; "A lawyer may substantially eliminate the likelihood of a charge of misusing a client's funds if she follows a strict practice of billing clients only after the services have been rendered and withdrawing funds only after the dispute period (most cardholders typically have 120 days from the date of a transaction within which to dispute a charge)."; finally, warning lawyers to advise their clients if a credit card company would require any repayment to be made by a credit card (as opposed to a repayment by cash or check); "Accepting credit cards for the payment of unearned fees imposes on a lawyer the obligation to know whether her merchant contract with the credit card company requires her to refund any unearned funds to the client directly, or whether she may leave the charge on the credit card and return the fees to the client by cash or check. If the credit card company requires crediting the refund to the account, the lawyer must explain this in writing before accepting the credit card for payment.").

Not surprisingly, IRS regulations can complicate all of this.

- Joe Forward, Lawyers Taking Credit Card Payments Should Take Action to Avoid Internal Revenue Service Penalty, State Bar of Wis., Dec. 12, 2012 ("Are you a lawyer or law firm allowing clients to pay by credit card? If so, read on for instructions on avoiding an Internal Revenue Service (IRS) penalty with potential ethical implications."; "Starting January 1, 2013, the IRS will impose a 28 percent withholding penalty on all credit card transactions if the lawyer or law firm's tax ID number and entity name on file with the credit card processing company do not match, exactly, the tax ID number and entity name on file with the IRS."; "This means lawyers and law firms should contact their credit card processing company to ensure that tax ID numbers and entity names match IRS records. However, if LawPay is your credit card processing company, don't worry about contacting LawPay about this issue."; "LawPay, which partners with the State Bar of Wisconsin to provide reduced-fee credit card processing services while complying with American Bar Association and state requirements for managing client funds, is taking proactive steps to ensure their clients' tax IDs and entity names match."; "If you are a LawPay client, you don't need to call us," said Amy Porter, LawPay's chief executive officer. Porter says LawPay does quarterly validation checks with the IRS's tax database to ensure tax ID numbers and entity names match LawPay accounts."; "If the IRS reports a mismatch, LawPay deactivates the account until the problem is resolved, Porter says. This avoids the 28 percent penalty and potential ethical issues that could arise if a 28 percent withholding penalty is assessed on a transaction (see ethics discussion below)."; "Lawyers and law firms not using LawPay are advised to call the processing company for confirmation that tax IDs and entity names match IRS records. If you're unsure, Porter advises lawyers and law firms to stop accepting credit cards until the match is verified.").

(b) Most states allow clients to pay unearned retainers by credit card, as long as that amount stays in the lawyer's trust account.

However, not all states have taken this approach. For instance, in 2008 the Arizona Bar has indicated that "[u]se of credit cards for payment of advance fees or expected costs is not ethically permissible in Arizona for several reasons."

- Arizona LEO 08-01 (9/2008) ("A lawyer may accept credit-card payments only for earned fees, earned-upon-receipt retainers, or reimbursement for advanced costs. Such credit-card payments may not be deposited into the lawyer's trust account. A lawyer may not accept payment in advance by credit card for unearned fees or costs not yet advanced. A lawyer may receive a single, non-cash payment from a client consisting of funds belonging partly to the client and partly to the lawyer. Such a payment must occur by check, money order, or electronic-fund transfer, and must be deposited into the lawyer's trust account. After the transaction has cleared the issuing bank, the lawyer's portion must be removed promptly from the trust account."; "We recognize that some other ethics committees that have considered the ethical implications of credit-card transactions have concluded that advance payments of fees by credit card can ethically be deposited into the lawyer's trust account under certain conditions."; "In our opinion, a lawyer's fiduciary duty to safeguard client property in the trust account requires stricter controls than the Oregon and North Carolina solutions. We conclude that the credit-card company's right of access creates a degree of risk, when associated with a lawyer trust account, that cannot be overcome by relying on the lawyer to remain vigilant about the possibility of access and then acting promptly to deposit the lawyer's own funds into the trust account to replace funds withdrawn by the credit-card company. Nor do we believe it is within our jurisdiction to opine that Arizona lawyers may negotiate contractual arrangements with credit-card companies on a case-by-case basis that involve a credit-card company's right to access the lawyer's trust account under any circumstances."; "We recognize the potential advantage to both lawyers and clients to reach an agreement that involves the client's advance grant of authority to the lawyer to charge the client's credit card. In our opinion, Arizona lawyers and clients have three options to consider."; "The first option is to designate advance fees paid by credit card as 'earned-upon-receipt' or 'non-refundable.' Fees of this kind belong to the lawyer when received and, therefore, must not be deposited into the lawyer's trust account. Lawyers electing to use this option, however, must take three precautions. First, the fee must be reasonable. Second, the fee agreement must state explicitly that the fee is 'earned-upon-receipt' or 'non-refundable' and also must contain language, required by ER 1.5(d)(3), that the client 'may nevertheless discharge the lawyer at any time and in that event may be

entitled to a refund of all or part of the fee based upon the value of the representation pursuant to [ER 1.5(a)].' Third, the lawyer must not bill against or credit work performed on an incremental basis against the 'earned-upon receipt' or 'non-refundable' fee, as such a practice would be consistent with an advance fee (or retainer) and not with an 'earned-upon receipt' fee."; "The second option is for the lawyer and client to enter into an agreement whereby the client allows the lawyer to keep credit-card information on file and charge earned fees and advanced costs against the card on a periodic basis, provided the lawyer has sent an invoice to the client detailing the fees and charges and has allowed the client a reasonable period of time to review and, if possible, communicate any disputes to the lawyer. We believe a period of 10 calendar days after sending the invoice is presumptively reasonable, recognizing the special circumstances or needs may shorten or extend that period. Absent any communication from the client disputing all or part of the invoice, the lawyer may (in accordance with the prior agreement with the client) charge the client's credit card either for the full amount of the invoice or for any undisputed charges contained on the invoice. The lawyer's trust account, however, may not be designated as the merchant account for such credit-card transactions."; "If a lawyer elects to use an advanced authorization agreement as described above, it must be stated in a writing communicated to and agreed to by the client, either in the original fee agreement or, if such an arrangement constitutes a change to the lawyer's current billing practice, in a separate agreement. The lawyer must also take precautions to safeguard the confidentiality of the client's credit-card information. See ER 1.6 (establishing the lawyer's duty to safeguard client confidences). In accordance with Ariz. Ethics Op. 89-10, the agreement must also state whether the client or lawyer is responsible for paying any additional charges imposed by the credit-card provider."; "The third option is for the client to take a cash advance on the client's credit card and pay the lawyer in cash. Lawyers should be cognizant, however, that credit-card companies often charge higher interest rates for cash-advance transactions and should discuss that fact with clients before requiring or recommending that the client take a cash advance on a credit card.").

A year earlier, the California Bar explained that "the attorney may not ethically accept any payment or deposit from a client by credit card, whether for earned fees or fees not yet earned, if the payment or deposit includes advances for costs and expenses."

- California LEO 2007-172 (2007) (explaining that lawyers may take credit card payments for earned fees and may pay the service charge debited by the issuer; also explaining that lawyers may accept retainer fee payments by credit card; noting that under California ethics rules "an attorney is ethically

permitted, but not required, to deposit fees not yet earned into a client trust account"; "If an attorney were required to deposit fees not yet earned into a client trust account, the attorney would not be permitted to accept such a deposit from a client by credit card to the extent that the credit card issuer deposits funds into a merchant account that is subject to invasion. That is because to that extent: (1) the credit card issuer deposits the funds into a merchant account; (2) the attorney, however, must deposit the funds into a client trust account; (3) the attorney must take reasonable care to protect the funds deposited into a client trust account; and (4) before the attorney can assert control over the funds, the merchant bank may invade the funds in the merchant account, thereby putting the funds at risk beyond the attorney's protection. As a consequence, the attorney could not immediately deposit such fees into a client trust account or take care to protect them, but would have to cede control to the merchant bank, at least initially. . . . But because an attorney need not deposit fees not yet earned into a client trust account, the attorney may accept such a deposit by credit card, resulting in a deposit into a merchant account."; noting that in contrast California ethics rules require lawyers to deposit any "advances for costs and expenses from a client into a client trust account"; "Because an attorney must deposit advances for costs and expenses from a client into a client trust account, he or she may not ethically accept such a deposit by credit card, as explained above, to the extent that the credit card issuer deposits funds into a merchant account that is subject to invasion. It follows that the attorney may not ethically accept any payment or deposit from a client by credit card, whether for earned fees or fees not yet earned, if the payment or deposit includes advances for costs and expenses. The attorney, however may accept reimbursement by credit card for costs and expenses already paid. By definition, reimbursement of costs and expenses already paid does not constitute an 'advance' of such costs and expenses, and consequently it need not -- and indeed may not -- be deposited into a client trust account." (footnote omitted)).

**(c)-(d)** Those states allowing clients to pay retainers by credit card face another issue -- whether lawyers should deposit such payments into their "merchant account" (the account into which the credit card company pays the necessary amounts, and from which it withdraws the service fees) or a trust account?

In Oregon LEO 2005-172 (8/2005), for instance, the Oregon Bar explained that other states "require[] that credit card transactions be treated like cash payments, with earned fees going into the business account and retainers into a trust account." Id. at n.3. Oregon joined Kansas, Missouri and North Carolina in explaining that the

. . . better practice may be to have separate merchant accounts for credit card retainers and earned fees. However, if a lawyer's bank insists on a single merchant account, it should be a trust account. Credit card payments representing earned fees are funds belonging "presently or potentially" to the lawyer. It is not a violation of DR 9-101(A) to deposit all credit card transactions into a trust account, if the portion representing earned fees is promptly transferred to the lawyer's business account.

Oregon LEO 2005-172 (8/2005),

Since Oregon took this approach, other states have followed suit.

- North Carolina LEO 2009-4 (4/24/09) ("[A] law firm may establish a credit card account that avoids commingling by depositing unearned fees into the law firm's trust account and earned fees into the law firm's operating account provided the problem of chargebacks is addressed."; "To avoid the commingling of client funds with a lawyer's own funds, Rule 1.15-2 of the Rules of Professional Conduct requires payments of mixed funds, unearned fees, and money advanced for costs to be deposited into a lawyer's trust account, and payments for earned fees and reimbursements for expenses advanced by a lawyer to be deposited into a lawyer's operating account. Although a lawyer may accept payment of legal fees by credit card, if there is no way to distinguish a credit card payment for earned fees or costs advanced from a payment for unearned fees or anticipated expenses, all credit cards must be initially deposited into the lawyer's trust account. Earned fees and expense reimbursement are then withdrawn promptly from the trust account for deposit into the operating account or payment to the lawyer."; "As noted in 97 FEO 9, '[u]nder all circumstances, a lawyer is ethically compelled to arrange for a payment (from his or her own funds or from some other source) to the trust account sufficient to cover the chargeback in the event that a chargeback jeopardizes the funds of other clients on deposit in the account.' Therefore, provided the lawyer can comply with the requirements set forth in 97 FEO 9, the lawyer may establish a credit card account that deposits funds into separate accounts.").
- Michigan LEO RI-344 (4/25/08) (explaining various issues raised by lawyers' acceptance of fees and deposits (against future fees) by credit card; explaining that "[t]here are two alternative methods by which a lawyer may enter into credit card arrangements for payment of advance legal fees. The first and less problematic practice would involve the use of two bank accounts. The credit card company would make deposits for advance legal fees and expenses into the lawyer's trust account and takes [sic] merchant fees and chargebacks from the lawyer's business account. . . . If the credit card company insists on using one account, all credit card payments for

- advance legal fees and expenses must be deposited into the lawyer's trust account and the lawyer must transfer legal fees and expenses to the business account as they are earned." (emphasis added); also explaining that "[t]o insure that credit card chargebacks do not impact the trust account, where chargebacks and credit card company fees are deducted from the trust account, legal fees and expenses paid by the credit card company into the trust account should not be considered fully earned until the credit card dispute period has expired.").
- Ohio LEO 2007-3 (4/13/07) ("A lawyer may accept credit card payments from clients for earned legal fees, reimbursement of legal expenses, advances on unearned legal fees, and advances on future expenses. Credit card payments for earned fees and reimbursement of legal expenses belong in a business account, whereas, credit card payments for advances on unearned legal fees and advances on future legal expenses must go into a client trust account. Preferably, a lawyer would maintain two credit card merchant accounts, one used for credit card payments to a business account and one for credit card payments to a client trust account. But, because two merchant accounts may not be feasible or practical, it is acceptable for a lawyer to maintain one merchant account with the credit card payments all going into a client trust account, provided that the credit card payments for earned legal fees and reimbursements of expenses are promptly transferred from the trust account to a business account. A lawyer may place his or her own funds into a client trust account to pay brokerage and credit card service charges. Credit card service charges are the responsibility of the lawyer and may not be deducted from the interest earned on a client trust account." (emphasis added)).

(e) Another recurring issue involves what are called "chargebacks" -- under which the credit card company debits the account into which the credit card company has made the payment, if a client disputes the payment.

States have taken different positions on this issue -- reflecting how difficult it can be to properly characterized payments, and comply with the ironclad prohibition on comingling funds, improperly transferring funds from a trust account into an operating account, and improperly leaving in a trust account money that should be moved to an operating account.

First, some bars have warned lawyers not to allow clients to use credit cards if credit card companies might improperly remove trust account funds.

- District of Columbia LEO 348 (3/2009) (analyzing an ethics issue involving clients' use of credit cards; ultimately concluding that "[c]redit cards are an acceptable method of paying legal fees provided that the client understands and consents to whatever disclosures to the credit card company are required by the merchant agreement. The client must also be informed of the actual cost of using the credit card if the lawyer intends to recapture from her client the fees she must pay to the credit card company. While credit cards may also be used to pay advance fees or retainers, this may be done only if it does not endanger entrusted client funds and only if the lawyer thoroughly understands the merchant agreement and arranges her affairs so that she has the ability to meet her obligation to refund unearned fees."; warning lawyers that they must preserve their clients' confidences, which requires the lawyers to " make every effort to enter into an agreement with a credit card company that will allow her to provide generic descriptions of services rendered. . . . If this level of generality cannot be accomplished, the lawyer must inform the client and obtain his informed consent to whatever disclosures the credit card company requires the lawyer to make."; also noting that lawyers fulfilling their obligation of preserving client confidences "should first seek to enter into an agreement with a credit card company that relieves her of any obligation to cooperate with the company in the event of a dispute between the credit card company and the client. If that is not possible, the lawyer is obligated to inform the client of the ramifications of the lawyer cooperating with the credit card company in any dispute between the company and the cardholder, and to obtain the client's informed consent that he still wants to pay by using a credit card."; also dealing with the issue of merchant fees; explaining that "[b]efore passing on such fees, however, the lawyer must comply with Rule 1.5(b) by explaining to the client that the fee charged by the credit card company will be charged to the client as an expense. To guard against later misunderstanding, the Committee suggests that the lawyer go further and obtain the client's 'informed consent' to being charged an additional amount to recapture the fees that the lawyer must pay the credit card company."; "We conclude that there is no ethical bar to lawyers passing on the credit card processing fees to their clients, however, we note that as a matter of good business practice, lawyers may wish to follow the practice of other merchants and absorb the costs." (footnote omitted); noting that lawyers must also deal with charge backs; "Because the Committee does not and cannot know the details of all contractual arrangements between lawyers and credit card companies, we cannot conclude that credit cards can never be used to pay advance fees into trust accounts. But if a credit card is used in this fashion, the lawyers must ensure that under no circumstances can the credit card company invade her trust account. If that possibility exists, a credit card may not be used." (emphasis added); noting that D.C. ethics rules allow lawyers to place advance fees into the lawyer's operating account with the client's consent; explaining that lawyers engaging in that practice must also deal with chargebacks).

Second, some bars have required lawyers to arrange for banks to pull back "chargeback" amounts from the lawyer's operating account, or immediately replace any money a bank removes from the lawyer's trust account.

- Louisiana LEO 12-RPCC-019 (10/24/12) ("[T]he transactions should not be linked to bank accounts in a manner that exposes the lawyer's trust account to 'charge backs' or credit card costs arising from client disputes and/or transaction costs."; "The 'merchant agreement' or contract between the vendor/credit card company and lawyer should also provide that any 'charge back,' other disputed transaction, or costs associated with using the credit card will be charged solely to the lawyer's operating account.").
- Virginia LEO 1848 (4/14/09) (having received an opinion from Virginia's Attorney General, approving Virginia lawyers passing along to their client the transactional costs/merchant fees charged by a credit card company when the client uses a credit card -- as long as the lawyer explains the process to the client before the client uses the credit card; explaining that such transactional/service fees may be deducted from the lawyers' trust account, but lawyers using best practices should arrange for the fees to be deducted from the lawyers' operating account; warning that lawyers must "monitor and personally replace any escrow funds that are subject to a chargeback" by a credit card company -- and lawyers using best practices should arrange for any chargebacks to come from the lawyers' operating account rather than trust account).
- Oregon LEO 2005-172 (8/2005) (explaining that the chargeback process "can put the funds of other clients at risk if the credit card payment has already been earned and withdrawn before the lawyer learns of the chargeback"; "[o]ne solution is to have the bank deduct all chargebacks from the lawyer's business account. If the bank is unwilling or unable to debit a separate account, the lawyer should try to arrange for an interaccount transfer process by which funds from the lawyer's business account will be transferred immediately to cover any chargeback to the trust account. However it is ultimately handled, the lawyer is ethically bound to ensure that any chargebacks that jeopardize other client funds in trust are promptly covered with the lawyer's own funds.").
- North Carolina LEO 97-9 (1/16/98) ("To avoid the potential jeopardy to the funds of other clients on deposit in a trust account, the lawyer must first attempt to negotiate an agreement with the bank that requires the bank to debit an account other than the trust account in the event of a chargeback. Some banks will route chargeback debits (and the discount fee for credit card charges) against a firm's operating account. Some banks may require a merchant to maintain a separate demand deposit account in an amount



sufficient to cover chargebacks. If a bank cannot or is unwilling to debit a separate account, (i.e., the bank requires all chargebacks to be debited from the account into which credit card payments are deposited), the lawyer must request that the bank arrange an inter-account transfer such that the lawyer's operating account, or other non-trust account, will be immediately debited in the event of a chargeback against the trust account and the money promptly deposited into the trust account to cover the chargeback. If the bank will not agree to debit another account or arrange for inter-account transfers, the lawyer must establish a trust account for the sole purpose of receiving advance payments by credit card. The lawyer must withdraw all payments to this trust account immediately and deposit them in the lawyer's 'primary' trust account. In this way, the risk that a chargeback will impact the funds of other clients will be minimized."; "Under all circumstances, a lawyer is ethically compelled to arrange for payment (from his or her own funds or from some other source) to the trust account sufficient to cover the chargeback in the event that a chargeback jeopardizes the funds of other clients on deposit in the account.").

Third, one bar encouraged lawyers to set up a separate trust account to receive credit card companies' advance payments, from which the bank could remove any chargeback amounts.

- North Carolina LEO 97-9 (1/16/98) ("[P]rovided steps are taken to safeguard the client funds on deposit in a trust account, a lawyer may accept fees paid by credit card although the bank's agreement to process such charges authorizes the bank to debit the lawyer's trust account in the event a credit card charge is disputed by a client."; "To avoid the potential jeopardy to the funds of other clients on deposit in a trust account, the lawyer must first attempt to negotiate an agreement with the bank that requires the bank to debit an account other than the trust account in the event of a chargeback. Some banks will route chargeback debits (and the discount fee for credit card charges) against a firm's operating account. Some banks may require a merchant to maintain a separate demand deposit account in an amount sufficient to cover chargeback. If a bank cannot or is unwilling to debit a separate account, (i.e., the bank requires all chargebacks to be debited from the account into which credit card payments are deposited), the lawyer must request that the bank arrange an inter-account transfer such that the lawyer's operating account, or other non-trust account, will be immediately debited in the event of a chargeback against the trust account and the money promptly deposited into the trust account to cover the chargeback. If the bank will not agree to debit another account or arrange for inter-account transfers, the lawyer must establish a trust account for the sole purpose of receiving advance payments by credit card. The lawyer must withdraw all payments to this trust account immediately and deposit them in the lawyer's 'primary' trust

account. In this way, the risk that a chargeback will impact the funds of other clients will be minimized." (emphasis added)).

Fourth, some bars have indicated that lawyers should retain any amounts in their trust account until the time has lapsed for any clients to challenge the lawyer's entitlement to payment.

- Michigan LEO RI-344 (4/25/08) (explaining various issues raised by lawyers' acceptance of fees and deposits (against future fees) by credit card; explaining that "[t]here are two alternative methods by which a lawyer may enter into credit card arrangements for payment of advance legal fees. The first and less problematic practice would involve the use of two bank accounts. The credit card company would make deposits for advance legal fees and expenses into the lawyer's trust account and takes [sic] merchant fees and chargebacks from the lawyer's business account. . . . If the credit card company insists on using one account, all credit card payments for advance legal fees and expenses must be deposited into the lawyer's trust account and the lawyer must transfer legal fees and expenses to the business account as they are earned." (emphasis added); also explaining that "[t]o insure that credit card chargebacks do not impact the trust account, where chargebacks and credit card company fees are deducted from the trust account, legal fees and expenses paid by the credit card company into the trust account should not be considered fully earned until the credit card dispute period has expired." (emphasis added)).

### **Best Answer**

The best answer to (a) is **YES**; the best answer to (b) is **PROBABLY YES**; the best answer to (c) **YES**; the best answer to (d) is **YES**; the best answer to (e) is **IMMEDIATELY REPLACE THAT AMOUNT WITH THE LAW FIRM'S OWN MONEY (PROBABLY)**.

B 11/14

## IOLTA Programs

### Hypothetical 11

You just left a large firm at which you had very little interaction with trust accounts, but as a sole practitioner you have had to educate yourself very quickly. You have several questions about so-called "IOLTA" accounts.

- (a) Is it possible to determine the interest paid on the trust account deposits of each client whose money is in your trust account?

**YES**

- (b) May you pay all interest earned on your trust account deposits to your state bar's IOLTA program, to be used for funding legal aid services to indigent people in your state?

**YES**

- (c) Must you pay all interest earned on your trust account to your state bar's IOLTA program, to be used for funding legal aid services to indigent people in your state?

**MAYBE**

### Analysis

Nearly every jurisdiction requires lawyers to pay interest earned on their trust accounts to some charitable or public service funds, usually those providing legal services to the indigent. These are usually known by the acronym IOLTA -- which stands for "Interest on Lawyers' Trust Accounts."

In a sense, this obligation stems from what might have been a logistical problem before the advent of computers, but continues as a public service policy with which clients sometimes disagree. Trust accounts nearly always contain numerous clients' property (and sometimes small amounts of lawyer property, to cover bank service

charges, etc.) for various amounts of time. Before computers, it may have been difficult to allocate interest earned on trust accounts to a particular client or to the lawyer.

Perhaps that is the reason that bars began to insist that lawyers take the full amount of the interest and handle it in just one way -- rather than try to give each client the amount of interest that its trust account deposit generated each month.

Any justification of this sort disappeared with the advent of computers and software that undoubtedly would allow lawyers to determine to the exact penny what client earned what interest on what amount.

**(a)-(c)** Despite the development of this technology, nearly every state continues to insist that lawyers hand over their clients' interest for these admittedly worthwhile goals. The Restatement explains this majority approach.

A lawyer must deposit funds of a client or a third person in an account, usually a trust or client account, separate from the lawyer's own funds, and including those of the lawyer's law practice. The trust account may contain funds of more than one person, but the records must adequately identify the share of each person. The lawyer may not receive interest on such funds. Most states now have arrangements under which certain client funds (usually small amounts) may or must be pooled in accounts, the interest from which is paid to a regulatory authority to fund legal services for the indigent and other similar activities. When trust accounts may bear interest for the benefit of an individual client and the amount and probable duration of the deposit justify the effort and expense involved, the lawyer should arrange for an interest-bearing account, with the interest to be transmitted to the clients. A lawyer holding client funds as a trustee or in other capacities may be required to invest them.

Restatement (Third) of Law Governing Lawyers § 44 cmt. d (2000) (emphasis added).

Most states follow this approach.

- Zoe Tillman, New Rule Approved to Verify District of Columbia Lawyers' Interest on Lawyers' Trust Account Participation, Nat'l L.J., Mar. 14, 2013 ("In

a move that would bring the District of Columbia Bar in line with other states with mandatory bars, the District of Columbia Court of Appeals recently approved a new rule giving the District of Columbia Bar Foundation authority to periodically check that local attorneys are participating in the Interest on Lawyers' Trust Accounts, or IOLTA, program."; "The mandatory program, which collects interest earned on lawyers' trust accounts, helps fund annual grants to local civil legal services organizations through the District of Columbia Bar Foundation. Katia Garrett, the foundation's executive director, said that having a way to verify participation is considered a best practice in managing IOLTA programs."; "'It's really to provide an added level of certainty,' she said. Garrett added that by checking, the foundation could make sure that the accounts reported by lawyers matched bank records."; "The IOLTA program has suffered in recent years because of low interest rates. Garrett said it's possible that new verification procedures would prompt attorneys not currently participating to do so, but that it was unlikely to make a dent in the program's declining revenues."; "Washington and 45 other jurisdictions have mandatory IOLTA programs. Of those, Garrett said that at least 40 have some form of reporting requirement for IOLTA programs. 'What all the stakeholders want is to have a system that makes it easy for lawyers to carry out their obligations,' she said."; "The foundation will have to develop a plan for how it intends to verify participation and submit it for approval by the District of Columbia Bar Board of Governors and the District of Columbia Court of Appeals. Once it starts checking, the foundation will also have to submit an annual report on its activities to the board of governors and the appeals court.").

One bar has even indicated that lawyers licensed in the state but holding some of their trust account amounts elsewhere must pay interest back to that state's chosen charity.

- Arizona LEO 09-03 (11/2009) ("An Arizona-licensed lawyer who maintains an office in Arizona but whose law firm also has an office in another jurisdiction may keep trust funds in a trust account held outside of Arizona provided that the client (or third person, where relevant) consents and the account is held at an approved financial institution. If the account is a pooled trust account on which interest and dividends are not paid to clients, the interest and dividends on the funds from the Arizona-licensed lawyer must be paid to the Arizona Foundation for Legal Services and Education.").

However, several states have balked at such mandatory programs.

- Kathleen Baydala Joyner, Bar Again Delays IOLTA Rule Change, Daily Report, Jan. 14, 2014 ("For the second time in three months, the State Bar of Georgia's Board of Governors delayed a vote on a professional rules change that would require lawyers to establish client trust funds exclusively with banks that offer competitive interest rates."; "The proposal now is slated to

- come up for a vote during the Board of Governors' spring meeting in March at Lake Oconee. It is part of a package of fund-raising measures recommended by a bar task force to fill a \$1.8 million gap in the budgets of Georgia Legal Services and the Atlanta Legal Aid Society."; "I am disappointed that we did not get to a vote today,' said Rita Sheffey, the vice chairwoman of the task force and secretary of the bar. 'I am confident we had the support.'"; "The bar's Civil Legal Services Task Force, a 14-member panel of judges and lawyers appointed last year by bar President Charles 'Buck' Ruffin, was poised to ask the Board of Governors for a vote on Saturday. The task force met in Atlanta Thursday afternoon to go over the proposal, which had been tabled during the bar's fall meeting in November at Jekyll Island. At that time, members of the Board of Governors said they had not had enough time to review the proposal."; "This time the delay came from the Georgia Bar Foundation, which collects and disburses funds gleaned from interest on lawyer trust accounts, also known as IOLTA.").
- Alan Cooper, Virginia's Mandatory IOLTA Effort Stalls, Va. Laws. Wkly., Feb. 22, 2011 ("Proponents of reinstating mandatory IOLTA as a tool to raise money for legal aid appear to have stumbled at the first step. The Supreme Court of Virginia approved mandatory IOLTA, the acronym for Interest on Lawyers' Trust Accounts, on a 4-3 vote in 1993, much to the consternation of state bankers. Two years later, the bankers prevailed in a lobbying battle by winning the adoption of Virginia Code § 54.1-3915.1, which banned the program. Since then, lawyers with trust accounts have been required to affirmatively opt out of participating in a voluntary IOLTA program. With the ban in place, the first task was to get the legislature to remove it. Delegates William H. Cleaveland, R-Botetourt, and A. Donald McEachin, D-Richmond, sponsored repeal legislation, House Bill 1571 and Senate Bill 817. Cleaveland's bill died in the House Courts of Justice Committee on a 10-12 vote, but the Senate version squeaked by Senate 22-18. That sent the concept to the House, but the Courts committee there failed to report it to the full House yesterday on an 11-11 vote. As we reported last month, just how much money the proposal would generate, at least in the near term, is very much in question. The amount collected through the program dropped from \$4.6 million to \$700,000 as the economy tanked and interest rates on the accounts dropped to near zero. Moreover, no one knows how much of the money that might be generated by a mandatory program is already being collected by the opt-out program. About 5,100 trust accounts participate in the program, compared with roughly 23,000 attorneys with active practices in the state. But some of the accounts cover entire law firms, and many lawyers don't have practices with a need for a trust account that would generate revenue for legal aid. And, as the 1993 vote suggests, getting the endorsement of the Virginia State Bar and the approval of the Supreme Court for the program was by no means a certainty.").

**Best Answer**

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

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## Creditors' Claims Against Trust Account Funds

### Hypothetical 12

With many of your clients facing severe financial hardships, you have had to address several incidents in which your clients' creditors asserted claims against client funds held in your trust account.

- (a) Can one of your clients' creditors assert a lien on client funds in your account?

**YES**

- (b) If you receive a letter from one of your clients' creditors claiming that the client has specifically pledged the amount held in your trust account for the benefit of that creditor, must you hold that money even if the client asks you to return it?

**MAYBE**

- (c) If you know that one of your clients is facing financial problems and owes many creditors fairly substantial amounts, must you hold all of the client's trust account amount even if the client asks them to be returned?

**NO (PROBABLY)**

### Analysis

(a)-(c) To the extent that clients and their lawyers disagree about the ownership of money being held in the trust account, the lawyer must keep the money in the trust account until the dispute has been resolved.

When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

ABA Model Rule 1.15(e) (emphasis added).

The Restatement takes the same basic approach.



This Section does not apply to property indisputably owned by a lawyer. Thus, when a client does not dispute a lawyer's good-faith claim to a certain amount as a fee then owing, the lawyer may transfer that amount into the lawyer's personal account. See also § 21 . . . , discussing when a lawyer may validly endorse a check on which the client is payee. Similarly, if a payment to a lawyer is a flat fee paid in advance rather than a deposit out of which fees will be paid as they become due, the payment belongs to the lawyer . . . . A lawyer holding client funds as an advance fee payment may withdraw them for fees as earned, so long as there is no existing dispute about the lawyer's right to do so. In such instances, the lawyer acts rightly in retaining the money even though, for example, the client might later claim that the fee was unreasonable . . . or the advance payment becomes unreasonable in light of later developments . . . .

When a lawyer asserts a lien on the client's property . . . , the lawyer must hold the client's property separate from the lawyer's personal or office funds and property . . . . Similarly, in most jurisdictions a lawyer must keep separate the disputed portion of any fund claimed both by the lawyer and a client or third person.

Restatement (Third) of Law Governing Lawyers § 44 cmt. f (2000) (emphasis added).

States unanimously agree that lawyers must keep any disputed amount in their trust accounts until some resolution.

- North Carolina LEO 2005-12 (1/20/06) (analyzing several hypotheticals dealing with flat fees; (1) "Adult Client and her mother come to Lawyer's office together. Mother agrees to pay a \$5,000 advance fee for representation of Client in her domestic case. Pursuant to Rule 1.8, Lawyer makes sure Mother understands that Lawyer represents only Client's interests, not Mother's, and that information received from Client during the course of the representation remains confidential. Client consents to the payment of her fees by Mother, and Mother agrees to pay under these terms. Lawyer deposits the \$5,000 in his trust account and begins billing against it."; "Shortly thereafter, Mother and Client having a falling out, and Mother demands the unused portion of the \$5,000 back. Client wants Lawyer to keep the funds and continue with the representation."; "Must Lawyer return the unearned portion of the fees to Mother?"; answering as follows: "Yes. Under these facts, Lawyer understands that the legal fees were paid by a third party for the purpose of Client's representation. See Rule 1.8(f). The unearned funds held in trust belong to the third party, not the client. In the event the payor wants the funds returned, Lawyer is obliged to do so. Lawyer should explain to both

Client and the third-party payor, at the outset, that the funds belong to the third party, that the funds will remain in trust until earned, and that if the third-party payor demands return of the unearned funds, Lawyer must return the funds to the payor. In addition, Lawyer may continue representation and seek payment from Client. If Client is unable to pay, Lawyer must decide whether withdrawal from representation is appropriate under Rule 1.16(b)(6)."; (2) "Assume the same facts as in Inquiry #4 [above], except that Lawyer received a \$5,000 flat fee from Mother to represent Client in her domestic matter. Lawyer explained to Client and Mother that the fee is earned immediately and will be placed in Lawyer's operating account. Lawyer also explained that the flat fee would not vary based upon the amount of time expended and assured them that this was the only legal fee owed to him. After Lawyer has begun work on the case, Mother demands the fee back. Client does not consent." (emphasis added); "What should Lawyer do?"; answering as follows: "If the flat fee is earned immediately and it is not "clearly excessive" under the circumstances, then the fee will ordinarily belong to the lawyer. See Rule 1.5(a). Lawyer need not return any portion of the fee to Mother. If, upon conclusion of the representation, however, Mother disputes the amount of fee charged, Lawyer must notify Mother of the State Bar's program of fee dispute resolution. Lawyer should place the disputed portion of the funds back in his trust account and must participate in good faith in the fee dispute process if Mother submits a proper request to the State Bar. See Rule 1.5(f)." (emphases added)).

In fact, lawyers can be punished if they remove disputed amounts, or amounts the client later proves that the lawyer had not yet earned.

- Iowa Supreme Court Attorney Disciplinary Bd. v. Powell, 830 N.W.2d 355, 358, 359 (Iowa 2013) (suspending for three months a lawyer who had improperly removed money from a trust fund before he earned it; "We agree with the commission that Powell violated rule 32:1.15, and the Iowa Court Rules governing trust funds. However, the evidence failed to support a finding that Powell had no colorable claim to the funds he removed from his trust account or failed to place in his trust account. Instead, consistent with the charges brought by the Board, he repeatedly failed to comply with the rules and procedures governing trust accounts. The fighting question turns on the sanction that should result from the violations, largely in light of the temporary seven-month suspension served by Powell prior to and during the pendency of this proceeding." (emphasis added); "Broadly, this case involves conduct by a lawyer in improperly removing client funds from a trust account and failing to deposit advance fees into the trust account. Within this broad category of conduct, we recognize that a revocation normally results when the conduct of the offending lawyer constitutes conversion or theft."; "Yet, when the case involves client funds held as an advance fee and the conduct of the

attorney involves the conversion of the funds before they were earned, we generally impose discipline in the form of a suspension.").

- North Carolina LEO 2011-13 (10/21/11) (explaining that a lawyer may not pay legal fees for money held in a trust account without the client's consent; "Rule 1.15-2(g) permits a lawyer to withhold only funds to which the lawyer has a claim to entitlement such as funds deposited as a client's advance payment of a legal fee or funds from a settlement negotiated by the lawyer that, by prior agreement, include a contingent fee. However, client funds or the funds of a third party that are placed in the lawyer's control for the purpose of being safeguarded, managed, or disbursed in connection with a transaction, but which were not otherwise designated or identified as funds for the payment of legal fees, may not be retained in the trust account as disputed funds pursuant to Rule 1.15-2(g). As explained in Comment [14] to Rule 1.15, '[a] lawyer is not required to remit to the client funds that the lawyer reasonably believes represent fees owed. However, a lawyer may not hold funds to coerce a client into accepting the lawyer's contention.'"; "Regardless of whether the funds are identified as funds of the Estate of E or funds of the PLLC, the funds in this inquiry are the property of the Estate of E and were delivered to Attorney for the purpose of being managed by Attorney as a part of his legal services to the estate. The funds are subject to legal requirements to pay the claims of the creditors of the PLLC and of the estate. Moreover, payment of administrative expenses of an estate from estate assets, including attorney's fees, is only permitted on the issuance of an order of the clerk of superior court and requires the clerk to exercise judicial discretion in such matters. A personal representative must file a petition seeking an order from the clerk enabling the payment of attorney's fees by an estate. These legal restrictions on the assets of an estate demonstrate that Attorney had no claim of entitlement to the funds. Therefore, when the representation ended, Attorney was obligated to deliver all of the funds as directed by Administrator. Rule 1.15-2(m) (a lawyer shall promptly pay or deliver to the client, or to third persons as directed by the client, any entrusted property belonging to the client and to which the client is currently entitled)." (footnotes omitted); "Rather than deposit the funds of an estate in a general trust account, estate funds should, in most instances, be deposited in a fiduciary account maintained solely for the deposit of fiduciary funds or other entrusted property of a particular person or entity. Rule 1.15-1(e) (defining 'fiduciary account'). In a fiduciary account, the funds can be invested as usually required for prudent management of fiduciary funds.").

Things can become far more complicated if some third party asserts a claim to amounts lawyers have deposited in their trust accounts.

The ABA Model Rules recognize this in their black letter provision.

When in the course of representation a lawyer is in possession of property in which two or more persons (one of whom may be the lawyer) claim interests, the property shall be kept separate by the lawyer until the dispute is resolved. The lawyer shall promptly distribute all portions of the property as to which the interests are not in dispute.

ABA Model Rule 1.15(e). A comment provides an explanation of this issue.

Paragraph (e) also recognizes that third parties may have lawful claims against specific funds or other property in a lawyer's custody, such as a client's creditor who has a lien on funds recovered in a personal injury action. A lawyer may have a duty under applicable law to protect such third-party claims against wrongful interference by the client. In such cases, when the third-party claim is not frivolous under applicable law, the lawyer must refuse to surrender the property to the client until the claims are resolved. A lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, but, when there are substantial grounds for dispute as to the person entitled to the funds, the lawyer may file an action to have a court resolve the dispute.

ABA Model Rule 1.15 cmt. [4].

The Restatement deals with this scenario in more detail than the ABA Model Rules.

A lawyer might be in possession of property claimed both by the lawyer's client and by a third person, for example a creditor claiming an interest in the client's property, a previous lawyer of the client claiming a lien on the client's recovery . . . , or a person claiming that property deposited with the lawyer by the client was taken or withheld unlawfully from that person. In such circumstances, this Section requires the lawyer to safeguard the contested property until the dispute has been resolved . . . , but does not prescribe the rules for resolving it. Those rules are to be found in other law. Thus, if a third person claims that property stolen from that person has been used by the client to pay the lawyer's fee, the lawyer's right to keep the payment depends on the law generally applicable to transfers of stolen property. The result might turn on whether the lawyer was a bona fide purchaser for value without notice of the theft, on whether the property was negotiable, or on other circumstances. It might also be affected by statutes

providing for the forfeiture of property to the government, to the extent that such statutes validly apply to property used to pay lawyer's fees.

Restatement (Third) of Law Governing Lawyers § 44 cmt. g (2000) (emphasis added).

A lawyer who receives property claimed by a client or third person to whom the lawyer owes a duty of safekeeping must inform the owner or claimant so that the latter can protect his or her rights . . . . Likewise, the lawyer must render account of the property of others in the lawyer's possession when requested. . . .

When the claimant is a third person whose interests conflict with those of the lawyer's client but to whom the lawyer owes a duty of safekeeping or notification, the lawyer must notify that person of the lawyer's receipt of the property. That situation could exist, for example, where the lawyer is an executor and the third person a legatee, where the law designates the lawyer a constructive trustee for the person because the property has been converted . . . , or where other law imposes a duty on the lawyer to turn over property or funds directly to the third person. The lawyer's duties of confidentiality to the client do not bar such notice because the lawyer may not assist the client to conceal the property from the third person to whom the lawyer owes the duty of safekeeping . . . . Moreover, the arrangement under which the lawyer receives property of a third person of adverse interest -- for example, an escrow arrangement -- can imply that the client and third person have agreed that the lawyer is to protect the third person's interests.

Restatement (Third) of Law Governing Lawyers § 44 cmt. h (2000).

State legal ethics opinions have also dealt with this issue, requiring lawyers to gauge the legitimacy of such third-parties' claim against amounts in their trust accounts.

- Washington LEO 2220 (2012) ("Under the facts of the inquiry, a lawyer receives an advance fee deposit from client and places the funds in his or her client trust account. While work is underway for the client, a third party creditor of the client serves a writ of garnishment on the lawyer based on an unrelated judgment the creditor obtained against the client. The lawyer has requested an advisory opinion on his/her ethical obligations in these circumstances."; "On the facts presented, after receipt of a properly served writ of garnishment, the lawyer must determine whether a dispute exists between the creditor and the client regarding the funds subject to the writ. If a

- dispute exists with respect to entitlement to the subject funds, the lawyer must hold the funds in trust until the issuing court determines the rights of the judgment creditor and debtor with respect to the client funds, or the client and creditor otherwise resolve their dispute. If the client does not dispute the creditor's assertion of rights to the funds, the lawyer must disburse the funds in accordance with garnishment procedures." (emphasis added); "A dispute between the client and the creditor with respect to a writ of garnishment triggers a lawyer's safekeeping duties because the writ of garnishment is specific to funds in the lawyer's possession, and has a valid legal basis; namely, the underlying judgment, which is presumptively well-founded and represents a legal obligation from client to creditor. In the event of a dispute, the lawyer is required to maintain the client funds in trust until the issuing court determines the rights of the judgment creditor and debtor with respect to the client funds, or the client and creditor otherwise resolve their dispute. Retaining the funds in trust over a client's objection does not constitute a violation of RPC 1.15A(f) because a client may not be 'entitled' to funds subject to a writ of garnishment. RPC 1.15A(g). In addition, if the lawyer has begun work on a matter to the extent that he or she is entitled to fees from the client, then the lawyer's own interest in the advance deposit may also be part of the dispute to be resolved before the funds are disbursed.").
- Virginia LEO 1865 (11/16/12) (explaining that Virginia's unique Comment 4 to Rule 1.15 describes a lawyers' duties in dealing with trust account funds to which a third party might claim some entitlement; indicating that in the case of such formal indicia of entitlement as "a statutory lien, a judgment lien and a court order or judgment," lawyers have the same duty to such third parties as they do to clients -- even though the lawyer is not a party to such agreement and has not signed any document; noting that lawyers need not determine if the client or such a third party is entitled to the trust account funds, but instead "should hold the disputed funds in trust for a reasonable period of time or interplead the funds into court."; also noting that lawyers should indicate in retainer letters that "medical liens will be protected and paid out of the settlement proceeds or recovery."; warning that although in most situations lawyers' duties arise only if they have "actual knowledge" of a third party's lawful claim to trust account funds, "in some situations under federal or state law, the lawyer need only be aware that the client received medical treatment from a particular provider or pursuant to a health care Plan."; noting that if a third party "has not taken the steps necessary in order to perfect its lien or claim" to trust account funds, and cannot point to a "contract, order or statute establishing entitlement to the funds," lawyers may safely distribute the trust account funds to the client -- but should warn the client of the risks the client faces in disregarding a third party's claim; addressing three hypotheticals, concluding that: (1) a lawyer who knows that a client had medical bills paid by a health plan, but who has insufficient information to know whether a valid lien for that claim even exists, may not investigate the plan's claim against the settlement amount without the client's informed

- consent -- because the lawyer's inquiries might "remind or encourage the plan to perfect a lien."; the lawyer may thus disburse the settlement funds to the client without violating the ethics rules, but should warn the client in writing of the risk of the client then disbursing the funds; the lawyer and the client may also "suffer civil liability under federal law."; (2) a lawyer who receives a letter from a health plan asserting subrogation rights, and who has twice requested documentation from the plan supporting its claims without receiving a response, may safely disburse the trust account funds to the client, because the lawyers has "exercised reasonable diligence" to determine the plan's subrogation claims or a lien; (3) a lawyer representing a client who has settled a claim against a hospital, and who has received a health plan's response asserting subrogation rights and citing federal regulations, but who has not heard back from the plan after three emails and a voice mail message seeking more information about the plan's subrogation rights, may safely disburse funds to the client without violating any ethics rules; explaining that a third party's "mere assertion" of a claim to trust account funds does not entitle the third party to the funds; indicating that lawyers must exercise "competence and reasonable diligence" to determine whether a "substantial basis exists for a claim asserted by a third party," but in the absence of such a basis and the absence of the third party's steps perfecting its entitlement to funds, a lawyer may disburse funds to the client after warning the client about "the consequences of disregarding the third party's claim."; concluding that if a lawyer "reasonably believes" that a third party has an interest in trust account funds (or the client "has a non-frivolous dispute" over a third party's entitlement to funds), the lawyer cannot disburse the funds -- but must hold them in trust until the dispute is resolved, or interplead the funds into court.
- Arizona LEO 11-03 (12/2011) ("A lawyer holding property in which both the client and a third person have an 'interest' must account for the property, pay undisputed sums to the proper party, and abide resolution of any disputes." Arizona Rules of Professional Conduct ('ERs') 1.15(d), (e). ER 1.15(d) requires a lawyer with knowledge of claims against the client to protect those with an 'interest' in funds in the lawyer's control. An 'interest' is a matured legal or equitable claim. The ethical claim. The ethical rules do not require a claimant's lawyer to search public records or other sources for medical liens or claims in order to acquire knowledge of an 'interest.'" (emphasis added); "[N]othing in the applicable ethics rules or previous opinions suggests that a lawyer has an obligation to discover or inquire about claims, contracts, liens or other encumbrances that would constitute an interest within the meaning of ER 1.15(d). Nor would recording a medical lien without actual notice to the lawyer give the lawyer knowledge of the lien. Further, the Committee has made it clear that contractual or other obligations of the client that do not rise to the level of an 'interest' are outside the scope of ER 1.15(d).").
  - Arnold, Matheny & Eagan, P.A. v. First Am. Holdings, Inc., 982 So. 2d 628, 641 (Fla. 2008) (holding that a lawyer had a duty to stop payment on a check

when that lawyer receives a writ of garnishment on the funds immediately after writing a check on the proceeds; "We conclude that Florida law imposes on both bank and non-bank garnishees the duty to retain funds held by the garnishee, even after a check on those funds has been drawn by the garnishee and delivered to the payee. We hold that the funds remain in the possession or control of an attorney garnishee if service of the writ of garnishment occurs after a check drawn on an attorney's trust account has been written and delivered to a client but before presentment to the attorney's bank. Accordingly, pursuant to the provisions of the garnishment statute, the attorney in those circumstances has an obligation to inquire of the bank as to the status of the funds in its account and to issue a stop payment order if he or she has the ability to do so. This decision is consistent with the garnishment statute and prior case law interpreting the statute, as well as the Rules Regulating the Florida Bar." (footnote omitted)).

Lawyers risk being whipsawed by clients' directions that contradict some third parties' claim against the trust account amounts. Lawyers must generally follow their clients' instructions about disbursing money from trust accounts.

- New York LEO 946 (11/7/12) ("Upon receiving clear instruction from a client to distribute settlement proceeds to the client or a named third person, a lawyer may follow the request of the client to distribute the funds in a certain manner.").

Somewhat ironically, lawyers generally must follow client instructions even if they suspect some impropriety.

- Texas LEO 606 (5/2011) (holding that a Texas lawyer may not withhold fees in a trust account based on the lawyer's suspicions about the origins of the fees; explaining that "since there has been no claim made by the federal prosecutor's office or any other person regarding the funds held in the lawyer's trust account relating to the client's matter, the lawyer is required to return the portion of the funds to the client as required under the fee agreement."; ultimately concluding that "[u]nder the Texas Disciplinary Rules of Professional Conduct, a lawyer is not permitted to continue to hold in the lawyer's trust account unearned fees that are otherwise repayable to a client under the fee agreement between the lawyer and client if continuing to hold the unearned fees is based only on the lawyer's belief, in the absence of a claim asserted, that the client may have improperly or illegally obtained the funds paid by the client. The lawyer is not permitted to communicate with possible claimants to determine the existence of unasserted claims to funds to which the client is otherwise entitled.").



**Best Answer**

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

B 11/14

## Handling Left-Over Client Trust Account Funds

### Hypothetical 13

Your firm just merged with another firm, and you took the opportunity to carefully review the status of your newly combined trust account. You have discovered that a number of clients sent in retainer checks and then disappeared -- leaving the deposit in your trust account. You have also found that some checks your lawyers wrote in connection with real estate transactions were never cashed by the payee surveyors, couriers, title companies, etc.

- (a) Must you try to find the clients who left the money in the trust account?

YES

- (b) If your effort to find the missing clients will require some expense, may you withdraw some of their money from the trust account to pay the search expenses?

YES

- (c) What should you do with leftover funds for which you cannot locate the client, the payee, etc.?

FOLLOW YOUR STATE'S ESCHEAT LAWS (PROBABLY)

### Analysis

Not surprisingly, lawyers occasionally find that their trust accounts have left-over money -- because some vendor or transactional party neglected to cash a trust account check, etc. As in other areas, some counterintuitive principles apply to such remaining funds.

- (a) Most (if not all) ethics rules require lawyers to take reasonable steps to find clients entitled to receive leftover trust account funds.

- District of Columbia LEO 359 (6/2011) ("Applying Rule 1.15 and the Unclaimed Property Act to the present inquiry, this Committee concludes that a lawyer must make reasonable efforts to locate a missing client whose last

known address is in the District or where the lawyer's principal place of business is in the District to return that client's trust account monies. Reasonable efforts to locate a missing client might include using available internet technologies and on-line directories, sending a certified letter with return receipt requested to the client's last known address, contacting friends or relatives, or posting a notice in a newspaper of general circulation in the vicinity of the last known address of the property owner." (emphasis added); "A lawyer who is in possession of funds (or other intangible personal property) belonging to a client who cannot be located, and whose last known address is in the District of Columbia (or where the lawyer is domiciled in the District), must exhaust reasonable efforts to locate the client as described more particularly above. Therefore, it is not a violation of the D.C. Rules of Professional Conduct for a lawyer in such circumstances to report to the Mayor and transfer client funds that are deemed to be abandoned as required by the D.C. Unclaimed Property Act.").

- Virginia LEO 1644 (6/9/95) (providing guidance to a real estate lawyer whose checks are not cashed: (1) the lawyer should follow the Uniform Disposition of Unclaimed Property Act (Va. Code § 55-210.1 et seq.); (2) a lawyer must "use whatever means are reasonable" to find people entitled to receive trust funds (this would "in almost all instances" include first class mail and -- "if the amount of money involved justify[es] the cost" -- include checking with telephone information or postal records); (3) a lawyer may deduct from the funds held in trust reasonable costs incurred in attempting to locate the party, but may not deduct an attorney's fee; (4) the lawyer may not agree with the client in advance that the lawyer may keep unclaimed funds.).

In a later legal ethics opinion, the Virginia Bar indicated that the lawyer does not need to hire an investigator to find the clients, because "[d]ue diligence is all that is required of an attorney trying to locate a client." Virginia LEO 1673 (5/16/96).

**(b)** If the search for a client results from the client's actions, bars generally allow lawyers to expend trust fund monies in an effort to find the clients. As might be expected, bars generally do not allow lawyers to pay themselves a fee (out of the trust account money) for the search.

**(c)** Bars have issued some guidelines (often evolving over time) for the handling of leftover trust account money.

For instance, the Virginia Bar issued a number of early legal ethics opinions inviting lawyers<sup>1</sup> or their estates<sup>2</sup> to keep any leftover money.

More recently, North Carolina took this approach.

- North Carolina RPC 226 (4/12/96) (holding that a law firm may take ownership of trust account funds if the law firm has failed to identify to whom the trust account funds are owed; inexplicably not pointing to the escheat statute).

However, more recent opinions indicate that leftover money goes to the states under escheat laws.

- District of Columbia LEO 359 (6/2011) ("Applying Rule 1.15 and the Unclaimed Property Act to the present inquiry, this Committee concludes that a lawyer must make reasonable efforts to locate a missing client whose last known address is in the District or where the lawyer's principal place of business is in the District to return that client's trust account monies. Reasonable efforts to locate a missing client might include using available internet technologies and on-line directories, sending a certified letter with return receipt requested to the client's last known address, contacting friends or relatives, or posting a notice in a newspaper of general circulation in the vicinity of the last known address of the property owner."; "A lawyer who is in possession of funds (or other intangible personal property) belonging to a client who cannot be located, and whose last known address is in the District of Columbia (or where the lawyer is domiciled in the District), must exhaust reasonable efforts to locate the client as described more particularly above. Therefore, it is not a violation of the D.C. Rules of Professional Conduct for a lawyer in such circumstances to report to the Mayor and transfer client funds that are deemed to be abandoned as required by the D.C. Unclaimed Property Act." (emphasis added)).
- Ohio LEO 2008-3 (8/15/08) ("[P]roper disposition of client funds in a lawyer's IOLTA or individual client trust account, when either the identity or the

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<sup>1</sup> Virginia LEO 548 (3/1/84) (a lawyer who cannot determine to whom leftover trust account money should be paid may transfer the money to the lawyer's own account after diligently trying to determine to whom the money is owed and waiting until it is reasonable to conclude that no one will claim the money). See also Virginia LEO 415 (5/20/81) (a lawyer whose real estate escrow account check was never cashed may withdraw funds from the trust account and place them in a separate interest-bearing account pending resolution of the lost check).

<sup>2</sup> Virginia LEO 697 (5/10/85) (a deceased lawyer's trust account may be paid to the lawyer's estate if a diligent effort has not uncovered the clients to whom the money is owed and the money is kept in an interest-bearing account until it is unlikely that any client would claim it; [the lawyer should also check any escheat laws]).

whereabouts of the client who is the owner of the funds is unknown, is for a lawyer to follow the statutory procedure for the disposition of unclaimed funds to the state set forth in Chapter 169 of the Ohio Revised Code. A lawyer's reporting of unclaimed funds of a client whose identity or whereabouts are unknown does not violate either the ethical duty of safekeeping a client's funds under Rule 1.15 or the ethical duty to protect a client's confidentiality under Rule 1.6." (emphasis added)).

**Best Answer**

The best answer to **(a)** is **YES**; the best answer to **(b)** is **YES**; the best answer to **(c)** is **FOLLOW YOUR STATE'S ESCHEAT LAWS (PROBABLY)**.

B 11/14

## Law Firm Names

### Hypothetical 14

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

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

YES

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

NO

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

NO

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

NO (PROBABLY)

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

NO

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

YES

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

**NO (PROBABLY)**

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

**MAYBE**

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

**MAYBE**

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

**MAYBE**

### **Analysis**

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

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

(a) The ABA<sup>2</sup> and state bars<sup>3</sup> permit the inclusion in a law firm's name of a lawyer who is retired from the practice of law. It may be necessary that the retired partner have practiced law at the law firm until retirement.

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

(c) ABA Model Rule 7.5(c) indicates that "the name of a lawyer holding a public office shall not be used in the name of a law firm, or in communications on its

behalf, during any substantial period in which the lawyer is not actively and regularly practicing with the firm." State rules take the same approach.

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

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

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

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

- Florida Rule 4-7.21 cmt. ("A sole practitioner may not use the term 'and Associates' as part of the firm name, because it is misleading where the law firm employs no associates in violation of rule 4-7.13. See Fla. Bar v. Fetterman, 439 So. 2d 835 (Fla. 1983). Similarly, a sole practitioner's use of

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

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

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

'group' or 'team' implies that more than one lawyer is employed in the advertised firm and is therefore misleading.").

- North Carolina Rule 7.5 cmt. [1] ("It is also misleading to use a designation such as 'Smith and Associates' for a solo practice.").
- Peter Vieth, Solo suspended after use of "Associates" in firm name, 25 VLW 859, Jan. 10, 2011 ("A Virginia Beach lawyer whose advertising made his solo practice look like a multi-lawyer firm has had his license suspended by a three-judge panel in Virginia Beach Circuit Court. The advertising issue was just one of the transgressions charged against Jason M. Head, who was suspended for 30 days, but the judges' decision adds new force to the VSB's regulation of lawyer advertising. One of the examples of ethical misconduct cited in the panel's Dec. 10 order was the use of the name 'Jason Head & Associates, PLC' when Head practiced and operated his firm as a solo practitioner. The panel found that Head used the phrase 'Attorneys at Law' in various communications and posted video on his website that portrayed a non-attorney as an attorney within Head's firm. The order also noted Head was responsible for the repeated use of the plural terms 'our,' 'we,' 'lawyers,' and 'attorneys' in the description of his firm. Head was found to have made false statements that the firm had three locations and decades of experience. The judges determined such communications contained false and misleading information in violation of Rules 7.1 and 7.5 of the Virginia Rules of Professional Conduct. 'We consider "and associates" to refer to lawyers in the firm,' explained VSV Assistant Ethics Counsel Leslie A.T. Haley, who was not involved in prosecuting Head. 'This has been applied for years and has been cited in our legal ethics opinions,' Haley said. 'We have issued numerous letters to firms across the state.' Haley pointed to LEO 1532, which interprets the term 'associates' in law firm titles as referring to lawyer employees.").
- Utah LEO 09-01 (2/23/09) ("[A] Utah lawyer cannot have a firm name 'and Associates' unless there are at least two lawyer associates.").
- Disciplinary Counsel v. McCord, 905 N.E.2d 1182, 1187 (Ohio 2009) (indefinitely suspending a lawyer for various acts of wrongdoing, including deceptive use of various names for his law firm; "Under this count, relator claims that respondent improperly held himself out as a member of entities named 'McCord, Pryor & Associates,' 'McCord, Pryor & Associates Co., L.P.A.,' and 'McCord & Associates.' Respondent's actions related to these purported entities raise three questions: (1) Was respondent ever a law partner with David E. Pryor? (2) Did respondent act inappropriately in forming an entity named 'McCord, Pryor & Associates Co., L.P.A.'? and (3) Did respondent have any associates that would justify using the term 'and associates' in firm names?"; finding that McCord had never been a partner of Pryor, and had never employed true "associates").

- Minnesota LEO 20 (6/18/09) ("[T]he use of the word 'Associates' in a law firm name, letterhead or other professional designation -- such as 'Doe Associate' -- is false and misleading if there are not at least two licensed attorneys practicing law with the firm. Similarly, the use of the phrase '& Associates' in a firm name, letterhead or other professional designation -- such as 'Doe & Associates' -- is false and misleading if there are not at least three licensed attorneys practicing law with the firm."; "Whether or not a law firm name using the word 'Associates' or the phrase '& Associates' is false and misleading will depend on the particular facts and circumstances of each case. For example, there may be circumstances where three attorneys with a law firm name such as 'Doe & Associates' may lose one of the firm's attorneys. In that event, if another attorney joins the firm within a reasonable period of time thereafter, or if the firm reasonably and objectively anticipates another attorney joining the firm within a reasonable period of time, it is not false or misleading for the firm to continue using '& Associates' in its name during the interim period. If neither circumstance exists, the continued use of '& Associates' would be considered false and misleading. In addition, there may be circumstances where one or more of the attorneys practicing with a firm may be working part-time. As long as the requisite minimum number of attorneys, part-time or otherwise, regularly and actively practice with the firm, the use of 'Associates' or '& Associates' would not be considered false or misleading.").
- Ohio LEO 2006-2 (2/10/06) ("It is proper for a solo practitioner to name his or her law firm 'The X Law Group' when 'X' is the solo practitioner's surname and 'X' employs one or more attorney [sic] as associates. 'Group' and 'Law Group' are not considered misleading or a trade name when used in naming a law firm comprised of more than one attorney. 'Group' or 'Law Group' should not be used in a law firm name to refer to paralegals, other non-attorney personnel, office sharing attorneys, or 'of counsel' attorneys.").
- District of Columbia LEO 332 (10/18/05) ("A lawyer who opens a solo practice may conduct his or her business under any trade name that does not constitute a false or misleading communication about the lawyer or the lawyer's services. The use of the word 'firm' in the firm name does not inherently constitute a misleading representation about a solo practitioner. A solo practitioner must take care, however, to insure that clients and potential clients are not misled as to the nature of his or her practice."; "It is useful to reiterate that, as we said in Opinion No. 189 (decided under the former Code of Professional Responsibility), a solo practitioner may not practice under the name 'John Doe & Associate' for the use of the word 'associates' would naturally be read to necessarily imply the existence of other legal staff in the practice. See D.C. Ethics Op. 189 (1988). This prohibition remains in effect today under Rule 7.5(d) of the Rules of Professional Conduct. Cf. Disciplinary Counsel v. Furth, 754 N.E.2d 219 (Ohio 2001) (solo practitioner may not practice under his name followed by 'Associates, Attorneys and

Counselors at Law'); cf., Medina County Bar Ass'n v. Grieselhuber, 678 N.E.2d 535 (Ohio 1977) (solo practitioner may not style his firm 'and Affiliates' or hold himself out as 'Body Injury Legal Centers'). Similarly a solo lawyer using the title 'Senior Attorney and Director of Services' misleads because the lawyer implies the existence of other staff. Oklahoma Bar Ass'n v. Leigh, 914 P.2s 611 (Okla. 1996).").

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

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

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

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id. (emphasis added).

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

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

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

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

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

Id.

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

The difficulty of analyzing all the effects of "of counsel" relationships (including the implications for purposes of law firm names) has become more difficult recently. The "of counsel" designation formerly was limited to semi-retired partners. However, law firms now use that designation for part-time associates, folks who are valuable enough to stay at the firm, but not eligible for full-time partnership positions, etc. Another complicating factor is the ability of a lawyer with an "of counsel" relationship with one firm to have a similar relationship with another firm -- which also complicates law firm name issues.

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

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

that there is not a similar misleading implication in the use of a retired partner's name in the firm name, while the same partner is of counsel, where the firm name is long-established and well-recognized.").

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

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

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

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

lawyer in the same firm for purposes of division of fees under Rule 1.5(e); therefore, the restrictions on division of fees with a lawyer not in the same firm do not apply to a lawyer who is properly designated as 'of counsel.' A lawyer may serve as 'of counsel' to more than one law firm. Conflicts of interest are attributed in an 'of counsel' relationship. 'Of counsel' relationships may be entered into between Ohio lawyers and law firms and out-of-state lawyers and law firms.").

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

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

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

### **Best Answer**

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



best answer to (f) is **YES**; the best answer to (g) is **PROBABLY NO**; the best answer to (h) is **MAYBE**; the best answer to (i) is **MAYBE**; the best answer to (j) is **MAYBE**.

b 7/14

## Law Firm Trade Names and Telephone Numbers

### Hypothetical 15

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

May you use the following names for your law firm:

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

**MAYBE**

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

**NO (PROBABLY)**

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

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

**YES (PROBABLY)**

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

**NO (PROBABLY)**

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

**NO (PROBABLY)**

### Analysis

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

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

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

First, some states flatly prohibit trade names.

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

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

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

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

Rule 199. Firm names and letterhead.

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

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

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

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

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

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

Second, some states prohibit only inherently deceptive trade names.

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

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

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

protections afforded by the client-lawyer relationship such as confidentiality and the prohibitions on conflicts of interest.").

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

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

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

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

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

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



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

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

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

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

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

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

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

New York Rule 7.5 cmt. [4].

### **Best Answer**

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

b 7/14

## Law Firm Domain Names and URLs

### Hypothetical 16

You and another law school classmate plan to start practicing together immediately after graduation. Among other things, you are trying to determine what domain name to use.

- (a) May you use "southsidelawfirm.com" as a domain name?

**YES**

- (b) May you use "smithandjones.org" as a domain name?

**YES (PROBABLY)**

- (c) If you use "smithandjones.com" as your domain name and eventually go your separate ways, may either of you continue to use "smithandjones.com" as a domain name?

**YES (PROBABLY)**

### Analysis

The use of domain names and URLs have complicated the issue of law firm names.

- (a) Law firms may use domain names.

However, only a few states have addressed the ethics issues that such domain names might raise.

- New York Rule 7.5(e) ("A lawyer or law firm may utilize a domain name for an internet web site that does not include the name of the lawyer or law firm provided: (1) all pages of the web site clearly and conspicuously include the actual name of the lawyer or law firm; (2) the lawyer or law firm in no way attempts to engage in the practice of law using the domain name; (3) the domain name does not imply an ability to obtain results in a matter; and (4) the domain name does not otherwise violate these Rules.").

- New York Rule 7.5(f) ("A lawyer or law firm may utilize a telephone number which contains a domain name, nickname, moniker or motto that does not otherwise violate these Rules.").
- North Carolina LEO 2005-14 (1/20/06) (holding that a law firm could register a URL "that does not include words or language sufficient to identify it as the address of a website of a law firm" -- "provided the URL is not otherwise false or misleading and the homepage of the website clearly and unambiguously identifies the site as belonging to a lawyer or a law firm"; "Rule 7.1 and Rule 7.5(a) prohibit lawyers and law firms from using trade names that are misleading. Nevertheless, the Rules of Professional Conduct are rules of reason and should be interpreted with reference to the purposes of legal representation. Rule 0.2, Scope, cmt. [1]. None of the URLs listed in the inquiry make false promises or misrepresentations about a lawyer or a lawyer's services. Although a person who is using the internet to research a medical condition, such as mesothelioma, or injuries caused by prescription medications or on the job, may be given one of these website addresses in a response to an internet browser search, if the user is not interested in legal advice relative to the medical condition or the injury, the user does not have to click on the URL or, having done so, may exit the website as soon as he or she determines that it does not contain the information being sought. At worst, the URLs may cause the user of the internet an extra click of the mouse and, at best, they may provide a user with helpful information about legal rights. Therefore, as long as a URL of a law firm is not otherwise misleading or false and the homepage of the website identifies the sponsoring law firm or lawyer, the URL does not have to contain language specifically identifying the website as one belonging to a law firm.").
- New Jersey Adver. Op. 32 (5/23/05) ("[A] law firm may adopt a domain name for its Internet Uniform Resource Locator ('URL'), that does not include the firm's name or that of any individual attorney within that firm, provided that the Internet web site to which the browser is directed clearly and prominently identifies the actual law firm name and its address; the domain name must not be false or misleading; the name must not imply that the lawyer has been recognized or certified as a specialist other than as provided by rules of professional conduct; and, the domain name must not be used in advertising exclusively as a substitute identifier of the firm"; noting that other states have allowed domain names as long as they are not misleading; also indicating that "a firm may use a different form of its name for purposes of Internet access and retrieval of information about the firm and its services").
- Arizona LEO 01-05 (3/2001) (explaining that "[a] trade name may not be used by a lawyer in private practice" (citing Arizona Rule 7.5), but that a law firm could use a domain name; indicating that a law firm could not use the secondary domain name "countybar.com" because it would "erroneously suggest that this private law firm has some special affiliation with the local bar

association."; also noting that a law firm could not use the top level domain suffix ".org" -- because such a top level domain suffix would create "a false impression that the firm either is a non-profit or is in some way specifically affiliated with a non-profit.").

(b) In 2001, Arizona prohibited the use of the domain suffix ".org," because it would create a false impression that the firm either is a nonprofit or is in some way specifically affiliated with a nonprofit. Arizona LEO 01-05 (3/2001).

In 2011, Arizona reversed this earlier holding.

- Arizona LEO 11-04 (12/2011) ("In March 2001, the Committee issued Ariz. Ethics Op. 01-05, which discussed the limitations to which a law firm is subject when creating or using a website address for its law firm website. Among other conclusions, the Committee opined that a for-profit law firm may not use a domain name that contains the suffix '.org,' on the ground that such use 'creates a false impression that the firm either is a non-profit or is in some way specifically affiliated with a non-profit.'"; "A law firm has requested that the Committee reconsider its position that the use of the suffix '.org' violates the Arizona Rules of Professional Conduct."; "Since 2011 [sic], use of Internet domain names, including those with the suffix '.org,' has skyrocketed. Of particular significance here, notwithstanding the 'guidelines' in the Department of Commerce document relied on in Op. 01-05, the use of an '.org' suffix for Internet domain names has not been restricted to 'non-profit' entities. To the contrary, anyone may register a website address that contains the suffix '.org,' and the person registering the address is not required to demonstrate that the website is or will be owned by a non-profit entity."; "In light of the foregoing, the Committee does not believe that the mere use of '.org' by a for-profit law firm is a violation of the Arizona Rules of Professional Conduct. Opinion 01-05 is modified accordingly.").

(c) Virginia dealt with this issue in a 2014 legal ethics opinion -- concluding that immediately terminating the domain name's use would prejudice the public.

- Virginia LEO 1873 (3/20/14) (explaining that the hypothetical law firm of "Smith & Jones, P.C." need not immediately stop using the Internet domain name and URL "smithjones.com" after Smith withdraws from the P.C. -- because an immediate termination would not serve "the interests of the public" or "the partners in the former firm who collectively built goodwill and created value associated with that firm name."; noting that the "appropriate way of explaining why smithjones.com is no longer the Smith & Jones website" is to place a notice on that website; explaining that although the P.C. owns the former domain name, it may not indicate on the website that the

Smith & Jones "has now become" the "Jones Law Office," because that implies that Smith is no longer practicing law; similarly noting that any redirection of visitors to the smithjones.com website to the "joneslawoffice.com" website also requires additional information, and is appropriate only if the joneslawoffice.com website, or a page visible during the process of redirecting, "explains the change from Smith & Jones to Jones Law Office and that Smith continues to practice law in a different firm.").

### **Best Answer**

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

b 7/14

## Clearing Conflicts When Hiring Laterals

### Hypothetical 17

Your firm's chairman asked you to meet with a potential lateral hire to discuss the possibility of her joining your firm. You have conducted some independent research about the lateral hire, but a few question cross your mind as you prepare for your lunch together.

- (a) Without your clients' consent, may you identify some of your law firm's clients during your lunch conversations?

**YES (PROBABLY)**

- (b) Without your clients' consent, may you describe your work for some of your law firm's clients during your lunch conversations?

**YES (PROBABLY)**

- (c) Without her clients' consent, may the potential lateral hire identify some of her clients during your lunch conversation?

**YES (PROBABLY)**

- (d) Without her clients' consent, may the potential lateral hire describe her work for some of her clients during your lunch conversation?

**YES (PROBABLY)**

### Analysis

(a)-(d) The process of law firms hiring currently practicing laterals implicates a number of basic conflicts principles -- including the ethics rules' emphasis on mobility, lawyers' fiduciary duties to their employers, and lawyers' ethics and fiduciary duties to their clients -- including the confidentiality duty.

Every states' ethics rules encourage job-hopping, by (among other things) prohibiting restrictions on lawyers' right to practice when they leave their current position.

A lawyer shall not participate in offering or making . . . a partnership, shareholders, operating, employment, or other similar type of agreement that restricts the right of a lawyer to practice after termination of the relationship, except an agreement concerning benefits upon retirement.

ABA Model Rule 5.6(a). A comment describes the societal benefit of such lawyer mobility.

An agreement restricting the right of lawyers to practice after leaving a firm not only limits their professional autonomy but also limits the freedom of clients to choose a lawyer. Paragraph (a) prohibits such agreements except for restrictions incident to provisions concerning retirement benefits for service with the firm.

ABA Model Rule 5.6 cmt. [1].

Despite the ethics rules' undeniable encouragement of lawyer mobility, such moves necessarily require disclosure of protected client information.

Without disclosing protected client information, lawyers could not move from firm to firm. The hiring law firm needs to know information about such a lateral hire -- to avoid bringing on board a "Typhoid Mary" whose presence might disqualify the firm from current representations, or prevent the firm from taking on future representations. On a more mundane level, the law firm needs to know about the lateral hire's experience and rainmaking skills, and what clients the lateral hire might bring with him or her. On the other side of the coin, the lateral hire needs to know about the law firm's client base and practice focus.



The 1908 ABA Canons of Professional Ethics did not deal with this issue.

Perhaps the absence of any guidance reflected the unlikelihood of most lawyers facing conflicts of interest on a frequent basis, or the rarity at that time of lawyers moving from firm to firm.

The 1969 ABA Model Code of Professional Responsibility contained a fairly limited, but very logical, confidentiality duty. Absent client consent or some other exception, ABA Model Code DR 4-101(B) prohibited lawyers from knowingly disclosing client confidences or secrets. The ABA Model Code defined those protected types of client information.

"Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

ABA Model Code of Professional Responsibility, DR 4-101(A).

In most situations, lawyers operating under this approach could freely make the types of disclosures required to clear conflicts. For instance, lawyers' disclosure of a client's identity or even the general nature of the lawyers' work for the client normally would not harm that client. On the other hand, the ABA Model Code prohibited lawyers from disclosing certain types of client information -- thus preventing lawyers from undertaking some work because they could not clear conflicts. For example, a lawyer representing a wife in secretly preparing to divorce her husband would not be able to disclose that representation, the client's identity, or her plans if the lawyer interviewed for a new job. The ban presumably would apply regardless of the firm at which the

lawyer interviewed -- because any firm could conceivably be secretly representing the husband in planning to divorce his wife.

It might be possible for such a lawyer to simply list the clients for whom the lawyer has worked or was then working -- unless disclosing an individual client's identity (such as the wife's identity) might somehow tip off the interviewing law firm about the wife's plans. For instance, if the lawyer was a matrimonial lawyer, disclosing the identities of his or her clients would clearly signal the nature of the representation. Absent unusual circumstances such as this, lawyers operating under the ABA Model Code provisions normally could make the type of limited disclosure necessary to interview and then join another law firm. Similarly, law firms normally could interview and then hire laterals without violating the ABA Model Code confidentiality provisions.

In 1983, the ABA adopted its Model Rules of Professional Conduct, with a dramatically wider scope of lawyers' confidentiality duties. Under ABA Model Rule 1.6,

[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

ABA Model Rule 1.6(a) (emphasis added).

Lateral hires and law firms interested in hiring them might be tempted to rely on the "impliedly authorized" exception. However, the accompanying ABA Model Rule Comment takes a very limited view of that exception.

Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a

disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

ABA Model Rule 1.6 cmt. [5] (emphasis added).

And of course, neither the hiring law firm's nor the lateral hire's disclosure of protected client information during the hiring process meets the "in order to carry out the representation" requirement. Instead, the disclosures serve the law firm's and lateral hire's interests, not any client's interests. The law firm and lateral hire might half-heartedly contend that the lateral lawyer must move to a new law firm to "carry out" a client's representation, but that would be a stretch.

Thus, law firms interested in hiring a lateral and laterals interested in moving to another law firm presumably must solely rely on client consent before disclosing to the other any "information relating to the representation of a client."

In principle, hiring law firms presumably could often meet this standard -- their clients normally would not object to disclosing certain information as part of the law firms' interview process.

But obtaining client consent could be a logistical nightmare for law firms. And the consent requirement would frequently preclude the sort of informal discussions with potential hires that may come up at unexpected times. Absent every law firm clients' consent to the disclosure, no law firm lawyer could have the sort of wide-ranging discussion of the law firm's practice and client base. The law firms' lawyers probably would not know in advance where the conversation with a possible lateral hire might go, and would be stymied (absent client consent) from discussing with the lateral hire

current business opportunities that might come from the hiring, or how to avoid conflicts because of some portable representations that the lateral hire discloses for the first time during the conversation.

Furthermore, obtaining a client's informed consent might require specific disclosure to the client about the potential lateral hire. For instance, a client might acquiesce in disclosure of limited information to a second-year associate, but balk at similar disclosure to a senior partner at a law firm which represents its adversary (given the chance that the senior partner might decide not to move from his or her firm).

These logistical roadblocks could effectively prevent law firm lawyers from having any meaningful discussions with lateral hires, absent every law firm clients' standing consent to disclose essentially every non-damaging piece of information about it.

The potential lateral hire has all of these logistical problems, and even a more fundamental dilemma. Unless the lateral has firmly committed to leaving her current firm, she often would not want to reveal to firm clients that she is looking elsewhere -- because the news almost surely would work its way back to the law firm and could cause obvious tension between the firm and the lawyer exploring even at the earliest stages the possibility of leaving the law firm.

Astoundingly, until just a few years ago the ABA simply never addressed the seemingly irreconcilable tension between the immovable object of confidentiality and the irresistible force of lateral lawyer movement.

In the absence of any ABA Model Rule dealing with this issue, states had to fend for themselves.

Of course, the states following the ABA Model Code formulation had a much easier time in pointing to their rules' provisions permitting such disclosures.

- Virginia LEO 1712 (7/22/98) (addressing rules governing both the hiring and handling of "temp" lawyers; pointing to ABA LEOs 356 and 400 as providing some guidance, but acknowledging the irreconcilable nature of the ABA Model Rules' confidentiality duty and the necessary conflict-clearing disclosures; "Exactly how the ABA opinions expect 'an appropriate inquiry' and 'screening for conflicts' to occur in all situations is unclear. Even the identity of clients and the subject of their legal matters may be entitled to confidentiality under DR: 4-101 as client secrets. Virginia Legal Ethics Op. 1300 (1989). This Committee has previously opined, however, that it would not be improper to reveal the identity of a former client in order to cure a possible conflict of interest where the former client is the opposing counsel in a pending matter and such information needed to be disclosed to the current client to obtain consent. Virginia Legal Ethics Op. 1147 . . . (1989). The Committee has also opined that once the fact of representation of a client is a matter of public record, then disclosure of the mere fact of such representation would not violate DR: 4-101 unless the client has requested such information to remain confidential or the disclosure of such information would be detrimental or embarrassing to the client. . . . Hence, the Lawyer Temp's disclosure of his/her current or former clients on assignments with other law firms is tested by DR: 4-101(A)'s definition of a 'secret.' It is 'information gained in the professional relationship [which includes the fact of the representation] that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.' If the Lawyer Temp's current or former client does not request him/her or the law firm to hold the fact of representation in confidence, and if the Lawyer Temp reasonably determines that disclosure of the fact of representation would not be embarrassing to the client or would not likely be detrimental to the client's interests, then the Lawyer Temp may include such clients in his/her client log for disclosure to another hiring law firm without client consent. The committee cautions, however, that a client's request that information gained 'be held inviolate' is a function of inquiry of the client. The broad public perception is that information gained by lawyers is confidential. Indeed, lawyers foster that perception. Thus, the client's failure to exact an affirmation of confidentiality, or to instruct the lawyer to hold information inviolate, does not permit the lawyer to assume without inquiry that the client consents to disclosure of the fact of representation to third persons. Client consent permits disclosure of confidences and secrets under DR: 4-101(C)(1), but the consent contemplated is a meaningful one that entails the lawyer's disclosure to the client of the significance and ramifications of revealing confidences and secrets. There are two practical considerations for Lawyer Temps. First, if the Lawyer Temp concludes that client consent to disclosure is not necessary under DR: 4-101(B), the Lawyer

Temp should confirm his conclusion with the law firm with which he/she worked or works for those clients. It seems fair to say that the client would have a more intimate relationship with the law firm than with the Lawyer Temp assigned to work on the client's matter. The Lawyer Temp thus can be guided by the law firm's perception or informed judgment of the client's desires as to disclosure of the fact of the Lawyer Temp's representation. The second practical consideration is that whether the Lawyer Temp is permitted to disclose the fact of representation of a client should be addressed at the outset of the placement with the law firm. The risk of wrongful disclosure could be minimized if each of the Lawyer Temp's hiring law firms made a disclosure to clients for whom he/she would work, explained that the nature of transitory placement with law firms required the Legal Temp to maintain a client log, and requested consent to inclusion of the client's name in the Lawyer Temp's log. If a client objects to disclosure of the fact of the Lawyer Temp's representation, the Lawyer Temp acts at his/her peril under DR: 4-101 in disclosing the fact of the client's representation. Likewise, the hiring law firm acts at its peril under DR 5-105 if it fails to assess the possibility of conflicts of interests between clients. In those situations where an exchange of information between the Lawyer Temp and the hiring firm is not permitted with respect to identification of current or former clients of the Lawyer Temp, the Lawyer Temp must be cognizant of conflicts of interest and decline employment when required to do so under the applicable rules. In effect, the personal conflicts of a Lawyer Temp are to be analyzed and resolved in the same manner as the personal conflicts of any lawyer switching firms. LE Op. 1419, LE Op. 1428, LE Op. 1430 and LE Op. 1629. Both the Lawyer Temp and the lawyers hiring the Lawyer Temp would be barred from representing any party adverse to any client in whose legal matter the Lawyer Temp has 'actively participated,' or from whom the Lawyer Temp gained confidences and secrets, unless the clients consent after full disclosure. DR: 5-105; Legal Ethics Opinion . . . 1428." (emphases added)).

- New York LEO 720 (8/27/99) ("When a lawyer moves from Firm A to Firm B, Firm B must seek the names of clients represented by the Moving Lawyer and, depending upon the size of Firm A, the names of all clients of Firm A for a reasonable period of time, and the Moving Lawyer may provide this information, except to the extent that (a) this information is protected as a confidence or secret of the clients of Firm A or (b) the Moving Lawyer has a contractual or fiduciary duty to Firm A that forbids disclosing this information. If the information is protected from disclosure, then the Moving Lawyer may disclose only general information, not protected as a client confidence or secret, about the nature of his or her representations at Firm A." (emphasis added); "A law firm's database with information about its own clients will usually include information as to the full name of each client and a brief description of the matter for which the firm was engaged. It may not, however, be possible for a Moving Lawyer to give such information, since the name of the client of Firm A and the fact and nature of the representation may

constitute a confidence or secret of the client. DR 4-101 generally requires a lawyer to preserve the confidentiality of both 'confidences' (i.e., attorney-client privileged information) and 'secrets' (i.e., other information 'gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client'). Although the fact that the client consulted a lawyer and the general nature of the consultation will not usually be privileged, see, e.g., Colton v. United States, 306 F.2d 633 (2d Cir. 1962), cert. denied, 371 U.S. 951 (1963), the client's name, the fact that the client consulted a lawyer and the general nature of the consultation may nevertheless constitute 'secrets' of the client which the lawyer may not disclose. Firm B should admonish a prospective hire not to disclose client confidences or secrets in responding to its conflicts questionnaire. Where information identifying a client or the client's matter constitutes a confidence or secret that the Moving Lawyer may not ethically disclose, Firm B may be limited to obtaining more general information about the nature of the Moving Lawyer's prior work. General information will enable Firm B to identify some possible conflicts of interest. See, e.g., Evans [Evans, Ethical Issues and Financial Data, 1004 PLI/Corp 229 (1997)], supra, at 239. Additionally, the Moving Lawyer may make personal efforts to ascertain whether there are or may be conflicts of interest in light of any information that may not be disclosed. The Moving Lawyer may also seek to obtain the consent of the former client to the disclosure of additional information, where it is needed. Firm A may believe that information about the names of Firm A's clients is proprietary to Firm A. If the information is not protected as a confidence or secret of Firm A's clients, then whether Firm A may prevent the disclosure by Moving Lawyer of such information which is known to Moving Lawyer is a matter of contract and fiduciary law governing the relationship between Firm A and Moving Lawyer, and not a matter of legal ethics on which this Committee may opine." (emphasis added)).

- District of Columbia LEO 312 (4/2002) (explaining that lawyers withdrawing from a law firm may disclose to other law firms from which they might seek a job information about their clients that is not a client confidence or secret; "Typically, when a lawyer contemplates joining a new firm, the lawyer provides information to that firm indicating the clients, adversaries, and an indication of the subject matter on which the lawyer has worked at the lawyer's existing firm so that the potential new firm may check to see whether the lawyer's joining it would create a conflict of interest with any of that firm's clients."; explaining that a representation that is "generally known" does not fall into the "secret" category; explaining that in most cases this type of disclosure will be permissible, and will allow the lawyer to work with a potential new firm in identifying conflicts; "Without the former client's consent, therefore, a lawyer may, in checking conflicts at a new firm, reveal information about representations that is not privileged and is not a secret because it has not been requested by that client to be held inviolate and the revelation of

which would not be harmful or embarrassing to that client or has become generally known. In the great majority of cases, we believe, this leaves lawyers free to reveal sufficient information to carry out a reliable conflict check. Information about many representations would not harm or embarrass the client where the basic facts of the representation are unexceptionable or already known to opponents or others who are not the client, including, for example, regulatory agencies or other government bodies." (emphasis added); also explaining that in some situations the withdrawing lawyer will not be able to disclose information allowing the new law firm to check conflicts; "There are, of course, many instances in which the facts surrounding a representation (such as that client X is contemplating a takeover of another business or has consulted a divorce lawyer or a criminal defense lawyer) may be extremely sensitive and so fraught with the possibility of injury or embarrassment to that client that absent a waiver that information is not subject to disclosure even for the purpose of checking conflicts. . . . There is no specific exemption to the confidentiality rules in Rule 1.6 or elsewhere that permits a lawyer to reveal confidential information for the purpose of checking or seeking waiver of a conflict."; explaining that lawyers and hiring law firms in that situation might be able to simply exchange lists of names (without explaining whether the names are of clients or adversaries) or make other limited disclosures in an effort to identify and clear conflicts).

States following the new ABA Model Rules confidentiality approach had a much more difficult time dealing with this issue.

- Pennsylvania and Philadelphia LEO 2007-300 (6/2007) ("This Opinion does not attempt to resolve definitively the difficult question of what information, if any, relating to a client might be disclosed by a lawyer in discussions with another firm regarding a potential new association, prior to the lawyer's joining the new firm, in the absence of client consent. On a practical level, we perceive a need, for conflicts checking purposes, to disclose pre-departure at least some limited information regarding the identity of the lawyer's clients, both those who might, and those might not, join the lawyer at the new firm, as well as the nature of the work done for those clients, and the parties opposite those clients in current matters that may become matters of the new firm. We also recognize that, as a practical matter, this type of exchange of client information and conflicts checking is routinely done in connection with lawyer's changing law firms. In Formal Opinion No. 99-414, the ABA Committee recognized the need for limited disclosure of otherwise confidential client information in this context and seemed to assume that such disclosure is permissible under the Rules. Formal Opinion No. 99-414 at 6 n. 12 ("The departing lawyer must ensure that her new firm would have no disqualifying conflict of interest in representing the client in a matter under Rule 1.7, or other Rules, and has the competence to undertake the representation. In order to do so, she may need to disclose to the new firm



- certain limited information relating to this representation.'). The ABA Committee, however, cited no authority in the Rules or otherwise to support this assumption. We note the apparent absence of any express authorization in the Rules of Professional Conduct or elsewhere for a lawyer's making these types of pre-departure disclosures to another law firm without client consent. See Tremblay, *Migrating Lawyers and the Ethics of Conflicts Checking*, 14 Geo. J. Legal Ethics 489 (Spring 2006). Of course, where client consent is obtained, there can be no ethical issue regarding the propriety of disclosures under Rule 1.6. Thus, obtaining client consent would insulate the lawyer from allegations of ethical improprieties in making such disclosures. Moreover, where such client consent is sought prior to departure, the lawyer may be obligated to disclose the fact of the discussions and the communication with the client regarding the same. . . . Further, when a lawyer involved in discussions with another firm regarding a new association discloses client information without client consent, such disclosures should go no further than necessary to insure the new firm's ability to comply with its own ethical obligations, e.g., to avoid conflicts and ensure the ability to competently and diligently represent a prospective client." (emphases added)).
- Kansas LEO 07-01 (3/1/07) (analyzing the following issue: "Requesting attorney (Lawyer A) has recently left a law firm and asks the following question: May law firm formerly employing Lawyer A (Firm 1) refuse to disclose a list of the parties to all suits filed by Lawyer A during A's tenure at Law Firm 1 for the purpose of checking on conflict of interest with prospective law firm (Firm 2)."; "The rule of client-lawyer confidentiality applies in all situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law. First, while Law Firm 1 may rightfully refuse to reveal confidential matters under Rule 1.6, it is difficult to see how the mere identity of Law Firm 1's clients who are potential adverse parties to those of Law Firm 2 would be entitled to specific protection, particularly where public records are involved, i.e., pleadings filed on their behalf. On the other hand, there may be instances where a law firm's practice is so sensitive and so specialized that the release of a clients [sic] name may be a breach of confidentiality. Firms that predominantly represent impaired lawyers, or take only insider trading cases spring to mind; however, the Committee is unaware of any such firms, at least in Kansas. Second, clients of Firm 1 were also clients of Lawyer A during the term of employment, so disclosure to Lawyer A is not a breach of confidentiality but merely a refreshing of confidential knowledge previously held. Third, conflicts checking are imperative in today's legal climate of law firm mergers, breakups and lateral hiring. To refuse disclosure of a client list exposes Lawyer A not only subjects Lawyer A and Firm 2 to disciplinary

complaints for conflict of interest, but also legal malpractice charges. Disqualification of Firm 2 from a case after thousands of billable hours for a conflict of interest due to its hiring of Lawyer A is almost a prima facie case, not to mention the possible forfeiture of fees. Furthermore, if it developed that Lawyer A had exclusive knowledge of cases assigned while at . . . Firm 1, it is likely that Firm 1 could also be disqualified from those cases. And Firm 1 also has a duty to its clients to avoid conflicts of interest regarding their cases." (footnotes omitted) (emphasis added); "Therefore the Committee concludes that a law firm may not refuse to disclose a list of clients previously assigned to a departing attorney for the purpose of conflict checking by the attorney's new firm. The Kansas Comments to KRPC 1.6 seem to support this conclusion when it states that an exception to nondisclosure is '. . . required by the Model Rules of Professional Conduct. . . .' The answer raises a second question: Given the concerns by Firm 1 of confidentiality and possible loss of clients to Attorney A and Firm 2, how is such disclosure of a client list best accomplished? Use of an intermediary appears to be the most obvious method. In discussing a similar fact scenario, the Boston Bar Association Ethics Committee proposed that Firm 2 institute procedures to limit access to the information, such as a retired partner who is not otherwise privy to client information in the firm, or a paralegal employed in a separate conflict-checking unit. Professor Tremblay, while favoring this approach, which he labels 'middle counsel', also suggests that Firm 2 share its entire client list with Attorney A, a solution perhaps more plausible if it involves a younger associate, with fewer cases and better memory than a middle-aged partner may have. A third solution also seems plausible. Since Firm 2 appears to have a greater risk for conflicts than Firm 1, perhaps sharing its entire client list with a 'middle counsel' of Firm 1 would solve the problem." (footnote omitted) (emphases added)).

Some of those states adopted explicit provisions dealing with this scenario.

- Colorado Rule 1.6 cmt. [5A] ("A lawyer moving (or contemplating a move) from one firm to another is impliedly authorized to disclose certain limited non-privileged information protected by Rule 1.6 in order to conduct a conflicts check to determine whether the lawyer or the new firm is or would be disqualified. Thus, for conflicts checking purposes, a lawyer usually may disclose, without express client consent, the identity of the client and the basic nature of the representation to insure compliance with Rules such as Rules 1.7, 1.8, 1.9, 1.10, 1.11 and 1.12. Under unusual circumstances, even this basic disclosure may materially prejudice the interests of the client or former client. In those circumstances, disclosure is prohibited without client consent. In all cases, the disclosures must be limited to the information essential to conduct the conflicts check, and the confidentiality of this information must be agreed to in advance by all lawyers who receive the information." (emphasis added)).

In 1996, the ABA issued an ethics opinion dealing with a subset of this issue -- lawyers interviewing for a job with a law firm representing an adversary.

In ABA LEO 400 (1/24/96), the ABA dealt almost exclusively with the conflicts of interest ramifications of discussions between a law firm and a possible lateral hire who was currently working on a matter adverse to the potential hiring law firm's client. The legal ethics opinion's conclusion focused on the conflicts issues.

In sum, we conclude that, for the protection of clients, Rule 1.7(b) requires a lawyer who is actively representing a client in a matter, and who is considering an association with a firm or party to whom he is opposed in the matter, to consult with his client and obtain the client's consent to his continuing to work on the matter while the lawyer explores such association. Generally, the required consultation should occur before the lawyer engages in a substantive discussion of his experience, clients, or business potential with the opposing firm or party. If the client consents, the lawyer may continue the representation. If the client does not consent, the lawyer must either discontinue the job search that created the conflict, or withdraw from participation in the representation and transfer his work to others in the firm, if withdrawal can be accomplished properly under Rule 1.16. Where the lawyer has had a limited role in a matter or has had limited client contact, it will ordinarily be more appropriate for him to inform his supervisor. The supervisor can then determine whether to relieve the lawyer of responsibility, or to seek the client's consent for the lawyer to continue to work on the matter. While the negotiating lawyer's conflict of interest is not imputed to other lawyers in his firm, those other lawyers must each evaluate whether they may themselves have a conflict by virtue of their own interest in their colleague's negotiations. The lawyers in a law firm seeking to employ a lawyer who is involved in a matter adverse to the firm have similar obligations to their client.

This Committee regularly addresses, as in this Opinion, important issues relating to conflicts of interest. We recognize that among all of the issues this Committee confronts, conflicts of interest decisions generate much attention from the bar because of the possibilities they

present for the disqualification of counsel. While there are, undoubtedly, many situations in which disqualification on grounds of conflict is warranted if not compelled, the opportunities for mischief presented by disqualification motions are numerous as well. Thus, we conclude this Opinion with a cautionary note. We do not intend, by this Opinion, to provide additional opportunities for merely tactical or dilatory motions to disqualify where the role of the negotiating lawyer has been such that no real harm can arise by permitting the lawyer to secure a new position of employment. As stated in the Rules themselves, 'the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.' Scope para. [18]. It is our hope that members of the profession will approach motions to disqualify in this context, as in any other context, responsibly and with prudence.

ABA LEO 400 (emphasis added).

ABA LEO 400 mentioned the confidentiality duty almost as an afterthought -- identifying it as the third of four duties requiring some attention.

A third duty is the preservation of confidentiality under Rule 1.6. Job-seeking lawyers must guard against the risk that in the course of the interviews to determine the compatibility of the lawyer with the opposing firm, or the discussions between the lawyer and the firm about the lawyer's clients and business potential, the lawyer might inadvertently reveal 'information relating to the representation' in violation of Rule 1.6.

Id. (emphasis added).

This paragraph reflects a remarkably naïve approach or (more likely) an implicit acknowledgement that lateral hiring simply could not occur if lateral hire candidates and the hiring law firms' lawyers complied with the black letter of ABA Model Rule 1.6. The lawyers involved in this process do not risk "inadvertently" disclosing protected client information. The discussion simply cannot take place without disclosing such information. Lawyers on either side of the employment discussion must "reveal 'information relating to the representation' in violation of Rule 1.6."

Under the ABA Model Rule scope of the confidentiality duty, the potential lateral hire could not even disclose to the potential hiring law firm that the lawyer represents the client on the other side of a matter the hiring law firm is handling -- even if the lateral hire and the interviewing law firm lawyer argued against each other that morning in court. After all, ABA Model Rule 1.6 "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." ABA Model Rule 1.6 cmt. [3]. Even information in the public record falls within the ABA Model Rules' confidentiality duty.

ABA LEO 400's glancing mention of the confidentiality rule almost surely represents the legal ethics opinion authors' inability to reconcile the ABA Model Rules' encouragement of mobility and the ludicrously overbroad confidentiality duty.

Less than four years later, the ABA returned to the general issue, and issued another opinion that implicitly acknowledged the inability of lawyers following the ABA Model Rules to know what they can and cannot disclose during a lateral interview or hiring process.

In ABA LEO 414 (9/8/99),<sup>1</sup> the ABA dealt mostly with lawyers' need to balance their fiduciary duties to their law firms and their primary duties to clients. Amazingly, the

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<sup>1</sup> ABA LEO 415 (9/8/99) (explaining that a lawyer planning to leave a firm has an ethical obligation to inform the pertinent clients in a timely manner, but must comply with applicable restrictions on solicitation; noting that any notice before the lawyer leaves the firm should be "limited to clients whose active matters the lawyer has direct professional responsibility at the time of the notice"; should "not urge the client to sever its relationship with the firm, but may indicate the lawyer's willingness and ability to continue her responsibility for the matters upon which she currently is working"; and should emphasize that the client may choose to stay with the firm or hire the withdrawing lawyer; explaining that despite implications to the contrary in earlier informal opinions [1457 and 1466], "we reject any implication . . . that the notices to current clients and discussions as a matter of ethics must await departure from the firm;" warning that the departing lawyer "must ensure that her new law firm would have no disqualifying conflicts of interest" preventing the new firm from representing the client; noting that although it would be best for the firm and the departing lawyer to provide joint notice to the clients, the firm's failure to cooperate entitles the departing lawyer to send a separate notice; acknowledging that legal rules govern a departing lawyer's actions before the firm receives notice of the departure; assuring that "the departing lawyer may

legal ethics opinion did not address the process that would necessarily have occurred before lawyers changing firms had to deal with balancing these duties. For instance, the opinion does not address lawyers' ability to tell their potential new colleagues at another firm what clients the lateral lawyer represents. And, of course, many if not most lawyers would engage in at least preliminary discussions with a number of potential new hiring law firms. The legal ethics opinion's silence is understandable, because there is nothing the ABA could have said about it. Having adopted an overly broad definition of protected client information in 1983, the ABA would not be able to point to any rules permitting disclosure of protected client information by the lateral lawyer or any law firm who was interviewing such a lawyer.

The ABA finally tiptoed directly into this issue in a 2009 ethics opinion. Interestingly, much of the opinion addressed the lack of rules justification for what every lawyer knows happens every day.

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avoid charges of engaging in unfair competition and appropriation of trade secrets if she does not use any client lists or other proprietary information in advising clients of her new association, but uses instead only publicly available information and what she personally knows about the clients' matters"; citing the case of Graubard Mollen v. Moskovitz, 653 N.E.2d 1179 (N.Y. 1995) and providing helpful guidance on a departing lawyer's fiduciary duties, including the fact that "informing firm clients with whom the departing lawyer has a prior professional relationship about his impending withdrawal and reminding them of their right to retain counsel of their choice is permissible"; also assuring that a withdrawing lawyer generally may retain documents the lawyer prepared or which are in the public domain, although "principles of property law and trade secret law" govern these issues; noting that a lawyer "does not violate any Model Rule in notifying the current clients of her impending departure by in-person or live telephone contact before advising the firm of her intentions to resign, so long as the lawyer also advises the client of the client's right to choose counsel and does not disparage her law firm or engage in conduct that involves dishonesty, fraud, deceit, or misrepresentation. After her departure, she also may send written notice of her new affiliation to any firm clients regardless of whether she has a family or prior professional relationship with them.").

In ABA LEO 455 (10/8/09),<sup>2</sup> the ABA acknowledged the obvious need for lateral hires and for hiring law firms to analyze conflicts issues -- and then acknowledged the ABA Model Rules inexplicable failure to deal with that scenario.

Despite the need for both a lawyer considering a move and the prospective new firm to detect and resolve conflicts of interest, some commentators have expressed concern that the Model Rules do not specifically permit disclosure of the information required for conflicts analysis. This concern arises from the definition of information covered by Rule 1.6(a), which is "all information relating to the representation, whatever its source." Thus, the persons and issues involved in a matter generally are protected by Rule 1.6 and ordinarily may not be disclosed unless an exception to the Rule applies or the affected client gives informed consent.

ABA LEO 455 (10/8/09) (footnotes omitted) (emphasis added).

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<sup>2</sup> ABA LEO 455 (10/8/09) (explaining that lawyers moving from one firm to another and law firms that hire them cannot rely on any specific rule allowing the exchange of information about clients necessary for a conflicts analysis, but may exchange such otherwise protected information -- although the disclosure "should be no greater than reasonably necessary to accomplish the purpose of detection and resolution of conflicts of interest"; noting that the exception in Rule 1.6 for disclosure "impliedly authorized" to represent a client does not apply, because the disclosures by the moving lawyer and the hiring law firm do not serve the client's interests; also pointing out that the exception in Rule 1.6 for disclosures necessary to "comply with other law" does not apply, because the exception refers to law, not ethics rules; acknowledging that although client consent would resolve any issue, obtaining the consent normally is impractical; emphasizing that the ethics rules are "rules of reason," and the recent rule change allowing the screening of lateral hires to avoid imputed disqualification highlights the permissibility of basic conflicts data disclosure that necessarily precedes such a lateral hire; explaining that in some situations, neither the moving lawyer nor the firm can disclose privileged information when the disclosure would "prejudice a client or former client" -- as with a planned hostile takeover, contemplated divorce, etc.; also noting that in other situations, it will quickly become apparent that conflicts will prevent the firm from hiring the moving lawyer -- such as situations in which there are "numerous existing matters" involving conflicts, or the law firm and the potential lateral hire "regularly represent[s] commonly antagonistic groups"; explaining that "conflicts information normally should not be disclosed when conversations concerning potential employment are initiated, but only after substantive discussions have taken place"; further explaining that if checking for conflicts will require a "fact-intensive analysis of information beyond just the persons and issues involved in a representation" (as when analyzing the "substantial relationship" between a current and former representation), the law firm might be able to analyze conflicts by obtaining information other than from the moving lawyer -- if not, the moving lawyer must seek the client's consent to disclose such detailed information, or rely on the new Rule 1.10 provision permitting screening of lateral hires to avoid imputed disqualification; concluding that the law firm receiving any confidential information as part of the conflicts analysis should limit use of the information "to the detection and resolution of conflicts of interest, and dissemination of conflicts information should be restricted to those persons assigned to or involved in the conflicts analysis with respect to a particular lawyer.").

ABA LEO 455 then candidly explained that none of the black letter exceptions to ABA Model Rule 1.6 applied when lawyers and law firms are really serving their own interests rather than their clients' interests in discussing a possible employment arrangement.

Disclosure of conflicts information does not fit neatly into the stated exceptions to Rule 1.6. The exception in Rule 1.6(a) for disclosures "impliedly authorized in order to carry out the representation" typically is limited to disclosures that serve the interests of the client.

Id.

Similarly, ABA LEO 455 acknowledged the inapplicability of one of the other ABA Model Rule 1.6 exceptions.

A second stated exception to Rule 1.6(a) that might arguably allow disclosure of conflicts information incident to lawyers moving between firms is Rule 1.6(b)(6), which permits disclosure of information "the lawyer reasonably believes necessary . . . to comply with other law." However, Comment [12] to Rule 1.6 seems to limit "other law" to law other than the Rules.

Id.

ABA LEO 455 also recognized the practical difficulties of seeking client consent to the inevitable disclosure of protected client information during the interviewing process.

Obtaining clients' informed consent, as defined in Rule 1.0(e), before a lawyer explores a potential move could resolve the tension between the broad scope of Rule 1.6(a) and the need to disclose conflicts information, but there are serious practical difficulties in doing so. Many contemplated moves are never consummated. In the common situation where a lawyer interviews more than one prospective new firm, multiple consents would be required. Consent of all former clients, as well as all current clients, also would be necessary. Further, seeking prior informed consent likely



would involve giving notice to the lawyer's current firm, with unpredictable and possibly adverse consequences.

Id. (footnotes omitted) (emphasis added).

ABA LEO 455 eventually relied on a general, ambiguous, and essentially meaningless phrase in the Scope section of the ABA Model Rules.

In most situations involving lawyers moving between firms, however, lawyers should be permitted to disclose the persons and issues involved in a matter, the basic information needed for conflicts analysis. The Model Rules are "rules of reason" to be "interpreted with reference to the purposes of legal representation and of the law itself." Interpreting Rule 1.6(a) to prohibit any disclosure of the information needed to detect and resolve conflicts of interest when lawyers move between firms would render impossible compliance with Rules 1.7, 1.9, and 1.10, and prejudice clients by failing to avoid conflicts of interest. Such an interpretation would preclude lawyers moving between firms from conforming with the conflicts rules.

Id. (footnote omitted) (emphasis added).

The ethics opinion then noted the obvious -- in a sentence that implicitly condemned the ABA Model Rules' overbroad definition of protected client information.

Opinions from jurisdictions that did not adopt the Model Rules definition of protected information, but rather retained the 1969 Model Code of Professional Responsibility formulation of confidences and secrets, reached similar results.

Id. The legal ethics opinion could have, and perhaps should have, pointed to those other states' rules, not just their opinions. Of course, the other states' opinions take the common sense approach that ABA LEO 455 ultimately adopted -- because those states rejected the 1983 ABA Model Rules undeniably overbroad definition of protected client information. So it is not just those states' opinions that took the only practical approach, it is their ethics rules.

Not surprisingly, ABA LEO 455 warned that the inevitable disclosure of protected client information during the interviewing and hiring process should not exceed that which is reasonably necessary.

Permissive disclosure of conflicts information otherwise protected by Rule 1.6(a) incident to the process of lawyers moving between firms is limited in scope. Consistent with Comment [14] to Rule 1.6, any disclosure of conflicts information when lawyers move between firms should be no greater than reasonably necessary to accomplish the purpose of detection and resolution of conflicts of interest.

Id. The legal ethics opinion later provided some examples.

Another important limitation is that disclosing conflicts information must not compromise the attorney-client privilege or otherwise prejudice a client or former client. There are matters, albeit rare, in which the identity of the client or the nature of the representation or both are protected by the attorney-client privilege. There are also situations (e.g., clients planning a hostile takeover, contemplating a divorce, or appearing before a grand jury) in which disclosure of non-privileged information to the prospective new firm of the persons and issues involved would likely prejudice the client or former client.

Id. (footnotes omitted).

Finally, ABA LEO 455 took the only logical and reasonable approach to the timing of disclosures during this interviewing and hiring process.

Timing is also important. Conflicts information should not be disclosed until reasonably necessary, but the process by which firms decide to offer lateral lawyers positions varies widely among firms and usually differs within firms according to the age and experience level of the lawyer under consideration. Many firms might not ask conflicts information of younger lawyers until making an offer of employment, which will be contingent on resolution of conflicts. For partner-level lawyers, the process is more complicated. As a consequence, conflicts issues may need to be detected and resolved at a relatively early stage. In any event, negotiations between the moving lawyer and the prospective new firm should have moved beyond the initial

phase and progressed to the stage where a conflicts analysis is reasonably necessary, which typically will not occur until the moving lawyer and the prospective new firm have engaged in substantive discussions regarding a possible new association.

Id. (footnote omitted) (emphasis added).

All in all, ABA LEO 455 could not avoid the implications of the ABA Model Rules' broad confidentiality duty -- and thus simply ignored it. The reference to the ABA Model Rules as "rules of reason" seems particularly ironic. In 1983, the ABA explicitly abandoned the much more common-sense driven ABA Model Code confidentiality formulation, which generally would have permitted such hiring discussions. In fact, ABA LEO 455 essentially represented a justifiable abandonment of the black letter ABA Model Rules confidentiality duty, and an acknowledgment that hundreds of thousands of lawyers may have violated the ABA Model Rules' technical provisions.

The ABA addressed this issue again several years later.

In 2011, the ABA Ethics 20/20 Commission issued a Report explaining its approach to what was really an age-old dilemma.

The ABA Commission on Ethics 20/20 has examined various ways in which globalization and technology are changing the legal profession, including increased lawyer mobility. The Commission found that this increased mobility has produced a number of ethics-related issues and that one question in particular commonly arises: Before a lawyer becomes associated with a firm, to what extent can the lawyer disclose to the firm confidential information about current and former clients to permit the lawyer and the firm to identify possible conflicts of interest arising from the lawyer's potential association? The Commission concluded that the Model Rules of Professional Conduct are not clear in this regard and that lawyers and firms would benefit from more guidance. . . . Formal Opinion 09-455 from the ABA Standing Committee on Ethics and Professional Responsibility recently recognized that, before becoming

associated with a firm, a lawyer must have some discretion to disclose confidential information about current and former clients to permit the lawyer and the firm to determine if a conflict would arise from the lawyer's association. Despite the reasonableness of this conclusion, the Formal Opinion concluded that '[d]isclosure of conflicts information does not fit neatly into the stated exceptions to Rule 1.6.' The Commission reached the same conclusion and determined that, given the importance of the issue and the increasing frequency with which it arises, the Commission should propose an amendment to Model Rule 1.6 that provides a firmer doctrinal basis for these disclosures and more guidance on the limitations on such disclosures. The Commission considered a number of ways to address this issue, but concluded that the most effective way to do so is to propose the creation of Model Rule 1.6(b)(7). In particular, the proposed amendment would permit a lawyer to disclose confidential information to the extent that it is reasonably necessary to determine if a conflict of interest would arise from the lawyer's association with a firm. Any disclosure, however, is subject to several important exceptions. First, the lawyer must determine that the disclosure is reasonably necessary to permit the lawyer and the firm to determine if a conflict of interest would arise from the lawyer's association with the firm. As the proposed new Comment [14] explains, this condition means that a lawyer can reveal only limited information, typically a client's identity and the general nature of the work that the lawyer performed for that client. Even this limited disclosure, however, is not permissible if it will adversely affect the client. For example, the Comment explains that, if a lawyer knows that a particular corporate client is seeking advice on a corporate takeover that has not yet been publicly announced or if an individual consults a lawyer about the possibility of a divorce before the spouse is aware of such an intention, it may be impossible for that lawyer to disclose sufficient information to permit another firm to ensure compliance with the conflict of interest rules. Under those circumstances, the lawyer may have to postpone any association with the firm until the information, if disclosed to that firm, will no longer prejudice the client. Second, the discussions between the lawyer and the firm must be such that there is a reasonable possibility that the lawyer may become associated with the firm. Typically, this moment occurs before a formal offer of employment is made or is imminent. For example, the disclosure can occur once the lawyer and the firm begin to

engage in substantive discussions regarding the lawyer's possible association with the firm. The last sentence of the proposed new paragraph is intended to remind firms that they must not use or reveal the information that they receive from a potential lateral lawyer, except to determine whether a conflict would arise from that lawyer's possible association with the firm.

ABA Commission on Ethics 20/20 Report, Sept. 7, 2011 (emphasis added).

Along with its Report, the ABA Ethics 20/20 Commission issued its proposed addition to ABA Model Rule 1.6. The Commission's proposed rule would allow lawyers to

reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to determine if a conflict of interest would arise from the lawyer's association with a firm, but only when there is a reasonable possibility of such an association and the revealed information would not adversely affect the lawyer's client. Information revealed under this paragraph may not be used or revealed by the lawyers receiving the information for any purpose except the identification and resolution of potential conflicts of interest.

Proposed ABA Model Rule 1.6(b)(7) (9/7/11).

The ABA Ethics 20/20 Commission also proposed an explanatory comment.

Paragraph (b)(7) recognizes that, before a lawyer becomes associated with a firm, it may be necessary for the lawyer to reveal limited information about the lawyer's current and former clients to permit the lawyer and the firm to identify conflicts of interest that would arise from the lawyer's association with the firm. A lawyer is permitted to reveal this limited information, typically no more than the client's identity and the general nature of the work that the lawyer performed for that client, but only to the extent reasonably necessary to permit the lawyer and the firm to determine if a conflict of interest would arise from the lawyer's association with the firm. In no event may disclosure prejudice a client or former client. In most cases, prejudice will not occur from the mere disclosure of a client's or former client's identity or a brief summary of the type of work that the lawyer performed for that client or former client. In certain cases, however, such a

disclosure could adversely affect the client's interests (e.g., the lawyer reveals that a particular corporate client is seeking advice on a corporate takeover that has not yet been publicly announced or that a person has consulted with a lawyer about the possibility of seeking a divorce before the person's intentions are known to the person's spouse). If disclosure could prejudice a client or former client, the lawyer must obtain the client's consent before disclosing any information or delay the association with the firm until the disclosure of the information would no longer adversely affect the client's interests. Moreover, information revealed under paragraph (b)(7) may not be used or revealed by the lawyers receiving the information for any purpose except the identification and resolution of potential conflicts of interest. This prohibition does not apply to other lawyers in the same firm who have obtained the information from an independent source.

Proposed ABA Model Rule 1.6 cmt. [14] (9/7/11).

After some public input, the ABA Ethics 20/20 Commission issued an amended proposed addition to ABA Model Rule 1.6, which the ABA House of Delegates adopted on September 6, 2012.

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

ABA Model Rule 1.6(b)(7) (emphasis added).

Several as-adopted comments provide guidance.

Paragraph (b)(7) recognizes that lawyers in different firms may need to disclose limited information to each other to detect and resolve conflicts of interest, such as when a lawyer is considering an association with another firm, two or more firms are considering a merger, or a lawyer is considering the purchase of a law practice. See Rule 1.17, Comment [7]. Under these circumstances, lawyers and law firms are permitted to disclose limited information, but only once substantive discussions regarding the new relationship

have occurred. Any such disclosure should ordinarily include no more than the identity of the persons and entities involved in a matter, a brief summary of the general issues involved, and information about whether the matter has terminated. Even this limited information, however, should be disclosed only to the extent reasonably necessary to detect and resolve conflicts of interest that might arise from the possible new relationship. Moreover, the disclosure of any information is prohibited if it would compromise the attorney-client privilege or otherwise prejudice the client (e.g., the fact that a corporate client is seeking advice on a corporate takeover that has not been publicly announced; that a person has consulted a lawyer about the possibility of divorce before the person's intentions are known to the person's spouse; or that a person has consulted a lawyer about a criminal investigation that has not led to a public charge). Under those circumstances, paragraph (a) prohibits disclosure unless the client or former client gives informed consent. A lawyer's fiduciary duty to the lawyer's firm may also govern a lawyer's conduct when exploring an association with another firm and is beyond the scope of these Rules.

Any information disclosed pursuant to paragraph (b)(7) may be used or further disclosed only to the extent necessary to detect and resolve conflicts of interest. Paragraph (b)(7) does not restrict the use of information acquired by means independent of any disclosure pursuant to paragraph (b)(7). Paragraph (b)(7) also does not affect the disclosure of information within a law firm when the disclosure is otherwise authorized, see Comment [5], such as when a lawyer in a firm discloses information to another lawyer in the same firm to detect and resolve conflicts of interest that could arise in connection with undertaking a new representation.

ABA Model Rule 1.6 cmt. [13], [14] (emphases added).

This new rule presumably has had little impact, because lawyers have always been doing this. In fact, this provision represents a vindication of the ABA Model Code confidentiality formulation, and a repudiation of the 1983 overbroad ABA Model Rules formulation. Just like the ABA Model Code, this provision permits disclosure of non-

privileged client information, as long as it would not harm the client. That is precisely what the ABA Model Code permitted.

Unfortunately, the ABA did not extend this approach to lawyers' day-to-day conflicts clearing process. Although perhaps not as starkly as lateral hire conversations, that process also normally requires disclosure of client information protected by the ABA Model Rules. Lawyers presumably can take some comfort in the ABA's recognition of reality in connection with the lateral hiring process. This is not to say that lawyers practicing in ABA Model Rules states have worried about this -- since 1983 they have been violating the ABA Model Rules in their day-to-day conflicts clearing, and undoubtedly will continue to do so even in the absence of a black letter rule permitting the necessary disclosures in that process.

**Best Answer**

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

b 10/14



## Clearing Conflicts in Hiring Adverse Lawyers

### Hypothetical 18

As a mid-level associate working on a large litigation matter, you must frequently deal with the law firm representing your client's adversary. You have really grown to admire that other firm, and its associates seem much more satisfied with their salaries and responsibility than associates at your firm. You have actually considered seeking a job at that other firm, and you wonder about the confidentiality and conflicts ramifications of taking such a step.

- (a) Without advising your law firm and its client whom you are representing in the current litigation, may you mention to one of that other law firm's partners that you might be interested in applying for a job there at some point?

### YES (PROBABLY)

- (b) Without advising your law firm and its client whom you are representing in the current litigation, may you meet with one of the other firm's partners to discuss possible salary and job assignments?

### NO (PROBABLY)

- (c) If one of the other firm's partners senses your interest without your having said anything about it, must you advise your firm and its client if the partner offers you a job?

### MAYBE

### Analysis

Clearing conflicts when hiring lawyers from other firms primarily involves confidentiality issues. However, conflicts issues can arise as well.

(a)-(b) Unless and until the lateral hire actually moves to another firm, the potential conflict involves the amorphous principle focusing on any material effect on lawyers' judgment based on some other interest.

The ethics rules describe two types of conflicts of interest. Lawyers are most familiar with the first type -- in which "the representation of one client will be directly adverse to another client." ABA Model Rule 1.7(a)(1). Some folks describe this as a "light switch" conflict, because a representation either meets this standard or it does not. This is not to say that it can be easy to analyze such conflicts. But a lawyer concluding that a representation will be "directly adverse to another client" must deal with the conflict.

The second type of conflict involves a much more subtle analysis. As the ABA Model Rules explain it, this type of conflict exists if

there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

ABA Model Rule 1.7(a)(2) (emphasis added).

This has been called a "rheostat" conflict. Unlike making a "yes" or "no" determination as required in analyzing the first type of conflict, a lawyer dealing with a "rheostat" conflict has a more difficult task. The lawyer must determine if some other duty, loyalty, or interest has a "significant risk" of "materially" limiting the lawyer's representation of a client. This often involves a matter of degree rather than kind.

For instance, in the hiring context, an associate is not likely to "pull punches" when dealing with the adversary's lawyer just because the associate and the other lawyer had a fleeting conversation about the associate possibly joining the adversary's law firm at some point in the future. However, the associate might be less aggressive on behalf of her client when dealing with one of the adversary's lawyers who just offered the associate a partnership at the other law firm, accompanied by a huge pay increase.

Thus, this second type of conflict requires a far more subtle analysis than a "light switch" type of conflict arising from direct adversity to another client.

As with the first of type of conflict, a lawyer dealing with a "rheostat" conflict may represent a client only if the lawyer "reasonably believes" that she can "provide competent and diligent representation," the representation does not violate the law, and each client provide "informed consent." ABA Model Rule 1.7(b)(1). Perhaps the possible lateral hire can talk himself into thinking that he can continue providing competent and diligent representation to the existing client after receiving a solid job offer from the adversary's law firm, but making the necessary disclosures and obtaining the necessary consents could be a logistical nightmare.

As lawyers' lateral moves became more common, the ABA dealt with this issue in 1996.

In ABA LEO 400 (1/24/96), the ABA addressed the conflicts of interest ramifications of discussions between a law firm and a possible lateral hire who was currently working on a matter adverse to the potential hiring law firm's client. ABA LEO 400's conclusion primarily focused on the conflicts issues.<sup>1</sup>

In sum, we conclude that, for the protection of clients, Rule 1.7(b) requires a lawyer who is actively representing a client in a matter, and who is considering an association with a firm or party to whom he is opposed in the matter, to consult with his client and obtain the client's consent to his continuing to work on the matter while the lawyer explores such association. Generally, the required consultation should occur before the lawyer engages in a substantive discussion

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<sup>1</sup> Interestingly, ABA LEO 400 mentioned the confidentiality duty almost as an afterthought -- identifying it as the third of four duties requiring some attention. ABA LEO 400 (1/24/96) ("A third duty is the preservation of confidentiality under Rule 1.6. Job-seeking lawyers must guard against the risk that in the course of the interviews to determine the compatibility of the lawyer with the opposing firm, or the discussions between the lawyer and the firm about the lawyer's clients and business potential, the lawyer might inadvertently reveal 'information relating to the representation' in violation of Rule 1.6.").

of his experience, clients, or business potential with the opposing firm or party. If the client consents, the lawyer may continue the representation. If the client does not consent, the lawyer must either discontinue the job search that created the conflict, or withdraw from participation in the representation and transfer his work to others in the firm, if withdrawal can be accomplished properly under Rule 1.16. Where the lawyer has had a limited role in a matter or has had limited client contact, it will ordinarily be more appropriate for him to inform his supervisor. The supervisor can then determine whether to relieve the lawyer of responsibility, or to seek the client's consent for the lawyer to continue to work on the matter. While the negotiating lawyer's conflict of interest is not imputed to other lawyers in his firm, those other lawyers must each evaluate whether they may themselves have a conflict by virtue of their own interest in their colleague's negotiations. The lawyers in a law firm seeking to employ a lawyer who is involved in a matter adverse to the firm have similar obligations to their client.

This Committee regularly addresses, as in this Opinion, important issues relating to conflicts of interest. We recognize that among all of the issues this Committee confronts, conflicts of interest decisions generate much attention from the bar because of the possibilities they present for the disqualification of counsel. While there are, undoubtedly, many situations in which disqualification on grounds of conflict is warranted if not compelled, the opportunities for mischief presented by disqualification motions are numerous as well. Thus, we conclude this Opinion with a cautionary note. We do not intend, by this Opinion, to provide additional opportunities for merely tactical or dilatory motions to disqualify where the role of the negotiating lawyer has been such that no real harm can arise by permitting the lawyer to secure a new position of employment. As stated in the Rules themselves, 'the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons.' Scope para. [18]. It is our hope that members of the profession will approach motions to disqualify in this context, as in any other context, responsibly and with prudence.

ABA LEO 400 (1/24/96) (emphases added).

The Restatement also deals with this issue -- and follows the ABA legal ethics opinion in recognizing an increasing duty by the lawyer as the job negotiations become "concrete."

This Section applies when a lawyer seeks to discuss the possibility of the lawyer's future employment with an adversary or an adversary's law firm. The conflict arises whether the discussions about future employment are initiated by the lawyer or by the other side. If discussion of employment has become concrete and the interest in such employment is mutual, the lawyer must promptly inform the client. Without effective client consent, the lawyer must terminate all further discussions concerning the employment, or withdraw from representing the client. The same protocol is required with respect to a merger of law firms or similar change. . . .

Restatement (Third) of Law Governing Lawyers § 125 cmt. d (2000). The Restatement offers a helpful illustration of how this principle works.

Lawyer has been employed by Law Firm ABC for three years. For the last two of those years, Lawyer has worked on a case on behalf of Client against a company represented by Law Firm DEF. Lawyer decided to explore leaving Law Firm ABC. Lawyer wrote letters to 10 firms, including Law Firm DEF, to determine if they had any openings. Law Firm DEF indicated that it has an opening and encouraged Lawyer to come for an interview. This Section does not require Lawyer, at the time of sending the initial letters, to inform Client of the possible relationship to Law Firm DEF. However, when Firm DEF responded favorably, the possibility of employment became both concrete and mutual. At that point, Lawyer must promptly notify Client, fully inform Client of the nature and consequences of the conflict, and obtain Client's voluntary consent before continuing the representation.

Restatement (Third) of Law Governing Lawyers § 125 cmt. d, illus. 4 (2000).

States have also issued legal ethics opinions addressing this scenario. As with ABA LEO 400, these opinions almost apologetically acknowledge there can be no "bright-line" rule, as much as lateral hires and hiring law firms might wish for one.

- District of Columbia LEO 367 (7/2014) ("When a lawyer is seeking employment with an entity or person adverse to his client, or with the adversary's lawyer, a conflict of interest may arise under Rule 1.7(b)(4) if the lawyer's professional judgment on behalf of the client will be, or reasonably may be, adversely affected by the lawyer's own financial, business, property, or personal interests (for purposes of this Opinion, a lawyer's own financial, business, property, or personal interests are collectively referred to as a 'personal interest conflict'). Both subjective and objective tests must be applied to determine whether a personal interest conflict exists. There is no 'bright line' test for determining the point during the employment process when a personal interest conflict arises, and that point may vary. There are a number of factors to consider in determining whether a personal interest conflict exists, including whether the individual lawyer is materially and actively involved in representing the client and, if so, whether the lawyer's interest in the prospective employer is targeted and specific, and/or has been communicated to, and reciprocated by, the prospective employer. Where the prospective employer is affiliated with, but separate and distinct from, the entity adverse to the job-seeking lawyer's client, there may be no personal interest conflict in the first instance, because the adversary and the prospective employer may be separate entities for conflicts purposes. If a personal interest conflict arises, there are three possible courses of action that may be available to the individual lawyer, each of which is subject to applicable requirements of the D.C. Rules of Professional Conduct: (a) disclosing to the client the existence and nature of the personal interest conflict and the possible adverse consequences of the lawyer's representation of the client and obtaining the client's informed consent to the representation; (b) withdrawing from the representation; or, (c) discontinuing seeking employment with the client's adversary or the adversary's lawyer until all pending matters relating to that potential new employment have been completed. The personal interest conflict of an individual lawyer in a law firm, nonprofit, or corporate legal department is not imputed to the other lawyers in the law firm, nonprofit, or corporate legal department, so long as the personal interest conflict does not present a significant risk of adversely affecting the representation of the client by such other lawyers. The imputation rule does not apply to a government agency. A subordinate lawyer who discusses a potential personal interest conflict with his supervisory lawyer, and acts in accordance with the supervisory lawyer's reasonable determination of whether the subordinate lawyer has a personal interest conflict and follows the supervisory lawyer's recommended course of action, will not be held professionally responsible even if it is subsequently determined that the supervisory lawyer's determination of whether there was a personal interest conflict, and/or the recommended course of action, were incorrect under the Rules." (footnote omitted) (emphasis added)).
- Kentucky LEO E-399 (5/1997) ("Question: When law firms represent adverse parties in a matter, may a lawyer in one of the law firms negotiate for

employment with the other law firm? If so must disclosure of the fact of the negotiations be made to the firms' client who is involved in the adverse representation?"; "Answer: If there is an appearance of side-switching by a lawyer who is actually working on the case, the negotiations should not be initiated without the client's consent. If the lawyer is involved in the case or has actual knowledge of protected client information within the meaning of KRPC 1.9 and 1.10, then the lawyer should not negotiate for employment with the law firm representing the adverse party without the client's consent. If the lawyer seeking employment is not involved in the case, the negotiations are not necessarily violative of the Rules, but disclosure to the firm's client may be appropriate and prudent in specific cases." (emphasis added)).

(c) In 1991, the New York City Bar indicated that a lawyer must advise her client about such a job offer unless she promptly declines it.

- New York City LEO 1991-1 (1991) ("This Opinion addresses whether and under what circumstances a lawyer has a duty to disclose to a current or prospective client that the lawyer is seeking or is considering whether to accept future employment with a person or entity having interests that are adverse to the interests of that current or prospective client."; "A serious issue arises as to when, in the process of looking for and deciding to accept new employment, the lawyer's interest in such employment becomes sufficiently concrete and serious to require disclosure under DR 5-101(A). The Committee is quite aware of the desirability of a 'bright-line' rule that would be easy to apply and would provide unambiguous guidance. However, we have concluded that no such 'bright-line' test can adequately accommodate the variety of circumstances in which the issues addressed herein might arise." (emphases added); "Nevertheless, the Committee believes that disclosure would be required under DR 5-101(A) in any case no later than when an offer of conflicting employment is extended to the lawyer, which offer is not promptly declined. Therefore, disclosure would always be necessary at least where an offer of future employment is outstanding and being considered (or has been accepted). This rule, however, is not sufficient. Although disclosure at the point an offer is extended would protect against certain of the types of conflict identified above; it is not sufficient as to others. In particular, it does not deal at all with the potential conflicting influences that may arise in connection with the process of securing the offer of employment. Therefore, the Committee notes that, in many cases, the disclosure obligations under DR 5-101(A) may arise as soon as the lawyer either (i) has taken clear affirmative steps to seek to obtain specific conflicting employment (e.g., applied for such a position) or (ii) is seriously considering the pursuit of such employment in response to some expression of interest by the potential employer. Both situations can raise the ethical problems identified above. We are not prepared, however, to opine that in all cases the obligation to

decline proffered representation or make disclosure will arise at these earlier identified points in the process." (emphasis added)).

This approach seems to allow for a "wink and a nod" offer that probably should be disclosed if the lateral hire recognizes that the hiring law firm is essentially making a standing offer that will remain open until the litigation ends. But perhaps New York intended to avoid the mischief that would come from a disclosure duty automatically arising from a job offer. An automatic disclosure approach would allow law firms to sow dissension in the adversary's ranks by offering jobs to its associates -- triggering their law firms' doubts about the associates' loyalty.

### **Best Answer**

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

b 10/14



## Focus on Individual Lawyer's Experience and Knowledge

### Hypothetical 19

Your firm is thinking of hiring a mid-level associate from another large law firm in your city. You and your colleagues are representing a client in very contentious litigation against a company represented by that other law firm. You worry that your litigation adversary would do anything to "knock out" your firm. However, as far as you know the associate has never worked on that matter.

Given this situation, is the mid-level associate practicing at the other law firm totally off-limits as a lateral hire?

**NO**

### Analysis

Interestingly, an entire law firm's knowledge and loyalty duties are imputed to every lawyer in the firm (including the newest associate) while the lawyer practices at the firm -- but generally evaporate when the lawyer leaves the firm. Thus, lawyers withdrawing from a firm only carry with them the knowledge that is in their brain. This is the knowledge that defines their ability to take matters adverse to the old firm's clients -- which of course have become the withdrawing lawyer's former clients.

To be sure, lawyers can obtain material confidential information without working on a matter. They might talk to a colleague about the matter that she is handling, attend partnership meetings at which matters are widely discussed, or receive internal email news updates about firm's matters. Therefore, it would be a mistake to focus solely on matters in which a lawyer represents a client. Instead, the analysis must examine the lawyer's receipt of confidential information in any setting.

Having said that, it seems clear that lawyers leaving a law firm do not face individual disqualification from adversity to their former firm's client as long as the

lawyers did not acquire material confidential information that could be used to the former client's disadvantage. Of course, the lack of any individual grounds for disqualification means that the hiring law firm does not risk an imputed disqualification to the entire firm from adversity to a client represented by the lateral's now-former firm.

A comment to ABA Model Rule 1.9 addresses the competing interests involved in analyzing lawyers' adversity of clients represented by a lawyer's former firm.

When lawyers have been associated within a firm but then end their association, the question of whether a lawyer should undertake representation is more complicated. There are several competing considerations. First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association. In this connection, it should be recognized that today many lawyers practice in firms, that many lawyers to some degree limit their practice to one field or another, and that many move from one association to another several times in their careers. If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.

ABA Model Rule 1.9 cmt. [4]. The next comment focuses on the lateral hire's actual personal knowledge.

Paragraph (b) ["A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client"] operates to disqualify the lawyer only when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c). Thus, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer

individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict. See Rule 1.10(b) for the restrictions on a firm once a lawyer has terminated association with the firm.

ABA Model Rule 1.9 cmt. [5].

The comment after that acknowledges law firms' lawyers' normal exchange of information.

Application of paragraph (b) depends on a situation's particular facts, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussions of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients. In such an inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

ABA Model Rule 1.9 cmt. [6].

The Restatement takes the same approach.

When a lawyer leaves a firm or other organization whose lawyers were subject to imputed prohibition owing to presence in the firm of another lawyer, the departed lawyer becomes free of imputation so long as that lawyer obtained no material confidential client information relevant to the matter. Similarly, lawyers in the new affiliation are free of imputed prohibition if they can carry the burden of persuading the finder of fact that the arriving lawyer did not obtain confidential client information about a questioned representation by another lawyer in the former affiliation.

Restatement (Third) of Law Governing Lawyers § 124 cmt. c(ii) (2000) (emphasis added). An illustration provides further support for this general approach.

Client X has sought to retain Lawyer A, a partner in the firm of ABC, to represent X in a suit against Y. The suit has not yet been filed. Lawyer A is required to decline the representation because Y is also a client of Lawyer B in ABC. Lawyer A resigns from the ABC firm without having learned material confidential information of Y relevant to X's claim. The imputed disqualification is thereby removed, and Lawyer A may now represent Client X.

Restatement (Third) of Law Governing Lawyers § 124 cmt. illus. 2 (2000).

The case law also unanimously agrees with this rule.

- Kennedy v. MindPrint, 587 F.3d 296, 300, 394 (5th Cir. 2009) (confirming that an individual lawyer's disqualification when a lawyer moves to a new firm must be based only on the individual lawyer's personal involvement and knowledge; "Regardless of linguistic differences, the two codes produce the same result in application -- they both require that a departing lawyer must have actually acquired confidential information about the former firm's client or personally represented the former client to remain under imputed disqualification."; "Under both the Texas Rules and the ABA Model Rules, Kennedy should have had the opportunity to demonstrate that he did not obtain confidential information regarding MindPrint during his time at Jackson Walker. Kennedy presented uncontradicted evidence that he was unaware of MindPrint's existence -- let alone Schooler's representation of MindPrint -- during his affiliation with Jackson Walker."; reversing a district court's disqualification of the new firm).
- District of Columbia LEO 312 (4/2002) (explaining that a lawyer withdrawing from a law firm only carries to his or her new firm conflicts that arise from the lawyer's personal knowledge, rather than any imputed knowledge; "But when that lawyer moves to firm B the only conflicts that the lawyer carries along from firm A are those caused by client representations in which the lawyer actually participated. Conflicts that applied to the lawyer while in firm A only because of the imputation required by Rule 1.10(a) do not apply when the lawyer is moving to another firm.").
- Adams v. Aerojet-General Corp., 104 Cal. Rptr. 2d 116, 125, 2001 Cal. App. LEXIS 89 (Cal. Ct. App. 2001) ("We conclude that a rule which disqualifies an attorney based on imputed knowledge derived solely from his membership in the former firm and without inquiry into his actual exposure to the former client's secrets sweeps with too broad a brush, is inconsistent with the language and core purpose of rule 3-310(E), and unnecessarily restricts both the client's right to chosen counsel and the attorney's freedom of association. It also clashes with the principle that applying the remedy of disqualification 'when there is no realistic chance that confidences were disclosed [to

counsel] would go far beyond the purpose' of the substantial relationship test." (citation omitted)).

If the lateral hire faces an individual disqualification based on ABA Model Rule 1.9 standard, another ABA Model Rule imputes that disqualification to the entire firm -- although the ABA Model Rules allow the hiring law firm to screen the individually disqualified lawyer and avoid such an imputed disqualification. ABA Model Rule 1.10(a).

It is also worth noting that if the lateral hire brings any clients with him or her to the new firm, the firm cannot be adverse to those former clients on any matter without the client's consent. This total duty of loyalty does not focus on the lawyer's information, but rather on the total prohibition or adversity to current clients. ABA Model Rule 1.7(a)(1).

In most situations, lawyers leaving a law firm withdraw from representing the clients they worked for at the firm -- except for those clients that they carefully select for possible solicitation to move with them to the new firm. Withdrawal might require court approval if the lateral hire has appeared as counsel of record -- although most courts consider the law firm to be the litigant's lawyer, rather than the individual lawyer within the law firm. In any event, it usually makes sense for lawyers leaving law firms to explicitly or implicitly sever their attorney-client relationships with clients that they do not want to try to bring with them to the new firm. This turns the old firm's clients into the individual lawyer's former clients -- thus allowing both the individual lawyer and every other lawyer at the hiring firm to take unrelated matters adverse to those former clients.

A 2012 Montana case highlighted what can go wrong with some logistical snafus. In that case, a lawyer did not adequately advise his former clients that he was

withdrawing from representing them. In fact, the lateral hire sent a letter to all or most of the clients with whom he had worked at the old firm, touting his new firm's ability to represent those clients. This apparent widely-sent form letter had the unfortunate effect of maintaining an attorney-client relationship with clients that the lateral hire undoubtedly did not want to continue representing at the new firm.

- Krutzfeldt Ranch, LLC v. Pinnacle Bank, 272 P.3d 635, 641, 642, 643, 644 (Mont. 2012) (finding that a lawyer's individual disqualification was imputed to his new law firm, because he was not screened in a timely fashion under the Montana rules; explaining that the lawyer had been retained by one of the law firm's adversaries, but was essentially on "stand by" to assist at a later time; holding that the lawyer had not officially terminated his representation of the client when he moved to the adversary's law firm, and instead had sent what seemed to be a form letter to all of his clients announcing the move and indicating that he could assist them in the future; "The attorney-client relationship is not automatically terminated when a lawyer joins another firm." (emphasis added); "The critical fact here is that, even if grounds for withdrawal existed under the terms of his engagement letter, Hoskins did not withdraw from his representation of the Krutzfeldts prior to accepting his new position. He never informed the Krutzfeldts that his work for them had concluded, never terminated his representation of them, and never advised them he was contemplating joining Crowley. The 'Dear Client' letter gave no indication the Krutzfeldts were no longer Hoskins's client. To the contrary, the letter contemplated future legal services: 'We feel we will be more responsive and efficient to your needs and the ever changing tax and regulatory world by utilizing the resources that Crowley Fleck has to offer.' 'Withdrawal is effective to render a representation 'former' for the purposes of this Section if it occurs at a point that the client and lawyer had contemplated as the end of the representation.' Restatement (Third) of the Law Governing Lawyers § 132 cmt. c (2000) (emphasis added). In the absence of any affirmative steps by Hoskins prior to his transition, if the Krutzfeldts were Hoskins's current clients on December 31, 2010, they remained in an attorney-client relationship at the time he signed on as a member of the Crowley team." (emphasis added); "[W]e conclude Hoskins had a concurrent conflict of interest at the time he took the job with Crowley. After the July 19 meeting, Hoskins sent Harris a formal engagement letter indicating the prospective nature of his services. Hoskins's bill for his services did not indicate it was a 'final' bill nor did he take any steps to conclude his relationship with the Krutzfeldts. That he was not consulted for the next several months was simply a matter of timing. Consistent with Harris's previous engagement of Hoskins, Hoskins's services only would be needed for particular components of the case. Following Harris's call to advise Hoskins of the upcoming

settlement conference, Hoskins did nothing until sending Harris the form letter that advised all of Hoskins's clients he had joined Crowley. At no time did Hoskins advise Harris of any notice or intent to withdraw as counsel."; "An attorney's duty to his client, however, is not dependent on the purpose for which he has been engaged. '[T]he mere fortuity that [the client] did not require more extensive or frequent services than he did cannot be the [attorney's] escape hatch[.]' Manoir-Electroalloys Corp. v. Amalloy Corp., 711 F. Supp. 188, 194 (D.N.J. 1989). Hoskins was retained for his expertise in tax matters. Although the specific tasks in which a lawyer was engaged might make the access to confidential client information insignificant in subsequent representation of an adverse party, the lawyer bears the burden of persuasion on that issue. Restatement (Third) of the Law Governing Lawyers § 132 cmt. h. No one contends Hoskins was not privy to confidential information. His limited specific role in the case does not diminish his professional obligations to the Krutzfeldts."; "The Krutzfeldts have made a sufficient showing of prejudice in this case. They lost the time and money they invested in Hoskins. They lost their trial date because Hoskins's abrupt move rendered them without expert assistance just weeks before trial and prompted the need for their motion to disqualify. Without prior notice of Hoskins's move, they did not have an opportunity to elect to seek new tax counsel or to determine how to address the impending conflict. Aside from these setbacks, the Krutzfeldts assert the most damaging loss was that of their attorney's loyalty. They argue that to ignore a lawyer's duty of loyalty in this case effectively would sanction the opportunistic hiring of an adverse party's attorney to weaken and derail the adverse party's claim against the hiring client.").

### **Best Answer**

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

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## Imputation of a Lateral Hire's Individual Disqualification: Strict Approach

### Hypothetical 20

For several years, you have had your eye on a rising associate who works at a relatively small firm with offices in your building. Unfortunately, the associate has been working on a team of lawyers at her firm which represents an adversary in a very lengthy high-stakes litigation in which your firm represents your largest client.

If your firm hired the associate, is there a chance that your firm could be disqualified from continuing to represent your largest client in the pending litigation?

YES

### Analysis

Under the traditional ABA Model Rules' approach and most states' approach to this issue, an individual lawyer's obvious disqualification would be imputed to the new law firm.

The ABA Model Rules disqualify an individual lawyer from adversity to a former client.

A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

ABA Model Rule 1.9(a).

Until fairly recently, this individual disqualification was automatically imputed to the entire hiring law firm.

While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless . . . .



## ABA Model Rule 1.10(a).

Many states still follow this traditional approach -- automatically disqualifying the hiring law firm in most situations.

- H & C Corp. v. Puka Creations, LLC, Case No. 4:12-cv-00013-RBH, 2013 U.S. Dist. LEXIS 147174, at \*5-6 (D.S.C. Oct. 11, 2013) (holding that South Carolina had not adopted the ABA Model Rules approach, which allows screening of a lateral hire to avoid imputed disqualification; "Nexsen Pruet [plaintiff's lawyers] contends that it has put in place a screen between Mr. St. Clair and the rest of the firm. However, South Carolina's ethical rules do not provide for a screen in this situation. While Rule 1.10 allows programs providing legal services to avoid imputed disqualification by screening lawyers from conflicting matters within the office, this rule however applies only to public defenders, legal services organizations, and similar programs.").
- In re Columbia Valley Healthcare Sys., L.P., 320 S.W.3d 819, 824 (Tex. 2010) ("If the lawyer works on a matter, there is an irrebuttable presumption that the lawyer obtained confidential information during representation. . . . When the lawyer moves to another firm and the second firm is representing an opposing party in ongoing litigation, a second irrebuttable presumption arises; it is presumed that the lawyer will share the confidences with members of the second firm, requiring imputed disqualification of the firm.").

Interestingly, in 2012 a California federal court bluntly rejected the possibility of an ethics screen preventing an individual lawyer's imputed disqualification to the hiring firm.

- Beltran v. Avon Prods., Inc., 867 F. Supp. 2d 1068, 1078, 1083, 1083-84, 1084 (C.D. Cal. 2012) (finding that an individual lawyer's disqualification was imputed to his new law firm, despite an ethics screen; explaining that the lawyer spent over 300 hours working on matters for Avon while at Paul Hastings, and then moved to a law firm representing a plaintiff suing Avon; "The instant case presents an unfortunate and awkward set of circumstances in which two former colleagues and long-time friends who previously worked together in representing a major corporate client now find themselves on opposite sides in a case involving that same client."; "Plaintiff claims that disqualification is not warranted because an ethical wall was immediately imposed to cordon off Mr. Frank from the instant case after Mr. Frank spoke with Mr. Ellis on March 12, 2012. . . . As a matter of law, however, an ethical wall is insufficient to overcome the possession of confidential information by the segregated attorney, except in very limited situations involving former government attorneys now in private practice."; noting the individually

disqualified lawyer had assisted his new firm in attempting to avoid disqualification; "Even if an ethical wall were legally sufficient, it was untimely because it was not imposed until March 12, 2012, two weeks after Plaintiff filed her complaint against Avon in Estee Lauder on February 28, 2012. Nor did Plaintiff's counsel send written notice to Avon regarding the implementation of an ethical wall as required under the Rules of Professional Conduct. See ABA Model Rules of Prof'l Conduct 1.10(a)(ii)&(iii). The effectiveness of an ethical wall is further compromised by the close proximity of attorneys working together in one office at Eagan Avenatti, which consists of less than ten attorneys, and by Mr. Frank's co-representation of parties with Mr. Avenatti and Mr. Sims in several concurrent class actions. . . . The Court also notes that Mr. Frank has already actively participated in the current litigation by speaking with Mr. Ellis about the case and the instant motion (as early as February 28, 2012), submitting a declaration in support of Plaintiff's opposition to the disqualification motion, reviewing Avon's motion, and even seeking to participate telephonically at the May 21, 2012 hearing. Mr. Frank's behavior casts doubt as to whether an ethical wall can be successfully implemented and maintained in this case."; "The Court also finds that, although there is no direct California authority regarding vicarious disqualification of an associated law firm, disqualification of the X-Law Group is warranted under the circumstances of this case. The X-Law Group consists of four attorneys, two of whom have already collaborated with Eagan Avenatti in the filing of the complaint against Avon in Estee Lauder and this case. It is also reasonable to assume that the two law firms engaged in fairly extensive discussions about the case and Plaintiff's litigation strategy before filing their complaint and prior to the erection of an [sic] wall ethical[ly] segregating Mr. Frank from the case. Even if the X-Law Group did not, in fact, acquire confidential information, their involvement in the case would taint the appearance of probity and fairness of the proceeding.").

This strict approach contrasted sharply with a 2010 California appellate court decision recognizing the possibility that the hiring law firm could screen a lateral hire to avoid such an imputed disqualification.

- Kirk v. First Am. Title Ins. Co., 108 Cal. Rptr. 3d 620, 631 (Cal. Ct. App. 2010) (analyzing in great detail the California rule requiring imputation of an individual lawyer's (Cohen) disqualification, and rejecting a per se imputation approach; explaining that an individual lawyer who had several communications with plaintiff's counsel about a case moved to the Sonnenschein firm, which was later joined by lawyers from Bryan Cave -- who represented the other side of the case in which the lawyer had spoke to the plaintiff; noting that Sonnenschein screened the individual lawyer immediately upon learning of the individual lawyer's disqualification; noting that "[g]enerally speaking, the California State Bar's Rules of Professional Conduct govern

attorney discipline; they do not create standards for disqualification in the courts. . . . Nonetheless, as will be seen in our discussion, courts analyzing questions of disqualification often look to the Rules of Professional Conduct for guidance."; reversing the disqualification of the Sonnenschein firm and remanding an analysis on whether the firm had rebutted the presumption that the individual lawyer had disclosed confidences to colleagues).

Of course, the lawyer can seek the former client's consent to the hiring law firm's continuing representation of the former client's adversary. The former client could even consent to the lawyer's participation on the matter for the other side, but is extremely unlikely to do so. Instead, the normal scenario involves the former client consenting to the hiring law firm's continued representation of the adversary on the condition that it effectively screen the lawyer from any participation in the case, or disclosure of confidential information to lawyers at the hiring law firm working on the case.

As a matter of courtesy and professionalism, most law firms work with their clients to grant such a consent -- especially when a young associate wants to move to another firm. However, even then the logistics can be frightening to the lawyer interested in moving from one firm to another. The associate normally does not want to announce that he or she is leaving the current firm without locking in a job somewhere else. But the hiring law firm often cannot guarantee a job without knowing that it can obtain consents allowing it to continue representing clients adverse to the lateral hire's former firm's clients. This "chicken and egg" dilemma can be excruciating for young associates. If they advise their current firm that they are interested in leaving, they may burn bridges there. And if their current firm's clients do not grant the consent that the hiring firm requires (either because of the clients' intransigence or the current firm's spiteful response to the associate's desire to leave), the associate can be left without a job.

If anything, the issue becomes even more acute for more experienced lawyers. In those situations, the current firm might be less inclined to grant consents that the hiring law firm justifiably requires -- worrying that they are not only losing one of their important team members, but also that the more experienced lawyer has more critical strategic knowledge that might conceivably be disclosed to the adversary's law firm.

**Best Answer**

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

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## Imputation of a Lateral Hire's Individual Disqualification: Other Approaches

### Hypothetical 21

You are interested in hiring a third- or fourth-year associate to bolster your intellectual property practice. One associate who practices elsewhere in your state seems like a good prospect, but you wonder whether her individual disqualification might be imputed to your law firm -- potentially disqualifying your firm from handling a number of matters that you are currently handling adverse to the associate's current firm. Your state just abandoned its traditional approach to the imputation issue -- and now allows hiring law firms to avoid imputed disqualification by screening lateral hires under certain circumstances.

- (a) Will you be able to avoid imputed disqualification if the associate was actively working as a member of the team at the other law firm representing your client's adversary?

### NO (PROBABLY)

- (b) Will you be able to avoid imputed disqualification if the associate had only taken one deposition in the case in which her current law firm represents your client's adversary?

### MAYBE

- (c) Will you be able to avoid imputed disqualification if the associate had only prepared several abstract legal memoranda in the case in which her current law firm represents your client's adversary?

### YES (PROBABLY)

### Analysis

(a),(c) Traditionally, a hiring law firm could not avoid imputation of an individually disqualified lateral hire's taint. In a sense, a lateral hire came to the firm as a "Typhoid Mary" -- and the firm could avoid imputed disqualification only by successfully obtaining the lawyer's consent of former clients to allow its continued representation of the former clients' adversaries. Former clients asked for such consent inevitably demanded that

the individually disqualified lateral hire be screened. However, law firms under this traditional approach could not erect what could be called "self-help" screens and avoid the imputed disqualification without the former clients' consent.

As lawyer mobility increased over the years, more and more states began to allow hiring law firms to erect "self-help" screens, and avoid harsh imputed disqualification. Although many purists resisted such changes, they were supported by some common sense principles and reflected modern realities. Lawyers must protect their clients' confidences every day of their practice. It is difficult to imagine that a lateral hire would risk the ability to practice in the legal profession by violating the duty of confidentiality -- when every lawyer must do so on a daily basis. Applying this basic principle made increasing sense in a world where few lawyers stay at their first firm for their entire careers. Not only is the legal profession changing, but entire generations now seem destined to frequently move from job to job.

## **ABA**

The ABA dealt with this issue three times in less than ten years.

In 2002, the ABA House of Delegates rejected the Ethics 2000 Commission's proposal to allow self-help screening of lateral hires. However, states continued to act on their own in adopting such changes. By the time the ABA House of Delegates addressed the issue six years later, twenty-four states had already adopted such self-help screening. Kuhlman, George A., "Follow the Middle Road," ABA Journal, May 2009.

In 2008, the ABA House of Delegates voted on a change that would have allowed such self-help screening in the case of lateral hires. By a one-vote margin of

192 to 191, the House of Delegates postponed indefinitely its consideration of the proposed amendment.

The issue came back to the ABA House Delegates in February 2009. The ABA Journal Law News reported on the vigorous debate. For instance, the chair of the ABA's Standing Committee on Ethics and Professionalism argued that self-help screens would work -- noting that

Illinois has had a rule similar to that in Resolution 109, and for the last 15 years, none of the state's 93,000 ethics complaints have alleged a violation of it.

Edward A. Adams, ABA House OKs Lateral Lawyer Ethics Rule Change, ABA Journal Law News, Feb. 16, 2009.

In rebuttal, an opponent of the rules change argued that "no violations were reported because they all take place behind a black curtain." Id.

In response to the argument that lawyers should involve clients in the debate over the rules change, Starbucks' general counsel responded that in a sense clients were participating.

Paula Boggs, general counsel of Starbucks, effectively made the case there were clients present, speaking in favor of Resolution 109. She noted that ethics rules allow government lawyers to join firms which are litigating against the government, so long as they are screened from the matters and keep the government's confidences.

She has found herself in that situation. "It makes no sense that I can leave the Department of Justice (DOJ) for a firm doing mortal combat with DOJ, but if I move from company A to firm A" screening is not sufficient.

"If a firm can effectively screen the former government lawyer, why can't it screen the former in-house lawyer?" she asked.

Id.

The House of Delegates ultimately passed the self-help screen provision by a vote of 226 to 191.

Interestingly, the ABA returned to the issue one more time later in 2009, adding language making it clear that the self-help screen avoids imputed disqualification only if the disqualification "arises out of the disqualified lawyer's association with a prior firm." As earlier passed by the House of Delegates, the provision could theoretically have allowed a law firm to avoid imputed disqualification of an individually disqualified lawyer's "taint" in other circumstances.

As ultimately adopted and then quietly revised by the ABA, the self-help screening provision imputes an individually disqualified lawyer's "taint" to the entire law firm or law department unless

the prohibition is based upon Rule 1.9(a) or (b) and arises out of the disqualified lawyer's association with a prior firm, and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom;

(ii) written notice is promptly given to any affected former client to enable the former client to ascertain compliance with the provisions of this Rule, which shall include a description of the screening procedures employed; a statement of the firm's and of the screened lawyer's compliance with these Rules; a statement that review may be available before a tribunal; and an agreement by the firm to respond promptly to any written inquiries or objections by the former client about the screening procedures; and

(iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client by the screened lawyer and by a partner of the firm, at reasonable intervals upon the former client's written request and upon termination of the screening procedures.

ABA Model Rule 1.10(a)(2) (emphases added).



A comment to the new rule provides a basic explanation -- including a troublesome warning that courts might disqualify the hiring firm despite its compliance with the ethics rules.

Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.

ABA Model Rule 1.10 cmt. [7] (emphases added).

Another comment deals with the financial screening.

Paragraph (a)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

ABA Model Rule 1.10 cmt. [8]. The next comment addresses the notice requirement.

The notice required by paragraph (a)(2)(ii) generally should include a description of the screened lawyer's prior representation and be given as soon as practicable after the need for screening becomes apparent. It also should include a statement by the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Rules. The notice is intended to enable the former client to evaluate and comment upon the effectiveness of the screening procedures.

ABA Model Rule 1.10 cmt. [9].

Finally, a new comment explains the "certification" requirement.

The certifications required by paragraph (a)(2)(iii) give the former client assurance that the client's material confidential information has not been disclosed or used inappropriately,

either prior to timely implementation of a screen or thereafter. If compliance cannot be certified, the certificate must describe the failure to comply.

ABA Model Rule 1.10 cmt. [10].

### **Restatement**

The 2000 Restatement acknowledges the difficulty of balancing clients' justifiable worry about their lawyers working at an adversary's law firm and the societal benefit of lawyer mobility.

Imputation of conflicts of interest to affiliated lawyers reflects three concerns. First, lawyers in a law firm or other affiliation described in this Section ordinarily share each other's interests. A fee for one lawyer in a partnership, for example, normally benefits all lawyers in the partnership. Where a lawyer's relationship with a client creates an incentive to violate an obligation to another client, an affiliated lawyer will often have similar incentive to favor one client over the other. Second, lawyers affiliated as described in this Section ordinarily have access to files and other confidential information about each other's clients. Indeed, clients might assume that their confidential information will be shared among affiliated lawyers. . . . Sharing confidential client information among affiliated lawyers might compromise the representation of one or both clients if the representations conflict. Third, a client would often have difficulty proving that the adverse representation by an affiliated lawyer was wholly isolated. Duties of confidentiality on the part of the affiliated lawyers prevents adequate disclosure of the interactions among them. Moreover, to demonstrate that the lawyer misused confidential information the client often would be forced to reveal the very information whose confidentiality the client seeks to protect. However, considerations of free choice of lawyers by clients and the free mobility of lawyers between firms or other employers caution against extending imputation further than necessary.

Restatement (Third) of Law Governing Lawyers § 123 cmt. b (2000).

The Restatement essentially adopts a middle ground that is similar to that found in a number of states. Rather than rejecting per se the concept of screening a lateral

hire or allowing a self-help screen regardless of the lateral hire's involvement or knowledge at the old firm, the Restatement allows a self-help screen if any confidential client information the lateral hire brings with him or her "is unlikely to be significant in a subsequent matter [the new firm is handling adverse to the lateral hire's former firm's client]."

Imputation specified . . . does not restrict an affiliated lawyer with respect to a former-client conflict . . . , when there is no substantial risk that confidential information of the former client will be used with material adverse effect on the former client because:

(a) any confidential client information communicated to the personally prohibited lawyer is unlikely to be significant in the subsequent matter;

(b) the personally prohibited lawyer is subject to screening measures adequate to eliminate participation by that lawyer in the representation; and

(c) timely and adequate notice of the screening has been provided to all affected clients.

Restatement (Third) of Law Governing Lawyers § 124(2) (2000).

A comment explains the justification for allowing such limited self-help screening. In essence, the Restatement justifies self-help screening for private lateral hires by pointing to the longstanding rule permitting such self-help screening when lawyers hire former government lawyers.

Lawyer codes generally recognize the screening remedy in cases involving former government lawyers who have returned to private practice. . . . Screening to prevent imputation from former private-client representations has similar justification, giving clients wider choice of counsel and making it easier for lawyers to change employers. The rule in Subsection (2) thus permits screening as a remedy in situations in which the information possessed by a personally prohibited lawyer is not likely to be significant. The lawyer or firm seeking to remove imputation has the

burden of persuasion that there is no substantial risk that confidential information of the former client will be used with material adverse effect on the former client.

Restatement (Third) of Law Governing Lawyers § 124 cmt. d(i) (2000) (emphases added).

The traditional self-help remedy when hiring former government lawyers rests on the perceived need to encourage lawyers to enter government service -- by making it easier to find a job when they leave that service. The same societal justification does not exist for private lawyers moving to another firm, although many other ethics rules encourage lawyer mobility (for instance, lawyers cannot have non-competes). Although perhaps the Restatement did not intend to rely on the track record for such former government lawyers (rather than the justification for the rule covering them), there seems to be no record of former government lawyers violating any self-help screens.

In addressing the concept of "significant" client confidential information, the Restatement provides an explanatory comment.

Significance of the information is determined by its probable utility in the later representation, including such factors as the following:

- (1) whether the value of the information as proof or for tactical purposes is peripheral or tenuous;
- (2) whether the information in most material respect is now publicly known;
- (3) whether the information was of only temporary significance;
- (4) the scope of the second representation; and
- (5) the duration and degree of responsibility of the personally prohibited lawyer in the earlier representation.

Restatement (Third) of Law Governing Lawyers § 124 cmt. d(i) (2000).

A comment describes a spectrum of possible scenarios.

Three situations must be distinguished. First, a lawyer's minor involvement in a matter for a former client might have involved no or so little exposure to confidential information that no conflict should be found . . . . Second, the lawyer's involvement might have been more substantial, rendering the lawyer personally prohibited from the representation by reason of a former-client conflict of interest . . . , but screening may be appropriate under Subsection (2). A common instance in which this may be true is that of a junior lawyer in a law firm who provides minimal assistance on a peripheral element of a transaction, thereby gaining little confidential information that would be relevant in the later matter. Third, in the circumstances the lawyer's involvement and the nature and relevance of confidential information in the lawyer's possession might be such that screening will not remove imputation under Subsection (2). Determining which result is appropriate requires careful analysis of the particular facts.

If the requirements of either Subsection (2) or (3) are met, imputation is removed and consent to the representation by the former client is not required. The required screening measures must be imposed in the subsequent representation at the time the conflict is discovered or reasonably should have been discovered, and they must be of sufficient scope, continuity, and duration to assure that there will be no substantial risk to confidential client information.

Restatement (Third) of Law Governing Lawyers § 124 cmt. d(i) (2000).

The Restatement provides three useful illustrations providing more details.

In the first illustration, the lateral hire does not have "significant" client confidential information.

As can readily be shown from contemporaneous time records, when Lawyer was an associate in Law Firm ABC, Lawyer spent one-half hour in conversation with another associate about research strategies involving a narrow issue of venue in federal court in the case of Developer v. Bank, in which the firm represented Bank. The conversation was based entirely on facts pleaded in the complaint and answer, and Lawyer learned no confidential information about the

matter. Lawyer then left Firm ABC and became an associate in Firm DEF. Two years later, Lawyer was asked to represent Developer against Bank in a matter substantially related to the matter in which Firm ABC represented Bank. In the circumstances, due to the proven lack of exposure of Lawyer to confidential information of Bank, Bank should not be regarded as the former client of Lawyer for the purpose of applying § 132 . . . . Alternatively, a tribunal may require that Lawyer be screened from participation in the matter as provided in this Section and, on that basis, permit other lawyers affiliated with Lawyer in Firm DEF to represent the client against Bank.

Restatement (Third) of Law Governing Lawyers § 124 cmt. d(i), illus. 3 (2000)

(emphases added).

In the second illustration, the lateral hire has substantial information, but the information is of "little significance" and therefore does not preclude use of a self-help screen.

The same facts as Illustration 3, except that Lawyer while representing Bank in Firm ABC was principally in charge of developing factual information about the underlying dispute. The dispute involved a loan Bank made to Developer on Tract A in the city in which both conduct business. The dispute was resolved after extensive discovery and a full trial before Lawyer left Firm ABC. An affiliated lawyer in Lawyer's new firm, Firm DEF, has been asked to represent Developer in a dispute with Bank over a loan on Tract B. Because of the similarity of facts in the two disputes -- involving both tracts, both loans, and both parties to them -- a tribunal finds the matters are substantially related and accordingly that Lawyer is personally prohibited from representing Developer against Bank with respect to Tract B . . . . However, the tribunal also finds that, despite that factual overlap, the information Lawyer might have acquired about Bank would have little significance in the later dispute because it concerned only an earlier period of time so that any importance it might have had was significantly diminished by the time of the second dispute, because it mainly involves information already a matter of public record in the earlier trial, and because all factual information will be largely irrelevant in view of the fact that

the pleadings indicate that the only contested issue in the second dispute involves a matter of contract interpretation. In the circumstances, the tribunal should further find that Firm DEF may represent Developer against Bank if Lawyer has been screened as provided in Subsection (2).

Restatement (Third) of Law Governing Lawyers § 124 illus. 4 (2000) (emphases added).

The third illustration provides the classic example of a lateral hire who has such significant confidential information a firm hiring him or her cannot avoid imputation of the lawyer's "taint" through a self-help screen.

The same facts as Illustration 4, except that the earlier dispute was settled after Lawyer had conducted extensive examination of Bank's files but without any discovery by Developer's then counsel or trial. Little time has passed since Lawyer acquired the information from Bank, and the information remains highly relevant in the later dispute. The pleadings in the second dispute indicate that a large number of important factual issues similar to those in the earlier dispute remain open. In the circumstances, the likelihood that the information possessed by Lawyer will be significant in the second matter renders screening under this Section inappropriate.

Restatement (Third) of Law Governing Lawyers § 124 illus. 5 (2000) (emphasis added).

### **State Rules**

Unfortunately for anyone desiring some nationally uniform approach, the states' independent adoption of self-help screening for lateral hires has resulted in rules that differ from state to state.

Some states allow screening regardless of the lateral hire's level of participation at the former firm (the ABA Model Rule approach). Other states allow such screening only if the lawyer played some peripheral role at the old firm (some of these are discussed below). States also differ in such logistical requirements as the type of screening that will work, referred disclosure to the former clients or tribunals, etc.

And of course some states continue to take the traditional approach, automatically imputing an individually disqualified lateral hire's disqualification to the entire hiring firm -- thus rejecting a self-help screening remedy.

The varying nature of states' approach to this issue can make it very difficult to analyze the efficacy of a self-help screen.

A 2010 California state court case endorsing self-help screens relied as much on experience with other screens as it did on some societal purpose justifying the switch from an automatic imputation rule. Kirk v. First Am. Title Ins. Co., 108 Cal. Rptr. 3d 620, 642 & n.25 (Cal. Ct. App. 2010).

The court explained that the evolving way in which lawyers practice law justifies giving them a chance to rebut the automatic presumption of information-sharing that underlies the tradition strict disqualification imputation rule.

We do not doubt that vicarious disqualification is the *general* rule, and that we should presume knowledge is imputed to all members of a tainted attorney's law firm. However, we conclude that, in the proper circumstances, the presumption is a rebuttable one, which can be refuted by evidence that ethical screening will effectively prevent the sharing of confidences in a particular case. . . . The instant case illustrates the changing landscape of legal practice -- we are concerned with the tainted attorney working in a different geographical office and in a different practice group from the attorneys with responsibility for the litigation. These are not attorneys discussing their cases regularly, passing each other in the hallways, or at risk of accidentally sharing client confidences at lunch. In a situation where the 'everyday reality' is no longer that all attorneys in the same law firm actually 'work[] together,' there would seem to be no place for a rule of law based on the premise that they do.

Kirk, 108 Cal. Rptr. 3d at 637-39 (citation omitted) (emphases added; emphasis in original indicated by italics).



Thus, the court pointed to the longstanding and universally accepted ethics rule permitting law firms to self-help screen former government lawyers to avoid imputation of their individual disqualification.

"The law cannot possibly be" that Sonnenschein could have effectively screened the lawyer if he had come directly from the government but could not screen him when he came from another firm; also noting that California law permits the screening of non-lawyers.

Id. at 642 n.25. The court also noted most states' self-help screening mechanism for prospective clients.

36 states and the District of Columbia permit ethical screening when the confidential information was conveyed by a former prospective client, although these rules generally apply only when the attorney took reasonable measures to avoid exposure to more information than was reasonably necessary to determine whether to accept the representation -- a circumstance which arguably did not occur in the instant case.

Id. at 639 n.22. The opinion also mentioned many states' self-help screening mechanism for non-lawyer hires.

There is another context in which a rebuttable presumption of imputed knowledge -- and therefore, the use of ethical screens -- has been adopted, that of the tainted non-attorney employee. When a tainted non-attorney employee of a law firm, possessing confidential case information, moves to an opposing law firm, vicarious disqualification of the opposing law firm is not necessary if the employee is effectively screened.

Id. at 642. Finally, the court pointed to the states that had already adopted the ABA Model Rule approach in one variation or another.

That nearly half of the states have chosen to permit some level of ethical screening in the non-governmental attorney context demonstrates a growing understanding that law is often practiced in firms in which effective screening is possible.

Id. at 640.

That case described states' differing approaches as of that date.

Other states are very nearly split evenly as to whether to permit ethical screening of attorneys moving from one private law firm to another. Twelve states have adopted rules of professional conduct permitting such screening with no limitations based on the scope of the disqualified attorney's prior involvement in the representation. . . . An additional twelve states have adopted rules permitting screening when the disqualified attorney was not substantially involved in the prior representation, or under other similar limitations on the attorney's prior involvement.

Id. at 639.

That tally is undoubtedly inaccurate or incomplete now, because states are constantly tinkering with their ethics rules.

Ironically, a California federal court decision issued two years later rejected the concept of self-help screening -- thus setting up the possibility of different results between federal and state courts in the same state.

- Beltran v. Avon Prods., Inc., 867 F. Supp. 2d 1068, 1078, 1083, 1083-84, 1084 (C.D. Cal. 2012) (finding that an individual lawyer's disqualification was imputed to his new law firm, despite an ethics screen; explaining that the lawyer spent over 300 hours working on matters for Avon while at Paul Hastings, and then moved to a law firm representing a plaintiff suing Avon; "The instant case presents an unfortunate and awkward set of circumstances in which two former colleagues and long-time friends who previously worked together in representing a major corporate client now find themselves on opposite sides in a case involving that same client."; "Plaintiff claims that disqualification is not warranted because an ethical wall was immediately imposed to cordon off Mr. Frank from the instant case after Mr. Frank spoke with Mr. Ellis on March 12, 2012. . . . As a matter of law, however, an ethical wall is insufficient to overcome the possession of confidential information by the segregated attorney, except in very limited situations involving former government attorneys now in private practice."; noting the individually disqualified lawyer had assisted his new firm in attempting to avoid disqualification; "Even if an ethical wall were legally sufficient, it was untimely because it was not imposed until March 12, 2012, two weeks after Plaintiff filed her complaint against Avon in Estee Lauder on February 28, 2012. Nor

did Plaintiff's counsel send written notice to Avon regarding the implementation of an ethical wall as required under the Rules of Professional Conduct. See ABA Model Rules of Prof'l Conduct 1.10(a)(ii)&(iii). The effectiveness of an ethical wall is further compromised by the close proximity of attorneys working together in one office at Eagan Avenatti, which consists of less than ten attorneys, and by Mr. Frank's co-representation of parties with Mr. Avenatti and Mr. Sims in several concurrent class actions. . . . The Court also notes that Mr. Frank has already actively participated in the current litigation by speaking with Mr. Ellis about the case and the instant motion (as early as February 28, 2012), submitting a declaration in support of Plaintiff's opposition to the disqualification motion, reviewing Avon's motion, and even seeking to participate telephonically at the May 21, 2012 hearing. Mr. Frank's behavior casts doubt as to whether an ethical wall can be successfully implemented and maintained in this case."; "The Court also finds that, although there is no direct California authority regarding vicarious disqualification of an associated law firm, disqualification of the X-Law Group is warranted under the circumstances of this case. The X-Law Group consists of four attorneys, two of whom have already collaborated with Eagan Avenatti in the filing of the complaint against Avon in Estee Lauder and this case. It is also reasonable to assume that the two law firms engaged in fairly extensive discussions about the case and Plaintiff's litigation strategy before filing their complaint and prior to the erection of an [sic] wall ethical[ly] segregating Mr. Frank from the case. Even if the X-Law Group did not, in fact, acquire confidential information, their involvement in the case would taint the appearance of probity and fairness of the proceeding.").

In the same year that a California state court adopted a self-help screen approach, the Western District of Wisconsin endorsed the concept of self-help screening -- pointing to Illinois' long experience with a self-help screen rule, apparently without any allegations of lawyer violations.

- Silicon Graphics, Inc. v. ATI Techs., Inc., 741 F. Supp. 2d 970, 977, 979-80 (W.D. Wis. 2010) (denying a disqualification motion based on a law firm's hiring of an individually disqualified lateral; finding that the hiring law firm's screen was adequate; explaining that "[a]t least 12 states have a rule of imputed disqualification similar to th[e] ABA model rule that allows for screening regardless of the scope of the work conducted by the lawyer for the former client. Kirk, 183 Cal. App. 4th at 802-803. [Kirk v. First Am. Title Ins. Co., 183 Cal. App. 4th 776 (Cal. Ct. App. 2010)] About the same number of states allow for screening under more limited circumstances. Id. In adopting the new rule, the ABA relied on the experience of these states, concluding that history has 'established [that] screens are effective to protect confidentiality' and 'that courts have exhibited no difficulty in reviewing and,

where screening was found to have been effective, approving screening mechanisms.' Committee Report at 11. See also Robert A. Creamer, 'Three Myths about Lateral Screening,' *Professional Lawyer* 20 (Winter 2002) ('[T]he experience of about 70,000 Illinois lawyers over nearly nine years has been no formal cases involving charges that an effort to screen under Rule 1.10 was inadequate to protect confidential information.') (internal quotations omitted)."; "This leaves about half of the states that require automatic disqualification. However, some predict that, '[w]ith the passage of amended Model Rule 1.10, more states will likely follow suit' to allow screening under more circumstances. Kathy L. Yeatter, 'Ethical Considerations of the Mobile Lawyer,' *American Bankruptcy Institute Journal* 22 (May 2009). See, e.g., Mark Fucile, 'Screening: An Idea Whose Time Has Come?' *Advocate* 21 (Jan. 2010) (arguing that Idaho should adopt model rule)."; "Despite the lack of a clear holding in this circuit, I agree with defendants that federal law is controlling. As a general matter, federal courts apply state law to 'substantive' questions when state law created the underlying cause of action. . . . In addition, federal courts may 'borrow' state law principles when federal law is silent on a particular question. . . . However, the Supreme Court has held that '[t]he state code of professional responsibility does not by its own terms apply to sanctions in the federal courts.' *In re Snyder*, 472 U.S. 634, 645, 105 S. Ct. 2874, 86 L. Ed. 2d 504 (1985). This is because a federal court's authority to regulate lawyer conduct in its own cases comes from its inherent power, not from a particular state rule. . . . If decisions whether to sanction a lawyer for misconduct are decided under federal law, it follows that '[m]otions to disqualify are . . . decided under federal law' as well." (citation omitted))

States that have adopted what could be called a middle ground usually allow self-help screening of individually disqualified lateral hires unless they played a "substantial role" at their old firm on the matter being handled by the new firm adverse to the lateral hire's former firm's client.

Unfortunately, that is such an elastic concept that it can be difficult, if not impossible, to judge in advance whether a self-help screen will avoid imputed disqualification.

- *Martin v. AtlantiCare*, Civ. No. 10-6793 (JHR/JS), 2011 U.S. Dist. LEXIS 122987, at \*9, \*15-17, \*19 (D.N.J. Oct. 25, 2011) (disqualifying a lawyer who had worked at Morgan Lewis in defending a case, and then switched to join the plaintiff's law firm; explaining that under New Jersey ethics rules the hiring law firm can avoid imputed disqualification (among other things) if the "matter does not involve a proceeding in which the personally disqualified lawyer had

primary responsibility" despite the lawyer's argument to the contrary; "Plaintiff's characterization of LG's [attorney in question] role at Morgan as 'limited' does not comport with the evidence. This is illustrated by the fact that from November 2010 to March 2011 LG worked 108.2 hours on the case, almost twice as many hours as the combined total of the other two members of the Morgan defense team. Further, LG's Certification supports defendants' argument that she played an integral role while at Morgan. LG acknowledges that she prepared all or part of defendants' removal papers and motion to dismiss, reviewed client documents for relevancy, consulted with defendants' in-house counsel, prepared witness outlines, interviewed defendants' witnesses, prepared witness summaries, and spoke with plaintiffs' counsel. LG's contemporaneous time billing entries also contradict her allegation that she only performed 'limited tasks.' . . . According to her billing entries LG researched relevant legal issues, prepared legal papers, analyzed plaintiffs' complaints, reviewed background investigation materials about plaintiffs by the client, exchanged e-mails with the client, reviewed client documents, prepared representation letters, analyzed plaintiffs' discovery directed to defendants, reviewed and analyzed plaintiffs' personnel files with regard to the defense of their discrimination claims, prepared witness outlines, interviewed witnesses, prepared witness summaries, communicated with her clients about plaintiffs, and identified relevant and responsive documents. These are hardly 'limited' roles. LG's descriptions evidence that she played a substantial and substantive role in AtlantiCare's defense."; "The foregoing evidence demonstrates to the Court that LG's actions fit squarely within the meaning of the term 'primary responsibility' as the term is defined in the RPC's. In order to have primary responsibility it was not necessary for LG to be the supervising attorney on the file or the partner in charge of the file. This is evident by the fact that the applicable definition merely requires 'participation" in the 'management and direction of the matter at the policy-making level.' LG plainly 'participated' in the management of the case as she took the 'laboring oar' in AtlantiCare's defense and she regularly consulted with the Morgan defense team about defense strategy.").

- Roosevelt Irrigation Dist. v. Salt River Proj. Agric. Improvement & Power Dist., 810 F. Supp. 2d 929, 948, 954, 955 (D. Ariz. 2011) (disqualifying the law firm of Gallagher & Kennedy from representing plaintiff in a CERCLA lawsuit against the firm's former clients Honeywell & Corning; noting that Arizona Rule 1.10 "precludes screening when: (1) the disqualified lawyer either switched sides in the current representation or the current representation necessarily requires relitigating a particular aspect of a prior representation; (2) the prior representation was a proceeding before a tribunal; and (3) the disqualified lawyer played a substantial role in that prior proceeding."; finding that one of the law firm lawyers had previously represented Honeywell in a related matter in which he played a "substantial role," so that he could not screen to avoid imputed disqualification; noting that another law firm lawyer had worked in-house at Honeywell, in a substantially related matter, but had

- not been screened when he joined the law firm; "[A]lthough Hallman became a shareholder at G&K in 1999, and RID engaged G&K in October 2008, G&K did not screen Hallman from the RID matter until June 2010. G&K explains that it did not enter Hallman's prior employment and experience at Honeywell into its conflicts database when Hallman joined the firm."; noting that the screen had not been put in place in a timely fashion; "An untimely screen cannot be cured by the affected attorney's assurances that, in the absence of the screen, he did not reveal any confidential information.").
- Litig. Mgmt., Inc. v. Bourgeois, 915 N.E.2d 342, 349, 348, 349 (Ohio Ct. App. 2009) (affirming disqualification of the Ogletree, Deakins firm from representing a client adverse to a client represented by Baker & Hostetler, because Ogletree hired a first-year associate who had worked for approximately 14.6 hours on the other side of the case; noting that Ogletree had not screened the young lawyer when she joined Ogletree; finding that the young associate had "substantial responsibility" for the matter while at Baker & Hostetler, and therefore could not have been sufficiently screened to avoid imputed disqualification of Ogletree; "Appellants assert . . . that Somich was a young associate, that she only performed 14.6 hours of general research on the matter, that she did not recall any details of the matter concerning LMI, that she did not have any contact with the client, and that Stronczer was the attorney principally responsible for the work."; "Comment 5B to Rule 1.10(c) provides in relevant part as follows: 'Determining whether a lawyer's role in representing the former client was substantial [in these circumstances] involves consideration of such factors as the lawyer's level of responsibility in the matter, the duration of the lawyer's participation, the extent to which the lawyer advised or had personal contact with the former client and the former client's personnel, and the extent to which the lawyer was exposed to confidential information of the former client likely to be material to the matter.'" also finding that the lawyer had not actually been successfully screened, which provided another grounds for disqualifying the law firm; explaining that the lawyer "acknowledged she reviewed the pleadings in this matter and had discussed with attorney Petrusis the content of the LMI billing invoice from the former matter. Furthermore, appellants failed to establish that they took any action to timely and effectively screen Somich from participation in this matter. Therefore, disqualification of the Ogletree firm was also required by Rule 1.10(d).").
  - Nevada LEO 39 (4/24/08) (explaining Nevada's Rule allowing the screening of lateral hires; noting that in 2006 Nevada adopted a new version of Rule 1.10 that authorizes "limited screening" to avoid imputed disqualification; "[S]creening is allowed to avoid imputed disqualification without the consent of the former client -- even if the laterally moving lawyer possesses confidential information from the former firm so as to be personally disqualified under Rule 1.9(b) -- but only if the laterally moving lawyer did not have a substantial role in, or primary responsibility for, the matter. When the

laterally moving lawyer did have a substantial role in, or primary responsibility for, the matter, the ABA rule prohibiting screening applies."; providing several examples: "For example, suppose the lawyer who was the lead or '2nd chair' counsel for Client A in case A v. B while the lawyer was with former firm, White & Brown, moves to firm Red & Green, which represents Client B in the same or a related case. In that situation, the lawyer's new firm, Red & Green, cannot continue to represent Client B. In that situation, screening could not eliminate the imputed disqualification. However, even if screening did not remove the imputed disqualification, both the laterally moving lawyer and the new firm, Red & Green, could continue to represent Client B if Client A waives the conflict under Rule 1.7. Rule 1.10(c)."; "On the other hand, suppose the laterally moving lawyer had no direct role in case A v. B while the lawyer was with former firm, White & Brown -- but did possess confidential information from the former firm so as to be personally disqualified under Rule 1.9(b) -- and then moves to firm Red & Green, which represents Client B in the same or a related case. In that situation, the lawyer's new firm, Red & Green, could continue to represent Client B without Client A consent if the personally disqualified lawyer is ethically screened from the case."; "Finally, if the lawyer changing firms had neither a role in the case A v. B, nor the possession of confidential information about the case, then neither screening nor client consent is required for the lawyer and the new firm to represent the opposite party in the case.").

At least one state precludes self-help screening of a lateral hire who either had "substantial involvement" or has "substantial material information relating to the matter" -- which involves an even more vague standard. In 2009, a court in that state held that a lawyer who had spent only 7.2 hours over two days writing a one and a half page memorandum did not have a "substantial involvement" in the matter, but had acquired "substantial material information relating to the matter." The court disqualified the hiring law firm.

- O'Donnell v. Robert Half Int'l, Inc., 641 F. Supp. 2d 84, 86, 89. 88 n.3 (D. Mass. 2009) (disqualifying a plaintiff's law firm which had hired a lawyer from defense counsel Seyfarth Shaw despite being warned that the lawyer had spent some time working with the defense in the same case that the plaintiff's law firm was handling against Seyfarth Shaw's client; explaining that Massachusetts Rule 1.10 allows a hiring law firm to avoid imputed disqualification if it hires a lawyer who "had neither substantial involvement nor substantial material information relating to the matter" and is screened from the matter; explaining that lawyer did not have "substantial involvement"

in the matter, because she spent 7.2 hours over two days writing a one and a half page memorandum summarizing research; however, finding that the lawyer did have "substantial material information" about the matter, because she learned about the defendant's legal strategy and "a single fact clearly relevant to the issue being researched"; considering in its analysis only information disclosed to the court in camera; "The Court does not consider any assertions by defendants' counsel that there were other revelations to Attorney Getchell which were so sensitive that defendants determined not to include them in the in camera record for fear that the Court, in considering the matter, or the Court hearing an objection to the undersigned's ruling, might order the material disclosed to counsel for the plaintiffs. The Court shall decide the motion to disqualify solely on the record which has been put before it and shall not consider any hints of juicier aspects of Attorney Getchell's involvement in or knowledge of the case while at the Seyfarth firm which defendants choose not to reveal to the Court.").

At least one court has rejected the argument that the hiring law firm could have discovered during the litigation all of the information possessed by a lateral hire.

- Martin v. AtlantiCare, Civ. No. 10-6793 (JHR/JS), 2011 U.S. Dist. LEXIS 122987, at \*9, \*28-29 (D.N.J. Oct. 25, 2011) (disqualifying a lawyer who had worked at Morgan Lewis in defending a case, and then switched to join the plaintiff's law firm; explaining that under New Jersey ethics rules the hiring law firm can avoid imputed disqualification (among other things) if the "matter does not involve a proceeding in which the personally disqualified lawyer had primary responsibility"; rejecting the lawyer's argument that her knowledge would have been discovered in the normal course of the case anyway; "The Courts discounts plaintiffs' argument that even if CM [plaintiffs' law firm] received information from LG regarding the case, the information would have been discoverable and not subject to any privilege. . . . This argument has been rejected in various decisions. 'Other courts have rejected the notion that the potential disclosure of confidential information in discovery could somehow ameliorate a conflict under Rule 1.9.'" (citation omitted).

And of course hiring law firms relying on self-help screens must meet all of the logistical standards as well, imposing an adequate screen at an appropriately early time. Those requirements complicate the issue even further.



**Best Answer**

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

B 11/14

## Elements of an Effective Screen

### Hypothetical 22

Having just been "burned" by hiring a young associate in your New York office that ended up being "Typhoid Mary," you now take every step to screen lateral hires before they come on board. However, you just received a motion to disqualify your firm in a large matter, based on your hiring of a lateral associate. The motion acknowledges that you imposed a screen before hiring the lateral associate, but claims that the screen was not effective -- because it did not mention that lawyers violating the screen would be punished, and did not include an assurance that the lateral associate would not share in any fees generated by your firm's representation of your client in the litigation.

Is your firm likely to be disqualified based on these alleged deficiencies in the screen?

**MAYBE**

### Analysis

Although 2009 revisions to ABA Model Rule 1.10 permit self-help screening in some circumstances, hiring law firms will still suffer from an imputed disqualification if they do not meet the screening standards.

A comment to ABA Model Rule 1.10 points to another part of the rule in describing an adequate screen, but adds a chilling warning.

Rule 1.10(a)(2) similarly removes the imputation otherwise required by Rule 1.10(a), but unlike section (c), it does so without requiring that there be informed consent by the former client. Instead, it requires that the procedures laid out in sections (a)(2)(i)-(iii) be followed. A description of effective screening mechanisms appears in Rule 1.0(k). Lawyers should be aware, however, that, even where screening mechanisms have been adopted, tribunals may consider additional factors in ruling upon motions to disqualify a lawyer from pending litigation.

ABA Model Rule 1.10 cmt. [7] (emphasis added).

The ABA Model Rules describe a valid screen as follows:

The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. To implement, reinforce and remind all affected lawyers of the presence of the screening, it may be appropriate for the firm to undertake such procedures as a written undertaking by the screened lawyer to avoid any communication with other firm personnel and any contact with any firm files or other materials relating to the matter, written notice and instructions to all other firm personnel forbidding any communication with the screened lawyer relating to the matter, denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.

ABA Model Rule 1.0 cmt. [9].

The Restatement similarly describes the type of screen that will effectively avoid imputation.

Screening must assure that confidential client information will not pass from the personally prohibited lawyer to any other lawyer in the firm. The screened lawyer should be prohibited from talking to other persons in the firm about the matter as to which the lawyer is prohibited, and from sharing documents about the matter and the like. Further, the screened lawyer should receive no direct financial benefit from the firm's representation, based upon the outcome of the matter, such as a financial bonus or a larger share of firm income directly attributable to the matter. However, it is not impermissible that the lawyer receives compensation and benefits under standing arrangements established prior to the representation. An adequate showing of screening ordinarily requires affidavits by the personally prohibited lawyer and by a lawyer responsible for the screening

measures. A tribunal can require that other appropriate steps be taken.

Restatement (Third) of Law Governing Lawyers § 124 cmt. d(ii) (2000).

The Restatement also discusses a screen's timing.

An affected client will usually have difficulty demonstrating whether screening measures have been honored. Timely and adequate notice of the screening must therefore be given to the affected clients, including description of the screening measures reasonably sufficient to inform the affected client of their adequacy. Notice will give opportunity to protest and to allow arrangements to be made for monitoring compliance.

Notice should ordinarily be given as soon as practical after the lawyer or firm realizes or should realize the need for screening. Obligations of confidentiality to a current client, however, might justify reasonable delay. A firm advising about a possible takeover of a former client of a lawyer now in the firm, for example, need not provide notice until the attempt becomes known to the target client.

Restatement (Third) of Law Governing Lawyers § 124 cmt. d(iii) (2000).

Many state rules have their own variations.

To make matters more complicated, courts also add their own thoughts about the elements of an effective screen.

- Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines, Inc., 279 P.3d 166, 168, 172, 171 & nn.4 & 5, 172 (Nev. 2012) (analyzing appropriate steps for an ethics screen; "Although the Nevada Rules of Professional Conduct (RPC) permit the screening of disqualified attorneys to prevent an associated law firm's imputed disqualification in some cases, RPC 1.10(e); 1.11(b); 1.12(c), we have never considered whether screening is appropriate with regard to a settlement judge acting under this court's settlement conference program or how to determine the sufficiency of any screening measures utilized. We take this opportunity to consider the practice of attorney screening to cure imputed disqualification."; "When considering whether the screening measures implemented are adequate, courts are to be guided by the following nonexhaustive list of factors: (1) instructions given to ban the exchange of information between the disqualified attorney and other members of the firm; (2) restricted access to files and other information about the case; (3) the size of the law firm and its structural divisions; (4) the

- likelihood of contact between the quarantined lawyer and other members of the firm; and (5) the timing of the screening."; also citing Pappas V. Waggoner's Heating & Air, Inc., 108 P.3d 9, 14 (Okla. Civ. App. 2004)], which stated as follows: "(1) instructions given to ban the exchange of information between the disqualified attorney and other members of the firm; (2) restricted access to files and other information about the case; (3) prohibited sharing in fees derived from the litigation; (4) the size of the law firm and its structural divisions; and (5) the likelihood of contact between the quarantined lawyer and other members of the firm."; also citing Leibowitz v. Eight Judicial Dist. Court of Nev., 78 P.3d 515, 522 (Nev. 2003), which stated as follows: "To determine whether screening has been or may be effective, the district court should consider: (1) 'the substantiality of the relationship between the former and current matters,' (2) 'the time elapsed between the matters,' (3) 'the size of the firm,' (4) 'the number of individuals presumed to have confidential information,' (5) 'the nature of their involvement in the former matter,' (6) 'the timing and features of any measures taken to reduce the danger of disclosure,' and (7) whether the 'old firm and the new firm represent adverse parties in the same proceeding, rather than in different proceedings' because inadvertent disclosure by the non-lawyer employee is more likely in the former situation."; also citing "Marc I. Steinberg & Timothy U. Sharpe, Attorney Conflict of Interest: The Need for a Coherent Framework, 66 Notre Dame L. Rev. 1, 20 (1990)," which stated as follows: "Chinese Walls are specific institutional mechanisms which prevent contact between the tainted attorney and members of the firm working on the related matter. Such mechanisms may be structural, such as departmentalization, procedural, as in restricting access to files, pecuniary, by denying the tainted attorney any remuneration from fees derived from the representation, or educational, such as providing programs that make firm members aware of the ban on exchange of information. Usually, effective screening procedures involve all of the above components."; "Today, we adopt an analysis similar to the approaches taken by the courts discussed above. When presented with a dispute over whether a lawyer has been properly screened, Nevada courts should conduct an evidentiary hearing to determine the adequacy and timeliness of the screening measures on a case-by-case basis. The burden of proof is upon the party seeking to cure an imputed disqualification with screening to demonstrate that the use of screening is appropriate for the situation and that the disqualified attorney is timely and properly screened.").
- Kirk v. First Am. Title Ins. Co., 108 Cal. Rptr. 3d 620, 627, 645 n.29, 645-46, 647, 650 (Cal. Ct. App. 2010) (analyzing in great detail the California rule requiring imputation of an individual lawyer's (Cohen) disqualification, and rejecting a per se imputation approach; explaining that an individual lawyer who had several communications with plaintiff's counsel about a case moved to the Sonnenschein firm, which was later joined by lawyers from Bryan Cave -- who represented the other side of the case in which the lawyer had spoke to the plaintiff; noting that Sonnenschein screened the individual lawyer

immediately upon learning of the individual lawyer's disqualification; "The screening memorandum recites that it was created to 'formalize and memorialize the procedures necessary to assure that no confidences or secrets relating to the [related class actions] will be disclosed, even inadvertently, to [the First American team] or any other Sonnenschein lawyer who may be asked to work on the [related class actions].' The memorandum indicated that the failure to observe the procedures would subject the offender to discipline. The memorandum provided that (1) Cohen could not work on the related class actions; (2) no attorney or paralegal who may work on the related class actions may discuss them with Cohen; (3) Cohen may not be given nonpublic documents pertaining to the related class actions; (4) Cohen shall not access any documents on Sonnenschein's computer network pertaining to the related class actions; and (5) no fees from any work related to the related class actions would be apportioned to Cohen."; ultimately allowing Sonnenschein to rebut the presumption that the lawyer had disclosed confidences to colleagues at that firm; reiterating that "the presumption is not rebuttable in those cases" in which a lawyer switches sides in the same case; also discussing the elements of an effective screen; "The specific elements of an effective screen will vary from case to case, although two elements are necessary: First, the screen must be timely imposed; a firm must impose screening measures when the conflict first arises. It is not sufficient to wait until the trial court imposes screening measures as part of its order on the disqualification motion. . . . Second, it is not sufficient to simply produce declarations stating that confidential information was not conveyed or that the disqualified attorney did not work on the case; an effective wall involves the imposition of preventive measures to guarantee that information will not be conveyed." (footnote omitted); "As with the other factors, we do not hold that any particular method of preventing access to confidential information and files is necessary—indeed, a trial court might conclude that a simple directive not to access the information is sufficient. The more steps a firm has taken to prevent any disclosure, however, the more likely it is that a court will find the ethical wall to be sufficient."; noting also that the individual lawyer had left Sonnenschein; "Cohen was present at the Sonnenschein firm for approximately one year. On remand, the trial court must determine whether Cohen's activities at the firm actually resulted in the improper transmission, directly or indirectly, of confidential information from Cohen to the First American team, or any other member of the Sonnenschein firm who may have worked on the related class actions."; reversing the disqualification of the Sonnenschein firm and remanding an analysis on whether the firm had rebutted the presumption that the individual lawyer had disclosed confidences to colleagues).

- In re Columbia Valley Healthcare Sys., L.P., 320 S.W.3d 819, 824-25 (Tex. 2010) (disqualifying a law firm for hiring an individually disqualified non-lawyer but failing to properly screen the non-lawyer; "To determine whether the screening used by a firm is effective, we have said that the following factors

may be considered: (1) the substantiality of the relationship between the former and current matters; (2) the time elapsing between the matters; (3) the size of the firm; (4) the number of individuals presumed to have confidential information; (5) the nature of their involvement in the former matter; and (6) the timing and features of any measures taken to reduce the danger of disclosure.").

- Del. River Port Auth. v. Home Ins. Co., Civ. A. No. 92-3384, 1994 U.S. Dist. LEXIS 11427, at \*20-21 (E.D. Pa. Aug. 17, 1994) (ordering that a lawyer be screened, and describing the elements of an adequate screen; "The Court finds that a screen would be effective in this case given the following factors: 1) Kopp is not participating in this matter at all; 2) he has had no discussions with any of the attorneys representing Home about this litigation except in connection with the motion to disqualify; 3) Kopp has testified that he has not imparted any confidential information regarding DRPA to any attorneys representing Wolf Block; 4) Kopp has not seen any documents relating to this litigation, and he does not have any access to files related to this litigation; 5) Wolf Block is a very large firm, and only one of its members (Kopp) needs to be screened; and 6) Kopp has represented through sworn affidavits and under penalty of perjury that he does not have any confidential information of DRPA that might be relevant to this case.").
- LaSalle Nat'l Bank v. Cnty. of Lake, 703 F.2d 252, 259 (7th Cir. 1983) (affirming disqualification of a law firm, and describe the elements of an adequate screen; "The screening arrangements which courts and commentators have approved, however, contain certain common characteristics. The attorney involved in the Armstrong v. McAlphin case [625 F.2d 433 (2d Cir. 1980), vacated on other grounds, 449 U.S. 1106 (1981)], for example, was denied access to relevant files and did not share in the profits or fees derived from the representation in question; discussion of the suit was prohibited in his presence and no members of the firm were permitted to show him any documents relating to the case; and both the disqualified attorney and others in his firm affirmed these facts under oath. . . . The screen approved in the Kesselhaut case [Kesselhaut v. United States, 555 F.2d 791 (1977)] was similarly specific: all other attorneys in the firm were forbidden to discuss the case with the disqualified attorney and instructed to prevent any documents from reaching him; the files were kept in a locked file cabinet, with the keys controlled by two partners and issued to others only on a 'need to know' basis. . . . In both cases, moreover, as well as in Greitzer & Locks [Greitzer & Locks v. Johns-Manville Corp., No. 81-1379, slip op. at 7 (4th Cir. Mar. 5, 1982)], the screening arrangement was set up at the time when the potentially disqualifying event occurred, either when the attorney first joined the firm or when the firm accepted a case presenting an ethical problem.").

In a potentially troubling approach that deprives hiring law firms of any certainty, some courts have found that screens -- however carefully drafted and implemented -- simply cannot work if the hiring firm is too small, or if the screened lawyers work too closely together.

- Rippon v. Rippon, No. 2012 CV 4412 DV, 2014 Pa. Dist. & Cnty. Dec. LEXIS 1, at \*1, \*14-15, \*16-17, \*17, \*21-22, \*22-23, \*23 (C.P. Dauphin Jan. 29, 2014) (acknowledging that Pennsylvania allows screening of lateral hires to avoid imputed disqualification, but relying on the "appearance of impropriety" standard, the inadequacy of the screen, and other factors in disqualifying a law firm from representing the husband in a divorce case after the wife's lawyer joined that firm; "The issue presented is if Wife's lawyer, along with her secretary, leaves Law Firm A to work for Law Firm B, during the parties' hotly contested divorce litigation, may another lawyer in Law Firm B represent Husband in those matters. Legal ethical experts and others may answer with a resounding 'No.' Other legal ethical experts may answer 'Yes,' if Law Firm B establishes a proper screen, or 'Chinese Wall.' In this case, under the facts presented, I held 'no.'"; "[E]ven though a lawyer changes law firms, disqualification can be avoided when a proper screen, or 'Chinese Wall' is established prior to the arrival of the new attorney at the firm and when it is a formal, written screening procedure. . . . The burden of proving compliance with the screening exceptions of Rule 1.10(b) is on the law firm whose disqualification is sought. . . . A law firm whose disqualification is sought may still avoid a disqualifying conflict by demonstrating an adequate screen in compliance with Rule 1.10(b)."; "Wife's concern is not about Levin [Wife's lawyer] accessing information in the files or the cloud she or her secretary have been barred from obtaining through McNees' [Levin's new law firm, also representing Husband] screen. Wife's concern is that her private confidential information, trial strategies and other related matters which Levin and her secretary knew or had access to over the past fifteen years could inadvertently, accidentally and unintentionally be revealed to one of the other attorneys or staff in the small family law group at McNees now representing her Husband in these same legal matters."; "The narrow issue presented was the adequacy of the McNees' screen or if any screen could be deemed adequate in this case, disqualifying all McNees lawyers."; "In this case, the 'new firm' really consists not of the entire McNees law firm but actually the 'Family Law Section.' It is housed together in adjoining offices on the west side of their building's 5th floor, in a separate, 'Family Law suite' . . . where Levin and her secretary's offices are located, together with five (5) other family law lawyers, two (2) paralegals and secretarial staff. The family law lawyers and support staff at McNees provides coverage and assistance to each other in any matter as needed or requested."; Although, the McNees attorneys and staff have been advised to insure no discussions of the Rippon



case occur in front of Levin or Thomas, and that all discussions of the case must take place behind closed doors, discussions, facial expressions or other unintended unanticipated exchanges will inevitably, however, unintentionally, occur within the small confines and relationships of a small environment among family law lawyers, paralegals and secretaries about this case. There is presumably much more contact between attorneys and support staff that interact in a small setting rather than in a large one." (emphasis added); "Wife points out none of McNees' Screen Memoranda contain any sanctions for violations of the screen, which failure alone is sufficient to warrant disqualification.").

- Beltran v. Avon Prods., Inc., 867 F. Supp. 2d 1068, 1078, 1083, 1083-84, 1084 (C.D. Cal. 2012) (finding that an individual lawyer's disqualification was imputed to his new law firm, despite an ethics screen; explaining that the lawyer spent over 300 hours working on matters for Avon while at Paul Hastings, and then moved to a law firm representing a plaintiff suing Avon; "The instant case presents an unfortunate and awkward set of circumstances in which two former colleagues and long-time friends who previously worked together in representing a major corporate client now find themselves on opposite sides in a case involving that same client."; "Plaintiff claims that disqualification is not warranted because an ethical wall was immediately imposed to cordon off Mr. Frank from the instant case after Mr. Frank spoke with Mr. Ellis on March 12, 2012. . . . As a matter of law, however, an ethical wall is insufficient to overcome the possession of confidential information by the segregated attorney, except in very limited situations involving former government attorneys now in private practice."; noting the individually disqualified lawyer had assisted his new firm in attempting to avoid disqualification; "The effectiveness of an ethical wall is further compromised by the close proximity of attorneys working together in one office at Eagan Avenatti, which consists of less than ten attorneys, and by Mr. Frank's co-representation of parties with Mr. Avenatti and Mr. Sims in several concurrent class actions. . . . The Court also notes that Mr. Frank has already actively participated in the current litigation by speaking with Mr. Ellis about the case and the instant motion (as early as February 28, 2012), submitting a declaration in support of Plaintiff's opposition to the disqualification motion, reviewing Avon's motion, and even seeking to participate telephonically at the May 21, 2012 hearing. Mr. Frank's behavior casts doubt as to whether an ethical wall can be successfully implemented and maintained in this case."; "The Court also finds that, although there is no direct California authority regarding vicarious disqualification of an associated law firm, disqualification of the X-Law Group is warranted under the circumstances of this case. The X-Law Group consists of four attorneys, two of whom have already collaborated with Eagan Avenatti in the filing of the complaint against Avon in Estee Lauder and this case. It is also reasonable to assume that the two law firms engaged in fairly extensive discussions about the case and Plaintiff's litigation strategy before filing their complaint and prior to the erection of an

[sic] wall ethical[ly] segregating Mr. Frank from the case. Even if the X-Law Group did not, in fact, acquire confidential information, their involvement in the case would taint the appearance of probity and fairness of the proceeding.").

- Arista Records LLC v. Lime Grp. LLC, No. 06 CV 5935 (KMW), 2011 U.S. Dist. LEXIS 17434, at \*23, \*23-24, \*27, \*27-28 (S.D.N.Y. Feb. 18, 2011) (declining to disqualify a law firm which hired an individually disqualified lawyer, despite the law firm's sloppy positioning of a screen; "Notwithstanding these shortcomings, the Court finds that disqualification is not warranted, because there is no 'real risk that the trial will be tainted.'" (citation omitted); "First, Defendants have submitted a declaration from Korn attesting to the fact that he has never disclosed Plaintiffs' confidential information to anyone. . . . The Court asked Plaintiffs' counsel whether they challenge the truth of any of the statements in Korn's declaration; Plaintiffs' counsel responded no. . . . Plaintiffs have also submitted (1) declarations from every member of Willkie's LimeWire team who has billed 50 hours or more to the LimeWire matter attesting to the fact that Korn has not disclosed confidential information to them; and (2) a declaration from Menton attesting to the fact that he has confirmed with every other member of the LimeWire team that Korn has never disclosed confidential information to them."; "Second, Defendants are not relying solely on attorney affidavits, but are also relying on electronic audits showing that Korn has never accessed any LimeWire documents. Specifically, Defendants have submitted a declaration stating that Willkie has audited all documents ever created in Willkie's document management system under either the Tower/LimeWire matter or the LimeWire matter. . . . The resulting report from the audit shows every user who has ever accessed any version of those documents. Korn is not listed included in that report."; "Third, Willkie is a large firm, with more than 600 lawyers worldwide, more than 200 lawyers in its litigation department, and approximately 136 litigation lawyers in its New York office. . . . Willkie's large size makes the risk of inadvertent disclosures of confidences less likely.").
- Rella v. N. Atl. Marine, Ltd., No. 02 Civ. 8573 (GEL), 2004 U.S. Dist. LEXIS 22309, at \*17-18 (S.D.N.Y. Nov. 3, 2004) (disqualifying a two lawyer firm based on the firm's hiring of an individually disqualified lawyer from another firm; "While recent caselaw has questioned whether the total disqualification rule is without exception in an era of large law firms or legal departments, in which firewall procedures to insulate conflicted lawyers from matters in which they may not participate may perhaps be effective barriers to the exchange of confidential information . . . no such exception applies here. The Friedrich firm is not a large institution in which a nominal 'partner' of a conflicted lawyer may be one of hundreds of members of a mega-law firm, located in another city and perhaps having only a nodding acquaintance with other members of the firm, and which has regular established procedures for dealing with such conflict situations. Rather, the Friedrich firm is a two-member firm, the

partners in which are father and son who evidently share the same offices. Under these circumstances, the inference that the partners cannot effectively avoid sharing information is strong.").

Ironically, one court reached exactly the opposite conclusion -- explaining that screens can rarely if ever work in large firms.

- In re Cendant Corp. Sec. Litig., 124 F. Supp. 2d 235, 243 n.5 (D.N.J. 2000), Furthermore, it is difficult for this Court to believe that the proposed firewall is leak-proof, especially in a firm with over 175 attorneys in the litigation department alone. Presumably, numerous attorneys would be required to assist in trial preparation and discovery for both E&Y and Ms. Lipton. Notwithstanding the good faith efforts of the attorneys to adhere to the firewall, this Court is cognizant that casual conversations in hallways, elevators, and other common areas may take place and may be overheard by the 'screened' attorneys for either E&Y or Ms. Lipton." (emphasis added), vacated and remanded on other grounds, 264 F.3d 201 (3d Cir. 2001), cert. denied, 535 U.S. 929 (2002).).

In another case, a court rejected the possibility of a screen working at a large firm, because the new "firm" should actually be considered a subset of the hiring firm.

- Rippon v. Rippon, No. 2012 CV 4412 DV, 2014 Pa. Dist. & Cnty. Dec. LEXIS 1, at \*1, \*14-15, \*16-17, \*21-22, \*22-23, \*23 (C.P. Dauphin Jan. 29, 2014) (acknowledging that Pennsylvania allows screening of lateral hires to avoid imputed disqualification, but relying on the "appearance of impropriety" standard, the inadequacy of the screen, and other factors in disqualifying a law firm from representing the husband in a divorce case after the wife's lawyer joined that firm; "The issue presented is if Wife's lawyer, along with her secretary, leaves Law Firm A to work for Law Firm B, during the parties' hotly contested divorce litigation, may another lawyer in Law Firm B represent Husband in those matters. Legal ethical experts and others may answer with a resounding 'No.' Other legal ethical experts may answer 'Yes,' if Law Firm B establishes a proper screen, or 'Chinese Wall.' In this case, under the facts presented, I held 'no.'"; "[E]ven though a lawyer changes law firms, disqualification can be avoided when a proper screen, or 'Chinese Wall' is established prior to the arrival of the new attorney at the firm and when it is a formal, written screening procedure. . . . The burden of proving compliance with the screening exceptions of Rule 1.10(b) is on the law firm whose disqualification is sought. . . . A law firm whose disqualification is sought may still avoid a disqualifying conflict by demonstrating an adequate screen in compliance with Rule 1.10(b)."; "Wife's concern is not about Levin [Wife's lawyer] accessing information in the files or the cloud she or her secretary have been barred from obtaining through McNees' [Levin's new law firm, also

representing Husband] screen. Wife's concern is that her private confidential information, trial strategies and other related matters which Levin and her secretary knew or had access to over the past fifteen years could inadvertently, accidentally and unintentionally be revealed to one of the other attorneys or staff in the small family law group at McNees now representing her Husband in these same legal matters. The narrow issue presented was the adequacy of the McNees' screen or if any screen could be deemed adequate in this case, disqualifying all McNees lawyers."; "In this case, the 'new firm' really consists not of the entire McNees law firm but actually the 'Family Law Section.' It is housed together in adjoining offices on the west side of their building's 5th floor, in a separate, 'Family Law suite' . . . where Levin and her secretary's offices are located, together with five (5) other family law lawyers, two (2) paralegals and secretarial staff. The family law lawyers and support staff at McNees provides coverage and assistance to each other in any matter as needed or requested." (emphasis added); "Although, the McNees attorneys and staff have been advised to insure no discussions of the Rippon case occur in front of Levin or Thomas, and that all discussions of the case must take place behind closed doors, discussions, facial expressions or other unintended unanticipated exchanges will inevitably, however, unintentionally, occur within the small confines and relationships of a small environment among family law lawyers, paralegals and secretaries about this case. There is presumably much more contact between attorneys and support staff that interact in a small setting rather than in a large one." (emphasis added); "Wife points out none of McNees' Screen Memoranda contain any sanctions for violations of the screen, which failure alone is sufficient to warrant disqualification.").

In addition to these conceptual disagreements among courts about whether self-help screens are even available, courts often conduct a fact-intensive analysis about whether the screen was effective or not -- often adding to their own standards above and beyond those described in the applicable ethics rules.

Not surprisingly, many courts conclude that the hiring law firm simply did not do a good enough job of imposing a self-help screen -- which meant that a lateral hire's individual disqualification was imputed to the entire firm.

- Martin v. AtlantiCare, Civ. No. 10-6793 (JHR/JS), 2011 U.S. Dist. LEXIS 122987, at \*9, \*33, \*34-35, \*37-38 (D.N.J. Oct. 25, 2011) (disqualifying a lawyer who had worked at Morgan Lewis in defending a case, and then switched to join the plaintiff's law firm; explaining that under New Jersey ethics rules the hiring law firm can avoid imputed disqualification (among

- other things) if the "matter does not involve a proceeding in which the personally disqualified lawyer had primary responsibility"; finding that the new law firm's screen was ineffective, so it would be disqualified even if the lawyer did not have primary responsibility; "RPC 1.10(f) and 1.0(e) indicate in clear and unmistakable terms that to be adequate a screening procedure must be in writing. CM never established a written procedure and for this reason alone its screening was inadequate." (emphasis added); "In addition, even if CM's screening procedure was put in writing, the procedure CM used was inadequate. Although there is no definitive New Jersey guidance on the elements of an effective screen, the Court has no hesitation in finding CM's procedure inadequate. There is no indication that the AltantiCare file was physically separated from other files. In addition, the file was not specially secured or 'kept under lock and key,' LG and CM's employees did not acknowledge in writing CM's procedures, and LG was not 'locked out' of the AltantiCare file on CM's computer system. These are the sorts of procedures that are put in place in instances where courts have found screens to be adequate." (emphasis added); also finding that the hiring law firm must be disqualified even though the individually disqualified lawyer had left the law firm on the day that the defendant filed the motion to disqualify; "Defendants argue that severing a relationship with a disqualified attorney does not cure imputed disqualification."; agreeing with this contention).
- Norfolk S. Ry. v. Reading Blue Mountain & N. R.R., 397 F. Supp. 2d 551, 555, 554 (M.D. Pa. 2005) (assessing the efficacy of a screen imposed by a ten-lawyer firm which had hired a lawyer who had been working for the adversary in litigation; noting that Pennsylvania allowed a law firm hiring a disqualified lawyer from avoiding imputed disqualification by imposing a screen, but finding the screen ineffective; among other things, noting that "screen does not include the prospect of termination or disciplinary proceedings for violators. This is significant because it is imperative that all Janssen & Keenan [new law firm] employees understand the importance of compliance and that Reading be assured that non-compliance will be severely punished. Additionally, . . . Janssen & Keenan's screen fails to expressly prohibit discussing sensitive matters around, near, or in the presence of Howard [lawyer moving to the law firm], and merely prohibits discussing them with Howard. This is no small distinction, as Janssen & Keenan has only ten attorneys in a single office, and the close working environment presents the distinct possibility that Howard could be nearby and overhear a sensitive discussion." (emphasis added); also noting that "nowhere in the affidavits opposing disqualification does it assert that Howard will receive no part of the fee from its representation in this case. This failure alone warrants disqualification."; pointing to Pennsylvania rule allowing a law firm to avoid imputed disqualification if the disqualified lawyer "is apportioned no part of the fee therefrom").

A smaller number of cases approve hiring law firms' screening.

- Kirk v. First Am. Title Ins. Co., 108 Cal. Rptr. 3d 620, 627 (Cal. Ct. App. 2010) (analyzing in great detail the California rule requiring imputation of an individual lawyer's (Cohen) disqualification, and rejecting a per se imputation approach; explaining that an individual lawyer who had several communications with plaintiff's counsel about a case moved to the Sonnenschein firm, which was later joined by lawyers from Bryan Cave -- who represented the other side of the case in which the lawyer had spoken to the plaintiff; noting that Sonnenschein screened the individual lawyer immediately upon learning of the individual lawyer's disqualification; "The screening memorandum recites that it was created to 'formalize and memorialize the procedures necessary to assure that no confidences or secrets relating to the [related class actions] will be disclosed, even inadvertently, to [the First American team] or any other Sonnenschein lawyer who may be asked to work on the [related class actions].' The memorandum indicated that the failure to observe the procedures would subject the offender to discipline. The memorandum provided that (1) Cohen could not work on the related class actions; (2) no attorney or paralegal who may work on the related class actions may discuss them with Cohen; (3) Cohen may not be given nonpublic documents pertaining to the related class actions; (4) Cohen shall not access any documents on Sonnenschein's computer network pertaining to the related class actions; and (5) no fees from any work related to the related class actions would be apportioned to Cohen.").
- Silicon Graphics, Inc. v. ATI Techs., Inc., 791 F. Supp. 2d 970, 983 (W.D. Wis. 2010) (denying a disqualification motion based on a law firm's hiring of an individually disqualified lateral; finding that the hiring law firm's screen was adequate; "Plaintiff does not deny that defendants' screening procedures comply with each of these factors. Three weeks before Leichtman joined Robins Kaplan, the firm sent a memorandum to Leichtman and all the members of the litigation team for this case. The memorandum instructed team members not to discuss the case with Leichtman or in his presence. Under the memorandum, Leichtman is denied access to any records relating to this case and is prohibited from providing team members any information he knows about the case. All of the electronic records are protected by a computer security protocol that prevents Leichtman from viewing or searching those records. Leichtman and each of the lawyers for Robins Kaplan working on this case have filed declarations in which they aver that Leichtman and the others have not spoken with each other about the case, that none of the lawyers has had a discussion about the case in Leichtman's presence and that Leichtman has not viewed any of the records relevant to this case or attempted to do so. An analysis conducted by Robins Kaplan's computer support group shows that Leichtman has not attempted to view the electronic files. Leichtman will not receive any fees related to this case.").

Very few cases have found law firms violated their self-help screens.

- Decision & Order (Motion Sequence No. 016), Line Trust Corp. Ltd. v. Lichtenstein, Index No. 601951/2009, NYSCEF Doc. 237, slip op. at 4, 5, 6 (N.Y. Sup. Ct. Nov. 17, 2011) (disqualifying Wilkie Farr & Gallagher from representing Bank of America, because other Wilkie Farr lawyers had represented Bank of America's co-defendant in a related matter; explaining that the lawyer representing Bank of America had recently moved from Kaye Scholer, and that Wilkie Farr had set up an ethics screen between the new lawyer and those lawyers at the firm who had previously represented the now-adverse co-defendant, but that the screen apparently had not worked; "Between May 9 and May 13, 2011, Wilkie Farr's Information Technology Department (Department) audited documents stored in the firm's document management system relating to Wilkie Farr's representation of the Lichtenstein Defendants to determine if attorneys or legal assistants working on behalf of Bank of America accessed any of those documents. The Department discovered that in October 2010, Avani Shah, an associate, opened and printed one of the documents, but now improbably claims to have destroyed it before reading it. Belatedly, and perhaps negligently so, Wilkie Farr removed Ms. Shah from the BofA Action, the Line Trust Action, and the Senior Lender Action. She has been removed from all the cases referenced here."; "In February 2009, Alison Ambeault, a legal assistant, cite-checked a memorandum for the Lichtenstein Defendants for one hour and viewed five electronic documents related to Wilkie Farr's representation of the Lichtenstein Defendants for twenty minutes. Ms. Ambeault claims she does not remember performing the cite-check and has no memory of the documents themselves."; "Wilkie Farr has had an opportunity to rebut the presumption of disqualification. See Kasis v Teacher's Ins. & Annuity Assn., 93 NY2d 611, 617 (1999). However, Wilkie Farr has submitted insufficient proof that they erected adequate screening measures to prevent attorneys advising Bank of America from having access to (i) other Wilkie Farr attorneys who worked for the Lichtenstein Defendants or documents related to Lichtenstein Defendants."; "If an ethical wall exists here at all, and it may not, it is porous and ineffective. Wilkie Farr submits time records to show that breaches of the wall were minimal. The time records are inadequate, as they cannot be expected to reflect the totality of breaches of the ethical wall. In particular, Ms. Shah's recollection of supposed document destruction is crucially not reflected in such records. In short, they afford but a glimpse of a failed procedure." (emphasis added)).

Because a hiring law firm's screen depends largely on the honor system, one might expect that the hiring law firm's and the later hire's affidavits might cure an improperly imposed screen, or perhaps entirely take the place of a screen that the hiring law firm failed to impose. Thus, courts have debated such post-hiring affidavits.

Some courts rely on such affidavits in denying disqualification motions despite some flaws in the hiring law firm's screens.

- Arista Records LLC v. Lime Grp. LLC, No. 06 CV 5935 (KMW), 2011 U.S. Dist. LEXIS 17434, at \*7, \*11, \*22 & n.11, \*23, \*23-24, \*27, \*27-28 (S.D.N.Y. Feb. 18, 2011) (declining to disqualify a law firm which hired an individually disqualified lawyer, despite the law firm's sloppy positioning of a screen; noting that the individually disqualified lawyer "Korn testified that, although [lawyers at the new firm] discussed the status of the LimeWire litigation, they did not discuss anything substantive about the case."; explaining that "[o]n June 18, 2010, Willkie submitted a new matter form for the Tower/LimeWire Matter. . . . The form has a box asking whether there are any conflict concerns. Notwithstanding that the firm was aware of a Korn's LimeWire conflict, the box is checked 'no.'"; "On July 1, 2010, one month after being approached by Tower about the Tower/LimeWire matter, Willkie circulated an internal firm-wide email asking attorneys to comment on possible conflicts related to the Tower/LimeWire Matter. . . . Korn responded, stated that, '[a]s [I] mentioned to Tariq Mundiya, I previously represented Plaintiffs in the Limewire litigation.' . . . In response, Mundiya wrote, 'we will have to have a wall placed so that Mr. Korn is not involved in the matter.'"; [W]hen finally implemented, Willkie's screening procedures were, to some extent, flawed. First, the screening memo drafted by Mundiya was sent only to those lawyers who had worked on the LimeWire or the Tower/LimeWire matter within the preceding year; it was not sent to the entire firm. . . . Second, Korn was still able to view an electronic LimeWire folder icon on his computer months after the electronic wall was purportedly put in place, although he was not able to view any documents contained within that folder."; "As a result, a lawyer not working on the LimeWire matter who talked to a lawyer working on the LimeWire matter may not have been instructed to refrain from later speaking to Korn about what he or she learned during that conversation."; "Notwithstanding these shortcomings, the Court finds that disqualification is not warranted, because there is no 'real risk that the trial will be tainted.'"; "First, Defendants have submitted a declaration from Korn attesting to the fact that he has never disclosed Plaintiffs' confidential information to anyone. . . . The Court asked Plaintiffs' counsel whether they challenge the truth of any of the statements in Korn's declaration; Plaintiffs' counsel responded no. . . . Plaintiffs have also submitted (1) declarations from every member of Willkie's LimeWire team who has billed 50 hours or more to the LimeWire matter attesting to the fact that Korn has not disclosed confidential information to them; and (2) a declaration from Menton attesting to the fact that he has confirmed with every other member of the LimeWire team that Korn has never disclosed confidential information to them." (emphasis added); "Second, Defendants are not relying solely on attorney affidavits, but are also relying on electronic audits showing that Korn has never accessed any LimeWire documents. Specifically, Defendants have submitted a declaration stating



that Willkie has audited all documents ever created in Willkie's document management system under either the Tower/LimeWire matter or the LimeWire matter. . . . The resulting report from the audit shows every user who has ever accessed any version of those documents. Korn is not listed included in that report." (emphasis added); "Third, Willkie is a large firm, with more than 600 lawyers worldwide, more than 200 lawyers in its litigation department, and approximately 136 litigation lawyers in its New York office. . . . Willkie's large size makes the risk of inadvertent disclosures of confidences less likely.").

- Burgess-Lester v. Ford Motor Co., Civ. A. No. 1:06CV43, 2008 U.S. Dist LEXIS 83268, at \*15-16, \*16, \*22 (W.D. W. Va. Oct. 17, 2008) (finding that a plaintiff's law firm should be disqualified from adversity to Ford, because one of the lawyers in the firm had previously worked on a number of Ford cases while at another firm; noting the debate about the efficacy of screens within a law firm; explaining that "the Fourth Circuit has not adopted a per se rule against screening, and this Court does not adopt such a rule here. Rather, to determine whether the screening measures employed by BG avoid the appearance of impropriety, it will follow the three-part test in Schiessle [Schiessle v. Stephens, 717 F.2d 417 (7th Cir. 1983)] because, in that case, the Seventh Circuit '[took] the most realistic view of the methodology to be followed in resolving competing interests raised by such a disqualification motion.'" (citation omitted); explaining that the three-part test looks at the "substantial relationship" between the matters, whether the individual lawyer was privy to confidential information, and whether that lawyer might have passed confidential information to his new colleagues (citation omitted); acknowledging that the plaintiff's law firm put a screen in place, but noting that the individual lawyer admitted in an affidavit that he did "not know the precise details of this barrier" (citation omitted); "Thus, the screened attorney is unsure of the screen's parameters and merely knows that a screen is in place. . . . This aspect of the screen therefore is ineffective because the attorney for whom BG [plaintiff's law firm] implemented the screen should at least know from whom, what, and in what manner he is being screened"; disqualifying the law firm from representing the plaintiff in the case against Ford.).

In contrast, other courts have disqualified hiring law firms despite such affidavits.

- Roosevelt Irrigation Dist. v. Salt River Proj. Agric. Improvement & Power Dist., 810 F. Supp. 2d 929, 955 (D. Ariz. 2011) ("An untimely screen cannot be cured by the affected attorney's assurances that, in the absence of the screen, he did not reveal any confidential information.").
- SK Handtool Corp. v. Dresser Indus., Inc., 619 N.E.2d 1282, 1285, 1290, 1292, 1294 (Ill. App. Ct. 1993) (noting that Illinois ethics rules permit screening of an individually disqualified new hire to avoid imputed disqualification; holding that the law firm of Winston & Strawn had not timely

screened a lateral hire; acknowledging that Winston & Strawn put an ethics screen in place the day that it realized that it should have done so, but noting that the lawyer had been at the firm for five weeks; also acknowledging sworn testimony that the new hire had not shared any confidences with the Winston & Strawn lawyers working on the case for the new hire's adversary, and disqualifying Winston & Strawn -- although the litigation had been going on for nine years, Winston & Strawn lawyers had taken eighty-five days of depositions, and had spent 10,000 hours on the case as of that time; explaining that on August 1, 1989, Winston & Strawn hired a former Sidley & Austin lawyer (Durchslag) who had worked on that firm's representation of Corcoran Partners since litigation began between Corcoran and Winston & Strawn's client Dresser in May 1984; "According to a legal assistant employed at Winston & Strawn, the firm has devoted over 10,000 hours to the litigation, including over 85 days spent depositing over 44 persons. More than 70,000 pages of documents have been produced in the litigation."; noting that Durchslag's former client notified Winston & Strawn on August 7, 1989, of the conflict, but that Winston & Strawn declined to acknowledge the conflict; "The record indicates that in addition to contemnor, Winston & Strawn attorneys directly representation Dresser in the litigation were Jane McCullough and Kimball Anderson. An affidavit by Ms. McCullough states that she also received a copy of Brace's letter and has not discussed the case with Durchslag. An affidavit by Mr. Anderson states that he has not discussed the case with Durchslag, but does not indicate whether he received a copy of Brace's letter."; noting that on September 7, 1989, Corcoran filed a motion to disqualify Winston & Strawn, the same day that Winston & Strawn proposed an ethics screen between Durchslag and the lawyers representing the Winston & Strawn client; "[I]t appears that the trend of Illinois and federal case law, as well as the adoption of the Illinois Rules, is toward allowing the existence of effective screening to rebut the presumption of shared confidences between a newly associated attorney and his new firm. Accordingly, we hold that the presumption of shared confidences at the new firm may be rebutted by effective screening of a newly associated attorney."; "[T]he record indicates that a screening memorandum was not circulated within Winston & Strawn until September 7, 1989 -- five weeks after Durchslag joined the firm."; "[T]his court does not need to determine whether any factual determination in this regard would be an abuse of discretion. Nor does this court need to decide today whether screening must be in place on the day an attorney joins a firm to prevent disqualification as a matter of law. The record indicates that contemnor and other Winston & Strawn personnel had actual knowledge of the problem on August 7 and 8, 1989, when contemnor was informed by Brace of the problem."; "Defendant and contemnor note that it is uncontroverted that Durchslag did not share Corcoran Partners' confidences with Winston & Strawn and will not do so in the future. Defendant and contemnor's reliance on the affidavits of Durchslag and the Winston & Strawn personnel representing Dresser, all of which state that no confidences were or will be disclosed, is misplaced.").

In addition to suffering from the imputation of an individual lawyer's disqualification, lawyers violating a screen could face other consequences.

- Spur Prods. Corp. v. Stoel Rives LLP, 122 P.3d 300 (Idaho 2005) (allowing a client to sue its lawyer for malpractice based on a law firm's disclosure of client information to a firm lawyer who was supposed to be screened from the matter).

### **Best Answer**

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

B 11/14

## Timing of an Effective Screen

### Hypothetical 23

Two weeks ago, you hired a young associate in your New York office from another large Los Angeles-based law firm. This morning, you received a frantic call from one of your partners, who said that he just learned that the young associate had worked at his old firm on a litigation matter in which your firm represents your largest client. Your partner wants you to screen the young associate immediately, and asks whether the immediate imposition of a screen will eliminate the risk that your firm might be disqualified from that litigation matter.

- (a) Can you avoid the possibility of an imputed disqualification by immediately screening the new hire?

**NO**

- (b) Will you be able to avoid an imputed disqualification if the new hire can establish (under oath) that he did not share any confidences from his old firm with any of your lawyers, and that the lawyers working on the litigation matter at your firm did not acquire any confidential information from the new hire?

**NO (PROBABLY)**

### Analysis

(a)-(b) Although the trend nationally has clearly been in favor of allowing self-help screens, the hiring law firms obviously must comply with the applicable rules' screening requirements.

In most lateral hire situations, the hiring law firm identifies conflicts before bringing on the new lawyer. In states following ABA Model Rule 1.6(b)(7) (adopted in 2012), the hiring law firms and the lateral hire will have exchanged sufficient information to identify conflicts. In states that have not adopted that rule, the law firms do it anyway -- relying on a traditional but unstated exception.

In any event, law firms requiring self-help screens to cure conflicts identified during the hiring process must impose the screen before the lateral hire starts working at the firm.

- Philadelphia Bar LEO 2014-1 (4/2014) ("The Inquirer wrote seeking an opinion from the Committee concerning a potential conflict of interest issue that arose. Over one year ago, Inquirer was appointed by the United States District Court to represent a criminal defendant in a securities fraud case (the 'Client'). Shortly before seeking guidance from the Committee, Inquirer learned that a new member of his law firm ('Attorney A') had previously acted as counsel for the primary government witness against Inquirer's Client."; "[T]he Committee believes that there is a non-waivable conflict of interest that precludes Inquirer from continuing to represent his Client in the criminal matter. Attorney A gained material, confidential information in connection with his former representation, and the interests of Attorney A's Former Client and those of Inquirer's current Client are materially adverse in the same matter. . . . There is no question that the criminal matter involving these representations is the same and that the interests of the Client and Attorney A's Former Client are adverse in the criminal matter. . . . More importantly, once Attorney A joined Inquirer's law firm, any information that Attorney A learned from Attorney A's Client was imputed to Inquirer in the absence of an effective screen and without appropriate notice being provided to the affected clients. . . . From the inquiry itself, it is clear that no screen was established prior to Attorney A joining Inquirer's law firm and, based upon what information was already shared as part of the inquiry, it would be impossible to create an effective screen after the fact. Therefore, any confidential information obtained from Attorney A's Client would be imputed to Inquirer and would prohibit Inquirer from continuing to represent his Client. As such, Inquirer should no longer represent his Client, and Attorney A should not represent Attorney A's Former Client if Attorney A's Former Client sought further representation from Attorney A in this particular criminal matter.").

For conflicts that cannot be identified when the lateral hire joins the firm, the analysis can become much more complicated. For instance, suppose that a lateral hire represented Acme in a case against Baker. If the hiring firm has had no involvement in that case, it will not identify any conflict or require any screening when hiring the lateral. However, what if Baker later hires the law firm to replace its existing law firm? It

obviously is too late to screen the lateral hire at the time the firm hires him or her. In that situation, the firm must act as soon as it learns of the need for the screen.

### **ABA Model Rules and Restatement**

The ABA Model Rules require a timely screen, but implicitly acknowledge that hiring law firms might not need a screen until after the lateral hire started working there.

In order to be effective, screening measures must be implemented as soon as practical after a lawyer or law firm knows or reasonably should know that there is a need for screening.

ABA Model Rule 1.0 cmt. [10].

The Restatement takes the same approach.

The required screening measures must be imposed in the subsequent representation at the time the conflict is discovered or reasonably should have been discovered, and they must be of sufficient scope, continuity, and duration to assure that there will be no substantial risk to confidential client information.

Restatement (Third) of Law Governing Lawyers § 124 cmt. d(i) (2000).

A Restatement illustration recognizes the possibility that a hiring law firm will not need a screen until long after the lateral hire begins working there.

As can readily be shown from contemporaneous time records, when Lawyer was an associate in Law Firm ABC, Lawyer spent one-half hour in conversation with another associate about research strategies involving a narrow issue of venue in federal court in the case of Developer v. Bank, in which the firm represented Bank. The conversation was based entirely on facts pleaded in the complaint and answer, and Lawyer learned no confidential information about the matter. Lawyer then left Firm ABC and became an associate in Firm DEF. Two years later, Lawyer was asked to represent Developer against Bank in a matter substantially related to the matter in which Firm ABC represented Bank. In the circumstances, due to the proven lack of exposure of Lawyer to confidential information of

Bank, Bank should not be regarded as the former client of Lawyer for the purpose of applying § 132. . . . Alternatively, a tribunal may require that Lawyer be screened from participation in the matter as provided in this Section and, on that basis, permit other lawyers affiliated with Lawyer in Firm DEF to represent the client against Bank.

Restatement (Third) of Law Governing Lawyers § 124 illus. 3 (2000) (emphases added).

### Case Law

Numerous courts have disqualified law firms which have not imposed otherwise effective self-help screens in a timely fashion.

- Beltran v. Avon Prods., Inc., 867 F. Supp. 2d 1068, 1078, 1083 (C.D. Cal. 2012) (finding that an individual lawyer's disqualification was imputed to his new law firm, despite an ethics screen; explaining that the lawyer spent over 300 hours working on matters for Avon while at Paul Hastings, and then moved to a law firm representing a plaintiff suing Avon; "The instant case presents an unfortunate and awkward set of circumstances in which two former colleagues and long-time friends who previously worked together in representing a major corporate client now find themselves on opposite sides in a case involving that same client."; "Plaintiff claims that disqualification is not warranted because an ethical wall was immediately imposed to cordon off Mr. Frank from the instant case after Mr. Frank spoke with Mr. Ellis on March 12, 2012. . . . As a matter of law, however, an ethical wall is insufficient to overcome the possession of confidential information by the segregated attorney, except in very limited situations involving former government attorneys now in private practice."; noting the individually disqualified lawyer had assisted his new firm in attempting to avoid disqualification; "Even if an ethical wall were legally sufficient, it was untimely because it was not imposed until March 12, 2012, two weeks after Plaintiff filed her complaint against Avon in Estee Lauder on February 28, 2012. Nor did Plaintiff's counsel send written notice to Avon regarding the implementation of an ethical wall as required under the Rules of Professional Conduct. See ABA Model Rules of Prof'l Conduct 1.10(a)(ii)&(iii)." (emphasis added))
- Arista Records LLC v. Lime Grp. LLC, No. 06 CV 5935 (KMW), 2011 U.S. Dist. LEXIS 17434, at \*7, \*11, \*21-22 (S.D.N.Y. Feb. 18, 2011) (declining to disqualify a law firm which hired an individually disqualified lawyer, despite the law firm's sloppy positioning of a screen; noting that the individually disqualified lawyer "Korn testified that, although they [lawyers at the new firm] discussed the status of the LimeWire litigation, they did not discuss anything substantive about the case."; explaining that "[o]n June 18, 2010, Willkie

submitted a new matter form for the Tower/LimeWire Matter. . . . The form has a box asking whether there are any conflict concerns. Notwithstanding that the firm was aware of a Korn's LimeWire conflict, the box is checked 'no.'; "On July 1, 2010, one month after being approached by Tower about the Tower/LimeWire matter, Willkie circulated an internal firm-wide email asking attorneys to comment on possible conflicts related to the Tower/LimeWire Matter. . . . Korn responded, stated that, '[a]s [I] mentioned to Tariq Mundiya, I previously represented Plaintiffs in the Limewire litigation.' . . . In response, Mundiya wrote, 'we will have to have a wall placed so that Mr. Korn is not involved in the matter.'"; "As a technical matter, Willkie's screening procedures were imperfect. First, Willkie repeatedly failed to enter Korn's LimeWire conflict into its conflicts database, as the firm says should have happened. . . . Second, after undertaking representation of Tower in LimeWire matter, Willkie waited approximately seven weeks to implement an electronic screen, and approximately three months to circulate an internal screening memorandum. . . . Defendants argue that a screen was in place from 'the get go' because, in early June 2010, Mundiya informed Cosenza that he should not communicate with talk to Jeff Korn.' . . . However, Cosenza testified that four other Willkie lawyers were working on Tower/LimeWire Matter. Cosenza also testified that he told those four lawyers that they should not discuss the case with Korn, but he did not do so with at least one of those lawyers until the end of August." (emphasis added)).

- Nat'l Union Fire Ins. Co. v. Alticor, Inc., 472 F.3d 436 (6th Cir. 2007) (revisiting imputation of an individual lawyer's disqualification to an entire law firm under Michigan Rule 1.10; noting that in November 2006 Michigan amended its Rule 1.10 to allow law firms to avoid imputed disqualification by screening a new lawyer; essentially softening the absolute imputation rule by referring to a pre-existing screening mechanism; nevertheless disqualifying the law firm because it had not complied with the screening mechanism rule by providing written notice to the "appropriate tribunal"; noting that the court was unaware for two weeks that the individually disqualified lawyer had joined the law firm).
- SK Handtool Corp. v. Dresser Indus., Inc., 619 N.E.2d 1282, 1285, 1290, 1292, 1294 (Ill. App. Ct. 1993) (noting that Illinois ethics rules permit screening of an individually disqualified new hire to avoid imputed disqualification; holding that the law firm of Winston & Strawn had not timely screened a lateral hire; acknowledging that Winston & Strawn put an ethics screen in place the day that it realized that it should have done so, but noting that the lawyer had been at the firm for five weeks; also acknowledging sworn testimony that the new hire had not shared any confidences with the Winston & Strawn lawyers working on the case for the new hire's adversary, and disqualifying Winston & Strawn -- although the litigation had been going on for nine years, Winston & Strawn lawyers had taken eighty-five days of depositions, and had spent 10,000 hours on the case as of that time;



explaining that on August 1, 1989, Winston & Strawn hired a former Sidley & Austin lawyer (Durchslag) who had worked on that firm's representation of Corcoran Partners since litigation began between Corcoran and Winston & Strawn's client Dresser in May 1984; "According to a legal assistant employed at Winston & Strawn, the firm has devoted over 10,000 hours to the litigation, including over 85 days spent depositing over 44 persons. More than 70,000 pages of documents have been produced in the litigation."; noting that Durchslag's former client notified Winston & Strawn on August 7, 1989, of the conflict, but that Winston & Strawn declined to acknowledge the conflict; "The record indicates that in addition to contemnor, Winston & Strawn attorneys directly representation Dresser in the litigation were Jane McCullough and Kimball Anderson. An affidavit by Ms. McCullough states that she also received a copy of Brace's letter and has not discussed the case with Durchslag. An affidavit by Mr. Anderson states that he has not discussed the case with Durchslag, but does not indicate whether he received a copy of Brace's letter."; noting that on September 7, 1989, Corcoran filed a motion to disqualify Winston & Strawn, the same day that Winston & Strawn proposed an ethics screen between Durchslag and the lawyers representing the Winston & Strawn client; "[I]t appears that the trend of Illinois and federal case law, as well as the adoption of the Illinois Rules, is toward allowing the existence of effective screening to rebut the presumption of shared confidences between a newly associated attorney and his new firm. Accordingly, we hold that the presumption of shared confidences at the new firm may be rebutted by effective screening of a newly associated attorney."; "[T]he record indicates that a screening memorandum was not circulated within Winston & Strawn until September 7, 1989 -- five weeks after Durchslag joined the firm."; "[T]his court does not need to determine whether any factual determination in this regard would be an abuse of discretion. Nor does this court need to decide today whether screening must be in place on the day an attorney joins a firm to prevent disqualification as a matter of law. The record indicates that contemnor and other Winston & Strawn personnel had actual knowledge of the problem on August 7 and 8, 1989, when contemnor was informed by Brace of the problem."; "Defendant and contemnor note that it is uncontroverted that Durchslag did not share Corcoran Partners' confidences with Winston & Strawn and will not do so in the future. Defendant and contemnor's reliance on the affidavits of Durchslag and the Winston & Strawn personnel representing Dresser, all of which state that no confidences were or will be disclosed, is misplaced.").

Of course, other courts have approved hiring law firms' timing of their self-help screens.

- Silicon Graphics, Inc. v. ATI Techs., Inc., 791 F. Supp. 2d 970, 983 (W.D. Wis. 2010) (denying a disqualification motion based on a law firm's hiring of an individually disqualified lateral; finding that the hiring law firm's screen was

adequate; "Plaintiff does not deny that defendants' screening procedures comply with each of these factors. Three weeks before Leichtman joined Robins Kaplan, the firm sent a memorandum to Leichtman and all the members of the litigation team for this case. The memorandum instructed team members not to discuss the case with Leichtman or in his presence. Under the memorandum, Leichtman is denied access to any records relating to this case and is prohibited from providing team members any information he knows about the case. All of the electronic records are protected by a computer security protocol that prevents Leichtman from viewing or searching those records. Leichtman and each of the lawyers for Robins Kaplan working on this case have filed declarations in which they aver that Leichtman and the others have not spoken with each other about the case, that none of the lawyers has had a discussion about the case in Leichtman's presence and that Leichtman has not viewed any of the records relevant to this case or attempted to do so. An analysis conducted by Robins Kaplan's computer support group shows that Leichtman has not attempted to view the electronic files. Leichtman will not receive any fees related to this case." (emphasis added)).

And courts have justifiably approved the timing of self-help screens after a lateral hire has joined the hiring law firm, if the conflict arises after the hiring.

- Openwave Sys. Inc. v. Myriad France S.A.S., No. C 10-02805 WHA, 2011 U.S. Dist. LEXIS 35526, at \*13, \*14 (N.D. Cal. Mar. 31, 2011) (finding that a law firm had acted promptly enough in imposing an ethics screen after learning that a lateral hire was individual disqualified from a matter that the law firm took after the lateral hire arrived at the firm; noting that Morgan Lewis imposed the ethics screen one day after learning of the conflict; relying on Kirk v. First Am. Ins. Co., 108 Cal. Rptr. 3d 620 (Cal. Ct. App. 2010); declining to disqualify Morgan Lewis; "The Court is satisfied that Attorney Edwards has not had and will not have any improper communication with others at the firm concerning the litigation. Myriad has provided no sworn evidence that Attorney Edwards ever transmitted confidential information to the attorneys representing Openwave. The Openwave attorneys have submitted sworn declarations that they have never met or spoken to Attorney Edwards and have never learned any confidential information from him related to this litigation. Attorney Edwards swears that he has never shared any information."; also noting that "[t]he firm has taken the additional step of ensuring that Attorney Edwards does not directly receive compensation generated by this litigation. This order finds that the ethical wall erected by Morgan Lewis is sufficient to overcome the presumption that confidential information has been or will be shared.").

Some very forgiving courts have declined to disqualify law firms even after they missed a conflict during the hiring process -- as long as they act quickly upon realizing that they should have screened the lateral hire.

- Lutron Elecs. Co. v. Crestron Elecs., Inc., Case No. 2:09-CV-707, 2010 U.S. Dist. LEXIS 120864, at \*8, \*17-18 (D. Utah Nov. 12, 2010) (denying a motion by Kaye Scholer to disqualify Quinn Emanuel, who had hired a young associate from Kaye Scholer who had worked on the opposite side of litigation; noting that Quinn Emanuel had screened the young associate upon receiving notice from Kay Scholer of the issue; "Mr. Reisberg was advised that an 'ethical wall' had been put in place, and he was instructed not to discuss or share any information or materials with anyone at Quinn Emanuel that related in any way to his prior work at Kaye Scholer on behalf of Lutron. . . . Similarly, Quinn Emanuel personnel were directed not to share with Mr. Reisberg any information or materials relating in any way to Lutron. . . . In addition, Mr. DeFranco personally spoke with each attorney and staff member working on the Crestron case and confirmed that these individuals understood the precautions that had been put in place and would follow them. Mr. DeFranco also confirmed that nothing inconsistent with the ethical wall had occurred since Mr. Reisberg joined Quinn Emanuel."; noting that Utah rules allow the law firm to avoid imputed disqualification if it "timely" screened the individually disqualified lawyer; "In this case, the facts make clear that the Quinn Emanuel lawyers representing Crestron were unaware of any possible imputed conflict resulting from the representation until they received notice from Lutron on August 5, 2010. Although Lutron vigorously asserts that Crestron violated the rule because they 'should have known' of the conflict, the Utah Rules of Professional Conduct expressly states that actual knowledge is what is required. Moreover, because the Rule requires actual knowledge, the court finds that the ethical screen was timely under the circumstances. As soon as counsel for Crestron received notice of the conflict from Lutron's counsel, they immediately established an effective ethical screen in full compliance with the rules. While it certainly would have been preferable for Quinn Emanuel to conduct an effective conflicts check and discover the conflict initially, once it had the requisite knowledge, it acted in accord with the rules. Finally, although Lutron claims that counsel for Crestron failed to give 'notice' as required by the rule, given that counsel for Crestron learned of the conflict from Lutron, there was no opportunity to 'notify' Lutron and doing so would have been pointless. Moreover, even though counsel for Crestron was initially unaware and therefore could not 'notify' Lutron of the conflict, it did thereafter notify Lutron of the measures it had taken to screen Mr. Reisberg and to ensure that Lutron's confidential information would be protected. (P1.'s Ex. 7.) Given these facts, the court finds that Quinn Emanuel's conduct was not egregious.").

Most courts are not that flexible.

Ironically, at least one court has declined to disqualify a law firm which had imposed an inadequate screen -- based on the length of time between the lateral hire's joining the firm and the firm's acceptance of a case that would otherwise have resulted in its disqualification.

- Arista Records LLC v. Lime Grp. LLC, No. 06 CV 5935 (KMW), 2011 U.S. Dist. LEXIS 17434, at \*29, \*31, \*32-33 (S.D.N.Y. Feb. 18, 2011) (declining to disqualify a law firm which hired an individually disqualified lawyer, despite the law firm's sloppy positioning of a screen; "Finally, approximately 32 months has elapsed between Korn's last day at Cravath in August 2007, and late May 2010, when Willkie undertook representation of Tower in the Tower/LimeWire matter. During that time, Korn's recollection of any confidential information has naturally diminished."; "[T]hat decision was issued before Hempstead [Hempstead Video, Inc. v. Inc. Vill. of Valley Stream, 409 F.3d 127 (2d Cir. 2005)], and represents the kind of per se rule that the Second Circuit rejected in Hempstead"; "The Willkie firm's screening procedures appear to have been sub-standard. However, when evaluating a motion to disqualify, it is the Court's job to assess whether an attorney's conflict actually 'poses a significant risk of trial taint.' . . . The Court is confident that Korn's conflict has not tainted, and will not taint, the upcoming trial. The conflict has existed for over two years, and Korn states that he has not disclosed any confidential information during those years, testimony that is not challenged. The risk that now -- two years later, and with the heightened awareness of conflict issues going forward -- there will be inadvertent disclosures is unlikely, particularly in view of the instant motion's focus on the issue. Given the 'lack of a meaningful showing that the trial process here will be tainted in any way,' and the significant hardship that disqualifications would place on Defendants, Plaintiffs' motion must be denied." (citation omitted)).

This hypothetical comes from a 2007 case. In Lucent Techs., Inc. v. Dell, Inc., Civ. No. 02CV2060-B(CAB) c/w 03CV-0699-B(CAB) & 03CV1108(CAB), 2007 U.S. Dist. LEXIS 35502 (S.D. Cal. May 15, 2007), an associate moved from Kirkland & Ellis to Gibson Dunn's New York office. While at Kirkland and Ellis, the associate had worked for about 2,300 hours for Lucent in a patent case against Microsoft.

Approximately ten days after its New York office hired the associate, Gibson Dunn's Washington office was retained by Microsoft to assist in that case. Gibson Dunn entered its appearance for Microsoft on March 12, 2007 -- and learned three days later that its new New York associate had worked on the other side while at Kirkland & Ellis. Gibson Dunn screened the lawyer on March 19.

The Southern District of California nevertheless disqualified Gibson Dunn, although noting that while the associate had never communicated with the Gibson Dunn lawyers in the D.C. office representing Microsoft, he nevertheless "was asked by a few attorneys about his involvement in the case" while at Kirkland & Ellis. Id. at \*19. The associate claimed that on those occasions he had, he "changed the topic of conversation and did not disclose any confidential information." Id. The court disqualified Gibson Dunn after noting that

"the current screening procedure was not put in place when Koehl began at Gibson Dunn in February" and was not in place when the three Gibson Dunn lawyers entered their appearance; noting that "while the attorneys working on the instant litigation are in a different city and state from Koehl, the prevalence of electronic and phone communication make this factor at best neutral."

Id. at \*28-29.<sup>1</sup>

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<sup>1</sup> Lucent Techs., Inc. v. Dell, Inc., Civ. No. 02CV2060-B(CAB) c/w 03CV-0699-B(CAB) & 03CV1108(CAB), 2007 U.S. Dist. LEXIS 35502, at \*18, \*19, \*28, \*28-29 (S.D. Cal. May 15, 2007) (assessing plaintiff Lucent's motion to disqualify the law firm of Gibson, Dunn & Crutcher from representing defendant Microsoft in what the court labeled a "high profile" patent case; explaining that on February 12, 2007 a lawyer formerly employed by Lucent's law firm Kirkland & Ellis (and who had billed 2,300 hours for Lucent in the patent case) moved to Gibson Dunn's New York office; noting that defendant Microsoft retained Gibson Dunn some time after a February 22, 2007 jury verdict on the first set of patents to be tried, and that three lawyers from Gibson Dunn's Washington, D.C. office entered an appearance for Microsoft on March 12, 2007; further explaining that the former Kirkland & Ellis lawyer notified Gibson Dunn of his involvement in the case, but that Gibson Dunn "failed to recognize the conflict until after it had made an appearance in the instant case and Lucent had brought the matter to its attention on March 15, 2007"; acknowledging that Gibson Dunn had screened the lawyer starting on March 19; "Prior to the screen, Koehl [former Kirkland & Ellis lawyer] was asked by a few attorneys about his involvement in the case; according to Koehl he changed the topic of conversation and did not disclose

## **Best Answer**

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

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any confidential information. ([Koehl's Declaration at 7].) According to Koehl, he has never communicated with the Gibson Dunn attorneys working on the instant litigation. (Id. at P 8.); analyzing Lucent's motion to disqualify Gibson Dunn on the California ethics rules; noting among other things that lawyers in Gibson Dunn's New York office had "asked Koehl about his involvement in the case before any ethical wall was in place," and that "the current screening procedure was not put in place when Koehl began at Gibson Dunn in February" and was not in place when the three Gibson Dunn lawyers entered their appearance; noting that "while the attorneys working on the instant litigation are in a different city and state from Koehl, the prevalence of electronic and phone communication make this factor at best neutral"; disqualifying Gibson Dunn).

## Temporary Lawyers

### Hypothetical 24

Your firm has several large litigation projects that you expect to last for several years. You want to avoid adding to your permanent roster of lawyers, so you are looking into various categories of lawyers that might be able to assist you in these projects. You have asked your firm's ethics partner about the conflicts of interest ramifications of hiring such lawyers, many of whom have worked on numerous projects for other law firms.

- (a) Will your firm have to worry about the imputation of a lawyer's individual disqualification, if the lawyer will work only on one large case -- conducting research, taking depositions, preparing pleadings, etc.?

### YES (PROBABLY)

- (b) Will your firm have to worry about the imputation of a lawyer's individual disqualification, if the lawyer will work only on privilege review projects, without access to your firm's computer network and the files of other clients?

### NO (PROBABLY)

### Analysis

The increasing proliferation of various categories of lawyers within law firms have complicated a conflicts of interest analysis.

### ABA Model Rules

Interestingly, the ABA Model Rules do not deal directly with this issue. Instead, the analysis begins with the general imputation rule -- and one word in particular.

While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9 unless [some exception applies].

ABA Model Rule 1.10(a) (emphasis added). Unfortunately, the ABA Model Rules do not define the term "associated." The term "firm" has a fairly broad meaning.

"Firm" or "law firm" denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.

ABA Model Rule 1.0(c). See also ABA Model Rule 1.10 cmt. [1].

The ABA provided guidance about this issue in a 1988 legal ethics opinion. In ABA LEO 356 (12/16/88), the ABA indicated that the use of "temporary lawyers" had raised several questions.

The Committee has received a number of inquiries relating to the increasing use by law firms of temporary lawyers. The temporary lawyer may work on a single matter for the firm or may work generally for the firm for a limited period, typically to meet temporary staffing needs of the firm or to provide special expertise not available in the firm and needed for work on a specific matter. The temporary lawyer may work in the firm's office or may visit the office only occasionally when the work requires. The temporary lawyer may work exclusively for the firm during a period of temporary employment or may work simultaneously on other matters for other firms.

ABA LEO 356 (12/16/88) (footnote omitted).

ABA LEO 346 then turned to some of the terms' definitions.

For purposes of this opinion, "firm" or "law firm" includes a sole practitioner and a corporate legal department. See ABA Model Rules of Professional Conduct (1983, amended 1987), Terminology, Rule 1.10 Comment. The term "temporary lawyer" means a lawyer engaged by a firm for a limited period, either directly or through a lawyer placement agency. The term does not, however, include a lawyer who works part time for a firm or full time but without contemplation of permanent employment, who is nevertheless engaged by the firm as an employee for an extended period and does legal work only for that firm. That person's relationship with the firm, during the period of employment, is more like the relationship of an associate of the firm, and the Model Rules or the predecessor Model Code of Professional Responsibility (1969, amended 1980) will govern the lawyer and the firm and their relationship as



with any associate of the firm. Similarly, "temporary lawyer" does not include a lawyer who has an "of counsel" relationship with a law firm or who is retained in a matter as independent associated counsel.

Id.

Not surprisingly, ABA LEO 356 first recognized that temporary lawyers may themselves be disqualified from adversity to their former clients -- just like full-time law firm lawyers.

It is clear that a temporary lawyer who works on a matter for a client of a firm with whom the temporary lawyer is temporarily associated, "represents" that client for purposes of Rules 1.7 and 1.9. Thus, a temporary lawyer could not, under Rule 1.7, work simultaneously on matters for clients of different firms if the representation of each were directly adverse to the other (in the absence of client consent and subject to the other conditions set forth in the Rule). Similarly, under Rule 1.9, a temporary lawyer who worked on a matter for a client of one firm could not thereafter work for a client of another firm on the same or a substantially related matter in which that client's interests are materially adverse to the interests of the client of the first firm (in the absence of consent of the former client and subject to the other conditions stated in the Rule).

Id. (footnote omitted). This makes sense. A temporary lawyer working for a client can learn just as many material confidences from or about that client as a lawyer working full time.

As ABA LEO 356 then recognized, the key issue is whether the law firm hiring such a temporary lawyer risks imputation of such an individual disqualification.

The basic question is under what circumstances a temporary lawyer should be treated as "associated in a firm" or "associated with a firm." The question whether a temporary lawyer is associated with a firm at any time must be determined by a functional analysis of the facts and circumstances involved in the relationship between the temporary lawyer and the firm consistent with the purposes for the Rule.

Id. (footnote omitted) (emphasis added). ABA LEO 356 focused on the temp lawyer's access to other client confidences.

Preserving confidentiality is a question of access to information. Access to information, in turn, is essentially a question of fact in particular circumstances, aided by inferences, deductions or working presumptions that reasonably may be made about the way in which lawyers work together. A lawyer may have general access to files of all clients of a law firm and may regularly participate in discussions of their affairs; it should be inferred that such a lawyer in fact is privy to all information about all the firm's clients. In contrast, another lawyer may have access to the files of only a limited number of clients and participate in discussion of the affairs of no other clients; in the absence of information to the contrary, it should be inferred that such a lawyer in fact is privy to information about the clients actually served but not those of other clients.

Application of paragraphs (b) and (c) [of Rule 1.10] depends on a situation's particular facts. In any such inquiry, the burden of proof should rest upon the firm whose disqualification is sought.

Id. (emphasis added).

ABA LEO 356 ultimately concluded that the temp lawyer's access to other clients' confidential information determined whether the temp lawyer should be considered "associated" with the firm.

Ultimately, whether a temporary lawyer is treated as being "associated with a firm" while working on a matter for the firm depends on whether the nature of the relationship is such that the temporary lawyer has access to information relating to the representation of firm clients other than the client on whose matters the lawyer is working and the consequent risk of improper disclosure of misuse of information relating to representation of other clients of the firm. For example, a temporary lawyer who works for the firm, in the firm office, on a number of matters for different clients, under circumstances where the temporary lawyer is likely to have access to information relating to the representation of other firm clients, may well be deemed to be "associated with" the firm generally under Rule 1.10 as to all other clients of the

firm, unless the firm, through accurate records or otherwise, can demonstrate that the temporary lawyer had access to information relating to the representation only of certain other clients. If such limited access can be demonstrated, then the temporary lawyer should not be deemed to be "associated with" the firm under Rule 1.10. Also, if a temporary lawyer works with a firm only on a single matter under circumstances like the collaboration of two independent firms on a single case, where the temporary lawyer has no access to information relating to the representation of other firm clients, the temporary lawyer should not be deemed "associated with" the firm generally for purposes of application of Rule 1.10. This is particularly true where the temporary lawyer has no ongoing relationship with the firm and does not regularly work in the firm's office under circumstances likely to result in disclosure of information relating to the representation of other firm clients.

As the direct connection between the temporary lawyer and the work on matters involving conflicts of interest between clients of two firms becomes more remote, it becomes more appropriate not to apply Rule 1.10 to disqualify a firm from representation of its clients or to prohibit the employment of the temporary lawyer. Whether Rule 1.10 requires imputed disqualification must be determined case by case on the basis of all relevant facts and circumstances, unless disqualification is clear under the Rules.

Id. (emphases added).

ABA LEO 356 recommended that a law firm hiring such a temp lawyer "screen" the lawyer from other clients' confidences.

For the reasons discussed above, in order to minimize the risk of disqualification, firms should, to the extent practicable, screen each temporary lawyer from all information relating to the clients for which the temporary lawyer does no work. All law firms employing temporary lawyers also should maintain a complete and accurate record of all matters which each temporary lawyer works. A temporary lawyer working with several firms should make every effort to avoid exposure within those firms to any information relating to clients on whose matters the temporary lawyer is not working. Since a temporary lawyer has a coequal interest in avoiding future imputed disqualification, the temporary lawyer should also maintain a record of clients and matters worked on.

Id. (emphasis added).

Significantly, ABA LEO 356's recommendation of a screening preceded by twenty years the ABA Model Rules' adoption of a self-help screening to avoid imputation of a lawyer's individual disqualification. The screening of temp lawyers would not avoid such imputation. Instead, the screening would effectively prevent the temp lawyer from being "associated" with the law firm. This step presumably would preclude the need for disclosure, consent or screening as part of a required consent.

The ABA also warned law firms that it would be "inadvisable" for a law firm to hire a temp lawyer who had worked on the other side of the case the firm was then handling.

The distinction drawn between when a temporary lawyer is or is not associated with a firm is only a guideline to the ultimate determination and not a set rule. For example, if a temporary lawyer was directly involved in work on a matter for a client of a firm and had knowledge of material information relating to the representation of that client, it would be inadvisable for a second firm representing other parties in the same matter whose interests are directly adverse to those of the client of the first firm to engage the temporary lawyer during the pendency of the matter, even for work on other matters. The second firm should make appropriate inquiry and should not hire the temporary lawyer or use the temporary lawyer on a matter if doing so would disqualify the firm from continuing its representation of a client on a pending matter.

Id. ABA LEO 356 did not explain this warning. Theoretically, a temp lawyer not "associated" with the new firm would not put that firm in harm's way -- even if the temp lawyer had worked on the other side of an active case the firm was handling. However, such a hire would undoubtedly tempt the other side to seek the hiring law firm's disqualification -- thus forcing the hiring firm's fate to ride on the outcome of the "associated in a firm" analysis.

Interestingly, a different analysis determines whether the hiring law firm must disclose the temp lawyer's hiring to the client, as well as the law firm's ability to earn a profit on the temp lawyer's time without the client's consent after disclosure.

In addressing the law firm's disclosure obligations, ABA LEO 356 distinguished between temporary lawyers working under the "direct supervision" of the law firm and temporary lawyers who were not working in that way.

The Committee is of the opinion that where the temporary lawyer is performing independent work for a client without the close supervision of a lawyer associated with the law firm, the client must be advised of the fact that the temporary lawyer will work on the client's matter and the consent of the client must be obtained. This is so because the client, by retaining the firm, cannot reasonably be deemed to have consented to the involvement of an independent lawyer. On the other hand, where the temporary lawyer is working under the direct supervision of a lawyer associated with the firm, the fact that a temporary lawyer will work on the client's matter will not ordinarily have to be disclosed to the client. A client who retains a firm expects that the legal services will be rendered by lawyers and other personnel closely supervised by the firm. Client consent to the involvement of firm personnel and the disclosure to those personnel of confidential information necessary to the representation is inherent in the act of retaining the firm.

Id. (emphasis added).

Thus, under this analysis a temporary lawyer's imputation issues depend on the lawyer's access to confidential information, while the hiring law firm's disclosure obligations to the client will depend on whether a firm lawyer closely supervises the temporary lawyer. So theoretically a temporary lawyer might receive close supervision from a firm lawyer, but not enjoy access to other clients' confidential information.

ABA LEO 356 later introduced yet another standard.

Turning to the issue of fees, ABA LEO 356 concluded that a law firm paying a temporary lawyer was not engaged in a fee-split that required client consent after disclosure.

Rule 1.5(e), relating to division of a fee between lawyers, does not apply in this instance because the gross fee the client pays the firm is not shared with the temporary lawyer. The payments to the temporary lawyer are like compensation paid to non-lawyer employees for services and could also include a percentage of firm net profits without violation of the Rules or the predecessor Code. See ABA Informal Opinion 1440 (1979).

If, however, the arrangement between the firm and the temporary lawyer involves a direct division of the actual fee paid by the client, such as percentage division of a contingent fee, then Rule 1.5(e)(1) requires the consent of the client and satisfaction of the other requirements of the Rule regardless of the extent of the supervision.

Id. ABA LEO 356 then explained that the fee-split rules do not apply -- because the temporary lawyer is not considered to be "outside the firm" for purposes of that analysis.

[W]here a temporary lawyer is working under the close firm supervision described above, such employment does not involve "association with a lawyer outside the firm," within the meaning of this Ethical Consideration. The underlying purposes of the Rule and Code provisions and their functional analyses are similar. For the reasons set forth above, absent a division with the temporary lawyer of the actual fee paid by the client to the firm, the client need not be informed of the financial arrangement with the temporary lawyer under the Model Code since it does not involve a division of the gross fee between lawyers.

Id. (emphasis added).

Thus, a law firm can add a profit to a temporary lawyer's billing rate without complying with the fee-split rules -- because the temp lawyer is not practicing "outside the firm." ABA LEO 356 therefore analyzed three standards: (1) whether temp lawyers have broad access to client confidences (which determines whether such lawyers are

"associated" with the firm for disqualification imputation purposes); (2) whether temp lawyers work under a firm lawyer's close supervision (which determines whether the law firm may earn a profit on temp lawyers' work without advising clients); (3) whether the temp lawyer practices "outside the firm" (which determines the fee-split rules' applicability).

Law firms hoping to avoid the imputed disqualification problem can fairly easily avoid giving temporary lawyers general access to firm clients' confidences. A common practice involves housing temporary lawyers in a remote (generally less expensive) location where they can conduct privilege reviews or other similar tasks. Such temporary lawyers generally do not need, and therefore do not receive, access to the hiring law firm's computer system. This effectively screens those temporary lawyers from any confidential information beyond that required to conduct a privilege review or other task.

This scenario precludes an individual temp lawyer's disqualification from being imputed to the entire law firm. To be extra careful, law firms might (1) seek individually disqualified temp lawyers' former clients' consent -- as when law firms hire individually disqualified lateral hires; or (2) pass over a temp lawyer whose services are offered by a staffing agency, if a quick conflicts check reveals some previous work that might cause a problem for the hiring law firm.

### **Restatement**

Surprisingly, the Restatement does not devote much discussion to temporary lawyers, and generally takes an approach that is different from the ABA Model Rules.

The basic Restatement imputation rule uses the same term as the ABA Model Rules, impute a lawyer's individual disqualification to

other affiliated lawyers who . . . are associated with that lawyer in rendering legal services to others through a law partnership, professional corporation, sole proprietorship, or similar association.

Restatement (Third) of Law Governing Lawyers § 123(1) (2000) (emphasis added).

However, the Restatement provides only what could be seen as an off-handed comment about temporary lawyers.

A form of lawyer-employee is the lawyer temporary -- a lawyer who temporarily works for a firm needing extra professional help. The rules barring representation adverse to a former client . . . and imputing conflicts to all lawyers associated in a firm generally apply to such lawyer temporaries.

Restatement (Third) of Law Governing Lawyers § 123 cmt. c(i) (2000). However, the preceding paragraph emphasizes the role of access to client confidences.

The rule of imputation applies to both owner-employer and associate-employees of a sole-proprietorship law practice, to partners and associates in a partnership for the practice of law, and to shareholder-principals and nonequity lawyer employees of a professional corporation or similar organization conducting a law practice. The lawyers in all such organizations typically have similar access to confidential client information. Owners, partners, and shareholder-principals have a shared economic interest. Associates and nonequity lawyer employees have both a stake in the continued viability of their employer and an incentive to keep the employer's good will.

Id. Thus, the Restatement presumably would reach the same conclusion as ABA LEO 356 (12/16/88) if it had analyzed the varying degrees of access that temp lawyers might have to law firm clients.



It is also worth noting the Restatement's provision dealing with office-sharing -- which again emphasizes access to client confidences as the dispositive factor in analyzing imputation of a lawyer's individual disqualification. The Restatement's general imputation rule explains that a lawyer's individual disqualification will be imputed to

other affiliated lawyers who . . . share office facilities without reasonably adequate measures to protect confidential client information so that it will not be available to other lawyers in the shared office.

Restatement (Third) of Law Governing Lawyers § 123(3) (2000). To the extent that a temp lawyer could be seen as "office sharing" with other law firm lawyers, the law firm presumably can avoid imputation of a lawyer's individual disqualification by taking "reasonably adequate measures" to assure that the other firm lawyers' confidential client information is unavailable to the temp lawyer.

Thus, the Restatement does not on its face parallel the ABA's approach to the temp lawyer issue, but elsewhere provides the building blocks for the same conclusion.

### **State Ethics Opinions**

State ethics opinions generally follow this approach as well.

In 2010, the District of Columbia Bar dealt with this issue in some detail. In District of Columbia LEO 352 (2/2010).<sup>1</sup> The Bar explained that a temp lawyer's

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<sup>1</sup> District of Columbia LEO 352 (2/2010) ("The imputation of a temporary contract lawyer's individual conflicts to a hiring firm under D.C. Rule 1.10 depends on the nature and extent of the lawyer's relationship with the firm and the extent of the temporary lawyer's access to the firm's confidential client information. A temporary contract lawyer who works with the same firm sporadically on a few different projects, or on a single project for a longer period of time, would not be 'associated with' the hiring firm if the firm does not have or otherwise create the impression that the temporary lawyer has a continuing relationship with the firm, and the firm institutes appropriate safeguards to ensure that the temporary contract lawyer does not have access to the firm's confidential client information except for the specific matter or matters on which he is working."; explaining that the "temporary contract lawyer" at issue was involved in the following activity: "The temporary contract lawyer would work solely on a single matter for

individual disqualification's imputation to a hiring firm depended on the temp lawyer's role in the new firm.

The District of Columbia Bar first described such a temp lawyer's intimate involvement in firm matters, which would result in such an imputation.

[A] temporary contract lawyer who is located in a firm's office space, works simultaneously on multiple projects for the firm, is listed on the firm's website or other directories, and has access to the firm's e-mail system and electronic documents would be 'associated with' the contracting firm.

Id. The District of Columbia Bar contrasted that situation with temp lawyers' physical and electronic isolation from other firm lawyers.

The temporary contract lawyer would work solely on a single matter for Law Firm B, performing tasks such as digesting transcripts and reviewing discovery documents for responsiveness and privilege. The temporary contract lawyer works through a number of temporary service agencies that have an arrangement under which Law Firm B

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Law Firm B, performing tasks such as digesting transcripts and reviewing discovery documents for responsiveness and privilege. The temporary contract lawyer works through a number of temporary service agencies that have an arrangement under which Law Firm B pays for the temporary contract lawyer's services."; explaining that "the temporary contract lawyer does not have a past or ongoing association with Law Firm B. Law Firm B hired him to work on one project of limited duration. He will work in a separate location away from the firm's office space or in a segregated area within the firm. His electronic access to the firm and the confidential information of its clients is confined to the specific project on which he is working. We think that in this circumstance the temporary contract lawyer would not be 'associated with' the hiring firm (Law Firm B), and thus, his conflicts would not be imputed to Law Firm B under D.C. Rule 1.10(b). Accordingly, the hiring firm must conduct a conflict check only for the matters on which the temporary contract lawyer will be working for the firm."; "On the other hand, a temporary contract lawyer who is located in a firm's office space, works simultaneously on multiple projects for the firm, is listed on the firm's website or other directories, and has access to the firm's e-mail system and electronic documents would be 'associated with' the contracting firm."; "In contrast, a temporary contract lawyer who works intermittently with the same firm on a small number of projects or on one long-term assignment would not be 'associated with' the contracting firm so long as the firm does not have an ongoing relationship with the temporary contract lawyer. The contracting firm also must avoid creating the impression that the temporary contract lawyer is 'associated with' the firm by listing him on the firm's letterhead, website or other directories, permitting him to use the firm's business cards, or introducing him to clients and others as long-term member of the firm. In addition, the firm must take all appropriate steps to ensure that the temporary contract lawyer has access only to the confidential client information for the matter on which he is working."; "The law firm must institute safeguards to prevent the improper disclosure or misuse of the firm's confidential client information, including talking with the temporary contract lawyer about his duty to avoid obtaining such information and executing a confidentiality agreement memorializing this understanding.").

pays for the temporary contract lawyer's services. . . . [T]he temporary contract lawyer does not have a past or ongoing association with Law Firm B. Law Firm B hired him to work on one project of limited duration. He will work in a separate location away from the firm's office space or in a segregated area within the firm. His electronic access to the firm and the confidential information of its clients is confined to the specific project on which he is working. We think that in this circumstance the temporary contract lawyer would not be 'associated with' the hiring firm (Law Firm B), and thus, his conflicts would not be imputed to Law Firm B under D.C. Rule 1.10(b). Accordingly, the hiring firm must conduct a conflict check only for the matters on which the temporary contract lawyer will be working for the firm.

Id.

In 1999, the Colorado Bar dealt with the issue in more detail. In Colorado LEO 105 (5/22/99), the Colorado Bar followed the ABA in confirming that a temp lawyer will be individually disqualified based on client confidences that the temp lawyer obtains during a representation -- just like a permanent firm employee.

The Colorado Bar then recognized that

The more difficult conflict question involves other clients of the engaging firm or lawyer for whom the temporary lawyer provides no services. Colo. RPC 1.10(a) provides: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7, 1.8(c), 1.9 or 2.2." The key question is whether a temporary lawyer is "associated in a firm." If yes, then the rule of imputation set forth in Colo. RPC 1.10(a) applies, and all of the clients (and conflicts) of the lawyer or firm employing the temporary lawyer are deemed to be the temporary lawyer's clients (and conflicts), and vice versa. If the temporary lawyer is not associated in a firm under Colo. RPC 1.10(a), then the firm's other present or former clients for whom the temporary lawyer has not performed work are not deemed to be present or former clients of the temporary lawyer, and conflicts are not imputed one to the other.

Colorado LEO 105 (5/22/99).

The Colorado Bar agreed with ABA LEO 356's approach, which focused on the temp lawyer's access to the hiring law firms' other clients.

This Committee concurs with the ABA opinion's "functional analysis." . . . The Committee agrees with the ABA opinion that the temporary lawyer's access to information regarding the firm's other clients is the key factor in determining whether the temporary lawyer is associated with the firm under Colo. RPC 1.10(a).

Temporary lawyer and firms that wish to avoid imputation of conflicts, and minimize the risk of disqualification, should screen temporary lawyers from all information relating to other firm clients for whom the temporary lawyer is not working. In particular, the temporary lawyer should not have access to the firm's files for other clients, should not have access to the firm's computer network unless documents related to other clients are password-protected, and should not be exposed to meetings, discussions or other communications where matters or other clients are discussed. To position themselves to defend claims of imputed disqualification, temporary lawyers and firms should maintain accurate records of all clients for whom the temporary lawyer has performed work, and of the measures taken to ensure that the temporary lawyer has not had access to information relating to other clients of the firm.

Id.

The Colorado Bar added another factor ABA LEO 356 did not address -- the hiring law firm's characterization of the temp lawyer in marketing and other "holding out" contexts.

Beyond the question of access to information regarding other clients of the firm, this Committee believes that the manner in which the temporary lawyer is presented to and perceived by clients, courts and third-parties is another important factor in determining whether the temporary lawyer is associated with the firm under Colo. RPC 1.10(a). Specifically, if a temporary lawyer is expressly or implicitly identified as "an associate" or "employee" of the firm -- whether in correspondence to the client or third-parties, in pleadings, during depositions or hearings, or otherwise -- that designation will tend to indicate that the temporary

lawyer is associated with the firm, even if the firm has adequately screened the temporary lawyer from information regarding its other clients. . . . By contrast, where the firm discloses that the temporary lawyer is an independent contractor working for the firm on a limited basis, that disclosure will further help avoid imputation.

Id. (footnote omitted).

In 2012, another bar took the same approach.

- Virginia LEO 1866 (7/26/12) (a lawyer will not be deemed "associated" with the firm for imputation or conflicts purposes "if the lawyer's access to information is restricted solely to those matters on which he or she is working on a temporary or occasional basis.").

In contrast, at least one bar's legal ethics opinion applied the standard imputed disqualification rules to temporary lawyers.

- Georgia LEO 05-9 (4/13/06) (analyzing a lawyer's retention of a temporary lawyer; "One of the most difficult issues involving conflict of interest in the employment of temporary lawyers is imputed disqualification issues. In other words, when would the firm or legal department be vicariously disqualified due to conflict of interest with respect to the temporary lawyer? Since a temporary attorney is considered to be an associate of the particular firm or corporate law department for which he or she is temporarily working, the normal rules governing imputed disqualification apply." (emphasis added); "If a temporary attorney is directly supervised by an attorney in a law firm, that arrangement is analogous to fee splitting with an associate in a law firm, which is allowed by Rule 1.5(e). Thus, in that situation there is no requirement of consent by the client regarding the fee. Nevertheless, the ethically proper and prudent course is to seek consent of a client under all circumstances in which the temporary lawyer's assistance will be a material component of the representation. The fee division with a temporary attorney is also allowed even if there is no direct supervision if three criteria are met: (1) the fee is in proportion to the services performed by each lawyer; (2) the client is advised of the fee splitting situation and consents; and (3) the total fee is reasonable."; "In that the agency providing the temporary lawyer is not authorized to practice law, any sharing of fees with such an agency would be in violation of Rule 5.4(a). Therefore, while it is perfectly permissible to compensate an agency for providing a temporary lawyer, such compensation must not be based on a portion of client fees collected by the firm or the temporary lawyer."; "[E]mployment as a temporary lawyer and use of temporary lawyers are proper when adequate measures, consistent with the guidance offered in this opinion, are employed by the temporary lawyer and

the employing firm or corporate law department. These measures respond to the unique problems created by the use of temporary lawyers, including conflicts of interest, imputed disqualification, confidentiality, fee arrangements, use of placement agencies, and client participation.

Generally, firms employing temporary lawyers should: (1) carefully evaluate each proposed employment for conflicting interests and potentially conflicting interests; (2) if conflicting or potentially conflicting interests exist, then determine if imputed disqualification rules will impute the conflict to the firm; (3) screen each temporary lawyer from all information relating to clients for which a temporary lawyer does not work, to the extent practicable; (4) make sure the client is fully informed as to all matters relating to the temporary lawyer's representation; and (5) maintain complete records on all matters upon which each temporary lawyer works.").

(a) Even if a temp lawyer works on only one project, his or her intimate involvement with other law firm lawyers and access to the firm's network and client confidences could mean that the temp lawyer is "associated" with the firm for imputation purposes.

(b) A temp lawyer's work (especially off-site) and lack of access to the firm's computer network and client confidences normally means that such a temp lawyer normally will not be construed to be "associated" with the firm. However, the firm presumably would have to assure that such a temp lawyer does not gain client confidences in some other way -- such as chatting with supervising lawyers about their work for other clients, receiving internal client newsletters, attending client lunches at which lawyers discuss other clients, etc.

### **Best Answer**

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

## Outsourcing

### Hypothetical 25

You are considering outsourcing some of your firm's discovery work to an overseas operation suggested by one of your largest clients. You wonder about the conflicts of interest ramifications of such a step.

Will the lawyers at the overseas privilege review operation be considered part of your firm for conflicts of interest purposes?

### NO (PROBABLY)

#### Analysis

For domestic outsourcing, it makes sense to apply the same standards for imputed disqualification as most bars follow in the case of temp lawyers. That standard looks at whether a temp lawyer is "associated" with the firm -- which in turn depends on whether the temp lawyer has general access to the firm's other clients' confidential information.

In 2012, a court applied this standard -- declining to impute to an entire law firm the individual disqualification of a lawyer working out of her home on specific matters for a law firm.

- Brown v. Fla. Dep't of Highway Safety & Motor Vehicles, Case No. 4:09-cv-171-RS-CAS, 2012 U.S. Dist. LEXIS 145159, at \*3-4, \*6-7, \*7-8, \*7-9, \*9 (N.D. Fla. Oct. 5, 2012) (because a lawyer's individual disqualification is only imputed to a law firm if the lawyer is "associated" with the law firm, individual disqualification of a lawyer working for the law firm in an outsourcing arrangement is not imputed to the whole firm; explaining the factual context; "Ms. Moore left employment at the OAG to work at Sniffen & Spellman, P.A. For personal and family reasons, Ms. Moore resigned her associate position with the Sniffen firm and went to work instead for the firm of Marie A. Mattox, P.A. The relationship was not a typical associate relationship. Ms. Moore was to work from home preparing summary-judgment responses on specific cases as assigned. There was some prospect that in the future Ms. Moore might also draft complaints. Ms. Moore was to be paid a set hourly rate without the health and retirement

benefits available to attorneys employed at the firm's offices. The firm and Ms. Moore did not address how long the relationship would last and did not define the relationship with precision. This was a relationship of indefinite duration, terminable at will by either side, with no exception that Ms. Moore would ever have client contact or responsibility for cases beyond drafting papers for review by another attorney. There was no expectation that Ms. Moore would advance to a different or higher position with the firm."; "Under the plain language of Rule 4-1.10(b), the Mattox firm is disqualified if Ms. Moore became 'associated' with the firm. The meaning of 'associated' is not completely clear. But one thing *is* clear: not every lawyer who is paid by a law firm to do work of a legal nature is 'associated' with the firm. Thus, for example, a firm can outsource research or other support services so long as the firm complies with any applicable requirements on billing and on disclosures to the client. . . . An attorney to whom work is outsourced -- for example, an attorney who contracts to do research or draft pleadings from the attorney's own premises on the attorney's own schedule -- ordinarily is not an associate."; "Determining whether an attorney is associated or unassociated requires an analysis of all the circumstances. No one factor is determinative in every case. Here Ms. Moore works only from home, does only work for review by another attorney of a kind that can properly be outsourced, has no client contact or expectation of advancement, and does not receive the health and retirement benefits the firm makes available to associates. Ms. Moore works only for the Mattox firm -- it can provide as much work as she currently wishes to do so -- but Ms. Moore is free to do contract work for others as well, if at any time she chooses to do so. In substance, this is an outsourcing relationship. The Rule 4-1.10 imputed-disqualification provision does not apply."; "In reaching this conclusion, I have not overlooked two additional considerations. First, some superficial indicia cut the other way. Ms. Moore obtained a Mattox-firm email address, called herself an associate and used the firm's physical address when she updated her Florida Bar filing, and received a first paycheck that treated her as an employee, not as an independent contractor."; "Second, Defendant's lay representation are concerned that Ms. Moore sat in on confidential discussions and now has a relationship with the plaintiff's law firm. The concern is understandable. But Ms. Moore has an obligation to maintain the defendant's confidences. For all that appears in this record, Ms. Moore has complied with her obligation and will continue to do so. This order mandates it.").

In another domestic outsourcing situations, a court declined to disqualify a vendor working for both sides of a case.

- Victor Li, [Judge Refuses to Disqualify Electronic Data Discovery Vendor for Playing Both Sides](#), Law Tech. News, July 16, 2013 ("Kaleida Health isn't taking a May decision by United States Magistrate Judge Leslie Foschio (Western District, New York) lying down. Foschio refused to disqualify e-



discovery vendor D4 Discovery."; "On Friday, Kaleida, the largest non-profit health care provider in Western New York, filed papers with the United States District Court in Buffalo reaffirming its stance that Foschio erred and D4 should have been disqualified. Kaleida had originally hired D4 in 2010 after Kaleida was sued by a group of employees in a wage-and-hour class action alleging that they were owed regular and overtime wages. According to Foschio's opinion, Kaleida did not retain D4 for its e-discovery consulting services. Instead, Kaleida's attorneys at Nixon Peabody had decided to use predictive coding to go through its gigantic cache of 300,000 to 400,000 emails, and had hired D4 to provide scanning and coding services. In 2011, D4 entered into a contract to provide e-discovery consulting services to the plaintiffs. Despite D4's representation that its consultants had not been involved in the project for Nixon Peabody, Kaleida and Nixon Peabody objected."; "According to Foschio, there was no conflict of interest because D4's involvement with Kaleida was limited to scanning and coding documents and that Kaleida failed to show that D4 had access to any confidential information. Foschio drew a distinction between D4's duties to Kaleida, which he called 'a routine clerical function' and similar to photocopying documents, and the consulting services D4 provided to the plaintiffs, which Foschio described as 'requiring expert knowledge or skills.' Foschio held that D4 had not provided expert services to Kaleida, merely routine clerical work. As such, Foschio ruled that there was no conflict of interest when its consultants signed up to provide expert services to the plaintiffs."; "Foschio also found that Nixon Peabody's exposure to D4 was extremely limited. D4 had only been hired to code objective information into assigned fields and was not asked to identify substantive case issues or make subjective decisions about the documents. Foschio also noted that D4's was even more minimal since it had actually subcontracted its work for Kaleida to Infovision 21, Law 360's interface in Ohio. Additionally, Foschio pointed out that Nixon Peabody had utilized other companies, such as the Ricoh Company and Pangea 3 to provide other e-discovery services, as well as its own in-house e-discovery services."; "E-discovery consultant George Socha told Law Technology News that it is extremely rare to see an e-discovery vendor on both sides of the same case. Socha says that the Electronic Discovery Reference Model Code of Conduct, which he helped draft, encourages vendors to avoid these types of situations. 'It's never been my view that that's appropriate,' says Socha. 'If you are working for me on a matter as a e-discovery provider, what I'm looking for from your is your advice and counsel. That means you're on my team.'").

Both of these fact-intensive analyses presumably would apply to overseas outsourcing as well -- with the almost inevitable result that the overseas outsourcing arrangement involves a much more tenuous relationship with the hiring law firm.

Surprisingly, the several ethics opinions dealing with outsourcing do not extensively address conflicts of interest. All of them address the lawyer's duty of diligence in selecting the service provider, obligation to assure that the service provider provides confidentiality, and (with differing results) the lawyer's possible duty to disclose to the client that the lawyer has engaged in offshore outsourcing. However, the ethics opinions do not address a basic question -- does a lawyer arranging for offshore outsourcing have to confirm that the service provider is not simultaneously (1) working for the other side on the same matter, or (2) not working for one of the lawyer's client's other adversaries in an unrelated matter.

New York City LEO 2006-3 (8/2006) contained the following discussion under the heading "The Duty to Check Conflicts when Outsourcing Overseas."

DR 5-105(E) requires a law firm to maintain contemporaneous records of prior engagements and to have a system for checking proposed engagements against current and prior engagements. N.Y. State Opinion 720 (1999) concluded that a law firm must add information to its conflicts-checking system about the prior engagements of lawyers who join the firm. In N.Y. State Opinion 774 (2004), that Committee subsequently concluded that this same obligation does not apply when non-lawyers join a firm, but noted that there are circumstances under which it is nonetheless advisable for a law firm to check conflicts when hiring a non-lawyer, such as when the non-lawyer may be expected to have learned confidences or secrets of a client's adversary.

As 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 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.

New York City LEO 2006-3 (8/2006) (emphasis added).

Unfortunately, the legal ethics opinion did not explain what the lawyer should do with the information once the lawyer has obtained it.

It seems very unlikely that lawyers working for an overseas service provider would be considered "associated" with the law firm that hired them. When applied to temp lawyers, that status normally requires that the temporary lawyer have access to other law firm clients' confidences. ABA Model Rule 1.10(a); ABA LEO 356 (12/16/88).

Treating the lawyers working overseas as temp lawyers, it would seem that the lawyers would not be "associated" with the law firm that arranged for their involvement.

In contrast, to the extent that an overseas service provider is considered a "law firm" -- rather than a collection of temp lawyers -- for conflicts analysis, any individual lawyer's disqualification might be imputed to the entire operation overseas. That would prevent the service provider from assisting both sides of the same case.

Of course, every bar recognizes that a temporary lawyer's own involvement in a matter might result in the temp lawyer's acquisition of client confidences -- resulting in his or her individual disqualification. That would prevent the same overseas lawyer from working on both sides of the same case. However, it would seem that the overseas service provider could establish a screen between two groups of lawyers working on opposite sides of the same case. However, such a tactic could would create an enormous risk, because a court or bar might find it almost inevitable that such an

internal screen would not be effective (especially with no daily oversight from the lawyers in the United States handling the matter).

**Best Answer**

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

B 11/14

## Imputation Rules When Hiring Non-Lawyers

### Hypothetical 26

You have been advising one of your firm's offices in a state that does not allow screening of lawyers to avoid imputed disqualification of an individually disqualified lawyer. That office is considering hiring several paralegals who previously worked at your law firm's largest competitor.

You work in-house in a state that does not allow screening of lawyers to avoid imputed disqualification of an individually disqualified lawyer. Your law department is considering hiring several paralegals who previously worked at a law firm that is frequently adverse to your company.

- (a) Do you risk imputed disqualification of your law department by hiring a paralegal who has been working on the other side of a large case that goes to trial next year?

YES

- (b) Will you be able to avoid any risk of imputed disqualification by screening any individually disqualified paralegal from your side of the case?

MAYBE

### Analysis

(a)-(b) Although the imputed disqualification rules governing lateral lawyer hires can be complicated, hiring non-lawyers can involve even more subtle issues -- many of which are unfortunately addressed only in legal ethics opinions rather than black letter rules or in comments.

### Introduction

The authorities (such as the ABA Model Rules) generally reflect a counterintuitive approach to the "Typhoid Mary" effect of hiring non-lawyers with material confidential information that the hiring firm could use against its adversaries.

At first blush, one would think that firms would face greater risks when hiring non-lawyers than when hiring lawyers. After all, non-lawyers at law firms clearly have as much (if not more) material confidential information about clients than lawyers possess. Perhaps more importantly non-lawyers (1) might not understand the remarkably stringent rules prohibiting disclosure of such information to anyone outside the law firm where they were working at the time they acquired the information, and (2) do not risk losing their ability to work if they violate such stringent rules (although they might face civil or even criminal sanctions, they do not risk loss of a bar license and their livelihood). Thus, the factors would seem to weigh in favor of a greater application of the "Typhoid Mary" imputation effect when hiring non-lawyers.

### **ABA Model Rules and Restatement**

However, the ABA Model Rules take exactly the opposite approach.

A comment to the ABA Model Rules explicitly indicates that a non-lawyer's individual disqualification is not imputed to the entire law firm.

The [automatic imputed disqualification] rule in paragraph (a) also does not prohibit representation by others in the law firm where the person prohibited from involvement in a matter is a non-lawyer, such as a paralegal or legal secretary. Nor does paragraph (a) prohibit representation if the lawyer is prohibited from acting because of events before the person became a lawyer, for example, work that the person did as a law student. Such persons, however, ordinarily must be screened from any personal participation in the matter to avoid communication to others in the firm of confidential information that both the non-lawyers and the firm have a legal duty to protect.

ABA Model Rule 1.10 cmt. [4] (emphases added). The comment's reference to paralegals and legal secretaries makes it clear that this general principle applies even to folks who have as much (if not more) confidential information about clients than lawyers

possess. In other words, this approach does not apply just to mail clerks, accounts receivable folks, etc. -- who might not possess material client confidences.

Significantly, the ABA comment also does not condition the non-imputation on any type of screening. Instead, the comment merely indicates that hiring law firms "ordinarily" must screen individually disqualified non-lawyers.

The Restatement takes the same basic approach. Restatement § 123 describes the general imputation principle as applying only to lawyers.

A comment bluntly states that the imputation principle simply does not apply to non-lawyers.

Non-lawyer employees of a law office owe duties of confidentiality by reason of their employment. . . . However, their duty of confidentiality is not imputed to others so as to prohibit representation of other clients at a subsequent employer. Even if the person learned the information in circumstances that would disqualify a lawyer and the person has become a lawyer, the person should not be regarded as a lawyer for purposes of the imputation rules of this Section.

Restatement (Third) of Law Governing Lawyers § 123 cmt. f (2000) (emphasis added).

A Reporter's Note applies this approach to law firm subsidiaries' non-lawyer employees, but also warning that one might expect challenges to its logic.

One would expect a less sharp line to be drawn between lawyers and non-lawyers for purposes of imputed prohibition if the law firm in question has one or more non-law-firm subsidiaries as part of its overall organizations. Because of the significant incentive to make improper use of the information, one would expect to see efforts to disqualify law firms, for example, if their affiliated consulting organization earlier acquired confidential information from the current opponent in litigation. Pending such development of the law, however, the legal rule is as described.

The Restatement (Third) of Law Governing Lawyers § 123 reporter's note cmt. f (2000).

A comment next provides a lengthy explanation of this difference.

Some risk is involved in a rule that does not impute confidential information known by non-lawyers to lawyers in the firm. For example, law students might work in several law offices during their law-school careers and thereby learn client information at Firm A that could be used improperly by Firm B. Experienced legal secretaries and paralegal personnel similarly often understand the significance and value of confidential material with which they work. Incentives exist in many such cases for improper disclosure or use of the information in the new employment.

On the other hand, non-lawyers ordinarily understand less about the legal significance of information they learn in a law firm than lawyers do, and they are often not in a position to articulate to a new employer the nature of the information gained in the previous employment. If strict imputation were applied, employers could protect themselves against unanticipated disqualification risks only by refusing to hire experienced people. Further, non-lawyers have an independent duty as agents to protect confidential information, and firms have a duty to take steps designed to assure that the non-lawyers do so. . . . Adequate protection can be given to clients, consistent with the interest in job mobility for non-lawyers, by prohibiting the non-lawyer from using or disclosing the confidential information . . . but not extending the prohibition on representation to lawyers in the new firm or organization. If a non-lawyer employee in fact conveys confidential information learned about a client in one firm to lawyers in another, a prohibition on representation by the second firm would be warranted.

Id. (emphasis added).

This analysis does not make much sense. Many non-lawyers possess just as much protected client information as lawyers. And they are not as likely to understand the critical importance of confidentiality. Perhaps even more importantly, they do not risk losing their professional license if they violate their confidentiality duty.

### **State Approaches**

Unfortunately for anyone seeking certainty in the hiring process, states have taken widely varying approaches to lawyers' risks when hiring non-lawyers.



Some courts hold that paralegals are subject to the same rules governing imputed disqualification as are lawyers. In jurisdictions that do not recognize screening devices as adequate protection against a lawyer's potential conflict in a new law firm, neither a 'cone of silence' nor any other screening device will be recognized as a proper or effective remedy where a paralegal who has switched firms possesses material and confidential information.

ABA Model Guidelines for Paralegals, cmt. to Guideline 7. And to make matters more complicated and difficult to assess, states' guidance normally appears in legal ethics opinions rather than in ethics rules.

Interestingly, no state seems to follow the ABA Model Rules or Restatement approach, which suggests but does not require hiring firms to screen non-lawyers with material confidential information -- or else risk disqualification based on their imputed disqualification to the firm.

Instead, most states focus on one or both of two factors -- (1) non-lawyers' acquisition of material protected client information while working at the old firm (with presumptions about whether that has occurred or not), and (2) lateral non-lawyer hires' disclosure of material protected client information to his or her new colleagues at the hiring law firm (including various presumptions that such disclosure has occurred or not). The ABA Model Guidelines for Paralegals addresses these two settings.

Disqualification is mandatory where the paralegal gained information relating to the representation of an adverse party while employed at another law firm and has revealed it to lawyers in the new law firm, where screening of the paralegal would be ineffective, or where the paralegal would be required to work on the other side of the same or substantially related matter on which the paralegal had worked while employed at another firm. When a paralegal moves to an opposing firm during ongoing litigation, courts have held that a rebuttable presumption exists that the paralegal will share client confidences.

ABA Model Guidelines for Paralegals, cmt. to Guideline 7.

Despite this uncertainty, the stakes can be high.

In one interesting case (reported in a newspaper but not in any case law), a large law firm threatened to disqualify another firm that was planning to hire one of its paralegals.

- Nathan Carlile, Holland & Knight Sued for Tortious Interference, Legal Times, Jan. 4, 2008 (reporting that a paralegal who had committed to leave Holland & Knight and join Hughes, Hubbard & Reed had filed a lawsuit against her former firm Holland & Knight after Hughes Hubbard withdrew its employment offer after Holland & Knight had raised the possibility of a conflict caused by her move; explaining that Hughes Hubbard was representing a plaintiff in a lawsuit against a Spanish government involved in an oil spill off the Spanish coast, and that the paralegal had billed approximately 15 hours while at Holland & Knight working for its client (Spain) in that litigation; quoting the paralegal as arguing that she "did not participate in legal strategy, had no direct contact or communications with the client, and had no involvement with the preparation of court filings, case chronologies or deposition outlines"; also quoting Holland & Knight as arguing that the paralegal "worked on a matter in which both firms were engaged as counsel," and that "because of knowledge she gained there was the possibility of a breach in client confidentiality"; also noting that a Holland & Knight partner told a Hughes Hubbard lawyer during a deposition in the case that Holland might try to disqualify Hughes Hubbard if the paralegal began working there).

It is worth addressing some of these various state permutations -- in order of increasing risk for the hiring law firm.

**First**, some states permit self-help screening of non-lawyer lateral hires despite prohibiting such self-help screening in the case of lawyer lateral hires.

- Texas Rule 1.06 cmt [19] ("A law firm is not prohibited from representing a client under paragraph (f) merely because a non-lawyer employee of the firm, such as a paralegal or legal secretary, has a conflict of interest arising from prior employment or some other source. Nor is a firm prohibited from representing a client merely because a lawyer of the firm has a conflict of interest arising from events that occurred before the person became a lawyer, such as work that the person did as a law clerk or intern. But the firm must ordinarily screen the person with the conflict from any personal participation in the matter to prevent the person's communicating to others in

the firm confidential information that the person and the firm have a legal duty to protect. See Rule 5.03; see also MODEL RULES PROF'L CONDUCT r. 1.10 cmt. 4 (AM. BAR. ASS'N 1983); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 123 cmt. f (AM. LAW INST. 2000).").

- USA Recycling Inc. v. Baldwin Endico Realty, No. 305816-2013, slip op. at 2-3, 12, 13, 15, 15-16 (N.Y. Sup. Ct. July 2, 2015) (disqualifying a lawyer based on his hiring of a paralegal who had previously worked for the adversary; "This motion was brought on by [an] order to show cause by Baldwin on November 3, 2014 seeking a stay of this proceeding, including a stay of the stipulation of settlement, and consolidation of this proceeding with three other proceedings pending in the Supreme Courts of Bronx County and Westchester County. Defendants also seek disqualification of the plaintiff's counsel Rocco F. D'Agostino Esq. upon the grounds that he had access to confidential information from a newly-hired paralegal, one James Monteleon, who had formerly been employed by, or concerned in the affairs of, attorneys representing Baldwin, its principals, and related entities controlled by the late Michael Endico. Defendant contends that Mr. Monteleon's familiarity with the affairs of the late Mr. Endico, and his attorneys, was subject to being improperly utilized in Mr. D'Agostino's prosecution and settlement of this action."; "Where the employer firm takes appropriate measures to isolate the new employee from the case in issue, disqualification will not lie. For example, the retention of a legal secretary/paralegal by plaintiff's counsel, who had worked on 'scores' of cases while employed by the defendant's firm including the case at bar, did not provide grounds for disqualification where plaintiff's counsel demonstrated that it did a satisfactory job of ensuring that its employee was and continued to be isolated from the former employer's case."; "A law firm which hires a secretary, paralegal or other non-lawyer employee who has previously worked at another firm must adequately supervise the non-lawyer not to disclose protected information obtained at the former law firm. This supervision may include instructing the non-lawyer not to disclose protected information or not to exploit such information. It is advisable that the firm conduct an inquiry, or comprehensive conflict check based on the non-lawyer's prior employment."; "There is simply no excuse for the failure of Mr. D'Agostino to make inquiry of his new employee and ascertain whether he should be shielded from participation in this suit, or whether, in the alternative, the consent of his adversary could be obtained to Mr. Monteleon's participation."; "The Court finds that Mr. Monteleon's extensive and unusual involvement in the affairs of the defendants, and his employment by attorneys representing the defendants, their corporations, and Mr. Endico's Estate necessitates disqualification. Although the distinction between a law school graduate awaiting admission and an attorney admitted to practice is not without significance, under the unusual circumstances of this case, given the extraordinary nature and extent of Mr. Monteleon's involvement, the impact on the defendant's expectation of

confidentiality is real and substantial. Due to this appearance of impropriety, the disqualification of Mr. D'Agostino as the counsel for plaintiff USA Recycling Inc. is mandated." (emphases added)).

- Texas LEO 650 (05/2015) (analyzing the following situation: "Firm A is a law firm representing the plaintiff, and Firm B is a law firm representing the defendant in a lawsuit. While the lawsuit is pending, Firm A hires a marketing assistant who had been previously employed as a marketing assistant at Firm B. Firm A seeks to determine whether it must withdraw from representing the plaintiff in the lawsuit, and if not, whether it must utilize screening procedures to prevent the new employee from being involved in the representation of the plaintiff and from sharing confidential information concerning the defendant with anyone in Firm A."; "Under the Texas Disciplinary Rules of Professional Conduct, a law firm representing a party in a lawsuit that hires an employee who is not a lawyer, paralegal or secretary but who was previously employed by the law firm that represents the opposing party in the lawsuit may in some circumstances be required to withdraw from the representation. The hiring law firm will be required to withdraw from the representation if the employee in question had in the prior employment worked on the lawsuit or otherwise had access to information concerning the prior employer's representation of the opposing party in the lawsuit and the hiring law firm fails to take effective steps, which normally would include screening the newly hired employee, to prevent the employee from disclosing or using in the hiring law firm confidential information related to the lawsuit. In all other circumstances, the hiring law firm will not be required to withdraw from the representation unless, regardless of the hiring law firm's attempts to prevent improper disclosure or use of any confidential information relating to the lawsuit acquired by the employee in the prior law firm, the employee actually discloses or uses such confidential information in the hiring law firm. Because issues of disqualification are determined by the courts based on standards that are not necessarily identical with the requirements of the Texas Disciplinary Rules of Professional Conduct, in some circumstances a law firm may be held to be disqualified from a representation even if there has been full compliance by the law firm with the requirements of the Texas Disciplinary Rules concerning successive employment of non-lawyer employees.").
- Ullman v. Denco, Inc., Case No. 2:14-cv-843 SMV/GBW, 2015 U.S. Dist. LEXIS 179860, at \*17-18, \*19, \*19-21, \*22 (D.N.M. Apr. 22, 2015) (disqualifying a law firm which hired a paralegal who had worked on the other side of the case the law firm was handling; acknowledging that non-lawyers can be screened to avoid imputations of their individual disqualification, but finding that the hiring law firm did not impose timely and effective screens; "Certain relevant factors have been identified by other courts to determine the effectiveness of a screen, including: '(1) the substantiality of the relationship between the former and current matters, (2) the time elapsed

between the matters, (3) the size of the firm, (4) the number of individuals presumed to have confidential information, (5) the nature of their involvement in the former matters, (6) the timing and features of any measures taken to reduce the danger of disclosure, and (7) whether the old firm and the new firm represent adverse parties in the same proceedings, rather than in different proceeding because inadvertent disclosure by the non-lawyer employee is more likely in the former situation.' [Liebowitz v. Eighth Judicial Dist. Court, 78 P.3d 515, 521 (Nev. 2003)]."; "The first factor weighs heavily against a finding of effectiveness. The matter on which HMM [Holt Mynatt Martinez] (with Gonzales as their screened employee) seeks to represent Defendants is the same matter on which Gonzales worked while with Plaintiffs' counsel. Similarly, the second factor weighs heavily against effectiveness. No time has elapsed between the matters because they are identical. In fact, less than a week transpired between the end of Gonzales' employment with Plaintiffs' counsel and her first day with HMM. The third factor also weighs against a finding of effectiveness. HMM is a relatively small firm comprised of nine attorneys, three of which are in a 'senior' status. . . . Three of the non-senior attorneys have entered their appearance in the instant case. Moreover, all attorneys and support staff for HMM work in the same building. . . . HMM's small size is highlighted by the fact that it needed Gonzales to start as soon as possible rather than being able to wait just over three weeks until after the scheduled mediation."; "The fourth factor weighs in favor of an effectiveness finding. Only one person -- Gonzales -- possesses the confidential information and needs to be screened. The fifth factor weighs strongly against an effectiveness finding. It is undisputed that Gonzales was heavily involved in the matter, both quantitatively and qualitatively, when she was employed by Plaintiffs' counsel. She worked extensively on the case, was involved in interviews of Plaintiffs, participated in litigation and settlement strategy meetings with Furth [plaintiff's lead lawyer], and knows Plaintiffs' 'bottom line' settlement numbers. The sixth factor is evenly balanced. The proposed screening rules are comprehensive. Indeed they mirror and, sometimes exceed, screens approved in other cases. . . . On the other hand, the confidential information possessed by Gonzales is particularly sensitive and susceptible to disclosure given how easily and quickly it could be revealed. Moreover, the Court notes the gap, albeit short, between the implementation of the screening procedures and HMM's contact with Gonzales. The seventh factor weighs heavily against a finding of effectiveness. Plaintiffs' counsel and HMM represent adverse parties in the same proceeding, rather than in different proceedings, making inadvertent disclosure by Gonzales significantly more likely." (footnote omitted); "Considering the factors as a whole, and the balance of interests the factors represent, I conclude that Defendants have failed to meet the burden of proving that the screen will be effective." (emphases added)).

- In re Johnston, 872 N.W.2d 300, 302, 303 (N.D. 2015) (reprimanding a lawyer for hiring a paralegal from an opposing law firm but not screening him;

"In January 2011, the Johnston Law Office hired Chrzanowski as a paralegal. Johnston made no effort to screen Chrzanowski from the West [Johnston's client] matter, despite his prior work on the Hansons' [Farroh's client] behalf as attorney Farroh's paralegal. Rather, Chrzanowski worked directly on West's case against Hanson, serving as a primary contact with West, meeting and exchanging emails with West, discussing litigation strategy, and drafting pleadings that were subsequently signed by Johnston."; "The hearing panel found Johnston violated N.D.R. Prof. Conduct 5.3(a), (b), and (c) by failing to adequately supervise paralegal Chrzanowski when Johnston failed to screen Chrzanowski from Johnston's litigation on behalf of West involving the same or a substantially related matter in violation of N.D.R. Prof. Conduct 1.7(a) and (c), and 1.9; and when Johnston purportedly held Chrzanowski out as a lawyer and turned West's legal matter over to Chrzanowski in violation of N.D.R. Prof. Conduct 5.5(a) and (d). The hearing panel also found Johnston violated N.D.R. Prof. Conduct 1.5(a) by charging an unreasonable fee in the unsuccessful attempt to recover the client's investment from an insolvent individual. Johnston objected and raises three main issues to this Court in response to the Board's recommendations.").

- Hodge v. Urfa-Sexton, LP, 758 S.E.2d 314, 317, 319, 321-22, 322, 323 (Ga. 2014) (holding that a law firm hiring a non-lawyer can avoid disqualification by screening the non-lawyer, but remanding for determination whether the law firm followed the proper procedures; "We granted certiorari in this case to determine whether the Court of Appeals correctly held that a conflict of interest involving a non-lawyer can be remedied by implementing proper screening measures in order to avoid disqualification of the entire law firm. For the reasons set forth below, we hold that a non-lawyer's conflict of interest can be remedied by implementing proper screening measures so as to avoid disqualification of an entire law firm. In this particular case, we find that the screening measures implemented by the non-lawyer's new law firm were effective and appropriate to protect against the non-lawyer's disclosure of confidential information. However, we remand this case to the trial court for a hearing to determine whether the new law firm promptly disclosed the conflict." (emphasis added) (footnote omitted); "There is a split of authority among the courts on this issue. The minority approach, which is what Hodge argues we should apply here, is to treat non-lawyers the same way we treat lawyers. Under this approach, when a non-lawyer moves to another firm to work for opposing counsel, the non-lawyer's conflict of interest is imputed to the rest of the firm, thereby disqualifying opposing counsel. . . . URFA-Sexton argues that we should adopt the majority approach and treat non-lawyers differently from lawyers. Under this approach, rather than automatic imputation and disqualification of the new firm, lawyers hiring the non-lawyer can implement screening measures to protect any client confidences that the non-lawyer gained from prior employment. . . . After reviewing both approaches, we join today with 'the majority of professional legal ethics commentators, ethics tribunals, and courts[, which] have concluded that non-

- lawyer screening is a permissible method to protect confidences held by non-lawyer employees who change employment." (emphasis added) (citation omitted); "Accordingly, as a matter of first impression, we set forth the following guidance for disqualification of a law firm based on a non-lawyer's conflict of interest. Once the new firm knows of the non-lawyer's conflict of interest, the new firm must give prompt written notice to any affected adversarial party or their counsel, stating the conflict and the screening measures utilized. . . . The adversarial party may give written consent to the new firm's continued representation of its client with screening measures in place." (emphasis added); "Absent written consent, the adversarial party may move to disqualify the new firm. The adversarial party must show that the non-lawyer actually worked on a same or substantially related matter involving the adversarial party while the non-lawyer was employed at the former firm. If the moving party can show this, it will be presumed that the non-lawyer learned confidential information about the matter. . . . This prevents the non-lawyer from having to disclose the very information that should be protected." (footnote omitted); "Once this showing has been made, a rebuttable presumption arises that the non-lawyer has used or disclosed, or will use or disclose, the confidential information to the new firm. . . . The new firm may rebut this by showing that it has properly taken effective screening measures to protect against the non-lawyer's disclosure of the former client's confidential information. . . . If the new firm can sufficiently rebut the presumption and show that it promptly gave written notice of the non-lawyer's conflict, then disqualification is not required." (emphasis added); "The firm administrator immediately implemented and confirmed electronic screening measures with Bussey, including taking steps to restrict Bussey's access to any information about the Williams case, implementing security measures to prevent Bussey from accessing any computerized information maintained by Insley & Race regarding the Williams case, and testing the security measures he implemented to ensure their success. Since October 5, Bussey has been unable to access the case management system used by Insley & Race for the Williams matter, including any calendar events, contact information, documents, and billing information for the Williams case. Additionally, the physical file was removed from the general file room and securely placed in the office of an associate.").
- In re Guar. Ins. Servs., Inc., 343 S.W.3d 130, 134 (Tex. 2011) (reversing disqualification of a law firm based on its hiring of a paralegal, and failure to properly screen the paralegal; explaining the Texas approach: "If the lawyer works on a matter, there is an irrebuttable presumption that the lawyer obtained confidential information during the representation. . . . When the lawyer moves to another firm and the second firm represents an opposing party to the lawyer's former client, a second irrebuttable presumption arises -- that the lawyer has shared the client's confidences with members of the second firm. . . . The effect of this second presumption is the mandatory disqualification of the second firm."; "But the rule is different for non-lawyers.

A non-lawyer who worked on a matter at a prior firm is also subject to a *conclusive* presumption that confidences were *obtained*. . . . However, the second presumption [--] that confidences were *shared* with members of the second firm [--] may be rebutted where non-lawyers are concerned."

(emphasis added; emphasis in original indicated by italics); explaining that the law firm did not properly screen the paralegal at first, but took remedial steps on finding the issue; explaining that the firm overcame the presumption that the paralegal had shared confidences with the new firm).

- Mississippi LEO 258 (12/1/11) (allowing screening of a paralegal hiree to avoid imputed disqualification; "The Ethics Committee of the Mississippi Bar has been asked to render an opinion on the following question: A paralegal worked for approximately six years at Firm 1. Corporation A was one of numerous Defendants in a lawsuit in which Firm 1 represented Corporation A as local counsel. The paralegal's involvement in the lawsuit was minimal with the total time spent being approximately fifteen (15) hours and consisting primarily of filing documents with the Court for Corporation A's national counsel. The paralegal never met with representatives of Corporation A. Corporation A settled the lawsuit with the Plaintiff approximately two years ago. Firm 2 and other firms represent the Plaintiff in the lawsuit against the remaining Defendants. The paralegal has now joined Firm 2. Under the Mississippi Rules of Professional Conduct, does the paralegal's employment at Firm 2, wherein she would assist counsel for the Plaintiff in the lawsuit against the remaining Defendants, constitute an ethical violation due to her involvement with Firm 1, who defended Corporation A in the same lawsuit."; "It is the opinion of the Ethics Committee that disqualification of a paralegal is not imputed to the firm so long as the non-lawyer is screened to protect confidential information. The screening process of a non-lawyer should involve the supervisory lawyer cautioning the non-lawyer (1) not to disclose any information relating to the representation of a client of the former employer; and (2) that the employee should not work on any matter in which the employee worked for the prior employer or respecting which the employee has information relating to the representation of the client of the former employer. When the new firm becomes aware of such matters, the employing firm must also take reasonable steps to ensure that the employee takes no action and does no work in relation to matters on which the non-lawyer worked in the prior employment absent written consent from the prior client." (emphasis added); "Sometimes a firm may be disqualified from representing a client when the firm employs a non-lawyer who formerly was employed by another firm. These circumstances are present either (1) where information relating to the representation of an adverse party gained by the non-lawyer while employed in another firm has been revealed to lawyers or other personnel in the new firm; or (2) where screening would be ineffective or the non-lawyer necessarily would be required to work on the other side of the same or a substantially related matter on which the non-lawyer or



respecting which the non-lawyer has gained information relating to the representation of the opponent while in the former employment.").

- In re Columbia Valley Healthcare Sys., L.P., 320 S.W.3d 819, 822, 823, 824, 826, 827, 828, 829 (Tex. 2010) (analyzing the ethics implications of a paralegal joining a law firm representing the opposite side of the paralegal's former firm; ultimately disqualifying the law firm; "In this original mandamus proceeding, we must determine whether a law firm should be disqualified from the underlying suit on the basis of a legal assistant's work on the matter after previously having worked on the same matter while employed by opposing counsel. We have previously held that a firm can usually avoid disqualification when hiring an assistant who previously worked on a matter for opposing counsel if the firm (1) instructs the assistant not to work on the matter, and (2) takes other reasonable steps to shield the assistant from working in connection with the matter. In re Am. Home Prods. Corp., 985 S.W.2d 68, 75 (Tex. 1998). We have not, however, set forth the types of 'other reasonable steps' that are required, nor have we addressed whether disqualification is required when an assistant actually works on the matter for the second firm."; "Because the legal assistant's employer did not take effective reasonable steps to shield the assistant from working on the case, and the assistant actually worked on the case at her employer's directive, we hold that disqualification is required and direct the trial court to grant the defendant's motion to disqualify and recuse plaintiffs' counsel."; "Despite the oral instructions from Magallanes, Rodriguez had contact with the Leal file on a few occasions while working at Magallanes & Hinojosa. According to Rodriguez, her contact consisted of the following: (1) filing correspondence related to the Leal case; (2) rescheduling a docket control conference; (3) preparing an order and sending correspondence to counsel concerning a docket control conference; (4) calling Gault's legal assistant regarding the docket control conference; (5) calendaring dates regarding the case on Magallanes' calendar; and (6) making a copy of a birth certificate and social security card in the case at Magallanes' directive on one occasion. When Magallanes learned that Rodriguez had scheduled the docket control conference, he again orally instructed her not to work on the case, and held a meeting where he informed both Rodriguez and Castro that they would be dismissed if this happened again."; "[U]nlike with attorneys, a non-lawyer is not generally subject to an irrebuttable presumption of having shared confidential information with members of the new firm. . . . Instead, this second presumption can be overcome, but only by a showing that: (1) the assistant was instructed not to perform work on any matter on which she worked during her prior employment, or regarding which the assistant has information related to her former employer's representation, and (2) the firm took 'other reasonable steps to ensure that the [assistant] does not work in connection with matters on which the [assistant] worked during the prior employment, absent client consent.'" (emphasis added); "With these principles in mind, we conclude that a simple informal admonition to a non-

lawyer employee not to work on a matter on which the employee previously worked for opposing counsel, even if repeated twice and with threat of termination, does not satisfy the 'other reasonable measures' a firm must take to properly shield an employee from the litigation. Instead, the other reasonable measures must include, at a minimum, formal, institutionalized screening measures that render the possibility of the non-lawyer having contact with the file less likely." (emphasis added); "Despite the screening measures used, if the employee actually works on the case at her employer's directive, as happened here, and the employer reasonably should know about the conflict of interest, then the presumption of shared confidences must become conclusive."; "In summary, when considering a motion to disqualify on the basis of a firm's employment of a non-legal employee who previously worked on the same or a substantially related matter for opposing counsel, the trial court must consider whether the hiring firm has rebutted the presumption of shared confidences. To rebut this presumption, the hiring firm must demonstrate that (1) the employee was instructed not to work on any matter which she worked on during her prior employment, or regarding which the employee has information related to her former employer's representation, and (2) the firm took other reasonable steps to ensure that the employee does no work in connection with matters on which the employee worked during the prior employment, absent client consent. These other reasonable steps must include, at a minimum, formal, institutional measures to screen the employee from the case." (emphasis added); "We finally note that these requirements apply only to non-lawyer employees who have access to material information relating to the representation of clients, as well as agents who technically may be independent contractors, such as investigators." (emphasis added); "Magallanes asked Rodriguez to make copies for the Leal case on one occasion. Making copies is perhaps a simple, clerical matter, yet the message sent not only to Rodriguez but other employees at the firm was that Magallanes & Hinojosa was not serious about guarding against conflicts of interest.").

- Hamilton v. Dowson Holding Co., Civ. No. 2008/02 & 2008/10, 2009 U.S. Dist. LEXIS 57715, at \*14-15 (D. V.I. July 2, 2009) ("In this jurisdiction, where a non-lawyer employee has learned the confidences of an adversary, a rebuttable presumption arises that the non-lawyer employee will disclose the confidential information to the new employer. . . . Once the presumption arises, it must be rebutted by competent evidence that the non-lawyer employee has not shared any confidential evidence with the new firm.").
- Virginia LEO 1832 (5/10/07) (explaining that although not bound by lawyers' ethics rules, law firms' secretaries must maintain the confidentiality of information they learn; warning that a secretary who receives confidential information from a prospective client whom the law firm does not represent (because it wishes to or already does represent the prospective client's adversary) must maintain the confidentiality of that information; explaining

- that lawyers in that firm can avoid disqualification from representing the adversary if the lawyers screen the secretary from the matters, instruct the secretary "that she cannot reveal to the lawyer any confidential information obtained from Ms. X [the prospective client]," and use another staff person to work on the matter; also noting that the law firm "should send a written communication to Ms. X or her lawyer that these measures have been taken."; ultimately such screens do not prevent imputed disqualification involving an individually disqualified lawyer, but can successfully avoid imputation of a non-lawyer's individual disqualification; warning that the firm may have to withdraw from representing the adversary if the screen is breached; recommending that "the firm train non-lawyer support staff to minimize confidential information obtained from prospective clients before they can perform the necessary conflicts analysis."
- New York LEO 774 (3/23/04) ("When a law firm hires a secretary, paralegal, or other non-lawyer who has previously worked at another law firm, the law firm must adequately supervise the conduct of the non-lawyer. Supervisory measures may include i) instructing the non-lawyer not to disclose protected information acquired at the former law firm and ii) instructing lawyers not to exploit such information if proffered. In some circumstances, it is advisable that the law firm inquire whether the non-lawyer acquired confidential information from the former law firm about a current representation of the new firm or conduct a more comprehensive conflict check based on the non-lawyer's prior work. The results of such an inquiry will help determine whether the new firm should take further steps, such as seeking the opposing party's consent and/or screening the non-lawyer."; "Occasionally, however, a law firm will conclude that screening the non-lawyer will not adequately protect an opposing party's confidences and secrets. For example, if the non-lawyer had substantial exposure to relevant confidential information at the old firm and will now be working closely with the lawyers who are handling the opposite side of the same matter, or where the structure and practices of the firm make it difficult to isolate a non-lawyer from confidential conversations or documents pertaining to a given matter, a law firm may be obliged to adopt measures more radical than screening" such as "[o]btaining consent from the opposing law firm's client," "[t]erminating the non-lawyer," or "[w]ithdrawing from the matter in question. Concluding that ("[w]hen a New York law firm hires a non-lawyer who has previously worked at another law firm, the hiring firm must, as part of its supervisory responsibilities under DR 1-104(C) and DR 4-101(D), exercise adequate supervision to ensure that the non-lawyer does not reveal any confidences or secrets that the non-lawyer acquired while working at the other law firm. . . . If a law firm learns that a non-lawyer did acquire information protected by DR 4-101(B) that is material to a matter in which the adversary is represented by the non-lawyer's former employer, the law firm should adopt appropriate measures to guard against improper disclosure of protected information.").New York LEO 774 (3/23/04) ("When a New York law firm hires a non-lawyer who has previously worked at another

- law firm, the hiring firm must, as part of its supervisory responsibilities under DR 1-104(C) and DR 4-101(D), exercise adequate supervision to ensure that the non-lawyer does not reveal any confidences or secrets that the non-lawyer acquired while working at the other law firm. . . . If a law firm learns that a non-lawyer did acquire information protected by DR 4-101(B) that is material to a matter in which the adversary is represented by the non-lawyer's former employer, the law firm should adopt appropriate measures to guard against improper disclosure of protected information."; explaining that the appropriate steps the law firm might take include screening of the non-lawyer or "measures more radical than screening" such as: "[o]btaining consent from the opposing law firm's client," "[t]erminating the non-lawyer," or "[w]ithdrawing from the matter in question").
- In re Mitcham, 133 S.W.3d 274, 276 (Tex. 2004) (assessing the imputed disqualification impact of a paralegal (who later obtained a law degree) moving from firm to firm; "[W]e have recognized different standards for attorneys and their assistants. For attorneys, there is an irrebut[t]able presumption they gained confidential information on every case at the firm where they work (whether they work on them or not), . . . and an irrebuttable presumption they share that information with the members of a new firm . . . . For legal assistants, there is an irrebut[t]able presumption they gain confidential information only on cases on which they work, and a rebuttable presumption they share that information with a new employer. . . . The last presumption is rebutted not by denials of disclosure, but by prophylactic measures assuring that legal assistants do not work on matters related to their prior employment."; holding that a law firm's contractual agreement not to bring certain lawsuits because of the paralegal's employment had no time limit and required the new firm's disqualification even after the paralegal/lawyer had left that firm).
  - Virginia LEO 1800 (10/8/04) (explaining that a two-member law firm hiring a secretary who until the previous week was the only secretary at another two-member law firm representing a litigation adversary will not be disqualified from the case, as long as the new firm: warns the secretary not to reveal or use any client confidences acquired at the old firm; advises all lawyers and staff not to discuss the matter with the new secretary; screens the new secretary from the litigation matter (including the new firm's files on the matter); recommending that the new firm "develop a written policy statement" regarding such situations, and note the need for confidentiality "on the cover of the file in question.").
  - In re TXU US Holdings Co., 110 S.W.3d 62, 65 (Tex. App. 2002) (explaining that "[a] different rule applies to a firm which hires a non-lawyer who previously worked for opposing counsel. . . . If the former client establishes that the non-lawyer worked on its case, a conclusive presumption exists that the client's confidences were imparted to the non-lawyer. . . . Unlike the irrebuttable presumption which exists for a disqualified attorney however, a

rebuttable presumption exists that a non-lawyer has shared the confidences of a former client with his new employer. . . . The presumption may be rebutted 'only by establishing that "sufficient precautions have been taken to guard against any disclosure of confidences."' (citation omitted); explaining that "non-lawyers are treated differently because of 'a concern that the mobility of a non-lawyer could be unduly restricted'" (citation omitted); applying the irrebuttable presumption because the person who moved from firm to firm had been a non-lawyer at one firm but gained her law degree and moved to another firm as a lawyer; conditionally granting a writ of mandamus and disqualifying the law firm she joined from representing plaintiffs in asbestos actions).

**Second**, some states allow the screening of non-lawyer lateral hires to avoid imputed disqualification -- essentially paralleling the rule that those states also follow when hiring lawyers.

- Fedora v. Werber, 84 A.3d 812, 814 (R.I. 2013) (treating a paralegal who moved to another law firm in the same way as a lawyer; declining to disqualify the law firm to which the paralegal moved, because she was screened when she joined the other law firm, but concluding that the new law firm had not adequately provided notice to the former client; "Here, Ms. Jardon began her employment with D&W [DeLuca & Weizenbaum] on September 14, 2009, and D&W did not provide notice of its screening measures to GSM until December 7, 2009, nearly three months later. Furthermore, as the trial justice noted, notice was not independently provided; rather, it was incorporated into plaintiff's objection to defendant's motion to disqualify D&W. Ms. Jardon was employed by D&W for roughly six weeks while Dr. Moulton's case was pending. We are satisfied, therefore, that the trial justice did not abuse her discretion when she determined that D&W's actions failed to constitute prompt notice under Rule 1.10(c)(2).").
- Pennsylvania LEO 98-75 (12/4/98) ("Lawyers are forbidden to represent a client if that representation will be adverse to another client. Rule 1.7. Rule 1.10 imputes the disqualification of a lawyer in a law firm to the other lawyers when any one of them has a prohibited conflict of interest. The principles of these sections have been extended to non-lawyer assistants. Their conflicts of interest can be charged to their employing lawyer or law firm. But a non-lawyer assistant who arrives with a disqualifying conflict of interest may be employed if the sanitizing procedure of Rule 1.10(b) is followed: She must be screened and the client must be notified.").
- North Carolina RPC 176 (7/21/94) ("The imputed disqualification rules contained in Rule 5.11 of the Rules of Professional Conduct do not apply to non-lawyers. However, Attorney B must take extreme care to ensure that Paralegal is totally screened from participation in the case even if Paralegal's

involvement in the case while employed by Attorney A was negligible. See RPC 74. This requirement is consistent with a lawyer's duty, pursuant to Rule 3.3(b), to make reasonable efforts to ensure that the conduct of a non-lawyer over whom the lawyer has direct supervisory authority is compatible with the professional obligations of the lawyer including the obligation to avoid conflicts of interest and to preserve the confidentiality of client information.").

**Third**, some courts have not allowed screening of non-lawyer lateral hires, thus imputing such a lateral hire's individual disqualification to the entire hiring firm -- as those states do with lawyers.

- In re Complex Asbestos Litig., 283 Cal. Rptr. 732 (Cal. Ct. App. 1991) (disqualifying a plaintiff's asbestos law firm which hired a paralegal who had been involved in defending asbestos case at another firm).

**Fourth**, at least one bar indicated that paralegals should be treated like lawyers under that state's imputed disqualification rules, while non-lawyers other than paralegals should be treated differently (implicitly allowing their screening to avoid any imputed disqualification).

- Los Angeles County LEO 524 (5/16/11) (explaining the imputed disqualification rules for non-lawyer employees; not including paralegals "as paralegals are subject to the same confidentiality requirements as attorneys under the provisions of Business & Professions Code Section 6453."; "The Committee believes that it is the obligation of the hiring firm, before hiring a non-lawyer employee who has worked on matters at another firm, to conduct a reasonable investigation into whether the proposed employee has been exposed to or acquired confidential information during prior employment relevant to legal matters which may arise in the course of the new employment. The hiring firm should in particular ascertain whether the proposed employee's former firm is or has been opposing counsel to the hiring firm on any current cases, to determine whether the proposed employee has been exposed to confidential information of an adverse party or witness regarding those cases. However, the hiring firm must not attempt to delve into the substance of any information the non-lawyer may have acquired. It is the obligation of the hiring firm to instruct the non-lawyer employee, once hired, as to his or her confidentiality obligations, and, absent first obtaining the consent of the former employer or the affected client of the former employer, to promptly screen the non-lawyer employee from involvement in particular matters if the non-lawyer is in possession of confidential information which is materially related to matters in which the

hiring firm represents an adversary party."; "Elements of an adequate screen include written notification to all legal staff to isolate the screened employee from communication regarding the matter, prevention of the screened employee's access to the relevant files, admonishment of the employee not to discuss the prior matter with the new firm, and a search of the firm's records to ensure that all cases on which the new employee's former firm is opposing counsel are identified. . . . The Committee believes that electronic security is also an important element of an effective screen. Electronic files should be password-protected and the password withheld from screen employees. Effective practices may also include documenting the continued existence and impermeability of the screen, for example by periodic electronic or written reminders to all staff or by requiring periodic certification by screened staff that they have not breached the screen.").

Some of these cases and ethics opinions focus on the timing and elements of an effective screen, which of course arises in the lawyer context as well.

- Hodge v. Urfa-Sexton, LP, 758 S.E.2d 314, 317, 319, 321-22, 322, 323 (Ga. 2014) (holding that a law firm hiring a non-lawyer can avoid disqualification by screening the non-lawyer, but remanding for determination whether the law firm followed the proper procedures; "We granted certiorari in this case to determine whether the Court of Appeals correctly held that a conflict of interest involving a non-lawyer can be remedied by implementing proper screening measures in order to avoid disqualification of the entire law firm. For the reasons set forth below, we hold that a non-lawyer's conflict of interest can be remedied by implementing proper screening measures so as to avoid disqualification of an entire law firm. In this particular case, we find that the screening measures implemented by the non-lawyer's new law firm were effective and appropriate to protect against the non-lawyer's disclosure of confidential information. However, we remand this case to the trial court for a hearing to determine whether the new law firm promptly disclosed the conflict." (footnote omitted); "There is a split of authority among the courts on this issue. The minority approach, which is what Hodge argues we should apply here, is to treat non-lawyers the same way we treat lawyers. Under this approach, when a non-lawyer moves to another firm to work for opposing counsel, the non-lawyer's conflict of interest is imputed to the rest of the firm, thereby disqualifying opposing counsel. . . . URFA-Sexton argues that we should adopt the majority approach and treat non-lawyers differently from lawyers. Under this approach, rather than automatic imputation and disqualification of the new firm, lawyers hiring the non-lawyer can implement screening measures to protect any client confidences that the non-lawyer gained from prior employment. . . . After reviewing both approaches, we join today with 'the majority of professional legal ethics commentators, ethics tribunals, and courts[, which] have concluded that non-lawyer screening is a permissible method to protect confidences held by non-lawyer employees

who change employment." (citation omitted); "Accordingly, as a matter of first impression, we set forth the following guidance for disqualification of a law firm based on a non-lawyer's conflict of interest. Once the new firm knows of the non-lawyer's conflict of interest, the new firm must give prompt written notice to any affected adversarial party or their counsel, stating the conflict and the screening measures utilized. . . . The adversarial party may give written consent to the new firm's continued representation of its client with screening measures in place." (emphasis added); "Absent written consent, the adversarial party may move to disqualify the new firm. The adversarial party must show that the non-lawyer actually worked on a same or substantially related matter involving the adversarial party while the non-lawyer was employed at the former firm. If the moving party can show this, it will be presumed that the non-lawyer learned confidential information about the matter. . . . This prevents the non-lawyer from having to disclose the very information that should be protected."; "Once this showing has been made, a rebuttable presumption arises that the non-lawyer has used or disclosed, or will use or disclose, the confidential information to the new firm. . . . The new firm may rebut this by showing that it has properly taken effective screening measures to protect against the non-lawyer's disclosure of the former client's confidential information. . . . If the new firm can sufficiently rebut the presumption and show that it promptly gave written notice of the non-lawyer's conflict, then disqualification is not required."; "The firm administrator immediately implemented and confirmed electronic screening measures with Bussey, including taking steps to restrict Bussey's access to any information about the Williams case, implementing security measures to prevent Bussey from accessing any computerized information maintained by Insley & Race regarding the Williams case, and testing the security measures he implemented to ensure their success. Since October 5, Bussey has been unable to access the case management system used by Insley & Race for the Williams matter, including any calendar events, contact information, documents, and billing information for the Williams case. Additionally, the physical file was removed from the general file room and securely placed in the office of an associate.").

- Fedora v. Werber, 84 A.3d 812, 814 (R.I. 2013) (treating a paralegal who moved to another law firm in the same way as a lawyer; declining to disqualify the law firm to which the paralegal moved, because she was screened when she joined the other law firm, but concluding that the new law firm had not adequately provided notice to the former client; "Here, Ms. Jardon began her employment with D&W [DeLuca & Weizenbaum] on September 14, 2009, and D&W did not provide notice of its screening measures to GSM until December 7, 2009, nearly three months later. Furthermore, as the trial justice noted, notice was not independently provided; rather, it was incorporated into plaintiff's objection to defendant's motion to disqualify D&W. Ms. Jardon was employed by D&W for roughly six weeks while Dr. Moulton's case was pending. We are satisfied, therefore, that the trial justice did not abuse her



discretion when she determined that D&W's actions failed to constitute prompt notice under Rule 1.10(c)(2)." (emphasis added)).

- Los Angeles County LEO 524 (5/16/11) (explaining the imputed disqualification rules for non-lawyer employees; not including paralegals "as paralegals are subject to the same confidentiality requirements as attorneys under the provisions of Business & Professions Code Section 6453."; "The Committee believes that it is the obligation of the hiring firm, before hiring a non-lawyer employee who has worked on matters at another firm, to conduct a reasonable investigation into whether the proposed employee has been exposed to or acquired confidential information during prior employment relevant to legal matters which may arise in the course of the new employment. The hiring firm should in particular ascertain whether the proposed employee's former firm is or has been opposing counsel to the hiring firm on any current cases, to determine whether the proposed employee has been exposed to confidential information of an adverse party or witness regarding those cases. However, the hiring firm must not attempt to delve into the substance of any information the non-lawyer may have acquired. It is the obligation of the hiring firm to instruct the non-lawyer employee, once hired, as to his or her confidentiality obligations, and, absent first obtaining the consent of the former employer or the affected client of the former employer, to promptly screen the non-lawyer employee from involvement in particular matters if the non-lawyer is in possession of confidential information which is materially related to matters in which the hiring firm represents an adversary party."; "Elements of an adequate screen include written notification to all legal staff to isolate the screened employee from communication regarding the matter, prevention of the screened employee's access to the relevant files, admonishment of the employee not to discuss the prior matter with the new firm, and a search of the firm's records to ensure that all cases on which the new employee's former firm is opposing counsel are identified. . . . The Committee believes that electronic security is also an important element of an effective screen. Electronic files should be password-protected and the password withheld from screen employees. Effective practices may also include documenting the continued existence and impermeability of the screen, for example by periodic electronic or written reminders to all staff or by requiring periodic certification by screened staff that they have not breached the screen." (emphasis added)).

### **Best Answer**

The best answer to (a) is **YES**; and the best answer to (b) is **MAYBE**.<sup>B 11/14; B 12/16</sup>

## Duty to Supervise Lawyers and Non-Lawyers

### Hypothetical 27

You just hired two new lawyers and one new assistant. The lawyers recently graduated from law school, and the assistant had previously worked only for doctors. Having been a sole practitioner until now, you wonder about the ethical and professional implications of bringing on new folks like this.

- (a) Do you have any responsibility for assuring that lawyers and non-lawyers you supervise comply with the ethics rules?

**YES**

- (b) Can you be held responsible for any ethics violations by lawyers and non-lawyers you supervise?

**YES**

### Analysis

The ethics rules contain provisions that deal with lawyers supervising other lawyers and non-lawyers.

- (a) Not surprisingly, the ethics rules deal with a supervising lawyer's responsibilities.

A partner in a law firm, or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

ABA Model Rule 5.1(a).

Thus, lawyers who manage other lawyers must take reasonable steps to put in place "measures" that provide at least reasonable assurance that lawyers in the firm comply with the ethics rules. Comment [2] to that rule mentions such "internal policies

and procedures" as those designed to identify conflicts, assure that filing and other deadlines are met, provide for proper trust account processes, etc. ABA Model Rule 5.1 cmt. [2]. Comment [3] explains that the measures lawyers may take to comply with this managerial responsibility can vary according to the size of the law firm.

In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. . . . Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members, and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

ABA Model Rule 5.1 cmt. [3].

ABA Model Rule 5.1(b) applies to lawyers who have "direct supervisory authority" over another lawyer, and predictably require more immediate steps to assure that other lawyer's compliance with the ethics rules.

A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

ABA Model Rule 5.1(b).

A different rule applies essentially the same standard to managers and direct supervisors of non-lawyers.

With respect to a non-lawyer employed or retained by or associated with a lawyer:

(a) a partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the

person's conduct is compatible with the professional obligations of the lawyer; [and]

(b) a lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.

ABA Model Rule 5.3. It is not clear how far away from lawyer ethics rules a non-lawyer can stray and still be considered to have acted in a way "compatible" with the lawyer ethics rules.

**(b)** The ethics rules explain the standard for holding a supervising lawyer responsible for a subordinate lawyer's ethics breach.

A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ABA Model Rule 5.1(c).

Not surprisingly, the same basic rules apply to a supervising lawyer's responsibility for a non-lawyer's ethics breach.

[A] lawyer shall be responsible for conduct of such a person [non-lawyer employed or retained by or associated with a lawyer] that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the person is employed, or

has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ABA Model Rule 5.3(c).

Thus, lawyers can face bar discipline for ethical violations by their subordinates. In most situations, lawyers will face such punishment only if they have some complicity, either before or after the wrongdoing. However, the "should have known" standard could trigger a lawyer's discipline under what amounts to a negligence standard.

### **Best Answer**

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

b 12/10; 10/14

## General Fee-Sharing Rules

### Hypothetical 28

You have always worked at a large law firm, which frequently coordinates as co-counsel with a minority-owned law firm. Your managing partner just asked you to set up another arrangement with that firm, under which your firm and the other firm will share fees.

- (a) Do you need the client's consent to share your fees with another law firm?

**YES**

- (b) Must your fee sharing be in proportion to the amount of work that you handle on the matter?

**NO**

- (c) To share in another law firm's fees, must your firm assume ethical and malpractice responsibility for a matter?

**MAYBE**

- (d) May either your firm or the minority-owned firm earn a "referral fee" without handling any of the work on the matter?

**MAYBE**

### Analysis

**(a)-(b)** Lawyers in different firms generally can share fees, as long as they follow the ethical guidelines.

Co-counsel who bill by the hour generally do not deal with such fee-splitting provisions. Each of the firms normally bills for their own time. In contrast, law firms handling work on a contingent fee basis or under a fixed fee must carefully comply with the fee-splitting provisions -- because they are dividing a set amount that the client has agreed to pay both of them.

## **ABA Model Rules**

The ABA Model Rules permit fee sharing under certain circumstances.

A division of a fee between lawyers who are not in the same firm may be made only if: (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation; (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and (3) the total fee is reasonable.

ABA Model Rules 1.5(e). A comment provides an additional explanation.

A division of fee is a single billing to a client covering the fee of two or more lawyers who are not in the same firm. A division of fee facilitates association of more than one lawyer in a matter in which neither alone could serve the client as well, and most often is used when the fee is contingent and the division is between a referring lawyer and a trial specialist. Paragraph (e) permits the lawyers to divide a fee either on the basis of the proportion of services they render or if each lawyer assumes responsibility for the representation as a whole. In addition, the client must agree to the arrangement, including the share that each lawyer is to receive, and the agreement must be confirmed in writing. Contingent fee agreements must be in writing signed by the client and must otherwise comply with paragraph (c) of this Rule. Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership. A lawyer should only refer a matter to a lawyer whom the referring lawyer reasonably believes is competent to handle the matter. See Rule 1.1.

ABA Model Rules 1.5 cmt. [7].

## **Restatement**

The Restatement takes essentially the same approach.

A division of fees between lawyers who are not in the same firm may be made only if:

(1) (a) the division is in proportion to the services performed by each lawyer or (b) by agreement with the client, the lawyers assume joint responsibility for the representation;

(2) the client is informed of and does not object to the fact of division, the terms of the division, and the participation of the lawyers involved; and (3) the total fee is reasonable.

Restatement (Third) of Law Governing Lawyers § 47 (2000). A comment explains the basis for this rule.

The traditional prohibition of fee-splitting among lawyers is justified primarily as preventing one lawyer from recommending another to a client on the basis of the referral fee that the recommended lawyer will pay, rather than that lawyer's qualifications. The prohibition has also been defended as preventing overcharging that may otherwise result when a client pays two lawyers and only one performs services. Beyond that, the prohibition reflects a general hostility to commercial methods of obtaining clients.

Those grounds do not warrant a complete ban on fee-splitting between lawyers. It is often desirable for one lawyer to refer a client to another, either because the services of two are appropriate or because the second lawyer is more qualified for the work in question. Allowing the referring lawyer to receive reasonable compensation encourages such desirable referrals. Lawyers are more able than other referral sources to identify other lawyers who will best serve their client. Even if a referring lawyer is compensated for the referral, that lawyer has several reasons to refer the client to a good lawyer rather than a bad one offering more pay. The referring lawyer will wish to satisfy the client, will to an extent remain responsible for the work of the second lawyer . . . , and, because fee-splitting arrangements most commonly occur in representations in which only a contingent fee is charged, will usually receive no fee at all unless the second lawyer helps the client to prevail. The reasonable-fee requirement of Subsection (3), moreover, reduces the likelihood that fee-splitting will lead to client overcharging. The balance between the dangers and advantages of fee-splitting is sufficiently close that informed clients should be able to agree to it, provided the safeguards specified in this Section are followed.

Restatement (Third) of Law Governing Lawyers § 47 cmt. b (2000).

The Restatement provides additional guidance on a number of issues that might come up in fee-sharing arrangements.



First, the Restatement explains that a fee-sharing arrangement can either be based on the proportion of the work performed by each lawyer, or on assumption of responsibility by each lawyer.

There are two bases on which fee division is permissible. The division recognized by Subsection (1)(a) requires that each lawyer who participates in the fee have performed services beyond those involved in initially being engaged by the client. The lawyers' own agreed allocation of the fee at the outset of the representation will be upheld if it reasonably forecasts the amount and value of effort that each would expend. If allocation is not made until the end of the representation, it must reasonably correspond to services actually performed.

Restatement (Third) of Law Governing Lawyers § 47 cmt. c (2000).

The second basis for fee-splitting . . . allows fee-splitting between lawyers in any agreed proportion when each agrees with the client to assume responsibility for the representation. (Some jurisdictions may impose an upper limit on the total fee, absent explicit client consent.) That means that each lawyer can be held liable in a malpractice suit and before disciplinary authorities for the others' acts to the same extent as could partners in the same traditional partnership participating in the representation . . . . Such assumption of responsibility discourages lawyers from referring clients to careless lawyers in return for a large share of the fee.

Restatement (Third) of Law Governing Lawyers § 47 cmt. d (2000). A comment explains that

[i]n the large majority of jurisdictions permitting, as an alternative method of validating a fee-splitting arrangement, that the lawyers allocate the fee in proportion to the services each provides, a much-litigated issue is the extent of proportionality required and the means of testing it.

Restatement (Third) of Law Governing Lawyers § 47 cmt. c, reporter's note (2000). The next comment explains the other possibility.

Almost every jurisdiction permits assumption of joint responsibility as an alternative basis on which a permissible fee-splitting arrangement can be made with another lawyer.

Restatement (Third) of Law Governing Lawyers § 47 cmt. d, reporter's note (2000).

Second, the Restatement emphasizes lawyers' obligation to explain the arrangement to the client.

Because of the hazards of fee-splitting arrangements, they are not permissible unless the client consents as provided in subsection (1)(a) to joint responsibility of the lawyers when the division is not in proportion to the services each lawyer performs, and unless the client is informed and does not object to the fact and terms of the division and the participation of the lawyers involved as provided in Subsection (2). On the lawyer's duty to respond to client inquiries, see § 20. If disclosure and client consent do not occur at the outset of the representation, a fee-splitting arrangement constitutes a mid-representation fee agreement subject to § 18(1)(a).

Restatement (Third) of Law Governing Lawyers § 47 cmt. e (2000). A comment explains that

[a] substantial majority of jurisdictions, following the ABA Model Rules of Professional Conduct (1983), require disclosure to the client only of the participation of all the lawyers involved.

Restatement (Third) of Law Governing Lawyers § 47 cmt. e, reporter's note (2000).

Third, the Restatement highlights the requirement (found elsewhere in the Restatement) that all fees must be reasonable -- including fees shared by lawyers.

Under § 34, a lawyer's compensation for any representation must be reasonable. Under this Section, the total fee for all lawyers involved in a fee-splitting arrangement, not just the individual fee of each lawyer, must be reasonable. That requirement discourages fee-splitting arrangements that increase what the client must pay. It follows that what is a reasonable fee should be determined without reference to the value of the referring lawyer's services as a broker. Time devoted to conferences between the lawyers may be taken

into account to the extent the case reasonably required the consultation. Even after applying those safeguards, it is still possible that the total fee under a fee-splitting arrangement will be larger than what the client might have had to pay to a single lawyer handling the same matter, since there will usually be a range of total fees satisfying the reasonableness requirements of § 34 and this Section. The remedy of the client, who must be informed of fee-splitting arrangements . . . , lies in rejecting the arrangement and retaining a single lawyer at a lower fee. As with other fee arrangements, fees agreed to by clients sophisticated in entering into such arrangements should almost invariably be found reasonable.

Restatement (Third) of Law Governing Lawyers § 47 cmt. f (2000).

Fourth, the Restatement analyzes fee sharing in what it calls "[b]orderline arrangements."

Many arrangements between lawyers are similar to but diverge to some extent from the usual fee-splitting arrangement. Whether this Section applies to them depends on whether they pose the dangers that the Section is meant to address. When a client discharges one lawyer and retains another who is not recommended by the first, the danger of biased referral is absent, and any danger of excessive fees results from the substitution rather than from any referral agreement between the lawyers. An agreement in which the lawyers settle what part of the client's fee each will receive is therefore not forbidden by this Section, and may serve the useful purpose of resolving fee disputes between them that could delay and burden the client. The client is entitled to disclosure of such agreements between past and present counsel . . . , and the client's own liability for legal fees cannot be increased by an agreement to which the client is not a party. . . .

In class actions, a court usually awards attorney fees and other expenses to the prevailing plaintiff class. When lawyers from different firms work together to represent the interests of the class, those lawyers often agree who will perform certain services or advance required funds, subject to payment if the action succeeds. Such arrangements ordinarily do not violate this Section. Likewise, agreements governing how any fee award will be divided ordinarily do not violate this Section, provided that the division is in proportion

to the services performed by each firm or each firm assumes joint responsibility for the representation. When an agreement provides for payments that are disproportionate to the services performed or funds advanced, or for a distribution differing from the tribunal's award, it should be disclosed to the tribunal, which may invalidate it in whole or in part if it undermines the proper representation of the class and its members. A tribunal considering whether to do so should consider the justifications for the arrangement, the probable effects on the independent professional judgment of the lawyers involved, and the timeliness of disclosure to the tribunal.

Restatement (Third) of Law Governing Lawyers § 47 cmt. h (2000).

After analyzing the basic rule and all of these complicated factors, the Restatement discusses the lawyer's liability for any misconduct in this context, and the enforceability of such arrangements.

A fee-splitting agreement that violates this Section renders the participating lawyers subject to professional discipline . . . . It also cannot be enforced against the client, may lead to partial or total forfeiture of the lawyers' fee claim . . . , and may form the basis for a claim by the client of restitution of the portion of the fee paid to the forwarding lawyer . . . . Some urge that lawyers who enter into an improper fee-splitting arrangement should be able to enforce it against each other, reasoning that neither may charge the other with an impropriety to which both agreed, and that the prohibition on fee-splitting protects clients rather than lawyers. Enforcement, however, encourages lawyers to continue entering into improper fee-splitting agreements. Accordingly, a lawyer who has violated a regulatory rule or statute by entering into an improper fee-splitting arrangement should not obtain a tribunal's aid to enforce that arrangement, unless the other lawyer is the one responsible for the impropriety. On the other hand, although most lawyer codes on the subject require that a fee-splitting agreement be in writing (and the absence of a writing is a disciplinary violation), when the fact of such agreement is clearly established, the absence of a writing by itself should not affect the rights of the lawyers between themselves.

It is appropriate for the tribunal in which is pending either a separate suit between the lawyers or a suit to which the fee

dispute is ancillary . . . to require notification to the client so that the client, if so disposed, may assert a claim to a refund of all or part of the fee.

Restatement (Third) of Law Governing Lawyers § 47 cmt. i (2000).

(c) Ethics rules address the meaning of the phrase "joint responsibility."

The ABA explains that

[j]oint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership.

ABA Model Rule 1.5 cmt. [7] (emphasis added).

Similarly, the Restatement explains that the phrase

means that each lawyer can be held liable in a malpractice suit and before disciplinary authorities for the others' acts to the same extent as could partners in the same traditional partnership participating in the representation.

Restatement (Third) of Law Governing Lawyers § 47 cmt. d (2000) (emphasis added).

Legal ethics opinions highlight some disagreement about whether "joint responsibility" necessarily involves substantial involvement. Most opinions follow the ABA Model Rules and Restatement approach finding such involvement unnecessary.

- Arizona LEO 10-04 (6/2010) (explaining that in Arizona the term "joint responsibility" does not necessarily require "substantive involvement in a matter").
- Samuel v. Druckman & Sinel, LLP, 906 N.E.2d 1042, 1045 (N.Y. 2009) (upholding a fee-split agreement in a medical malpractice case, under which the original law firm was to receive one third of the ultimate legal fee recovered; explaining that it "is of no moment" that the law firm "did not contribute to that part of the work that resulted in the award of the enhanced fee").
- Arizona LEO 04-02 (3/2004) ("The 'joint responsibility' that a referring lawyer must assume in order to share a single fee is not limited merely by the duties to refer matters only to another lawyer believed to be competent and to take appropriate steps if the referring lawyer learns the other lawyer has violated the ethical rules. These obligations, after all, would exist whether or not the

referring lawyer also assumed 'joint responsibility' for the ongoing representation."; "Other jurisdictions disagree whether 'joint responsibility' must entail substantive involvement by the referring attorney, such as supervision of the other lawyer's work, or merely financial responsibility. Compare ABA Informal OP. 85-1514, supra; McFarland v. George, 316 S.W. 2d 662, 671-72 (Mo. Ct. App. 1958) ('responsibility' under Missouri's ethical rules means substantive involvement); Ohio Bd. Comm'rs of Grievance and Discipline Op. 2003-3 (concluding that 'responsibility' means referring lawyer must be available to other lawyer and client throughout the representation and remain knowledgeable about progress of matter); Wis. State Bar, Formal Op. E-00-01 (same, with Aiello v. Adar, 750 N.Y.S. 2d at 465 [750 N.Y.S.2d 457 (N.Y. Sup. Ct. 2002)] (joint responsibility is synonymous with joint and several liability; vicarious liability for any act of malpractice is sufficient assumption of responsibility). See also N.Y. County Lawyers' Association Comm. Professional Ethics Opinion 715 (1996) (referring attorney who assumes joint responsibility in exchange for legal fees is ethically obligated to accept vicarious liability for any act of malpractice that occurs during the course of the representation, but not required to supervise the activities of the receiving lawyer); Ill. Jud. Ethics Comm. Op. 94-16 ('acceptance of legal responsibility' required by Illinois professional ethics rule 'consists solely of potential financial responsibility for any malpractice action against the recipient of the referral'); Chicago Bar Association Professional Responsibility Comm. Op. 87-2 at 4 (same)." (first emphasis added); "Under Arizona's recently revised ER 1.5(e), the requisite 'joint responsibility' exists if the referring attorney assumes financial responsibility for any malpractice that occurs during the course of the representation. This conclusion comports with the amendments to ER 1.5(e), which delete the prior reference in the comments to ER 5.1 and do not otherwise suggest that a referring attorney must have a relationship comparable to a 'partnership' with the recipient of the referral. It also would be somewhat illogical to require a referring attorney to 'supervise' the handling of a matter by another attorney believed to be more experienced or capable in a particular area. See Aiello, 750 N.Y.S. 2d at 465. Interpreting 'joint responsibility' as synonymous with joint liability allows flexibility in structuring the relationship among the attorneys and client involved. A referred attorney may, but is not necessarily required, to have ongoing supervisory responsibilities or other substantive involvement in the matter."").

(d) The requirement in the ABA Model Rules and the Restatement that lawyers sharing their fees actually provide services or (in the alternative) assume "joint responsibility" for the matter generally precludes lawyers from earning what could be called a pure "referral fee."

Under a pure "referral-fee" arrangement, a lawyer retained by a client hands off the client to another lawyer without taking on any of the work, and without assuming any ethical or other responsibility for the matter.

Some states reject such arrangements.

- Washington LEO 2189 (2008) ("Paying a pure referral fee to anyone is generally prohibited by RPC 7.2(b). Also, because the referral fee proposed by the inquirer is not in proportion to services rendered, and the referring lawyer is not assuming any responsibility for the representation, payment and receipt of the fee is prohibited under RPC 1.5(e). As Professor Robert Aronson noted when the RPCs were first adopted in Washington, 'Unless another lawyer is not considered "a person," then pure referral fees are impermissible under RPC 7.2(c) [now subsection (b)], even if not barred by RPC Rule 1.5(e)(2).'" (citation omitted).)
- Arizona LEO 04-02 (3/2004) ("Arizona, unlike some other states, does not allow a lawyer to be paid a fee merely for recommending another lawyer or referring a case. Instead, Arizona allows 'referral fees' only in the sense that lawyers who are not in the same firm may divide a fee as provided in ER 1.5(e). That rule allows lawyers to divide a single billing to a client if three conditions are met: (1) each lawyer receiving any portion of the fee assumes joint responsibility for the representation; (2) the client agrees, in a signed writing, to the participation of all the lawyers involved; and (3) the total fee is reasonable. 'Joint responsibility; requires, at the least, that the referring attorney accept vicarious liability for any malpractice that occurs in the representation. Although the client must consent to the respective roles of the lawyers in the ongoing representation, ER 1.5(e) does not require that the client consent to the particular division of the total fee among the lawyers.").

Although generally not using the phrase "referral fee," some states' ethics rules implicitly permit referral fees by not requiring that lawyers provide services or assume "joint responsibility" for a case.

- Va. Rule 1.5 Committee Commentary ("Paragraph (e) eliminates the requirement in the Virginia Code that each lawyer involved in a fee-splitting arrangement assume full responsibility to the client, regardless of the degree of the lawyer's continuing participation. The requirement in the Virginia Code was deleted to encourage referrals under appropriate circumstances by not requiring the lawyer making the referral to automatically assume ethical responsibility for all of the activities of the other lawyers involved in the

arrangement. However, such an arrangement is acceptable only if the client consents after full disclosure, which must include a delineation of each lawyer's responsibilities to the client.").

**Best Answer**

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

B 10/14



## General Rules for Direct Mail

### Hypothetical 29

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

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

### MAYBE

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

### YES (PROBABLY)

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

### YES

### Analysis

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

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

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

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

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

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

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

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

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

Some states have expanded such restrictions.

- Matt Friedman, Assembly committee approves bill making public wait 90 days to see accident reports, Star-Ledger, June 18, 2012, [http://www.nj.com/news/index.ssf/2012/06/assembly\\_committee\\_passes\\_bill.html](http://www.nj.com/news/index.ssf/2012/06/assembly_committee_passes_bill.html) ("The Assembly Judiciary Committee this morning approved a bill that would make the public wait 90 days to see accident reports."; "The bill (A801) is intended to bar lawyers, doctors, chiropractors and others from soliciting victims shortly after their accidents. Only accident victims, insurance

companies and government authorities would have immediate access to the report."; "Both the Senate and Assembly passed a bill in January would restrict solicitation of accident victims for 30 days, but it was 'pocket vetoed' by Gov. Chris Christie when he did not sign it before the session ended. The current bill, however, is substantially different.").

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

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

. . . .

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

49 U.S.C. § 1136(g)(2).

Every serious plane crash seems to implicate this rule.

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

International, was referred to the Attorney Registration and Disciplinary Commission (ARDC) of the Illinois Supreme Court for its alleged contacting of victims.").

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

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

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

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

of (b)(4). And acquiring petitioners' personal information for a legitimate investigatory purpose does not entitle respondents to then use that same information to send direct solicitations. Each distinct disclosure or use of personal information acquired from a state DMV must be permitted by the DPPA. See §2724(a) ("A person who knowingly obtains, discloses or uses personal information, from a motor vehicle record, for a purpose not permitted under this chapter shall be liable to the individual to whom the information pertains"); see also §2721(c). If the statute were to operate otherwise, obtaining personal information for one permissible use would entitle attorneys to use that same information at a later date for any other purpose. For example, a lawyer could obtain personal information to locate witnesses for a lawsuit and then use those same names and addresses later to send direct marketing letters about a book he wrote.").

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

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

purchasers. Accordingly, the referee's report is approved insofar as it granted summary relief in favor of Gold on the rule 7.4(b)(2)(K) claim.").

Lawyers obviously must comply with the most restrictive rule.

Bar disciplinary regulators severely punish lawyers who violate these restrictions.

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

**(b)** Most states would permit such targeted mailing, because the potential client has not been involved in a personal injury or wrongful death incident.

For instance, ABA Model Rule 7.3(c) does not prohibit targeted "written, recorded or electronic communication[s]" to any particular potential client, although the ABA Model Rules require that the words "Advertising Material" be included on the "outside envelope, if any, and at the beginning and ending of any recorded or electronic communication" (unless a communication is to a lawyer or to someone who "has a family, close personal, or prior professional relationship with the lawyer").

In 2010, the Second Circuit upheld New York's fairly broad restriction on marketing (including direct mail) to accident victims.

- Alexander v. Cahill, 598 F.3d 79, 102, 103 (2d Cir. 2010) (in an opinion filed by Circuit Judge Guido Calabresi, upholding the constitutionality of New York State's 30-day moratorium on direct marketing in wrongful death or personal injury situations, but finding unconstitutional other provisions of New York's marketing rules, including bans on testimonials, portrayals of judges, irrelevant techniques such as gimmicky depictions, nicknames, and trade names; ultimately upholding the constitutionality of New York State's 30-day moratorium on certain direct marketing in wrongful death and personal injury cases; "[W]e conclude that ads targeting certain accident victims that are sent by television, radio, newspapers, or the Internet are more similar to direct-mail solicitations, which can properly be prohibited within a limited time frame, than to 'an untargeted letter mailed to society at large,' which 'involves no willful or knowing affront to or invasion of the tranquility of bereaved or injured individuals and simply does not cause the same kind of reputational harm to the profession' as direct mail solicitations." (citation omitted); "Moreover, we do not find constitutional fault with the 30-day time period during which attorneys may not solicit potential clients in a targeted fashion.").

Because other types of clients are not as likely to be susceptible to improper lawyer conduct, at least one circuit court had earlier declared unconstitutional restrictions on direct mail marketing to criminal clients.

- Ficker v. Curran, 119 F.3d 1150, 1151, 1153, 1154, 1156 (4th Cir. 1997) (analyzing the following situation: "Robin Ficker, a Maryland attorney, and Natalie Boehm, the owner of a direct-mail advertising company, challenged the constitutionality of a Maryland law forbidding lawyers from targeted direct-mail solicitation of criminal and traffic defendants within thirty days of arrest. We agree with the district court that the Maryland ban encroaches impermissibly on First Amendment rights."; explaining that "as the Supreme Court has already recognized, targeted letters do not carry the same potential for undue influence as in-person solicitation, and such letters are no more likely to overwhelm the judgment of a potential client than an untargeted letter or newspaper advertisement."; "We will not resolve this battle of studies, nor will we credit or discredit state interests based on the shifting sands of polling data, which change according to techniques, sample populations, and even the phrasing of the questions. It is hardly clear, however, that where criminal and traffic defendants, in need of timely legal advice and representation, receive just such information in the mail, they will hold the legal profession in low esteem." (footnote omitted); ultimately holding that "a thirty day ban on

attorney advertising to defendants charged with crimes and incarcerable traffic offenses cannot stand.").

(c) The following are examples of the specific requirements that some states have included in their ethics rules.

- Florida Rule 4-7.18(b)(2)(A)-(C) ("Written communications to prospective clients for the purpose of obtaining professional employment that are not prohibited by subdivision (b)(1) are subject to the following requirements: (A) Such communications are subject to the requirements of 4-7.11 through 4-7.17 of these rules. (B) Each page of such communication and the face of an envelope containing the communication must be reasonably prominently marked 'advertisement' in ink that contrasts with both the background it is printed on and other text appearing on the same page. If the written communication is in the form of a self-mailing brochure or pamphlet, the 'advertisement' mark must be reasonably prominently marked on the address panel of the brochure or pamphlet and on each panel of the inside of the brochure or pamphlet. If the written communication is sent via electronic mail, the subject line must begin with the word 'Advertisement.' Brochures solicited by clients or prospective clients need not contain the 'advertisement' mark. (C) Every written communication must be accompanied by a written statement detailing the background, training and experience of the lawyer or law firm. This statement must include information about the specific experience of the advertising lawyer or law firm in the area or areas of law for which professional employment is sought. Every written communication disseminated by a lawyer referral service must be accompanied by a written statement detailing the background, training, and experience of each lawyer to whom the recipient may be referred.").
- Georgia Rule 7.3(b) ("Written communications to a prospective client, other than a close friend, relative, former client or one whom the lawyer reasonably believes is a former client, for the purpose of obtaining professional employment shall be plainly marked 'Advertisement' on the face of the envelope and on the top of each page of the written communication in type size no smaller than the largest type size used in the body of the letter.").
- Illinois Rule 7.3(c) ("Every written, recorded or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal services in a particular matter shall include the words 'Advertising Material' on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication is a person specified in paragraphs (a)(1) or (a)(2).").
- North Carolina Rule 7.3(c)(1), (c)(2), (c) & (c)(3) ("Written Communications. Written communications shall be mailed in an envelope. The advertising notice shall be printed on the front of the envelope, in font that is as large as



any other printing on the envelope. The front of the envelope shall contain no printing other than the name of the lawyer or law firm and return address, the name and address of the recipient, and the advertising notice. The advertising notice shall also be printed at the beginning of the body of the letter in font as large as or larger than any other printing contained in the letter."; "Electronic Communications. The advertising notice shall appear in the 'in reference' block of the address section of the communication. No other statement shall appear in this block. The advertising notice shall also appear, at the beginning and ending of the electronic communication, in a font as large as or larger than any other printing in the body of the communication or in any masthead on the communication."; These words, "THIS IS AN ADVERTISEMENT FOR LEGAL SERVICES," are required in all capital letters on any communications from lawyer soliciting professional employment. This advertising notice must be "clearly articulated" at the beginning and end of any recorded communications.).

- South Carolina Rule 7.3(c) ("Any lawyer who uses written or recorded solicitation shall maintain a file for two years showing the following: (1) the basis by which the lawyer knows the person solicited needs legal services; and (2) the factual basis for any statements made in the written, recorded, or electronic communication.").
- South Carolina Rule 7.3(d)(1) ("The words 'ADVERTISING MATERIAL,' printed in capital letters and in prominent type, shall appear on the front of the outside envelope and on the front of each page of the material. Every such recorded communication shall clearly state both at the beginning and at the end that the communication is an advertisement.").

Ethics opinions provide additional explanation:

- Rhode Island LEO 2013-02 (3/13/2013) (finding that a lawyer could ethically send letters to those with potential information the lawyer could use in representing a client, but that the letter proposed by the lawyer seeking the opinion instead amounted to an effort to obtain business and therefore had to comply with the applicable direct mail ethics regulations; "The inquiring attorney represents a client who is attempting to withdraw from his/her membership plan at a Golf Club. The client is on a membership-redemption waiting list, seeking the return of his/her initiation payment pursuant to the Golf Club's membership plan. In a pending lawsuit against the Golf Club, the inquiring attorney's client has alleged that the membership agreement is unfair and unconscionable. The inquiring attorney has obtained through discovery a list of other Club members who are also on the redemption list. The inquiring attorney wants to send a letter to each of the members on the list in an effort to obtain further information about the Golf Club's redemption process, but states that he/she is concerned about running afoul of Rule 7.3 of the Rules of Professional Conduct entitled 'Direct contact with prospective clients.' The inquiring attorney submitted a proposed letter to the Panel.";

"The Panel has reviewed the proposed letter submitted by the inquiring attorney in the instant inquiry. The letter states that the inquiring attorney represents X, a member of the Golf Club who is on the membership-redemption waiting list; states that he/she filed a lawsuit against the Club; states that the inquiring attorney is looking to obtain information about the redemption process and about representations made to the member upon joining the Club; and asks the member to contact the inquiring attorney. The inquiring attorney's letter should, but does not, stop there. In additional paragraphs, the inquiring attorney describes the Club's redemption process, states the inquiring attorney's position that the redemption process is unfair and unconscionable, and discloses that at a recent deposition it was learned that only a small number of members received a return of the initiation fee over the last ten years. In a separate lengthy paragraph, the inquiring attorney describes with particularity how recent changes to the Golf Club's bylaws deliberately impede the return of initiation payments; states that arbitrary new-member classifications make it highly unlikely that a resigning member will live to see the return of his or her initiation payment; and likens the Golf Club to 'Hotel California, where you can get in anytime you want but you can never leave.' In the Panel's view, the proposed letter goes too far, and it appears to be more a solicitation for professional employment than a request for information from persons having knowledge of matters related to the inquiring attorney's client's case. As such, the proposed letter must comply with the requirements of Rule 7.3. The Panel believes, however, that the Rules permit lawyers to contact persons who have knowledge related to their clients' lawsuits by letter or advertisement without complying with Rule 7.3. . . . Such a letter for this inquiry would simply state that the inquiring attorney represents a Club member who is suing the Golf Club; that the inquiring attorney is seeking information about the membership-redemption process; and that the inquiring attorney is requesting Club members to contact the inquiring attorney for this purpose. The restrictions of Rule 7.3(c) and (d) would not apply to such a letter.").

- Nebraska LEO 09-04 (2009) (addressing the following question: "With respect to email communications which require the inclusion of the words 'This is an advertisement,' where must these words appear when the newsletter is included as an attachment to an email message?"; answering as follows: "With respect to newsletters emailed as attachments, where the words 'This is an advertisement' are required, it is sufficient if those words are included in the subject line of the email message and at the end of the email message. It is not necessary to include those words in the attached newsletter."; also addressing the following question: "May a law firm mail or email a newsletter to present clients, former clients, and persons who request a copy of the newsletter without including the disclaimer 'This is an Advertisement' on either the front of the mailing envelope or within the email?"; answering as follows: "It is not necessary to include the words 'This is an advertisement' for law firm newsletters sent to present clients, former

clients, and persons who request a copy of the newsletter."; ("The Committee is of the opinion that an advertisement coupon placed in a mass mailer, which does not state 'This is an advertisement' on the outside of the envelope[,] violates Rule 7.2.").

- North Carolina LEO 2007-15 (4/25/08) (providing guidance for lawyers sending targeted direct mail; "Rule 7.3(c) allows a lawyer to solicit professional employment from a potential client known to be in need of legal services by written, recorded, or electronic communication provided the statement, in capital letters, 'THIS IS AN ADVERTISEMENT FOR LEGAL SERVICES' (the advertising notice) appears on a specified part of the communication. If the solicitation is by letter, Rule 7.3(c)(1) requires the advertising notice to 'be printed at the beginning of the body of the letter in a font as large or larger than the lawyer's or law firm's name in the letterhead or masthead."; [T]he requirement in Rule 7.3(c) that the advertising notice 'be printed at the beginning of the body of the letter' is satisfied if the advertising notice appears anywhere between the top of the page to immediately below the salutation of a direct mail letter."; "[I]f the insignia or border is used consistently by the firm in official communications on behalf of the firm, the insignia or border is considered a part of the firm name and may appear next to the firm name in the return address on the front of the envelope provided the advertising notice remains conspicuous."; "The front of the envelope may contain an insignia with initials that are in a font that is larger than the font used for the advertising notice provided the insignia is used consistently by the firm in official communications on behalf of the firm, the advertising notice is in a font that is the same size or larger than the font used for the firm name, and the advertising notice remains conspicuous."; also addressing the following question: "ABC Law Firm uses the motto 'Attorneys for Injured People' and prints the motto just below its name in all of its official written communications. May the front of the envelope for a direct mail letter contain a motto connected with the law firm name in the return address on the envelope?"; answering as follows: "No. A motto will detract from the conspicuousness of the advertising notice. However, the motto may appear on the back of the envelope subject to the font size requirements in Rule 7.3(c)."; also addressing the following question: "May the URL or website address for a law firm appear in the return address on the front of the envelope for a direct mail letter?"; answering as follows: "No. It may appear on the back of the envelope subject to the font size requirements in Rule 7.3(c)." (emphases added)).
- Ohio LEO 2007-5 (6/8/07) ("A lawyer's or law firm's advertising of legal services to a prospective business client through a personalized letter addressed to a contact person at the business is a direct mail solicitation subject to the requirements of Rule 7.3(c). A lawyer or law firm should disclose in the letter how the identity of the prospective client was obtained. A lawyer or law firm should include the recital 'Advertising Material' or

'Advertisement Only' in the text of the letter and on the envelope. And, a lawyer or law firm must refrain from addressing a predetermined evaluation of the merits of any legal matter that the business might pursue." (emphasis added)).

- Maryland LEO 2004-27 (11/10/04) (forbidding Maryland lawyers from using a marketing firm to send mailings or otherwise contact people who have not responded to a lawyer's mailed advertisement).
- North Carolina LEO 97-6 (1/16/98) (holding that a lawyer violated the ethics rules in the way that the lawyer included a disclosure statement in a direct mail piece; "The disclosure statement must be in a shade of print that contrasts sufficiently with the stationery to be easily read by a recipient. Revised Rule 7.3(c) requires the advertising disclosure statement 'at the beginning of the body of the written communication in print as large or larger than the lawyer's or law firm's name. . . .' The font size and location of the disclosure are dictated by the rule to insure that the recipients of direct mail letters have notice that the letters are advertisements and may be discarded. This purpose is defeated if the shade of print is so light that the disclaimer cannot be read."; "The omission of a lawyer's address from the stationery used for targeted direct mail letters is a material misrepresentation because a recipient of the letter will not be able to determine whether the lawyer practices in the recipient's community, in another community in North Carolina, or out of state.").
- Illinois LEO 90-37 (5/15/91) ("A lawyer may initiate contact with a prospective client by written communication plainly labeled as advertising material.").
- Illinois LEO 90-22 (1/29/91) ("Labeling marketing materials as 'promotional' materials complies with requirements of the Rules as to the labeling of 'advertising' materials.").

As in other areas, some states have unique rules governing targeted mailings.

For instance:

- South Carolina Rule 7.3(d)(2)-(3) ("Each solicitation must include the following statements: (A) 'You may wish to consult your lawyer or another lawyer instead of me (us). You may obtain information about other lawyers by consulting directories, seeking the advice of others, or calling the South Carolina Bar Lawyer Referral Service at 799-7100 in Columbia or toll free at 1-800-868-2284. If you have already engaged a lawyer in connection with the legal matter referred to in this communication, you should direct any questions you have to that lawyer' and (B) 'The exact nature of your legal situation will depend on many facts not known to me (us) at this time. You should understand that the advice and information in this communication is general and that your own situation may vary.' Where the solicitation is

written, the above statements must be in a type no smaller than that used in the body of the communication. (3) Each solicitation must include the following statement: 'ANY COMPLAINTS ABOUT THIS COMMUNICATION OR THE REPRESENTATIONS OF ANY LAWYER MAY BE DIRECTED TO THE COMMISSION ON LAWYER CONDUCT, 1015 SUMTER STREET, SUITE 305, COLUMBIA, SOUTH CAROLINA 29201 - TELEPHONE NUMBER 803-734-2037.' Where the solicitation is written, this statement must be printed in capital letters and in a size no smaller than that used in the body of the communication.").

- South Carolina Rule 7.3(g) ("Any written communication prompted by a specific occurrence involving or affecting the intended recipient of the communication or a family member shall disclose how the lawyer obtained the information prompting the communication.").

### **Best Answer**

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

b 7/14

## Different State Rules Governing Solicitation

### Hypothetical 30

You financed your college and law school education by selling magazine subscriptions to your fellow students, so you know that you have the type of sales skills that will serve you well as you try to build your practice as a new lawyer. However, you do not want to start your legal career with an ethics charge, so you want to make sure that you do not engage in any solicitation prohibited by the ethics rules.

May you engage in the following type of solicitation:

- (a) Placing telephone calls to automobile accident plaintiffs while they are in the hospital?

**NO**

- (b) Calling members of your church to see if they would like some estate planning advice?

**MAYBE**

- (c) Setting up appointments to see the general counsel of local companies?

**YES (PROBABLY)**

### Analysis

The United States Supreme Court has long recognized that in-person solicitation creates a far greater risk of abuse than general advertising or even targeted mailings.<sup>1</sup>

The Supreme Court has therefore given states wide latitude to restrict solicitation.<sup>2</sup>

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<sup>1</sup> Ohralik v. Ohio State Bar, 436 U.S. 447 (1978) (upholding ban on in-person solicitation in personal injury and wrongful death cases because of the potential for overreaching); see also In re Primus, 436 U.S. 412 (1978) (holding that in-person solicitation is permissible if the lawyer is motivated by political objectives rather than monetary objectives).

<sup>2</sup> Some corporate clients are disappointed that lawyers generally are not prohibited from publishing advertisements which seemed designed to find plaintiffs (or in some cases additional plaintiffs) to sue a company -- but which do not explicitly indicate as much, or which purport to seek "witnesses" who might provide favorable testimony on behalf of another one of the lawyer's clients. See, e.g., EEOC v. McCormick & Schmick's Seafood Rests., Inc., Civ. A. WMN-08-CV-984, 2011 U.S. Dist. LEXIS 35258, at

Most states lump live telephone and real-time solicitation in the same category.

For example, the ABA Model Rules flatly state that

[a] lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted: (1) is a lawyer; or (2) has a family, close personal, or prior professional relationship with the lawyer.

ABA Model Rule 7.3(a). Most states follow this basic formulation.

Many states severely discipline lawyers who violate the anti-solicitation rules, especially in situations where there could be overreaching or coercion.

- Hamm v. TBC Corp., 345 F. App'x 406, 410-11 (11th Cir. 2009) (unpublished opinion) (affirming the district court's sanctions against a law firm for soliciting employees of various companies to file Fair Labor Standards Act cases, under the guise of interviewing them as witnesses; also upholding the magistrate judge's sanction prohibiting the plaintiff's law firm from representing employees of these other companies; "[T]he magistrate judge recommended narrowly tailored sanctions to permit SLG [law firm] to continue to represent the named plaintiffs and co-workers of the named plaintiffs (presumably because they most likely learned about SLG and the lawsuit from the named plaintiffs), but prohibited SLG from representing opt-in plaintiffs from other stores.").
- Fla. Bar v. Wolfe, No. SC94226, 2000 Fla. LEXIS 659 (Fla. Mar. 30, 2000) (suspending for one year a lawyer who engaged in unethical in-person solicitation of clients after they were hit by tornadoes).
- In re Ravich, Koster, Tobin, Oleckna, Reitman & Greenstein, 715 A.2d 216, 220, 224, 225 (N.J. 1998) (publicly reprimanding lawyers for personally soliciting clients after a gas explosion at an apartment building; Oleckna and TEAMLAW rented an RV to use as "a mobile office for potential clients at the site" and after a day with no calls, returned with "copies of the advertisement the firm was to run in the weekend paper and taped several copies of it to the windows of the RV."; "After hearing about the explosion on the radio, Charles Meaden, a solo practitioner, drove to Edison the day after the explosion

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\*2 (D. Md. Mar. 17, 2011) (denying defendant's motion to prevent the EEOC from running the following radio advertisement: "In connection with the class rate discrimination lawsuit, the U.S. EEOC is looking for black individuals who applied for employment at or used to work for McCormick and Schmick's or M&S Grill at the Inner Harbor. If you applied to work, or worked at either restaurant, please call the EEOC at 410-209-2208. Again, 410-209-2208.").

seeking clients. When he was stopped by the Edison police and told that he could proceed no further by car, he began to walk into Edison."; "When Meaden went to the Red Roof Inn, he knew that the Inn was temporarily housing many of the victims of the explosion. He also went to the Inn specifically for the purpose of pecuniary gain in the form of obtaining professional employment.").

One New York state court case involved a type of solicitation that most large law firms would find acceptable -- but which a New York state court judge relied on to punish what the judge found was an improper attempt to block plaintiffs' ex parte communications with the defendant's current and former employees.

- Rivera v. Lutheran Med. Ctr., 866 N.Y.S.2d 520, 525, 526 (N.Y. Sup. Ct. 2008) (in an opinion by Supreme Court of New York, Kings County, Judge Michael A. Ambrosio, analyzing defendant hospital's law firm Morgan Lewis's conduct in soliciting as separate clients of the firm: two executives of the defendant hospital; one current lower level employee who was involved in the alleged sexual harassment; two other current lower level hospital employees, apparently not involved in the incident; two former hospital supervisory employees; recognizing that the first three individuals would be considered "parties" under New York's ex parte communications rule, and therefore not "subject to informal interviews by plaintiff's counsel"; explaining that the last four witnesses would have been fair game for ex parte communications from the plaintiff's lawyer; "These [four] witnesses are not parties to the litigation in any sense and there is no chance that they will be subject to any liability. They were clearly solicited by Morgan Lewis on behalf of LMC to gain a tactical advantage in this litigation by insulating them from any informal contact with plaintiff's counsel. This is particularly egregious since Morgan Lewis, by violating the Code in soliciting these witnesses as clients, effectively did an end run around the laudable policy consideration of Niesig in promoting the importance of informal discovery practices in litigation, in particular, private interviews of fact witnesses. This impropriety clearly affects the public view of the judicial system and the integrity of the court."; ultimately disqualifying Morgan Lewis from representing the four witnesses, because of the firm's improper solicitation of the witnesses, and reporting Morgan Lewis to the bar's Disciplinary Committee).

Not surprisingly, lawyers cannot use non-lawyers to solicit clients -- which courts traditionally called "running and capping."

- Marilyn Tennison, Texas state rep. named 'Freshman of the Year' jailed on barratry charges, Southeast Tex. Record, Apr. 25, 2012 ("A state



representative who was named the Democrats' 'Freshman of the Year' spent some time in jail Tuesday night. State Representative Ron Reynolds (District 27), a managing partner at Brown, Brown and Reynolds Law Firm, is accused of illegally soliciting legal cases. Reynolds, 38, whose district includes Fort Bend County, was arrested Tuesday. He posted a \$5,000 bond and was released after midnight Wednesday. He will make his first court appearance Thursday. According to Fox 26 in Houston, another Houston attorney, Marcela Halmagean, filed a complaint against Reynolds that led to his arrest. The complaint alleges Reynolds used an individual to solicit Halmagean as a client when she was involved in an auto crash. Texas law prohibits soliciting a client for legal services, and just last year, the Texas Legislature passed a statute that makes barratry a civil as well as criminal infraction, allowing civil suits to be filed. Reynolds, a former municipal court judge, past president of the Houston Lawyers Association and an adjunct professor at Texas Southern University was named 'Freshman of the Year' in 2011 by the House Democratic Caucus.").

- In re Ravith, 919 N.Y.S.2d 141 (N.Y. App. Div. 2011) (suspending for three months a lawyer who directed her paralegal to solicit clients).
- In re Sinowski, 720 S.E.2d 597, 597-98, 598 (Ga. 2011) (disbarring two lawyers for using "runners,;" "The State Bar alleged that in their practice Respondents utilized 'runners' (non-lawyers who recruit, recommend or direct people to the services of a given lawyer in return for a fee or other compensation from the lawyer)."; "The Review Panel adopted the special master's findings of fact, and Respondents' admissions, that from April 1995 through April 1999 they paid runners to secure clients for them and paid non-lawyers compensation for referrals. They kept a record of those payments in a 'Runner Book.' Although Respondents and the State Bar disagree on the amount and volume of the runner activity, Respondents admit to payments to 46 runners (the State Bar contends it was 54) or \$276,025 (as opposed to the State Bar's assertion of \$399,733) in 1,376 separate cases (versus the State Bar's assertions of 2,441 cases").
- Samuel Howard, Arent Fox, Elliott Greenleaf Tossed From UBP Ch. 11, Bankruptcy Law360 (Nov. 5, 2010), <http://www.law360.com/bankruptcy/articles/207257> (disqualifying the law firm of Arent Fox from representing a bankruptcy creditor's committee, because the law firm had solicited creditors to serve on the committee through an intermediary in China).
- Philadelphia LEO 2010-12 (10/2010) (analyzing the following situation: "Physicians employ a consulting firm that monitors police reports and then contacts injured persons to see if they need medical treatment. The consulting firm through an investigator will also obtain relevant photographs and statements from the injured. The representative of the consulting firm inquires as to whether the injured person has an attorney. If not, the representative will obtain an executed fee agreement and forward the

relevant documents to different attorneys on a revolving basis. The assigned attorney is then required to pay a flat fee to the consulting firm."; finding the arrangement unethical for various reasons; "There are multiple reasons why the arrangement as described by the inquirer is unethical. Standing alone, Rule 7.3(a) prohibits the conduct since an intermediary (the consulting firm) is engaged in direct solicitation by phone. The rationale behind the prohibition and its application to this inquiry is made clear by the Comment to the Rule. It does not matter that the consulting firm is hired by physicians rather than the inquirer. The consulting firm still is engaging in prohibited telephonic solicitation as an intermediary for the inquirer as well as any of the other lawyers who receive clients in this fashion. The specific prohibition in the Rule on the use of an intermediary (in this case that is professionally trained) clearly places the inquirer in violation of Rule 7.3a should he accept referrals that come as a result of the conduct in question."; "The violation is again present in reviewing Rule 5.3, specifically 5.3(c)(1). By accepting a referral obtained via unethical solicitation from the consulting firm, the attorney is ratifying the third party's conduct which conduct is in direct violation of the Rule. Furthermore, each of these violations is compounded by the prohibition, contained in Rule 8.3a, which prohibits an attorney from engaging in unethical conduct through the acts of a third party."; explaining that the solicitation would be improper even if it were undertaken in writing; "It is clear under Rule 1.2 that an attorney must clearly communicate with a client what the scope and goal of representation are from the start of the attorney-client relationship. The fact that the individual sent out to meet with the prospective client has that client sign a fee agreement with the attorney before meeting with the attorney, and in fact acts without any direct supervision from the attorney, thwarts the requirements of the Rule. There is no way for the attorney to determine whether the client's stated goal is or is not an acceptable one. In addition, there is no way for the client to obtain direct information from the attorney prior to agreeing to the attorney's representation. Furthermore, since the 'investigatory work' is being done by an individual prior to the client hiring the attorney, there could in fact be a problem with an inadvertent waiver of the attorney-client privilege."; finding that the arrangement also involved an improper fee-split; "Finally, the Committee has a grave concern regarding the payment by the attorney of the fee to the consulting firm. Clearly, fee splitting with a non-attorney is prohibited by Rule 5.4. While the inquiry tries to couch the payment to the consulting firm for the fee as payment for 'investigative services,' that a flat fee is paid and that non-legal services were provided do not standing alone make the payment permissible. Other factors which would affect that determination include the amount of the payment, the amount of time spent by the investigator, and whether the flat fee is in any way dependent upon the size of the possible recovery in the case. The payment should be reasonably related to the value of the services provided. If not, it can easily be seen as a subterfuge to avoid the prohibition against fee sharing with a non-lawyer.").

- Illinois LEO 97-05 (1/23/98) ("A lawyer is approached by a non-lawyer who proposed setting up a marketing company which would solicit personal injury cases by methods which would violate the Rules of Professional Conduct if employed by a lawyer. The lawyers would receive referrals from the non-lawyer's company. The lawyers would pay a fee to the company for each referral.").
- New York LEO 565 (10/1/84) ("May an attorney employ a public relations and marketing firm to solicit potential clients for whom the attorney will provide prepaid legal services and pay such firm as compensation either a salary, commission or percentage of the annual fee charged to such clients by the attorney for legal services where the public relations firm will handle all advertising, inquiries, and initial correspondence on behalf of the attorney as well as the presentation and marketing of the prepaid legal services and such public relations firm will seek out corporations, non-profit organizations and various groups?"; concluding that "any compensation in the form of a commission or percentage based upon the volume of business developed would be clearly improper. Such form of compensation would tend to give the marketing firm a pecuniary interest in the success of the solicitation, and may lead to the use of hard-sell tactics or other improprieties.").

Ethics rules prohibiting solicitation have been upheld by various courts.

- McKinley v. Abbott, 643 F.3d 403, 408-09 (5th Cir.) (upholding the Texas barratry statute making it a crime to solicit accident victims within a certain time after the accident; "[T]he state introduced anecdotal testimony from accident victims about solicitation directly after an automobile accident and the stress causes by those solicitations. There was also expert testimony about the stress disorder many people suffer for up to a month after a traumatic event, which can lead to cognitive dysfunctions in information processing and decision-making. This is sufficient evidence to demonstrate that the harm is real."), cert. denied, 132 S. Ct. 825 (2011)
- Bergman v. District of Columbia, 986 A.2d 1208, 1211, 1212, 1217 (D.C. Cir. 2010) (upholding the constitutionality of a Washington, D.C., law; explaining that "[t]he Act makes it unlawful for 'practitioner[s]' to solicit business from 'a client, patient, or customer within 21 days of a motor vehicle accident with the intent to seek benefits under a contract of insurance or to assert a claim against an insured, a governmental entity, or an insurer on behalf of any person arising out of the accident.' D.C. Code § 22-3225.14 (a)(1)."; "The Act contains several exemptions from this twenty-one day prohibition. It permits immediate solicitation of legal business from accident victims through the mail, and the proscription against in-person solicitation does not apply if there is a preexisting relationship between the practitioner and the person solicited, or if the contact is initiated by the 'potential client, patient, or customer.' D.C. Code § 22-3225.14 (a)(2)."; analyzing the D.C. law under commercial speech

guidelines; concluding that "[w]e are satisfied that the Act addresses a substantial governmental interest, namely, the protection of consumers from unsolicited and often distressing one-on-one intrusions upon their privacy, effected for the purpose of securing their business in the immediate aftermath of an automobile accident, a time when many of them are likely to be in physical or emotional distress or in vulnerable circumstances."; noting that the United States Supreme Court upheld a thirty-day prohibition on direct mail solicitation of accident victims in Florida Bar v. Went For It, Inc., 515 U.S. 618, 620 (1995)).

- Falanga v. State Bar of Ga., 150 F.3d 1333 (11th Cir. 1998) (upholding Georgia's prohibition on in-person solicitation), cert denied, 526 U.S. 1087 (1999).

Courts have also upheld (against equal protection claims) state ethics rules that prohibit solicitation in certain situations while permitting it in others.

- State v. Falk, 724 So. 2d 146 (Fla. Dist. Ct. App. 1998) (upholding against an equal protection claim a Florida ethics prohibiting solicitation of automobile accident victims but not other injured claimants), review denied, 740 S. 2d 527 (Fla. 1999).

State ethics rules that permit solicitation in certain circumstances obviously spawn various issues about whether those circumstances exist.

Some states have peculiar rules regarding solicitation.

- Florida Rule 4-7.18(a)(1) ("Except as provided in subdivision (b) of this rule, a lawyer may not: (1) solicit, or permit employees or agents of the lawyer to solicit on the lawyer's behalf, professional employment from a prospective client with whom the lawyer has no family or prior professional relationship, in person or otherwise, when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain. The term 'solicit' includes contact in person, by telephone, telegraph, or facsimile, or by other communication directed to a specific recipient and includes any written form of communication, including any electronic mail communication, directed to a specific recipient and not meeting the requirements of subdivision (b) of this rule and rules 4-7.11 through 4-7.17 of these rules.").
- Georgia Rule 7.3(d) ("A lawyer shall not solicit professional employment as a private practitioner for the lawyer, a partner or associate through direct personal contact or through live telephone contact, with a non-lawyer who has not sought advice regarding employment of a lawyer.").

- Illinois Rule 7.3(a)(1)-(2) ("A lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment from a prospective client when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain, unless the person contacted: (1) is a lawyer; or (2) has a family, close personal, or prior professional relationship with the lawyer.").
- New York Rule 7.3(a)(1) ("A lawyer shall not engage in solicitation . . . by in-person or telephone contact, or by real-time or interactive computer-accessed communication unless the recipient is a close friend, relative, former client or existing client.").
- Virginia Rule 7.3(a) ("A lawyer shall not solicit employment from a potential client if: (1) the potential client has made known to the lawyer a desire not to be solicited by the lawyer; or (2) the solicitation involves harassment, undue influence, coercion, duress, compulsion, intimidation, threats or unwarranted promises of benefits.").
- D.C. Rule 7.1(d) ("No lawyer or any person acting on behalf of a lawyer shall solicit or invite or seek to solicit any person for purposes of representing that person for a fee paid by or on behalf of a client or under the Criminal Justice Act, D.C. Code Ann. §11-2601 (2001) et seq., in any present or future case in the District of Columbia Courthouse, on the sidewalks on the north, south, and west sides of the courthouse, or within 50 feet of the building on the east side.").

Bars have had the most difficulty wrestling with lawyers' activities at meetings or seminars, either legitimately or illegitimately scheduled to provide general information about legal issues.

- New York LEO 830 (7/14/09) ("A lawyer may ethically contact lay organizations to inform them that he or she is available as a public speaker on legal topics, but must adhere to advertising and solicitation requirements under the Rules where the communication is made expressly to encourage participants to retain the lawyer or law firm.").
- Disciplinary Bd. of Supreme Court v. McCray, 755 N.W.2d 835, 841-42, 843-44, 845, 844 (N.D. 2008) (suspending for six months a lawyer for improperly soliciting vulnerable client who required legal assistance with financial woes, and who also permitted most of the work to be done by non-lawyers; "The evidence supports this finding. McCray testified he spent between 10 and 40 hours per week working for Bradley Ross Law, P.C. Assuming for the sake of argument McCray worked 40 hours per week during the 10 months or approximately 45 weeks McKenzie was a client, he would have spent 1,800 hours servicing approximately 9,450 clients, including McKenzie. According

to our calculations, this results in .19 hours, or less than 12 minutes, McCray spent working for each client during the 10-month period. We agree with the hearing panel that this is an insufficient amount of time to adequately represent McKenzie along with his other clients. . . . We also agree that 'little in the way of meaningful legal work' was performed for McKenzie. It appears the vast majority of the work performed consisted of simply inundating credit reporting agencies with dispute letters written in the consumer's name to trigger the obligation of those agencies under the Credit Repair Organizations Act, 15 U.S.C., § 1679 et seq., to respond to all consumer disputes within 30 days and remove any legitimately challenged item that cannot be verified within the 30-day period. . . . The persons who prepared and mailed the dispute letters were located in Indiana. Moreover, the panel's finding that Bradley Ross Law, P.C., did not until recently verify that work was performed for clients each month they were billed is supported by McCray's own testimony."; also explaining that the lawyer engaging in improper solicitation at "manned booths" at "numerous seminars on the topic of how to improve a person's credit scores"; "McCray had 9,450 clients, and the vast majority of the work performed by Bradley Ross Law, P.C., i.e., mailing dispute letters, was performed by his leased employees in Indiana. McCray could not have given individual attention to all of his clients or sufficiently overseen the work performed by his leased workers in Indiana. In effect, McCray allowed the Indiana employees to practice law under his license."; "A 'seminar . . . is a curious hybrid of advertising and in-person solicitation as well as a pure educational effort . . .," N. Keilin, Client Outreach 101: Solicitation of Elderly Clients by Seminar Under the Model Rules of Professional Conduct, 62 Fordham L. Rev. 1547, 1548 (1994), but the Rules of Professional Conduct do not expressly prohibit a lawyer's involvement in an educational seminar. However, improper solicitation of clients occurs when a lawyer involves himself with an organization that independently targets and solicits prospects for his representation.").

- North Carolina LEO 2007-4 (4/25/08) (providing guidance on issues "relative to client seminars and solicitation, gifts to clients and others following referrals, distribution of business cards, and client endorsements"; explaining that "[a]n attorney may conduct educational seminars for non-clients. See RPC 36. The attorney may advertise the seminars so long as the advertisements comply with the Rules of Professional Conduct. See Rule 7.2. The attorney may request attendees to complete an evaluation feedback form that includes the attendee's name, contact, and family information, as well as check boxes to indicate areas of particular interest. After the seminar, the attorney may not contact an attendee by in-person or telephone solicitation, but must wait for the attendee to contact the attorney. Rule 7.3(a)."; also holding that a lawyer may host a social event for non-clients and "allied professionals" who have referred business to the lawyer; "An attorney may host a social function for existing clients, non-clients, or both. See RPC 146. The attorney may invite non-clients, provided the

attorney does not solicit business from the non-clients."; also holding that a lawyer may not "send a restaurant or store gift certificate to a client or non-client in appreciation for a referral from that person" because "Rule 7.2(b) prohibits a lawyer from giving anything of value to a person for recommending the lawyer's services"; holding that a lawyer may "send gifts of nominal value -- such as holiday fruit baskets, flowers, or gift certificates -- to existing clients or non-clients with whom the attorney has an existing professional relationship . . . as long as a gift is not a quid pro quo for the referral of clients. Rule 7.2(b).").

- Philadelphia LEO 2007-13 (12/2007) (generally permitting lawyers to be included on a "preferred" lawyer list prepared by a non-profit educational institution; also generally permitting the lawyer to purchase "booth space" at "housing fairs" sponsored by the institution).
- Illinois LEO 06-02 (7/2006) ("Lawyer may make appearances before civil and similar organizations in an effort to obtain clients").
- Ohio LEO 2005-7 (8/5/05) (allowing Ohio lawyers to provide pro bono legal services regarding "advance directive" forms such as living wills and anatomical gift forms, as long as the lawyer was not using the program to solicit clients; warning that it "would be improper if the purpose and modus operandi is in-person solicitation of legal business").
- Nebraska LEO 09-05 (2009) ("[A]n attorney may rent a booth at a Chamber of Commerce event to promote his professional services. This includes offering a drawing for a prize so long as the use of the attorney's services is not required to enter or win the drawing. Listening to a 'pitch' should not be a requirement for entering or winning the drawing."; "[A] lawyer may rent a table or sponsor a booth at a business exposition and not violate Rule 7.3, as long as the lawyer does not approach, accost, or importune members of the public in the area of the table or the booth. A lawyer must not use any deceptive tactics to influence the public's decision to visit or not visit the table or the booth. The decision to make contact must always be made by the public, not by the lawyer. Once members of the public take the initiative to contact the lawyer, the lawyer has the right to respond and to distribute written materials which otherwise comply with the Rules of Professional Conduct, just as the lawyer would be free to do in his or her own office.").
- Maryland LEO 2004-29 (6/24/04) (providing guidance for a lawyer asking whether he could set up a booth at professional conferences and seminars which would allow the lawyer to solicit clients at those meetings; "Solicitation occurs when an attorney initiates personal contact with a potential client with whom the attorney had no previous relationship, for the purpose of pecuniary gain. Whereas you suggest that it is the attendee at a conference who would initiate the contact by choosing to approach the vendor booth, the whole idea of having a booth at the event is to entice attendees to approach your booth

- and then hire your firm for their needs. Under the circumstances, it would be impossible for the Committee to provide you with a definitive statement as to which actions would, or would not, involve 'initiation' of a personal contact. Whether solicitation occurs will depend on the factual context of each case."; considering as irrelevant "the sophistication of an attendee" at the type of conference the lawyer describes; "the provisions of Rule 7.3 on 'Direct contact with prospective clients' (or 7.2 on 'Advertising') do not concern themselves with the sophistication of the prospective client in describing conduct which is permissible. Sophisticated and unsophisticated persons are equally off-limits for impermissible advertisement and in-person contact by lawyers."; concluding that the lawyer's plan is not a per se violation of the rules but "appears to be fraught with potential problems").
- Arizona LEO 02-08 (9/2002) (holding that a lawyer may sponsor a booth at a business exposition and speak personally with visitors, as long as the visitors initiate the contact, are acting in "an atmosphere free of coercion and deception" and are not vulnerable to overreaching).
  - Illinois LEO 96-1 (7/1996) ("A lawyer may distribute printed material advising persons of their legal rights who are in attendance at public service seminars and to community advocates for personal circulation to interested persons."; "A lawyer may distribute materials at a seminar and community advocates may distribute the lawyer's material, which materials must contain at least the name of one attorney responsible for the content. The lawyer would be restricted from giving anything of value to the promoter of the seminar or community advocates for the distribution of the materials.").
  - Illinois LEO 94-4 (7/1994) ("A lawyer or law firm may participate in a seminar relating to advance directive services in which a health care organization (HCO) assists in preparation of materials so long as any payment by the lawyer or firm to the HCO is limited to the costs of preparation of the materials, those materials and their distribution comply with the rules on advertising, and all legal services are rendered solely by the lawyer.").
  - Rhode Island LEO 93-30 (5/12/93) (holding that a "common membership" by a law firm's lawyer and a prospective client in a "professional business organization" does not constitute a "prior professional relationship" for purposes of the solicitation rules, meaning that a mailing to such a prospective client must be marked as an advertisement).

State bars having to regulate solicitation have sometimes drawn lines so thin as to be nearly ludicrous. For instance, one bar indicated that lawyers could display law firm brochures at church festivals, but could not hand them out.



- Ohio LEO 99-5 (10/8/99) (prohibiting lawyers from handing out brochures at church festivals and fairs, but allowing the lawyer to display the brochures on a counter at such events).

(a) All (or most) states would prohibit telephone calls to accident victims, either because they fall within some explicit prohibition, or because they violate the general ban on inherently coercive solicitation.

(b)-(c) A state bar's attitude toward these more benign forms of solicitation would depend on the state's specific rules.

Some states have addressed whether a third person had a "prior professional relationship" with the lawyer, thus permitting in-person solicitation.

- Nebraska LEO 09-04 (2009) (addressing the following question: "Is the general prohibition of Neb. Ct. R. Prof. Cond. § 3-507.3 concerning in-person, live telephone or real-time electronic contact solicitation of professional employment inapplicable to persons who have engaged the law firm for estate planning in the past?"; answering as follows: "The general prohibition of Neb. Ct. R. Prof. Cond. § 3-507.3 concerning in-person, live telephone or real-time electronic contact solicitation of professional employment is inapplicable to persons who have engaged the law firm for estate planning in the past.").
- North Carolina LEO 2000-9 (1/18/01) (analyzing the following question about a lawyer who also acts as a CPA: "Attorney may decide to join an existing accounting practice as a CPA. If so, may Attorney operate a separate legal practice within his office in the accounting firm?"; answering as follows: "Yes, this arrangement is not distinct from the arrangement allowed in RPC 201 in which a lawyer/real estate agent operated a separate law practice within the offices of a real estate brokerage. Nevertheless, such an arrangement presents serious obstacles to the fulfillment of a lawyer's professional responsibility. Preserving the confidentiality of client information and records is virtually impossible in such a setting. Client information must be isolated and concealed from all of the employees of the CPA firm. See Rule 1.6. In addition, Attorney must avoid conflicts of interest between the interests of his legal clients and the interests of the clients of the CPA firm. See Rules 1.7 and 1.9. There may be no sharing of legal fees with the CPA firm in violation of Rule 5.4(a) which prohibits a lawyer from sharing legal fees with a non-lawyer. Finally, Attorney must maintain a separate trust account for the funds of his law clients pursuant to Rule 1.15 et seq."; also analyzing the question of whether the lawyer may "offer legal services to his accounting clients and vice

versa"; answering as follows: "Yes, if there is full disclosure of the lawyer's self-interest in making the referral and Attorney reasonably believes that he is exercising independent professional judgment on behalf of his legal clients in making such a referral. However, direct solicitation of legal clients is prohibited under Rule 7.3 although it may be permitted by the regulations for certified public accountants. Rule 7.3(a) does permit a lawyer to engage in in-person or telephone solicitation of professional employment if the lawyer has a 'prior professional relationship' with a prospective client. If a prior professional relationship was established with a client of the accounting firm, Attorney may call or visit that person to solicit legal business."; also holding that the lawyer may share a telephone number with the accounting firm with whom the lawyer also works).

Most states' ethics rules specifically exempt any restrictions to direct mail sent to lawyers. At least one state reached the same conclusion in an opinion.

- Ohio LEO 2002-6 (6/14/02) (permitting out-of-state lawyers to solicit Ohio lawyers in an effort to seek appellate work).

### **Best Answer**

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

b 7/14