BASIC CONFLICTS OF INTEREST RULES: PART II

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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General Rule -- Adversity to Former Clients

Hypothetical 1

In connection with your service on a committee reviewing your state's ethics rules, you have been asked to vote on proposals governing adversity to former clients.

What basic conflict rule should apply to a lawyer's adversity to a former law firm client?

1. As long as the lawyers with material confidential information do not work on the matter (and comply with their ethical duty of confidentiality), other lawyers in the firm may be adverse to the former client.

2. As long as the firm sets up a formal "ethics screen" prohibiting the lawyers with material confidential information from revealing it to anyone else in the firm, other lawyers in the firm may be adverse to the former client.

3. If any lawyer at the firm has material confidential information from an earlier representation, no lawyer in the firm may be adverse to the former client.

THERE IS NO "BEST ANSWER" IN THIS HYPOTHETICAL, BUT THE GENERALLY APPLICABLE RULE IS NO. 3 (THE NARROWEST RULE)

Analysis

The basic conflicts rule governing adversity to former clients primarily rests on a duty of confidentiality, rather than on a duty of loyalty.

Unlike the analysis when a lawyer considers adversity to a current client, this assessment therefore must consider the nature of the earlier representation, and the substance of the information the lawyer learned or was likely to have learned in the earlier representation. The bottom-line rule is that lawyers may not (absent consent) be adverse to a former client if:

- The adversity is in the "same" or "substantially related" matter as the earlier representation; or

- The lawyer acquired material confidential information that could now be used to the former client's disadvantage.

ABA Model Rule 1.9(b).[1]

The ABA Model Rules can be somewhat confusing, because the information-based concern does not appear in the black letter rule itself, but rather in a comment that defines as "substantially related" any matter in which the lawyer might have acquired material confidential information that the lawyer could now use against the client.

> Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter.

ABA Model Rule 1.9 cmt. [3] (emphasis added).

Interestingly, the ABA Model Rules take a different approach to a lawyer's adversity to a current and to a former client.

Under ABA Model Rule 1.7, a lawyer faces a "concurrent conflict of interest" if the lawyer's representation of one client "will be directly adverse to another client" or if there is a "significant risk" with a lawyer's representation of a client will be "materially limited by the lawyer's responsibilities to another client [or] a former client." ABA Model Rule 1.7(a). In that circumstance, a lawyer may proceed only (among other things) if the client consents and if "the lawyer reasonably believes that the lawyer will be able to

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[1] ABA Model Rule 1.9(a) ("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.").

provide competent and diligent representation to each affected client." ABA Model Rule 1.7(b)(1). In other words, ABA Model Rule 1.7 contains what amounts to an objective "reasonable lawyer" standard that might prohibit the lawyer's representation despite client consent.

In contrast, ABA Model Rule 1.9 allows a lawyer (if the former client provides informed consent) to "represent another person in the same or substantially related matter in which [a new client's interests] are materially adverse to the interests of the former client." ABA Model Rule 1.9(a). That rule does not contain an explicit "reasonable lawyer" standard. However, a lawyer assessing a possible representation adverse to a former client presumably has to look at both ABA Model Rule 1.9 and ABA Model Rule 1.7. If an adversity to the former client would trigger the "materially limited" provision of ABA Model Rule 1.7(a)(2), the "reasonable lawyer" standard of ABA Model Rule 1.7(b)(1) presumably applies.). One would think that the "materially limited" standard would automatically apply if the lawyer took a representation adverse to a former client "in the same or substantially related matter" in which the lawyer formerly represented the client, but the lack of a "reasonable lawyer" standard in ABA Model Rule 1.9 at least implies that such is not the case.

The Restatement takes the same approach. Restatement (Third) of Law Governing Lawyers § 132 (2000). The Restatement also builds the information issue into the "substantially related" definition, by indicating that

> the current matter is substantially related to the earlier matter if: (1) the current matter involves the work the lawyer performed for the former client; or (2) there is a substantial risk that representation of the present client will involve the use of information acquired in the course of representing the

> former client, unless that information has become generally known.

Restatement (Third) of Law Governing Lawyers § 132 (2000).

A 2008 District of Columbia legal ethics opinion provided a useful analysis.

> A lawyer who has formerly represented a client in a matter is prohibited from representing another person in the same or 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. Two matters are "substantially related" to one another if there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation is useful or relevant in advancing the client's position in the new matter. Subject to certain conditions, a lawyer may limit the scope of the new representation such that factual information normally obtained in the prior matter would be legally irrelevant to the advancement of the current client's position in the new matter. Specifically, by agreeing only to represent a client as to a discrete legal issue or with respect to a discrete stage in the litigation, a lawyer may be able to limit the scope of the representation such that the new matter is not substantially related to the prior matter. Restrictions on the scope of the representation that effectively ensure that there is no substantial risk that confidential factual information as would normally have been obtained in the prior representation would be useful or relevant to advance the client's position in the new matter may, under certain circumstances, be sufficient to avoid a conflict of interest."

District of Columbia LEO 343 (2/2008). The D.C. Bar also noted that

> [t]he Restatement likewise suggests that "the lawyer may limit the scope of representation of a later client so as to avoid representation substantially related to that undertaken for a previous client." RESTATEMENT OF THE LAW GOVERNING LAWYERS at § 132 cmt. E (2007). . . .
>
> Even if it is permissible generally to restrict a representation to avoid substantial overlap with a prior representation, it may not be possible in a particular case. Private lawyers, like former government lawyers, should "err well on the side of caution." We have considered two

> different categories in which a lawyer may avoid the applicability of D.C. Rule 1.9 -- by agreeing only to represent a client as to a discrete legal issue and by agreeing to represent a client with respect to a discrete stage of the litigation. While we recognize that these categories can, under appropriate conditions, allow for lawyers to represent clients without violating D.C. Rule 1.9, we also appreciate that it may prove very difficult for lawyers to do so in fact. Where confidential information from the prior representation could be useful in or relevant to the new representation -- however it may be limited or circumscribed -- then the substantial-relationship test is satisfied, and the new representation may not proceed without the consent of the former client.

Id. (citation omitted).

The harshness of this information-based rule becomes apparent when combined with the general principle imputing any individual lawyer's disqualification to all other lawyers in that firm. ABA Model Rule 1.10. That concept makes sense in a loyalty-based context (as with adversity to a current client), but seems out of place when the prohibition rests on information (which of course is useless to any lawyer who does not possess the information).

Nevertheless, the general imputation rule normally precludes a law firm from avoiding a conflict in this setting by either expecting any of its lawyers with material confidential information to honor their ethics duties of confidentiality, or even erecting "ethics screens" around those lawyers so that others in the firm (untainted by the information) may pursue adversity to the former client.

Best Answer

There is no "best answer" in this hypothetical, but the generally applicable rule is **No. 3** (the narrowest rule). N 3/12

Defining the End of a Relationship

Hypothetical 2

About six months ago, a doctor asked you to prepare an offer for an office building she was interested in purchasing. She gave you the figure to include in the offer, and you prepared and sent her a standard offer for her review. You have not heard from her since you sent her the draft offer, and you have no idea whether she ever presented it to the seller. This morning, you received a call from a company who wants you to pursue a trademark infringement action against the doctor (based on some phrases that the doctor uses in her marketing).

Without the doctor's consent, can you represent the company in the trademark action against the doctor?

MAYBE

Analysis

Every state's ethics rules recognize an enormous dichotomy between a lawyer's freedom to take matters adverse to a current client and a former client.

Absent consent, a lawyer cannot take any matter against a current client -- even if the matter has no relationship whatever to the representation of that client. ABA Model Rule 1.7. In stark contrast, a lawyer may take a matter adverse to a former client unless the matter is the "same or . . . substantially related" to the matter the lawyer handled for the client, or unless the lawyer acquired material confidential information during the earlier representation that the lawyer could now use against the client. ABA Model Rule 1.9.

Given this difference in the conflicts rules governing adversity to current and former clients, lawyers frequently must analyze whether a client is still "current" or can be considered a "former" client for conflicts purposes.

Absent some adequate termination notice from the lawyer, it can be very difficult to determine if a representation has ended for purposes of the conflicts analysis.

Interestingly, the meager guidance offered by the ABA Model Rules appears in the rule governing diligence, not conflicts.

> Unless the relationship is terminated as provided in Rule 1.16, a lawyer should carry through to conclusion all matters undertaken for a client. If a lawyer's employment is limited to a specific matter, the relationship terminates when the matter has been resolved. If a lawyer has served a client over a substantial period in a variety of matters, the client sometimes may assume that the lawyer will continue to serve on a continuing basis unless the lawyer gives notice of withdrawal. Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so.

ABA Model Rule 1.3 cmt. [4].

In one legal ethics opinion, the ABA provided an analysis that adds to the confusion rather than clarifies.

> [T]he Committee notes that if there is a continuing relationship between lawyer and client, even if the lawyer is not on a retainer, and even if no active matters are being handled, the strict provisions governing conflicts in simultaneous representations, in Rule 1.7, rather than the more permissible former-client provisions, in Rule 1.9, are likely to apply.

ABA LEO 367 (10/16/92). Thus, the ABA did not provide any standard for determining when a representation terminates in the absence of some ongoing matter.

The ACTEC Commentaries provide an analysis, but also without any definitive guidance.

> [T]he lawyer may terminate the representation of a competent client by a letter, sometimes called an 'exit' letter,

> that informs the client that the relationship is terminated. The representation is also terminated if the client informs the lawyer that another lawyer has undertaken to represent the client in trusts and estates matters. Finally, the representation may be terminated by the passage of an extended period of time during which the lawyer is not consulted.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.4, at 57 (4th ed. 2006), http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf (emphasis added).

The case law is equally ambiguous, although some cases require some dramatic event or affirmative action by the lawyer before finding the representation to have ended.

- Johnson v. Riebesell (In re Riebesell), 586 F.3d 782, 789 (10th Cir. 2009) (holding that a lawyer had an attorney-client relationship with a client until the client terminated the relationship; "[W]e agree with the bankruptcy court, which held otherwise - an attorney-client relationship did exist because (1) the relationship did not formally terminate until March or April 2003, when Johnson terminated it.").

- Comstock Lake Pelham, L.C. v. Clore Family, LLC, 74 Va. Cir. 35, 37-38 (Va. Cir. Ct. 2007) (opinion by Judge Thacher holding that a law firm which had last performed work for a client in August 2005 should be considered to still represent the client, because the law firm "never communicated to [the client] that [the law firm's] representation had been terminated. Regardless of who initiated the termination or representation, the Rules place the burden of communication squarely upon the lawyer. . . . Because the burden is upon the lawyer to communicate with the client upon the termination of representation, the lack of communication of same from [law firm] could lead one to reasonably conclude that the representation was ongoing. It was [law firm's] burden to clarify the relationship, and they failed to satisfy that burden.").

- GATX/Airlog Co. v. Evergreen Int'l Airlines, Inc., 8 F. Supp. 2d 1182, 1186, 1187 (N.D. Cal. 1998) (disqualifying the law firm of Mayer, Brown & Platt upon the motion of the Bank of New York; explaining that the law firm's "use of the word 'currently' to describe the MBP/BNY relationship evidences its

longstanding and continuous nature. Some affirmative action would be needed to sever that type of relationship, and MBP assumed the relationship had not been severed." (emphasis added); also concluding that the Bank was a current client because "MBP [the firm] assisted BNY [the Bank] on a repeated basis whenever matters arose over a three-year period. Although MBP may or may not still have been working on matters for BNY when the January 30 complaint was filed, it is undisputed that MBP billed BNY through January 12."), vacated as moot, 192 F.3d 1304 (9th Cir. 1999).

- Mindscape, Inc. v. Media Depot, Inc., 973 F. Supp. 1130, 1132-33 (N.D. Cal. 1997) (finding that a law firm's attorney-client relationship with a client was continuing as long as the lawyer had a "power of attorney" in connection with a patent, was listed with the Patent & Trademark Office as the addressee for correspondence with the client, and had not yet corrected a mistake in a patent that had earlier been discovered).

- Research Corp. Techs., Inc. v. Hewlett-Packard Co., 936 F. Supp. 697, 700 (D. Ariz. 1996) ("'The relationship is ongoing and gives rise to a continuing duty to the client unless and until the client clearly understands, or reasonably should understand that the relationship is no longer depended on.'" (emphasis added; citation omitted); denying Hewlett-Packard's motion to disqualify plaintiff's counsel).

- Shearing v. Allergan, Inc., No. CV-S-93-866-DWH (LRL), 1994 U.S. Dist. LEXIS 21680 (D. Nev. Apr. 4, 1994) (noting that the law firm had not performed any work for the client for over one year, but pointing to a letter that the law firm sent to the client indicating that they were a valuable client and that the firm remained ready to respond to the client's needs; granting motion to disqualify plaintiff's counsel).

- Alexander Proudfoot PLC v. Federal Ins. Co., Case No. 93 C 6287, 1994 U.S. Dist. LEXIS 3937, at *10 (N.D. Ill. Mar. 30, 1994) (holding that the insurance company could "assume" that the firm would continue to act as its lawyer if and when the need arose based on the law firm's prior service to the party and stating that "any perceived disloyalty to even a 'sporadic' client besmirches the reputation of [the] legal profession"), dismissed on other grounds, 860 F. Supp. 541 (N.D. Ill. July 27, 1994).

- Lemelson v. Apple Computer, Inc., Case No. CV-N-92-665-HDM (PHA), 1993 U.S. Dist. LEXIS 20132, at *12 (D. Nev. June 2, 1993) (quoting an earlier decision holding that "'the attorney-client relationship is terminated only by the occurrence of one of a small set of circumstances'" and listing those circumstances as one of three occurrences -- first, an express statement that the relationship is over, second, acts inconsistent with the continuation of the relationship, or third, inactivity over a long period of time (citation omitted); concluding that "[n]one of these events occurred in the instant action").

- SWS Fin. Fund A v. Salomon Bros., Inc., 790 F. Supp. 1392, 1398, 1403 (N.D. Ill. 1992) (finding that an attorney-client relationship existed between Salomon Brothers and a law firm which had periodically answered commodity law questions, and had finished its last billable project about two months before attempting to take a representation adverse to Salomon; finding that the law firm had the "responsibility for clearing up any doubt as to whether the client-lawyer relationship persisted" (emphasis added); ultimately concluding disqualification was inappropriate).

At least one court has taken a more forgiving approach.

- Banning Ranch Conservancy v. Superior Court, 123 Cal. Rptr. 3d 348, 352 (Cal Ct. App. 2011) (holding that a lawyer's open-ended retainer agreement with the city entered into six years earlier did not render the city a current client when the lawyer had not provided services to the city under the agreement; "The 2005 agreements provide that the Shute firm would provide legal services to the City, on an 'as requested' basis, in connection with 'public trust matters of concern to [the City].' The agreements, however, conditioned such representation on the Shute firm's confirmation of its 'ability to take on the matter.' If such representation was requested and accepted, the agreed-upon rates were to be $250 per hour for partners and $215 per hour for associates. The City's supporting declarations showed the 2005 agreements never had been terminated."; "The Shute firm continued doing some minor legal work on another matter, but that matter concluded in early 2006. Other than the initial matter concerning mooring permit regulations, the City never requested that the Shute firm undertake any other legal work pursuant to the 2005 letter agreements."; overturning the trial court's disqualification order).

Thus, the safest (and in some courts, the only) way to terminate an attorney-client relationship is to send a "termination letter" explicitly ending the relationship. Some lawyers (especially those who practice in the domestic relations area) routinely send out such letters.

However, most lawyers would find "termination letters" contrary to their marketing instincts. In fact, many lawyers continue to send e-mail alerts to former clients (usually addressed to "Clients and Friends"), inviting former clients to firm events, etc. All of these steps are designed to bring future business, but of course they also provide evidence of a continuing attorney-client relationship.

Unfortunately, the consent remedy does not provide a very promising avenue either. A former client is not likely to feel any loyalty toward the lawyer who used to represent him or her -- and therefore might be less inclined than a current client to grant a consent to the lawyer who wishes to be adverse even on an unrelated matter.

Best Answer

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

N 3/12

Lawyer's Retention of Documents as Evidence of a Continuing Relationship

Hypothetical 3

You prepared the estate plan for a wealthy developer about three years ago. His original will is still in your law firm's safe, and you send him periodic "legal updates" on estate tax changes -- none of which has prompted him to retain you for any work since you finished his estate documents. This morning your largest client asked you to file a lawsuit against the developer over an important zoning matter that arose six months ago.

Without the developer's consent, can you represent your client in the suit against the developer?

YES (PROBABLY)

Analysis

As in other contexts, the key here is to determine whether the developer is a "current" or "former" client. If the developer is no longer your client, you can freely sue him on this presumably unrelated matter (about which you would not have acquired any material confidential information).

Not surprisingly, the ACTEC Commentaries use this as an example.

> The retention of the client's original estate planning documents does not itself make the client an 'active ' client or impose any obligation on the lawyer to take steps to remain informed regarding the client 's management of property and family status. Similarly, sending a client periodic letters encouraging the client to review the sufficiency of the client's estate plan or calling the client's attention to subsequent legal developments does not increase the lawyer's obligations to the client. See ACTEC Commentary on MRPC 1.4 (Communication) for a discussion of the concept of dormant representation.

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.8, at 113-14 (4th ed. 2006),

http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf

(emphasis added).

The ACTEC Commentaries provide an illustration of this basic principle.

> Example 1.4-1. Lawyer (L) prepared and completed an estate plan for Client (C). At C's request, L retained the original documents executed by C. L performed no other legal work for C in the following two years but has no reason to believe that C has engaged other estate planning counsel. L's representation of C is dormant. L may, but is not obligated to, communicate with C regarding changes in the law. If L communicates with C about changes in the law, but is not asked by C to perform any legal services, L's representation remains dormant. C is properly characterized as a client and not a former client for purposes of MRPCs 1.7 (Conflict of Interest: Current Client) and 1.9 (Duties to Former Clients). N 1/10

American College of Trust & Estate Counsel, Commentaries on the Model Rules of Professional Conduct, Commentary on MRPC 1.4, at 58 (4th ed. 2006), http://www.actec.org/Documents/misc/ACTEC_Commentaries_4th_02_14_06.pdf.

For trust and estate lawyers, this issue involves not only ethics, but malpractice liability. The ACTEC Commentaries clearly hope to avoid burdening trust and estate lawyers with liability for not updating the estate plans of arguably former clients. Thus, the answer probably is not as clear as the ACTEC Commentaries would like it to be.

Best Answer

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

Effect of Sending a Withdrawal Notice or Requesting a Consent

Hypothetical 4

You represented an out-of-state company in several matters over the past five years. Your last work for the company involved a dispute with its landlord. After several months of intense negotiations, you stopped hearing from the company, although you do not know if it resolved its dispute with the landlord. Your last communication with the company was approximately eight months ago.

Your largest client just asked you to represent it in a large patent case against the out-of-state company. The case has nothing to do with the landlord dispute, and would generate several million dollars of fees for your firm. You are wondering what steps (if any) you should take.

(a) Should you send a termination letter to the out-of-state company?

NO (PROBABLY)

(b) Should you ask the out-of-state company for consent to take the antitrust matter against it?

NO (PROBABLY)

Analysis

Lawyers wondering if a client should be considered "current" or "former" for conflicts analysis purposes often are tempted to increase the certainty by officially terminating the relationship or by asking for a consent.

(a) Sending a termination letter would certainly end the relationship. However, it might also trigger the "hot potato" rule -- under which many courts refuse to recognize such withdrawals if they are motivated by the desire to immediately take a matter adverse to the now-former client. Some courts even can find that the termination amounts to a disloyal act under the ethics rules.

Although this can often be a close call, in most situations it probably does not make sense to send a termination letter. The "hot potato" risk in most situations outweighs the benefit of any certainty.

(b) If a former client consents to the adversity, the lawyer almost certainly can rely on that consent. In a small number of situations, courts or bars find that a reasonable or "disinterested" lawyer would not even ask for a consent -- because the lawyer could not reasonably believe that he or she could take a matter adverse to the client or former client. Those situations almost always involve current rather than former clients -- although conceivably a court or bar could apply that principle if a lawyer wanted to essentially "turn on" a former client in the same matter on which the lawyer represented the client (or if the lawyer could use confidential information to the former client's great disadvantage).

In any event, most lawyers do not ask for consent because it is unlikely that a former client would grant it. Former clients in that situation have little to gain but much to lose by allowing their former law firm to represent a client adverse to them.

To make matters worse, the court might find that the request for the consent showed that the law firm thought it <u>needed</u> a consent. In a 2009 case, the District of Delaware declined to disqualify Howrey from representing a client adverse to Wyeth, although finding that Howrey had unethically taken on the matter. In discussing the reasonableness of Wyeth's belief that Howrey was representing it, the court pointed to Howrey's earlier request for a consent from Wyeth.

> Howrey went to Wyeth to seek permission to represent Lonza Biologics, PLC, in an unrelated matter; because Howrey would have needed Wyeth's permission only if Wyeth were Howrey's client in the Lonza matter, it is

> reasonable for Wyeth to believe, from Howrey's overture, that it is in fact the client in the Lonza matter. For at least these reasons, then, Wyeth's belief as to its status as a client of Howrey is reasonable, and since the Lonza matter is still active, there is a current attorney-client relationship between Howrey and Wyeth.

Boston Scientific Corp. v. Johnson & Johnson Inc., 647 F. Supp. 2d 369, 374 (D. Del. 2009).[1] A court might come to the same conclusion if a law firm unsuccessfully sought

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[1] Boston Scientific Corp. v. Johnson & Johnson Inc., 674 F. Supp. 2d 369, 371, 374, 374-75 (D. Del. 2009) (declining to disqualify Howrey from representing another client adverse to Wyeth, although finding that Howrey had improperly taken a matter adverse to Wyeth; explaining that "Howrey had handled several matters for the Wyeth family of companies. (. . . (timekeeper sheet showing Howrey's hours billed to 'Wyeth Pharmaceuticals' on various matters between 2003 and sometime in 2009)). In handling these matters, it has not always been clear which Wyeth entity Howrey has been representing. . . . While Howrey attorney Carreen Shannon, the drafter of the letters, declares that she understood her client to be 'Wyeth Pharmaceuticals,' the letters she drafted were '[o]n behalf of Wyeth, including Wyeth Pharmaceuticals B.V.'"; noting that Howrey's internal system listed many different billing addresses for a number of Wyeth entities; concluding that Howrey had violated Rule 1.7 by taking a matter adverse to a current client; "The record here does not contain any express agreements evidencing any current attorney-client relationship between Howrey and Wyeth. The record, however, does support the conclusion that it is reasonable for Wyeth to believe that Howrey has been acting on its behalf with respect to the currently-active Lonza matter. . . . Howrey went to Wyeth to seek permission to represent Lonza Biologics, PLC, in an unrelated matter; because Howrey would have needed Wyeth's permission only if Wyeth were Howrey's client in the Lonza matter, it is reasonable for Wyeth to believe, from Howrey's overture, that it is in fact the client in the Lonza matter. For at least these reasons, then, Wyeth's behalf as to its status as a client of Howrey is reasonable, and since the Lonza matter is still active, there is a current attorney-client relationship between Howrey and Wyeth. Accordingly, Howrey's representation of plaintiffs in the instant suits violates Model Rule 1.7."; nevertheless declining to disqualify Howrey; "[T]he instant suits are unrelated to the Lonza matter; Howrey's Washington, D.C.-based attorneys are handling the instant suits, while its Europe-based attorneys continue to handle the Lonza matter; there is an ethical wall between the two matters -- leads to the same conclusion."; rejecting the concept that a ethics rule violation should automatically result in disqualification; "'In the Third Circuit, and under this court's precedent, whether disqualification is appropriate depends on the facts of the case and is never automatic."; attributing part of the fault to Wyeth; "Moreover, Howrey's failure to comply with Model Rule 1.7 is, to a significant degree, due to Wyeth's conduct. Among other things, Wyeth's naming conventions, its use of the same in-house attorneys on matters involving different subsidiaries without consistently identifying to Howrey which entity those in-house attorneys were representing, and the willingness of it and its subsidiaries to receive billing invoices for matters on which they were not directly engaged with Howrey, together created significant confusion for Howrey as to which entity or entities it was representing, confusion which is evident from Howrey's time sheets, its mailing of billing invoices, and the averments of its attorneys in Europe. Wyeth should not now benefit from such obfuscatory conduct. Accordingly, the court declines to disqualify Howrey from the instant suits and instead orders Howrey to maintain its ethical wall.").

a consent to handle a matter adverse to an arguably current client, and then took the matter anyway (arguing that the client wasn't a current client after all).

Interestingly, one court declined to disqualify Morgan Lewis from adversity to Koch -- agreeing with Morgan Lewis that its earlier representation of Koch was not substantially related to its current adversity. The court noted but did not rely on Morgan Lewis's spurned request for a consent from Koch. The court explained that

> in 2003 Morgan Lewis had sought a conflict waiver to represent a former KoSa customer in a separate antitrust lawsuit related to the 1998 polyester business sale, and Koch's general counsel had refused. . . . The inconsistency between seeking (and being denied) a conflict waiver in 2003 and proceeding with an adverse representation without notifying Koch just five years later is difficult to reconcile. If, indeed, this contradictory behavior was simply the result of a breakdown in Morgan Lewis conflict check procedures, then Morgan Lewis would do well to examine those procedures carefully and immediately, lest future disqualification motions made against it end less favorably.

Koch Indus., Inc. v. Aktiengesellschaft, S.A.R.L., 650 F. Supp. 2d 282, 288 (S.D.N.Y. 2009).[2]

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[2] Koch Indus., Inc. v. Aktiengesellschaft, S.A.R.L., 650 F. Supp. 2d 282, 286, 286-87, 285, 288 (S.D.N.Y. 2009) (declining to disqualify the law firm of Morgan Lewis from handling a matter adverse to Koch although it had conducted a confidential antitrust audit in 2001 for a different Koch affiliate; noting that Morgan Lewis had screened the lawyers handling the case against Koch from those lawyers remaining from the earlier project in which Morgan Lewis represented the Koch subsidiary; noting that the "substantial relationship" standard requires that the matters be "identical" or "essentially the same"; explaining that "[t]he Morgan Lewis audit that plaintiffs cite as the basis for their disqualification motion, however, took place in 2000 and 2001 -- two years after that transaction [which formed the basis of the current litigation Morgan Lewis was handling adverse to Koch]. Further, Morgan Lewis's audit of Koch and certain Koch affiliates did not include KoSa, which was the entity that actually purchased the polyester business that was the locus of the antitrust conspiracy. . . . Instead, the audit report indicates that Morgan Lewis recommended that Koch encourage Kosa to conduct its own antitrust audit and reflects Morgan Lewis's understanding that another law firm would be performing that audit. . . . The audit report is otherwise quite general, providing, for the most part, broad antitrust compliance advice and recommendations. Further, the audit report makes no reference to the DOJ's antitrust investigation, and Morgan Lewis was not otherwise involved in that investigation." (footnote omitted); noting but apparently

Many courts would not be this forgiving, so most lawyers would not seek consent from a client that the law firm believes it no longer represents for a conflicts analysis purposes.

Best Answer

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

finding insignificant the fact that "[i]n early 2003, Morgan Lewis sought a conflict waiver to represent a former KoSa customer in one such civil antitrust suit, and Koch's general counsel refused because of Morgan Lewis's prior antitrust compliance work for the company"; "[I]n 2003 Morgan Lewis had sought a conflict waiver to represent a former KoSa customer in a separate antitrust lawsuit related to the 1998 polyester business sale, and Koch's general counsel had refused. . . . The inconsistency between seeking (and being denied) a conflict waiver in 2003 and proceeding with an adverse representation without notifying Koch just five years later is difficult to reconcile. If, indeed, this contradictory behavior was simply the result of a breakdown in Morgan Lewis conflict check procedures, then Morgan Lewis would do well to examine those procedures carefully and immediately, lest future disqualification motions made against it end less favorably.").

Irrelevance of the Time since the Representation Ended

Hypothetical 5

You represented an antique dealer for about ten years, ending in 1990. Another client just asked you to handle a lawsuit against the antique dealer.

Without your former client's consent, may you represent a client adverse to the antique dealer now that twenty years has passed since you represented the dealer?

MAYBE

Analysis

Unfortunately for lawyers wanting some certainty, there is no "statute of limitations" for the ethics rules' prohibition on adversity to a former client in a matter substantially related to the matter the lawyer handled for the client.

This hypothetical comes from a 2009 Massachusetts case. The court disqualified the lawyer, noting that in 1989 the lawyer's paralegal reminded the antique dealer to carefully maintain all of the corporate books -- to avoid any personal liability.[1]

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[1] R & D Muller, Ltd. v. Fontaine's Auction Gallery, LLC, 906 N.E.2d 356, 358, 358-59 (Mass. App. Ct. 2009) (disqualifying plaintiff's lawyer, who had represented defendants many years earlier; "Affidavits and exhibits submitted in support of the motion to disqualify establish that, between 1980 and 1990, Cain Hibbard [plaintiff's lawyer] had represented the Fontaines [defendants in the current action] on personal and business matters. Among other things, in 1987, Cain Hibbard helped Dina Fontaine (Dina) incorporate Dina's Antiques, Inc., and advised her on the proper maintenance of corporate formalities. Two years later, on March 14, 1989, Cain Hibbard sent Dina a letter reminding her of the necessity of maintaining the corporate records of Dina's Antiques, Inc., so that they reflected the current state of the corporation accurately. The letter also advised Dina that 'these records are necessary to support the corporation's role as a separate entity, and they help to maintain a barrier against personal liability.' Shortly thereafter, on April 12, 1989, a Cain Hibbard paralegal wrote to Dina about updating her corporate minute book, and enclosed backdated stockholders' resolutions that she directed Dina to sign and return."; "Here, the judge determined that, even though considerable time had passed since Cain Hibbard represented the Fontaines, the attorneys had been exposed to confidential information that could be used to the Fontaines' disadvantage in the present case."; "The correspondence Cain Hibbard sent to Dina indicates that the firm had advised her and Dina's Antiques with respect to observing corporate formalities, in part to help 'maintain a barrier against personal liability,' and had provided her with

At about the same time, a Minnesota court analyzed the possible information overlap between a lawyer's adversity to an employee and the same lawyer's representation of the employee twenty-five years earlier in an employment discrimination case against another employer. In Niemi v. Girl Scouts, 768 N.W.2d 385 (Minn. Ct. App. 2009),[2] the court ultimately declined to disqualify the lawyer, finding that the lawyer had not obtained disqualifying information from the former client.

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backdated corporate resolutions to facilitate her belated compliance. In these circumstances, the judge could conclude in his discretion that Cain Hibbard had been exposed to confidential information germane to the present dispute and that the current and former matters are substantially related for purposes of rule 1.9(a).").

[2] Niemi v. Girl Scouts, 768 N.W.2d 385, 389, 389-90, 390 (Minn. Ct. App. 2009) (refusing to disqualify a lawyer from representing defendant in an employment discrimination case, although the same law firm had represented the plaintiff twenty-five years earlier in an employment discrimination case against another employer; "The second type of information identified by Niemi, her 'approach to litigation,' presents the weaker of the two arguments. As an initial matter, it is debatable whether this type of information can be described as 'confidential factual information.' Minn. R. Prof. Conduct 1.9 cmt. 3. It is not necessarily 'factual' in nature because it appears to consist primarily of Niemi's personal characteristics and behavioral tendencies or, more accurately, Roby's impressions of Niemi's personal characteristics and behavioral tendencies. See State ex rel. Ogden Newspapers, Inc. v. Wilkes, 211 W. Va. 423, 566 S.E.2d 560, 567 (W. Va. 2002) (stating that attorney's '[v]ague general impressions' about corporate client's 'philosophical outlook' did not warrant attorney's disqualification in subsequent lawsuit against corporation); Restatement (Third) of the Law Governing Lawyers § 132 cmt. d(iii) (2000) (stating that attorney's knowledge of manner in which client approaches litigation is not 'independently relevant' for purposes of substantial relation test, unless information is 'directly in issue or of unusual value in the subsequent matter'). In addition, the information is not necessarily 'confidential' because it may refer to information that is available to persons who are not part of the attorney-client relationship, such as opposing counsel, a court reporter transcribing a deposition, or court personnel, and perhaps even persons who know Niemi through social interactions. See Minn. R. Prof. Conduct 1.9 cmt. 3 ('Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying.'); see also Restatement (Third) of the Law Governing Lawyers § 132(2) (2000) (stating that rules do not restrict attorney's use of information that has become 'generally known').'"; explaining that because "this type of information exists in practically every lawsuit," finding that such information would disqualify a lawyer "effectively prevent[s] an attorney from taking a position adverse to a former client for the remainder of the attorney's career. The drafters of the rules could have imposed a lifetime ban on being adverse to a former client, but the drafters obviously declined to do so."; ultimately concluding that "information consisting of Niemi's 'approach to litigation' does not justify a conclusion that the prior lawsuit and the present lawsuit are 'substantially related matters.' We reach this conclusion without considering whether this type of information retains any relevance or usefulness 25 to 30 years after it is acquired.").

On the other hand, it should go without saying that a lawyer's earlier acquisition of information that has now become stale often will not preclude adversity to the former client from whom the lawyer acquired the information.

- See, e.g., D.C. Rule 1.9 cmt. [3] ("Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related.").

Best Answer

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

N 3/12

Irrelevance of the Representation's Duration

Hypothetical 6

A former client just filed a motion to disqualify your firm from handling a matter adverse to it. You check your time records, and discover that one of your lawyers spent less than two hours working for that client during the very brief time that you handled a matter for it.

Without the former client's consent, can you take a matter adverse to the former client whom you represented for less than two hours?

MAYBE

Analysis

Just as there is no statute of limitations on the prohibition against lawyers taking matters adverse to a former client that are "substantially related" to the matter the lawyer handled for the client, so there is no bright-line rule governing the duration of a representation that could result in disqualification.

Several courts have disqualified lawyers who represented clients for only a very short period of time.

- State ex rel. Thompson v. Dueker, 346 S.W.3d 390, 395 (E.D. Mo. 2011) (declining to disqualify a lawyer from representing a wife in a motion to modify a divorce decree and maintenance obligation case, based on the husband's earlier brief discussion with the law firm; noting that the husband had paid the law firm $140.00 for the advice, which had occurred years earlier; finding that the husband should be treated as a "former prospective client" under Rule 1.18 rather than a former client; "Instead the evidence shows that after husband consulted with Jeffrey Schechter, husband hired someone else to represent him in the dissolution action. 'A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.' Rule 4-1.18(a). A former prospective client is a 'a person who made preliminary revelations to a lawyer during an initial consultation, but who did not thereafter enter into an ongoing client-lawyer relationship.' Charles W. Wolfram, Former - Client Conflicts, 10 Geo. J. Legal Ethics 677, 682 n.20 (1997); see also Restatement (Third) of the Law Governing Lawyers § 15 (2000). Thus, husband is not a former 'client,' but a

former 'prospective client' of the Schechter Law Firm."; finding that the husband had not provided "significantly harmful" information during the brief discussion with the firm's lawyer, which meant that justification was not warranted).

- Quinn v. Georgilas, 16 LCR 23, 2008 Mass. LCR LEXIS 8 (Mass. Land Ct. Jan. 11, 2008) (disqualifying a law firm which had spent only 5.37 hours representing the former client three years earlier).

- El Camino Res., Ltd. v. Huntington Nat'l Bank, 623 F. Supp. 2d 863, 875, 876, 877, 878, 879 (W.D. Mich. 2007) (assessing a situation in which Pepper Hamilton acted as local counsel for a company, billing 2.5 hours during the first six months of 2007; explaining that Pepper Hamilton sought the client's consent to represent another client adverse to it, but was turned down; explaining that Pepper Hamilton later concluded that "a conflict of interest waiver was not necessary after all" because of an earlier consent the client had provided the firm; ultimately finding that the consent was not sufficient, and disqualifying Pepper Hamilton from adversity to its client; "Ethical rules involving attorneys practicing in the federal courts are ultimately questions of federal law. The federal courts, however, are entitled to look to the state rules of professional conduct for guidance."; "The law makes no distinction between 'lead' and 'local' counsel in assessing their ethical duties. . . . There are no small or unimportant clients. Pepper Hamilton cannot and does not deny that ePlus Group was an active client of the firm when Pepper Hamilton agreed to undertake the representation of Huntington National Bank to oppose the claims of ePlus in this case." (citation omitted); "The courts universally hold that a law firm will not be allowed to drop a client in order to resolve a direct conflict of interest, thereby turning a present client into a former client."; "Pursuant to this universal rule, the status of the attorney/client relationship is assessed at the time the conflict arises, not at the time the motion to disqualify is presented to the court."; "This ethical rule is not triggered only when the attorney's motives are selfish or otherwise suspect. The rule vindicates the attorney's fundamental duty of loyalty: the breach of ethics is not triggered by bad motive or excused by good motive."; "A law firm is not privileged to extinguish its duty of loyalty to a present client by unilaterally turning it into a former client.").

- United States Filter Corp. v. Ionics, Inc., 189 F.R.D. 26 (D. Mass. 1999) (finding in a declaratory judgment action that a law firm could not handle a matter adverse to a former client, although the pertinent lawyer had spent only 1.6 hours representing the former client).

- Elan Transdermal Ltd. v. Cygnus Therapeutic Sys., 809 F. Supp. 1383, 1388, 1390 (N.D. Cal. 1992) ("The fact that Cost and Rothman billed only a short period of time does not preclude their work from being substantially related to the present litigation."; explaining that lawyers presumably discuss their cases

> with their colleagues; "Those attorneys most actively engaged on Cygnus projects shared a small office with other attorneys still with the firm. Chu, now the partner in charge of the representation of Elan, was in and out of the Menlo Park office. The presumption of shared confidences is based on the common-sense notion that people who work in close quarters talk with each other, and sometimes about their work. It is also only common sense that when there is no hard evidence of the subjects of years of office conversation, and firm conversation, and there is a significant amount of business to be gained by not remembering that anything relative to a particular former client's representation was discussed, there are strong incentives to claim no actual knowledge."; disqualifying a lawyer who was handling a matter adverse to a former client).

Thus, a lawyer analyzing adversity to a former client must examine the information conveyed, not the duration of the representation.

Best Answer

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

N 3/12

Role of Information Rather Than Subject Matter of the Earlier Representation

Hypothetical 7

Last year you represented a dentist in divorcing his wife. You have now been asked to take a matter adverse to the dentist on a completely unrelated matter.

Is there any circumstance in which you would not be able to take the matter adverse to the dentist in the completely unrelated matter?

YES

Analysis

Most states' ethics rules prohibit lawyers from being adverse to former clients in the "same" or "substantially related" matter as the earlier representation. ABA Model Rule 1.9(a). In those circumstances, the law presumes that the lawyer acquired material confidential information that the lawyer could use to the former client's disadvantage.

Most state bars' analyses of this rule adds another (independently sufficient) ground for prohibiting such a representation adverse to a former client -- if the lawyer has acquired confidential information in the earlier representation that could be used to the former client's disadvantage.

In this hypothetical, you would not be able to represent a creditor (absent the dentist's consent) in pursuing the dentist's assets if you acquired confidential information about those assets during the earlier divorce representation. Even though the representations are totally unrelated, your acquisition of the confidential information triggers the basic prohibition on adversity to your former client without consent.

Best Answer

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

Meaning of "Substantial Relationship"

Hypothetical 8

Several months ago you began to represent a bank in foreclosing on a hotel in another state. Your bank client had loaned the hotel owner several million dollars five years ago, but he defaulted. Your conflicts check had showed that your firm had previously represented the hotel owner (the matter was called "General Business"), but the matter was closed over 15 years ago. Your firm had not done any work for the owner since then, and the partners who formerly represented the owner could not recall any of the details of their work for him.

You just received a letter from your state bar, reporting that the hotel owner has filed an ethics charge against you. As you hurriedly read the charge, you learn for the first time that 15 years ago your law firm represented the owner in buying the exact hotel upon which you are now helping the bank foreclose. As you do some more checking, you discover that some of the purchase closing documents actually contain your partners' signatures as witnesses. The hotel owner alleges that it is a blatant conflict of interest for you to foreclose on the very same hotel that your partners assisted him in buying.

Does your representation of the bank in the foreclosure matter violate the ethics rules?

NO (PROBABLY)

Analysis

Courts and bars take differing positions on the type of relationship that prevents a current representation adverse to a former client.

A comment to the ABA Model Rules provides some guidance to lawyers trying to define the "substantial relationship" test.

> Matters are "substantially related" for purposes of this Rule if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce.

> Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

ABA Model Rule 1.9 cmt. [3] (emphasis added).

The ABA has noted that many courts require matters to be "identical" or "essentially the same" for them to meet the "substantial relationship" standard. ABA LEO 415 (9/8/99).

Most courts follow this basic approach. The Southern District of New York declined to disqualify the law firm of Morgan Lewis from adversity to Koch despite the firm's confidential antitrust audit of a Koch affiliate several years earlier -- pointing to the

requirement that the matters be "identical" or "essentially the same" to trigger the "substantial relationship" test.[1]

In this hypothetical, it would be tempting to conclude that the two matters are "substantially related" -- because they involve the very same piece of property. However, the issues are quite different, because the current adversity involves a recent debt -- not the underlying transaction that occurred decades ago.[2]

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[1] Koch Indus., Inc. v. Aktiengesellschaft, S.A.R.L., 650 F. Supp. 2d 282, 286, 286-87, 285, 288 (S.D.N.Y. 2009) (declining to disqualify the law firm of Morgan Lewis from handling a matter adverse to Koch although it had conducted a confidential antitrust audit in 2001 for a different Koch affiliate; noting that Morgan Lewis had screened the lawyers handling the case against Koch from those lawyers remaining from the earlier project in which Morgan Lewis represented the Koch subsidiary; noting that the "substantial relationship" standard requires that the matters be "identical" or "essentially the same"; explaining that "[t]he Morgan Lewis audit that plaintiffs cite as the basis for their disqualification motion, however, took place in 2000 and 2001 -- two years after that transaction [which formed the basis of the current litigation Morgan Lewis was handling adverse to Koch]. Further, Morgan Lewis's audit of Koch and certain Koch affiliates did not include KoSa, which was the entity that actually purchased the polyester business that was the locus of the antitrust conspiracy. . . . Instead, the audit report indicates that Morgan Lewis recommended that Koch encourage Kosa to conduct its own antitrust audit and reflects Morgan Lewis's understanding that another law firm would be performing that audit. . . . The audit report is otherwise quite general, providing, for the most part, broad antitrust compliance advice and recommendations. Further, the audit report makes no reference to the DOJ's antitrust investigation, and Morgan Lewis was not otherwise involved in that investigation." (footnote omitted); noting but apparently finding insignificant the fact that "[i]n early 2003, Morgan Lewis sought a conflict waiver to represent a former KoSa customer in one such civil antitrust suit, and Koch's general counsel refused because of Morgan Lewis's prior antitrust compliance work for the company"; "[I]n 2003 Morgan Lewis had sought a conflict waiver to represent a former KoSa customer in a separate antitrust lawsuit related to the 1998 polyester business sale, and Koch's general counsel had refused. (Mem. at 6-7.) The inconsistency between seeking (and being denied) a conflict waiver in 2003 and proceeding with an adverse representation without notifying Koch just five years later is difficult to reconcile. If, indeed, this contradictory behavior was simply the result of a breakdown in Morgan Lewis conflict check procedures, then Morgan Lewis would do well to examine those procedures carefully and immediately, lest future disqualification motions made against it end less favorably.").

[2] See Stokes v. Firestone, 156 B.R. 181, 187 (Bankr. E.D. Va. 1993) (holding that a law firm's brief representation of a couple in buying land did not disqualify the firm from representing the now-former husband in suing the wife for failing to transfer her interest in the land to the former husband as part of a divorce agreement; explaining that "I find a substantial relationship lacking, even though there is a superficial resemblance in that both involve [the land]. The land use issues involved in the previous representation and the domestic relations issues involved in the current litigation are simply not related, much less identical").

The same debate sometimes arises if a lawyer represents a client in entering into a contract. The general rule would prohibit a lawyer from taking a matter adverse to the former client if it involves the contract formation or the meaning of the contract. On the other hand, a lawyer who formerly represented the client in entering into the contract probably can take a matter adverse to the former client if the representation involves some later developing dispute over payment under the contract, some recent alleged breach, product quality issues, etc.

Not surprisingly, courts sometimes find a disabling "substantial relationship."

- See, e.g., Office of Lawyer Regulation v. Kostich (In re Kostich), 793 N.W.2d 494, 498 (Wis. 2010) (publicly reprimanding a lawyer who interviewed the victim of alleged sexual abuse by a Catholic nun, and then later defended the nun; "We agree with the referee's finding that G.K. [victim] was a former client of Attorney Kostich. As noted, SCR 20:1.9(a) provides that an attorney may not represent one client whose interests are materially adverse to the interests of a former client if the representation involves a matter that is the same or substantially related to the nature of the prior representation of the former client unless the former client consents in writing."; "Attorney Kostich's former relationship with G.K. and his subsequent representation of Giannini [nun] were both adverse and substantially related. G.K. sought legal advice from Attorney Kostich regarding assaults committed by Giannini and whether he could pursue litigation against Giannini. Attorney Kostich then undertook to defend Giannini in a criminal matter in which she was prosecuted for the same assaults on G.K. There is no dispute that Attorney Kostich received G.K.'s therapy records sometime in 1997 or that Attorney Kostich later received substantially the same records as part of the discovery materials in the same records as part of the discovery materials in the criminal case against Giannini."; "Attorney Kostich certainly did not obtain G.K.'s consent to the later representation to Giannini. Indeed, when G.K. learned that Attorney Kostich was going to represent Giannini in the criminal charges arising from the assaults, G.K. contacted Attorney Kostich and voiced his objection to the representation, and Attorney Kostich refused to step down as Giannini's attorney."; "Thus, the record evidence amply supports the referee's conclusion that by representing Giannini on criminal charges in which G.K. was the victim, after G.K. had consulted with Attorney Kostich about bringing a civil action against Giannini for the same sexual assaults that were the subject of the criminal proceedings, Attorney Kostich acted contrary to former and current SCR 20:1.9(a).").

In contrast, ethics rules, legal ethics opinions and case law highlight situations in which there is no disabling substantial relationship.

- Maryland LEO 86-62 (1986) (addressing the following situation: "You present the following factual situation. Your law firm previously represented both a husband and wife in an adoption matter and in preparing their Wills, the latter having occurred in 1981. Subsequently, the husband and wife obtained a divorce, each having separate representation by firms other than yours, at your insistence. The husband now requests you to redraft his Will, deleting his former wife as a legatee."; ultimately holding that "[t]he Committee does not believe that there is any inherent conflict in your situation such that you would have to automatically refuse representation of the husband").

- City of Atlantic City v. Trupos, 992 A.2d 762, 774, 775, 775-76 (N.J. 2010) ("A distillation of these varied precepts yields a workable standard: for purposes of RPC 1.9, matters are deemed to be 'substantially related' if (1) the lawyer for whom disqualification is sought received confidential information from the former client that can be used against that client in the subsequent representation of parties adverse to the former client, or (2) facts relevant to the prior representation are both relevant and material to the subsequent representation. We adopt that standard because it protects otherwise privileged communications, see RPC 1.6(a) (proscribing revelation of 'information relating to representation of a client'), while also requiring a fact-sensitive analysis to ensure that the congruity of facts, and not merely similar legal theories, governs whether an attorney ethically may act adverse to a former client."; "[P]laintiff can point to no confidential communications it shared with the law firm that could have been or might be used against it in the 2009 tax appeals."; "[T]here is no record proof that the facts of the prior representation -- the law firm's 2006-2007 representation of plaintiff in defense of tax appeals -- are relevant or material to the 2009 tax appeals. The law firm's 2006-2007 work on behalf of plaintiff dealt with very large commercial properties appraised by a different appraiser than the one who provided the valuations at issue in the 2009 tax appeals. Thus, other than the purely superficial similarity that all of this work involved tax appeals, there are no facts in this record common to the 2006-2007 tax appeals in which the law firm represented plaintiff, on the one side, and the 2009 tax appeals in which the law firm represented taxpayers, on the other side."; "In sum, we conclude that (1) during its representation of plaintiff in 2006-2007, the law firm did not receive confidential information from plaintiff which can be used against plaintiff in the prosecution of the 2009 tax appeals adverse to plaintiff, and (2) the facts relevant to the law firm's 2006 representation of plaintiff also are not relevant and material to the law firm's representation of the taxpayers in the 2009 tax appeals. In those circumstances, the order of disqualification entered against the law firm was unwarranted and must be vacated.").

- Stanley v. Bobeck, 2009 Ohio 5696, at ¶¶ 21, 22 (Ohio Ct. App. 2009) (reversing a lower court's order disqualifying a lawyer who had represented a limited liability company from representing the company in an action brought by a member of the limited liability company; "When an attorney brings an action against a former client on a matter substantially related to his prior representation of that client, the attorney is irrebutably presumed to have benefitted from confidential information relevant to the subsequent case. . . . However, when the attorney in the subsequent litigation is not the original attorney, but, instead, another attorney in the same law firm, the presumption of received confidences becomes rebuttable. . . . In the instant case, the presumption is rebuttable because the original attorney is not the attorney in the instant case. Instead, another attorney from the firm represented Bobeck."; "Stanley has failed to establish that defense counsel possessed confidential information that would be prejudicial to him in the current case. In fact, it is undisputed that counsel never met with Stanley or spoke with him. Instead, all conversations regarding Sunshine I were conducted with Bobeck. Therefore, it is difficult to imagine what confidential information MRFL could have obtained from Stanley given it had never communicated with him. Therefore, MRFL rebutted the presumption that confidential information was received. As a result, the third prong of the Dana [Dana Corp. v. Blue Cross & Blue Shield Mut. of N. Ohio, 900 F.2d 882 (6th Cir. 1990)] test has not been met.").

- Graham Co. v. Griffing, Civ. A. No. 08-1394, 2009 U.S. Dist. LEXIS 103222, at *9, *9-10, *13, *18 n.6, *20 (E.D. Pa. Nov. 3, 2009) (denying defendant's motion to disqualify the plaintiff's law firm, because lawyers at the firm had earlier represented a corporate affiliate of the defendant and acquired material confidential information that the law firm could now use against the former client; explaining that "to perform a substantial relationship analysis under Rule 1.9, a court must answer the following three questions: (a) what is the nature and scope of the prior representation at issue; (b) what is the nature of the present lawsuit against the former client; and (c) in the course of the prior representation, might the client have disclosed to his attorney confidences which could be relevant to the present action and detrimental to the former client therein."; noting that "[e]ven if a party meets its burden of proving that matters are 'substantially related,' a screen between the attorneys representing the former client and those representing the client adverse to the former client can prevent the opportunity for any arguably confidential information to be used against the former client."; concluding that the law firm had properly screened the possibly affected lawyers from those currently representing the plaintiff against the defendant; "Plaintiff offered the testimony of Mr. Donahue, whom the Court finds to have been highly credible. Mr. Donahue testified, in sum, that (a) confidential information received from Commerce Banc and Commerce Banc Insurances Services during the MA Trademark Litigation was limited to Massachusetts-specific trademark and business opportunity issues, (b) all information and files were returned by

> Woodcock Washburn after its termination, (c) he could not even remember the vast majority of information he received several years before concerning the MA Trademark Litigation, and (d) the entire Woodstock Washburn firm has been sternly advised in writing not to discuss any issues concerning Defendants or the instant litigation with Mr. Donahue and his former team. . . . Finally, Mr. Donahue affirmatively represented, as a member of the bar, that he has not shared any confidential information whatsoever with any Woodstock Washburn personnel involved with the instant litigation."; holding that the screening should also have included the law firm's billing records of its earlier representation; "In recognition of the fact that Woodstock Washburn's billing records related to the MA Trademark Litigation might, although very unlikely, contain some specific confidential information, the Court will order Woodcock Washburn to segregate those records from its general files so that its current litigation team may not access them, and to recirculate its screen memo to explicitly include prohibited communication of any confidential information contained in those billing records."; declining to disqualify the law firm, but ordering an additional screening mechanism; "For the sake of absolute caution, the Court will require Woodcock Washburn to revise its screen notice as discussed in footnote 6 of this Memorandum and re-issue it on November 16, 2009, as well as every two months following that date during the pendency of the instant action.").

Interestingly, one bar has explained that lawyers might be able to immunize themselves from a former client's allegation that the lawyers could use the former client's information against it -- which would otherwise require the lawyer's disqualification. In 2008, the Washington, D.C. Bar advised lawyers that they can avoid disqualification by "limit[ing] the scope of the new representation such that factual information normally obtained in the prior matter would be legally irrelevant to the advancement of the current client's position in the new matter."[3] This approach might be theoretically possible, but it is difficult to envision it working in the real world.

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[3] District of Columbia LEO 343 (2/2008) ("A lawyer who has formerly represented a client in a matter is prohibited from representing another person in the same or 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. Two matters are 'substantially related' to one another if there is a substantial risk that confidential factual information as would normally have been obtained in the prior representation is

Best Answer

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

N 3/12

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useful or relevant in advancing the client's position in the new matter. Subject to certain conditions, a lawyer may limit the scope of the new representation such that factual information normally obtained in the prior matter would be legally irrelevant to the advancement of the current client's position in the new matter. Specifically, by agreeing only to represent a client as to a discrete legal issue or with respect to a discrete stage in the litigation, a lawyer may be able to limit the scope of the representation such that the new matter is not substantially related to the prior matter. Restrictions on the scope of the representation that effectively ensure that there is no substantial risk that confidential factual information as would normally have been obtained in the prior representation would be useful or relevant to advance the client's position in the new matter may, under certain circumstances, be sufficient to avoid a conflict of interest."; noting that "The Restatement likewise suggests that 'the lawyer may limit the scope of representation of a later client so as to avoid representation substantially related to that undertaken for a previous client.' RESTATEMENT OF THE LAW GOVERNING LAWYERS at § 132 cmt. E (2007)."; "Even if it is permissible generally to restrict a representation to avoid substantial overlap with a prior representation, it may not be possible in a particular case. Private lawyers, like former government lawyers, should 'err well on the side of caution.' . . . We have considered two different categories in which a lawyer may avoid the applicability of D.C. Rule 1.9 -- by agreeing only to represent a client as to a discrete legal issue and by agreeing to represent a client with respect to a discrete stage of the litigation. While we recognize that these categories can, under appropriate conditions, allow for lawyers to represent clients without violating D.C. Rule 1.9, we also appreciate that it may prove very difficult for lawyers to do so in fact. Where confidential information from the prior representation could be useful in or relevant to the new representation -- however it may be limited or circumscribed -- then the substantial-relationship test is satisfied, and the new representation may not proceed without the consent of the former client.").

"Playbook" Information

Hypothetical 9

You formerly represented a corporation on several (but not all) of its legal matters. Over the course of that representation, you learned quite a bit about the corporation's preferred approach to settlement discussions and negotiation strategies, corporate executives' willingness or unwillingness to be deposed by an adversary, etc. About six months after your representation of the company ended, you received a call from another company that wants you to handle a breach of contract action against your former client. When your former client learns of this possibility, its president calls you to complain, arguing that you are prohibited from taking the matter because of the "intimate" knowledge you acquired while representing the company.

Is the type of knowledge you acquired while representing the company sufficient to prevent you from taking the breach of contract matter without its consent?

NO (PROBABLY)

Analysis

Courts and bars have analyzed the type of information that prohibits lawyers from taking a matter adverse to a former client from or about whom the lawyer learned the information.

If even general information about a corporate client prohibited later adversity to that client, a lawyer would be forever barred from adversity to the corporation -- contrary to the general societal interest in favor of all clients hiring the lawyers they want. On the other hand, allowing a lawyer with fairly specific material confidential information to take a matter adverse to a former corporate client would violate the bedrock duty of confidentiality.

The ABA Model Rules indicate that

> [i]n the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand,

> knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation.

ABA Model Rule 1.9 cmt. [3] (emphasis added). Similarly, an ABA legal ethics opinion indicated that "general knowledge of the strategies, policies, or personnel of the former employer [for an in-house corporate lawyer] is not sufficient by itself" to disqualify the lawyer. ABA LEO 415 (9/8/99) (emphasis added).

The Restatement likewise indicates that

> [a] lawyer might also have learned a former client's preferred approach to bargaining in settlement discussions or negotiating business points in a transaction, willingness or unwillingness to be deposed by an adversary, and financial ability to withstand extended litigation or contract negotiations. Only when such information will be directly in issue or of unusual value in the subsequent matter will it be independently relevant in assessing a substantial relationship.

Restatement (Third) of Law Governing Lawyers § 132 cmt. d (2000).

A number of commentators use the term "playbook" information -- although it is unclear in some situations whether "playbook" information is the type of useful confidential information that will disqualify a lawyer, or instead whether such information would not be sufficient. It makes more sense to use the term "playbook" in describing disqualifying information -- the type of useful information that a football team would gain by having the adversary's specific "playbook" for a particular game.

In any event, courts take differing approaches to the type of information that meets this standard.

For instance, in 2009 a Minnesota court refused to disqualify a lawyer from adversity to an employee, despite the employee's claim that the lawyer had learned

valuable confidential information about her when the lawyer represented her twenty-five years earlier in an employment discrimination case against another employer. The court explained that the type of disqualifying information that the former client claimed to have conveyed to her lawyer twenty-five years earlier "exist[] in practically every lawsuit," so that disqualifying the lawyer based on that information would "effectively prevent an attorney from taking a position adverse to a former client for the remainder of the attorney's career." Niemi v. Girl Scouts, 768 N.W.2d 385, 389 (Minn. Ct. App. 2009).[1]

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[1] Niemi v. Girl Scouts, 768 N.W.2d 385, 389, 389-90, 390 (Minn. Ct. App. 2009) (refusing to disqualify a lawyer from representing defendant in an employment discrimination case, although the same law firm had represented the plaintiff twenty-five years earlier in an employment discrimination case against another employer; "The second type of information identified by Niemi, her 'approach to litigation,' presents the weaker of the two arguments. As an initial matter, it is debatable whether this type of information can be described as 'confidential factual information.' Minn. R. Prof. Conduct 1.9 cmt. 3. It is not necessarily 'factual' in nature because it appears to consist primarily of Niemi's personal characteristics and behavioral tendencies or, more accurately, Roby's impressions of Niemi's personal characteristics and behavioral tendencies. See State ex rel. Ogden Newspapers, Inc. v. Wilkes, 211 W. Va. 423, 566 S.E.2d 560, 567 (W. Va. 2002) (stating that attorney's '[v]ague general impressions' about corporate client's 'philosophical outlook' did not warrant attorney's disqualification in subsequent lawsuit against corporation); Restatement (Third) of the Law Governing Lawyers § 132 cmt. d(iii) (2000) (stating that attorney's knowledge of manner in which client approaches litigation is not 'independently relevant ' for purposes of substantial relation test, unless information is 'directly in issue or of unusual value in the subsequent matter'). In addition, the information is not necessarily 'confidential' because it may refer to information that is available to persons who are not part of the attorney-client relationship, such as opposing counsel, a court reporter transcribing a deposition, or court personnel, and perhaps even persons who know Niemi through social interactions. See Minn. R. Prof. Conduct 1.9 cmt. 3 ('Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying.'); see also Restatement (Third) of the Law Governing Lawyers § 132(2) (2000) (stating that rules do not restrict attorney's use of information that has become 'generally known').''; explaining that because "this type of information exists in practically every lawsuit," finding that such information would disqualify a lawyer "effectively prevent[s] an attorney from taking a position adverse to a former client for the remainder of the attorney's career. The drafters of the rules could have imposed a lifetime ban on being adverse to a former client, but the drafters obviously declined to do so.''; ultimately concluding that "information consisting of Niemi's 'approach to litigation' does not justify a conclusion that the prior lawsuit and the present lawsuit are 'substantially related matters.' We reach this conclusion without considering whether this type of information retains any relevance or usefulness 25 to 30 years after it is acquired.").

In contrast, in 2007 a Maine court disqualified a lawyer from representing the husband in a divorce case, because the lawyer had previously represented the wife in a personal injury action. The court described the type of disqualifying information that the lawyer had obtained.

> An attorney representing a client in a personal injury action involving significant representation would learn confidential information about the way in which his or her client handles the stress of litigation. In the present case, for over two years Spurling observed Nadine's reaction to the numerous tribulations of the litigation process. Spurling personally observed: Nadine 's ability to testify under oath, her reactions to her adversary, her patience with the protracted process, her ability to accept compromise, her ability to handle stress, and the way in which she relates to her attorney. Disclosing knowledge of Nadine's strengths and weaknesses in these areas would be detrimental to her interests in another litigation, particularly in a contentious divorce action.

Hurley v. Hurley, 923 A.2d 908, 909, 912 (Me. 2007) (emphases added).[2] In addition to finding a "substantial relationship" based on this type of information, the court also held

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[2] Hurley v. Hurley, 923 A.2d 908, 909, 912, 913 (Me. 2007) (disqualifying a lawyer from representing the husband in a divorce case after the lawyer had earlier represented the wife in a personal injury action; "During the course of litigation, which lasted over two years, Nadine [woman] revealed to Spurling [lawyer] details concerning her health, work history, injury history, and a workers' compensation claim."; explaining that the divorce action was "substantially related" to the earlier personal injury action because the lawyer acquired confidential information during the latter that would be relevant in the former; "An attorney representing a client in a personal injury action involving significant representation would learn confidential information about the way in which his or her client handles the stress of litigation. In the present case, for over two years Spurling observed Nadine's reaction to the numerous tribulations of the litigation process. Spurling personally observed: Nadine's ability to testify under oath, her reactions to her adversary, her patience with the protracted process, her ability to accept compromise, her ability to handle stress, and the way in which she relates to her attorney. Disclosing knowledge of Nadine's strengths and weaknesses in these areas would be detrimental to her interests in another litigation, particularly in a contentious divorce action."; also finding under what the court called the "alternative confidential information prong" of the disqualification standard that the lawyer acquired confidential information during a personal injury case that the lawyer could now use against the wife in the divorce case; agreeing with the lower court's determination "that the information Spurling acquired regarding

that there was a "second, independent basis "for the lawyer's disqualification -- the confidential nature of information the lawyer acquired "regarding [the former client's] physical and mental health, work history, and the way she handles contested litigation." Id. at 913.

Best Answer

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

N 3/12

Nadine's physical and mental health, work history, and the way she handles contested litigation was confidential, providing a second, independent basis for Spurling's disqualification.").

Application to In-House Lawyers

Hypothetical 10

An in-house lawyer recently left her company and joined your firm. She just called to ask you whether the same standard governing adversity to former clients applies to in-house lawyers and outside lawyers.

Does the same standard apply to in-house lawyers' and outside lawyers' adversity to former clients?

NO (PROBABLY)

Analysis

As with all other ethical principles, in-house lawyers are bound by the same basic conflicts principles.

However, the ABA has analyzed some subtle distinctions based on the inherently different role of in-house lawyers. In ABA LEO 415 (9/8/99), the ABA explained that former in-house lawyers may not take representations materially and directly adverse to their former employers (absent consent) (1) if they "personally represented" their former employer in the same or substantially related matter (some courts indicate that the matter must be "identical" or "essentially the same" as the previous matter); or (2) if the in-house lawyers acquired material confidential information about their former employer. The ABA explained that "general knowledge of the strategies, policies, or personnel of the former employer is not sufficient by itself" to disqualify the lawyer. Id.

In a departure from the general rule governing outside lawyers, the ABA explained that a de minimus standard might apply if the in-house lawyer only addressed legal questions on the periphery of a matter. As the ABA put it, "general supervisory responsibility such as that exercised by the head of a legal department" ordinarily does

not disqualify an in-house lawyer. Id. This seems to be a more forgiving standard than would apply to an outside lawyer.

The ABA also noted that sophisticated companies may grant prospective consents in these circumstances.

Best Answer

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

Adversity to Former Clients -- Application to Government Lawyers

Hypothetical 11

A government lawyer just left her agency and joined your firm. She called to ask you whether the standard governing adversity to former clients applies any differently to government lawyers than to private lawyers.

Does the same standard apply to government lawyers' and private lawyers' adversity to former clients?

NO (PROBABLY)

Analysis

States treat former government lawyers with dramatically different rules than private lawyers. The rules ease a government lawyer's move to private practice -- to encourage other lawyers to enter socially beneficial government service.

Under ABA Model Rule 1.11, there are two important distinctions between the standards under which a former government lawyer may be adverse to the government, and the standards under which a private lawyer may be adverse to a former client.

First, a former government lawyer will be prohibited from adversity to the government only if the lawyer "participated personally and substantially as a public officer or employee" in the matter. ABA Model Rule 1.11(a)(2). For private lawyers, the participation does not have to be "substantial."

Second, former government lawyers will be disqualified from adversity to their former employer based on information that the lawyers acquired while working in the government only if the information is such that "the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not

otherwise available to the public." ABA Model Rule 1.11(c). This is a far narrower range of information than that which would disqualify a private lawyer.

In addition, the ABA Model Rules and most state's ethics rules permit a law firm to avoid imputed disqualification of the entire firm by screening an individually disqualified former government lawyer. ABA Model Rule 1.11(b). Fewer than one half of the states permit law firms to undertake this self-help remedy in the case of private lawyers.

Best Answer

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

Ability to Withdraw from a Representation At Any Time If There is No Prejudice

Hypothetical 12

One of your partners has been handling small employment discrimination cases for an out-of-state company with a factory in your town. Cases are slowly moving forward, but there are no depositions or trial dates on the immediate schedule. You just read a press release from that company indicating that it would begin manufacturing and selling outboard motors -- starting about three years from now. One of your firm's largest clients manufactures outboard motors, and you want to "clear the decks" now to avoid any possible conflict once the two companies begin to compete with one another.

Would it be ethical for you to withdraw now from the small employment discrimination cases your firm is handling?

YES (PROBABLY)

Analysis

State bar rules generally allow a lawyer to withdraw from a representation at any time, as long as the withdrawal does not prejudice the client. ABA Model Rule 1.16(b)(1) ("a lawyer may withdraw from representing a client if . . . withdrawal can be accomplished without material adverse effect on the interests of the client"). If the representation involves a tribunal, the withdrawing lawyer obviously must seek the tribunal's permission. ABA Model Rule 1.16(c).

The Restatement seems to acknowledge permissibility of such a "clearing the decks" withdrawal.

> 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. . . . The representation will also be at an end for purposes of this Section if the existing client discharges the lawyer (other than for cause arising from the improper representation) or if other grounds for mandatory or permissive withdrawal by the lawyer exist . . . , and the

> lawyer is not motivated primarily by a desire to represent the new client.

Restatement (Third) of Law Governing Lawyers § 132 cmt. c (2000).

In this hypothetical, you are not withdrawing from the representation to take a specific matter adverse to your current client -- so you should not be affected by the "hot potato" rule prohibiting dropping a client in order to take a particular matter against it.

Assuming that your withdrawal would not prejudice your client, the ethics rules would probably permit the withdrawal.

Best Answer

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

N 3/12

Ability to Withdraw if the Client Does Not Pay Invoices

Hypothetical 13

You are about three weeks away from a large trial, but your client just told you that it cannot afford to pay your last bill and will not be able to pay any future bills. Your law firm's management wants you to withdraw from the representation.

May you withdraw from representing a client who has not paid its bills?

YES (PROBABLY)

Analysis

Under every state's ethics' rules, lawyers may withdraw from the representation if their client does not pay its bills -- even if the withdrawal would have a "material adverse effect" on the client.

Under ABA Model Rule 1.16(b), a lawyer may withdraw (even if the withdrawal cannot be "accomplished without material adverse effect on the interests of the client") if

> [t]he client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given a reasonable warning that the lawyer will withdraw unless the obligation is fulfilled.

ABA Model Rule 1.16(b)(1),(5). The lawyer can also withdraw (despite harming the client) if

> the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client.

ABA Model Rule 1.16(b)(6).

Of course, the Rules also require the court's permission to withdraw if the lawyer has appeared as counsel of record for the client in a case. ABA Model Rule 1.16 (c).

In states following the ABA Model Rules approach, the lawyer would also have to give "reasonably warning" that the lawyer will withdraw unless the client pays the bills. Not all states require such a warning.

Lawyers frequently decide not to withdraw on the eve of a trial, corporate closing, etc. even if they are not being paid -- justifiably worried that the former client might file a malpractice case against the lawyer and claim that the law firm's withdrawal harmed the client in some way.

Still, some law firms choose to withdraw in such settings, and courts often allow them to withdraw.

- Brandon v. Blech, 560 F.3d 536, 538 (6th Cir. 2009) (reversing the trial court's refusal to allow Proskauer Rose LLP to withdraw from representing a client who had not paid his bills; "There are, of course, several occasions when a district court ought to prohibit counsel from withdrawing. For example, attorneys may forfeit the right to withdraw when they engage in strategically-timed or coercive behavior, like waiting until a client is 'over a barrel' before demanding payment. . . . To avoid such tactics, Model Rule 1.16(b)(5) requires counsel to give 'reasonable warning.' But Proskauer gave reasonable notice -- over three weeks -- and did not coerce in any regard; the case remained inactive, with no impending deadlines."; "Likewise, a district court may forbid withdrawal if it would work severe prejudice on the client or third parties. . . . But neither party identified any prejudice -- no one opposed Proskauer's motion, either before the district court or on appeal. And while the district court correctly noted that withdrawal would leave Blech without counsel, this does not amount to severe prejudice. The case remained inactive, with no imminent deadlines and ample time for Blech to retain new counsel.").

Another Restatement provision implies the same thing.

> A lawyer or firm might be in a position to withdraw from fewer than all the representations in a joint-client representation and thereby remove a conflict if it is possible after withdrawal for the lawyer to continue representation only with respect to matters not substantially related to the former representation . . . or with respect to related matters for clients that are not adverse to the now-former client."

Restatement (Third) of Law Governing Lawyers § 121 cmt. e(ii) (2000).

Not surprisingly, lawyers withdrawing on this basis must carefully consider the applicable confidentiality rules.

- Oregon LEO 2011-185 (8/2011) (addressing the following facts: "During litigation, Lawyer and Client have a dispute concerning the representation. Lawyer and Client cannot resolve the dispute and Lawyer files a motion to withdraw in which Lawyer wishes to state one of the following: 1. My client won't listen to my advice; 2. My client won't cooperate with me; 3. My client hasn't paid my bills in a timely fashion; or 4. My client has been untimely and uncooperative in making discovery responses during the course of this matter."; finding such disclosure improper; "For example, a client's inability or refusal to pay may prejudice the client's ability to resolve the dispute with an opposing party. Likewise, a party's unwillingness to cooperate with discovery may lead the plaintiff to file additional pleadings or seek sanctions. Consequently, Lawyer cannot unilaterally and voluntarily decide to make this information public unless an exception of Oregon RPC 1.6 can be found."; "Neither a disagreement between Lawyer and Client about how the client's matter should be handled nor the client's failure to pay fees when due constitute a 'controversy between the lawyer and the client' within the meaning of Oregon RPC 1.6(b)(4). While there may be others, the two most obvious examples of such a controversy are fee disputes and legal malpractice claims. A client's dissatisfaction with the lawyer's performance may ultimately ripen into a controversy, but at the point of withdrawal, such a controversy is inchoate at best. In a fee dispute or malpractice claim, fairness dictates that the lawyer be on equal footing with the client regarding the facts. Such is not the case under the facts presented here."; "If the court orders disclosure, Lawyer may reveal information relating to the representation of Client under Oregon RPC 1.6(b)(5) but may only do so to the extent 'reasonably necessary' to comply with the court order. Lawyer should therefore take steps to limit unnecessary disclosure of confidential information by, for example, offering to submit such information under seal (or outside the presence of the opposing party) so as to avoid prejudice or injury to the client.").

- New Hampshire LEO 2010/2011-1 (holding that a lawyer whose client had not paid the lawyer's bills could not engage in certain conduct in an effort to pressure the client to pay the bills; "It is a violation of Rule 1.9 (Duties to Former Client) and Rule 1.6 (Confidentiality of Information) for an attorney to inform the Internal Revenue Service that the attorney has written off the account receivable and considers that the unpaid legal fees are a debt that has been forgiven."; "It is a violation of Rule 1.9 (Duties of Former Client) and Rule 1.6 (Confidentiality of Information) for an attorney to inform a regulatory agency that a client owes unpaid fees to the attorney.").

Best Answer

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

N 3/12

Withdrawal Provisions in Retainer Letters

Hypothetical 14

You are considering adding a phrase to your standard retainer letters that would secure a client's advance consent to your law firm's withdrawal "if the client fails to pay agreed legal fees and expenses in a timely manner."

May you include such a provision in your standard retainer letter?

MAYBE

Analysis

Many lawyers include such a provision in their standard retainer letters, but at least one bar has found it improper. New York LEO 805 (1/10/07) (holding that a lawyer may not include in a retainer agreement a provision "that would secure a client's advance assent to a lawyer's withdrawal from employment if the client fails to pay agreed legal fees and expenses in a timely manner"; explaining that a provision could refer to the ethics rules standard for withdrawing, but that the provision in question would allow withdrawal even from "an inadvertent failure to pay or a failure to pay a de minimus amount").

Best Answer

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

The "Hot Potato" Rule

Hypothetical 15

You just received a call from the president of your firm's largest client. She asks that you file a lawsuit on your client's behalf against a small company from which your client buys equipment. Your conflicts check reveals that one of your lawyers is currently representing the equipment supplier in a very small unrelated real estate matter. You are familiar with the general ethics rules, and you ask your firm's "ethics guru" whether the rules allow you to withdraw from representing the equipment supplier so it will be considered a "former" client under the conflicts analysis -- thus permitting you to represent your largest client against it in this new unrelated matter.

Would it be ethical for you to withdraw from representing the equipment supplier so you could take the case against it for your largest client?

NO (PROBABLY)

Analysis

Given the enormous difference between the conflicts rule governing adversity to current clients (which prohibits adversity on any matter, absent consent) and adversity to former clients (which is an information-based rule, and often permits such adversity without consent), lawyers often face the temptation to turn a "current" client into a "former" client so they can apply the more lenient rule.

However, most bars and courts apply what is called the "hot potato" rule, which prohibits withdrawal from a representation if the withdrawal is motivated by the desire to immediately take a matter adverse to that client. The term "hot potato" apparently comes from a 1987 Northern District of Ohio case. Picker Int'l, Inc. v. Varian Assocs., Inc., 670 F. Supp. 1363, 1365 (N.D. Ohio 1987) ("A firm may not drop a client like a hot potato, especially if it is in order to keep happy a far more lucrative client.").

Interestingly, the ABA Model Rules do not address this issue. In fact, it would seem that the ethics rules might permit such a withdrawal. Under ABA Model Rule 1.16(b)(1), a lawyer may withdraw from representation of a client if there is no "material adverse effect" on the client. That rule presumably examines the effect to the client in the matter from which the lawyer withdraws -- not some other matter. If that is true, then the lawyer's later adversity to the client in an unrelated matter would not appear to violate that rule.

Still, such a withdrawal normally receives strong condemnation. As the Restatement (Third) of Law Governing Lawyers § 132 cmt. c (2000) explains "[a] premature withdrawal violates the lawyer's obligation of loyalty to the existing client," and is effective only if the lawyer "is not motivated primarily by a desire to represent the new client."[1]

Most courts and bars follow this approach.

- Philadelphia LEO 2009-7 (7/2009) (analyzing a situation in which a law firm had "for a long period of time" represented the builder of a proposed office building, but learned two weeks before a scheduled zoning presentation that a neighbor of the building (whom the law firm represented on unrelated matters) opposed the project; explaining the effect of the later-developing conflict; "The hot potato rule in general disallows a law firm from discharging a

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[1] Restatement (Third) of Law Governing Lawyers § 121 cmt. c(iii), illus. 5 (2000) ("For many years Law Firm has represented Bank in mortgage foreclosures and does so currently. Other lawyers in Law Firm have continuously represented Manufacturer as outside general counsel and do so currently. Bank and Manufacturer entered into an agreement under which Bank would loan a sum of money to Manufacturer. Lawyers from Law Firm did not represent either client in negotiating the loan agreement. A dispute arose between the parties to the agreement, and Manufacturer announced that it would file suit against Bank for breach of the loan contract. Absent client consent as provided in § 122, Law Firm lawyers may not represent either Bank or Manufacturer in the litigation . . . . Law Firm may not withdraw from representing either client in order to file or defend a suit on the loan agreement against the other . . . . Law Firm may, however, continue to provide legal services to both clients in matters unrelated to the litigation because as to those matters the clients' interests are not in conflict.").

client for the purpose of eliminating a conflict where it desires to accept the representation of another client. This rule is a salutary one in that it prevents law firms from violating a duty of loyalty to a client that already exists in favor of a perhaps more lucrative client relationship.").

- Philadelphia LEO 2009-4 (3/2009) ("The inquirer previously represented Company A in connection with patent and trademark procurement. Company A then sold its business, along with all patents and trademarks, to Company B. The inquirer was not involved in any way with the asset purchase and did not represent Company A after the sale. The inquirer currently represents Company B in connection with maintaining IP rights related to the assets it purchased from Company A. Company A now wants to consult with the inquirer about a dispute with Company B concerning the terms of the asset purchase. The inquirer asks whether the so-called 'hot potato' rule prohibits him from terminating his representation of Company B so that he can represent Company A in the asset purchase dispute."; "Absent compliance with Rule 1.7(b), which includes informed consent from both clients, the inquirer can not represent Company A because the matter is directly adverse to the interests of the inquirer's current client, Company B. Moreover, the ethical violation cannot be avoided by the inquirer terminating his representation of Company B. As noted in International Longshoremen's Association, 909 F. Supp. 287, 293 (E.D. Pa. 1995), '[A]n attorney may not drop one client like a 'hot potato' in order to avoid a conflict with another, more remunerative client.'" (emphasis added)).

- Santacroce v. Neff, 134 F. Supp. 2d 366, 370, 371 (D.N.J. 2001) (recognizing the "hot potato doctrine," and disqualifying a law firm which attempted to drop a client in order to take a matter adverse to it, explaining that the firm dropped the client on December 22, 2000 and therefore was not representing the former client at the time she filed a complaint on January 4, 2001; "Here, Santacroce was fired as a client by Jaffe & Asher because it got wind of her proposed complaint against the Estate. This conclusion is compelled by the timing of the December 21 or 22 sharing of the complaint by Rosenbaum with Stifelman, the then-attorney for the Estate, coupled with the December 22 letter, which referred to her commencing an action against the Estate, asserted a conflict and fired her as a client. Thus, the appropriate date for evaluating the applicability of RPC 1.7(a) is not the filing date of the complaint, by which time Santacroce was a former client of Jaffe & Asher. Under the circumstances here, the appropriate date is after Jaffe & Asher found out about the proposed complaint but before the firm fired Santacroce [sic]. During that interval, Jaffe & Asher represented both Santacroce and the Estate. At that time, there was a clear conflict (as Jaffe & Asher asserted in the December 22 letter) and RPC 1.7(a) applies and precludes Jaffe & Asher's representation of defendants herein."; explaining that "[w]hen Jaffe & Asher found out that the firm's two clients, Santacroce and the Estate, were at odds, it dropped Santacroce like a 'hot potato.' The firm dropped Santacroce

even before suit was filed in a transparent attempt to represent the extraordinarily more remunerative client, the Estate of multimillionaire Goldberg. Although Jaffe & Asher claim that they terminated representation of Santacroce's only due to her inability to pay legal fees, this is belied by their own words. The firm itself refers to the 'conflict of interest' in their December 22, 2000 letter to Santacroce."; disqualifying the law firm).

- International Longshoremen's Ass 'n, Local Union 1332 v. International Longshoremen's Ass'n, 909 F. Supp. 287, 293 (E.D. Pa. 1995) ("However, an attorney may not drop one client like a 'hot potato' in order to avoid a conflict with another, more remunerative client.").

- Schiffli Embroidery Workers Pension Fund v. Ryan, Beck & Co., Civ. A. No. 91-5433, 1994 U.S. Dist. LEXIS 2154, at *11 n.2 (D.N.J. Feb. 23, 1994) (disapproving of "instances where a lawyer concurrently representing two clients simultaneously withdraws as counsel for one client and sues the reconstituted 'former' client on behalf of the other client").

- Harrison v. Fisons Corp., 819 F. Supp. 1039, 1041 (M.D. Fla. 1993) (disqualifying McDermott, Will and Emery; "Nor does MW&E's effort to end its relationship with First Union affect the outcome. A lawyer may not evade ethical responsibilities by choosing to jettison a client whose continuing representation becomes awkward. Allowing lawyers to pick the more attractive representation would denigrate the fundamental concept of client loyalty.").

- Stratagem Dev. Corp. v. Heron Int'l N.V., 756 F. Supp. 789, 793, 794 (S.D.N.Y. 1991) (finding that a law firm could not avoid a conflict by terminating a representation of a client against whom the firm wanted to take an adverse position; disqualifying Epstein Becker & Green [Epstein], because it represented a wholly owned subsidiary of a company that it later became adverse to; noting that Epstein Becker & Green sent a letter with the following language to its client; "'Should you feel that a conflict, actual or potential, may exist, or should you want us to resign from this case because of our ongoing representation of Stratagem and affiliates, please let us know and we will resign as counsel in the labor matter.'"; explaining that Epstein sent a letter with the following language after the client objected to the firm's adversity to its parent: "'From the tone and tenor of your letter, it is apparent that you would feel uncomfortable if we were to continue to represent [FSC] . . . . Accordingly, we hereby notify you that we are withdrawing as counsel to Fidelity in this lawsuit.'"; "Epstein Becker's obligations to Stratagem do not trump those it owes to FSC, even if they pre-dated them. Once Epstein Becker undertook to represent FSC, it assumed the full panoply of duties that a law firm owes to its client. Epstein Becker may not undertake to represent two potentially adverse clients and then, when the potential conflict becomes actuality, pick and choose between them. Nor may it seek consent for dual

representation and, when such is not forthcoming, jettison the uncooperative client.").

- Harte Biltmore Ltd. v. First Pennsylvania Bank, N.A., 655 F. Supp. 419, 421, 422 (S.D. Fla. 1987) (explaining that plaintiffs sought to disqualify the law firm which was representing the defendant bank; noting that as a result of a law firm merger, a lawyer representing one of the plaintiffs (on an unrelated matter) and the lawyer representing the bank ended up in the same firm; explaining that the firm withdrew from its representation of the plaintiff when it learned of the conflicts; rejecting the law firm's argument that the plaintiff was a former client, rather than a current client; holding that the law firm had "breached the duty of loyalty" owed to the plaintiff when it withdrew; discussing "[p]ublic confidence in lawyers and the legal system must necessarily be undermined when a lawyer suddenly abandons one client in favor of another. This is true regardless of the nature and extent of the representations of the clients involved and the size of the firm, how many separate offices it may maintain, or the number of jurisdictions in which the firm or its members may practice.").

On the other hand, at least two courts have found a violation of this rule but declined to disqualify the law firms involved.

- Metro. Life Ins. Co. v. Guardian Life Ins. Co., No. 06 C 5812, 2009 U.S. Dist. LEXIS 42475, at *3, *4-5, *9-10, *10-11 (N.D. Ill. May 18, 2009) (denying plaintiff's motion to disqualify Winston & Strawn from representing defendant, although finding that Winston had improperly terminated its representation of MetLife on unrelated matters; explaining that Winston had handled several unrelated matters for MetLife, which were arguably completed; noting that despite this fact, "[o]n February 18, 2009, in an email to MetLife's in house benefits attorney, Weisberg acknowledged that 'Guardian is an existing client,' but nevertheless sought a waiver from MetLife to represent Guardian. . . . MetLife refused to provide a waiver."; after receiving MetLife's denial, Winston sent a letter terminating its representation of MetLife; "Winston determined that its projects for MetLife had been completed, although not formally terminated. Importantly, the investigation revealed that Winston's representation of MetLife was, at most, sporadic and did not involve regularly scheduled meetings, conference calls or daily communication. In turn, Anderson and Thar concluded that MetLife was not a current client and, since all matters were complete, Winston could formally terminate its relationship with MetLife and represent Guardian without a conflict. On March 13, 2009 Rogers sent an email to his contacts at MetLife, confirming that Winston was not working on any active matters. . . . Then, on March 16, 2009 Winston sent a letter to Karen Francis-Moorer (MetLife refers to Francis-Moorer as a 'paralegal,' while Winston calls her a 'billing contact'), explaining that Winston's representation had concluded."; "[I]t is well-settled that once an

attorney-client relationship is established, it does not terminate easily. . . . Absent an express termination, 'something inconsistent with the continuation of the relationship must transpire in order to end the relationship.'. . . Examples of inconsistent conduct include: a client filing a grievance against his attorney; a client retaining another attorney; or a client refusing to pay his attorney's bill."; "In this case there is nothing inconsistent with Winston's relationship with MetLife. And, without a formal termination of the parties' relationship, MetLife reasonably could have considered itself a current client of Winston at the time Guardian approached Winston to represent it in this case. More importantly, the record is void of any evidence suggesting that MetLife and Winston contemplated an abrupt end to their relationship. In all respects, the representation continued even after Winston completed the immediate projects that MetLife assigned to the firm. See Perillo v. Johnson, 205 F.3d 775, 798-99 (5th Cir. 2000) ('Where the prior representation has not unambiguously been terminated, or is followed closely by the subsequent representation, there is more likely to be a conflict arising from defense counsel's representation of the first client . . . .'); IBM Corp. v. Levin, 579 F.2d 271, 281-82 (3d Cir. 1978) (ruling that client was current client for conflict of interest analysis even where attorney had no specific assignment from client at the time the attorney undertook the adverse representation); Manoir-Electroalloys Corp. v. Amalloy Corp., 711 F. Supp. 188, 194 (D.N.J. 1989) (finding client to be a current client even though the law firm was not actively providing legal services to the client at the time the suit was filed and had not done so for four years); see also Quinones v. Miller, No. 01 C 10752, 2003 U.S. Dist. LEXIS 9176, 2003 WL 21276429, at *29 (S.D.N.Y. June 3, 2003) (the 'mere passage of time do[es] not end the attorney-client relationship'); cf. Caban v. United States, 281 F.3d 778, 784 n.4 (8th Cir. 2002) (finding in a criminal case that a conflict based on a concurrent representation despite attorney's representation that work for the client was inactive)."; nevertheless finding that disqualification was not an appropriate remedy).

- SWS Fin. Fund A v. Salomon Bros., Inc., 790 F. Supp. 1392, 1398, 1398-99, 1399, 1403 (N.D. Ill. 1992) (explaining that Schiff, Hardin and Waite which was then representing Salomon Brothers because it engaged in a series of discrete projects for the client, billed approximately $40,000 from May 1990 to June 1991; "The undisputed facts demonstrate that Schiff served Salomon Brothers over a thirteen month period, answering Salomon's commodity law questions as they arose. The comment makes clear that Salomon Brothers was entitled to 'assume' that Schiff would continue to be its lawyer on a continuing basis Schiff had the [sic] and that responsibility for clearing up any doubt as to whether the client-lawyer relationship persisted. Consequently, this court finds that Salomon was a present client at the time Schiff began to represent Hickey against Salomon."; explaining that an attorney-client relationship can be terminated in one of three ways, none of which applied; "First, the Drustar [Artromick Int'l, Inc. v. Drustar, 134 F.R.D. 226 (S.D. Ohio 1991)] court stated that the relationship can be terminated by the express

statement of either the attorney or the client. Second, acts inconsistent with the continuation of the relationship (e.g., the client's filing a grievance with the local bar association against the attorney) are a second means. In Drustar, the court ruled that the client was a former client because he had refused to pay the attorney's bill and had retained other lawyers to do legal work which that attorney had formerly performed. Third even without overt statements or acts by either party, the relationship may lapse over time."; noting that Schiff did not expressly terminate the relationship with Salomon, and that such a termination "would have been invalid if made for the purposes of dropping Salomon like a 'hot potato' in order to obtain the more lucrative business Hickey [Salomon's adversary] could provide"; also noting that "the parties' behavior was not inconsistent with the continuation of the relationship. Indeed, if anything their behavior weighs very heavily in the direction of finding that that relationship was continuing. On August 13, about the time that Schiff began its work for Hickey against Salomon, Mr. Rosenzweig called Salomon's General Counsel to obtain consent for Schiff's representation of a commodity trading advisor in negotiations with Salomon. The other contacts between the firm and Salomon uniformly were conducted with the tone of a friendly, professional relationship, not at all inconsistent with the continuation of the lawyer-client relationship."; also noting that the relationship did not terminate through the passage of time; "Within two months of finishing its last billable project on June 25, 1991, Schiff had begun its adverse representation. The complaint was filed November 20, less than six months later. By comparison, the lawyer in Amalloy [Manoir-Electroalloys Corp. v. Amalloy Corp., 711 F. Supp. 188 (D.N.J. 1989)] began its adverse representation four years after last working for the client, yet the client was held to be a current client."; finding that Schiff had violated Rule 1.7, but not disqualifying the law firm; "The foregoing discussion should not be misunderstood to mean that this court does not take very seriously a lawyer's ethical responsibilities to avoid conflicts of interest. Schiff should not have agreed to bring this suit against Salomon Brothers. Rule 1.7 prohibited it from doing so. The court, however, does not believe that the costly sanction of disqualification should be automatic for a breach of even so serious an obligation as that imposed by Rule 1.7.").

Best Answer

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

N 3/12

Ethics Screens -- Adversity to Current Clients

Hypothetical 16

You have been fairly active in international bar association activities, and enjoy learning about other countries' ethics rules. During one recent meeting, a lawyer from another country told you that her country's ethics rules allow a law firm to take a matter adverse to another firm client as long as the lawyers representing the client and the lawyers representing the client's adversary are separated from one another. She expresses some surprise that the United States might not follow the same rule.

Would an "ethics screen" allow your firm to take a matter adverse to a current client without its consent?

NO

Analysis

The bedrock rule governing adversity to current clients does not include an "ethics screen" remedy -- at least as a matter of self-help. In other words, your firm may not undertake a matter adverse to a current client unless the other current client consents. In the case of a current client conflict, any lawyer's individual disqualification is imputed to the entire law firm (or law department). ABA Model Rule 1.10.

To be sure, some courts applying the disqualification standard decline to disqualify a law firm if it can point to a separation between the lawyer handling the matter for a client and the other lawyers handling another unrelated matter adverse to that client. For instance, in 2009 the District of Delaware declined to disqualify Howrey in that setting. The court held that Howrey had violated Rule 1.7 -- but also found that

Howrey's disqualification was not an appropriate remedy.[1] Thus, internal self-help screens might save a law firm from disqualification, but would not avoid an ethics violation.

However, a law firm may freely negotiate for consent with the client, and the law firm's agreement to impose such an "ethics screen" might induce the client to provide the requested consent.

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[1] Boston Scientific Corp. v. Johnson & Johnson Inc., 674 F. Supp. 2d 369, 371, 374, 374-75 (D. Del. 2009) (declining to disqualify Howrey from representing another client adverse to Wyeth, although finding that Howrey had improperly taken a matter adverse to Wyeth; explaining that "Howrey had handled several matters for the Wyeth family of companies. (. . . (timekeeper sheet showing Howrey's hours billed to 'Wyeth Pharmaceuticals' on various matters between 2003 and sometime in 2009)). In handling these matters, it has not always been clear which Wyeth entity Howrey has been representing. . . . While Howrey attorney Carreen Shannon, the drafter of the letters, declares that she understood her client to be 'Wyeth Pharmaceuticals,' the letters she drafted were '[o]n behalf of Wyeth, including Wyeth Pharmaceuticals B.V.'"; noting that Howrey's internal system listed many different billing addresses for a number of Wyeth entities; concluding that Howrey had violated Rule 1.7 by taking a matter adverse to a current client; "The record here does not contain any express agreements evidencing any current attorney-client relationship between Howrey and Wyeth. The record, however, does support the conclusion that it is reasonable for Wyeth to believe that Howrey has been acting on its behalf with respect to the currently-active Lonza matter. . . . Howrey went to Wyeth to seek permission to represent Lonza Biologics, PLC, in an unrelated matter; because Howrey would have needed Wyeth's permission only if Wyeth were Howrey's client in the Lonza matter, it is reasonable for Wyeth to believe, from Howrey's overture, that it is in fact the client in the Lonza matter. For at least these reasons, then, Wyeth's behalf as to its status as a client of Howrey is reasonable, and since the Lonza matter is still active, there is a current attorney-client relationship between Howrey and Wyeth. Accordingly, Howrey's representation of plaintiffs in the instant suits violates Model Rule 1.7."; nevertheless declining to disqualify Howrey; "[T]he instant suits are unrelated to the Lonza matter; Howrey's Washington, D.C.-based attorneys are handling the instant suits, while its Europe-based attorneys continue to handle the Lonza matter; there is an ethical wall between the two matters -- leads to the same conclusion."; rejecting the concept that a ethics rule violation should automatically result in disqualification; "'In the Third Circuit, and under this court's precedent, whether disqualification is appropriate depends on the facts of the case and is never automatic."; attributing part of the fault to Wyeth; "Moreover, Howrey's failure to comply with Model Rule 1.7 is, to a significant degree, due to Wyeth's conduct. Among other things, Wyeth's naming conventions, its use of the same in-house attorneys on matters involving different subsidiaries without consistently identifying to Howrey which entity those in-house attorneys were representing, and the willingness of it and its subsidiaries to receive billing invoices for matters on which they were not directly engaged with Howrey, together created significant confusion for Howrey as to which entity or entities it was representing, confusion which is evident from Howrey's time sheets, its mailing of billing invoices, and the averments of its attorneys in Europe. Wyeth should not now benefit from such obfuscatory conduct. Accordingly, the court declines to disqualify Howrey from the instant suits and instead orders Howrey to maintain its ethical wall.").

Most states' ethics rules define the type of "screen" that will effectively prevent an imputed disqualification (if accompanied by client consent in the case of a current client conflict). The ABA Model Rules define the requirements of an effective screen.

> 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 ABA Model Rules also dictate the timing of an effective screen.

> 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].

One court found ineffective an ethics screen because it did not describe the punishment that violators might face, and did not financially screen a lawyer from

receiving fees from the matter. Norfolk S. Ry. v. Reading Blue Mountain & N. R.R., 397 F. Supp. 2d 551 (M.D. Pa. 2005).[2]

Interestingly, the court found significant the fact that the law firm "has only ten attorneys in a single office, and the close working environment presents the distinct possibility that [the screened lawyer] could be nearby and overhear a sensitive discussion." Id. at 555. This concern does not make any sense, because the screen was to prevent the lawyer from providing information to his new firm, not prevent him from hearing information about the firm's current matter adverse to his former client (that would be a concern only if the lawyer reported back to his old firm what he had overheard at the new firm). However, the court's worry about the law firm's small size certainly makes sense.

However, another court found just the opposite -- that Paul Weiss's large size meant that a proposed screen might not work.

> Furthermore, it is difficult for this Court to believe that the proposed firewall is leak-proof, especially in a firm with over

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[2] 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."; 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").

> 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.

In re Cendant Corp. Sec. Litig., 124 F. Supp. 2d 235, 243 n.5 (D.N.J. 2000), vacated and remanded on other grounds, 264 F.3d 201 (3d Cir. 2001), cert. denied, 535 U.S. 929 (2002).[3]

Significantly, there are only a handful of cases in which courts have disqualified or otherwise punished law firms for breaching an agreed-upon screen. See, e.g., Spur Prods. Corp. v. Stoel Rives LLP, 122 P.3d 300 (Idaho 2005) (allowing a client to sue its

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[3] In re Cendant Corp. Sec. Litig., 124 F. Supp. 2d 235, 241-42, 243, 243 n.5 (D.N.J. 2000) (denying defendant Ernst & Young's request for a declaration that Paul Weiss lawyer Theodore Wells may represent it in litigation involving Cendant; explaining that Paul Weiss had represented a former Executive Vice President and Deputy General Counsel of Cendant in connection with claims against Cendant; also explaining that Ernst & Young had been represented by Lowenstein Sandler, but that Wells had moved from that firm to Paul Weiss and wished to continue representing Ernst & Young; explaining that Ernst & Young would arrange for co-counsel rather than Wells to conduct any future discovery of Paul Weiss's client; explaining that "[t]he Committee believes that as a general matter examining one's own client as an adverse witness on behalf of another client, or conducting third party discovery of one client on behalf of another client, is likely (1) to pit the duty of loyalty to each client against the duty of loyalty to the other; (2) to risk breaching the duty of confidentiality to the client-witness; and (3) present a tension between the lawyer's own pecuniary interest in continued employment by the client-witness and the lawyer's ability to effectively represent the litigation client. The first two of these hazards are likely to present a direct adverseness of interest falling within Rule 1.7(a); all three may constitute material limitations on the lawyer's representation, so as to come under Rule 1.7(b)"; rejecting the concept that co-counsel could conduct discovery of the former Cendant executive; "Mr. Wells or his colleagues at Paul Weiss at some point will be required to work with co-counsel to develop trial strategy, organize opening and closing arguments, and prepare other aspects of the case."; also explaining that Paul Weiss's large size meant that the proposed firewall might not work; "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."), vacated and remanded on other grounds, 264 F.3d 201 (3d Cir. 2001), cert. denied, 535 U.S. 929 (2002).

lawyer for malpractice based on a law firm's disclosure of client information to firm lawyer who was supposed to be screened from the matter).

Best Answer

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

Required Consents

Hypothetical 17

A new client just called to hire you in a relatively small real estate matter. Your conflicts check reveals that one of your partners is representing a much larger firm client in a business negotiation with the new client. You want to begin working quickly, so you immediately obtain the new client's consent for your firm to continue representing your larger client in the business negotiation. You are not sure if you also need the larger client's consent, so you call your firm's "ethics guru" to ask.

Before representing the new client in the real estate matter, must you obtain your larger existing client's consent?

YES

Analysis

This is the consent that many lawyers forget.

At first blush, a lawyer might think that only the new client's consent would be required. After all, that consent assures your continued representation of your larger client in the business negotiations. In addition, you have not been asked to represent the new client in anything adverse to the existing larger client.

However, most states' ethics rules require you to obtain the existing client's consent as well. ABA Model Rule 1.7(b)(4) (requiring that "each affected client gives informed consent").

Upon careful consideration, this requirement makes sense. Your existing client has the right to worry about your firm "pulling punches" in the business negotiation if the other party to the negotiation is a new firm client from whom you would like to seek more work.

However, the logistics of obtaining these consents can cause some confusion. For instance, a lawyer whose largest client is a bank might ask the bank for a consent to represent a borrower in a transaction with the bank. The lawyer obviously must advise the borrower that the law firm represents the bank. Otherwise, the borrower might later argue that the lawyer had not been diligent in negotiating on its behalf with the bank, because the lawyer did not want to anger a large firm client. The lawyer would have this disclosure obligation even if the bank had provided a prospective consent allowing any lawyer in the firm to represent borrowers in transactional matters with the bank.

When presenting the issue to the borrower, the lawyer might ask for the borrower's "consent" to the law firm's representation of the bank in unrelated matters. Technically, this is what the ethics rules require. However, that question seems awkward, because the borrower cannot say "No" to the request for consent -- and force the law firm to withdraw from all of their representations of the bank. Instead, the borrower's "No" answer would mean that the lawyer would not represent the borrower in the transaction.

So the lawyer's approach to the borrower is not the same as the lawyer's approach to the bank -- in the latter situation, the bank can essentially "veto" the lawyer's representation of the borrower in the matter adverse to the bank.

Best Answer

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

Permitted Disclosure When Seeking Consents

Hypothetical 18

In the last day or two, several potential new clients have called to see whether your firm could represent them. The conflicts checks have revealed the need for consents, and you want to know what steps to undertake.

(a) May you call an existing client and ask for its consent to your representation of a new client in business negotiations adverse to your existing client?

YES (PROBABLY)

(b) May you call an existing client and ask for its consent to your representation of a new client in analyzing the existing client's patents which might be infringed by an important new product that the new client plans to market next year?

NO (PROBABLY)

Analysis

(a) Despite the strength of a lawyer's duty of confidentiality, state bars recognize a limited exception for disclosure of certain limited client information during the conflicts-clearance process.

Interestingly, the ABA Model Rules do not deal with this necessary exception. The closest the ABA Model Rules come to addressing a type of implied authorization to disclose confidential information when clearing conflicts comes from a comment to the rule governing a lawyer's sale of her practice. This is doubly strange, because that comment discusses a law firm's lateral hiring -- which has nothing to do with the sale of a law practice.

> Negotiations between seller and prospective purchaser prior to disclosure of information relating to a specific representation of an identifiable client no more violate the confidential provisions of Model Rule 1.6 than do preliminary

> discussions concerning the possible association of another lawyer or merger between firms, which respect to which client consent is not required.

ABA Model Rule 1.17 cmt. [7].

An ABA legal ethics opinion also discussed this type of implied authorization to disclose client confidences.

- 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.").

Most courts would necessarily take this approach as well. See, e.g., Virginia LEO 1147 (1/4/89) (explaining that a lawyer may reveal to a current client that the lawyer formerly represented the client's adversary's lawyer in that lawyer's own divorce years earlier; explaining that the disclosure should not embarrass the former client/lawyer and must be made to the current client in order to obtain proper consent).

Under the best approach, the law firm should first advise the new client of the conflict, and ask whether it wishes the law firm to seek the required consent from the current client. This maintains the confidentiality of the information received from the prospective new client, and allows the new client to decide whether to permit the disclosure of the information to the adversary, or instead to retain another law firm without such "baggage."

In this scenario, it seems likely that the new client would permit such disclosure.

(b) In some situations, revealing the new client's request for the representation would so clearly prejudice the new client that no lawyer could reveal it to the current client. This scenario seems like such a situation (although ultimately it would be up to the new client to make the decision).

Best Answer

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

N 3/12

Requirements for a Valid Consent

Hypothetical 19

You act as your firm's "ethics guru." You just received a call from one of your partners, who wonders whether she needs a consent letter. She is handling a negotiation on behalf of a developer against a general contractor that your firm represents in ERISA matters. Your partner tells you that the general contractor's in-house lawyer handling the negotiations obviously knows about the conflict, because the in-house lawyer had visited your firm's partner who handles the ERISA matters and attended negotiation sessions (with your firm representing the contractor's adversary) during the very same visit to your firm's offices. Your partner argues that obtaining a formal consent is a waste of time, given this situation.

(a) Must you obtain the general contractor's formal consent to your representation of the developer adverse to it in negotiations?

YES

(b) Must the consent be in writing?

MAYBE

ANALYSIS

(a) No state recognizes "implied" consents. To be effective, a consent must be explicit, and follow full disclosure. ABA Model Rule 1.7(b)(4); ABA Model Rule 1.0(e) and cmts. 6 and 7.

The ABA Ethics 2000 changes included a requirement that a client's consent be "confirmed in writing." ABA Model Rule 1.7(b)(4). ABA Model Rule 1.0(b) explains that "confirmed in writing" means (in the context of informed consent) "that a lawyer promptly transmits to the person confirming an oral informed consent" either at the time the person gives the informed consent or "within a reasonable time thereafter." ABA Model Rule 1.7 cmt. [20] explains that the required written consent "may consist of a document

executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent," which the comment defines as including an electronic transmission.

(b) Most states do not require that consents be in writing. However, an increasing number of states do require such written consent. California and Washington require written consents, and North Carolina also changed its rules to require such written consent. New York LEO 829 (4/29/09) ("We note also that the new Rules do not require that the client actually sign an agreement containing the consent. See Rule 1.0(e)(ii). Moreover, any type of writing, even an e-mail, from the lawyer to the client confirming an oral consent would be sufficient. See Rule 1.0(x) (defining 'writing' to include email or any other 'tangible or electronic record of communication or representation').").

The new New York ethics rules effective April 1, 2009, require a client's written confirmation of a consent.[1]

Some states continue to recognize oral consents. For instance, the new Illinois ethics rules (effective January 1, 2010) do not require a client's written confirmation of a consent.

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[1] New York LEO 829 (4/29/09) ("We note also that the new Rules do not require that the client actually sign an agreement containing the consent. See Rule 1.0(e)(ii). Moreover, any type of writing, even an e-mail, from the lawyer to the client confirming an oral consent would be sufficient. See Rule 1.0(x) (defining 'writing' to include email or any other 'tangible or electronic record of communication or representation').").

Best Answer

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

Procedures for Obtaining Consents

Hypothetical 20

You want to represent a hospital in fairly friendly negotiations with the inventor of a medical device that the hospital wants to license. An associate at your firm currently represents the inventor on an unrelated intellectual property matter. You have advised your contact at the hospital that you must obtain the inventor's consent to represent the hospital adverse to the inventor. The hospital has offered to speak with the inventor, and arrange for the inventor to sign whatever consent letter you suggest.

May you follow the hospital's suggestion?

NO (PROBABLY)

Analysis

As tempting as this process would be (because it avoids the awkward call that your associate must make to the current client), you almost surely cannot follow such a process.

The conflict exists because your law firm has an attorney-client relationship with the other company. Because this relationship creates the conflict, you must communicate through this relationship to obtain the consent.

Furthermore, it would be inappropriate to have your client obtain the consent. The hospital is an adversary of the inventor, and as a fiduciary you may not appoint one of your client's adversaries as your agent to seek the client's consent. Your fiduciary relationship almost surely renders this a non-delegable duty.

Best Answer

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

Revocability of Consents

Hypothetical 21

Before beginning to defend one of your clients in a lawsuit brought by another company that your firm represents on unrelated matters, you obtained both clients' consent. The litigation has now turned uglier than expected, and the client who is the plaintiff in the litigation just sent you a letter revoking its consent -- and insisting that you withdraw as counsel of record for the defendant.

Must you withdraw from the representation?

NO (PROBABLY)

Analysis

Surprisingly, not many state courts or bars have analyzed the revocability of consents.

It seems clear that a client may withdraw a consent at any time -- just as a client may fire a lawyer at any time, for any reason.

However, it would seem unfair to the other client if such a revocation required a lawyer's withdrawal from a representation that the lawyer began only in reliance upon the consent.

There is support for treating a consent like other contracts, and refusing to allow revocation as to matters on which the lawyer relied on the consent before undertaking.

The ABA Model Rules address this issue.

> A client who has given consent to a conflict may revoke the consent and, like any other client, may terminate the lawyer's representation at any time. Whether revoking consent to the client's own representation precludes the lawyer from continuing to represent other clients depends on the circumstances, including the nature of the conflict, whether the client revoked consent because of a material change in circumstances, the reasonable expectations of the other

> client and whether material detriment to the other clients or the lawyer would result.

ABA Model Rule 1.7 cmt. [21].

The Restatement takes essentially the same approach.

> A client who has given informed consent to an otherwise conflicted representation may at any time revoke the consent . . . . Revoking consent to the client's own representation, however, does not necessarily prevent the lawyer from continuing to represent other clients who had been jointly represented along with the revoking client. Whether the lawyer may continue the other representation depends on whether the client was justified in revoking the consent (such as because of a material change in the factual basis on which the client originally gave informed consent) and whether material detriment to the other client or lawyer would result. In addition, if the client had reserved the prerogative of revoking consent, that agreement controls the lawyer's subsequent ability to continue representation of other clients.
>
> A material change in the factual basis on which the client originally gave informed consent can justify a client in withdrawing consent. For example, in the absence of an agreement to the contrary, the consent of a client to be represented concurrently with another . . . normally presupposes that the co-clients will not develop seriously antagonistic positions. If such antagonism develops, it might warrant revoking consent. If the conflict is subject to informed consent . . . , the lawyer must thereupon obtain renewed informed consent of the clients, now adequately informed of the change of circumstances. If the conflict is not consentable, or the lawyer cannot obtain informed consent from the other client or decides not to proceed with the representation, the lawyer must withdraw from representing all affected clients adverse to any former client in the matter . . . .
>
> . . . .
>
> In the absence of valid reasons for a client's revocation of consent, the ability of the lawyer to continue representing other clients depends on whether material detriment to the other client or lawyer would result and,

> accordingly, whether the reasonable expectations of those persons would be defeated. Once the client or former client has given informed consent to a lawyer's representing another client, that other client as well as the lawyer might have acted in reliance on the consent. For example, the other client and the lawyer might already have invested time, money, and effort in the representation. The other client might already have disclosed confidential information and developed a relationship of trust and confidence with the lawyer. Or, a client relying on the consent might reasonably have elected to forgo opportunities to take other action.

Restatement (Third) of Law Governing Lawyers § 122 cmt. f (2000).

Several Restatement illustrations show how this basic principle works.

> On Monday, Client A and Client B validly consent to being represented by Lawyer in the same matter despite a conflict of interest. On Wednesday, before either Client B or Lawyer has taken or forgone any significant action in reliance, Client A withdraws consent. Lawyer is no longer justified in continuing with the joint representation. Lawyer also may not continue to represent Client B alone without A's renewed informed consent to Lawyer's representation of B if doing so would violate other Sections of this Chapter, for example because A's and B's interests in the matter would be antagonistic or because Lawyer had learned confidential information from A relevant in the matter . . . . Similarly, if Client A on Wednesday did not unequivocally withdraw consent but stated to Lawyer that on further reflection Client A now had serious doubts about the wisdom of the joint representation, Lawyer could not reasonably take material steps in reliance on the consent. Before proceeding, Lawyer must clarify with Client A whether A indeed gives informed consent and whether the joint representation may thereby continue.

Restatement (Third) of Law Governing Lawyers § 122 cmt. f, illus. 5 (2000).

> Clients A and B validly consent to Lawyer representing them jointly as co-defendants in a breach-of-contract action. On the eve of trial and after months of pretrial discovery on the part of all parties, Client A withdraws consent to the joint representation for reasons not justified by the conduct of Lawyer or Client B and insists that Lawyer cease representing Client B. At this point it would be difficult and

> expensive for Client B to find separate representation for the impending trial. Client A's withdrawal of consent is ineffective to prevent the continuing representation of B in the absence of compelling considerations such as harmful disloyalty by Lawyer.

Id. illus. 6.

> Client A, who consulted Lawyer about a tax question, gave informed advance consent to Lawyer's representing any of Lawyer's other clients against Client A in matters unrelated to Client A's tax question. Client B, who had not theretofore been a client of Lawyer, wishes to retain Lawyer to file suit against Client A for personal injuries suffered in an automobile accident. After Lawyer informs Client B of the nature of Lawyer's work for Client A, and the nature and risks presented by any conflict that might be produced, Client B consents to the conflict of interest. After Lawyer has undertaken substantial work in preparation of Client B's case, Client A seeks to withdraw the advance consent for reasons not justified by the conduct of Lawyer or Client B. Even though Client A was Lawyer's client before Client B was a client, the material detriment to both Lawyer and Client B would render Client A's attempt to withdraw consent ineffective.

Id. illus. 7.

Bars tend to take the same approach.

- North Carolina LEO 2007-11 (7/13/07) (addressing the following question: "May a lawyer rely on a written waiver of conflict regarding the matter at hand signed, with informed consent, by two or more parties, after a subsequent, unforeseen falling out among those parties? (So that the lawyer is not required to relinquish representation of a long-term client/party to the original waiver due to one of the other party/signees revoking the waiver and objecting to the lawyer's continuing to represent the long-term client.)"; holding that "a lawyer is not required to withdraw from representing one client if the other client revokes consent without good reason" if the factors favor continued representation; "The consent agreement may specify the effect of one client's repudiation upon the other client's right to continued representation and the lawyer's right to continue to represent the other client. The DC Bar suggests the following language: 'You have the right to repudiate this waiver should you later decide that it is no longer in your interest. Should the conflict addressed by the waiver be in existence or contemplated at that time, however, and should we or the other client(s) involved have acted in

reliance on the waiver, we will have the right -- and possibly the duty, under the applicable rules of professional conduct -- to withdraw from representing you and (if permitted by such rules) to continue representing the other involved client(s) even though the other representation may be adverse to you.'").

- District of Columbia LEO 317 (11/19/02) (analyzing other opinions and case law dealing with revoked consents, and finding that generally a revoked consent does not require a lawyer's withdrawal from the other representation; "If there has been detrimental reliance by the other client or the lawyer, the lawyer ordinarily should continue representing the other client."; "If there has been no detrimental reliance by the other client or the lawyer, the lawyer and both clients in effect are restored to their positions immediately prior to the grant of the waiver. Given that the lawyer's acceptance of, and beginning work for, the other client (and in many cases, the repudiating client as well) typically will constitute reliance, cases in this category presumably will be rare, particularly where more than a brief period has elapsed since the waiver was granted.").

Case law also supports this approach.

- DeMeo v. Provident Bank, 2008 Ohio 2936 (Ohio Ct. App. 2008) (holding that borrowers could not sue a law firm for malpractice in representing the borrowers in a loan transaction while simultaneously representing the lender in an unrelated transaction, because the borrowers had consented to the adversity).

- Discotrade Ltd. v. Wyeth-Ayerst International, Inc., 200 F. Supp. 2d 355, 359 (S.D.N.Y. 2002) (explaining that a client "had the power to withdraw the waiver after consulting with her colleagues, at least before [the law firm] filed a complaint on behalf of [the adversary]").

- Fisons Corp. v. Atochem North America, Inc., No. 90 Civ. 1080(JMC), 1990 U.S. Dist. LEXIS 15284, at *17 n.6 (S.D.N.Y. 1990) (explaining that the client was "estopped from revoking its consent due to [the other client's] reliance on the consent").

Best Answer

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

N 3/12

Use of Prospective Consents for "Accommodation" Clients

Hypothetical 22

You have been representing both a trucking company and one of its drivers in a matter. Your retainer letter with the driver specifically identifies him as an "accommodation" client, and permits you to withdraw from representing him (and continuing representing the company) should adversity develop between them. Adversity has now developed, but the driver claims that the "hot potato" rule prevents you from withdrawing from representing him.

May you withdraw from representing the driver in order to represent the company adverse to him?

YES (PROBABLY)

Analysis

The Restatement specifically describes the situation presented in this hypothetical.

> With the informed consent of each client as provided in § 122, a lawyer might undertake representation of another client as an accommodation to the lawyer's regular client, typically for a limited purpose in order to avoid duplication of services and consequent higher fees. If adverse interests later develop between the clients, even if the adversity relates to the matter involved in the common representation, circumstances might warrant the inference that the "accommodation" client understood and impliedly consented to the lawyer's continuing to represent the regular client in the matter. Circumstances most likely to evidence such an understanding are that the lawyer has represented the regular client for a long period of time before undertaking representation of the other client, that the representation was to be of limited scope and duration, and that the lawyer was not expected to keep confidential from the regular client any information provided to the lawyer by the other client.

Restatement (Third) of Law Governing Lawyers § 132 cmt. I (2000).

A 2001 case confirms this principle. In Laborers Local 1298 Annuity Fund v. Grass (In re Rite Aid Corp. Securities Litigation), 139 F. Supp. 2d 649 (E.D. Pa. 2001), a court declined to disqualify the Ballard Spahr law firm from representing Rite Aid, despite the law firm's earlier representation of Rite Aid 's CEO, whose interests ultimately diverged from Rite Aid's. The court called the former CEO an "accommodation client," pointed to a carefully crafted retainer letter containing a clear prospective consent, and noted that the former CEO did not claim to have revealed any confidential information to Ballard Spahr (the court also cited his nine-month delay in seeking to disqualify the law firm).

In essence, this special rule governing "accommodation" clients provides a "safe harbor" for certain types of prospective consents.

Best Answer

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

Prospective Consents

Hypothetical 23

Your firm generally represents developers. A general contractor recently called one of your partners to see if she was available to handle some labor problems that the general contractor was facing. Your conflicts check reveals that you are not actively adverse to that general contractor, but you know that some of your developer clients deal with the general contractor, and you do not want to jeopardize your firm's opportunity to represent your large developer clients if they ever become adverse to that general contractor.

May you obtain a prospective consent from the general contractor that will allow you to represent your developer clients adverse to it in the future?

YES (PROBABLY)

Analysis

No ethics rule automatically prohibits a client from granting a prospective consent. However, lawyers arranging or (especially) relying on such prospective consents must be very wary.

ABA Model Rules

A comment to ABA Model Rule 1.7 explains that

> [t]he effectiveness of such [prospective] waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. The more comprehensive the explanation of the types of future representations that might arise and the actual and reasonably foreseeable adverse consequences of those representations, the greater the likelihood that the client will have the requisite understanding. Thus, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict. If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved. On the other hand, if the client is an experienced user of the legal

> services involved and is reasonably informed regarding the risk that a conflict may arise, such consent is more likely to be effective, particularly if, e.g., the client is independently represented by other counsel in giving consent and the consent is limited to future conflicts unrelated to the subject of the representation. In any case, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable under paragraph (b).

ABA Model Rule 1.7 cmt. [22].

The ABA added this comment in 2002, as part of the Ethics 2000 revisions. The new comment greatly expands the ABA's endorsement of prospective consents. In fact, the Ethics 2000 changes were so dramatic that the ABA took the fairly unusual step of withdrawing an earlier opinion that dealt with prospective consents. ABA LEO 436 (5/11/05) (withdrawing earlier ABA LEO 372 (4/16/93), because recent changes to Model Rule 1.7 and especially Comment [22] allow "effective informed consent to a wider range of future conflicts" than permitted under the older version of the Model Rule; explaining that open-ended prospective consents are likely to be valid if (for instance) the client "has had the opportunity to be represented by independent counsel in relation to such consent and the consent is limited to matters not substantially related to the subject of the prior representation"; continuing to recognize that such prospective consents do not authorize the lawyer to "reveal or use confidential client information" absent an additional explicit consent).

Restatement

The Restatement takes the same basic approach. Restatement (Third) of Law Governing Lawyers, § 122 cmt. d (2000) warns that prospective consents are "subject to special scrutiny," but acknowledges that they are often appropriate.

> A client's open-ended agreement to consent to all conflicts normally should be ineffective unless the client possesses sophistication in the matter in question and has had the opportunity to receive independent legal advice about the consent. . . . On the other hand, particularly in a continuing client-lawyer relationship in which the lawyer is expected to act on behalf of the client without a new engagement for each matter, the gains to both lawyer and client from a system of advance consent to defined future conflicts might be substantial. A client might, for example, give informed consent in advance to types of conflicts that are familiar to the client. Such an agreement could effectively protect the client's interest while assuring that the lawyer did not undertake a potentially disqualifying representation.

Restatement (Third) of Law Governing Lawyers, § 122 cmt. d (2000). A later comment implicitly deals with prospective consents in a discussion of the client's ability to revoke a consent.

> The issue of withdrawal of consent typically arises when consent was given in general terms or long in advance, and a direct conflict thereafter arises between the parties. Courts generally hold that such changed circumstances permit the objecting client to withdraw consent.

Restatement (Third) of Law Governing Lawyers § 122 reporter's note cmt. f.

State Legal Ethics Opinions

Every bar that has addressed the issue of prospective consents has refused to adopt a per se prohibition of such consents.

- New York City LEO 2008-2 (9/2008) (explaining that an in-house lawyer could obtain a prospective consent allowing the lawyer to take matters adverse to a former corporate affiliate; noting that the in-house lawyer might consider obtaining prospective consents from the various clients; "Careful drafting of the advance waiver will enhance the possibility that inside counsel will be able to continue to represent one or more clients after a conflict arises. In the context of a joint representation of a parent and an affiliate, the advance waiver should: [i]dentify for the clients the potential or existing conflicts with as much specificity as possible; [m]ake clear to the clients that the confidences and secrets of the affiliate will be shared with the parent; and [o]btain agreement from the affiliate that if inside counsel can no longer

represent both parent and affiliate, inside counsel can continue to represent the parent irrespective of the confidences and secrets that the affiliate may have shared with counsel and irrespective of what work counsel may have performed for the affiliate.").

- New York LEO 823 (6/30/08) ("A lawyer cannot continue to represent joint clients in litigation if their strategies significantly diverge. The lawyer can continue to represent one of the joint clients in the litigation if the former client provides informed consent to the future representation and the lawyer can represent the current client zealously and competently. The lawyer is required to comply with the court's procedures for withdrawal.").

- Pennsylvania LEO 2006-200 (7/26/06) (addressing a lawyer's simultaneous representation of a corporation and one of its constituents; acknowledging the possibility that the clients could grant a prospective consent; "In seeking to obtain a prospective waiver from clients, it frequently will be difficult for an attorney to make 'full disclosure' to the same extent as may be made with a concurrent waiver. This difficulty arises because it may not be clear to the attorney at the outset of the representation which conflicts might later arise. To satisfy his obligation of full disclosure the lawyer seeking a prospective waiver should, at a minimum, advise the client of the types of possible future adverse representations that the lawyer envisions, as well as the types of matters that may present such conflicts. The lawyer also should disclose the measures that he will implement to protect the client or prospective client should a conflict arise."; offering several examples of future conflicts that might arise between a corporate client and an individual client; "The following examples illustrate situations when future conflicts may arise: (a) A substantial discrepancy could develop between the testimony of the corporate representatives and the employee. (b) Based on newly discovered evidence, the corporation could reevaluate its decision as to whether the employee's actions were within the scope of the employee's employment, or whether they constituted actual fraud, willful misconduct or actual malice. (c) The corporation could later seek to disavow responsibility for the employee's actions. (d) A disagreement could arise as to whether the employee's actions were contrary to applicable laws or the corporation's policies and procedures. (e) A substantial difference could arise between the employee and the corporation regarding their respective goals in the litigation, for example, on questions such as the possibility or desirability of settlement. (i) The employee may seek vindication of her reputation or a trial on the merits of the case while the corporation's interest may be more economically motivated and oriented toward obtaining a favorable settlement in lieu of a trial, or (ii) The employee may desire to avoid the publicity and potential embarrassment of a trial and, therefore, favor settlement while the corporation as a matter of business judgment may favor litigation as a means of deterring future unfounded claims. (f) The corporation and the employee may disagree with one another at some point over other aspects of legal tactics and

strategy."; advising the lawyer to explain the nature of the joint representation to both clients; "Once it is decided that the lawyer will represent the corporation and the constituent, it is important to have a clear understanding with both clients about: (1) whether and what kind of confidential information will be shared; (2) who will control the privilege with respect to such information; (3) how the attorney-client privilege will operate in the event a dispute arises between the clients concerning the matter; and (4) whether the lawyer will continue to represent the corporation even if a conflict develops between the corporation and the constituent. We recommend that all such understandings be confirmed in writing.").

- New York City LEO 2006-1 (2/17/06) ("We conclude here that a law firm may ethically request an advance waiver that includes substantially related matters if the following conditions are met: (a) the client is sophisticated; (b) the waiver is not applied to opposite sides of the same litigation and opposite sides in a starkly disputed transactional matter; (c) the law firm is able to ensure that the confidences and secrets of one client are not shared with, or used for the advantage of, another client; (d) the conflict is consentable under the tests of DR 5-105(C); and (e) special consideration is given to the other factors described in Formal Opinion 2001-2."; explaining that Formal Opinion 2001-2 indicated that "[I]n a transactional setting in which the parties' interests are inherently antagonistic, such as when one party is a hostile bidder and the other an unwilling target in a corporate takeover, or when lawyers in the same law firm would be required to negotiate substantive business terms head-to-head, simultaneous representation generally will be ethically prohibited. But in transactional settings in which the adversity between clients is less stark, the application of DR 5-105 is more relaxed and nuanced. We also observed in Formal Opinion 2001-2 that many law firms service clients that insist the firm simultaneously represent multiple clients with differing interests in a single negotiated transaction – an observation that has even more force today.").

- Oregon LEO 2005-122 (8/2005) ("Nothing in Oregon RPC 1.7 prohibits a blanket or advance waiver from the State or from a nongovernment client as long as Lawyer adequately explains the material risks and available alternatives. See, e.g., ABA Formal Ethics Op No 05-436. Lawyer must be sensitive, however, to situations that were not contemplated in the original disclosure or that constitute nonwaivable conflicts. In the former situation, Lawyer would need to obtain the informed consent of each affected client as to the new conflict. In the latter situation, Lawyer would have to decline representation in the new matter that gives rise to the conflict. Oregon RPC 1.16(a)(1).").

- District of Columbia LEO 309 (9/20/01) ("Advance waivers of conflicts of interest are not prohibited by the Rules of Professional Conduct. Such waivers, however, must comply with the overarching requirement of informed

consent. This means that the less specific the circumstances considered by the client and the less sophisticated the client, the less likely that an advance waiver will be valid. An advance waiver given by a client having independent counsel (in-house or outside) available to review such actions presumptively is valid, however, even if general in character. Regardless of whether reviewed by independent counsel, an advance waiver of conflicts will not be valid where the two matters are substantially related to one another."; noting that "the lawyer must make full disclosure of facts of which she is aware, and hence cannot seek a general waiver where she knows of a specific impending adversity unless that specific instance also is disclosed"; "Finally, any decision to act on the basis of an advance waiver should be informed by the lawyer's reasoned judgment. For example, a prudent lawyer ordinarily will not rely upon an advance waiver where the adversity will involve allegations of fraud against the other client or is a litigation in which the existence or fundamental health of the other client is at stake. In accordance with the foregoing, a client not independently represented by counsel (including in-house counsel) generally may waive conflicts of interest only where specific types of potentially adverse representations or specific types of adverse clients are identified in the waiver correspondence. A client that is independently represented by counsel generally may agree to waive such conflicts even where the specificity requirements set out in the preceding sentence are not satisfied."; noting the following prospective consent language, although not describing the text as "authoritative or exclusive": "As we have discussed, the firm represents many other companies and individuals. It is possible that during the time we are representing you, some of our current or future clients will have disputes or transactions with you. [For example, although we are representing you on _____, we have or may have clients whom we represent in connection with _____.] You agree that we may continue to represent, or undertake in the future to represent, existing or new clients in any matter, including litigation, even if the interests of such other clients in such other matters are directly adverse to yours, so long as those matters are not substantially related to our work for you.").

- California LEO 1989-115 (1989) (declining to find that all prospective consents are inappropriate; "Consequently, it is the opinion of the Committee that if, within the meaning of rule 3-310(F), the client is 'informed' of the potential risks that are foreseeable at the time of the consent, no Rule of Professional Conduct is violated by the attorney's requiring the client's advance waiver."; "[T]he nature of the subsequent conflict of interest may range from simply representing two clients in entirely unrelated matters to actually representing both side in the same dispute. While a court would doubtless preclude a lawyer from representing both sides simultaneously, the Committee believes that in such situation, if the original waiver was informed, local counsel could withdraw from its representation of lead counsel's client and continue to represent its own client even if otherwise confidential

information would be used against lead counsel's client." (footnote omitted); "If the subsequent representation was unrelated to the original matter, the Committee believes that local counsel could continue its participation in the original matter at the same time as it is representing its own client in the unrelated matter."; "In summary, then, it is the opinion of the Committee that the execution of an advance waiver of conflict of interest and confidentiality protections is not per se improper; that to the extent that the waiver of confidentiality is 'informed,' it is valid; that to the extent that a potential client ripens into an actual conflict, the advance waiver may or may not be sufficient depending upon the degree of involvement and the nature of the subsequent conflict; that regardless of the validity of the waiver, it cannot be asserted as a defense to a disciplinary proceeding charging incompetent performance of legal services; and that under no circumstances may the agreement be used for the purposes of limiting the lawyer's civil liability for malpractice.").

- N.Y. County Law. Ass'n LEO 724 (undated) (finding that a lawyer might ethically seek a client's prospective consent; "The degree of disclosure that must be made in order for the client's or prospective client's consent to be 'informed' will also depend on other factors. For example, when the lawyer is seeking an advance waiver from a sophisticated client, such as a large corporation with in-house counsel, the adequacy of disclosure will be put to a less stringent test than if the client were a small business, an individual unsophisticated with respect to legal matters, a child or an incapacitated person."; "The Code does not require that the facts of each future adverse representation be known to the parties or described with precision in order for consent to be 'informed.' If such were the rule, no advance waiver would ever be enforceable; by their nature, such waivers include clients and claims that are not yet known. If the subsequent conflict should have been reasonably anticipated by the original client based on the disclosures made and the scope of the consent sought, we see no reason why the lawyer should not be permitted to rely on such consent under DR 5-105(C)."; "Notwithstanding that a lawyer may have obtained a client's consent to a future conflict, the lawyer must reassess the propriety of the adverse concurrent representation under the 'obviousness' test discussed above when the conflict actually arises. The lawyer must determine whether he or she can adequately represent the interests of all affected clients at that time. Of course, if the actual conflict that materializes is materially different than the conflict that has been waived, the lawyer may not rely on the consent previously obtained."; "A lawyer can seek and a client or prospective client can give an advance waiver with respect to conflicts of interest that may arise in the future. The lawyer must first evaluate whether the future representation is likely to give rise to a non-consentable conflict. If the lawyer determines that the prospective conflict is consentable, he or she can proceed to make full disclosure to the client or prospective client and obtain that person or entity's consent. The validity of the waiver will depend on the adequacy of disclosure given to the

client or prospective client under the circumstances, taking into account the sophistication and capacity of the person or entity giving consent.").

Case Law

Not surprisingly, courts uphold the effectiveness of prospective consents that meet the generally-accepted standard -- providing some specific description of the type of adversity that might develop.

- McKesson Info. Solutions Inc. v. Duane Morris LLP, Civ. No. 2006CV121110 (Fulton County (Ga.) Super. Ct. Mar. 6, 2007) (in earlier order disqualifying Duane Morris, addressing McKesson's "Verified Complaint for Emergency Injunctive Relief and Disqualification of Duane Morris LLP" ("Nov. 7, 2006 Order"); explaining that Duane Morris was representing two individuals in arbitration against McKesson while simultaneously representing two of McKesson's sister subsidiaries in a separate action in Pennsylvania (Nov. 7, 2006 Order); noting that Duane Morris undertook Pennsylvania representation of the two other McKesson subsidiaries as local counsel pursuant to an April 27, 2006 engagement letter which "attempts to distinguish between McKesson Corporation's entities and contains a waiver of future conflicts" (Nov. 7, 2006 Order at 2); noting that Duane Morris's adversary in the arbitration and one of its clients in the Pennsylvania bankruptcy action were part of the same segment of the overall McKesson corporate family, and among other things reported to the same law department (Nov. 7, 2006 Order); rejecting Duane Morris's argument that the McKesson entities are separate for conflicts purposes (Nov. 7, 2006 Order); holding that Georgia's ethics rules apply because Duane Morris's lawyers' conduct is occurring in Georgia (Nov. 7, 2006 Order); and quoting Duane Morris's engagement letter signed by McKesson in the Pennsylvania bankruptcy action: "Given the scope of our business and the scope of our client representations through our various offices in the United States and abroad, it is possible that some of our present or future clients will have matters adverse to McKesson while we are representing McKesson. We understand that McKesson has no objection to our representation of parties with interests adverse to McKesson and waive any actual or potential conflict of interest as long as those other engagements are not substantially related to our services to McKesson. We agree, however, that McKesson's consent to, and waiver of, such representation shall not apply in any instance where, as a result of our representation of McKesson, we have obtained proprietary or other confidential information of a non-public nature, that, if known to such other client, could be used in any such other matter by such client to McKesson's material disadvantage or potential material disadvantage. By agreeing to this waiver of any claim of conflicts as to matters unrelated to the subject matter of our services to McKesson, McKesson also agrees that we

are not obligated to notify McKesson when we undertake such a matter that may be adverse to McKesson." (Nov. 7, 2006 Order at 10-11); holding that in this case the consent was inadequate and invalid as a matter of Georgia law: "In this case, Defendant's engagement letter does not refer to any particular parties or circumstances under which adverse representation would be undertaken. As such, the Court finds that MMM and MAI [Duane Morris's clients in the Pennsylvania bankruptcy action] could not have reasonably anticipated that Defendant would actually consider representation of the Smiths [Duane Morris's clients in the Georgia action against the other McKesson subsidiary] in the concurrent action where the adverse party is attacking McKesson Corporation products and accusing it of fraudulent conduct. Courts must ensure that the trust and loyalty owed by lawyers to their clients are not compromised." (Nov. 7, 2006 Order at 11); the November 7, 2006 Order was later vacated after Duane Morris's representation of the McKesson subsidiaries in the Pennsylvania bankruptcy case ended, and Duane Morris sent a letter to McKesson's lawyer in the Pennsylvania bankruptcy matter indicating that Duane Morris "intended to withdraw as counsel for MMM and MAI" in the Pennsylvania bankruptcy matter (Mar. 6, 2007 Order on Motion for New Trial and to Vacate the Permanent Injunction and To Dismiss on the Grounds that the Controversy is Now Moot, slip op. at 3-4); also noting that Duane Morris had moved to withdraw as counsel for the McKesson entities in the Pennsylvania bankruptcy matter, which was granted by the bankruptcy court (slip op. at 4); rejecting McKesson's reliance on the "hot potato" rule, based on its argument that Duane Morris's withdrawal as counsel occurred during the pendency of the arbitration in Georgia (slip op. at 5); holding that Duane Morris "did not improperly terminate or prematurely abandon its attorney-client relations" with the McKesson subsidiaries it was representing in the Pennsylvania bankruptcy proceeding (slip op. at 6); noting that neither of the McKesson entities or the chief lawyer representing them in the Pennsylvania bankruptcy matter objected to Duane Morris's motion to withdraw, which the bankruptcy court granted).

- Visa U.S.A., Inc. v. First Data Corp., 241 F. Supp. 2d 1100, 1102-03 (N.D. Cal. 2003) (upholding the following prospective consent in a retainer letter between the Heller Ehrman Law Firm and First Data: "'Our engagement by you is also understood as entailing your consent to our representation of our other present or future clients in "transactions," including litigation in which we have not been engaged to represent you and in which you have other counsel, and in which one of our other clients would be adverse to you in matters unrelated to those that we are handling for you. In this regard, we discussed [Heller's] past and on-going representation of Visa U.S.A. and Visa International (the latter mainly with respect to trademarks) (collectively, "Visa") in matters which are not currently adverse to First Data. Moreover, as we discussed, we are not aware of any current adversity between Visa and First Data. Given the nature of our relationship with Visa, however, we

discussed the need for the firm to preserve its ability to represent Visa on matters which may arise in the future including matters adverse to First Data, provided that we would only undertake such representation of Visa under circumstances in which we do not possess confidential information of yours relating to the transaction, and we would staff such a project with one or more attorneys who are not engaged in your representation. In such circumstances, the attorneys in the two matters would be subject to an ethical wall, screening them from communicating from [sic] each other regarding their respective engagements. We understand that you do consent to our representation of Visa and our other clients under those circumstances.'"; noting that First Data moved to disqualify Heller Ehrman from representing Visa in an action against First Data; approving the prospective consent and denying First Data's motion to disqualify -- because the prospective consent provided a specific enough disclosure of the possible adversity and thus resulted in a knowing consent).

- Elonex I.P. Holdings, Ltd. v. Apple Computer, Inc., 142 F. Supp. 2d 579, 582, 582-83 (D. Del. 2001) (denying Apple's motion to disqualify the Dechert Price firm; "As a general matter, a client may expressly or impliedly waive his objection and consent to an adverse representation. Given the facts in the record, Apple cannot reasonably or credibly maintain that Albert P. Cefalo, in-house counsel for Apple, believed that he was merely granting a transactional waiver."; "Given that Cefalo, who was the Director of Intellectual Property at Apple, knew about the possibility of suit from Elonex, his discussion with Tim Blank of Dechert in Boston was reasonably sufficient, or should have been sufficient, to cause Apple to appreciate the significance of any potential conflicts. Therefore, considering that Elonex had not yet filed a suit, the court concludes that Dechert had provided Apple with sufficient information about the possible conflict. The facts in the record suggest that Dechert obtained a prospective waiver from Apple. The ABA has affirmed the validity of the prospective waivers. . . . A prospective waiver should identify the potential opposing party, the nature of the likely subject matter in dispute, and permit the client to appreciate the potential effect of the waiver. . . . Therefore, considering that Blank identified the possibility of this patent infringement suit, Cefalo was already aware of the possibility of suit, and the two discussed methods of dealing with the conflict, the court finds that Blank sufficiently explained the conflict in order to obtain a prospective waiver from Apple.").

- General Cigar Holdings, Inc. v. Altadis, S.A., 144 F. Supp. 2d 1334, 1336, 1339 (S.D. Fla. 2001) (enforcing a prospective consent obtained by Latham & Watkins; explaining that the client signed an engagement letter with the following provision: "'Our firm has in the past and will continue to represent clients listed on the attached Exhibit A (each an 'Exhibit A Client') in matters not substantially related to this engagement. Accordingly, each Client agrees to waive any objection, based upon this engagement, to any current or future

representation by the firm of any of the Exhibit A Clients, its respective parent, subsidiaries and affiliates in any matter not substantially related to this representation. Of course, we will not accept any representation that is adverse to you in this matter.'"; finding the prospective consent enforceable; "The engagement letter in the instant case was reviewed by outside counsel and the respective representatives of the corporations. As in Fisons [Fisons Corp. v. Atochem North America, Inc., No. 90 Civ. 1080 (JMC), 1990 U.S. Dist. LEXIS 15284 (S.D.N.Y. Nov. 14, 1990)], it is clear that advance consent was obtained from knowledgeable and sophisticated parties. There is no dispute that the predecessors of Altadis, U.S.A. were aware of the Latham attorneys' relationship with General Cigar. Allowing for advance, informed consent has significant advantages to both clients and lawyers alike, especially where large firms and sophisticated clients are involved. While the engagement letter could have been more explicit, under the circumstances, it represents informed consent for potential adverse actions.").

In contrast, some courts reject the effectiveness of prospective consents that tend to be too broad.

- All Am. Semiconductor, Inc. v. Hynix Semiconductor, Inc., Nos. C 07-1200, -1207, -1212 & No. 06-2915, 2008 U.S. Dist. LEXIS 106619, at *10-11, *11, *20-21, *24, *7-8, *33-34, *37-38 (N.D. Cal. Dec. 18, 2008) (assessing a situation in which lawyer John Vandevelde had represented Infineon's Vice President of Sales in connection with antitrust issues relating to the pricing of DRAM, and later joined (through a law firm merger) Crowell & Moring -- who was representing plaintiffs in an action against Infineon involving antitrust issues; noting: that Vandevelde's firm merged with Crowell on October 6, 2008, that two days later Infineon demanded that Crowell withdraw from representing its client in the case against Infineon, and that one day after the letter Crowell "despite its belief that there was no adversity between Hefner [former Infineon executive] and its current clients in this litigation, decided to erect an 'ethics wall' to protect against the inadvertent disclosure of confidential information to personnel at Crowell that the Lightfoot Vandevelde lawyers learned during their representation of Hefner"; explaining that as part of the "ethics wall . . . [a]ccording to Crowell, Crowell's document management system has been specially coded so that none of the former attorneys and staff of Lightfoot Vandevelde can access any documents related to the current litigation"; rejecting Crowell's argument that Vandevelde did not have an attorney-client relationship with Infineon and therefore should not be disqualified or cause Crowell & Moring to be disqualified; "[A] conflict of interest may be created when, as here, an attorney (Vandevelde) has acquired confidential information about a non-client (Infineon) in connection with his representation of a client (Hefner), such as when an attorney obtains confidential information about a co-defendant of a client during a joint defense of an action. Indeed, contrary to plaintiffs' contention, the fact that

Vandevelde and Infineon never had an attorney-client relationship is not determinative of whether disqualification of Crowell is appropriate because 'an attorney's receipt of confidential information from a non-client may lead to the attorney's disqualification.'"; pointing to Crowell & Moring's ethics screen at highlighting the firm's belief that there might be a problem; "Crowell's reaction to discovering that Vandevelde had previously represented Hefner in prior litigation relating to DRAM price-fixing immediately erecting an ethical wall -- suggests that Crowell recognized that Vandevelde had a duty to protect the confidential information he received from Infineon in the course of that litigation."; also rejecting Crowell's argument that a joint defense agreement under which Vandevelde represented the Infineon executive contained a valid prospective consent in which Infineon agreed not to seek his disqualification; noting that the joint defense agreement contained the following consent language: "While the precise nature of each possible conflict that may arise in the future cannot be identified at the present time, each client member after being informed of the general nature of the conflicts that may arise, knowingly, and intelligently waives any conflict of interest that may arise on account of this Agreement, including specifically from an attorney member of this Agreement, other than his, her or its own attorney, cross-examining him, her or it at trial in any other proceeding arising from or relating to the above Investigation. Each client member further waives any claim of conflict of interest which might arise by virtue of participation by his, her or its attorney in this Agreement. Each attorney member and client member waives any right to seek the disqualification of counsel for any other attorney member who is a party to this Agreement based upon a communication of joint-defense privileged information."; finding the prospective consent ineffective; "The court is not convinced that Infineon gave its informed consent to waive its right to seek disqualification of Vandevelde under the circumstances. Plaintiffs did not offer persuasive evidence or argument indicating that the prospective waiver provision sufficiently disclosed the nature of the conflict that has subsequently arisen between the parties, and that Infineon knowingly and specifically waived its right to object to this conflict. Neither the language of the JDA nor the argument advanced by plaintiffs compels the conclusion that Infineon consented to Vandevelde prospectively undertaking adverse representation on behalf of plaintiffs against Infineon in substantially related litigation. Indeed, the only specific conflict waived by the parties in the JDA was the conflict that could arise if an attorney member of the joint defense (e.g., Vandevelde) cross-examined a defendant that the attorney member did not represent (i.e., Infineon) at trial or in any other proceeding arising from or relating to the joint defense. In other words, the parties to the JDA waived any duty of confidentiality for purposes of cross-examining testifying defendants. To the extent that plaintiffs urge the court to adopt a broader reading of the Paragraph 13, the court declines to do so."; ultimately finding that "disqualification of the entire Crowell firm is warranted. First, plaintiffs have not shown that Infineon's motion to disqualify was tactically motivated or otherwise brought for an improper purpose, such as to delay the proceedings.

Second, while the court is mindful of the financial ramifications that disqualification of plaintiffs' counsel may subject plaintiffs to at this stage of the litigation, plaintiffs will not, as they suggest, be required to hire new counsel and prepare for a trial that is only six months away. Plaintiffs are simply mistaken in this regard. Only the dispositive motions involving Sun are being heard in December 2008 and only the trial of Sun will go forward in June 2009. The dispositive motions and trial for the four plaintiffs involved in this motion have yet to be scheduled. Thus, there is plenty of time for new counsel to get up to speed.").

- Celgene Corp. v. KV Pharm. Co., Civ. A. No. 07-4819 (SDW), 2008 U.S. Dist. LEXIS 58735, at *3-4, *13-14, *21-24, *32, *41 (D.N.J. July 28, 2008) (not for publication) (concluding that the following prospective consent in retainer letters between the law firm of Buchanan & Ingersoll and one of its clients was not sufficient to avoid the firm's disqualification: "'Recognizing and addressing conflicts of interest is a continuing issue for attorneys and clients. We have implemented policies and procedures to identify actual and potential conflicts at the outset of each engagement. From time to time we may be asked to represent someone whose interests may differ from the interests of the Company. We are accepting this engagement with the Company's understanding and express consent that our representation of the Company will not preclude us from accepting an engagement from a new or existing client, including litigation or other matters that may involve the Company. However, we will not accept an engagement that is directly adverse to the Company or any of its subsidiaries if either: (1) it would be substantially related to the subject matter of our representation of the Company or representation of Anthrogenesis Corp.; or (2) would impair the confidentiality of proprietary, sensitive or otherwise confidential communications made to us by the Company or Anthrogenesis Corp.'"; analyzing the standard for judging prospective consents under Congoleum [Century Indem. Co. v. Congoleum Corp., 426 F.3d 675 (3d Cir. 2005)]; concluding that the Buchanan Ingersoll retainer letters did not satisfy the standard; "'[T]ruly informed consent' requires the attorney to provide meaningful consultation to the client about potential conflicts. Thus, in determining whether Celgene gave 'truly informed consent,' the inquiry focuses in part on how Buchanan actually consulted with its client, Celgene, and informed Celgene about the potential conflict when consent was obtained."; concluding that the Buchanan Ingersoll retainer letters did not satisfy the standard; "This Court has examined the 2003 Retention Agreement and the 2006 Engagement Letter and does not find within either of those documents any of the following: 1) any statements which adequately communicate a proposed course of conduct with regard to concurrent conflicts of interest; 2) any explanation of the material risks of the course of conduct with regard to concurrent conflicts of interest; or 3) any explanation of reasonably available alternatives to the proposed course of conduct. . . . This Court finds no basis to conclude that either agreement manifests informed consent, within the meaning of RPC 1.0(e), for several

reasons. First, both agreements propose a future course of conduct that is very open-ended and vague. Both provisions are so general that a reader has no clear idea what course of conduct Buchanan anticipated: what kinds of cases are substantially related? Did the parties anticipate that Buchanan would be adverse to Celgene in other patent cases? Second, there is nothing in the agreements to indicate that Buchanan communicated to Celgene adequate information or explanation about the risks of the proposed course of conduct, with regard to concurrent conflicts of interest: would Celgene be comfortable if Buchanan represented a generic pharmaceutical company in a patent case? Third, there is nothing in the agreements to indicate that Buchanan explained to Celgene reasonably available alternatives to the proposed course of conduct, such as Celgene asking Buchanan to specifically define 'substantially related' or requesting an even broader limitation -- perhaps that Buchanan would not represent any generic drug companies. The record does not show that Celgene received anything in return for agreeing to these provisions. Indeed, the agreements only appear to benefit Buchanan -- which further underscores the importance of Buchanan fully explaining the meaning and implications of the waiver. Neither agreement manifests informed consent within the meaning of RPC 1.7(b) and 1.0(e)."; "It is significant that Buchanan does not even assert, no less offer supporting evidence, that Buchanan at any time provided a consultation to Celgene on the conflict waiver, nor that Buchanan provided full -- or any -- disclosure on the matter of conflicts of interest, nor that Buchanan communicated 'adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.' RPC 1.0(e)."; ultimately holding that Buchanan Ingersoll did not carry its burden of proof in establishing that the client gave "truly informed consent" to the firm's representation of another client adverse to it).

- Wolk v. Flight Options, Inc., No. 03-cv-06840, 2005 U.S. Dist. LEXIS 19891 (E.D. Pa. Sept. 13, 2005) (refusing to validate a contingency fee arrangement because the lawyer had included a general prospective consent in the retainer agreement).

- Concat LP v. Unilever, PLC, 350 F. Supp. 2d 796, 801-02, 820, 821 (N.D. Cal. 2004) (disqualifying Morgan Lewis & Bockius from representing a client adverse to another client who had signed a retainer letter containing the following prospective consent: "'Morgan, Lewis & Bockius is a large law firm, and we represent many other companies and individuals. It is possible that some of our present or future clients will have disputes or other dealings with you during the time that we represent you. Accordingly, as a condition of our undertaking of this matter for you, you agree that Morgan, Lewis & Bockius may continue to represent, or may undertake in the future to represent, existing or new clients in any matter, including litigation, that is not substantially related to our work for you, even if the interests of such clients in those other matters are directly adverse to you. Further, you agree in light of

its general consent to such unrelated conflicting representations, Morgan, Lewis & Bockius will not be required to notify you of each such representation as it arises. We agree, however, that your prospective consent to conflicting representations contained in the preceding sentence shall not apply in any instance where, as the result of our representation of you, we have obtained confidential information of a non-public nature that, if known to another client of ours, could be used to your material disadvantage in a matter in which we represent, or in the future are asked to undertake representation of, that client.'"; finding the prospective consent ineffective; "Applying these factors to the waiver executed by Dr. Winchell at Thomas' request, Winchell Decl., Ex. 1, the Court finds as follows: (1) the terms of the waiver are extremely broad and were evidently intended to cover almost any eventuality; (2) its temporal scope is likewise unlimited; (3) the record contains no evidence of any discussion of the waiver; (4) the waiver lacks specificity as to the conflicts that it covers and effectively awards Morgan, Lewis an almost blank check; (5) however, Morgan Lewis explicitly stated that it would not seek to represent Dr. Winchell and an adverse client in a 'substantially related' matter; and (6) Dr. Winchell's education and business experience are strongly indicative of a high degree of sophistication. Thus, the fifth and sixth factors tend to support a finding of informed consent, but the first four weigh in the opposite direction. The interests of justice (factor 7) remain to be determined." (footnote omitted); also explaining that "[u]nder the law of this jurisdiction, even if a prospective waiver of conflict has been obtained, the attorney must request a second, more specific waiver, 'if the [prospective] waiver letter insufficiently disclosed the nature of the conflict that subsequently arose between the parties.' . . . This Morgan, Lewis did not do.").

- Goss Graphics Sys., Inc. v. MAN Roland Druckmaschinen Aktiengesellschaft, No. C00-0035 MJM, 2000 U.S. Dist. LEXIS 18100, at *7 (N.D. Iowa May 25, 2000) (disqualifying Kirkland & Ellis from representing a client adverse to another firm client who had signed a retainer letter with the following prospective consent: "In the event a present conflict of interest exists between [Goss] and [Kirkland's] other clients or in the event one arises in the future, [Goss] agrees to waive any such conflict of interest or other objection that would preclude [Kirkland's] representation of another client in other current or future matters. Accordingly, our representation of [Goss] in connection with the [Bankruptcy Proceedings] and in connection with any future matter will be with the understanding that such representation will not preclude [Kirkland] from continuing any present representation or assuming future representation in other matters that another client may request (other than a matter where [Goss] and another [Kirkland] client are on opposing sides of litigation).").

- Worldspan, L.P. v. Sabre Group Holdings, Inc., 5 F. Supp. 2d 1356, 1359, 1359-60, 1360 (N.D. Ga. 1998) (disqualifying defendants' local counsel despite the following prospective consent which plaintiff Worldspan signed

when the law firm began to represent plaintiff on unrelated matters approximately five years earlier: "'As we have discussed, because of the relatively large size of our firm and our representation of many other clients, it is possible that there may arise in the future a dispute between another client and WORLDSPAN, or a transaction in which WORLDSPAN's interests do not coincide with those of another client. In order to distinguish those instances in which WORLDSPAN consents to our representing such other clients from those instances in which such consent is not given, you have agreed, as a condition to our undertaking this engagement, that during the period of this engagement we will not be precluded from representing clients who may have interests adverse to WORLDSPAN so long as (1) such adverse matter is not substantially related to our work for WORLDSPAN, and (2) our representation of the other client does not involve the use, to the disadvantage of WORLDSPAN, of confidential information of WORLDSPAN, we have obtained as a result of representing WORLDSPAN.'"; "Looking only at the original letter itself, the Court finds that its very language is ambiguous. The phrase 'will not be precluded from representing clients who may have interests adverse to WORLDSPAN so long as (1) such adverse matter' does not necessarily or even impliedly foreshadow future directly adverse litigation. It is the opinion of the Court that future directly adverse litigation against one's present client is a matter of such an entirely different quality and exponentially greater magnitude, and so unusual given the position of trust existing between lawyer and client, that any document intended to grant standing consent for the lawyer to litigate against his own client must identify that possibility, if not in plain language, at least by irresistible inference including reference to specific parties, the circumstances under which such adverse representation would be undertaken, and all relevant like information."; noting that the prospective consent allowed the law firm to begin to represent new clients in matters adverse to its existing client WORLDSPAN, which the court indicated carried "added weight" in its analysis).

- Hasco, Inc. v. Roche, 700 N.E.2d 768, 776 (Ill. App. Ct. 1998) (finding that prospective consent language in a retainer letter was not sufficient; explaining the consent letter contained the following provision: "'6. Waiver of Conflict of Interest. Each of Clients, as a subordinated lender to Arauca, has a claim against Arauca arising from any default by Arauca in repayment of the subordinated debt. Clients have been advised by Arauca that Arauca presently lacks sufficient resources to repay the subordinated debt. SRZ is presently representing Arauca in its pursuit of claims against FOC to recover lost profits on the Syntex transaction and for other relief. SRZ is also furnishing other legal advice to Arauca and its general partner, Arauca General, Inc. ("AGI"). A conflict exists between the interests of Arauca, AGI and each of the Clients. By executing this letter-agreement, each of the Clients hereby consents to waive any conflict of interest associated with the representation by SRZ of Arauca and the representation of Clients by SRZ with respect to their claims against FOC. Each Client further recognizes and

acknowledges the SRZ shall have no obligation to advise any Client with respect to any actual or potential claim against Arauca.'"; concluding that "[a]lthough the Schuyler parties argue that this waiver extends to the NASD arbitration dispute, the circuit court correctly determined that this conflict waiver was limited to SRZ's representation of the subordinated lenders in the West Virginia lawsuit").

- Florida Ins. Guar. Ass'n v. Carey Canada, Inc., 749 F. Supp. 255, 259-60 (S.D. Fla. 1990) (disqualifying a law firm from representing the insured in a lawsuit by the insurer against the insured; rejecting the law firm's argument that it had a prospective consent, because the law firm had "failed to come forward with any written instrument evidencing such consent," and "has been unable to identify any single [insurance company] employee much less a specific conversation that ever provided [the law firm] with standing consent to sue" the insurance company).

Not surprisingly, courts generally recognizing the effectiveness of prospective consents apply them as they are written -- which sometimes trips up law firms which have not adequately defined the scope of the prospective consent.

- See, e.g., Brigham Young Univ. v. Pfizer, Inc., Case No. 2:06-CV-890 TS BCW, 2010 U.S. Dist. LEXIS 104164, at *5-6, *11, *12 (D. Utah Sept. 29, 2010) (finding that a prospective consent Brigham Young University signed when retaining Winston & Strawn allowed Winston & Strawn only to represent existing clients in matters adverse to BYU; quoting the following prospective consent language: "'Advance Patent Waiver: As you may know, universities frequently hold patents in the product and inventions developed at such universities. Winston & Strawn LLP currently represents multiple pharmaceutical and other companies with respect to patent and intellectual property matters (collectively, the "Other Clients"), including litigation (the "Patent Matters"). Winston & Strawn LLP is not currently representing any Other Clients in matters adverse to the University. Because of the scope of our patent practice, however, it is possible that Winston & Strawn LLP will be asked in the future to represent one or more Other Clients in matters, including litigation, adverse to the University. Therefore, as a condition to Winston & Strawn LLP's undertaking to represent you in the BYU Matters, you agree that this firm may continue to represent Other Clients in the Patent Matters, including litigation, directly adverse to the University and hereby waive any conflict of interest relating to such representation of Other Clients.'"; finding that the prospective consent was limited only to current Winston & Strawn clients; "[T]he plain language of the engagement letter limits the term 'Other Clients' to companies the firm is, at the present, acting in their behalf or stead."; "The Court finds the plain language to be clear and fully supports the Magistrate Judge's conclusion that 'the waiver only applies

> to clients that Winston was representing with respect to patent and intellectual property matters as of the date of the agreement.'"; disqualifying Winston & Strawn from representing a new client (Pfizer) in a matter adverse to BYU).

Consent Language

Lawyers hoping to arrange for an effective prospective consent must undertake an awkward balancing act.

The kind of explicit (often ugly) language that might be required to assure an effective prospective consent could prompt the requested client to turn down the request for consent, or even become angry at being asked. On the other hand, a proposed prospective consent that attempts to "finesse" the issue by not explicitly describing the possible adversity, or not describing litigation as included within the scope of the prospective consent,[1] might ultimately prove to be ineffective if a court must later assess the consent.

The New York City Bar provided the following example of prospective consent language that would cover matters substantially related to what the firm was handling for the client.

> You also agree that this firm may now or in the future represent another client or clients with actually or potentially differing interests in the same negotiated transaction in which the firm represents you. In particular, and without waiving the generality of the previous sentence, you agree

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[1] Worldspan, L.P. v. Sabre Group Holdings, Inc., 5 F. Supp. 2d 1356, 1359-60 (N.D. Ga. 1998) (disqualifying defendant's local counsel despite a prospective consent; "It is the opinion of this Court that future directly adverse litigation against one's present client is a matter of such an entirely different quality and exponentially greater magnitude, and so unusual given the position of trust existing between lawyer and client, that any document intended to grant standing consent for the lawyer to litigate against his own client must identify that possibility, if not in plain language, at least by irresistible inference including reference to specific parties, the circumstances under which such adverse representation would be undertaken, and all relevant like information." (emphasis added)).

> that we may represent [to the extent practicable, describe the particular adverse representations that are envisioned, such as "other bidders for the same asset" or "the lenders or parties providing financing to the eventual buyer of the asset"]. This waiver is effective only if this firm concludes in our professional judgment that the tests of DR 5-105 are satisfied. In performing our analysis, we will also consider the factors articulated in ABCNY Formal Opinion 2001-2, including (a) the nature of any conflict; (b) our ability to ensure that the confidences and secrets of all involved clients will be preserved; and (c) our relationship with each client. In examining our ability to ensure that the confidences and secrets of all involved clients will be preserved, we will establish an ethical screen or other information-control device whenever appropriate, and we otherwise agree that different teams of lawyers will represent you and the party adverse to you in the transaction.

New York City LEO 2006-1 (2/17/06) (footnote omitted).

The same legal ethics opinion suggested the following prospective consent language that would not cover substantially related matters.

> Other lawyers in the Firm currently do [XXX] work for [existing client] and its affiliates, and expect to continue to do such work. In order to avoid any misunderstanding in the future, we ask that you confirm that the Company agrees to waive any conflict of interest which may be deemed to arise as a result of such representation. Please also confirm that neither the Company nor any of its affiliates will seek to disqualify our Firm from representing [existing client] or its affiliates in existing or future [XXX] or other matters. Our agreement to represent you is conditioned upon the understanding that we are free to represent any clients (including your adversaries) and to take positions adverse to either the company or an affiliate in any matters (whether involving the same substantive area(s) of law for which you have retained us or some other unrelated area(s), and whether involving business transactions, counseling, litigation or other matters), that are not substantially related to the matters for which you have retained us or may hereafter retain us. In this connection, you should be aware that we provide services on a wide variety of legal subjects, to a large number of clients both in the United States and internationally, some of whom are or may in the future

> operate in the same area(s) of business in which you are operating or may operate. (A summary of our current practice areas and the industries in which we represent clients can be found on our web site at www.XXX.com.) You acknowledge that you have had the opportunity to consult with your company's counsel [if client does not have in-house counsel, substitute: 'with other counsel'] about the consequences of this waiver. In this regard, we have discussed with you and you are aware that we render services to others in the area(s) of business in which you currently engage.

New York City LEO 2006-1 (2/17/06).

The Washington, D.C., Bar suggested the following prospective consent language (although warning that the language was not "authoritative or exclusive").

> "As we have discussed, the firm represents many other companies and individuals. It is possible that during the time we are representing you, some of our current or future clients will have disputes or transactions with you. [For example, although we are representing you on _____, we have or may have clients whom we represent in connection with _____.] You agree that we may continue to represent, or undertake in the future to represent, existing or new clients in any matter, including litigation, even if the interests of such other clients in such other matters are directly adverse to yours, so long as those matters are not substantially related to our work for you."

District of Columbia LEO 309 (9/20/01).

Courts have rejected the effectiveness of the following prospective consent provisions.

> "While the precise nature of each possible conflict that may arise in the future [in connection with a common interest agreement among several separately represented companies] cannot be identified at the present time, each client member after being informed of the general nature of the conflicts that may arise, knowingly, and intelligently waives any conflict of interest that may arise on account of this Agreement, including specifically from an attorney member of this Agreement, other than his, her or its own

> attorney, cross-examining him, her or it at trial in any other proceeding arising from or relating to the above Investigation. Each client member further waives any claim of conflict of interest which might arise by virtue of participation by his, her or its attorney in this Agreement. Each attorney member and client member waives any right to seek the disqualification of counsel for any other attorney member who is a party to this Agreement based upon a communication of joint-defense privileged information."

All Am. Semiconductor, Inc. v. Hynix Semiconductor, Inc., Nos. C 07-1200, -1207, -1212 & No. 06-2915, 2008 U.S. Dist. LEXIS 106619, at *7-8, *32-34 (N.D. Cal. Dec. 18, 2008).

> "Recognizing and addressing conflicts of interest is a continuing issue for attorneys and clients. We have implemented policies and procedures to identify actual and potential conflicts at the outset of each engagement. From time to time we may be asked to represent someone whose interests may differ from the interests of the Company. We are accepting this engagement with the Company's understanding and express consent that our representation of the Company will not preclude us from accepting an engagement from a new or existing client, including litigation or other matters that may involve the Company. However, we will not accept an engagement that is directly adverse to the Company or any of its subsidiaries if either: (1) it would be substantially related to the subject matter of our representation of the Company or representation of Anthrogenesis Corp.; or (2) would impair the confidentiality of proprietary, sensitive or otherwise confidential communications made to us by the Company or Anthrogenesis Corp."

Celgene Corp. v. KV Pharm. Co., Civ. A. No. 07-4819 (SDW), 2008 U.S. Dist. LEXIS 58735, at *3-4 (D.N.J. July 28, 2008) (not for publication).

> "Morgan, Lewis & Bockius is a large law firm, and we represent many other companies and individuals. It is possible that some of our present or future clients will have disputes or other dealings with you during the time that we represent you. Accordingly, as a condition of our undertaking of this matter for you, you agree that Morgan,

> Lewis & Bockius may continue to represent, or may undertake in the future to represent, existing or new clients in any matter, including litigation, that is not substantially related to our work for you, even if the interests of such clients in those other matters are directly adverse to you. Further, you agree in light of its general consent to such unrelated conflicting representations, Morgan, Lewis & Bockius will not be required to notify you of each such representation as it arises. We agree, however, that your prospective consent to conflicting representations contained in the preceding sentence shall not apply in any instance where, as the result of our representation of you, we have obtained confidential information of a non-public nature that, if known to another client of ours, could be used to your material disadvantage in a matter in which we represent, or in the future are asked to undertake representation of, that client."

Concat LP v. Unilever, PLC, 350 F. Supp. 2d 796, 801-02 (N.D. Cal. 2004).

> "In the event a present conflict of interest exists between [Goss] and [Kirkland's] other clients or in the event one arises in the future, [Goss] agrees to waive any such conflict of interest or other objection that would preclude [Kirkland's] representation of another client in other current or future matters. Accordingly, our representation of [Goss] in connection with the [Bankruptcy Proceedings] and in connection with any future matter will be with the understanding that such representation will not preclude [Kirkland] from continuing any present representation or assuming future representation in other matters that another client may request (other than a matter where [Goss] and another [Kirkland] client are on opposing sides of litigation)."

Goss Graphics Sys., Inc. v. MAN Roland Druckmaschinen Aktiengesellschaft, No. C00-0035 MJM, 2000 U.S. Dist. LEXIS 18100, at *7 (N.D. Iowa May 25, 2000).

> "As we have discussed, because of the relatively large size of our firm and our representation of many other clients, it is possible that there may arise in the future a dispute between another client and WORLDSPAN, or a transaction in which WORLDSPAN's interests do not coincide with those of another client. In order to distinguish those instances in which WORLDSPAN consents to our representing such other clients from those instances in which such consent is

> not given, you have agreed, as a condition to our undertaking this engagement, that during the period of this engagement we will not be precluded from representing clients who may have interests adverse to WORLDSPAN so long as (1) such adverse matter is not substantially related to our work for WORLDSPAN, and (2) our representation of the other client does not involve the use, to the disadvantage of WORLDSPAN, of confidential information of WORLDSPAN, we have obtained as a result of representing WORLDSPAN."

Worldspan, L.P. v. Sabre Group Holdings, Inc., 5 F. Supp. 2d 1356, 1359 (N.D. Ga. 1998).

In contrast, a court upheld the effectiveness of the following prospective consent.

> "Our engagement by you is also understood as entailing your consent to our representation of our other present or future clients in 'transactions,' including litigation in which we have not been engaged to represent you and in which you have other counsel, and in which one of our other clients would be adverse to you in matters unrelated to those that we are handling for you. In this regard, we discussed [Heller's] past and on-going representation of Visa U.S.A. and Visa International (the later mainly with respect to trademarks) (collectively, 'Visa') in matters which are not currently adverse to First Data. Moreover, as we discussed, we are not aware of any current adversity between Visa and First Data. Given the nature of our relationship with Visa, however, we discussed the need for the firm to preserve its ability to represent Visa on matters which may arise in the future including matters adverse to First Data, provided that we would only undertake such representation of Visa under circumstances in which we do not possess confidential information of yours relating to the transaction, and we would staff such a project with one or more attorneys who are not engaged in your representation. In such circumstances, the attorneys in the two matters would be subject to an ethical wall, screening them from communicating from [sic] each other regarding their respective engagements. We understand that you do consent to our representation of Visa and our other clients under those circumstances."

Visa U.S.A., Inc. v. First Data Corp., 241 F. Supp. 2d 1100, 1102-03 (N.D. Cal. 2003).

Best Answer

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

N 3/12

Effects of Conflicts -- General Rules

Hypothetical 24

As your law firm's new general counsel, you want to understand the imputed disqualification rules.

Does the same imputed disqualification rule apply to private law firms, corporate law departments and government agencies?

YES (PROBABLY)

Analysis

The ABA Model Rules and most state ethics rules define "law firm" to include private law firms, corporate law departments and government agencies. This means that all three of those groups of lawyers generally face imputed disqualification if any of the lawyers in their ranks is individually disqualified. ABA Model Rule 1.0(c).

Lawyers moving from firm to firm or from government to private practice present different issues. Most states allow private law firms to "screen" an individually disqualified government lawyer joining the firm, thus avoiding imputed disqualification. ABA Model Rule 1.11(b). The same approach presumably would apply to corporate law departments and government agencies.

Best Answer

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

Disqualification -- Standards

Hypothetical 25

Your law firm has either filed or defended a number of disqualification motions lately, and you would like to understand how the disqualification standard differs (if at all) from the conflicts analysis with which you are fairly familiar.

(a) Is a court likely to disqualify a law firm upon finding it guilty of a conflicts violation?

MAYBE

(b) Is the court likely to rely on an "appearance of impropriety" standard when assessing a disqualification motion?

MAYBE

Analysis

(a) Although each state follows its own disqualification standard, many states explicitly recognize that a conflict of interest does not automatically result in a law firm's disqualification as counsel of record in litigation. ABA Model Rules Preamble & Scope explains that "violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation."

In some situations, a court's choice of laws determination can be dispositive.

- See, e.g., Alzheimer's Institute of Am., Inc. v. Avid Radiopharmaceuticals, Civ. A. No. 10-6908, 2011 U.S. Dist. LEXIS 140345, at *23, *6-7, *7 n.5, *9-10, *12 (E.D. Pa. Dec. 7, 2011) (declining to disqualify the law firm of Bryan Cave, although it faced a conflict of interest in continuing to represent its client the Alzheimer's Institute of America after intervention in the lawsuit by the South Florida Board of Trustees, which Bryan Cave represented on unrelated intellectual property matters; explaining the choice of laws issue for the disqualification; explaining the situation facing Bryan Cave; "Under both California's and Pennsylvania's rules of professional conduct, a lawyer may not represent one client whose interest is directly adverse to another client's without the consent of each client. USF refused to give its consent to Bryan

> Cave to continue representing AIA in these matters. Bryan Cave then filed its motion to withdraw because the attorneys believed they had an obligation to do so under the California and the ABA rules of professional conduct. Marshall explained that he moved to withdraw 'because [he] ha[d] to, not because [he] wanted to.'"; "In a diversity action, the court 'must apply the choice of law rules of the forum state to determine what substantive law will govern,' Huber v. Taylor, 469 F.3d 67, 73 (3d Cir. 2006) (quoting Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941)). Accordingly, we turn to Pennsylvania's choice of law rules to determine the applicable law." (footnote omitted); "Although this is not a diversity action, the issue of attorney conduct is a question of state, not federal law."; ultimately concluding that the Pennsylvania ethics rules apply; "[T]he plain language of Rule 8.5 and its explanatory comment clearly state that if the lawyer's conduct relates to a proceeding pending before a tribunal, the lawyer is 'subject only to the disciplinary rules of the jurisdiction in which the tribunal sits.' Because Bryan Cave's motion to withdraw pertains to a proceeding pending in this court and the Pennsylvania Rules of Professional Conduct govern this tribunal, Pennsylvania's Rules of Professional Conduct apply in this case."; rejecting USF's argument that California ethics rules applied, and emphasizing that under California Rules the disqualification would be mandatory; "USF is correct that California Rule of Professional Conduct 3-310 imposes a per se disqualification rule whenever a concurrent conflict is presented.").

Many states follow a two-part test when assessing disqualification motions. First, the courts determine if there is clear evidence of a conflict. Second, the court then determines whether the conflict would somehow "taint" the proceeding. These courts disqualify a law firm only if both of these tests are satisfied. Board of Educ. of N.Y. City v. Nyquist, 590 F.2d 1241, 1246 (2d Cir. 1979) (holding that lawyers should be disqualified for conflicts only if the conflict will "taint the underlying trial").

The Second Circuit confirmed this approach in refusing to disqualify the law firm of Debevoise & Plimpton from representing MetLife.

> [T]he showing of prejudice is required as a means of proving the ultimate reason for disqualification: harm to the integrity of the judicial system. . . . [D]isqualification by imputation should be ordered sparingly, . . . and only when the concerns motivating the rule are at their most acute.

Murray v. Metro. Life Ins. Co., 583 F.3d 173, 178 (2d Cir. 2009).

Other courts have taken this approach.

- Morin v. Maine Education Association, 993 A.2d 1097, 1099, 1100 (Me. 2010) ("Morin [labor advocate and board member of the Maine Education Association] testified that Edelman [lawyer who conducted an investigation of Morin's complaint about a "hostile and discriminatory work environment"] represented to her that her statements made during the interview would remain confidential and would not be shared with the Association. Morin's attorney testified that she would have been more 'guarded' during the interview if she had known that Bredhoff & Kaiser might later represent the Association, and that she would not have offered her opinion to Edelman as to litigation strategy or settlement terms. Edelman testified, in contrast, that he explained to Morin that the details of his investigation would remain confidential 'to the extent that's practical, given the investigation, or the extent consistent with the . . . pursuit of the investigation,' but that he would describe the nature of Morin's complaint to the Association. After concluding his investigation, Edelman substantiated Morin's allegation of discrimination."; declining to disqualify the lawyer who conducted the investigations; "[W]e require a showing that continued representation by the attorney would result in actual prejudice to the party seeking that attorney's disqualification. . . . [C]ourts will not assume the existence of prejudice to the moving party just by the mere fact that an ethical violation was committed, even when that ethical violation involves confidential communications. . . . A mere general allegation that the attorney has some confidential and relevant information he gathered in the previous relationship will not support disqualification. . . . Rather, the moving party must point to the specific, identifiable harm she will suffer in the litigation by opposing counsel's continued representation. Indeed, to allow disqualification with proof of anything less than such actual prejudice would be to invite movants to employ this 'obvious vehicle for abuse.'" (emphasis added; citations omitted)).

Other courts implicitly acknowledge that they will not be bound by the ethics rules' per se approach, but rather apply a balancing standard.

- Alzheimer's Institute of Am., Inc. v. Avid Radiopharmaceuticals, Civ. A. No. 10-6908, 2011 U.S. Dist. LEXIS 140345, at *18, *26-27, *27, *27-28, *30 (E.D. Pa. Dec. 7, 2011) (declining to disqualify the law firm of Bryan Cave, although it faced a conflict of interest in continuing to represent its client the Alzheimer's Institute of America after intervention in the lawsuit by the South Florida Board of Trustees, which Bryan Cave represented on unrelated intellectual property matters; explaining the choice of laws issue for the disqualification; after concluding that Pennsylvania rather than California ethics rules apply, finding that the Pennsylvania rules require a balancing of

interests in the disqualification motion; "[U]nder Rule 1.16(c), the court can order a lawyer to continue to represent a client even if doing so would otherwise violate a disciplinary rule. Pa. Rules of Prof.l Conduct R. 1.16(c)."; "In summary, the Pennsylvania standard calls for a balancing of the concerns addressed in Local Rule 5.1(c) and Pennsylvania Rules of Professional Conduct 1.7 and 1.16 to determine whether good cause exists to permit the withdrawal. The factors to weigh include the potential prejudice that the proposed withdrawal will cause the clients, lawyers and the other parties to the lawsuit, the delay to the proceedings and the harm to the administration of justice."; noting that Bryan Cave had served for two and a half years as AIA's counsel in the case, and had spent more than 7,200 hours representing AIA; also finding that USF would not be prejudiced by Bryan Cave's continued involvement for AIA after USF's intervention; "USF expressly concedes that it cannot identify 'any specific or material harm that USF has suffered or will suffer' as a result of Bryan Cave continuing to represent AIA in these patent infringement actions."; "The perception of betrayal alone does not require withdrawal."; "USF stipulated that Bryan Cave did not and will not receive any confidential information from USF as a result of its representation of USF that would be relevant or material to this case. . . . Indeed, the matters in which Bryan Cave is representing and has represented USF are unrelated to this litigation or any other litigation brought by AIA."; also noting that Bryan Cave had imposed an ethics screen; concluding that Bryan Cave could not have foreseen USF's intervention; "[B]ecause USF never claimed ownership of the inventions, it was reasonable for Bryan Cave to believe that there was no conflict with USF and no need to run a conflict check as to USF when it brought the patent infringement actions. USF's potential interest did not become apparent until our ruling on the cross-motions for summary judgment.").

- Am. Int'l Group, Inc. v. Bank of Am. Corp., No. 11 Civ. 6212 (BSJ), 2011 U.S. Dist. LEXIS 141012, at *9, *10, *11, *11-12, *12, *12-13, *14-15 (S.D.N.Y. Dec. 6, 2011) (declining to disqualify the law firm of Quinn Emanuel from representing AIG in a lawsuit against Bank of America; "Disqualification is disfavored in this Circuit and, as a result, the party seeking it must meet a high standard of proof before it is granted."; "Courts will presume that the attorney shares his confidences with the firm, and so an attorney's successive representation risks disqualification of his firm as well. . . . In the Second Circuit, however, the confidence-sharing presumption is rebuttable."; "One method of rebutting the presumption is by demonstrating a timely and effective ethical screen 'that fences the disqualified attorney from the other attorneys in the firm' in connection with the case for which the conflict is alleged."; "Quinn's screening procedure was imperfect, without question. Quinn admits that it failed to realize a potential conflict until Defendants asserted one, on September 19, 2011. Because Quinn was unaware of the conflict until September, Becker was asked to review and comment on the draft complaint and draft motion to remand. However, flawed

screens-including late screens-are not fatal. In particular, screens erected immediately upon discovery of the conflict weigh against disqualification."; "Quinn erected an ethical screen within 24 hours of receiving notice of a conflict."; "[T]he Court finds that for several reasons Plaintiffs have rebutted the presumption that confidences were shared before the screen was erected. For one, Becker did not bring any confidential documents or files from Munger to Quinn, so there is 'no chance' that Quinn attorneys could have seen any."; "Also, as proof that no confidences were shared orally, Plaintiffs submit affidavits from all Quinn timekeepers who clocked more than 50 hours on the case swearing that no confidences were sought or received from Becker."; "Anyone else who recorded less than 50 hours on the case also confirmed that no confidences were sought or received. . . . And all temporary attorneys on the case have confirmed to the supervising associate that they have never communicated with Becker. . . . Not only has Becker sworn that he did not share any confidences, he further avers that he recalls his previous work on the First Franklin matter only at a high level of generality, and that he does not remember confidential information of First Franklin or Merrill Lynch."; "Lastly, the Court finds it unlikely that Becker inadvertently disclosed confidences before the screen was initiated given the 'de facto separation' that existed between him and the case. . . . As a partner in the London office, Becker was physically separated from the case. . . . Additionally, he was electronically separated from the case. An electronic audit of the Quinn document management system revealed that the only two documents Becker accessed on the system related to the AIG action were two mark-ups of the remand brief. . . . Becker never sought or obtained access to the folder relating to the action, which is maintained on a separate drive. . . . Finally, the Court notes that Quinn is a law firm with over 500 attorneys. Its 'large size makes the risk of inadvertent disclosures of confidences less likely.'" (citation omitted)).

- Wyeth v. Abbott Labs., 692 F. Supp. 2d 453, 458, 459, 459-60, 460 (D.N.J. 2010) (reversing a trial court's disqualification of Howrey LLP from representing a client adverse to Wyeth, because Howrey represented Wyeth in an ongoing patent matter, and was not representing another long-standing Howrey client against Wyeth in a patent infringement case pending in the District of New Jersey; noting that the District of Delaware found that Howrey's handling of a matter adverse to Wyeth was a Rule 1.7 violation, but declining to disqualify Howrey; explaining that "[w]hen presented with a motion to disqualify counsel, a court must strike a 'delicate balance' between the competing considerations. . . . On the one hand, the Court must examine the potential hardships that one party will experience if his lawyer is disqualified. On the other, the Court must weigh the potential hardships to the adversary if counsel is permitted to proceed."; finding that the Magistrate Judge improperly applied a per se test instead of balancing factors; "Here, the Court finds that the Magistrate Judge, by applying an automatic disqualification rule, failed to undertake the necessary factual analysis and

weigh the relevant factors before disqualifying Howrey from representing BSC [Boston Scientific Corp.] in this case. As such, the decision is erroneous and shall be set aside."; ultimately concluding that Howrey had violated Rule 1.7, but declining to disqualify the law firm; "Factors that this Court should consider in determining whether disqualification is warranted include: (1) prejudice to Wyeth; (2) prejudice to BSC; (3) whether's [sic] Howrey's representation of Wyeth in the Lonza matter has allowed BSC access to any confidential information relevant to this case; (4) the cost -- in terms of both time and money -- for BSC to retain new counsel; (5) the complexity of the issues in the case and time it would take new counsel to acquaint themselves with the facts and issues; (6) which party, if either, was responsible for creating the conflict."; "First, the substance of the two matters are completely unrelated. . . . Second, no Howrey personnel overlap on the two matters. . . . Third, as the matters are unrelated, Wyeth is unable to identify any confidential information accessible to Howrey in one case that could be used in the other. . . . Fourth, the Lonza matter has been dormant since November, 2008."; "According to BSC, Howrey has served as one of BSC's primary litigation counsel in matters relating to the stent products and technology at issue in this case for more than a decade. . . . Over approximately the past ten years, Howrey lawyers have billed an average of almost 14,000 hours per year on scores of different matters for BSC. . . . Given Howrey's historical representation and the complex technologies at issue in this case, depriving BSC of its counsel of choice deprives BSC of Howrey's depth of experience and expertise. Additionally, if BSC were required to obtain new counsel, there would likely be some delay in this litigation as well as certain additional costs incurred by BSC while new counsel familiarized itself with this case. In contrast, Wyeth has not identified any prejudice that it will suffer if Howrey is not disqualified from this matter."; "Given the different rules that apply across jurisdictions (national and international), when a global law firm such as Howrey undertakes to represent an entity that is part of large multi-national organization like Wyeth, counsel should take due care in identifying and confirming with the client at the outset of the representation exactly which entity is being represented. Apparently, that was not done here by Howrey. Because both parties contributed to creating the existing conflict, this factor weighs neither for nor against disqualification.").

- Air Prods. & Chemicals, Inc. v. Airgas, Inc., Civ. A. No. 5249-CC, 2010 Del. Ch. LEXIS 35, at *6, *7, *8, *8-9, *9 (Del. Ch. March 5, 2010) (not for publication) (declining to disqualify Cravath, Swaine & Moore; "[W]here a case is filed in the Court of Chancery involving Delaware entities represented by out-of-state lawyers, and a request is made to disqualify a lawyer in that case, that would obviously have an immediate effect on the litigation. I hold that the Court of Chancery has an obligation and the right to apply its own local rules in order to ultimately determine whether a particular lawyer or particular law firm may represent a client appearing before the Court of

Chancery."; "Before this Court may enter the Draconian order of disqualification, a moving party seeking that drastic relief must come forward with clear and convincing evidence establishing a violation of the Delaware Rules of Professional Conduct so extreme that it calls into question the fairness or the efficiency of the administration of justice."; "Nothing before me shows that Cravath had access to or learned internal and non-public confidential information, corporate strategies or defense tactics during the course of its narrowly focused work for Airgas from 2001 until late October of 2009, or that such information, even if available to Cravath, would prejudice the fairness or the integrity of this proceeding."; "The evidence presented to me indicates that Cravath's work for Airgas between 2001 and 2009 was limited in scope and nature, confined to advising Airgas regarding the completion of debt financings, and involved neither contact nor advice regarding corporate governance, litigation matters, charter or by-law issues, merger and acquisition advice, defensive tactics or corporate counseling."; "Cravath did not counsel or meet with the most senior Airgas executives or the Airgas board of directors, and Airgas, in fact, had other long-standing counsel advising it on litigation, corporate governance and mergers and acquisition issues."; "What's more, even if Cravath had access from its earlier representation to information that might be relevant in this proceeding, it has represented to this Court that it has no intention of using such information, and as is customary, Cravath has erected an ethical wall to seal off those members of the firm who worked on the Airgas debt financings from those members of the firm working on the Air Products proposed business combination with Airgas.").

- Boston Scientific Corp. v. Johnson & Johnson Inc., 647 F. Supp. 2d 369, 371, 374, 374-75 (D. Del. 2009) (declining to disqualify Howrey from representing another client adverse to Wyeth, although finding that Howrey had improperly taken a matter adverse to Wyeth; explaining that "Howrey ha[d] handled several matters for the Wyeth family of companies. (DX 31 (timekeeper sheet showing Howrey's hours billed to 'Wyeth Pharmaceuticals' on various matters between 2003 and sometime in 2009)). In handling these matters, it has not always been clear which Wyeth entity Howrey has been representing. . . . While Howrey attorney Carreen Shannon, the drafter of the letters, declares that she understood her client to be 'Wyeth Pharmaceuticals,' the letters she drafted were '[o]n behalf of Wyeth, including Wyeth Pharmaceuticals B.V.'"; noting that Howrey's internal system listed many different billing addresses for a number of Wyeth entities; concluding that Howrey had violated Rule 1.7 by taking a matter adverse to a current client; "The record here does not contain any express agreements evidencing any current attorney-client relationship between Howrey and Wyeth. The record, however, does support the conclusion that it is reasonable for Wyeth to believe that Howrey has been acting on its behalf with respect to the currently-active Lonza matter. . . . Howrey went to Wyeth to seek permission to represent Lonza Biologics, PLC, in an unrelated matter; because Howrey would have needed Wyeth's

> permission only if Wyeth were Howrey's client in the Lonza matter, it is reasonable for Wyeth to believe, from Howrey's overture, that it is in fact the client in the Lonza matter. For at least these reasons, then, Wyeth's behalf as to its status as a client of Howrey is reasonable, and since the Lonza matter is still active, there is a current attorney-client relationship between Howrey and Wyeth. Accordingly, Howrey's representation of plaintiffs in the instant suits violates Model Rule 1.7."; nevertheless declining to disqualify Howrey; "[T]he instant suits are unrelated to the Lonza matter; Howrey's Washington, D.C.-based attorneys are handling the instant suits, while its Europe-based attorneys continue to handle the Lonza matter; there is an ethical wall between the two matters -- leads to the same conclusion."; rejecting the concept that a ethics rule violation should automatically result in disqualification; "'In the Third Circuit, and under this court's precedent, whether disqualification is appropriate depends on the facts of the case and is never automatic."; attributing part of the fault to Wyeth; "Moreover, Howrey's failure to comply with Model Rule 1.7 is, to a significant degree, due to Wyeth's conduct. Among other things, Wyeth's naming conventions, its use of the same in-house attorneys on matters involving different subsidiaries without consistently identifying to Howrey which entity those in-house attorneys were representing, and the willingness of it and its subsidiaries to receive billing invoices for matters on which they were not directly engaged with Howrey, together created significant confusion for Howrey as to which entity or entities it was representing, confusion which is evident from Howrey's time sheets, its mailing of billing invoices, and the averments of its attorneys in Europe. Wyeth should not now benefit from such obfuscatory conduct. Accordingly, the court declines to disqualify Howrey from the instant suits and instead orders Howrey to maintain its ethical wall.").

Upon reflection, this approach makes sense. The conflicts analysis focuses on the relationship between the client and the lawyer, while disqualification motions involve a number of other interests, including the client's right to hire a lawyer of its choosing, the court's docket, etc. Gen-Cor, LLC v. Buckeye Corrugated, Inc., 111 F. Supp. 2d 1049 (S.D. Ind. 2000)

(b) Both the ABA Model Rules and the Restatement have abandoned the "appearance of impropriety" standard for defining a conflict or disqualifying a law firm, because of its inherently ambiguous meaning. Restatement (Third) of Law Governing Lawyers § 121 cmt. c(iv) (2000) (rejecting the "appearance of impropriety" standard;

noting that the standard "could prohibit not only conflicts as defined in this Section, but also situations that might appear improper to an uninformed observer or even an interested party").[1]

- City of Atlantic City v. Trupos, 992 A.2d 762, 772 (N.J. 2010) (noting that in the "2004 overhaul of the Rules of Professional Conduct . . . we eliminated the 'appearance of impropriety' language from the Rules of Professional Conduct" (internal quotations and citation omitted)).

- Gabayzadeh v. Taylor, 639 F. Supp. 2d 298, 305 (E.D.N.Y. 2009) ("Plaintiff's final argument is that Proskauer should be disqualified under Canon 9 of the ABA Model Code to 'avoid even the appearance of impropriety.' (P1.'s Mem. of Law in Supp. of Mot. to Disqualify 2.) 'The Second Circuit has repeatedly warned, however, that Canon 9, standing alone, does not warrant attorney disqualification in this Circuit.' Bass Pub. Ltd. Co. v. Promus Co. Inc., No. 92-CIV-0969, 1994 U.S. Dist. LEXIS 136, 1994 WL 9680, at *9 (S.D.N.Y. Jan. 10, 1994) (citing Int'l Elecs. Corp. v. Flanzer, 527 F.2d 1288, 1295 (2d Cir. 1975)) (additional citations omitted). Canon 9 'should not be used promiscuously as a convenient tool for disqualification when the facts simply do not fit within the rubric of other specific ethical and disciplinary rules.' Flanzer, 527 F.2d at 1295. . . . Given that the plaintiff's asserted grounds for disqualification are devoid of substance, merely relying on Canon 9 is insufficient to warrant the disqualification of Proskauer in this action.").

- Fred Weber, Inc. v. Shell Oil Co., 566 F.2d 602, 609 (8th Cir. 1977).

However, many courts continue to apply the "appearance of impropriety" standard when assessing disqualification motions. See, e.g., United States. v. Franklin,

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[1] Restatement (Third) of Law Governing Lawyers § 121 cmt. c(iv) (2000) ("This Section employs an objective standard by which to assess the adverseness, materiality, and substantiality of the risk of the effect on representation. The standard of this Section is not the 'appearance of impropriety' standard formerly used by some courts to define the scope of impermissible conflicts. That standard could prohibit not only conflicts as defined in this Section, but also situations that might appear improper to an uninformed observer or even an interested party."; "The propriety of the lawyer's action should be determined based only on facts and circumstances that the lawyer knew or should have known at the time of undertaking or continuing a representation. It should not be evaluated in light of information that became known only later and that could not reasonably have been anticipated.").

177 F. Supp. 2d 459 (E.D. Va. 2001); Dacotah Marketing & Research, L.L.C. v. Versatility, Inc., 21 F. Supp. 2d 570 (E.D. Va. 1998).

Best Answer

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

N 3/12

Disqualification -- Process and Effect

Hypothetical 26

For the past year, you and local counsel in another city have been defending a corporate client and one of its executives in a covenant-not-to-compete case. You were surprised to receive a call this morning from local counsel, advising you that the adversary had just filed a motion to disqualify that firm based on its alleged conflict caused by its representation of both the company and the executive. The motion claims that representing both defendants creates an inherent and insoluble conflict. A few questions come quickly to your mind.

(a) May you argue that your adversary does not have standing to pursue a disqualification motion?

MAYBE

(b) May you argue that the disqualification motion is barred by the doctrine of laches?

MAYBE

(c) If your adversary succeeds in disqualifying your co-counsel, will you also automatically be disqualified?

NO (PROBABLY)

Analysis

(a) Courts differ on the concept of standing to seek an opposing counsel's disqualification.

Some courts indicate that only the client that might be hurt by the conflict may seek a lawyer's disqualification based on a concept.

- SEC v. Tang, No. C-09-05146 JCS, 2011 U.S. Dist. LEXIS 136188, at *29, *34-35 (N.D. Cal. Nov. 28, 2011) (finding that the SEC did not have standing to disqualify a law firm from representing the defendant; "Because motions to disqualify are often tactically motivated, they are strongly disfavored and are subjected to 'particularly strict judicial scrutiny.'"; "This court finds the reasoning of Colyer [Colyer v. Smith, 50 F. Supp. 2d 966 (C.D. Cal. 1999)] to

be persuasive and therefore applies the majority rule that generally, a party seeking disqualification based on a conflict must be or have been a client. Further, having carefully reviewed the cases that have applied that rule -- as well as those that have invoked the exception -- the Court concludes that the facts here do not establish standing on the part of the SEC. Courts have invoked the exception in Colyer where particular facts have established that the party seeking disqualification had a personal stake beyond the general interest in the fair administration of justice. For example, in Decaview [Decaview Dist. Co. v. Decaview Asia Corp., No. C 99-02555 MJJ (ME), 2000 U.S. Dist. LEXIS 16534 (N.D. Cal. Aug. 14, 2000)] cited by the SEC, the party seeking disqualification had a personal interest because the counsel whose disqualification was sought had confidential information of the moving party in its possession. The Court has found no case that is factually on point with this case, where the only personal stake offered by the SEC is its interest in the integrity of the legal system. Accordingly, the Court concludes that the exception in Colyer does not apply and that under the general rule articulated in that case, the SEC does not have standing to bring a motion to disqualify based on the alleged conflicts arising out of Fenwick's former representation of Yu.").

- IMCO, L.L.C. v. Ford, No. C 11-01640 WHA, 2011 U.S. Dist. LEXIS 124535, at *4-5, *5, *6, *6-7 (N.D. Cal. Oct. 27, 2011) (holding that a plaintiff did not have standing to seek disqualification of a city attorney, because the plaintiff was not owed any fiduciary or other duty by the lawyer; "The general rule adopted in the Fifth, Third, and Eighth Circuits is that an attorney cannot be disqualified unless a current or former client moves for disqualification."; "Two circuits have adopted a minority view, finding non-clients to have standing to disqualify based on an ethical violation."; "The issue has not directly been addressed in the Ninth Circuit."; "California law follows the general rule that a party lacks standing to disqualify an attorney unless that party has a present or past attorney-client relationship with that attorney."; "The majority of circuits, as well as California courts, demand some sort of attorney-client or fiduciary relationship before a party can move to disqualify an attorney. IMCO does not now, nor ever had in the past, an attorney-client relationship with the City Attorney. IMCO does not allege to have had any fiduciary relationship with the City Attorney, nor that a duty of confidentiality was ever owed.").

- Great Lakes Constr., Inc. v. Burman, 114 Cal. Rptr. 3d 301, 303, 307 & n.5, 309 (Ca. Ct. App. 2010) (holding that an adversary did not have standing to seek disqualification of a lawyer who allegedly had a conflict of interest in jointly representing two litigants; "Attorneys who jointly represent clients in the same action owe a duty of undivided loyalty to each of their clients and are subject to disqualification if an unwaivable conflict exists arising from the joint representation. We address whether a non-client may enforce this duty of loyalty and move to disqualify opposing counsel. In this case, the parties seeking disqualification were not present clients, former clients, or

prospective clients, and they had no prior confidential relationship with opposing counsel. . . . Here, the non-client, moving parties have no legally cognizable interest in Graham's [lawyer] undivided loyalty to his clients. Therefore, the moving parties lacked standing to bring this motion to disqualify. We reserve the disqualification order."; "The State Bar Rules of Professional Conduct govern attorney discipline, not standards for disqualification in the courts. . . . We often look to the Rules of Professional Conduct for guidance."; "Generally, before the disqualification of an attorney is proper, the complaining party must have or must have had an attorney-client relationship with that attorney."; "[I]mposing a standing requirement for attorney disqualification motions protects against the strategic exploitation of the rules of ethics and guards against improper use of disqualification as a litigation tactic.").

- Simonca v. Mukasey, No. CIV. S-08-1453 FCD GGH, 2008 U.S. Dist. LEXIS 101969, at *8, *11 (E.D. Cal. Nov. 25, 2008) ("Although the Ninth Circuit has not squarely addressed whether a non-client may raise an objection to opposing counsel, the court in Colyer adopted the majority rule that allows only former and current clients standing to seek to disqualify opposing counsel."; "Thus, it is defendants [sic] ultimate burden to show they have standing to raise the issues in their disqualification motion in order for the court to exercise jurisdiction over the motion. . . . Accordingly, the court must consider whether defendants have demonstrated an injury in fact, that they will endure, as opposed to plaintiff, as a result of Sekhon's representation of plaintiff and the proposed class in this action.").

- Xcentric Ventures, LLC v. Stanley, No. CV-07-00954-PHX-NVW, 2007 U.S. Dist. LEXIS 55459, at *11 (D. Ariz. July 27, 2007) (holding that defendants did not have standing to move for plaintiff's lawyer's disqualification based on conflicts; pointing to earlier Ninth Circuit cases allowing disqualification motions based on conflicts only if the client or former client complains; holding that the "present Motion failed to articulate how Plaintiffs' representation will imminently result in any injury to Defendants and is transparently motivated by tactical considerations").

- In re Appeal of Infotechnology, Inc., 582 A.2d 215, 221 (Del. 1990) (declining to adopt a "bright-line" test "denying standing to all non-client litigants to challenge misconduct that taints the fairness of judicial proceedings," but placing the burden of proof on the moving party to show existence of a conflict and how the conflict would adversely affect the administration of justice; holding that "[a]bsent misconduct which taints the proceeding, thereby obstructing the orderly administration of justice, there is no independent right of counsel to challenge another lawyer's alleged breach of the Rules outside of a disciplinary proceeding").

Other courts explain that conflicts of interest implicate systemic and institutional concerns, and therefore address conflicts issues when they are raised by any party, or even by the court sua sponte.

- Foley-Ciccantelli v. Bishop's Grove Condo. Ass'n, 797 N.W.2d 789, 794 (Wisc. 2011) (holding that non-clients may have standing to seek disqualification of the adversary's lawyer; "We address the first question relating to standing in light of our analysis of the standing cases. We conclude that as a general rule only a former or current client has standing to move to disqualify an attorney from representing someone else in a civil action. Nevertheless, a non-client party may establish standing, that is, may establish that a personal interest in the controversy is adversely affected and that judicial policy calls for protection of that interest, when the prior representation is so connected with the current litigation that the prior representation is likely to affect the just and lawful determination of the non-client party's position.").

- Chisolm v. Transouth Fin. Corp., A. No. 2:93cv632, 2000 U.S. Dist. LEXIS 8483 (E.D. Va. May 12, 2000) (disqualifying a former judge from participating in a case; not imputing his disqualification to the law firm of Hunton & Williams).

(b) As with the issue of standing, courts take differing positions on the availability of a laches defense in disqualification motions.

The Restatement acknowledges that a party's delay in seeking disqualification could affect the court's conclusion.

> Even in the absence of consent, a tribunal applying remedies such as disqualification . . . will apply concepts of estoppel and waiver when an objecting party has either induced reasonable reliance on the absence of objection or delayed an unreasonable period of time in making objection.

Restatement (Third) of the Law Governing Lawyers § 122 cmt. (c)(i).

In 2009, the Second Circuit refused to disqualify Debevoise & Plimpton from representing MetLife, noting among other things the delay in plaintiff's filing of a disqualification motion.

> [P]laintiffs' lengthy and unexcused delay in bringing its motion to disqualify weighs against disqualification. When plaintiffs filed this lawsuit in 2000, they knew that Debevoise had represented MetLife during demutualization and that it would continue to represent MetLife in this litigation. But plaintiffs did not move to disqualify even when, seven years later, the district court ruled that plaintiffs were clients of Debevoise. Instead, plaintiffs waited until after settlement negotiations broke down, five weeks before trial was scheduled to begin, to finally file their motion.
>
> Plaintiffs' delay, which suggests opportunistic and tactical motives, magnifies the harms to the judicial system that already inhere in any disqualification by imputation, abuse the expectations of jurors, and has the general tendency to impair rather than promote confidence in the integrity of the judicial system.

Murray v. Metro. Life Ins. Co., 583 F.3d 173, 180 (2d Cir. 2009).[1]

Other bars and courts take the same approach, analyzing whether a party's delay in filing a disqualification motion should preclude relief.

- North Carolina LEO 2011-2 (4/22/11) (finding that a client's delay in seeking disqualification of a former lawyer might preclude an ethics violation, thus allowing the lawyer to continue representing the adversary; explaining that a lawyer met with a wife in 2002, but was never retained by her; further

[1] Murray v. Metro. Life Ins. Co., 583 F.3d 173, 178, 180 (2d Cir. 2009) (denying MetLife policyholders' motion to disqualify the law firm of Debevoise & Plimpton from representing MetLife in their lawsuit against MetLife related to its demutualization; rejecting the policyholders' argument that Debevoise must be disqualified because several of its lawyers would provide testimony at the trial that would be "prejudicial" to MetLife; noting that under Second Circuit law the party advancing that argument had to prove "specifically" how the lawyer's testimony would prejudice the client, and also that the likelihood of prejudice occurring was "substantial"; pointing to policyholders' delay in seeking disqualification of Debevoise as an additional grounds for denying the disqualification motion; "[P]laintiffs' lengthy and unexcused delay in bringing its motion to disqualify weighs against disqualification. When plaintiffs filed this lawsuit in 2000, they knew that Debevoise had represented MetLife during demutualization and that it would continue to represent MetLife in this litigation. But plaintiffs did not move to disqualify even when, seven years later, the district court ruled that plaintiffs were clients of Debevoise. Instead, plaintiffs waited until after settlement negotiations broke down, five weeks before trial was scheduled to begin, to finally file their motion."; "Plaintiffs' delay, which suggests opportunistic and tactical motives, magnifies the harms to the judicial system that already inhere in any disqualification by imputation, abuse the expectations of jurors, and has the general tendency to impair rather than promote confidence in the integrity of the judicial system.").

explaining that in 2009 the husband hired the lawyer to represent him in a divorce case; "Although delay will not be sufficient to constitute waiver in most cases, the following factors should be taken into consideration when evaluating whether a former client's failure timely to object to a new, adverse representation should constitute a de facto waiver of the right to object: (1) whether the lawyer's failure to identify the conflict of interest and bring it to the attention of the former client was unintentional; (2) whether the former client knew of the new representation and the adverse interest entailed; (3) the length of the delay in lodging in objection; (4) whether there was an opportunity to lodge an objection; (5) whether the former client was represented by counsel during the delay; (6) the reason the delay occurred; and (7) whether disqualification will result in substantial hardship for the new client."; "In the present situation, Attorney A's failure to identify the conflict was unintentional, Wife, the former client, however, was fully aware of the new, adverse representation by Attorney A; had numerous opportunities to object to the new representation at earlier stages in the proceedings; and had legal counsel to advise her during the delay. Moreover, there does not appear to be a justification for Wife's delay in lodging her objection other than to gain a tactical advantage by waiting until disqualification would work a substantial hardship on Husband. Under these circumstances, Attorney A is not required to withdraw from the representation of Husband when Wife raised her objection.").

- Stanley v. Bobeck, 2009 Ohio 5696, at ¶ 10 (Ohio Ct. App. 2009) (reversing a lower court's order disqualifying a lawyer who had represented a limited liability company from representing the company in an action brought by a member of the limited liability company; although ultimately reversing the disqualification, finding that the party seeking the disqualification had not waived the right to do so by waiting nine months to file a motion after noting the alleged conflict in a letter; noting that the trial was six months away, and that "no substantial discovery in the form of depositions or expert reports had been completed at that point").

- Halladay & Mim Mack Inc. v. Trabuco Capital Partners Inc., Case No. SACV 08-1138 AG (MLGx), 2009 U.S. Dist. LEXIS 97040, at *12-13, *14 (C.D. Cal. Oct. 5, 2009) (rejecting a law firm's argument that it should not be disqualified because the former client had waited too long to seek the firm's disqualification; "Even if an attorney possesses a former client's confidential information, a motion to disqualify the attorney will be denied if there has been 'unreasonable delay by the former client in making a motion and resulting prejudice to the current client.'. . . If a party opposing disqualification shows unreasonable delay and resulting prejudice, '[t]he burden then shifts back to the party seeking disqualification to justify the delay.'. . ."; "Here, Defendants moved to disqualify Murtaugh, Meyer less than a year after they were on notice of the conflict."; distinguishing cases in which the former client

waited two and a half years and three years before seeking disqualification of its former law firm).

- Holm v. City of Barstow, Case No. EDCV 08-420-VAP (JCx), 2008 U.S. Dist. LEXIS 110391, at *20, *21 (C.D. Cal. Sept. 16, 2008) (rejecting a law firm's argument that its former client had waited too long to seek the firm's disqualification; "Lackie argues that Libby delayed unnecessarily in bringing this Motion."; "The Court finds Lackie's argument unpersuasive. Holm filed this action on February 29, 2008 and Libby's counsel, Mr. Meneses ('Meneses'), first raised the subject of a possible conflict of interest with Plaintiff's counsel on May 21, 2008. . . . According to Meneses' declaration, he first learned of the potential conflict of interest from his client on May 20, 2008. . . . From May until July, counsel met and conferred regarding the conflict of interest. Meneses filed his motion on August 12, 2008." (footnote omitted)).

- City of El Paso v. Soule, 6 F. Supp. 2d 616, 622 (W.D. Tex. 1998) ("The instant Motion was filed in March 1998, just after Defendants filed their answers. The Court concludes the period of time from October 1997 to March 1998 does not constitute an unreasonable delay. Thus Defendants have not waived their right to object to KGM's representation of the City.").

On the other hand, some courts focus on the systemic issues in declining to recognize a laches defense.

- KABI Pharmacia AB v. Alcon Surgical, Inc., 803 F. Supp. 957, 964 (D. Del. 1992) ("[I]t is generally established that laches is not a bar to a motion to disqualify since a court's supervision of the ethical conduct of attorneys practicing before it is designed to protect the public interest and not merely the interest of the particular moving party." (citation and internal quotations omitted); disqualifying a law firm despite the fact that the motion to disqualify was filed one year after the conflict manifested itself, and near the conclusion of discovery).

(c) The imputed disqualification rules normally impute an individual lawyer's disqualification to an entire "firm" (defined to also include corporate law departments). ABA Model Rule 1.10. However, these imputed disqualification rules do not automatically extend to co-counsel.

- Venters v. Sellers, 261 P.3d 538 (Kan. 2011) (declining to disqualify a lawyer who had referred the case to another firm which was later disqualified).

- Gifford v. Target Corp., 723 F. Supp. 2d 1110, 1122 (D. Minn. 2010) (disqualifying a law firm which had represented a Target executive who had been exposed to privileged Target communications, and then became class counsel for a class of employees suing Target in a related matter; not automatically disqualifying the disqualified law firm's co-counsel, but requiring that firm to file an affidavit explaining its exposure to any materials or information that the law firm had obtained from the Target executive; "Target also seeks disqualification of the Halunen firm's co-counsel, Levin Fishbein Sedran & Berman (the 'Levin firm'). Where knowledge gained by counsel through disclosures of protected information will lead to an improper benefit, disqualification is required to protect the judicial process and the interests of the former client. . . . The record lacks evidence that the Levin firm has knowledge of the protected communications and documents Doe provided to the Halunen firm. Nevertheless, it is conceivable that the Levin firm became aware of the privileged information Doe disclosed. Therefore, the Levin firm is required to file an affidavit describing its contact, if any, with Doe, its exposure to materials Doe provided to the Halunen firm, and its communications with the Halunen firm or others concerning disclosures made by Doe.").

- Restatement (Third) of Law Governing Lawyers § 123 cmt. c(iii) (2000) ("Two or more lawyers or law firms might associate for purposes of handling a particular case. A common example is a lawyer who appears as local counsel in litigation principally handled by another firm. Each lawyer must comply with the rules concerning conflict of interest, and other lawyers in their respective firms are governed by the rules of imputation. However, a conflict imputed within a firm does not extend by imputation to lawyers in another firm working on another matter.").

When the disqualification motion rests on some informational problem (as with adversity to a former client), most courts require an additional showing of actual transmission of tainted information before disqualifying co-counsel.

Best Answer

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

N 3/12

Other Sanctions

Hypothetical 27

For the past twelve years, you have given an annual ethics program so your law firm colleagues and best client representatives may satisfy your state's two-hour ethics MCLE requirement. You have been trying to teach the basic ethics principles that govern conflicts of interest, but no one seems to listen to you -- although you are remarkably handsome (for a lawyer) and incredibly articulate. You want to scare your colleagues into complying with the conflicts rules -- by warning them about the sanctions that can be imposed on lawyers who ignore the rules.

May lawyers who ignore the conflicts rules face the following sanctions:

(a) Embarrassment?

YES

(b) Discharge by an angry client?

YES

(c) Loss of fees?

YES

(d) Malpractice claim by an angry client?

YES

(e) Suspension or revocation of their license to practice law?

YES

(f) Federal prison term?

YES

Analysis

(a) - (f) Courts have imposed all of these sanctions as punishment for a lawyer's violation of the conflicts rules, see, e.g., Restatement (Third) of Law Governing Lawyers § 6 (2000); Victory Lane Prods., LLC v. Paul, Hastings, Janofsky & Walker, LLP, 409 F. Supp. 2d 773 (S.D. Miss. 2006) (holding that a client could sue a law firm for negligence and breach of fiduciary duty for failure to disclose a conflict); United States v. Gellene, 182 F.3d 578 (7th Cir. 1999).

Best Answer

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