

CONFIDENTIALITY: PART IV (NON-CLIENTS' MISCONDUCT)

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

Hypothetical 1

Your practice primarily involves representing local governments, which keeps you close to home nearly every day. The lawyer with an office next to you seems to travel constantly, because her practice involves union campaigns, employment discrimination cases, and sexual harassment training for your firm's clients across the country. During one recent ethics program, you jokingly told your colleague that you can only be punished by one state's bar, while she is at risk for punishment by many states' bars. She wonders what you mean.

Can your colleague be punished by a state bar other than her home state's bar?

(A) YES

Analysis

As complicated as the ABA Model Rules or a particular state's ethics rules can be to interpret and apply, ethics issues become even more complex if more than one jurisdiction's ethics rules might govern the pertinent conduct.

Some lawyers mistakenly believe that the ABA Model Rules provide what amounts to a consensus formulation for guidance to lawyers in every state. In fact, the ABA Model Rules merely represent a voluntary organization's suggested guidelines. No state has adopted the ABA Model Rules in toto, and there can be enormous variation even among neighboring states' ethics rules.

The ABA's evolving rules reflect the growing mobility of the legal profession, and its difficulty wrestling with which jurisdiction's ethics rules should govern lawyers' conduct.

ABA Canons¹

The American Bar Association adopted its initial set of Canons of Professional Ethics in 1908 (Canons 1-32). The ABA adopted an additional set of canons in 1928 (Canons 33-45). Between 1908 and 1969, the ABA revised several of its canons.

The 1908 ABA Canons of Professional Ethics and their later supplements did not deal with choice of law issues. This should come as no surprise, given the likely rarity as of that time of lawyers venturing across state lines to engage in any professional activities.

1969 ABA Model Code

After a five-year effort,² in 1969 the ABA adopted a much more elaborate set of ethics rules, labeled the Model Code of Professional Responsibility.

¹ Model Rules of Professional Conduct and Code of Judicial Conduct, Preface, American Bar Association as amended August, 1984 ("For seventy-five years, the American Bar Association has provided leadership in legal ethics and professional responsibility through the adoption of professional standards which serve as models of the regulatory law governing the legal profession. On August 27, 1908, the Association adopted the original Canons of Professional Ethics. These were based principally on the Code of Ethics adopted by the Alabama Bar Association in 1887, which in turn had been borrowed largely from the lectures of Judge George Sharswood, published in 1854 under the title of Professional Ethics, and from the fifty resolutions included in David Hoffman's A Course of Legal Study (2d ed. 1836). The Canons of Judicial Ethics were adopted by the Association at a meeting in Philadelphia on July 9, 1924. After their initial adoption, the Canons of Professional Ethics and of Judicial Ethics were amended and clarified. In 1913, the Standing Committee on Professional Ethics of the American Bar Association was established to communicate to the Association information on the activity of state and local bar associations in respect to the ethics of the legal profession. In 1919 the name of the Committee was changed to the Committee on Professional Ethics and Grievances and in 1922 its purpose was amended to authorize the Committee to 'express its opinion concerning professional conduct, and particularly concerning the application of the tenets of ethics thereto. . . .' In 1958 the Committee on Professional Ethics and Grievances was separated into two committees: a Committee on Professional Grievances with authority to investigate charges of professional misconduct by its members and a Committee on Professional Ethics with responsibility to express its opinion concerning proper professional and judicial conduct.").

² Id. ("In 1964, at the request of [ABA] President Lewis F. Powell, Jr., the House of Delegates of the American Bar Association created a Special Committee on Evaluation of Ethical Standards (the 'Wright Committee') to assess whether changes should be made in the then current Canons of Professional Ethics. As a result of its deliberations, the Committee produced the Model Code of Professional Responsibility in response to a perceived need for change in the statement of professional

The 1969 ABA Model Code followed (and triggered) a widespread national debate about lawyer ethics.

Even the Model Code's title seems to have involved controversy. In 1982, the Roscoe Pound-American Trial Lawyers Foundation Commission on Professional Responsibility adopted a report entitled "The American Lawyer's Code of Conduct." In its very first footnote, the chairman's Introduction accused the ABA of changing its 1969 Code's name at the last minute to avoid antitrust scrutiny.

The A.B.A. first added the adjective "Model" to the title of its Code to avoid federal charges that its promulgation of The Code was restraint of trade. The A.B.A. Commission now seems to make a virtue of necessity; it always refers to its work-product as the Model Rules, although it courts federal displeasure by always calling the CPR "the Code," never the "Model Code."

The Roscoe Pound-American Trial Lawyers Foundation, *The American Lawyer's Code of Conduct*, at 3 n.1 (May 1982).

A later law review article leveled the same charge.

- Ronald D. Rotunda, The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of Himmel, 1998 U. Ill. L. Rev. 977 ("On August 12, 1969, the American Bar Association's House of Delegates adopted an entirely new code, then called the ABA Code of Professional Responsibility. It was written in much more statutory terms, with black letter requirements called 'Disciplinary Rules' (DRs). This code made very clear that its Disciplinary Rules set a minimum standard below which a lawyer could not fall. Strong evidence that the American Bar Association clearly intended its new code was to be not merely self-edifying but binding was its accompanying statement: the Code was 'adopted' on August 12, 1969 by the ABA House of Delegates to become effective for American Bar Association members on January 1, 1970.' Years later, in an atmosphere where the Department of Justice had brought antitrust charges against the ABA, the ABA changed the title of the Code of Professional Responsibility to

principles for lawyers. The Model Code was adopted by the House of Delegates on August 12, 1969, and subsequently was adopted by the vast majority of state and federal jurisdictions.").

the Model Code of Professional Responsibility. No longer did the ABA speak of this Model Code as binding on its members." (footnotes omitted)).

Like the earlier 1908 ABA Canons and their supplements, the 1969 ABA Model Code of Professional Responsibility did not address choice of law issues.

1983 ABA Model Rules

Starting in 1977, the ABA and the profession generally began a vigorous and often acrimonious debate about the ethics rules governing lawyers.

In September 1983, the chairperson of the ABA Commission on Evaluation of Professional Standards described the ABA's six-year effort to adopt its Model Rules.

The Commission on Evaluation of Professional Standards was appointed in the summer of 1977 by former ABA President William B. Spann, Jr. Chaired by Robert J. Kutak until his death in early 1983, the Commission was charged with evaluating whether existing standards of professional conduct provided comprehensive and consistent guidance for resolving the increasingly complex ethical problems in the practice of law. For the most part, the Commission looked to the former ABA Model Code of Professional Responsibility, which served as a model for the majority of state ethics codes. The Commission also referred to opinions of the ABA Standing Committee on Ethics and Professional Responsibility, as well as to decisions of the United States Supreme Court and of state supreme courts. After thoughtful study, the Commission concluded that piecemeal amendment of the Model Code would not sufficiently clarify the profession's ethical responsibilities in light of changed conditions. The Commission therefore commenced a drafting process that produced numerous drafts, elicited voluminous comment, and launched an unprecedented debate on the ethics of the legal profession.

On January 30, 1980, the Commission presented its initial suggestions to the bar in the form of Discussion Draft of the proposed Model Rules of Professional Conduct. The Discussion Draft was subject to the widest possible dissemination and interested parties were urged to offer comments and suggestions. Public hearings were held

around the country to provide forums for expression of views on the draft.

In the year following the last of these public hearings, the Commission conducted a painstaking analysis of the submitted comments and attempted to integrate into the draft those which seemed consistent with its underlying philosophy. The product of this analysis and integration was presented on May 31, 1981 as the proposed Final Draft of the Model Rules of Professional Conduct. This proposed Final Draft was submitted in two formats. The first format, consisting of blackletter Rules and accompanying Comments in the so-called restatement format, was submitted with the Commission's recommendation that it be adopted. The alternative format was patterned after the Model Code and consisted of Canons, Ethical Considerations, and Disciplinary Rules. In February 1982, the House of Delegates by substantial majority approved the restatement format of the Model Rules.

The proposed Final Draft was submitted to the House of Delegates for debate and approval at the 1982 Annual Meeting of the Association in San Francisco. Many organizations and interested parties offered their comments in the form of proposed amendments to the Final Draft. In the time allotted on its agenda, however, the House debated only proposed amendments to Rule 1.5. Consideration of the remainder of the document was deferred until the 1983 Midyear Meeting in New Orleans. The proposed Final Draft, as amended by the House of San Francisco, was reprinted in the November 1982 issue of the ABA Journal.

At the 1983 Midyear Meeting the House resumed consideration of the Final Draft. After two days of often vigorous debate, the House completed its review of the proposed amendments to the blackletter Rules. Many amendments, particularly in the area of confidentiality, were adopted. Debate on the Preamble, Scope, Terminology and Comments, rewritten to reflect the New Orleans amendments, was deferred until the 1983 Annual Meeting in Atlanta, Georgia.

On March 11, 1983, the text of the blackletter rules as approved by the House in February, together with the proposed Preamble, Scope, Terminology and Comments, was circulated to members of the House, Section and

Committee chairmen, and all other interested parties. The text of the Rules reflected the joint efforts of the Commission and the House Drafting Committee to incorporate the changes approved by the House and to ensure stylistic continuity and uniformity. Recipients of the draft were again urged to submit comments in the form of proposed amendments. The House Committees on Drafting and Rules and Calendar met on May 23, 1983 to consider all of the proposed amendments that had been submitted in response to this draft. In addition, discussions were held among concerned parties in an effort to reach accommodation of the various positions. On July 11, 1983, the final version of the Model Rules was again circulated.

ABA Model Rules, Chairperson's Introduction, 2001 edition, at *1-2.

Amazingly, the House of Delegates debated and adopted in just four hours the original 1983 ABA Model Rules' Preamble, Scope, Terminology and Comments.

The House of Delegates commenced debate on the proposed Preamble, Scope, Terminology and Comments on August 2, 1983. After four hours of debate, the House completed its consideration of all the proposed amendments and, upon motion of the Commission, the House voted to adopt the Model Rules of Professional Conduct, together with the ancillary material as amended. The task of the Commission had ended and it was discharged with thanks.

Id. This hasty adoption of Comments came back later to haunt the ABA in several situations where the comments did not match the black letter rules.

Ironically, this lengthy and wide-ranging debate about ethics and professionalism triggered angry words about the profession's adoption of ethics principles.

For instance, in 1982 the Roscoe Pound-American Trial Lawyers Foundation Commission on Professional Responsibility used surprisingly harsh language accusing the ABA drafters of engaging in "an elaborate charade" and "deception."

Our work and our attitude thus stand in stark contrast to those of the A.B.A. Commission. That Commission has refused to build on the wisdom of the past. It has rejected

the good faith efforts of others, such as the National Organization of Bar Counsel, to accommodate its ideas to the form of the CPR. It has even gone so far as to publish a huge "Alternative Draft" that the New York State Bar Association correctly concluded was not a good faith effort to amend the CPR. It was merely an elaborate charade, designed to make the Commission's "Proposed Final Draft" look good by invidious comparison.

The reader will find no such deception in the present document. Unlike the A.B.A. Commission's "Alternative Draft," our Code's Appendix is a good faith effort to improve upon the CPR is preserving and amending it. It was drafted by a Reporter who believes in the wisdom of that approach. It is relatively short, and considerably easier to read than either the elephantine "Alternative Draft" or the "Proposed Final Draft" of the proposed A.B.A. Rules.

The Roscoe Pound-American Trial Lawyers Foundation, The American Lawyer's Code of Conduct, May 1982 (emphases added).

The American Trial Lawyers complained both about the ABA's proposed format change and its proposed substantive revisions.

This Code is quite frankly presented as an alternative to the old Code of Professional Responsibility previously promulgated by the American Bar Association (ABA), and to the new Rules of Professional Conduct that the ABA is apparently about to hawk as the latest thing in legal ethics. It was dissatisfaction with both of these ABA products that both got us going on this Code, and kept us going.

That dissatisfaction was not reduced when the ABA's Kutak Commission published a new draft in mid-1981. It grew. It grew still more when the ABA House of Delegates voted in January 1982 to drop its "old" Code of 1969, and to frame its new Rules only in a new, untried format. Many of us deeply resent the take-it-or-leave-it attitude of the ABA, which seems to be switching codes on us for no better reason than that it has spent so much money on the Kutak Rules that rejecting them would cause it to lose face.

This is not just a squabble over form. It is a serious disagreement over substance. The ABA Commission

evidently is trying to win the debate over the substance of legal ethics by sidestepping it. It is trying to make us all not only debate whether and how to amend the present Code, but also debate that question in this very peculiar form: whether and how to amend a code that the Commission has already amended, in ways that even the Commission does not fully understand.

. . .

Chairman Kutak and his friends have ramrodded through the ABA a resolution committing the ABA to dropping the present Code.

By publishing this Code in two formats, we are giving notice that we are not going to let the ABA dictate the terms for the debate on lawyer's ethics. We regard the proposed Kutak Rules as fundamentally flawed, and we intend to force Kutak & Co. to debate the issues before the state courts and bar bodies that will really decide what the law of lawyers' ethics is to be.

Theodore I. Koskoff, Am. Lawyer's Code of Conduct: A Preface, Trial, July 1982, at 55-56 (emphasis added).

The ABA finally acknowledged the possibility of multijurisdictional practice in its 1983 ABA Model Rules of Profession Conduct.

ABA Model Rule 8.5 contained a simple but ambiguous provision.

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction although engaged in practice elsewhere.

ABA Model Rule 8.5 (as of 1983).

This rule had two possible meanings. First, it could simply have indicated that lawyers' home states could punish them for their misconduct in other states. That seems obvious. Second, the provision could have indicated that lawyers' home state's

ethics rules governed lawyers' conduct regardless of where the lawyers acted. That would have been a true choice of law provision.

Some comments provided guidance.

In modern practice lawyers frequently act outside the territorial limits of the jurisdiction in which they are licensed to practice, either in another state or outside the United States. In doing so, they remain subject to the governing authority of the jurisdiction in which they are licensed to practice. If their activity of law in another jurisdiction is substantial and continuous, it may constitute practice of law in that jurisdiction. See Rule 5.5.

If the rules of professional conduct in the two jurisdictions differ, principles of conflict of laws may apply. Similar problems can arise when a lawyer is licensed to practice in more than one jurisdiction.

Where the lawyer is licensed to practice law in two jurisdictions which impose conflicting obligations, applicable rules of choice of law may govern the situation. A related problem arises with respect to practice before a federal tribunal, where the general authority of the states to regulate the practice of law must be reconciled with such authority as federal tribunals may have to regulate practice before them.

ABA Model Rule 8.5 cmt. (as of 1983).

Few if any ethics opinions or cases focused on this issue before the ABA changed the rules again ten years later.

1993 ABA Model Rules Revisions

In 1993, amendments to the ABA Model Rules made the issue more complicated.

The new rule instituted an actual choice of law provision.

In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows: (1) for conduct in connection with a proceeding in a court before which a lawyer has been

admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and (2) for any other conduct, (i) if the lawyer is licensed to practice only in this jurisdiction, the rules to be applied shall be the rules of this jurisdiction, and (ii) if the lawyer is licensed to practice in this and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct.

ABA Model Rule 8.5(b) (as of 1993) (emphasis added).

A comment acknowledges the lack of any previous authority.

A lawyer may be potentially subject to more than one set of rules of professional conduct that impose different obligations. The lawyer may be licensed to practice in more than one jurisdiction with differing rules, or may be admitted to practice before a particular court with rules that differ from those of the jurisdiction or jurisdictions in which the lawyer is licensed to practice. In the past, decisions have not developed clear or consistent guidance as to which rules apply in such circumstances.

ABA Model Rule 8.5(b) cmt. [2] (as of 1993).

Two comments provided further guidance.

[3] Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, and (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions.

[4] Paragraph (b) provides that as to a lawyer's conduct relating to a proceeding in a court before which the lawyer is admitted to practice (either generally or pro hac vice), the lawyer shall be subject only to the rules of professional conduct of that court. As to all other conduct, paragraph (b) provides that a lawyer licensed to practice only in this jurisdiction shall be subject to the rules of professional conduct of this jurisdiction, and that a lawyer licensed in multiple jurisdictions shall be subject only to the rules of the jurisdiction where he or she (as an individual, not his or her firm) principally practices, but with one exception: if particular conduct clearly has its predominant effect in another admitting jurisdiction, then only the rules of that jurisdiction shall apply. The intention is for the latter exception to be a narrow one. It would be appropriately applied, for example, to a situation in which a lawyer admitted in, and principally practicing in, State A, but also admitted in State B, handled an acquisition by a company whose headquarters and operations were in State B of another, similar such company. The exception would not appropriately be applied, on the other hand, if the lawyer handled an acquisition by a company whose headquarters and operations were in State A of a company whose headquarters and main operations were in State A, but which also had some operations in State B.

ABA Model Rule 8.5(b) cmts. [3], [4] (as of 1993) (emphasis added).

Under this new approach, lawyers' conduct undertaken "in connection with" an ongoing court proceeding were governed by the jurisdiction in which the court sat, unless the court itself adopted a different rule. For other conduct, lawyers were governed by the ethics rules of jurisdictions where they were licensed.

The next provision reflected the increasing frequency of lawyers being licensed to practice in more than one jurisdiction. If a lawyer was admitted in more than one jurisdiction, a disciplinary authority would have to conduct a choice of law analysis -- applying either the ethics rules of (1) the jurisdiction where the lawyer "principally practices"; or (2) another state where the lawyer is licensed, if the lawyer's particular

conduct had its "predominant effect" in that other jurisdiction. However, lawyers not engaged in litigation still could not be subject to the ethics rules of states where they were not licensed.

The ABA changed its rules again in 2002. However, a chronological discussion of the profession's choice of law debate requires a look at the 2000 Restatement (Third) of the Law Governing Lawyers.

Restatement

In 2000, the American Law Institute promulgated the Restatement (Third) of Law Governing Lawyers.

The Restatement indicates that a lawyer might be governed by the ethics rules of a jurisdiction where the lawyer is not licensed. This differed from the ABA approach as of that time.

A comment to Restatement § 5 introduces the issue.

Choice-of-law questions may arise in lawyer-disciplinary matters because of the interstate nature or impact of a lawyer's activities and varying regulations found in the jurisdictions in which those impacts occurred. Addressing such questions is complicated due to the basis on which lawyer-disciplinary agencies have traditionally determined their subject-matter jurisdiction. In general and in most states, jurisdiction to impose discipline depends on whether the lawyer in question is admitted in the state, including through admission pro hac vice The array of disciplinary remedies consists largely of actions affecting such a respondent lawyer's local license A charged offense involving such a locally licensed lawyer is within the jurisdiction of the disciplinary agency, and the tribunal may apply the state's lawyer code even with respect to acts that occur wholly outside the jurisdiction and that have no significant impact within the jurisdiction. In contrast, under this theory of disciplinary competence, the only local sanction similar to discipline that may be available against a

lawyer practicing in the jurisdiction without an in-state license and committing a disciplinary offense within it is a proceeding for injunctive or similar relief for unauthorized practice. That will be true even with respect to in-state activity that violates the lawyer codes of both the states and the lawyer's jurisdiction of admission. California, the District of Columbia, Maryland, and perhaps other jurisdictions extend the competence of their lawyer-disciplinary bodies to any lawyer who commits an offense within the jurisdiction. That is the scope of jurisdiction recommended by the ABA Model Rules for Lawyer Disciplinary Enforcement (as amended 1996). But in the large majority of jurisdictions, the only disciplinary forum is that of a jurisdiction in which the lawyer has actually been admitted. That jurisdiction will typically have a lawyer-code provision prohibiting unauthorized practice by reason of practicing law where not admitted as well as general provisions that have extraterritorial effect, but the motivation for enforcement against wholly out-of-jurisdiction activity is often not great.

Restatement (Third) of Law Governing Lawyers § 5 cmt. h (2000) (emphases added).

The Restatement then indicates that some misbehavior would deserve sanctions under any state's ethics rules, but in other situations, a disciplinary authority will have to engage in a choice of law analysis.

The Restatement explicitly criticizes the 1993 ABA Model Rules approach.

With respect to choice-of-law considerations, an issue of true conflict may arise because a lawyer is admitted in two or more jurisdictions with conflicting lawyer-code provisions with respect to questioned action. Such a conflict may also arise in a jurisdiction exercising disciplinary jurisdiction over a lawyer not admitted in that state, when the lawyer's activities affect more than one jurisdiction. No single general rule or set of rules purporting to govern all situations inflexibly is desirable. In general, analysis of the question should correspond to two types of conduct.

First, some lawyer acts may appropriately lead to a finding that the lawyer demonstrates thereby an inability or unwillingness to comply with professional responsibilities. That demonstration involves conduct that will typically be in violation of the lawyer code of all interested jurisdictions, and

its blameworthiness does not depend on where the conduct occurred. For example, such acts include serious criminal activity.

Second, however, some lawyer acts may be prohibited under the lawyer code of one jurisdiction but permitted or required elsewhere, and the lawyer's activity may have had impacts in both such jurisdictions. Some provisions of the lawyer codes do differ markedly among jurisdictions It is therefore necessary to have a choice-of-law rule to determine which specific provision of two or more arguably applicable and inconsistent lawyer-code provisions should apply. Such a rule should take appropriate account of such elements as the following: the nature of the charged offense; the nature of the lawyer's work; the impact of the questioned conduct on the interests of third persons and on public institutions such as tribunals, administrative agencies, or legislative bodies; the residence and place of business of any client or third person whose interests are materially affected by the lawyer's actions; the place where the affected conduct occurred; and the nature of the regulatory interest reflected in the different provisions in question. That rule should be selected for application which, among rules having a plausible basis for application, is the rule of the jurisdiction with the most significant relationship to the charged offensive conduct. See Restatement Second, Conflict of Laws § 6. Somewhat contrary to that approach, the 1983 ABA Model Rules of Professional Conduct were amended in 1993 (Rule 8.5), adding a rule that attempted to provide more rigid, per se rules -- an approach that has not recommended itself to most jurisdictions.

The Restatement (Third) of Law Governing Lawyers § 5 cmt. h (2000) (emphases added).

Thus, the Restatement applies a traditional "significant relationship" test, similar to the Restatement (Second) Conflict of Laws § 6.

- (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
- (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include

- (a) the needs of the interstate and international systems;
- (b) the relevant policies of the forum;
- (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue;
- (d) the protection of justified expectations;
- (e) the basic policies underlying the particular field of law;
- (f) certainty, predictability and uniformity of result, and
- (g) ease in the determination and application of the law to be applied.

Restatement of the Law (Second) Conflict of Laws, § 6 (1971).

Another portion of Restatement acknowledges the difficulty of choosing the appropriate law, and creates a rebuttable presumption that transactional lawyers will be governed by the ethics rules of the state in which they principally practice. For litigators, the Restatement takes the opposite approach -- establishing a rebuttable presumption that they will be governed by the tribunal's ethics rules.

No more specific formula than that stated here can adequately deal with all relevant conflict considerations, and each issue of conflict must be addressed on its specific facts. However, as a presumptive preference, a lawyer in non-litigation work is subject to the lawyer code of the single state in which the lawyer is admitted or, if admitted in more than one state, in the state in which the lawyer maintains his or her principal place of law practice. If the lawyer's act occurs in the course of representing a client in a litigated matter, the presumptive preference is the for lawyer-code rules enforced by the tribunal in which the proceeding is pending. Either presumptive preference can be displaced by a sufficient demonstration that the interests of another jurisdiction are, on the particular facts, more involved than those of the presumptive jurisdiction.

The Restatement (Third) of Law Governing Lawyers § 5 cmt. h (2000) (emphasis added).

Thus, the 2000 Restatement for the first time indicated that lawyers could be governed by the ethics rules of jurisdictions where they are not licensed. The ABA soon followed suit.

2002 ABA Model Rules Revisions

In 2002, the ABA again revised its choice of law provisions. The ABA retained the basic approach for lawyers involved in active litigation, but adopted a dramatically different rule for other lawyers. As with other ethics issues, the ABA largely followed the recently articulated Restatement approach.

As in the previous ABA Model Rules version, a tribunal's host jurisdiction's ethics rules govern litigators' "conduct in connection with a matter pending before a tribunal" (unless the tribunal's rules provide otherwise).

In any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows . . . for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise.

ABA Model Rule 8.5(b)(1) (emphasis added).

A comment addresses that continuing principle.

Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise.

ABA Model Rule 8.5 cmt. [4] (emphasis added). As explained below, the rule's explicit reference to proceedings "pending before a tribunal" creates what could be seen as a

counterintuitive approach excluding from the rule's applicability pre-litigation actions up to the moment litigation begins.

For all other lawyers, the 2002 ABA Model Rules changes take an approach radically different from the ABA Model Rules' earlier version.

Under this new approach, lawyers can be disciplined by their home states or another state in which the lawyers have engaged in improper conduct.

A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction. A lawyer may be subject to the disciplinary authority of both this jurisdiction and another jurisdiction for the same conduct.

ABA Model Rule 8.5(a) (emphasis added).

A comment provides an explanation.

It is longstanding law that the conduct of a lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction. Extension of the disciplinary authority of this jurisdiction to other lawyers who provide or offer to provide legal services in this jurisdiction is for the protection of the citizens of this jurisdiction. Reciprocal enforcement of a jurisdiction's disciplinary findings and sanctions will further advance the purposes of this Rule. See, Rules 6 and 22, ABA Model Rules for Lawyer Disciplinary Enforcement. A lawyer who is subject to the disciplinary authority of this jurisdiction under Rule 8.5(a) appoints an official to be designated by this Court to receive service of process in this jurisdiction. The fact that the lawyer is subject to the disciplinary authority of this jurisdiction may be a factor in determining whether personal jurisdiction may be asserted over the lawyer for civil matters.

ABA Model Rule 8.5 cmt. [1] (emphasis added).

Thus, lawyers might be governed by the ethics rules of states where they are not licensed. Under ABA Model Rule 8.5(b)(2), the ethics rules will be applied as follows:

for any other conduct [other than in pending litigation], the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in a different jurisdiction, the rules of that jurisdiction shall be applied to the conduct.

ABA Model Rule 8.5(b)(2) (emphasis added). As mentioned above, lawyers covered by this new approach include litigators who are not yet involved in pending litigation.

A comment provides guidance.

As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct. In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

ABA Model Rule 8.5 cmt. [4] (emphasis added).

The new version of ABA Model Rule 8.5 substantially increases the difficulty of determining which jurisdiction's ethics rules might apply. Under the previous version, lawyers could only be governed by the ethics rules of a state where they were licensed to practice law, unless they were involved in litigation in another state. Under the current version, lawyers might be governed by the ethics rules of any state -- even if they are not licensed there.

A comment acknowledges the difficulty of identifying the state where the "predominant effect" of lawyers' actions occur.

When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred.

ABA Model Rule 8.5 cmt. [5] (emphasis added).

In four separate places, ABA Model Rule 8.5 and its comments assure lawyers that they will not be punished if they act reasonably in applying what seems to be the most appropriate jurisdiction's ethics rules.

A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

ABA Model Rule 8.5(b)(2) (emphasis added).

Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

ABA Model Rule 8.5 cmt. [3] (emphasis added).

So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule. With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonable specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.

ABA Model Rule 8.5 cmt. [5] (emphasis added).

If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

ABA Model Rule 8.5 cmt. [6] (emphasis added).

ABA Model Rule 8.5's repeated statements may spoil lawyers' exam-like choice of law conundrums, but should give some comfort to lawyers struggling to analyze which ethics rules they should follow.

2013 ABA Model Rules Changes

The ABA Ethics 20/20 Commission focused in large part on lawyer mobility.

Among other things, it recommended and the ABA House of Delegates approved a new sentence to ABA Model Rule 8.5 cmt. [5]. This new sentence recognizes a fascinating concept -- essentially allowing lawyers and their clients to contractually agree on what jurisdiction's ethics rules apply.

With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonable specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.

ABA Model Rule 8.5 cmt. [5] (emphasis added). Although this comment merely indicates that such written agreements "may be considered" in analyzing issues, it represents a significant transfer of power from regulatory bureaucracy to clients and their lawyers.

Variations in State Ethics Rules: Introduction

None of the ABA's evolving ethics rules govern any lawyer's conduct anywhere. Our profession has always been primarily governed by states.³

States have jealously protected their control over the legal profession. Lawyers receive licenses to practice law from states, not from the federal government. States use varying aspects of their judicial, legislative, and executive branch powers to regulate the legal profession.

Alabama adopted the first statewide ethics rules in 1887. Other states followed Alabama, with more- or less-detailed ethics rules.

States' adoption of their own ethics rules accelerated rapidly in 1969. Most states acted quickly in adopting their own variations of the 1969 ABA Model Code of Professional Responsibility, but were much slower in moving to the 1983 ABA Model Rules format.

³ Indian Nations also apply their own ethics rules. Matt Sharp, [ND High Court Reprimands Tribal Atty For False Comments](#), Law360, June 11, 2015 ("The North Dakota Supreme Court reprimanded a former attorney for the Oglala Sioux Tribe on Wednesday for making a false statement, issuing a reciprocal discipline order triggered by an action in the Supreme Court of the Oglala Sioux Nation."; "The state high court's disciplinary board recommended the move against Bernice C. Delorme in January after she was publicly reprimanded by the Oglala Sioux court for making a false statement about a former chief judge, impugning his judicial integrity and the integrity of the tribal courts, the order said."; "Delorme was accused of an ethical breach for suggesting Patrick Lee, a former tribal court chief judge, helped a 'pal' avoid registering as a sex offender. The statement occurred while Delorme was representing the Oglala Sioux Tribe in a lawsuit brought by the person in question, according to court records."; "Lee claimed in his ethical complaint that Delorme questioned his integrity and the Oglala Sioux Nation's judicial process by saying he used his position to favor friends -- a complaint Delorme tried to shoot down by citing privileged communication, truth of the assertion and failure to prove slander and libel as defenses."; "The tribal high court rejected Delorme's reasoning in its public reprimand, saying the claimed defenses were relevant to civil proceedings, not disciplinary actions. Delorme had every right to criticize to the court and its procedures, provided the comments were not intended to damage its integrity, the court said."; "But Lee wasn't involved in the dispute, and Delorme simply took a shot at him for unknown reasons, the court said. Delorme's comments were not supported by facts and designed to impugn the integrity of Lee and the tribe's court system, it said.").

The Preface to the 2001 edition of the ABA Model Rules states (without any editorial comment) that:

at the time this edition went to press, more than two-thirds of the jurisdictions had adopted new professional standards based on these Model Rules.

ABA Model Rules, Preface, 2001 edition. Compared to nearly every state's quick adoption of the 1969 ABA Model Code (albeit with some variations), the ABA had little to brag about in 2001. After states had nearly 20 years to consider moving to the ABA Model Rules format and substance, nearly one-third of them had deliberately declined to do so.

Perhaps not coincidentally, two states with the largest bars were the last to move in that direction. New York switched from the ABA Model Code format to the ABA Model Rules format on April Fool's Day 2009. California is still inching its way in that direction.⁴

This unfortunate delay in moving to at least the ABA Model Rules format makes it very difficult for those seeking ethics guidance to determine states' ethics principles. Although they do not guide any lawyer's conduct, the ABA Model Rules still serve a critical function. States begin their own selection of ethics standards by examining the ABA Model Rules. Various comparison charts allow both state ethics committees and lawyers to contrast states' ethics standards -- by looking at their states' adoption or rejection of the parallel ABA Model Rule.

⁴ The California Bar took several years to adopt a recommended ethics code in 2010, but on September 19, 2014, the California Supreme Court told the bar to try again. The Supreme Court directed the bar to submit a new proposal no later than March 31, 2017 -- so the California process will continue to drag on.

Just one example highlights the logistical benefit of having a nationally uniform proposed ethics standard for lawyers researching the ethics rules in states other than their own.

When the ABA dropped its prohibition on lawyers threatening criminal charges to gain an advantage in a civil manner, most states decided to maintain such a prohibition. But because there is no ABA Model Rule dealing with this issue, states that wanted to maintain that principle had to decide where to put it in their rules.

This makes it very difficult for practitioners to determine if a particular state continues to prohibit such conduct.

- Some states include the provision in their Rule 3.4 (entitled "Fairness to Opposing Party and Counsel"): Connecticut Rule 3.4(7); Florida Rule 4-3.4(g); Georgia Rule 3.4(h); New York Rule 3.4(e); Virginia Rule 3.4(i).
- Some states include the provision in their Rule 4.4 (entitled "Respect for Rights of Third Persons"): Tennessee Rule 4.4(a)(2); Texas Rule 4.04(b).
- Some states include the provision in their Rule 8.4 (entitled "Misconduct"). D.C. Rule 8.4(g); Illinois Rule 8.4(g).
- Those states having unique rules must find a place to put a prohibition that they wish to retain: California Rule 5-100(A).

Some states follow essentially the same approach, but use legal ethics opinions rather than rules.

- North Carolina LEO 2009-5 (1/22/09) ("[A] lawyer may serve the opposing party with discovery requests that require the party to reveal her citizenship status, but the lawyer may not report the status to ICE unless required to do so by federal or state law."; "It is unlikely that Lawyer's impetus to report Mother to ICE is motivated by any purpose other than those prohibited under these principles. The Ethics Committee has already determined that a lawyer may not threaten to report an opposing party or a witness to immigration to gain an advantage in civil settlement negotiations. 2005 FEO 3. Similarly, Lawyer may not report Mother's illegal status to ICE in order to gain an advantage in the underlying medical malpractice action.").

- North Carolina LEO 98-19 (4/23/99) ("Although the rule prohibiting threats of criminal prosecution to gain an advantage in a civil matter was omitted from the Revised Rules of Professional Conduct, a lawyer representing a client with a civil claim that also constitutes a crime should adhere to the following guidelines: (1) a threat to present criminal charges or the presentation of criminal charges may only be made if the lawyer reasonably believes that both the civil claim and the criminal charges are well-grounded in fact and warranted by law and the client's objective is not wrongful; (2) the proposed settlement of the civil claim may not exceed the amount to which the victim may be entitled under applicable law; (3) the lawyer may not imply an ability to influence the district attorney, the judge, or the criminal justice system improperly; and (4) the lawyer may not imply that the lawyer has the ability to interfere with the due administration of justice and the criminal proceedings or that the client will enter into any agreement to falsify evidence.").
- West Virginia LEO 2000-01 (5/12/00) (finding that threatening criminal prosecution can be improper if the threatening party seeks more than restitution).

This logistical difficulty seems less significant than many states' rejection of the ABA Model Rules' substance.

States' varying approach to their ethics rules reflects American federalism -- avoiding a "one-size-fits-all" approach in favor of their own tailored and often widely differing ethics principles. Although this state-centric approach to lawyers' ethics rules represents a laudable and time-proven process of customization and experimentation, it can make it very difficult for lawyers to determine what they must do or can do when confronting ethics dilemmas involving more than one state.

A 2012 article highlighted the often dramatic differences between the ethics rules followed even by neighboring and largely similar states. Mark J. Fucile, "Model! Doesn't Mean 'Uniform': The Continuing Importance of State Variation", 21 Prof. Law. (Am. Bar Ass'n), no. 2, 2012, at 20.

The article initially noted the geographic, demographic, political, economic and other similarities between Oregon and Washington. However, the article then described the enormous variations between Oregon's and Washington's ethics rules.

Different Rules. In some instances, the respective RPCs are simply different. Oregon, for example, gives lawyers the discretion to reveal confidential information when necessary to prevent reasonably certain death or substantial bodily harm. Washington, by contrast, makes the duty to disclose mandatory in this circumstance.

Different Wording within the Same Rule. In other instances, the variations are more subtle but equally important. Both Oregon and Washington use versions of the "no contact" rule that are based largely on ABA Model Rule 4.2. Oregon's version, however, defines the prohibition as extending broadly to the entire "subject" involved, while Washington's version hews to the narrower focus on the particular "matter" found in the ABA Model Rule.

Different Meanings for the Same Words. In still other instances, the respective RPCs use the same words but they have different meanings. Oregon, for example, defines "information relating to the representation of a client" in its confidentiality rule using the former and comparatively narrower terminology for "confidences" and "secrets." Washington, by contrast, defines the term more broadly using comments patterned on the ABA Model Rule commentary.

Different Commentary on the Same Rule. Oregon does not have official comments to its RPCs but does have a very comprehensive set of state bar ethics opinions. Washington does have official comments (and ethics opinions). In some instances, commentary on the same rule creates differences (or at least potential differences) in application. Oregon, for example, has an ethics opinion that specifically approves the use of "advance" conflict waivers (as long as the risks are adequately explained). When the Washington Supreme Court adopted its current version of RPC 1.7, however, it deleted proposed Comment 22 on advance waivers that mirrored the corresponding ABA Model Rule comment and substituted "Reserved" in its place.

Different Interpretations of the Same Rule. In still other instances, court interpretations of the same rule differ. The Oregon Court of Appeals, for example, found (albeit under a relatively similar predecessor version to RPC 1.8(a)) that the modification of a fee agreement to add security for past due fees is not a business transaction with a client. The Washington Supreme Court, by contrast, concluded (again under a comparatively similar predecessor version to RPC 1.8(a)) that a modification of that kind of a is business transaction with a client.

Different Impacts from External Court Rules. Apart from differences within the professional rules and the accompanying commentary, differences arise from the application of external court rules. Oregon, for example, has no expert discovery in state civil proceedings and, therefore, an ethics opinion concludes that a lawyer can directly contact an opposing expert (because no court rule prohibits it). Washington, by contrast, has expert discovery patterned on the corresponding federal procedural rules and, therefore, a Supreme Court decision finds that opposing experts may not be contacted directly (because contact is limited to depositions).

Different Impacts from External Law. Differences also arise from the application of both common law and statutory law. On the former, Oregon, for example, concludes that an insurance defense counsel has two clients for conflict purposes while Washington finds that an insurance defense counsel has only one client. On the latter, Oregon, for example, concludes that there is no ethics violation for recording a telephone call (as long as one participant consents) because such recording is permitted by Oregon statutory law while the same conduct is proscribed by Washington statutory law.

Different Consequences. There are differences in potential consequences, too. Oregon, for example, concludes that its Unfair Trade Practices Act generally does not apply to the business aspects of law practice. Washington, by contrast, finds that its Consumer Protection Act applies to the business aspects of law practice.

Mark J. Fucile, "Model" Doesn't Mean "Uniform": The Continuing Importance of State Variation", 21 Prof. Law. (Am. Bar Ass'n), no. 2, 2012, at 20-21 (footnotes omitted).

The article then addressed just some of the implications of these differences.

The Pacific Northwest experience suggests three broad observations on the continuing importance of state variation.

First, although the professional rules have generally drawn into much closer alignment as the Ethics 2000 amendments have been adopted at the state level, "material" state variations may ironically be more important now because it is far easier today to practice across state lines than it was 10 years ago. In other words, the very ease of cross-border practice has increased the likelihood that lawyers may encounter a "state variation."

Second, state variations are not necessarily obvious even for the well-intentioned cross-border practitioner. As the experience in the Pacific Northwest illustrates, there are multiple sources of state variation and they do not follow a predictable pattern. Both the Oregon and Washington state bars have excellent resources available both on-line and in paper form on their respective laws of lawyering. It is entirely possible, however, that even a diligent cross-border practitioner (whether admitted reciprocally or practicing temporarily under the "MJP" rule) might still not grasp the significance of a variation until it has become a "trap for the unwary."

Third, the practical consequences of running afoul of a "state variation" are several and are not mutually exclusive. Under Model Rule 8.5(b) and its common law equivalents, a lawyer's conduct in another jurisdiction will most often be gauged by the law of that state if the lawyer is either appearing in a court proceeding there or the "predominant effect" of the lawyer's conduct occurs in the other state. Model Rule 8.5(a), in turn, grants disciplinary jurisdiction to both the lawyer's "home" state and any venue of cross-border practice. Beyond regulatory consequences, failure to know the nuances of a local jurisdiction can also be fertile ground for legal malpractice by an out-of-state practitioner. Similarly, failure to adhere to local professional rules may subject an out-of-state lawyer to the multijurisdictional practice equivalent of disqualification: revocation of *pro hac vice* admission. With any of these, ignorance is generally no excuse.

Id. at 21-22 (footnotes omitted).

Ironically, the greatest substantive variation among states' ethics rules involves perhaps the most elemental and important ethics rules lawyers face -- their confidentiality duty.

A 1997 law review article highlighted as of that time the enormous variation among the states on that key issue.

- Irma S. Russell, Cries and Whispers: Environmental Hazards, Model Rule 1.6, and the Attorney's Conflicting Duties to Clients and Others, *Washington Law Review*, Vol. 72:409, 1997 ("State modifications principally relate to the following elements of the Rule: (1) the permissive nature of the rule; (2) the extension of protection to all client 'information'; (3) fraudulent client acts; (4) financial interests of third parties; (5) the duty to rectify client fraud; (6) the disclosure of future crimes; and (7) compliance with other law. Nine jurisdictions have made attorney disclosures of client information mandatory in designated circumstances by substituting "shall reveal" or similar language in place of the Rule's permissive language 'may reveal.' The New Mexico rule states that a lawyer 'should reveal' client information when a client's crime is likely to result in serious harm. At least three jurisdictions retained the scope language of the Model Code ('confidences and secrets'), rejecting the term 'information.' Twenty-two jurisdictions have broadened the category of 'crime' that qualifies as an exception by deleting the category of 'imminent death.' Of these jurisdictions fifteen have broadened the exception further by rejecting the qualifier 'substantial' to the category of 'bodily harm.' Eleven jurisdictions have added protection for the financial interest of third parties by including this interest within the exceptions to the prohibition. Ten jurisdictions include 'fraudulent' as well as criminal acts within the exception for harm, extending greater protection to third parties. Thirteen jurisdictions allow disclosures to 'rectify fraud' when the attorney's services have been used to further the fraud. Fifteen jurisdictions include an exception for disclosures to comply with other law. These state departures from Model Rule 1.6 are evidence of state dissatisfaction with the ABA's position on confidentiality.").

And because states keep tinkering with their ethics rules, even this description is now obsolete. Because states constantly change their ethics rules, lawyers seeking guidance on this and other issues must check the current status of ethics rules in any states that might supply governing ethics principles.

But sometimes even states' ethics rules provide only bare-bones requirements. States also regulate the profession on a day-to-day basis through legal ethics opinions, ethics "hot lines" allowing lawyers to seek guidance from their state's bars, case-specific disciplinary decisions, etc.

To this extent, the state-centric regulation of lawyers mirrors the British common law approach to law generally. Commentators have noted the role of Britain's common law tradition in enhancing and preserving individual freedom.

- Daniel Hannan, It's no accident that the English-speaking nations are the ones most devoted to law and individual rights, Wall St. J., Nov. 16, 2013 ("In August 1941, when Franklin Delano Roosevelt and Winston Churchill met on the deck of HMS Prince of Wales off Newfoundland, no one believed that there was anything inevitable about the triumph of what the Nazis and Communists both called 'decadent Anglo-Saxon capitalism.' They called it 'decadent' for a reason. Across the Eurasian landmass, freedom and democracy had retreated before authoritarianism, then thought to be the coming force. Though a small number of European countries had had their parliamentary systems overthrown by invaders, many more had turned to autocracy on their own, without needing to be occupied: Austria, Bulgaria, Estonia, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Poland, Portugal, Romania, Spain."); "We often use the word 'Western' as a shorthand for liberal-democratic values, but we're really being polite. What we mean is countries that have adopted the Anglo-American system of government. The spread of 'Western' values was, in truth, a series of military victories by the Anglosphere."; "I realize that all this might seem strange to American readers. Am I not diluting the uniqueness of the United States, the world's only propositional state, by lumping it in with the rest of the Anglosphere? Wasn't the republic founded in a violent rejection of the British Empire? Didn't Paul Revere rouse a nation with his cry of 'the British are coming'?"; "Actually, no. That would have been a remarkably odd thing to yell at a Massachusetts population that had never considered itself anything other than British (what the plucky Boston silversmith actually shouted was 'The regulars are coming out!'). The American Founders were arguing not for the rejection but for the assertion of what they took to be their birthright as Englishmen. They were revolutionaries in the 18th-century sense of the word, whereby a revolution was understood to be a complete turn of the wheel: a setting upright of that which had been placed on its head." (emphasis added); "What made the Anglosphere different? Foreign visitors through the centuries remarked on a number of peculiar characteristics: the profusion of non-state organizations, clubs, charities and foundations; the

cheerful materialism of the population; the strong county institutions, including locally chosen law officers and judges; the easy coexistence of different denominations (religious toleration wasn't unique to the Anglosphere, but religious equality -- that is, freedom for every sect to proselytize -- was almost unknown in the rest of the world). They were struck by the weakness, in both law and custom, of the extended family, and by the converse emphasis on individualism. They wondered at the stubborn elevation of private property over *raison d'état*, of personal freedom over collective need."; "Isolation meant that there was no need for a standing army in peacetime, which in turn meant that the government had no mechanism for internal repression. When rulers wanted something, usually revenue, they had to ask nicely, by summoning people's representatives in an assembly. It is no coincidence that the world's oldest parliaments -- England, Iceland, the Faroes, the Isle of Man -- are on islands." (emphasis added); "Above all, liberty was tied up with something that foreign observers could only marvel at: the miracle of the common law. Laws weren't written down in the abstract and then applied to particular disputes; they built up, like a coral reef, case by case. They came not from the state but from the people. The common law wasn't a tool of government but an ally of liberty: It placed itself across the path of the Stuarts and George III; it ruled that the bonds of slavery disappeared the moment a man set foot on English soil." (emphasis added); "There was a fashion for florid prose in the 18th century, but the second American president, John Adams, wasn't exaggerating when he identified the Anglosphere's beautiful, anomalous legal system -- which today covers most English-speaking countries plus Israel, almost an honorary member of the club, alongside the Netherlands and the Nordic countries -- as the ultimate guarantor of freedom: 'The liberty, the unalienable, indefeasible rights of men, the honor and dignity of human nature . . . and the universal happiness of individuals, were never so skillfully and successfully consulted as in that most excellent monument of human art, the common law of England.'" (emphasis added); "There is, of course, a flip-side. If the United States abandons its political structures, it will lose its identity more thoroughly than states that define nationality by blood or territory. Power is shifting from the 50 states to Washington, D.C., from elected representatives to federal bureaucrats, from citizens to the government. As the United States moves toward European-style health care, day care, college education, carbon taxes, foreign policy and spending levels, so it becomes less prosperous, less confident and less free."; "We sometimes talk of the English-speaking nations as having a culture of independence. But culture does not exist, numinously, alongside institutions; it is a product of institutions. People respond to incentives. Make enough people dependent on the state, and it won't be long before Americans start behaving and voting like . . . well, like Greeks.").

States' incremental approach to ethics issues parallels the British and American approach to other legal matters.

State Choice of Law Rules Variations

Most states have moved in the direction of the 2002 ABA Model Rules changes. However, some states have deliberately retained the 1993 ABA provision. Under that approach, litigators must comply with a tribunal's ethics rules, but other lawyers will be governed only by the ethics rules of a state where they are licensed. In the latter situation, a choice of law issue arises only if such lawyers are licensed in multiple states.

For instance, New York's ethics rules follow this 1993 principle, although New York adopted its new ethics rules in 2009.

- New York Rule 8.5(b) ("In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows . . . [f]or conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and . . . [f]or any other conduct . . . If the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and . . . If the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct." (emphasis added)).
- New York State LEO 1027 (10/16/14) ("If a lawyer is licensed only in New York, then the New York Rules of Professional Conduct apply to the lawyer's conduct in non-court matters (meaning all matters not in connection with proceedings pending before a court in which a lawyer has been admitted). If a lawyer is licensed in New York and other jurisdictions, then the lawyer's conduct in non-court matters will be governed by the rules of the jurisdiction where the lawyer principally practices unless the predominant effect of the lawyer's conduct clearly will be felt in another jurisdiction where the lawyer is

also licensed to practice. Whether a federal agency's rules of ethics preempt the New York Rules in particular cases depends on questions of law beyond our jurisdiction." (emphasis added); "Rule 8.5(b)(2) governs 'any other conduct,' a phrase that encompasses all of a lawyer's conduct not in connection with a proceeding in a court before which the lawyer has been admitted to practice. Thus, non-court law practice encompasses many types of conduct, including: adversarial matters (i.e., matters with an opposing party) that are pending before (i) a state or federal agency, (ii) an arbitrator not annexed to a court, or (iii) some other adjudicative body that is not a 'court' -- see Rule 1.0(w) (defining 'Tribunal'); non-adversarial matters before a government agency, such as prosecuting patents in the USPTO, filing papers with the SEC, and requesting private letter rulings from the IRS; transactional matters, such as mergers and acquisitions, contract negotiations, and formation of partnerships; and counseling-only matters, such as tax advice, estate planning advice, advice on corporate by-laws, and other counseling matters involving neither a government agency or an opposing party."; "Here, the Dual-Licensed Lawyer maintains offices in both New York and D.C., but we do not know the jurisdiction in which he 'principally practices.' Neither the text of Rule 8.5 nor its Comments provide any guidelines for determining where a lawyer principally practices. We believe that when a lawyer is licensed in more than one jurisdiction, various factors are relevant to determining the one in which the lawyer principally practices, including: (a) the number of calendar days the lawyer spends working in each jurisdiction; (b) the number of hours the lawyer bills in each jurisdiction; (c) the location of the clients the lawyer serves; (d) the activities the lawyer performs in each jurisdiction (e.g., legal work for clients vs. administrative work for the law firm); and (e) special circumstances (such as a recent move, an extended illness, or a natural disaster)." (emphasis added); "Unfortunately, no simple formula is available to determine where the 'predominant effect' will occur. . . . Factors to consider include such things as: (a) where the clients reside, and where they work; (b) where any payments will be deposited; (c) where any contract will be performed; and (d) where any new or expanded business will operate. For example, if a lawyer principally practices in D.C. but is advising a New York client on how to draft (or interpret, or enforce) a commercial contract among several parties, and all of those parties live and work in New York, and the contract will be performed solely in New York, then advising the client would ordinarily be conduct that 'clearly has its predominant effect' in New York. But if some of the parties to the contract work outside New York, or if part of the contract will be performed outside New York, then the lawyer's advice may not 'clearly' have its predominant effect in New York -- in which case the ethics rules applicable under Rule 8.5(b)(2)(ii) will be the rules of the jurisdiction in which the lawyer principally practices.").

- New York City LEO 2014-1 (01/2014) ("A New York lawyer must consider a wide range of ethical issues before entering into a business relationship with

a non-legal organization. A New York lawyer is contemplating an arrangement with a non-legal organization based in another state, where: (1) the New York lawyer would review forms prepared by the non-legal organization on behalf of its customers to determine whether they comply with certain applicable legal requirements; and (2) the non-legal organization would pay the lawyer a percentage of the fees paid by the customers to the non-legal organization, pursuant to a pre-determined fee schedule."; "A critical threshold question is which jurisdiction's professional responsibility rules apply to the Lawyer's conduct. The analysis depends on whether, in addition to being licensed in New York, the Lawyer is authorized to practice law in any other jurisdictions, such as the Foreign Country, the state where the NLO is based, or any jurisdictions where the Local Consulates are located. A New York lawyer who is also licensed to practice in one or more other jurisdictions may be governed either by the New York Rules or the rules of another jurisdiction, depending on the type of conduct involved. . . . If the Lawyer is also licensed in a jurisdiction other than New York, the Lawyer should examine Rule 8.5(b)(2) to determine which jurisdiction's professional responsibility rules apply to the Lawyer's conduct." (emphasis added); "On the other hand, if the Lawyer is licensed to practice only in New York, then the Lawyer's conduct would be governed by the New York Rules. See Rule 8.5(b)(1). The remainder of this opinion assumes that the Lawyer is licensed to practice law only in New York and, thus, a New York disciplinary authority examining the Lawyer's conduct would apply the New York Rules." (emphasis added)).

Application of Choice of Law Rules

As explained above, every state has adopted a choice of law provision indicating which ethics rules apply to lawyers licensed in or acting in that state.

Although the ABA Model Rules and most states' ethics rules indicate that their choice of law provisions apply in the state's "exercise of [its] disciplinary authority,"⁵ state bars and lawyers also use their choice of law provisions in assessing lawyers' day-to-day activities.

Some basic principles are apparent.

First, some bars and courts applying their own ethics rules nevertheless look to the ABA Model Rules or to other jurisdictions' ethics rules for guidance.

⁵ ABA Model Rule 8.5(b).

- Walker v. Apple, Inc., 209 Cal. Rptr. 3d 319, 326 n.4 (Cal. Ct. App. 2016) ("California has not adopted the ABA Model Rules [citation], although they may serve as guidelines absent on-point California authority or a conflicting state public policy [citation].' (City and County of San Francisco v. Cobra Solutions, Inc., (2006) 38 Cal. 4th 839, 852 [43 Cal. Rptr. 3d 771, 135 P. 3d 20].)").
- Runge v. Disciplinary Bd. of N.D. Supreme Court (In re Runge), 858 N.W.2d 901, 906 (N.D. 2015) (holding that a lawyer had not violated North Dakota Rule 1.14 by terminating a client's daughter's power of attorney without the daughter's consent; "This Court recognizes 'the North Dakota Rules of Professional Conduct are based in part on the ABA's Model Rules of Professional Conduct,' and in interpreting our rules, we may consider other authorities' interpretation and analysis of the Model Rules." (citation omitted)).
- California LEO 2013-188 (2013) ("While California has not adopted the ABA Model Rules, they may nevertheless be used as guidance for lawyers absent on-point California authority or a conflicting state public policy. . . . Thus, in the absence of related California authority, we may look to the Model Rules, and the ABA Formal Opinions interpreting them, as well as the ethics opinions of other jurisdictions or bar associations for guidance.").

Second, courts addressing disqualification motions frequently look beyond the black letter ethics rules. This makes sense, because disqualification motions involve many other justifiable interests -- courts' docket concerns, adversaries' interest in hiring lawyers of their own choosing, etc.

In analyzing the ethics rules component of disqualification motions, some courts not only look to other jurisdictions' rules for guidance, but apply them as binding principles -- ignoring their host jurisdiction's ethics rules.

For instance, Texas federal courts ignore the unique Texas conflicts of interest rules allowing lawyers to take matters directly adverse to their current clients if those matters are unrelated to the current representation.

- Centerboard Securities, LLC v. Benefuel, Inc., Civ. A. No. 3:15-CV-2611-G, 2016 U.S. Dist. LEXIS 72476, at *2-3, *7 (N.D. Tex. June 3, 2016) (declining to disqualify Husch Blackwell from representing witnesses in a breach of

contract action against a company, after concluding that the law firm had not represented the company; "Disqualification cases are guided by state and national ethical standards adopted by the Fifth Circuit. In re American Airlines, Inc., 972 F.2d 605, 610 (5th Cir. 1992), cert. denied, 507 U.S. 912 . . . (1993). In the Fifth Circuit, one of the sources for the standards of the profession is the canon of ethics developed by the American Bar Association. In re Dresser Industries, Inc., 972 F. 2d 540, 543 (5th Cir. 1992). Additionally, courts are to consider the Texas Disciplinary Rules of Professional Conduct because they govern attorneys practicing in Texas generally. See Federal Deposit Insurance Corporation v. United States Fire Insurance Company, 50 F. 3d 1304, 1312 (5th Cir. 1995). Lastly, the court also considers, when applicable, local rules promulgated by the court itself. Id. Because motions to disqualify are substantive motions which affect the rights of the parties, a party cannot be deprived of its choice of counsel on the basis of local rules alone. In re Dresser Industries, Inc., 972 F.2d at 543."; "Centerboard cannot move to disqualify the non-party witnesses' counsel of choice because it is not HB's [law firm] current or former client.").

- John Crane Prod. Solutions, Inc. v. R2R & D, LLC, Civ. A. No. 3:11-CV-3237-D, 2012 U.S. Dist. LEXIS 114293, at *6 (N.D. Tex. Aug. 14, 2013) ("The Model Rules adopted by the American Bar Association ('ABA'), the local rules adopted by the district court, and the ethics rules of the state are all relevant to a motion to disqualify, but none is dispositive. . . .; see also [Kennedy v. MindPrint (In re ProEducation Int'l Inc.), 587 F.3d 296, 299 (5th Cir. 2009)] (considering ABA Model Rules, local rules, and Texas rules); In re Dresser Indus., Inc., 972 F.2d 540, 543-44 (5th Cir. 1992) (holding that ABA rules are 'useful guides,' but not controlling). Attorneys practicing in this court are subject to the Texas Disciplinary Rules of Professional Conduct.").
- United States v. Lucio, 996 F. Supp. 2d 514, 524 (S.D. Tex. 2013) ("The Local Rules of the Southern District of Texas provide that the 'minimum standard of practice' for lawyers practicing before the court, 'shall be the Texas Disciplinary Rules of Professional Conduct.' Tex. R. of Court, Fed. app. A, R. 1 A. Fifth Circuit jurisprudence further consults, 'the ethical rules announced by the national profession in light of the public interest and the litigants' rights,' In re Am. Airlines, 972 F.2d 605, 610 (5th Cir. 1992) (internal quotation marks omitted), a criterion that encompasses the ABA Model Code of Professional Responsibility and the ABA Model Rules of Professional Conduct, see id. See also Wheat [v. United States], 486 U.S. at 153, 160, 162 (1988)] (considering ABA Model Code and Model Rules when ruling on defense counsel's disqualification). Finally, in keeping with the Circuit's example, the Court consulted the rules put forth in the Restatement (Third) of Law Governing Lawyers. See Fed. Deposit Ins. Corp. v. U.S. Fire Ins. Co., 50 F.3d 1304, 1314 (5th Cir. 1995) ('[T]he Restatement of The Law Governing Lawyers is indicative of the national consensus . . . within the profession.'.)" (footnote omitted)).

- Galderma Labs., L.P. v. Actavis Mid Atl. LLC, No. 3:12-cv-2038-K, 2013 U.S. Dist. LEXIS 24171, at *12 (N.D. Tex. 2013) (upholding the effectiveness of a prospective consent given by a sophisticated company advised by an in-house lawyer nine years before the law firm relied on the consent to represent the client's adversary in unrelated litigation; following a more stringent national ethic rule as reflected in the ABA Model Rules, rather than the more forgiving Texas conflicts rules; "The difference between the Model Rule and the Texas Rule goes to the central issue in this case, the need for informed consent. To give weight to the Texas Rule over the Model Rule in this case would vitiate the cornerstone of the national standard, the requirement of informed consent. Thus, while the Court has considered the applicable Texas Rules, the Model Rules and authority related to them must control in determining Galderma's motion to disqualify.").
- M-I LLC v. Stelly, Civ. A. No. 4:09-cv-1552, 2009 U.S. Dist. LEXIS 126434, at *3 (S.D. Tex. Nov. 17, 2009) ("The Local Rules of the Southern District of Texas provide that 'the minimum standard of practice shall be' the Texas Disciplinary Rules of Professional Conduct ('Texas Rules'), although 'the court is not limited by that code.' LOCAL R. OF THE U.S. DIST. CT. FOR THE S. DIST. OF TEX., app. A, R. 1A-B. The 'Texas Rules . . . are not the sole authority governing a motion to disqualify.' In re American Airlines, 972 F.2d 605, 610 (5th Cir. 1992) (internal quotations omitted) (citing In re Dresser Indus., 972 F.2d 540, 543 (5th Cir. 1992)). In reviewing a motion to disqualify, the Fifth Circuit also 'consider[s] . . . the ethical rules announced by the national profession in light of the public interest and the litigants' rights,' including the ABA Model Rules of Professional Conduct ('ABA Rules'). Id. The parties, however, have briefed only Texas Rules issues.").

Third, states can punish lawyers who engage in misconduct in the state, regardless of where those lawyers are licensed.

Punishment can include revocation of pro hac admission to a court,⁶ or revocation of an in-house lawyer's ability to practice. In those situations, the host state takes away a privilege that the state previously granted to the out-of-state lawyer.

⁶ Sisk v. Transylvania Cmty. Hosp., Inc., 695 S.E.2d 429, 434, 436, 431 (N.C. 2010) (approving a trial court's revocation of a pro hac vice admission of two Kentucky lawyers, although a Kentucky court found that the lawyers' interaction with another side's consulting expert did not amount to a knowing violation of the Kentucky ethics rules; explaining what the North Carolina Court of Appeals had concluded; "Apparently assuming that the predominant effect of the conduct would occur in Kentucky, the Court of Appeals held that because counsel's behavior did not violate the rules of that state, Rule 8.5 did not allow the conduct to be subject to discipline under the rules of North Carolina."; holding that the Court of Appeals had improperly analyzed the situation; "However, in focusing on the Rules of Professional

Under ABA Model Rule 5.5 cmt. [19]:

[a] lawyer who practices law in this jurisdiction pursuant to paragraphs (c) or (d) [providing for the temporary provision of legal services in another state, and services by in-house lawyers in another state] or otherwise is subject to the disciplinary authority of this jurisdiction. See Rule 8.5(a).

ABA Model Rule 5.5 cmt. [19] (emphasis added).

The issue becomes more complicated if such a lawyer has engaged in improper conduct while otherwise appropriately engaged in temporary activity in another state under Rule 5.5 or (especially) if the lawyer has engaged in the unauthorized practice of law where he or she is not licensed.

In those situations, states can rely on injunctions, among other things.

- In re Parilman, 947 N.E.2d 915 (Ind. 2011) (holding that Indiana can punish an Arizona lawyer for broadcasting radio advertisements from an Indiana radio station that violate the Indiana ethics rules; ultimately barring the lawyer from practicing law in Indiana, seeking temporary admission into Indiana or soliciting clients in Indiana).
- Iowa Supreme Court Attorney Disciplinary Bd. v. Carpenter, 781 N.W.2d 263, 269-70 (Iowa 2010) (analyzing misconduct by a lawyer (not licensed in Iowa) permissibly practicing immigration law in Iowa; noting that the lawyer had engaged in various misconduct involving trust accounts and other issues; using the court's equitable power to enter a cease and assist order, and barring the lawyer from practicing law in Iowa for two years; "[W]hen a non-Iowa licensed attorney commits misconduct that typically warrants a sanction directly affecting licensure, such as suspension or revocation, such sanctions are not feasible because there is no Iowa law license to suspend

Conduct, the Court of Appeals did not consider the trial court's independent inherent authority to discipline attorneys."; explaining that North Carolina courts can rely on their "inherent power" to revoke a pro hac admission; acknowledging that "[n]evertheless, in exercising its discretion, a trial court may consider the Rules of Professional Conduct when deciding whether to revoke pro hac vice status. Rule 4.3 of the North Carolina Revised Rules of Professional Conduct provides in pertinent part: 'In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not: . . . (b) state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.'"; ultimately concluding that "the North Carolina Rules of Professional Conduct do not limit the trial court's discretion to revoke pro hac vice status. Because we find that the trial court did not abuse its discretion, we reverse the Court of Appeals.").

or revoke. Nevertheless, like our sister courts, we conclude our authority to discipline non-Iowa licensed attorneys includes the ability to fashion practice limitations through our injunctive and equitable powers that are equivalent to license suspension, disbarment, or other sanctions related to an attorneys' license." (emphasis added)).

- Woloohojian Realty Corp. v. Bogosian, No. CA 93-348-L, 2008 U.S. Dist. LEXIS 83230, at *5 (D.R.I. Oct. 17, 2008) (citing numerous cases in concluding that Rhode Island could punish a Massachusetts lawyer for conduct in Rhode Island; "[T]he Court rejects the proposition that a state bar is powerless to discipline one of its members who engages in professional misconduct but carefully avoids committing any offending act within the geographical boundaries of the licensing state.").
- In re Discipline of Droz, 160 P.3d 881, 884, 885 (Nev. 2007) (enjoining a Utah lawyer from practicing law in Nevada, after finding that he had established a permanent presence in Nevada despite not being licensed there; noting that Droz was admitted to the Utah Bar in 1978, but disbarred by that Bar in 2006; explaining that Droz had moved to Nevada and continued practicing law, which prompted Nevada bar counsel to file a formal disciplinary complaint against Droz; holding that a Nevada rule indicates that any lawyer practicing in Nevada may be disciplined by the Nevada Supreme Court, even if the lawyer is not admitted in Nevada; "We recognize that NRS 7.285 prescribes criminal penalties for the unauthorized practice of law. But as a practical matter, such a complaint to law enforcement, which is also responsible for investigating matters such as violent crimes and drug offenses, would almost certainly be accorded a lower priority. Given this lower priority, by the time law enforcement could devote resources to an unauthorized practice of law complaint, several more clients could be harmed. Also, while NRS 7.285(3) permits the state bar to file a civil action and seek an injunction against a person engaging in the unauthorized practice of law, this court, as the ultimate authority over attorneys as officers of the court, has a special interest in enforcing its rules governing the legal profession. And although an injunction as provided in NRS 7.285(3) may prevent future harm, it cannot punish past misconduct." (footnote omitted); explaining why a Nevada court should exercise jurisdiction over Droz; "Moreover, Droz's actions clearly illustrate why this court should exercise jurisdiction over his conduct: Droz is already disbarred in Utah and so very little more disciplinary action could be imposed upon him there, and his misconduct affected several Nevada citizens, a Nevada lawyer, and the Nevada court system. Droz has apparently fled the jurisdiction, and so an injunction at this point would be ineffective. Criminal penalties against Droz are likewise of questionable effect, at least unless and until he is located and subject to arrest." (emphasis added); ultimately recommended enjoining Droz from practicing law in Nevada, and referring the matter to federal, state and county enforcement; "Accordingly, Paul Droz is prohibited from practicing law

in Nevada and from appearing in any Nevada court. Additionally, Droz shall pay the costs of this disciplinary proceeding and a fine of \$3,000. Further, we direct the state bar to refer this matter to any appropriate federal, state, or county law enforcement authorities for possible criminal investigation. We also direct the state bar to serve a copy of this opinion upon the Utah and Arizona bars. Finally, the state bar shall serve a copy of this opinion upon Droz at his last-known address." (emphasis added)).

- In re Tonwe, 929 A.2d 774, 776-77, 779 n.7, 781 (Del. 2007) (enjoining a Pennsylvania lawyer from engaging in the practice of law in Delaware without being admitted pro hac in Delaware; also suggesting that Pennsylvania disbar the lawyer; "Glover [respondent] developed a sizeable Delaware clientele. Glover claims that she never solicited business from Delaware residents, and that her Delaware practice grew because she was involved in church groups and other civic activities. In June 2005, after following up on information provided by a Delaware lawyer, the ODC notified Glover of its concerns about her Delaware activities. Shortly thereafter, she transferred more than 60 Delaware files to Delaware lawyers. In all, the ODC established that, from 2003-2006 Glover represented more than 100 Delaware residents in Delaware matters." (emphases added); "Glover says that she did not provide legal services 'in Delaware' because she worked out of an office in Pennsylvania. Moreover, because she reasonably believed that the predominant effect of her legal work was in Pennsylvania, she should be protected by the 'safe harbor' provision in Rule 8.5(b)."; "Glover's argument fails for several reasons. First, the record establishes that on three occasions she was physically present in Delaware, representing her Delaware clients. Second, physical presence is not required to establish that a person is providing, or offering to provide, legal services in this state. . . . We are satisfied that this regular pattern of representation of Delaware clients constituted the practice of law 'in Delaware' for purposes of Rule 8.5." (emphasis added); "Although it has limited relevance, the evidence suggests that Glover still lives in Delaware. She testified that her husband and children live in their home in Dover, Delaware, but that she is 'legally' a resident of Pennsylvania and that she sleeps in her office. When asked whether she and her husband are separated, however, Glover said, 'No.'"; "The Board recommended a series of sanctions that effectively result in disbarment: (1) Respondent be declared permanently unfit for admission to the Delaware bar; (2) Immediate prohibition on Respondent's ability to appear in Delaware pro hac vice; (3) An Order directing Respondent to cease and desist from all practice of law in Delaware; and (4) Request and recommend disbarment by the Supreme Court of Pennsylvania.").

If the conduct is sufficiently egregious, the state can also rely on criminal laws to punish the lawyer.

Fourth, lawyers sanctioned in a state where they are not licensed frequently (if not always) face reciprocal discipline in any state where they are licensed.

In other words, lawyers' home states will normally punish lawyers for misconduct in another state where the lawyers are not licensed.

- In re Hartke, 138 A.3d 478, 478 (D.C. Cir. 2016) (suspending a lawyer for six months based on reciprocity of punishment by the Virginia Bar; "In April 2015, respondent Wayne Richard Hartke was suspended from the practice of law in Virginia for six months. This court issued an order directing Mr. Hartke to show cause why this court should not impose identical reciprocal discipline. Mr. Hartke argues that he should not be sanctioned at all. We adopt Disciplinary Counsel's recommendation that we impose identical reciprocal discipline.").
- In re Sucklal, 928 N.Y.S.2d 598 (N.Y. App. Div. 2011) (suspending for one year from practicing in New York, a New York lawyer who had been found guilty of practicing in Maryland without a license).
- Ciano v. Reers, 893 N.Y.S.2d 851 (N.Y. Sup. Ct. 2010) (holding that a lawyer could be punished under a New York statute prohibiting misconduct, even though the lawyer's misconduct occurred in Hawaii rather than in New York).
- Disciplinary Counsel v. Glover, 876 N.E.2d 576 (Ohio 2007) (disbarring an Ohio lawyer from practicing law in Ohio, after the lawyer was found guilty of committing the unauthorized practice of law in Delaware).
- State ex rel. Okla. Bar Ass'n v. Mothershed, 66 P.3d 420, 422 (Okla. 2003) (disbarring a lawyer licensed only in Oklahoma for conduct in Arizona; "Respondent is a member of the Oklahoma Bar Association. He was licensed to practice law by the Supreme Court of the State of Oklahoma in 1968. At all times pertinent hereto, Respondent was a resident of the state of Arizona. Respondent sat for the Arizona Bar Exam three times, unsuccessfully, in February 1996, July 1996 and February 1997. He has never been licensed to practice law in the state of Arizona."; "In February 1998, the Respondent filed pleadings in the Superior Court of Arizona, Maricopa County in Bonney v. Bedore, et al., CV -98-01771. Again Respondent identified himself as 'Attorney for the Plaintiff,' but failed to indicate he was not licensed to practice law in Arizona. The pleadings indicated Respondent's State Bar Number was 006472, but did not state that this was his Oklahoma Bar Number. Respondent's stationary displayed an Arizona address and 'Attorney at Law' but did not specify he was licensed to practice law in Oklahoma, not in Arizona."; ultimately disbarring the lawyer).

Fifth, federal courts sometimes sanction lawyers based on misconduct in their host state, and vice versa.

- In re Hall, No. 15-3437, 2016 U.S. App. LEXIS 3987, at *2-3, *3, *8 (3rd Cir. Mar. 3, 2016) (finding that the Eastern District of Pennsylvania could refuse to reinstate a lawyer into its bar despite the Pennsylvania Bar's reinstatement; "After his release from prison, Hall began working as a paralegal for a law firm, doing primarily legal research and writing. He has remained current on legal developments and earned more than the required CLE credits. He also opened a bicycle shop with his wife, which they currently run. Hall testified at his reinstatement hearing that he has not consumed any alcohol since the day of the accident in November 2005. He attends Alcoholics Anonymous meetings at least once a week, regularly speaks at Mothers Against Drunk Driving events, and participates in the Lehigh Valley and Bucks County DUI programs."; "In March 2015, the Supreme Court accepted the Board's recommendation and reinstated Hall to the Pennsylvania bar. In addition to running the bicycle shop, Hall now has a solo law practice. He has 20 to 25 clients and concentrates his practice on insurance and civil rights matters."; "Hall argues the District Court did not properly credit the Pennsylvania Supreme Court's order reinstating him to the Pennsylvania bar. . . . Although the District Court was well aware of Pennsylvania's reinstatement of Hall, it was not bound by it.").
- In re Aranda, 25 N.Y.S.3d 186, 192 (N.Y. App. Div. 2016) (suspending a lawyer for eighteen months after the Second Circuit did the same and thus imposed the same punishment; "[T]he Committee's petition for reciprocal discipline should be granted, and respondent should be suspended for a period of 18-months, and until further order of this Court.").
- In re Howard, 127 A.3d 914, 917 (R.I. 2015) (suspending for sixty days a Rhode Island lawyer who had been suspended by the federal bankruptcy court for two years; "The respondent's misconduct before the Bankruptcy Court is worthy of sanction, and the suspension of the respondent's privileges to practice before both of those courts is appropriate. However, we are of the opinion that the imposition of a two-year suspension from the practice of law in our state courts as well would be unwarranted.").
- In re Peters, 127 A.D.3d 103, 108-09 (N.Y. App. Div. 2015) (approving a five year suspension in practicing in New York state courts of a lawyer who was suspended for seven years from practicing in New York federal courts two years ago -- meaning that the suspensions would run concurrently for five years; "On review of the entire record and under all the circumstances, we find that the sanction to be imposed should be coextensive with that directed by the Southern District of New York. In doing so, we are mindful of the fact that as a general rule in reciprocal disciplinary matters, this Court gives

significant weight to the sanction imposed by the jurisdiction in which the charges were initially brought.").

Sixth, specialized tribunals can conduct their own disciplinary processes, guided by their own rules.

- Swyers v. United States PTO, Civ. No. 1:16-cv-15, 2016 U.S. Dist. LEXIS 71530, at *1, *1-2 (E.D. Va. May 27, 2016) (rejecting a lawyer's effort to stop a USPTO disciplinary proceeding; holding that a lawyer had to wait until the administrative process had concluded; "Matthew Swyers filed this action to enjoin the United States Patent and Trademark Office ('PTO') from pursuing disciplinary proceedings against him stemming from the Office of Enrollment and Discipline's ('OED') purportedly unconstitutional investigation into his patent practice. In addition to injunctive relief, Swyers seeks damages from three individual PTO employees pursuant to Bivens [Bivens v. Six Unknown Named Agents of Fed Bureau of Narcotics, 403 U.S. 388 (1971)]. During the pendency of the complaint, the PTO initiated a formal disciplinary proceeding against Swyers that is now pending before an administrative law judge."; "The PTO moves to dismiss the complaint on the ground that the statutory scheme put in place by Congress precludes judicial review of Swyers' claims at this stage or, alternatively, for failure to state a claim. . . . [T]he Court will grant the motions and dismiss the complaint.").

Seventh, lawyers who are licensed in more than one jurisdiction may face punishment in all of those jurisdictions for sufficiently egregious misconduct in any of those jurisdiction.

- Matt Sharp, ND High Court Reprimands Tribal Atty For False Comments, Law360, June 11, 2015 ("The North Dakota Supreme Court reprimanded a former attorney for the Oglala Sioux Tribe on Wednesday for making a false statement, issuing a reciprocal discipline order triggered by an action in the Supreme Court of the Oglala Sioux Nation."; "The state high court's disciplinary board recommended the move against Bernice C. Delorme in January after she was publicly reprimanded by the Oglala Sioux court for making a false statement about a former chief judge, impugning his judicial integrity and the integrity of the tribal courts, the order said."; "Delorme was accused of an ethical breach for suggesting Patrick Lee, a former tribal court chief judge, helped a 'pal' avoid registering as a sex offender. The statement occurred while Delorme was representing the Oglala Sioux Tribe in a lawsuit brought by the person in question, according to court records."; "Lee claimed in his ethical complaint that Delorme questioned his integrity and the Oglala Sioux Nation's judicial process by saying he used his position to favor friends -- a complaint Delorme tried to shoot down by citing privileged

communication, truth of the assertion and failure to prove slander and libel as defenses."; "The tribal high court rejected Delorme's reasoning in its public reprimand, saying the claimed defenses were relevant to civil proceedings, not disciplinary actions. Delorme had every right to criticize to the court and its procedures, provided the comments were not intended to damage its integrity, the court said."; "But Lee wasn't involved in the dispute, and Delorme simply took a shot at him for unknown reasons, the court said. Delorme's comments were not supported by facts and designed to impugn the integrity of Lee and the tribe's court system, it said.").

- State ex rel. Okla. Bar Ass'n v. Wintory, 350 P.3d 131 (Okla. 2015) (suspending for two years and one day for prosecutorial misconduct in Arizona a lawyer who is also licensed in Oklahoma; noting that Arizona suspended the lawyer for only ninety days).
- Lisa Ryan, DC Hits Atty With Suspension After NJ Sanction For Sarcasm, Law360, February 6, 2015 ("A D.C. appellate court on Thursday suspended attorney Jared E. Stolz for three months after he failed to explain why the court shouldn't hit him with a reciprocal punishment following his suspension in New Jersey for being excessively snarky to opposing counsel and blowing off work for golfing and vacations."; "Stolz apparently made comments to opposing counsel that included, 'Why don't you grow a pair?' and 'Did you get beat up in school a lot?, because you whine like a little girl.' And during a court hearing with the unspecified counsel, the pair got into a physical altercation that resulted in Stolz being told not to touch the attorney, the blog said. In response, Stolz apparently called the attorney 'a fag,' the report said.").

Some well-known lawyers have faced such a ripple effect of bar sanctions.

In 2012, a Maryland court dealt with misconduct by a Maryland lawyer who had worked as a judicial clerk for the Chief Judge of the District of Columbia Court of Appeals, and then practiced in a number of firms in the District of Columbia and Maryland -- before joining the District of Columbia office of Drinker Biddle & Reath in December 2008. When she finally applied for admission on motion to the District of Columbia Bar she altered exhibits that accompanied her application -- including correspondence written on Drinker Biddle & Reath stationery -- to make it appear as if

she had properly added a disclaimer on her public communications indicating that she was licensed only in Maryland. Maryland disbarred her for the misconduct.

- Attorney Grievance Comm'n v. Smith, 40 A.3d 34, 36, 37 (Md. 2012) (disbarring a Maryland lawyer for having lied on her application to waive into the D.C. Bar; explaining the background; "Ms. Smith was admitted to the Maryland Bar in June 1997. She has also been admitted to practice before the United States District Court for the District of Columbia. Ms. Smith initially worked as a judicial clerk for the Chief Judge of the District of Columbia Court of Appeals. She subsequently practiced law at a number of firms in the District of Columbia and Maryland, including as a solo practitioner, before settling at the District of Columbia office of Drinker Biddle & Reath in mid-December 2008. Although she had practiced law for more than 10 years, largely in offices located in the District of Columbia, Ms. Smith had never been admitted to the District of Columbia Bar."; "In January 2009, Ms. Smith applied for 'Admission Without Examination' to the District of Columbia Court of Appeals Committee on Admissions ('Admissions Committee'). On October 20, 2009, the Admissions Committee wrote to Ms. Smith and asked her to explain (1) why she had delayed seeking admission for such a long period of time and (2) whether she had complied with the requirements of D.C. Rule 49 and the related advisory opinions of the District of Columbia Committee on Unauthorized Practice of Law."; "Ms. Smith responded in a letter dated December 8, 2009. In that letter Ms. Smith stated that her law practice had been an 'exclusively federal practice,' and that '[m]y business cards, correspondence written on firm letterhead, and promotional materials provided the appropriate notice that my admission to the bar was only in Maryland and that I limited myself to a federal practice.' She enclosed promotional materials and other documents identified as 'redacted copies of correspondence from my current and previous law firms.' The enclosures purported to document the assertions in her letter and included legends stating that Ms. Smith had been admitted only in Maryland and that she limited herself to federal practice. In fact, those disclosures did not appear on the original versions of many of those documents, but had been added by Ms. Smith shortly before she submitted them to the Admissions Committee."; "[S]he acknowledged that she had altered copies of her past correspondence written on Drinker Biddle & Reath stationery, to add the legends 'admitted only in Maryland' and 'practice limited to matters and proceedings before federal courts and agencies,' and had similarly altered the samples of correspondence she had submitted from three other law firms where she had practiced before joining Drinker Biddle & Reath.").

In 2013, another lawyer faced similar punishment for false representations in statements to a California court.

Joel Joseph may be suing the World Trade Organization (WTO) and the United States government to allow for more disclosure about what country meat comes from, but he's had some geographic problems of his own when it comes to practicing law -- specifically his status as a resident of Bethesda, Maryland.

The founder of the non-profit Made in the USA Foundation, Inc., Joseph filed suit in Colorado federal court in November seeking to overturn a WTO decision about how meat from Mexico and Canada is labeled.

But last week, Senior District Judge Richard Matsch disqualified him as counsel. The move stems from Joseph's disbarment in Maryland for allegedly misrepresenting his residency status and his subsequent suspension by the Supreme Court of Ohio.

. . . .

Joseph, who earned his law degree from Georgetown University Law Center in 1973, was admitted to the Maryland Bar in 1981 and founded Made in the USA in 1989, which is dedicated to promoting products manufactured or assembled in the United States.

His bar problems arose in 2007, when he contacted a solo practitioner in Santa Monica and said he was looking for a local lawyer to act as co-counsel for cases filed in California courts and to sponsor his admission as a non-resident attorney to appear pro hac vice, according to court papers. [A 2011 Central District of California court noted that Joseph had passed bar exams in Maryland and Washington, D.C., but failed the California bar exam four times; Joseph v. State Bar of Cal., CV 11-6598 CAS (AGRx), 2012 U.S. Dist. LEXIS 69168 (C.D. Cal. May 16, 2012).]

California does not offer bar reciprocity with other states -- the only way to be a member of the California bar is to pass the state's (notoriously difficult) bar exam.

Joseph filed several applications in 2007 to appear in California courts. Under penalty of perjury, he reported that his office was in Bethesda, and that he did not live in California. When pressed for his residential address, he listed a location on Hampden Lane in Bethesda that was

later determined to be a UPS store where his mail was received. (Ironically, Joseph wasn't actually required to obtain admission to appear pro hac vice -- he could have just been listed as out-of-state counsel.)

During roughly the same time period that he filed the applications, Joseph also allegedly leased an apartment in Santa Monica, got a California driver's license and registered his car there, opened a local bank account and rented office space. He paid California income taxes in 2008 and 2009, and none in Maryland. However, he was still registered to vote in Maryland.

"The issue at the heart of this matter is whether Respondent was candid and/or truthful when he represented to the California Courts that he was not a resident of California for purposes of the rules governing admission to the Courts in which he sought to practice," the seven judges of the Court of Appeals of Maryland found in an October 2011 opinion ordering his disbarment. "Respondent's conduct in this case lacked candor, was dishonest, misleading, prejudicial to the administration of justice, and beyond excuse. There are no mitigating circumstances."

After the Maryland decision, the Ohio Supreme Court in October 2012 issued an order directing Joseph to "immediately cease and desist from the practice of law in any form" and instructed him to file a notice of disqualification with courts where he was involved in ongoing litigation.

When Joseph failed to file such a notice in Colorado where the WTO meat case is pending, Timothy Jafek, an Assistant United States Attorney in Denver who is representing the United States government, brought it to the court's attention.

. . . .

As of now, though, he won't be the one making the case in Colorado. In an order issued January 11, Matsch disqualified him, writing that under Colorado rules, "An attorney who is not in good standing with all courts in which he has been admitted shall not practice before this court."

Jenna Greene, In World Trade Organization Suit, Debate Flares Over Disqualified Lawyer's Residence, Nat'l L. J., Jan. 17, 2013.

Eighth, in some situations, a court punishing a lawyer for misconduct in a state where he or she is not licensed reports the misconduct to the lawyer's home state.

- Manning v. Vellardita, Civ. A. No. 6812-VCG, 2012 Del. Ch. LEXIS 59, at *2-3, *6, *10 (Del. Ch. Mar. 28, 2012) ("[A]lthough I find that the severe remedy of disqualification is not warranted here, I cannot condone Mr. Manuel's failure to disclose without encouraging similar actions in the future, actions perhaps more sinister in intent than ones I have described here. I have therefore decided to refer this matter to the disciplinary authority of Mr. Manuel's home state bar association, and to the Delaware Disciplinary Counsel, for whatever action they find appropriate." (emphasis added)).
- In re Tonwe, 929 A.2d 774, 781 (Del. 2007) (enjoining a Pennsylvania lawyer from engaging in the practice of law in Delaware without being admitted pro hac in Delaware; also suggesting that Pennsylvania disbar the lawyer; "The Board recommended a series of sanctions that effectively result in disbarment: (1) Respondent be declared permanently unfit for admission to the Delaware bar; (2) Immediate prohibition on Respondent's ability to appear in Delaware pro hac vice; (3) An Order directing Respondent to cease and desist from all practice of law in Delaware; and (4) Request and recommend disbarment by the Supreme Court of Pennsylvania.").

Ninth, most states' bar rules require all lawyers licensed in that state to self-report if they face sanctions by another state.

In fact, failure to do so can be an independent grounds for punishment.

- In re Walters, 735 S.E 2d 635 (S.C. 2011) (disbarring a South Carolina lawyer for failing to advise the South Carolina Supreme Court that he had just been disbarred in North Carolina).

Tenth, jurisdictions' reciprocal punishment process occasionally draws complaints about inadequate due process.

- Hal R. Lieberman, Dunn: Collateral Estoppel and Attorney Discipline, N.Y. L.J. June 16, 2015 ("When I first wrote about the use of collateral estoppel in attorney discipline proceedings 17 years ago,1 most disciplinary and grievance committees had not applied the doctrine except to establish liability in criminal conviction cases or to impose reciprocal discipline based upon

discipline in a foreign jurisdiction. The idea of applying collateral estoppel to a broader array of civil judgments was largely rendered impractical by the burden of proof which, in a majority of United States jurisdictions, is proof 'by clear and convincing evidence' in order to establish disciplinary liability, a higher burden than the ordinary civil 'preponderance of the evidence' standard (except in fraud cases)." (footnote omitted); "New York, however, is different. Here, based on longstanding New York Court of Appeals precedent, the burden of proof in disciplinary cases is the same as the civil 'preponderance' standard. This allows New York's disciplinary and grievance committees to employ the doctrine of collateral estoppel, at least in theory, to preclude litigation of a broad array of civil judgments implicating an attorney in professional misconduct. Nonetheless, by 1998 only the Departmental Disciplinary Committee (First Department) and the Committee on Professional Standards (Third Department) had utilized the doctrine and obtained public discipline. Nor was any rule of disciplinary procedure concerning the use of collateral estoppel codified in the respective procedural rules of the four departments." (footnote omitted); "That may now change, for at least two reasons. First, the grievance committees and Appellate Divisions have begun to apply the doctrine with more regularity. Second, and of perhaps more importance, the New York Court of Appeals, for the first time, has addressed, and endorsed, collateral estoppel – if carefully applied – in the attorney discipline context, where there has been a prior civil adjudication implicating an attorney in professional misconduct." (footnote omitted)).

Several courts have wrestled with this issue.

- Chaganti v. Lee, Case No. 1:15-cv-1138, 2016 U.S. Dist. LEXIS 63027, at *1, *29 (E.D. Va. May 11, 2016) (upholding the USPTO's suspension of a lawyer who had been suspended in Missouri for misconduct; finding that the Missouri suspension process provided sufficient due process to deserve reciprocity; "Petitioner, a Missouri attorney, was suspended indefinitely from Missouri practice, with the ability to seek reinstatement after one year, by the Supreme Court of Missouri for violating the Missouri Rules of Professional Conduct. Based on the Supreme Court of Missouri's decision to suspend petitioner, the United States Patent and Trademark Office ('PTO'), before which petitioner was also admitted to practice, issued an Order imposing identical reciprocal discipline. Here, petitioner seeks judicial review of the PTO's imposition of reciprocal discipline pursuant to 35 U.S.C. § 32." (footnote omitted); "As the administrative record has been submitted and the parties have fully briefed the matter, it is now ripe for disposition. For the reasons that follow, the petition must be denied."; "In sum, the PTO's decision to impose reciprocal discipline against petitioner was not arbitrary and capricious or otherwise not in accordance with law because the record reflects that defendant did not -- and cannot -- establish by clear and

convincing evidence that, on the basis of the Selling [Selling v. Radford, 243 U.S. 46 (1917)] factors, reciprocal discipline was not warranted.")

- In re Laser, 16 N.Y.S.3d 635, 636 (N.Y. App. Div. 2015) (censuring a New York lawyer after she was punished by the Utah Bar despite her argument that the Utah disciplinary process did not adequately protect her due process rights; "Gail E. Laser was admitted to practice by this Court in 1984. She was also admitted to practice in Utah in 2003, where she maintains an office for the practice of law."; "Subsequently, by motion returnable June 15, 2015, the Committee on Professional Standards moved pursuant to Rules of the Appellate Division, Third Department (22 NYCRR) § 806.19 for an order imposing discipline upon Laser by reason of the discipline imposed in Utah. Laser thereafter submitted a response to the Committee's motion in which she, among other things, raised the defense that she did not receive due process in the Utah disciplinary proceedings against her (see Rules of App Div, 3d Dept [22 NYCRR] § 806.19 [d] [1]). At Laser's request, we have heard her arguments in opposition to the Committee's motion."; "Upon consideration of the facts, circumstances and record before us, we conclude that Laser has not demonstrated that she was deprived of due process in the Utah disciplinary proceedings. While it is true that the Utah Supreme Court recently expressed concerns about certain of the Utah procedures which, among other things, can result in an attorney being required to defend against charges in the later stages of the disciplinary process that were not fully set forth in the initial notice of informal complaint, we note that the Court only referred the issue to its rules committee and did not strike the rules down on due process grounds (see Johnson v. Office of Professional Conduct (775 Utah Adv Rep 15, ___, 342 P3d 280, 287-288 [2014]). Notably, the proof herein establishes that Laser -- who was represented by counsel -- was aware throughout the proceedings of the conduct for which discipline was sought and, significantly, she does not argue that she was deprived of an opportunity to present evidence in her defense. In any event, inasmuch as Laser concedes that she deliberately chose to accept the discipline in Utah rather than pursue her appeal rights, we find Laser's due process claims to be unpersuasive.").

Some states rely on another state's discipline to essentially short circuit its reciprocal punishment process.

- In re Dwyer-Jones, 24 N.E.3d 566, 567, 572 (Mass. 2015) ("We consider in this case whether an attorney who has been suspended from the practice of law in another jurisdiction based on mental health conditions or substance abuse is subject to reciprocal transfer to disability inactive status in Massachusetts without a separate hearing in Massachusetts to determine her incapacity. . . . We conclude that she is."; "The respondent's suspension in Maine based on a finding of incapacity was the practical equivalent of a

transfer to 'disability inactive status,' for purposes of the reciprocal disability provision of S.J.C. Rule 4:01, § 13 (l). The single justice correctly concluded that the respondent was not entitled to a separate hearing in Massachusetts to evaluate her incapacity, and properly transferred her to disability inactive status in Massachusetts.").

- In re Miller, 970 N.Y.S.2d 807, 809 (N.Y. App. Div. 2013) (affirming New York's disbarment of a lawyer for criminal conduct in Florida; rejecting the lawyer's argument that he should be subjected only to a lesser sanction in New York; "The respondent opposes the motion in part insofar as he seeks the imposition of a term of suspension in lieu of disbarment. He does not claim that the Florida proceedings deprived him of due process. He does, however, claim that disbarment in New York would be excessive and unjust. The Supreme Court of Florida did not disbar the respondent for a specified period. Florida's rules governing disbarred attorneys merely provide that an application for reinstatement may not be made sooner than five years from the date of disbarment. The fact that the waiting period is seven years in New York does not make disbarment by way of reciprocal discipline excessive or unjust.").
- In re Dobbins, VSB Docket No. 13-000-093449, Va. State Bar Disciplinary Bd., Feb. 7, 2013 (relying on Virginia's reciprocal discipline process, which essentially short-circuits lawyer discipline if another "jurisdiction" has already punished a Virginia lawyer; "[W]e are faced with the anomaly that had the Respondent been revoked from practicing in a circuit court in the Commonwealth of Virginia, the Bar could have taken no reciprocal action -- although they could have filed separate charges of misconduct -- and the Respondent could continue to practice law and appear in other courts. However, because a federal bankruptcy court revoked the Respondent's ability to practice in that particular court, and because reciprocal discipline is imposed due to the federal court being viewed as 'another jurisdiction' within the meaning of ¶13-24, the Respondent's license to practice law in the Commonwealth of Virginia is consequentially revoked. In this case, the Bar is not required to file separate charges of misconduct -- which the Bar must prove by clear and convincing evidence -- where a federal court judge has suspended or revoked the lawyer's ability to practice in that particular district court. Rather, where reciprocal discipline is sought, the burden of proof shifts to the respondent, and the requirements of ¶13-24(B) set a high standard for any respondent to meet. It is also noteworthy that in Mullen [In re Mullen, VSB Docket No. 02-000-1877] there was a vigorous Board dissent in which the dissenting member, after pointing out many of the same concerns the members of this Board have, stated that 'I would limit the effect of "[another] jurisdiction" . . . to state bars who license attorneys for the practice of law.' Mullen, at p. 9. That no action has been taken in the ten years since Mullen was decided to address this issue in the Rules suggests that the dissenting view may remain just that -- a dissenting view. At the end

of the day, however, the Respondent failed to comply with ¶13-24(B) and timely raise any of the permitted issues in response to the Show Cause Order in this case. Following the provisions of ¶13-24(G), and upon consideration of the matters before this panel of the Board therefore, it is hereby ORDERED that the Respondent, Denny Pat Dobbins, be and hereby is disbarred and his license to practice law in the Commonwealth of Virginia is hereby REVOKED effective November 16, 2012." (emphasis added; footnotes omitted)).

- In re Stubbs, 681 S.E.2d 113, 114, 115 (Ga. June 15, 2009) ("When a Georgia lawyer is subjected to discipline in another jurisdiction, the State Bar is authorized to dispense with the traditional investigatory and fact-finding processes found in the rules of professional conduct and instead utilize an abbreviated process of reciprocal discipline in which the sole issue is whether identical discipline is warranted." (emphasis added); "[W]e hold that our rules governing reciprocal discipline apply only to disciplinary actions taken by other licensing jurisdictions, as opposed to entities, such as individual courts and intermediate state appellate courts, that require already licensed lawyers to obtain a special certificate to practice before them."; "[T]he district court's order did not trigger the truncated process of reciprocal discipline under the Rules of Professional Conduct and this Court is without authority to impose reciprocal discipline in this proceeding."; "Our holding in this matter should not be interpreted as precluding disciplinary action in this state based on Stubbs' misconduct in the federal court. A lawyer's misconduct may be both the subject of disciplinary proceedings in this Court and the subject of discipline by the federal court pursuant to its own procedures and local rules. . . . In such cases, however, the State Bar must independently investigate the facts and follow the established procedure for seeking attorney discipline and may not take advantage of the abbreviated process of reciprocal discipline under Rule 9.4.").

This approach has faced criticism.

- In re Olivarius, 90 A.3d 1113, 1115, 1116, 1117 (D.C. 2014) (revoking a lawyer's license to practice law in Washington, D.C., after New York revoked the lawyer's license; rejecting the argument that New York's characterization of the revocation altered the analysis; "Notwithstanding New York's practice of revoking admission in these circumstances (without characterizing its sanction as a suspension or disbarment), the proper inquiry for us is whether the New York sanction is the function equivalent of suspension for purposes of applying our Rule XI, § 11 (c), which establishes standards for reciprocal discipline. There is no escaping the conclusion that, as a functional matter, respondent was suspended in New York. Prior to the revocation, respondent could practice law in New York. Afterwards, she was forbidden to do so. We have previously held that similar sanctions are analogous to indefinite suspension, and we find no reason to depart from that precedent here.";

"Because her suspension in the District of Columbia has already lasted longer than the thirteen months her admission was revoked in New York, respondent argues that she has been sanctioned sufficiently. Bar Counsel contends that the appropriate reciprocal sanction is an indefinite suspension with the requirement that she demonstrate her fitness to practice law before she may be reinstated. Although we agree, as discussed above, that the revocation of appellant's admission in New York amounted to a suspension, the fitness requirement requested by Bar Counsel is not comparable to what occurred in New York." (footnote omitted); "Analogizing the discipline imposed in New York to an indefinite suspension has provided a useful tool for determining whether respondent is subject to reciprocal discipline. But an open-minded suspension is not expressly authorized by our rules. . . . Imposing such a sanction here will complicate the process of reinstatement and likely will result in treating respondent much more severely than she was treated in New York. We conclude that a fair result is to suspend respondent for eighteen months, a period that will end at roughly the time this opinion is issued.").

Due process issues can arise in other disciplinary contexts as well.

- In re State Bar, 440 S.W.3d 621, 622 (Tex. 2014) ("In this original mandamus proceeding, the Commission for Lawyer Discipline complains that a former prosecutor, facing allegations of prosecutorial misconduct, has used an expunction order to block the Commission's prosecution. A district court has refused the Commission access to expunged criminal records for use in the disciplinary proceeding against the former prosecutor and has ordered the Commission to turn over investigative records. The grievance panel in the collateral disciplinary proceeding has construed the district court's actions as a bar to the disciplinary proceeding and granted the former prosecutor's summary judgment motion. Because we conclude that the expungement order does not bar the Commission from using records from the criminal trial in the grievance proceeding, we conditionally grant the writ.").

Best Answer

The best answer to this hypothetical is **(A) YES**.

B 2/13, 4/16, 2/17

Choice of Ethics Rules for Litigators: While a Matter is Pending Before a Tribunal

Hypothetical 2

You work in your firm's Chicago office, and are licensed only in Illinois. You have been admitted pro hac vice in a Missouri court to assist a client in contentious litigation there. You are considering several tactics in discovery and at trial that the Illinois ethics rules prohibit, but that the Missouri ethics rules allow.

May you undertake the tactics without risking ethics punishment?

(A) YES

Analysis

Under ABA Model Rule 8.5(b)(1):

[i]n any exercise of the disciplinary authority of this jurisdiction, the rules of professional conduct to be applied shall be as follows . . . for conduct in connection with a matter pending before a tribunal, the rules of the jurisdiction in which the tribunal sits, unless the rules of the tribunal provide otherwise.

ABA Model Rule 8.5(b)(1) (emphasis added).

Thus, at its core, ABA Model Rule 8.5(b)(1) essentially indicates that litigators follow the ethics rules of the court in which they are litigating. This makes great sense, because it assures a "level playing field" for all of the litigants and their lawyers.

Significantly, the rule applies the tribunal's jurisdiction's ethics rules only to lawyers involved in "pending" litigation. Thus, some other jurisdiction's ethics rules might apply to litigators' conduct until the moment the litigation begins.

In addition to this important element, the provision raises several other important questions.

First, what is a "tribunal"? The ABA Model Rules define that term.

'Tribunal' denotes a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity. A legislative body, administrative agency or other body acts in an adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party's interests in a particular matter.

ABA Model Rule 1.0(m). Although the definition provides some guidance, it is not precise enough to answer all the questions.

New York state's variation on this ABA Model Rule deliberately uses the word "court" rather than "tribunal," and that term has generated the type of discussion that could also arise under the ABA Model Rule version.

- New York Rule 8.5(b) ("In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows . . . [f]or conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise").
- New York State LEO 1027 (10/16/14) ("If a lawyer is licensed only in New York, then the New York Rules of Professional Conduct apply to the lawyer's conduct in non-court matters (meaning all matters not in connection with proceedings pending before a court in which a lawyer has been admitted). If a lawyer is licensed in New York and other jurisdictions, then the lawyer's conduct in non-court matters will be governed by the rules of the jurisdiction where the lawyer principally practices unless the predominant effect of the lawyer's conduct clearly will be felt in another jurisdiction where the lawyer is also licensed to practice. Whether a federal agency's rules of ethics pre-empt the New York Rules in particular cases depends on questions of law beyond our jurisdiction."; "Rule 8.5(b)(2) governs 'any other conduct,' a phrase that encompasses all of a lawyer's conduct not in connection with a proceeding in a court before which the lawyer has been admitted to practice. Thus, non-court law practice encompasses many types of conduct, including: adversarial matters (i.e., matters with an opposing party) that are pending before (i) a state or federal agency, (ii) an arbitrator not annexed to a court, or (iii) some other adjudicative body that is not a 'court' -- see Rule 1.0(w) (defining 'Tribunal'); non-adversarial matters before a government agency, such as prosecuting patents in the USPTO, filing papers with the SEC, and requesting private letter rulings from the IRS; transactional matters,

such as mergers and acquisitions, contract negotiations, and formation of partnerships; and counseling-only matters, such as tax advice, estate planning advice, advice on corporate by-laws, and other counseling matters involving neither a government agency or an opposing party." (emphasis added)).

Second, ABA Model Rule 8.5(b)(1)'s phrase "in connection with a matter pending before a tribunal" might generate a debate about what the phrase "in connection with" means.

The comment addressing that ABA Model Rule provision uses the term "relating to" -- which is equally vague.

Paragraph (b)(1) provides that as to a lawyer's conduct relating to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits unless the rules of the tribunal, including its choice of law rule, provide otherwise.

ABA Model Rule 8.5 cmt. [4] (emphasis added).

Despite some of this possible ambiguity, this rule's basic theme makes sense -- because it assures that lawyers on both sides of pending litigation will be playing by the same set of rules.

Only a few bars have addressed this provision. In 2008, the Pennsylvania Bar explained that a Pennsylvania lawyer handling a matter in Florida after being admitted pro hac in a Florida court would probably be governed by Florida ethics rules in his interaction with a witness who has expressed an interest in hiring the lawyer to handle an unrelated matter. The Pennsylvania Bar acknowledged that Florida's ethics rules apply to a lawyer litigating before a Florida court, and then used a more standard choice of law analysis to reach the same conclusion about a new representation arising from the Florida case.

- Philadelphia LEO 2008-3 (4/2008) (analyzing a Pennsylvania lawyer's inquiry to the Pennsylvania Bar about whether the lawyer could represent a client in Florida; noting that the Pennsylvania lawyer had been admitted pro hac vice in a Florida case; explaining that the lawyer's investigator in that case had interviewed someone who ultimately expressed an interest in hiring the lawyer to handle an unrelated matter; concluding that the Pennsylvania lawyer should seek advice of the Florida Bar, but that under Pennsylvania ethics rules the Pennsylvania Bar would apply the Florida tribunal's ethics rules for any conduct related to the case already pending before the Florida court; reaching essentially the same conclusion about the case that the lawyer expected to file for the new client; "[A]lthough it is not presently pending before a Florida tribunal, it is likely to be once filed. Given the provisions of Rule 8.5(b)(2), the Committee believes again that Florida Rules will apply. If there is a solicitation issue, that would be in Florida given that the inquirer's agent, the investigator, made the original contact with the wife and husband. As regards where the 'predominant effect of the conduct' will be felt, the Committee believes that the predominant effect of any solicitation issues (if in fact any at all are present), which result in an out of state lawyer handling matters which could easily be handled by in state counsel, in this case to have occurred in Florida."; "Thus based upon the Committee's analysis under Rule 8.5 of the facts as given, the inquirer must seek guidance regarding Florida ethics rules, including the choice of law precepts of that state's ethics decisions, and that such guidance must be provided by competent Florida counsel. If, under the Florida choice of law analysis, that counsel advises in an opinion that Florida ethics rules mandate that the inquirer's conduct is to be evaluated under Pennsylvania law, then this inquiry would be appropriate for substantive guidance by this Committee.").

Third, lawyers should remember that there might be a mismatch between the tribunal's ethics rules and the host jurisdiction's ethics rules.

Most federal courts adopt their host state's jurisdiction's ethics rules.

- Audio MPEG, Inc. v. Dell, Inc., Civ. A. No. 2:15cv73, 2016 U.S. Dist. LEXIS 147920, st *6 (E.D. Va. Oct. 25, 2016) ("This Court has adopted the Virginia Rules of Professional Conduct.")

But some federal courts do not apply their host state's ethics rules.

- Hydrogen Master Rights, Ltd., v. Weston, Civ. No. 16-474-RGA, 2016 U.S. Dist. LEXIS 177230, at *9 (D. Del. Dec. 22, 2016) ("Attorney conduct before this court is governed by the Model Rules of Professional Conduct of the American Bar Association ('Model Rules' or 'MRCP'").

Federal court practitioners should check the pertinent courts local rules.

And there might be some disagreement between the federal court and the host jurisdiction about some lawyer conduct.

For instance, there has been a long-standing issue in criminal cases such about prosecutors subpoenaing lawyers to appear before grand juries.

- United States v. Supreme Court of N.M., 824 F.3d 1263, 1267 (10th Cir. 2016) ("New Mexico Rule of Professional Conduct 16-308(E) ('Rule 16-308(E)') prohibits a prosecutor from subpoenaing a lawyer to present evidence about a past or present client in a grand-jury or other criminal proceeding unless such evidence is 'essential' and 'there is no other feasible alternative to obtain the information.' In a lawsuit brought against the New Mexico Supreme Court, and the state's Disciplinary Board and Office of Disciplinary Counsel ('Defendants'), the United States claims that the enforcement of this rule against federal prosecutors licensed in New Mexico violates the Supremacy Clause of the U.S. Constitution. U.S. Const., art. VI, § 2. The district court concluded, on cross-motions for summary judgment, that Rule 16-308(E) is preempted with respect to federal prosecutors practicing before grand juries, but is not preempted outside of the grand-jury context. We agree. Exercising jurisdiction under 28 U.S.C. § 1291, we **affirm.**").

Another debate involves federal prosecutors' ability to communicate ex parte with represented criminal targets. This issue has caused considerable (and heated) debate between prosecutors and bar officials -- on all levels of government from the federal to the local.

In a 2009 article, Professors Hazard and Irwin explained the history of federal prosecutors' interpretation of the "authorized by law" exception.

The Rule's application in the context of investigatory activities has a long and contentious history, which gained prominence after the Second Circuit's decision in United States v. Hammad [846 F.2d 854 (2d Cir.), modified, 858 F.2d 834 (2d Cir. 1988)]. There, the Second Circuit held that Rule 4.2 prohibited communications with suspects of a criminal investigation prior to the initiation of formal proceedings. The original opinion was withdrawn and replaced by an opinion conceding that "legitimate investigation techniques" can sometimes be "authorized by

law," but the Department of Justice (DOJ) nevertheless reacted with alarm. The DOJ worried that the decision would deprive government lawyers of important tools of investigation and would chill their investigative efforts. Accordingly, in June 1989, Attorney General Richard Thornburgh issued a department memorandum stating that the law enforcement activities of DOJ lawyers were "authorized" by federal law and therefore exempt from application of states' no-contact rules. The defense bar and the ABA countered that the memorandum's approach was impermissible in so far as it attempted to exempt DOJ lawyers from the ethical obligations generally applicable to lawyers.

Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Toward a Revised 4.2 No-Contact Rule, 60 Hastings L.J. 797, 807 (Mar. 2009) (footnotes omitted).

Professors Hazard and Irvin explained that the DOJ issued a new no-contact rule in 1994, which was rejected by a 1998 congressional action called the "McDade Amendment" -- which provided that all government lawyers were subject to state ethics rules. However, the congressional action did not end the debate.

In any event, the McDade Amendment does not address the key issue of what communications are "authorized by law" and therefore permissible. Relying on this ambiguity, the DOJ continues to assert the validity of its policy that certain lawful investigatory techniques are authorized by law and permissible under the Rule. Courts, meanwhile, continue to disagree on whether Rule 4.2 applies to federal prosecutors engaged in investigations that are otherwise entirely lawful.

Attempting to reconcile the positions of the DOJ, Congress, and the defense bar, the ABA's Ethics Committee and the Ethics 2000 Commission recommended substantial amendments to Model Rule 4.2 in 2002. Among other changes, the amendments would have authorized (i) communications with represented persons by federal agents acting under direction of government lawyers prior to the initiation of formal law enforcement proceedings, and (ii) communications with a represented organization's agent or employee who initiated a communication relating to a law

enforcement investigation. The ABA declined to adopt the proposed amendments.

Id. at 810 (footnotes omitted).

Professors Hazard and Irwin explained that most authority permits government lawyers to engage in ex parte communications with a represented person before "the initiation of formal law enforcement proceedings" (id. at 810), but also hold that a defendant "cannot waive the no-contact rule's protections under any circumstances."

Id. at 813.

The ABA Model Rules devote part of a comment to this issue.

Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings. When communicating with the accused in a criminal matter, a governmental lawyer must comply with this Rule in addition to honoring the constitutional rights of the accused. The fact that a communication does not violate a state or federal constitutional right is insufficient to establish that the communication is permissible under this Rule.

ABA Model Rule 4.2 cmt. [5].

In ABA LEO 396 (7/28/95), the ABA explained that a number of court decisions held the ex parte prohibition "wholly inapplicable to all pre-indictment non-custodial contacts, . . . or holding it inapplicable to some such contacts by informants or undercover agents." Although the ABA clearly did not endorse that line of cases, it indicated that "so long as this body of precedent remains good law, it is appropriate to treat contacts that are recognized as proper by such decisional authority as being 'authorized by law' within the meaning of that exception stated in the Rule. " Id.

The Restatement devotes a lengthy comment to this issue, after noting that:

[c]ontroversy has surrounded the question whether prosecutors are fully subject to the rule of this Section with respect to contact, prior to indictment, with represented non-clients accused or suspected of crime.

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

After articulating the arguments against and in favor of applying the ex parte contact rule in this setting, the Restatement also notes that:

[i]t has been extensively debated whether, beyond such constitutional protections, the anti-contact rule independently imposes all constraints of this Section on prosecutors, or, to the contrary, whether the authorized-by-law exception . . . entirely removes such limitations.

Id.

The Restatement concludes that "[p]rosecutor contact in compliance with law is within the authorized-by-law exception." Id.

D.C. also has its own comment on this issue, although it provides little guidance.

This Rule is not intended to enlarge or restrict the law enforcement activities of the United States or the District of Columbia which are authorized and permissible under the Constitution and law of the United States or the District of Columbia. The "authorized by law" proviso to Rule 4.2(a) is intended to permit government conduct that is valid under this law. The proviso is not intended to freeze any particular substantive law, but is meant to accommodate substantive law as it may develop over time.

D.C. Rule 4.2 cmt. [12].

As expected, the case law and legal ethics opinions tend to give the government leeway. These courts and bars generally either point to the "authorized by law" exception, conclude that the prosecutor's communications do not relate to the same "matter" on which the witness has a lawyer (if the lawyer is handling a civil matter), or rely on some other argument in refusing to condemn such ex parte contacts.

So lawyers litigating in federal criminal cases (less so in federal civil cases) must check not only the applicable rules, but also the jurisdiction's approach and interpretation of those rules.

Best Answer

The best answer to this hypothetical is **(A) YES**.

B 2/13, 4/16, 2/17

Choice of Ethics Rules for Litigators: Before a Matter is Pending Before a Tribunal

Hypothetical 3

You work in your firm's Chicago office, and you are preparing for litigation that your client will soon be filing in Colorado. You and your Colorado local counsel have been interviewing witnesses and conducting some surveillance of witnesses in several western states. Your local counsel has become somewhat nervous about the ethical propriety of some of the activity that you are undertaking in those other states. Colorado allows such surveillance activities, but some of the states where the surveillance is taking place do not permit it. You just spoke with one of your partners who is handling a case in Missouri, and you wonder if the same principle will apply to your pre-trial work preparing for the Colorado litigation.

Will the Colorado ethics rules apply to your pre-trial activities in connection with the case your client will soon be filing in Colorado?

(B) NO

Analysis

Under ABA Model Rule 8.5(b)(1), the ethics rules of the "jurisdiction in which the tribunal sits" apply to a lawyer's conduct "in connection with a matter pending before a tribunal."

Until the matter is actually pending before a tribunal, the lawyer's conduct is instead governed by ABA Model Rule 8.5(b)(2). A comment makes this plain.

As to all other conduct, including conduct in anticipation of a proceeding not yet pending before a tribunal, paragraph (b)(2) provides that a lawyer shall be subject to the rules of the jurisdiction in which the lawyer's conduct occurred, or, if the predominant effect of the conduct is in another jurisdiction, the rules of that jurisdiction shall be applied to the conduct.

ABA Model Rule 8.5 cmt. [4] (emphasis added).

This is somewhat counterintuitive. Lawyers preparing to file litigation (or preparing to defend litigation they anticipate) often face ethics questions as they deal with potential witnesses, draft pleadings they expect to file, engage in negotiations with (or even saber-rattling toward) expected litigation adversaries. Such lawyers probably would assume that the ethics rules governing such pre-litigation activity are the same that apply once the litigation begins.

However, the ABA Model Rule approach does not apply the tribunal's ethics rules until the litigation commences.

In the case of conduct in anticipation of a proceeding that is likely to be before a tribunal, the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction.

ABA Model Rule 8.5 cmt. [4] (emphasis added). The effect of these provisions is to apply the general rule to pre-litigation conduct -- applying the ethics rules of the state where the lawyer undertakes the conduct, or the ethics rules of some other jurisdiction "if the predominant effect of the conduct" is in that other jurisdiction. ABA Model Rule 8.5 cmt. [4].

Litigators preparing for litigation must therefore check the ethics rules of (1) the state where they are undertaking the pre-litigation activities; (2) any other state where the "predominate effect" of their activities might occur; and (3) their home state (which can also punish misconduct occurring in other states).

Best Answer

The best answer to this hypothetical is **(A) NO**.

Choice of Ethics Rules for Non-Litigation Conduct: Where the Conduct Occurs

Hypothetical 4

You primarily handle real estate transactional work, which frequently takes you to states where you are not licensed. You recently have been accompanying your client to another state (where you are not licensed) to negotiate a transaction with a large landowner. You have discovered that the landowner has for several years not properly paid real estate taxes. Your home state prohibits threatening criminal charges to gain an advantage in a civil matter, but the state in which you will be negotiating permits such a tactic.

May you mention the possibility of criminal tax charges in an effort to "close the deal" with the landowner?

(A) YES (PROBABLY)

Analysis

Under ABA Model Rule 8.5(b), conduct not "in connection with a matter pending before a tribunal" will be governed by either (1) the ethics rules of the jurisdiction "in which the lawyer's conduct occurred"; or (2) another jurisdiction -- if "the predominant effect of the conduct" is in that other jurisdiction. In other words, transactional lawyers' conduct will be governed by the ethics rules of the jurisdiction where the lawyer acts or (if different) the jurisdiction where the act has the "predominant effect."

It might be difficult to determine where a lawyer's conduct "occurred." For instance, Comment [4] of ABA Model Rule 5.5 (which deals with multijurisdictional practice) indicates that a lawyer might be "present" in a state "even if the lawyer is not physically present there." Thus, it seems clear that a lawyer's conduct can "occur" in a state where the lawyer has not been physically present -- but has sent e-mails, made telephone contacts, etc.

If a lawyer travels to a state where she is not licensed and meets with an adversary in the adversary's office, that state's ethics rules presumably will apply to a threat the lawyer makes in that office to report the adversary's activity to the criminal authorities. However, the analysis becomes much more difficult if a lawyer returns to her home state and sends an e-mail containing such a threat. The lawyer types the threat in her home state, but the threat obviously has a greater impact where it is received and read by the adversary. The analysis would become even more complex if the lawyer did not send the e-mail directly to the adversary, but to the adversary's lawyer practicing in a third state.

It can be even more difficult to determine where the "predominant effect" of the lawyer's actions might be felt. A comment admits as much.

When a lawyer's conduct involves significant contacts with more than one jurisdiction, it may not be clear whether the predominant effect of the lawyer's conduct will occur in a jurisdiction other than the one in which the conduct occurred. So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule. With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonable specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.

ABA Model Rule 8.5 cmt. [5] (emphasis added).

The comment does not provide much help. And the possibility that clients and lawyers might contractually agree on the applicable jurisdiction does not provide much certainty either, because the comment merely indicates that such agreements "may be considered."

Fortunately, the ABA Model Rules' general statements about trying to reconcile all of these issues¹ decreases the chance for a lawyer to be punished in such a complicated setting -- and there seems to be little if any case law or disciplinary precedent in which lawyers have faced punishment in such a context.

¹ In four separate places, ABA Model Rule 8.5 and its comments assure lawyers that they will not be punished if they act reasonably in applying what seems to be the most appropriate jurisdiction's ethics rules.

A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

ABA Model Rule 8.5(b)(2) (emphasis added).

Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

ABA Model Rule 8.5 cmt. [3] (emphasis added).

So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule. With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonable specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.

ABA Model Rule 8.5 cmt. [5].

If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

ABA Model Rule 8.5 cmt. [6] (emphasis added).

Best Answer

The best answer to this hypothetical is **(A) PROBABLY YES.**

B 2/13, 4/16

Choice of Ethics Rules for Non-Litigation Conduct: Where the "Predominant" Effect of the Conduct Occurs

Hypothetical 5

You primarily handle real estate transactional work. Although you are licensed only in North Carolina, you are currently working on one deal for a client based in Philadelphia -- which involves negotiations in, and the possible purchase of land in, New Hampshire. While meeting with your client representatives in their Philadelphia office preparing for the New Hampshire negotiations, you receive a proposed contract from the landowner. One of your colleagues suggests that you check for any "metadata" that the landowner might have failed to scrub from the document. Pennsylvania ethics rules permit such "mining" of metadata, while your home state's ethics rules and New Hampshire's ethics rules prohibit such conduct.

May you check the landowner's proposed contract for metadata?

(B) NO (PROBABLY)

Analysis

Under ABA Model Rule 8.5(b), conduct not "in connection with a matter pending before a tribunal" will be governed by either (1) the ethics rules of the jurisdiction "in which the lawyer's conduct occurred"; or (2) another jurisdiction -- if "the predominant effect of the conduct" is in that other jurisdiction.

Not surprisingly, it can be very difficult to determine where the "predominant effect" of such conduct occurs.

The only hint provided by the ABA Model Rules is remarkably unhelpful. In describing where the "predominant effect" of a litigator's pre-filing conduct might occur, Comment [4] of ABA Model Rule 8.5 explains that "the predominant effect of such conduct could be where the conduct occurred, where the tribunal sits or in another jurisdiction."

It might be equally difficult to determine where a transactional lawyer's conduct has its "predominant effect" -- where the action occurs, where the transaction will be consummated, where one of the transactional parties is based, where the lawyer's home office is located, etc.

Only a few states have ventured into this difficult analysis. Some opinions provide essentially no guidance.

- North Carolina LEO 2007-4 (4/25/08) (addressing the following question about discipline for conduct in North Carolina; "If the attorney's office is in North Carolina but the attorney is also licensed to practice in or for clients in another state, and something is expressly allowed ethically by the other state but prohibited in North Carolina, is the attorney subject to discipline in North Carolina?"; answering as follows: "Yes, if the conduct is unethical under the North Carolina Rules of Professional Conduct and the lawyer's conduct occurred in North Carolina or the predominant effect of the conduct is in North Carolina. Rule 8.5(b).").

At least one state has given some hint.

- In re Disciplinary Action against Overboe, 745 N.W.2d 852 (Minn. 2008) (finding that North Dakota ethics rules govern a lawyer's misconduct in connection with a trust account in a North Dakota Bank, because the predominant effect of the misconduct occurred in North Dakota; applying Minnesota law to the lawyer's misconduct in connection with the Minnesota Bar's investigation of the lawyer).

Although analyzing these issues can seem extremely complicated, transactional lawyers are much less likely than litigators to engage in the type of practice that might draw an ethics charge, and there appears to be little case law or other analyses indicating any upswing in disciplinary actions against non-litigation conduct outside a lawyer's home state.

More complicated issues involving lawyers' non-litigation activities can arise in states adopting a different approach. For instance, New York still follows the 1993 ABA Model Rules choice of law approach.

- New York Rule 8.5(b) ("In any exercise of the disciplinary authority of this state, the rules of professional conduct to be applied shall be as follows: . . . For conduct in connection with a proceeding in a court before which a lawyer has been admitted to practice (either generally or for purposes of that proceeding), the rules to be applied shall be the rules of the jurisdiction in which the court sits, unless the rules of the court provide otherwise; and . . . [f]or any other conduct . . . [i]f the lawyer is licensed to practice only in this state, the rules to be applied shall be the rules of this state, and . . . [i]f the lawyer is licensed to practice in this state and another jurisdiction, the rules to be applied shall be the rules of the admitting jurisdiction in which the lawyer principally practices; provided, however, that if particular conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice, the rules of that jurisdiction shall be applied to that conduct." (emphasis added)).

In 2014, the New York Bar addressed what the term "principally practices" means.

- New York State LEO 1027 (10/16/14) ("If a lawyer is licensed only in New York, then the New York Rules of Professional Conduct apply to the lawyer's conduct in non-court matters (meaning all matters not in connection with proceedings pending before a court in which a lawyer has been admitted). If a lawyer is licensed in New York and other jurisdictions, then the lawyer's conduct in non-court matters will be governed by the rules of the jurisdiction where the lawyer principally practices unless the predominant effect of the lawyer's conduct clearly will be felt in another jurisdiction where the lawyer is also licensed to practice. Whether a federal agency's rules of ethics pre-empt the New York Rules in particular cases depends on questions of law beyond our jurisdiction."; "Rule 8.5(b)(2) governs 'any other conduct,' a phrase that encompasses all of a lawyer's conduct not in connection with a proceeding in a court before which the lawyer has been admitted to practice. Thus, non-court law practice encompasses many types of conduct, including: adversarial matters (i.e., matters with an opposing party) that are pending before (i) a state or federal agency, (ii) an arbitrator not annexed to a court, or (iii) some other adjudicative body that is not a 'court' -- see Rule 1.0(w) (defining 'Tribunal'); non-adversarial matters before a government agency, such as prosecuting patents in the USPTO, filing papers with the SEC, and requesting private letter rulings from the IRS; transactional matters, such as mergers and acquisitions, contract negotiations, and formation of partnerships; and counseling-only matters, such as tax advice, estate planning advice, advice on corporate by-laws, and other counseling matters involving neither a government agency or an opposing party."; "Here, the Dual-Licensed Lawyer maintains offices in both New York and D.C., but we do not know the jurisdiction in which he 'principally practices.' Neither the text of Rule 8.5 nor its Comments provide any guidelines for determining where a

lawyer principally practices. We believe that when a lawyer is licensed in more than one jurisdiction, various factors are relevant to determining the one in which the lawyer principally practices, including: (a) the number of calendar days the lawyer spends working in each jurisdiction; (b) the number of hours the lawyer bills in each jurisdiction; (c) the location of the clients the lawyer serves; (d) the activities the lawyer performs in each jurisdiction (e.g., legal work for clients vs. administrative work for the law firm); and (e) special circumstances (such as a recent move, an extended illness, or a natural disaster)." (emphasis added); "Unfortunately, no simple formula is available to determine where the 'predominant effect' will occur. . . . Factors to consider include such things as: (a) where the clients reside, and where they work; (b) where any payments will be deposited; (c) where any contract will be performed; and (d) where any new or expanded business will operate. For example, if a lawyer principally practices in D.C. but is advising a New York client on how to draft (or interpret, or enforce) a commercial contract among several parties, and all of those parties live and work in New York, and the contract will be performed solely in New York, then advising the client would ordinarily be conduct that 'clearly has its predominant effect' in New York. But if some of the parties to the contract work outside New York, or if part of the contract will be performed outside New York, then the lawyer's advice may not 'clearly' have its predominant effect in New York -- in which case the ethics rules applicable under Rule 8.5(b)(2)(ii) will be the rules of the jurisdiction in which the lawyer principally practices." (emphasis added)).

Unfortunately, the unique nature of New York's choice of law standard decreases the usefulness of that state's choice of law opinions -- which are the most thorough of any state's.

- New York State LEO 1054 (4/10/15) (Virginia ethics rules governing a New York-licensed lawyer's "virtual" practice in Virginia; "If a New York lawyer has been admitted to practice (generally, or for purposes of a proceeding) before the Virginia courts, when the lawyer represents a client in a proceeding in a court in Virginia, the rules to be applied ordinarily will be the rules of Virginia, unless the court rules provide otherwise. If the lawyer does not represent a client in a proceeding in a court, the rules to be applied will be those of the 'admitting jurisdiction' in which the inquirer principally practices, unless the conduct clearly has its predominant effect in another jurisdiction in which the lawyer is licensed to practice. If the lawyer is permitted to practice in Virginia without being formally admitted there, the lawyer should be deemed to be 'licensed to practice' in Virginia for purposes of Rule 8.5(b)(2). However, if the lawyer solicits business in New York, the lawyer's conduct in connection with such solicitation would have its principal effect in New York and the disciplinary authorities would apply the rules of New York."; "Assuming the inquirer is soliciting business in New York, another question arises: must he

have a local office in New York? This question is governed by law and not by the Rules. In N.Y. State 1025 (2014), we noted that Judiciary Law §470 has been interpreted by New York courts to require that attorneys have an office in New York if they practice, but do not live, in New York. See Lichtenstein, 251 A.D.2d 64; Haas, 237 A.D.2d 729; Matter of Larsen, 182 A.D.2d 149 (2d Dept 1992). We also determined that Rule 7.1(h), which requires that every lawyer advertisement include the 'principal law office address and telephone number of the lawyer or law firm whose services are being offered,' does not provide an independent basis for requiring a physical office in New York."; "In N.Y. State 1025, we noted the case of Schoenefeld v. New York, 748 F.3d 464 (2d Cir. 2014). There, the Northern District of New York found unconstitutional the interpretation of § 470 requiring a physical office. On appeal, the Second Circuit referred a certified question to the New York Court of Appeals, asking about the minimum requirements necessary to satisfy the requirement for a local office for the transaction of law business. Although the Court of Appeals had not responded when we published N.Y. State 1025, on March 31, 2015, it issued its response, confirming that the statute requires a physical office for the conduct of business. The Second Circuit must now decide whether enforcement of §470 as so interpreted would be constitutional."; "Assuming the inquirer is soliciting business from New York residents, the inquirer must comply with various duties imposed by the Rules. See N.Y. State 1025 (2014) (listing duties under various Rules, and noting that there is no 'virtual law office exception' to any of the Rules).").

- New York LEO 889 (11/15/11) ("Forming the District of Columbia partnership does not clearly have its predominant effect in New York just because the partnership may undertake some New York litigation work. Under the circumstances presented, neither does it clearly have a predominant effect in New York for the partnership to distribute its fees according to the general terms of the partnership agreement, even though this may include occasional fees from New York litigation. . . . Accordingly, while the proposed distribution of legal fees may have to comply with relevant ethical rules in the District of Columbia, it is not subject to New York Rule 5.4. A contrary result, applying the New York Rules more broadly than their intended reach, could result in undue burdens for lawyers admitted in New York, but legitimately practicing in the District of Columbia through a partnership that includes a non-lawyer, who wish to participate in the occasional New York litigation matter.").

Best Answer

The best answer to this hypothetical is **(B) PROBABLY NO.**

Avoiding Punishment on the Basis of Inconsistent Ethics Rules

Hypothetical 6

Today you are facing one of the toughest ethics choices any lawyer can confront. During a meeting at your client's headquarters (in a state where you are not licensed), your client's president told you that she intends to arrange for her employees to hack into a competitor's computer system to steal the competitor's business plan. You warn your client that the conduct would violate federal and state criminal laws, but she insists that her company's survival depends on acquiring the information.

Your home state's ethics rules require you to report your client's criminal intent to the authorities, but the ethics rules of the state where you learned of the plan (and where your client is headquartered) prohibits disclosure of such a confidence.

Must you disclose your client's criminal intent if she refuses to abandon it?

(B) NO (PROBABLY)

Analysis

The ABA Model Rule's choice of ethics rule provision contains some good news for lawyers who act in several states, and might wonder which state's ethics rules should guide the lawyer's conduct.

In four separate places, ABA Model Rule 8.5 and its comments assure lawyers that they will not be punished if they act reasonably in applying what seems to be the most appropriate jurisdiction's ethics rules.

A lawyer shall not be subject to discipline if the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect of the lawyer's conduct will occur.

ABA Model Rule 8.5(b)(2) (emphasis added).

Paragraph (b) seeks to resolve such potential conflicts. Its premise is that minimizing conflicts between rules, as well as uncertainty about which rules are applicable, is in the best

interest of both clients and the profession (as well as the bodies having authority to regulate the profession). Accordingly, it takes the approach of (i) providing that any particular conduct of a lawyer shall be subject to only one set of rules of professional conduct, (ii) making the determination of which set of rules applies to particular conduct as straightforward as possible, consistent with recognition of appropriate regulatory interests of relevant jurisdictions, and (iii) providing protection from discipline for lawyers who act reasonably in the face of uncertainty.

ABA Model Rule 8.5 cmt. [3] (emphasis added).

So long as the lawyer's conduct conforms to the rules of a jurisdiction in which the lawyer reasonably believes the predominant effect will occur, the lawyer shall not be subject to discipline under this Rule. With respect to conflicts of interest, in determining a lawyer's reasonable belief under paragraph (b)(2), a written agreement between the lawyer and client that reasonable specifies a particular jurisdiction as within the scope of that paragraph may be considered if the agreement was obtained with the client's informed consent confirmed in the agreement.

ABA Model Rule 8.5 cmt. [5] (emphasis added).

If two admitting jurisdictions were to proceed against a lawyer for the same conduct, they should, applying this rule, identify the same governing ethics rules. They should take all appropriate steps to see that they do apply the same rule to the same conduct, and in all events should avoid proceeding against a lawyer on the basis of two inconsistent rules.

ABA Model Rule 8.5 cmt. [6] (emphasis added).

Thus, the ABA Model Rules try to avoid the type of "whipsawing" that worries some lawyers -- in which they might be punished for engaging in conduct that one arguably governing jurisdiction's ethics rules prohibit but another arguably governing jurisdiction's rules require.

Best Answer

The best answer to this hypothetical is **(B) PROBABLY NO.**

B 2/13, 4/16

Misprision of Felonies

Hypothetical 7

For years, you have been among your small town's most-respected lawyers. You have always tried to act with the utmost integrity and honesty, but an incident that occurred this evening has triggered an agonizing moral dilemma for you.

A despicable man was killed in a knife fight near your house. You initially thought that your young son had killed the man, defending himself and your daughter from his attack. When the sheriff arrived on the scene, he immediately told you that the attacker fell on his own knife, but you know that didn't happen. When the sheriff kept repeating what you know is a lie, you push back -- telling the sheriff that perpetuating such a falsehood would contradict the way you've raised your children.

The increasingly frustrated sheriff finally admitted that one of your neighbors killed the man to save your children's lives. However, the sheriff bluntly told you that he intends to protect the heroic neighbor from the inevitable publicity, and that he will report that the attacker fell on his own knife. You therefore know that the sheriff will knowingly lie on any official reports that he must file, and deliberately mislead the public.

Your young daughter overheard your tense confrontation with the sheriff. She knew that your heroic neighbor killed the attacker -- thus saving her and her brother. You lamely turned to your daughter and asked if she "can possibly understand" that the despicable man who attacked her and her brother died when he fell on his own knife. She assured you that she understands -- but you know that she realized that story is false.

Does your failure to report the sheriff's inevitable official and public falsehoods violate the ethics rules?

MAYBE

Analysis

Like all citizens, lawyers may have the responsibility to report a non-client's intentional sufficiently egregious wrongdoing, even if it does not occur before a tribunal (where the ethics rules create special disclosure duties).

Background of this Scenario

This scenario comes from the famous novel To Kill a Mockingbird.

Atticus Finch had insulted Bob Ewell in defending innocent Tom Robinson -- who had been wrongly accused of raping Ewell's daughter. Robinson had predictably been found guilty, and later shot while trying to escape from jail.

The vengeful Bob Ewell later assaulted Atticus' daughter Scout and son Jem while they walked home one evening. They were saved by their mysterious neighbor Boo Radley -- who killed Ewell and carried the seriously wounded Jem back to Atticus' house.

When questioned by Sheriff "Heck" Tate shortly after the incident, Atticus' young daughter Scout describes what she remembered of the attack. She initially thought that perhaps her brother Jem had pulled Ewell off her. However, Scout then confirms that their reclusive neighbor Boo Radley had saved her and Jem.

'Anyway, Jem hollered and I didn't hear him any more an' the next thing -- Mr. Ewell was tryin' to squeeze me to death, I reckon. . . then somebody yanked Mr. Ewell down. Jem must have got up, I guess. That's all I know. . . ."

'And then?' Mr. Tate was looking at me sharply.

'Somebody was staggerin' around and pantin' and -- coughing fit to die. I thought it was Jem at first, but it didn't sound like him, so I went lookin' for Jem on the ground. I thought Atticus had come to help us and had got wore out -- '

'Who was it?'

'Why there he is, Mr. Tate, he can tell you his name.'

As I said it, I half pointed to the man in the corner [Boo Radley], but brought my arm down quickly lest Atticus reprimand me for pointing. It was impolite to point.

Harper Lee, To Kill a Mockingbird, 270 (Warner Books 1982) (1960) (emphases added).

Atticus apparently had not listened carefully enough to his daughter Scout's story, because he initially assumed that his son Jem had killed Ewell.

Atticus starts thinking out loud about what comes next.

'Well, Heck,' [Tate, the sheriff] Atticus was saying, 'I guess the thing to do -- good Lord, I'm losing my memory . . .'
Atticus pushed up his glasses and pressed his fingers to his eyes. 'Jem's not quite thirteen . . . no he's already thirteen -- I can't remember. Anyway, it'll come before county court --'

'What will, Mr. Finch?' Mr. Tate uncrossed his legs and leaned forward.

'Of course it was clear-cut self defense, but I'll have to go to the office and hunt up --'

'Mr. Finch, do you think Jem killed Bob Ewell? Do you think that?'

'You heard what Scout said, there's no doubt about it. She said Jem got up and yanked him off her -- he probably got hold of Ewell's knife somehow in the dark . . . we'll find out tomorrow.'

Id. at 272 (emphasis added). Interestingly, Scout had clearly explained that she initially thought Jem might have pulled Ewell off her, but ultimately realized that Boo Radley had done so.

Sheriff Tate tells Atticus that Jem had not killed Ewell -- but Atticus quickly pushes back.

Atticus was silent for a moment. He looked at Mr. Tate as if he appreciated what he said. But Atticus shook his head.

'Heck, it's mighty kind of you and I know you're doing it from that good heart of yours, but don't start anything like that.'

. . .

'I'm sorry if I spoke sharply, Heck,' Atticus said simply, 'but nobody's hushing this us. I don't live that way.'

'Nobody's gonna hush anything up, Mr. Finch.'

Id. at 272-73 (emphases added).

Atticus reiterates his intent to help build his son Jem's defense.

'Thank you from the bottom of my heart,' but I don't want my boy starting out with something like this over his head. Best way to clear the air is to have it all out in the open. Let the county come and bring sandwiches. I don't want him growing up with a whisper about him, I don't want anybody saying, "Jem Finch . . . his daddy paid a mint to get him out of that." Sooner we get this over with the better.'

Id. at 273 (emphases added).

Sheriff Tate interrupts Atticus.

'Mr. Finch,' Mr. Tate said stolidly, 'Bob Ewell fell on his knife. He killed himself.'

Id. Atticus reiterates his refusal to allow Sheriff Tate to concoct a false story.

'Heck,' Atticus's back was turned. 'If this thing's hushed up it'll be a simple denial to Jem of the way I've tried to raise him. Sometimes I think I'm a total failure as a parent, but I'm all they've got. Before Jem looks at anyone else he looks at me, and I've tried to live so I can look squarely back at him . . . if I connived at something like this, frankly I couldn't meet his eye, and the day I can't do that I'll know I've lost him. I don't want to lose him and Scout, because they're all I've got.'

Id. (emphases added). Atticus refuses to acquiesce in Sheriff Tate's false story.

When Sheriff Tate again tells Atticus that Ewell fell on his knife, Atticus is even more determined.

Atticus wheeled around. His hands dug into his pockets, 'Heck, can't you even try to see it my way? You've got children of your own, but I'm older than you. When mine are grown I'll be an old man if I'm still around, but right now I'm -- if they don't trust me they won't trust anybody. Jem and Scout know what happened. If they hear of me saying downtown something different happened -- Heck, I won't

have them any more. I can't live one way in town and another way in my home.'

Id. at 274 (emphasis added). Ironically, Atticus' daughter Scout knew what happened -- Boo Radley had saved her and her brother Jem.

Sheriff Tate tries to demonstrate how Ewell might have fallen on his knife. When Atticus says "I won't have it," Sheriff says, "God damn it, I'm not thinking of Jem!" Id. At that point, Sheriff Tate kicks the floorboard so hard that it wakes up the neighbors.

Sheriff Tate then quietly tries to make Atticus understand what he is saying.

When Mr. Tate spoke again his voice was barely audible. 'Mr. Finch, I hate to fight you when you're like this. You've been under a strain tonight no man should ever have to go through. Why you ain't in the bed from it I don't know, but I do know that for once you haven't been able to put two and two together, and we've got to settle this tonight because tomorrow'll be too late. Bob Ewell's got a kitchen knife in his craw.'

Mr. Tate added that Atticus wasn't going to stand there and maintain that any boy Jem's size with a busted arm had fight enough left in him to tackle and kill a grown man in the pitch dark.

Id. at 275 (emphasis added).

As the truth begins to dawn on Atticus, he asks where Sheriff Tate obtained the switchblade he had just used to demonstrate how Ewell might have fallen on his own knife. Sheriff Tate answers coolly that he "took it off a drunk man downtown tonight."

Id. Sheriff Tate had already told Atticus that Ewell was killed by a kitchen knife -- and surmises that Ewell "probably found that kitchen knife in the dump somewhere." Id.

Although the book does not explicitly state as much, it must have finally occurred to Atticus that Boo Radley had used a kitchen knife to kill Ewell, who himself had been armed with the switchblade.

Atticus finally realizes that Sheriff Tate intends to lie about Ewell's death to avoid thrusting Boo Radley into the inevitable limelight.

Atticus made his way to the swing and sat down. His hands dangled limply between his knees. He was looking at the floor. He had moved with the same slowness that night in front of the jail, when I thought it took him forever to fold his newspaper and toss it in his chair.

Id. at 275.

Sheriff Tate repeats his intention to falsely report that Ewell fell on his own knife.

'It ain't your decision, Mr. Finch, it's all mine. It's my decision and my responsibility. For once, if you don't see it my way, there's not much you can do about it. If you wanta try, I'll call you a liar to your face.'

Id. at 275 (emphasis added).

Just before leaving, Sheriff Tate explains the reason for his deliberate public deception.

'I never heard tell that it's against the law for a citizen to do his utmost to prevent a crime from being committed, which is exactly what he [Boo Radley] did, but maybe you'll say it's my duty to tell the town all about it and not hush it up. Know what'd happen then? All the ladies in Maycomb includin' my wife'd be knocking on his door bringing angel food cakes. To my way of thinkin', Mr. Finch, taking the one man who's done you and this town a great service an' draggin' him with his shy ways into the limelight -- to me, that's a sin. It's a sin and I'm not about to have it on my head. If it was any other man it's be different. But not this man, Mr. Finch.

Id. at 276 (emphases added).

Atticus had to decide what to do. He had earlier refused to acquiesce in Sheriff Tate's false story when he thought it was intended to save his own son from prosecution.

However, Atticus eventually agrees to acquiesce in Sheriff Tate's false story -- to save the reclusive Boo Radley from a grateful town's attention.

Atticus then enlists his daughter Scout's cooperation in confirming Sheriff Tate's knowingly false story of what had happened.

Atticus sat looking at the floor for a long time. Finally he raised his head. 'Scout,' he said, 'Mr. Ewell fell on his knife. Can you possibly understand?'

Id. (emphasis added). Scout quickly cooperates.

Obviously sensing her father's implicit request that she also agree to Sheriff Tate's false narrative about the attack, Scout offers the central line echoing the novel's title.

Atticus looked like he needed cheering up. I ran to him and hugged him and kissed him with all my might. 'Yes sir, I understand,' I reassured him. 'Mr. Tate was right.'

Atticus disengaged himself and looked at me. 'What do you mean?'

'Well, it'd be sort of like shootin' a mockingbird, wouldn't it?'

Id. (emphases added)

Earlier in the novel, Atticus had explained that no one should ever kill a mockingbird.

When he gave us our air-rifles Atticus wouldn't teach us to shoot. Uncle Jack instructed us in the rudiments thereof; he said Atticus wasn't interested in guns. Atticus said to Jem one day, 'I'd rather you shot at tin cans in the back yard, but I know you'll go after birds. Shoot all the bluejays you want, if you can hit 'em, but remember it's a sin to kill a mockingbird.'

That was the only time I ever heard Atticus say it was a sin to do something, and I asked Miss Maudie about it.

'Your father's right,' she said. 'Mockingbirds don't do one thing but make music for us to enjoy. They don't eat up people's gardens, don't nest in corncribs, they don't do one thing but sing their hearts out for us. That's why it's a sin to kill a mockingbird.'

Id. at 90 (emphases added).

Boo Radley is like the mockingbird -- completely harmless to others, and deserving of protection. Although some have also analogized the falsely accused and wrongly murdered Tom Robinson as another example of a mockingbird, there is no direct reference to analogizing him to a mockingbird¹ -- as there is with Boo Radley.

Atticus seems relieved that Scout will go along with Sheriff Tate's false story, and then thanks Boo Radley.

Atticus put his face in my hair and rubbed. When he got up and walked across the porch into the shadows, his youthful step had returned. Before he went inside the house, he stopped in front of Boo Radley. 'Thank you for my children, Arthur,' he said.

Id. at 276 (emphasis added).

Interestingly, Atticus Finch remains by far America's favorite fictional lawyer. In 2010, the ABA Journal ran a story on the 25 greatest American fictional lawyers -- but put Atticus Finch in a class by himself.

- The 25 Greatest Fictional Lawyers (Who Are Not Atticus Finch), ABA Journal, Aug. 2010 ("Hollywood loves lawyers. Television loves lawyers. And literature? Well, from Shakespeare to Dickens to Grisham, there is no

¹ Harper Lee, To Kill a Mockingbird, 240-41 (Warner Books 1982) (1960) ("Mr. B. B. Underwood was at his most bitter, and he couldn't have cared less who canceled advertising and subscriptions. (But Maycomb didn't play that way: Mr. Underwood could holler till he sweated and write whatever he wanted to, he'd still get his advertising and subscriptions. If he wanted to make a fool of himself in his paper that was his business.) Mr. Underwood didn't talk about miscarriages of justice, he was writing so children could understand. Mr. Underwood simply figured it was a sin to kill cripples, be they standing, sitting, or escaping. He likened Tom's death to the senseless slaughter of songbirds by hunters and children, and Maycomb thought he was trying to write an editorial poetical enough to be reprinted in The Montgomery Advertiser.").

shortage of fictional lawyers for us to admire, disdain or, above all, simply remember. We wondered how the fictional lawyers of film, television and literature would stack up against each other. Of course, in some cases they are the same. The Perry Mason of Erle Stanley Gardner's popular novels is lost in Raymond Burr's television portrayal. John Mortimer's Horace Rumpole will forever have the face of actor Leo McKern. But whatever the medium, it is the character we come to love or loathe -- whether as a lawyer, a detective, a hero or a human being. In our survey of this literature of lawyers, however, we feel obliged to recognize a great divide -- ante-Atticus and post-Atticus. From Dick the Butcher's famous pronouncement to Jack Cade in Shakespeare's Henry VI, Part 2 -- 'First thing we do, let's kill all the lawyers.' -- through Dickens' Mr. Tulkinghorn and Galsworthy's Soames Forsyte, literature (with a few exceptions) treated lawyers poorly. That all changed with Harper Lee's unflappable, unforgettable Atticus Finch. With Atticus, the lawyer -- once the criminal mouthpiece, the country club charlatan, the ambulance-chasing buffoon -- was now an instrument of truth, an advocate of justice, the epitome of reason. Finch was comfortable in his own skin and reasonably respectful of the frailties in others. To lawyers, he was the lawyer they wanted to be. To non-lawyers, he fostered the desire to become one. So for this, and other reasons, we've withdrawn Atticus Finch from this particular literary comparison, allowing our panel of experts to rank their favorite fictional lawyers without the heavy lifting required by a demigod. So here are our panel's choices for the 25 greatest fictional lawyers (none of whom are named you-know-who)." (emphases added)).

Many lawyers decided to join the profession after reading or seeing To Kill a Mockingbird.

- Carmen Germaine, Harper Lee's Atticus Finch Leaves Enduring Mark On The Law, Law360, Feb. 19, 2016 ("Novelist Harper Lee, who died Friday at the age of 89, has left abiding inspiration for generations of lawyers in the figure of her beloved character Atticus Finch, who attorneys say continues to impart lessons about the importance of respect, empathy and courage."; "Lee's 1960 novel 'To Kill A Mockingbird' continues to resonate in the minds of readers who encounter Scout, her brother Jem, their father Atticus and the story of his dedication to the case of Tom Robinson, a black man accused of raping a white woman in Jim Crow-era Alabama. In the 65 years since the novel's publication, attorneys have continued to find themselves moved by Lee's tale to not only become better lawyers, but also better people."; "As Atticus himself says in the novel, 'Real courage . . . is when you know you're licked before you begin but you begin anyway and you see it through no matter what. You rarely win, but sometimes you do.'"; "The impact of Nelle Harper Lee's first novel on the legal profession is difficult to overstate, as Atticus' courageous stand before a judicial system stacked against his client inspired generations of youngsters to enter the legal profession."; "When I

start a class, or talk to people in an audience about it, I say how many of you decided to go to law school based on 'To Kill A Mockingbird,' and at least half the people raise their hands,' said Marc R. Kadish, a pro bono adviser at Mayer Brown LLP who teaches at Northwestern University."; "Dave Carothers, a partner at Carothers DiSante & Freudenberger LLP, said he knew he wanted be a lawyer at the age of 8 after reading the novel."; "I thought Atticus Finch was so honorable and brave to defend Tom Robinson even though there was no way he would win -- and he did it because it was the right thing to do,' Carothers said in an email. 'I knew that was what I was going to do.'"; "Joe R. Whatley Jr. of Whatley Kallas LLP, who grew up down the street from Lee and frequently saw the novelist when she dropped by to watch Alabama football games on the Whatleys' television, said 'To Kill A Mockingbird' was a 'major reason' he became a lawyer."; "The kind of respect, the kind of things that the Atticus Finch character did and tried to do, is something that makes us all want to be lawyers and live up to Atticus Finch as a lawyer,' Whatley said."; "To many readers, Atticus presents a rare image of a lawyer as a champion for the disadvantaged and dispossessed, showing how an attorney can be a hero to those in need." (emphasis added)).

- G. Michael Pace, Jr., Strengthening the Rule of Law, 35 VBA News J. 4, 5-6 (June/July 2008) ("I was recently invited to speak to the 8th grade students at St. Stephens and St. Agnes School in Alexandria by Mrs. Sherley Keith, their literature teacher. Ms. Keith is a student of To Kill a Mockingbird, and she had heard from my good friend and former VBA president, Ted Ellett, about my interest in the book and its characters. She had her students read the book and study it intensely for two months. Mrs. Keith asked me to share my thoughts with the students about To Kill a Mockingbird and what Atticus Finch means to me. When I arrived, the auditorium was filled with students, teachers and administrators. We talked about Nelle Harper Lee, the characters, the times in which they lived, life lessons and the role of lawyers in society. We also talked about the Rule of Law as the only real protection we have to ensure all people are treated equally. These young women and men were clearly engaged and understood that Atticus Finch believed in the Rule of Law. That is why he represented Tom Robinson Atticus had hoped the men of the jury would consider the evidence in the case and acquit Tom Robinson of a crime he did not commit. But he also knew the darkness in some people's hearts that allowed their prejudices to ignore right and do wrong. Atticus believed in the Rule of Law, and he knew that if they found Tom Robinson guilty, a higher court would overrule their decision on appeal. Unfortunately, Tom Robinson lost hope. But Atticus didn't, because he knew the greatness of our country is as a nation of laws, not of men, and that the law would ultimately protect Tom Robinson. For that, Atticus received the ultimate compliment, 'Miss Jean Louise, stand up. Your father's passin'.' That is what being a citizen lawyer is all about. Making sure there is justice for all, under fair laws, equally applied to everyone regardless of

race, sex, nationality or economic place. A nation of laws, not of men. Amen.").

After author Harper Lee's death on February 19, 2016, her book triggered a renewed outpouring of praise for her book's main characters.

- Anna Russell, WSJ Book Club: To Kill a Mockingbird: Why 'Mockingbird' Still Resonates, Wall St. J., June 12, 2015 ("The first time James McBride, author of the best-selling books 'The Good Lord Bird' and 'The Color of Water,' read 'To Kill a Mockingbird' by Harper Lee, he was sitting in a closet. 'There was so much activity in the house,' he said. 'It was a book that was passed between my brothers and sisters, and I just got ahold of it and buried myself in it.'"; "Perhaps no American classic this year has generated as much discussion as the Pulitzer-Prize winner first published in 1960. The discovery of a quasi-sequel, 'Go Set A Watchman,' to be published in July, has prompted a return for many to the fictional town of Maycomb, Alabama. Mr. McBride calls the book 'from the top of the gene pool.' 'In terms of craft, I don't think there's a better novel,' he said. 'It's simply a great story.'"; "Graceful and unhurried, 'To Kill a Mockingbird' begins in the 1930s on a deceptively simple note -- with a broken arm. The narrator, a young girl named Scout, recalls, 'When he was nearly thirteen, my brother Jem got his arm badly broken at the elbow.' From there, the story of the highly public trial of an African-American man accused of raping a white woman unfolds, with Scout's father, defense attorney Atticus Finch, at the center. In sleepy Maycomb, where 'fine folks' are those who 'did the best they could with the sense they had,' the events capture everyone's attention -- and force racial tensions to the surface."; "Atticus Finch is almost the archetype of a wonderful protagonist. He's just an extraordinary character. He's the kind of American that we'd all like to be and to meet." (emphasis added).

Misprision of Felony

Failure to report another person's felony itself can constitute a crime, called "misprision of felony."

The United States Code still contains a provision making such silence a crime.

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

18 USCS § 4 Misprision of Felony (LexisNexis 2014).

A 2003 Alabama Law Review article described the history and current status of the federal misprision statute.

- Christopher Mark Curenton, The Past, Present, and Future of 18 U.S.C. § 4: An Exploration of the Federal Misprision of Felony Statute, 55 Ala. L. Rev. 183, 184, 185, 186 (Fall 2003) ("Today, the law generally places no affirmative duty on citizens to report criminal activity. However, this has not always been the case. Historically, English citizens were expected to fully and actively participate in law enforcement. As the policing function became more of a state responsibility, the expected level of private citizen participation correspondingly decreased. Despite the diminished expectation for citizen involvement, the onus on citizens to act in response to criminality still exists in some limited circumstances. The federal misprision of felony statute is one remnant of this responsibility." (footnotes omitted) (emphasis added); "The offense of failure to report a felony was eventually branded as 'misprision of felony' in 1557. However, there were so few prosecutions for misprision of felony after that point that 'the continued existence of misprision as a crime in England was eventually questioned by both judges and commentators.' It fell into so much disuse that in 1866 it was claimed that the crime had disappeared from England altogether. The commentators were apparently in error, as several prosecutions for misprision of felony did take place in the twentieth century in England." (footnotes omitted); "Despite questions about the continued existence of misprision of felony in England, there is no refuting its existence in the United States. Since 1790, the United States has recognized some form of misprision of felony as an offense." (emphasis added); "[U]nlike its English counterpart, the phrasing 'conceals and does not as soon as possible make known' has been uniformly construed to require both active concealment and a failure to disclose. Thus, the elements of American misprision of felony are that: '(1) the principal committed and completed the felony alleged; (2) the defendant had knowledge of the fact; (3) the defendant failed to notify the authorities; and (4) the defendant took affirmative steps to conceal the crime of the principal." (emphasis added); "In order for a conviction to be sustained, there must be a concealment -- not merely an omission of failure to report criminal activity. Concealment under the statute comes in two varieties: Physical acts of concealment and verbal acts of concealment." (footnote omitted); "Verbal concealment is harder to prove. Mere silence is insufficient to support a conviction for misprision." (emphasis added); "Thus, the modern misprision of felony cases differ from their historical counterparts. The historical versions started with the assumption that an ordinary citizen had a duty to control crime, and they questioned whether the citizen failed in that duty. The modern cases assume the duty rests with law enforcement, and they question whether the citizen interfered with that duty.").

Thus, the law now conditions criminal liability for misprision of felony on some "affirmative steps to conceal the crime of the principal."

The United States Supreme Court mentioned the crime in its 1972 decision requiring a reporter to testify before a grand jury.

- Branzburg v. Hayes, 408 U.S. 665, 695, 695-96, 697 (1972) (holding that a newspaper staff reporter would have to appear before a grand jury; rejecting the reporter's argument that he was shielded by Kentucky's reporters' privilege statute; "Accepting the fact, however, that an undetermined number of informants not themselves implicated in crime will nevertheless, for whatever reason, refuse to talk to newsmen if they fear identification by a reporter in an official investigation, we cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future."; "We note first that the privilege claimed is that of the reporter, not the informant, and that if the authorities independently identify the informant, neither his own reluctance to testify nor the objection of the newsman would shield him from grand jury inquiry, whatever the impact on the flow of news or on his future usefulness as a secret source of information. More important, it is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy. Historically, the common law recognized a duty to raise the 'hue and cry' and report felonies to the authorities. Misprision of a felony – that is, the concealment of a felony 'which a man knows, but never assented to . . . [so as to become] either principal or accessory,' 4 W. Blackstone, Commentaries *121, was often said to be a common-law crime. The first Congress passed a statute, 1 Stat. 113, § 6, as amended, 35 Stat. 1114, § 146, 62 Stat. 684, which is still in effect, defining a federal crime of misprision: 'Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be [guilty of misprision].' 18 U.S.C. § 4." (emphasis added; footnotes omitted); "It is apparent from this statute, as well as from our history and that of England, that concealment of crime and agreements to do so are not looked upon with favor. Such conduct deserves no encomium, and we decline now to afford it First Amendment protection by denigrating the duty of a citizen, whether reporter or informer, to respond to grand jury subpoena and answer relevant questions put to him." (emphasis added)).

Lawyers occasionally face punishment under the federal misprision statute.

- Sue Reisinger, South Carolina State Ex-General Counsel Pleads Guilty; Knew About Kickbacks, Corporate Counsel, May 15, 2014 ("South Carolina State University's former general counsel and chief of staff Edwin Givens has pleaded guilty to a felony after being involved in a kickback scheme with university officials. In a statement released to the local press Tuesday after his plea hearing, Givens said, 'This has been a long ordeal for me and my family. I regret being a part of some phone conversations entailing improper activities, but it is important to stress that I never profited in any way for these illegal activities. Not one single dime.' He declined further comment. The federal criminal charge was brought under an obscure 'misprision of felony' statute that involves knowing about a crime, failing to report it and taking steps to cover it up. Misprision of felony, under 18 U.S.C. § 4, carries a maximum of three years in prison and a maximum fine of \$250,000. The crime rarely has been prosecuted on the federal level, and most states have abolished it. Only South Carolina has prosecuted the crime on a state level, according to an online legal dictionary." (emphasis added)).
- Sheri Qualters, Lawyer Gets Home Confinement For Failing To Report Boss's Mortgage Fraud, Nat'l L. J., Jan. 29, 2013 ("A federal judge has sentenced a lawyer who used to practice in Massachusetts to eight months of home confinement for not reporting a mortgage fraud scheme at his former firm."; "On January 28, Chief Judge Patti Saris of the District of Massachusetts sentenced Sean Robbins, 39, who now lives in New York, to that period of home confinement as part of three years of probation. Saris also ordered Robbins to pay \$300,000 in restitution."; "Last September, Robbins pleaded guilty to 24 counts of misprision of felony -- the failure to report knowledge of a felony to authorities."; "Robbins knew about and concealed mortgage fraud cooked up by his former employer, Marc Foley, who had a law firm in Needham, Massachusetts."; "Also in September, a jury convicted Foley of 33 counts of wire fraud and five counts of money laundering. According to the evidence, Foley defrauded six mortgage lenders who provided a collective \$4.9 million in real estate loans for condominium units in a building in Dorchester, Massachusetts, in December 2006 and January 2007."; "In December 2012, Judge Richard Stearns of the District of Massachusetts sentenced Foley to 72 months in prison and three years of supervised release. He also issued a special assessment of \$3,800 and ordered Foley to pay nearly \$2.2 million restitution. Foley's appeal is pending."; "Robbins' criminal actions took place in December 2006 and January 2007, while he was an associate at Foley's firm."; "Robbins knew Foley fraudulently led lenders to believe the firm collected \$449,000 in down payments and other expenses from buyers who bought condominiums. He conducted some of the closings, hid the crimes and failed to report Foley's firm." (emphasis added)).
- Bailey Somers, Scruggs' Ex-Partner Wants \$15M Fee Case Reopened, Law360, Apr. 25, 2008 ("Though Mississippi attorney Richard 'Dickie'

Scruggs has already pled guilty to attempting to bribe a judge, his legal troubles are far from over, now that his former law partner has asked a court to reopen a \$15 million fee dispute between the two attorneys."; "Last week, Roberts Wilson asked a Mississippi county court to reopen a case involving \$15 million in legal fees that he and Scruggs earned in the asbestos litigation that made them famous. Wilson claims that the case was tainted, as evidenced by the recent suspension of Hinds County Court Judge Bobby DeLaughter, who eventually awarded the \$15 million to Scruggs."; "DeLaughter has been suspended from the bench and is under investigation by the United States Department of Justice. Wilson has alleged that Scruggs paid a bribe to DeLaughter to rule in his favor, an allegation that has been corroborated by two of Scruggs' former attorneys, who have admitted to aiding Scruggs in the scheme."; "In exchange for a favorable ruling in the fee dispute, Scruggs allegedly promised DeLaughter a federal judgeship. Senator Trent Lott (R-Mississippi), Scruggs' brother-in-law, allegedly recommended DeLaughter for the judgeship, though he was never appointed."; "In asking the court to reopen the fee dispute, Wilson claims that Scruggs' scheme tainted the entire court proceeding. He has asked the court to strike all pleadings after January 2006. He has also asked the court to award him \$15 million in damages."; "Scruggs pled guilty in mid-March to a charge of conspiracy to bribe another judge, Judge Henry Lackey, just weeks before his trial was to start."; "Scruggs made a name for himself -- and millions of dollars -- through lawsuits against tobacco and insurance companies. He was also involved in insurance company suits in the wake of Hurricane Katrina."; "Scruggs' co-defendant and law partner, Sydney Backstrom, pled guilty to conspiracy. Backstrom's plea agreement calls for the government to recommend a sentence not to exceed half of the sentence imposed on Scruggs. If the court doesn't accept the agreement, he can withdraw his plea."; "Scruggs' son, Zachary, pled guilty to misprision of a felony -- having known about a felony but failing to report it. He faces at maximum a three-year prison term, a \$250,000 fine and a one-year supervised release, the plea agreement states. Prosecutors are recommending probation for the younger Scruggs." (emphasis added); "The trio and two others were charged with offering Mississippi state Judge Henry Lackey at least \$40,000 in exchange for a favorable ruling in a \$26.5 million fee dispute in the Hurricane Katrina insurance litigation." (emphasis added); "The indictment alleges that Scruggs purportedly gave attorney Timothy Balducci the go-ahead in March 2007 to proceed with the bribery scheme. Scruggs attempted to cover his tracks by creating false documents indicating that Balducci was performing jury selection work for a different case, the indictment alleges."; "After the initial payout offer, Judge Lackey reported the bribery attempt to the Federal Bureau of Investigation, which launched a sting operation to catch the co-conspirators. Judge Lackey played along with the bribery scheme and wore a wire to aid investigators.").

- State ex rel. Okla. Bar Ass'n v. Golden, 201 P.3d 862, 863, 864 (Okla. 2008) (disbarring a lawyer who was convicted of misprision of a felony; "The federal misprision of a felony statute provides: 'Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.'"; explaining that Golden [lawyer] "actively participated in health care fraud cover-up. According to the plea agreement, Golden knew that Floyd W. Seibert, Golden's client and a codefendant in the underlying criminal case, engaged in a fraudulent scheme to transfer money from his employees' benefit trust (pension fund) to Seibert's companies, some of which provide Medicare services."; "Golden actively participated in Seibert's [defendant's former client] scheme by concealing Seibert's fraudulent transactions when he wrote letters to Seibert addressed to his alias and when he prepared documents memorializing the bonds and transfers. The sentencing judge characterized Golden's participation in the fraudulent scheme in this way: 'It means that I am assessing conduct that assists in covering up the fraudulent conduct and that assists in creating vehicles that allow the fraudulent conduct to proceed and particularly creating vehicles that allow Mr. Seibert to do things that place people that have trusted him in peril.'"; "By pleading guilty to misprision of a felony, Golden has admitted his participation in the fraud was more than passive. He has admitted his affirmative acts to conceal the fraudulent scheme. Golden's admissions state that he knew about the pension fund transfers, that he knew the transfers were used to defraud the government, and that he concealed the transfers by writing letters addressed to Seibert's alias and by preparing paperwork memorializing the transfers." (emphasis added)).

Although the federal misprision statute may not technically be a dead letter, prosecutors rarely rely on it. Some states have likewise largely abandoned the misprision concept, although many if not most states' laws still contain misprision provisions.

Absent the prerequisites for a misprision of felony charge, lawyers generally have no duty to report non-clients' crimes or frauds.

- Utah LEO 03-02 (4/23/03) (assessing the following facts: "An attorney ('Attorney') represents tort plaintiffs. A health-care provider ('Provider') regularly treats patients with injuries arising from motor vehicle accidents, including some of Attorney's clients. Attorney expects to encounter Provider repeatedly as she maintains her practice in this area."; "A client ('Client')

engages Attorney to represent him in connection with injuries suffered in an auto accident. In the course of the representation, Client complains about Provider's bills, adamant that they were for services never rendered. Attorney reasonably believes Client's claims."; "In reviewing Client's case with Provider in preparation for trial or settlement discussions, Attorney questions the bills. Provider readily admits that the bills include amounts for work not actually performed."; finding that the lawyer could not disclose the client's past misconduct; "In the case here, the statements made by Provider to Attorney are confidential information as to Client and are protected by Rule1.6. Absent Client's consent, these communications may not be revealed. Because the information obtained does not pertain to Client's future commission of a criminal or fraudulent act, to Client's engaging in past criminal conduct in which Attorney was complicit, or to Attorney's establishing a claim or defense in a controversy with Client, there is no basis under Rule1.6 for Attorney to breach the confidentiality of Client, absent Client's informed consent." (emphasis added); "The fact that the information obtained by Attorney may reveal past criminal conduct by a third party, or even possibly of an ongoing criminal fraud scheme in which the client is not participating, is immaterial. The lawyer is bound to the obligation of confidentiality under Rule1.6 and may not reveal the information she has received in the course of representing Client to anyone, including insurance carriers or law enforcement authorities, without Client's consent." (emphasis added); "Of course, Client may choose to authorize Attorney, after consultation, to reveal what she had learned in the course of the representation. In that case, Attorney could reveal the information to third parties to the extent Client's waiver would allow. Client can control the breadth of the waiver, limiting it to time, persons or incident, for example. Further, nothing prohibits Attorney from asking Client for permission to disclose Provider's conduct to authorities, so long as there is proper consultation about the ramifications of the disclosure."; "The foregoing analysis does not prohibit an attorney who has gained experience about human behavior or human nature in the course of her practice from using the general knowledge and information for the benefit of other clients at a later time. Thus, although Attorney could not specifically advise future clients about the exact information she has learned about this particular Provider, the lawyer may warn all clients who are patients of health-care providers to review their bills carefully and to be vigilant in assuring that their health-care providers submit proper bills.").

Application of the Misprision Concept to "To Kill a Mockingbird"

In the incident in which Atticus Finch finds himself, there are two possible crimes.

First, Boo Radley killed Bob Ewell. The killing was not in self-defense, but obviously was intended to save Scout and Jem.

Second, Sheriff Tate intends to knowingly lie about Ewell's killing. Some, and perhaps all, states require law enforcement officials to file accurate crime reports. For instance, a California statute indicates that a peace officer filing a knowingly false crime report faces up to three years in prison.

Every peace officer who files any report with the agency which employs him or her regarding the commission of any crime or any investigation of any crime, if he or she knowingly and intentionally makes any statement regarding any material matter in the report which the officer knows to be false, whether or not the statement is certified or otherwise expressly reported as true, is guilty of filing a false report punishable by imprisonment in the county jail for up to one year, or in the state prison for one, two, or three years. This section shall not apply to the contents of any statement that the peace officer attributes in the report to any other person.

California Penal Code § 118.1 (2014).

Numerous articles describe police officers facing punishment for filing false reports.

- Gregg MacDonald, Fairfax Police Officer Charged With Filing False Report, Fairfax Times, July 19, 2013 ("A Fairfax County police officer who initially asked for the public's assistance in locating a car that he said hit him, causing him to crash into a utility pole before leaving the scene of the accident, has now been accused of fabricating the incident.").
- Leslie Parrilla, Corona: Officer convicted of filing false police report, The Press-Enterprise (Riverside, California), Aug. 3, 2012 ("A Corona police officer was accused of lying in court to cover up a drugs-for-sex exchange sting operation he and another officer were running on Craigslist against department orders, court documents state.").
- Gabriella Deluca, Former Newport News Police Officer Pleads Guilty To Filing A False Police Report, WTKR NewsChannel 3 (Hampton Roads Virginia), Nov. 7, 2013 ("A record-setting Newport News police officer pleaded guilty to filing a false police report.").
- Brian Day, Ex-Baldwin Park cop charged with filing false report on drug arrest, San Gabriel Valley Tribune, Feb. 20, 2014 ("Prosecutors Thursday

filed a felony charge against a former Baldwin Park police officer accused of filing a false police report related to a drug arrest last year. Matthew DeHoog, 29, pleaded not guilty to a count of filing a false report in Los Angeles Superior Court, Los Angeles County District Attorney's officials said in a written statement. Judge Renee Korn ordered him released on his own recognizance pending his next court appearance. 'DeHoog wrote a false police report about a July 31, 2013 incident where a man was arrested for investigation of possession of methamphetamine,' according to the district attorney's office statement. The criminal complaint filed against DeHoog alleges that, while working as a police officer, he filed a report regarding the commission and investigation of a crime, 'and knowingly and intentionally included a statement and statements regarding a material matter which the defendant knew to be false.'").

It is unclear whether Boo Radley's killing of Bob Ewell would amount to a felony, and whether Sheriff Tate's knowingly false statements or reports would be criminal under Alabama law (and if so, whether they would amount to a felony).

To the extent that any misprision charge against Atticus Finch would require that he "took affirmative steps to conceal the crime of the principal,"² it would seem that he took such an affirmative step by encouraging his daughter Scout to acquiesce in Sheriff Tate's false story -- even though both Scout and Atticus knew it to be untrue. Atticus Finch must have known that Sheriff Tate would knowingly lie to the public and in any official reports, and that Scout would also provide a false narrative about the attack if she was ever interviewed officially or unofficially.

Best Answer

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

B 4/15, 8/15, 2/17

² Christopher Mark Curenton, *The Past, Present, and Future of 18 U.S.C. § 4: An Exploration of the Federal Misprision of Felony Statute*, 55 Ala. L. Rev. 183, 185 (Fall 2003) (quoting *United States v. Goldberg*, 862 F.2d 101, 104 (6th Cir. 1988)).

Non-Clients' Child Abuse

Hypothetical 8

Your state's governor just appointed you to a Commission charged with reviewing their state laws, and possibly suggesting new ones. The Commission's very first meeting generated a vigorous debate.

Should lawyers be required by law to report child abuse by a non-client?

MAYBE

Analysis

Given the emotionally charged context, it should come as no surprise that intense controversy surrounds lawyers' possible duty to report child abuse -- especially if that would disclose client confidences.

Lawyers Acting in Other Roles

It seems clear that lawyers acting as guardians ad litem face a different standard from lawyers acting purely as advocates.

- Virginia LEO 1844 (12/18/08) (explaining that a lawyer acting as a guardian ad litem for a 7-year-old girl (who has asked the lawyer not to disclose her father's abusive behavior -- which the father denies) must balance the duty of confidentiality with his role as a GAL under Virginia Supreme Court Rule 8:6; noting that "lawyers serving as GALs are subject to the Rules of Professional Conduct as they would be in any other case, except when the special duties of a GAL conflict with such rules," and must generally protect the child's confidences; concluding that the GAL's compliance with Supreme Court Rule 8:6 and the Standards governing GALs "may justify the disclosure of confidential information pursuant to Rule 1.6(b)(1)" -- which allows the disclosure of confidences "to comply with law or a court order"; providing an example: "[T]he GAL may learn from the child that a custodian is taking illegal drugs and may use that information to request that the court order drug testing of the custodian" -- because "the GAL not only serves as the child's advocate but is obliged to identify and recommend the outcome that best serves the child's interests," the GAL "needs to investigate information obtained from and about the child in order to ascertain certain facts," after

which the GAL can assess "the risk of probable harm to the child" and then determine "whether the GAL has a duty, as an advocate for the child's best interests, to disclose to the court or appropriate authority information necessary to safeguard the best interests of the child"; "[D]isclosure would be permitted in light of the Committee's analysis earlier in this opinion of Rule 1.6(b)(1), where a lawyer can reveal protected information to the extent reasonably necessary to comply with law.").

- In re Christina W., 639 S.E.2d 770, 778 (W. Va. 2006) (analyzing the competing interests facing a guardian ad litem for a young girl who confided in the guardian that her mother's boyfriend had abused her; "[W]e now hold that while a guardian ad litem owes a duty of confidentiality to the child[ren] he or she represents in child abuse and neglect proceedings, this duty is not absolute. Where honoring the duty of confidentiality would result in the child[ren]'s exposure to a high risk of probable harm, the guardian ad litem must make a disclosure to the presiding court in order to safeguard the best interests of the child[ren].").

Lawyers representing minors must comply with their ethics rules' confidentiality provisions, but may interact with guardians ad litem -- whose disclosure duties normally differ from lawyers' duties.

- Los Angeles LEO 504 (5/15/00) (holding that a lawyer representing a minor had a duty to follow the minor's instructions about keeping confidential evidence that the minor had been sexually abused; acknowledging that the lawyer could seek appointment of a guardian ad litem if the minor was not competent, and follow that guardian ad litem's instructions about such information; explaining the factual background; "The court has appointed the inquiring attorney to represent a minor child in dependency court proceedings pursuant to California Welfare and Institutions Code section 317. The minor's age is not disclosed in the inquiry. The minor does not have a guardian ad litem. During a confidential attorney-client communication, the minor client tells the attorney that the minor client is being sexually assaulted at the residence where the minor client is currently placed pursuant to court order. For reasons not disclosed in the inquiry, the minor client explicitly directs the attorney not to disclose this information to anyone. The attorney is concerned that non-disclosure is not in the best interests of the minor client. Also, the inquiring attorney is uncertain whether Section 317 of the Welfare and Institutions Code imposes a legal obligation to disclose confidential information that is inconsistent with an attorney's general ethical obligation to follow a client's explicit instruction to maintain such information in confidence." (emphases added); "[I]f the attorney reasonably believes that the minor client has made an informed decision not to disclose the client's confidential information, even though the information

is that the minor is being sexually assaulted and even though the attorney believes that the decision is not in the best interests of the minor, the attorney is not ethically permitted to disclose the information. . . . The attorney must honor an explicit instruction from a competent client to maintain the client's confidential information in confidence. If the disagreement between the attorney and client materially impairs the attorney-client relationship such that the attorney cannot competently perform his or her duties, the attorney must seek to withdraw from the matter. . . . In withdrawing, the attorney should honor the client's instruction not to disclose the fact that the minor is being sexually assaulted." (emphases added); "The Committee believes that the attorney can avoid the prospect of having to disclose the client's confidential information, which could have a devastating impact on the attorney-client relationship, especially in juvenile proceedings, by seeking the appointment of a guardian ad litem." (emphasis added); "[I]f a guardian ad litem is appointed, the attorney may ethically discuss with the guardian ad litem the fact and circumstances that the minor client has been sexually abused and look to the guardian ad litem for instruction."; "If the guardian ad litem makes an informed decision and instructs the attorney not to disclose the fact that the minor is being sexually assaulted, the attorney is ethically obligated to follow the instruction. If the guardian ad litem makes an informed decision that the attorney should disclose the fact that the minor is being sexually assaulted, the attorney may ethically disclose such information even though such disclosure may be contrary to the minor's wishes." (emphasis added); concluding as follows: "An attorney is ethically obligated to follow the instructions of a minor client to maintain in confidence a communication between the attorney and the minor in which the minor discloses that the minor has been the victim of sexual abuse, provided the attorney properly discusses the matter with the minor and the attorney reasonably believes that the minor client is competent to make an informed decision on the matter. This is true even if the attorney believes the decision is not in the minor client's best interest. If the attorney so disagrees with the minor client's decision that the attorney-client relationship is materially impaired and the attorney cannot continue to represent the minor client competently, the attorney must seek to withdraw from the engagement."; "If the attorney reasonably believes that the minor is not competent to make an informed decision on the matter, the attorney may not substitute the attorney's own decision for that of the minor client. The attorney is not ethically precluded from undertaking appropriate action to protect the minor client's interests. This may include seeking the appointment of a guardian ad litem. In seeking the appointment of a guardian ad litem, the attorney is ethically precluded from disclosing to the court the information obtained from the minor client in confidence, that the minor client instructed the attorney to maintain in confidence. If a guardian ad litem is appointed for the minor, the attorney may ethically disclose the minor's confidential information to the guardian ad litem and should follow the instructions of the guardian ad litem, even if those instructions conflict with those of the minor client.").

Lawyers acting as mediators face their own set of confidentiality dilemmas, including those involving child abuse coming to the lawyer-mediator's attention.

- Lisa Hansen, Attorneys' Duty to Report Child Abuse, 19 J. Am. Acad. Matrimonial Law. 59, 74 (2004) ("Each state has different rules regarding mediators and mandated reporting. In Missouri the mediator is required to have either a J.D. or a master's degree in a social health field, such as a social worker, in order to do domestic relations mediations. The difference in education makes a difference as to whether the mediator is a mandated reporter. If a social worker facilitates the mediation and one party makes allegations of abuse, the mediator is also a mandated reporter and must call in a hotline report. However, if an attorney mediator is in the same mediation and hears the exact same information, the attorney is under no obligation to report the allegation. If the same set of circumstances occurs across the state line in Kansas, the rules change. When a mediation is performed in that state a mediator is a mandated reported regardless of what type of education or background the mediator possesses. Whether a mediator is a mandated reporter or not is a highly contested issue. Some mediators feel very strongly that the entire process of mediation is confidential regardless of what is disclosed. Others believe that they have an ethical duty to protect children who are possibly being abused." (footnote omitted) (emphasis added)).

History and Scope of Mandatory Child Abuse Reporting Statutes

Nationally, every state requires disclosure of child abuse in specified circumstances. However, it can be very difficult to determine if such mandatory reporting requirement cover lawyers.

- Katharyn I. Christian, Putting Legal Doctrines to the Test: The Inclusion of Attorneys as Mandatory Reporters of Child Abuse, 32 J. Legal Prof. 215, 218-19, 219-210 (2008) ("By 1967, every state had adopted some form of child abuse reporting statute. Initially, the reporting statutes only mandated that physicians report child abuse; however, state legislatures quickly expanded the scope of the statutes. Reporting statutes primarily followed two models: (1) the statute listed various professionals who were mandatory reporters or (2) the statute included a catch-all provision that required 'any person,' 'all persons,' or 'any other person,' to report child abuse." (footnotes omitted); "Since the mid-1990s, some states have modified their statutes specifically to include attorneys as mandatory reporters of child abuse. Alternatively, other states include attorneys in statutes that require 'all persons' or 'everyone' to report child abuse. The later type of statute is particularly confusing, as the phrase 'all persons' or 'everyone' are

ambiguous. Since these phrases can be construed as mandating both professionals and non-professionals to report suspected child abuse, attorneys in these states are left to divine the relationship between the statutory requirements, the attorney-client privilege, and the ethics rules regarding confidentiality. To avoid criminal liability, attorneys may infer that they are mandated reporters. Further compounding this confusion, states do not always provide exceptions to the attorney-client privilege or the professional duty of confidentiality that permit an attorney to report evidence of child abuse. Accordingly, attorneys are left in the proverbial catch-22 as to whether they should (1) report potential child abuse and potentially face ethical sanctions or (2) refuse to disclose evidence of child abuse and potentially face criminal liability for breaking the law." (footnotes omitted) (emphases added)).

- Lisa Hansen, Attorneys' Duty to Report Child Abuse, 19 J. Am. Acad. Matrimonial Law. 59, 71-72, 77 (2004) ("The state statutes contain varying requirements. For example, Oregon has reporting statutes that specifically state that attorneys are mandated reporters. However, in another section of the statute attorneys are allowed to invoke the attorney-client privilege so that they do not have to report suspected child abuse. When an attorney is allowed to use the privilege it is puzzling why the legislature designates them as mandated reporters in the first place. Seventeen states currently list 'any person' as a mandated reporter. Clearly it could be argued that attorneys fall under this broad category of 'any person' and therefore would not be in violation of the attorney-client privilege if they reported suspected child abuse. Out of those seventeen states that have the 'any person' category, only eight of them allow attorneys to invoke the privilege. In two states (Mississippi and New Jersey) attorneys as mandated reporters are not addressed in any of the reporting statutes. In the remaining seven states, an attorney as a mandated reporter is explicitly denied in any of the statutes." (footnotes omitted) (emphases added); "It is obvious that no easy, clear-cut answers respond to the question of whether attorneys should be considered mandated reporters. Due to the lack of case law in this area and the ambiguity of the statutes that do address mandated reporters, it is doubtful that these questions will be answered any time soon. Strong arguments exist on both sides of the reporting issue. On the one hand, it could be said that any person, whether an attorney or not, has a moral duty to help protect those who are abused, especially children who are unable to protect themselves. On the other hand, the longstanding traditions of confidentiality, the attorney-client privilege, and the duty to protect your client's confidences argue for silence. Attorneys will need to look at each ethical dilemma they encounter individually and decide what the best solution is for that situation.").
- Ellen Marrus, Please Keep My Secret: Child Abuse Reporting Statutes, Confidentiality, and Juvenile Delinquency, 11 Geo. J. Legal Ethics 509, 514-

15, 515-16, 517, 518, 519, 520 (Spring 1998) ("Reporting statutes began appearing in various states in the early 1960s, and by 1967 every state had some type of reporting statute in place. Doctors were the primary focus of early statutes. Mandatory reporting statutes first were expanded to include other professionals who had frequent or daily contact with children, including health professionals, teachers, mental health professionals, police officers, and child care workers. As public concern regarding child abuse continued to grow, there was support for more inclusive reporting statutes and some states began to mandate not just professionals, but all individuals, to report suspected child abuse or neglect." (footnotes omitted); "Although many professionals are included as mandatory reporters, it is not clear what role attorneys play in reporting child abuse. Some state statutes specifically include attorneys in a list of mandatory reporters or specifically suspend the attorney-client privilege. These statutes appear to be clear in the expectation that an attorney has a duty to report any known child abuse." (footnotes omitted) (emphasis added); "By contrast to the mandatory reporting states, in a little less than half the states, attorneys enjoy some kind of exemption from the obligation to report child abuse. Oregon is unique in that it requires any public or private official, who has reasonable grounds to believe a child has been abused, to make a report, but the statute also specifically preserves the attorney-client privilege. Of the twenty-three states that have adopted statutes that provide that *anyone may* report child abuse, nearly half exempt attorneys in some fashion. Of sixteen states in which all individuals *must* report child abuse, twelve of them also uphold the attorney-client privilege." (footnotes omitted) (emphasis added; emphasis in italics in original); "Most state statutes, however, neither clearly mandate attorneys to report suspected child abuse under these circumstances, nor exempt such a report. Some states do not even mention attorneys at all in the reporting statute." (emphasis added); "In other states the confusion arises because all individuals are encouraged to report child abuse, but the statutes do not specifically mention the privilege between attorney and client. This type of statutory scheme places the attorney in an ethical dilemma. Although the attorney may want to insure the protection of the child, she might be uncomfortable reporting confidential information obtained from her client in the absence of any specific guidance from the legislature regarding the attorney-client privilege." (footnote omitted) (emphasis added); "This dilemma becomes more difficult in the sixteen states that include all individuals as mandatory reporters. If there is no mention of the attorney-client privilege, an attorney may be legitimately confused over her responsibility. Mandatory reporting statutes, moreover, often include a time within which the abuse must be reported." (footnotes omitted) (emphasis added)).

Not surprisingly, incidents such as Jerry Sandusky's abuse of numerous children often bring the topic back before state legislatures.

- Ben Present, Penn State Case to Test Failure-to-Report Law, Legal Intelligencer, Nov. 9, 2011 ("The prosecution trying the cases of two former high-ranking Pennsylvania State University officials implicated by the Jerry Sandusky sex abuse scandal might be facing an uphill battle on one of the charges lodged against the two administrators, some legal observers have told The Legal. Former Penn State Athletic Director Tim Curley and former Vice President for Finance and Business Gary Schultz have been charged with failure-to-report an incident of child abuse and perjury, a more serious crime. But one attorney specializing in child advocacy said the officials might have a 'credible, if not very satisfying defense' on the failure to report charges because the alleged incident occurred when a more restrictive version of the law was in place. Sandusky, a former defensive coordinator for the Penn State football team who coached for more than 30 years, faces a 40-count indictment stemming from allegations he sexually abused eight boys over the course of at least 10 years. The charges against all three men follow a 23-page grand jury report alleging Curley and Schultz heard about an incident in 2002, but did not report it to authorities. That incident will be the linchpin of the state's case against Curley and Schultz. Under the statute at issue -- 23 Pa.C.S. Section 6311 -- a mandated reporter must '[come] into contact with children' as part of his or her position. In 2002, when the alleged incident occurred, a prior version of the statute required an abused child to come directly into contact with a person 'in their professional or official capacity' in order for them to be a mandated reporter. The law widened in 2007 to include those who hear the information secondhand. 'The law then was a bit more restrictive in establishing the obligation to report, so that for the administrator that heard about the report secondhand there wasn't arguably a legalistic standard,' said Frank Cervone, executive director of the Support Center for Child Advocates. 'One has to conclude these kids were strangers to the Penn State officials, whether or not they were visiting the building with Sandusky.'").
- Amaris Elliott-Engel, Task Force Suggests Making Attorneys Mandatory Reporters, Legal Intelligencer, Nov. 28, 2012 ("Attorneys may become mandated reporters of child abuse if one of the recommendations suggested by a task force created in the wake of the Jerry Sandusky and the Archdiocese of Philadelphia priest sex-abuse scandals is passed into law."; "The task force would add attorneys onto the list of mandatory reporters who must report suspected child abuse. The proposed change does make exceptions for confidential communications to lawyers 'but only to the extent that such communications are protected under the rules of professional conduct for attorneys.'"; "The task force said in its report it was adding the 'only to the extent' provision in order to narrow the scope of privilege regarding confidential communications made to attorneys.").
- Lisa Shapson, Disclosure of Child Abuse and Attorney-Client Privilege, Legal Intelligencer, July 25, 2013 ("An important bill addressing mandatory

reporting of child abuse was just recommitted to the appropriations committee of the Pennsylvania General Assembly on June 20. HB 436 proposes to amend portions of Title 23 of the Pennsylvania Consolidated Statutes; specifically, Chapter 63: Child Protective Services, which would require attorneys to become mandatory reporters of suspected child abuse."; "Mandated reporters under the current version of §6311(b) of Title 23 are people who come into contact with children in the course of employment, occupation or practice of a profession. These individuals are required to report -- or cause a report to be made -- when they have reasonable cause to suspect, on the basis of medical, professional or other training and experience, that a child under their care, supervision, guidance or training, or of an agency, institution, organization or other entity with which they are affiliated, is a victim of child abuse. This includes suspected child abuse by an individual who is not a perpetrator. Now, you're probably wondering why this doesn't, by definition, already apply to lawyers. The answer is that the current rule specifically exempts attorneys from mandatory reporting." (emphasis added); "The basic question of the day is: Will these proposed amendments to §6311 of Title 23 cut into a client's attorney-client privilege?" We can't forget Rule 1.6 of the Pennsylvania Rules of Professional Conduct, which states that a lawyer shall not reveal information that a client has told to him or her unless the client gives informed consent to do so, or unless the lawyer has to reveal the information under Rule 3.3, regarding candor toward the tribunal. Rule 1.6 goes on to state that there are exceptions in which a lawyer may reveal information that a client has told him or her if the purpose of the disclosure is to, among other things, prevent reasonable certain death or substantial bodily harm or to prevent the client from committing a criminal act. An explanatory comment to the rule states that although the purpose of the rule is to protect the public interest by preserving confidentiality of information relating to lawyers and the representation of their clients, there are limited exceptions where an attorney may reveal information. In general, exchange of complete information between client and attorney is encouraged rather than discouraged to allow the lawyer to effectively represent his or her client." (emphasis added); "In plain English, the proposed statute change states that attorneys are mandated reporters when a client makes a disclosure to the attorney that a specific child is a victim of child abuse or when an individual, 14 years of age or older, tells the attorney that he or she has committed child abuse. However, in making the report, the attorney can deem certain aspects of the report or the entire report confidential so as to protect the privilege of the person making the disclosure to the attorney. Information that is marked confidential is only given to the individuals who are making the investigation of child abuse and cannot be used as evidence that the suspected child abuse happened. Thus, if the only evidence of the abuse is the confidential disclosure, the investigation will not necessarily produce a finding of abuse. However, if the disclosure that is deemed confidential is learned by the investigator from an independent source, then it could be included as evidence in an abuse determination."; "Making

attorneys mandatory reporters of child abuse will prohibit us from maintaining attorney-client privilege as it exists today, particularly when the topic of the privilege is child abuse, which is difficult in and of itself. While the proposed statute change appears to go out of the way to protect attorney-client privilege, it will be interesting to see, if the statutory changes pass, what internal measurements will become necessary to keep disclosures marked 'confidential' really, and truly, 'confidential.'").

- P.J. D'Annunzio, Abuse Reporting Law Raises Issues of Confidentiality, Legal Intelligencer Online, May 13, 2014 ("A new [Pennsylvania] law concerning the mandatory reporting of suspected instances of child abuse has led several attorneys to question whether the legislation threatens attorney-client privilege by requiring lawyers to report suspected abuse. The concern comes from seemingly contradictory language in the law about what certain lawyers are expected to do when they come into contact with information regarding alleged abuse. Act 32 was signed into law last month by Governor Tom Corbett. The measure, which had been sponsored by state Representative Todd Stephens, R-Montgomery, was put forth as an amendment to existing child-abuse reporting statutes. Stephens told The Legal that the impetus for the bill was the recognition that most states have reporting standards for attorneys as well as the Jerry Sandusky child sex-abuse scandal. 'In that case, outside counsel for the university was made aware of Sandusky's conduct in the shower with a young boy and was not obligated to report it,' Stephens said. The legislation explains that among members of the clergy, medical and child-care professions, attorneys 'affiliated with an agency, institution, organization or other entity, including a school or regularly established religious organization that is responsible for the care, supervision, guidance, or control of children' are required to report suspected child abuse. However, the law goes on to specify that confidential communications made to an attorney are still protected. Stephens stressed that the obligation to report suspected child abuse applies to lawyers representing institutions and organizations. He added that lawyers representing individuals would be able to maintain attorney-client privilege. Philadelphia Bar Association Chancellor William P. Fedullo, however, said the act's description of who is to report and who is covered by attorney-client privilege is not clear. 'It's ambiguous with regard to whether the attorney retains the privilege or not. The other problem is . . . it's invasive of the Supreme Court's authority,' Fedullo said, adding that the state Supreme Court is the only body that can govern attorney behavior in Pennsylvania. Fedullo also said the legislation also makes no mention of any reporting requirements imposed upon legal support staff. 'The silence to attorney staff is a concern because if you're making notes and your secretary sees them, is he or she now required to be a mandatory reporter?' Fedullo said. The legislation needs to be challenged, Fedullo added, with the most effective solution being Supreme Court intervention. Conversely, Pennsylvania Bar Association President Forest N. Myers said his organization supported the

legislation. 'I think this clarifies and expands what the prior law had indicated, and I think it was necessary that this act be passed in light of various incidents that probably prompted this getting into the legislative spotlight,' Myers said.").

Ethics Rules

There are several possible ethics rules that could apply to lawyers' knowledge of non-clients' child abuse.

First, ABA Model Rule 1.6(b)(6) permits lawyers to disclose protected client information to comply with the law:

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to comply with other law or a court order.

ABA Model Rule 1.6(b)(6). But uncertainty about the law's application to lawyers clouds any analyses under that provision.

Second, the ABA ethics rules have since 1969 contained exceptions to the confidentiality duty that allow (but do not require) lawyers to disclose protected client information in certain circumstances involving bodily injury.

The 1969 ABA Model Code limited these disclosures to client misconduct. For instance, ABA Model Code DR 4-101(C) indicated that:

[a] lawyer may reveal . . . [t]he intention of his client to commit a crime and the information necessary to prevent the crime.

ABA Model Code of Professional Responsibility, DR 4-101(C)(3) (footnote omitted).

The 1983 ABA Model Rules of Profession Conduct originally permitted disclosure of protected client information:

to prevent the client from committing a criminal act that the lawyer believe is likely to result in imminent death or substantial bodily harm.

Former ABA Model Rule 1.6(b)(1) (emphases added).

In 2002, the ABA made two important changes to this rule, which expanded both the wrongdoers whose misconduct may be reported, and the scope of wrongdoing that lawyers may disclose.

First, the rules change permits lawyers to disclose anyone's -- not just their clients' -- actions that might result in someone's serious harm.

Second, the ABA expanded the level of harm that triggers lawyers' discretion to disclose protected client information. Instead of allowing such discretion only in the case of "imminent" death or substantial bodily harm, the standard now permits such disclosure to "prevent reasonably certain" death or substantial bodily harm.

As it now reads, ABA Model Rule 1.6(b)(1) indicates that:

[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent reasonably certain death or substantial bodily harm.

ABA Model Rule 1.6(b)(1). Of course, this provision allows lawyers to disclose protected client information only "to prevent" future harm to a third person, not past harm.

This expansion would seem to clearly permit -- although not require under the ABA Model Rules -- lawyers to disclose non-clients' child abuse. Thus, in 2012, the Illinois Bar pointed to this provision explaining that lawyers may (but do not necessarily have to) disclose a non-client's child abuse.

- Illinois LEO 12-08 (3/2012) ("Child sex abuse is 'substantial bodily injury' for purposes of the Illinois Rules of Professional Conduct, so an Illinois lawyer must reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain child sex abuse. Whether an Illinois lawyer has a duty to report suspected child sex abuse under a federal statute is a question of law beyond the competence of the Committee."; presenting the factual situation: "The inquiring lawyer, admitted in Illinois, works as a civilian lawyer providing legal assistance to military personnel and their families at a federal military facility. A divorce client has disclosed to the lawyer that the client's spouse had committed various infidelities, including soliciting sex from minors. When the lawyer advised the client to report the matter to law enforcement authorities, the client expressed a strong reluctance to do so. The client also claimed to lack proof of any actual sexual assault of minors although some of the spouse's emails that the client claimed to have seen, which the lawyer has not seen, indicated that the spouse was interested in meeting children for sex."; "There is a federal statute, 42 U.S.C. § 13031, concerning child abuse reporting. Paragraph (a) of § 13031 requires a person engaged in a professional capacity on federal land or in a federal facility who 'learns of facts that give reason to suspect that a child has suffered an incident of child abuse' to report promptly to designated authorities. Whether this statute applies to the Illinois lawyer in the situation presented is a question of law beyond the competence of this Committee. However, if § 13031 applies and requires a report, then the inquiring lawyer would be permitted by Rule 1.6(b)(6) to make the disclosures required to comply with the statute." (emphasis added); "The other potentially relevant provision of Rule 1.6 is paragraph (c), which directs that a lawyer 'shall' reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm. In contrast to the permissive disclosures under paragraph (b), the duty to disclose under paragraph (c) to prevent reasonably certain death or substantial bodily injury is mandatory. And this duty is neither excused nor negated by the client's wishes or instructions."; "Finally, it seems clear that child sex abuse should be regarded as 'substantial bodily harm' for purposes of Rule 1.6(c). By definition, sex acts with minors are nonconsensual; and such activity likely involves violence and intimidation. Comment c to § 66 of Restatement Third, The Law Governing Lawyers (2000), includes 'child sexual abuse' in the definition of 'serious bodily harm' for purposes of § 66, which permits a lawyer to use or disclose confidential client information when the lawyer reasonably believes necessary to prevent reasonably certain death or serious bodily harm to a person." (emphasis added)).

Some states that do not clearly require lawyers to report child abuse warn them to advise clients that law firm employees might have an independent duty to report such abuse.

- District of Columbia LEO 282 (6/17/98) ("An association of social workers seeks guidance regarding the obligations of a social worker employed by or consulting with a lawyer in the representation of a client where the social worker receives information that the client has engaged in child abuse. Under D.C. Code § 2-1352, social workers and certain other professionals who reasonably suspect that child abuse or neglect has taken place must 'immediately' report the suspected abuse to the Metropolitan Police Department or to the Child Protective Services Division of the Department of Human Services. The statute makes clear that the social worker so obligated has no discretion to refuse to report once the social worker knows or has reasonable cause to suspect that child abuse or neglect has taken place. The statute does not include lawyers among those professionals required to report child abuse or neglect." (footnote omitted) (emphasis added); "One of those exceptions is contained in Rule 1.6(d)(2), which provides that the lawyer may reveal the confidences or secrets of a client when 'required by law.' This provision continues practice under former Disciplinary Rule DR 4-101(C)(2) and follows a provision of the American Bar Association 1980 discussion draft of Model Rule 1.6, which was dropped from subsequent versions of the model rule by the ABA. During the drafting of Rule 1.6 in the District of Columbia, there was considerable debate concerning the scope of the exception to the lawyer's duty to refrain from disclosing confidences and secrets to prevent harm to third parties. By contrast, the exception for disclosure obligations required by law received very little attention. The unqualified language of the exception, though, appears to recognize the authority of the legislature to subordinate the obligation to preserve client confidences and secrets to other social objectives."; "The exception in Rule 1.6(e) allowing persons employed by the lawyer to disclose confidences or secrets is strictly derivative of the exception for disclosures by the lawyer. That is, it is defined by referring to Rules 1.6(c) and (d), which contains [sic] exceptions to the lawyer's obligation to keep client confidences and secrets. In other words, under Rule 1.6(e), client confidences and secrets can be disclosed by and [sic] employee only in circumstances where the lawyer may disclose. The Rule does not authorize disclosure of client confidences and secrets by an employee where the lawyer is prohibited from so disclosing."; "The inconsistent duties of the social worker and the lawyer -- the social worker to report under the child abuse and neglect law, the lawyer to assure that confidences and secrets of a client are preserved -- require that the lawyer take steps to assure that the client understands the inconsistency. See Rule 1.4(b). Before bringing a social worker into the representation, the lawyer should inform the client that

the social worker may have a statutory duty to report child abuse or neglect that is inconsistent with the duty of both the lawyer and the social worker to preserve confidences and secrets imposed by the Rules of Professional Conduct. The lawyer should further explain that, as a result, the social worker may in fact report information supplied by the client or the lawyer to relevant authorities. It is then the client's decision whether to proceed with the use of a social worker in the case." (footnote omitted) (emphasis added); "There may be circumstances where the lawyer may report child abuse under Rule 1.6(c)(1), but only where it amounts to 'a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm absent disclosure of the client's secrets or confidences by the lawyer.' The District of Columbia child abuse and neglect reporting requirement is far broader, both in referring to past acts and in using a lower threshold of harm to the child to trigger the reporting obligation." (emphasis added)).

Other states' legal ethics opinions treat such ancillary non-lawyer workers the same as lawyers -- even if the analysis of lawyers' disclosure duty is ambiguous.

In 2005 Nevada addressed this general confusion about mandatory child abuse reporting requirements' application to lawyers, and the ever more ambiguous issue of their application to non-lawyer employees.

- Nevada LEO 30 (3/25/05) (analyzing the conflict between Nevada's statutory duty to report child abuse and ethics rules generally requiring lawyers to maintain the confidentiality of client information about non-clients' abuse of children; ultimately concluding that under then-current Nevada ethics rules (since changed to allow lawyers to report non-client child abuse in some circumstances), Nevada lawyers might be professionally disciplined if they complied with a federal child abuse reporting statute; concluding that social work students working with lawyers would be treated as lawyers under this analysis; addressing the following facts: "In the course of their participation in legal representation teams, the social work students and their supervisor learn of confidential and privileged information about the clients and others, to the same extent as the licensed attorney and the law students. The social work students would not be able to participate and assist meaningfully if they were prevented from learning such information about the clients. For this reason, the policies and practices of the organization are clearly designed to require the social work students to limit their participation to that of a legal assistant and to require them to understand and observe the rules of attorney-client confidentiality applicable to legal assistants. Before commencing work for the organization, social work students are required to sign an acknowledgement of their duty as legal assistants to protect the confidentiality to the clients and of the information they learn in the course of

their work."; "The social work students are therefore 'legal assistants' for purposes of SCR 156 and bound by the attorney's duty of confidentiality to the client."; citing NRS 432B.220, indicating that the following persons (among others) must report if he or she "knows or has reasonable cause to believe that a child has been abused or neglected": "An attorney, unless he has acquired the knowledge of the abuse or neglect **from a client who is or may be accused of the abuse or neglect**"; also citing Nevada's ethics rules; "Meanwhile, SCR 156 prohibits lawyers and their assistants from disclosing or revealing information '**relating to the representation of a client**' (emphasis added), unless the client consents after consultation. The only express exception requires the disclosure of such information '**to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm**' (emphasis added) [that provision now reads "to prevent reasonably certain death or substantial bodily harm" Nevada Rule 1.6(a)(1); thus the current Nevada Rule 1.6 would apply to non-clients' child abuse]; describing a scenario that would note the conflicts between these two rules "if the lawyer or assistant learns from the client in the course of the representation that someone other than the client (a spouse or relative or other) has abused or neglected a child in the past, NRS 432B.220 would require the lawyer to report, regardless whether a threat of further abuse or neglect exists. Because the client is not the one who 'is or may be accused of the abuse or neglect,' the information is outside the lawyer's exception to the reporting statute. However, the information is still within the scope of the attorney's duty of confidentiality because it relates to the representation of the client and does not indicate or imply any reason to believe the client will commit a criminal act of any kind."; pointing to legislative history as apparently exempting lawyers from their reporting requirement; "Pertinent legislative history concerning NRS 432B.220 is scarce, but appears to support the position that the legislature intended to exempt attorneys from any reporting of confidential client information. Any such intent, however, is apparently contradicted at least to some extent by the plain text of the statute itself." (emphasis added); concluding that the attorney-client privilege did not trump the duty to report child abuse; "Unlike the issue of confidentiality, there is no direct conflict regarding privilege because the reporting statute clearly and explicitly overrides an otherwise-applicable claim of privilege. There is no question that the legislature intended to require attorneys to report information that might also have been covered by the attorney-client privilege or that the privilege will provide no defense to an attorney or legal assistant facing prosecution for failure to report child abuse or neglect when required by the statute. However, there is no similar explicit reference to attorney-client confidentiality in the child abuse and neglect reporting statutes. While the absence of a direct provision regarding attorney-client confidentiality might be seen as conspicuous, NRS 432B.250 might equally indicate a legislative intent to require reporting of child abuse and neglect even when traditional rules would otherwise prevent

the disclosure or excuse the failure to do so." (emphasis added); noting that a possible irreconcilable conflict between lawyers' duties did not absolve a lawyer from a possible ethics charge; "This committee agrees with the general proposition that a state or federal statute either allowing or requiring conduct that violates a rule of professional conduct does not necessarily absolve an attorney of the professional consequences for the violation. . . ." The Nevada Supreme Court maintains primary authority over the conduct of lawyers in Nevada, and there is no reliable authority for the position that it would be bound to observe a statutory immunity from disciplinary proceedings when the attorney has violated the letter of the Supreme Court Rule." (emphasis added); explaining that other states might not face the same difficulty in reconciling the duties; "Few other states place attorneys in a similar predicament, because most other state child abuse reporting statutes expressly preserve attorney-client confidentiality. One scholar studying the issue concluded that the benefits of mandatory child abuse reporting are far outweighed by their potential damage to the attorney-client relationship, 'particularly by the dangers inherent in approving threatened criminal sanctions as a means of transforming lawyers into mandatory reporters of crime.' Mosteller, Robert P., Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant, 42 Duke L.J. 203, 276-78 (1992). This further supports the position that the duty of confidentiality should take priority over the mandatory reporting statutes as they apply to attorneys. A comparison between the Nevada SCR's and the ABA Model Rules is also instructive. The Model Rules were recently amended to add an exception to the lawyer's duty of confidentiality 'to comply with other law or court order.' Model Rules of Professional Conduct, 5th ed., Rule 1.6(b)(4) (2003). . . . This change would resolve the conflict with NRS 432B.220 if it were adopted in Nevada, because the reporting of child abuse or neglect would be 'to comply with other law' and the lawyer's only obligation to the client would be to advise him of the report. Of course the attorney would be required to maintain the confidentiality of the information in all other respects, but under the amended Model Rules, the report would not be a violation of the attorney's duty of confidentiality under Rule 1.6." (emphasis added); concluding as follows: "It is beyond the charge and authority of this committee to definitively resolve the conflict between NRS 432B.220 and SCR 156. But because the Nevada Supreme Court has made no exception to SCR 156 that would absolve an attorney for a violation when the violation was required by state statute, we must conclude that SCR 156 continues to apply equally to confidential client information both within and without the scope of mandatory reporting under NRS 432B.220. There is no reliable basis to conclude either that a disclosure required by the statute would be immune from discipline under SCR 156 or that a failure to report in violation of NRS 432B.220 would be excused on account of the attorney's duty of confidentiality. So long as this conflict is resolved by neither the legislature nor the Supreme Court, the organization's attorneys, legal assistants and law student attorneys are left in

the unenviable position of violating one or the other when they come into possession of information that lies in the gap. The committee believes, however, that the most likely resolution of this conflict will be in favor of preserving attorney-client confidentiality. Because the social work students are clearly working for the organization as legal assistants, they are bound as legal assistants to the Supreme Court Rules and thus to the same duty of confidentiality. Thus, this opinion may be read to apply equally to all of them." (emphasis added)).

After the Nevada Bar explained the then-current ambiguity in the Nevada Rules and child abuse reporting statutes, Nevada added an explicit exception relieving lawyers of any disclosure duty in specified circumstances.

Notwithstanding the provisions of NRS 432B.220, an attorney shall not make a report of the abuse or neglect of a child if the attorney acquired knowledge of the abuse or neglect from a client during a privileged communication if the client:

- (a) Has been or may be accused of committing the abuse or neglect; or
- (b) Is the victim of the abuse or neglect, is in foster care and did not give consent to the attorney to report the abuse or neglect.

Nothing in this section shall be construed as relieving an attorney from:

- (a) Except as otherwise provided in subsection 1, the duty to report the abuse or neglect of a child pursuant to NRS 432B.220; or
- (b) Complying with any ethical duties of attorneys as set forth in the Nevada Rules of Professional Conduct, including, without limitation, any duty to take reasonably necessary actions to protect the client of the attorney if the client is not capable of making adequately considered decisions because of age, mental impairment or any other reason. Such actions may include, without limitation, consulting with other persons who may take actions to protect the client and, when appropriate, seeking the appointment of a guardian ad litem, conservator or guardian.

NV Rev Stat § 432B.225 (2013).

One would think that requiring lawyers to report child abuse by non-clients would be a no-brainer -- given the horrible nature of the crime.

For instance, the 2000 American Academy of Matrimonial Lawyers' Bounds of Advocacy included the following provision -- adopted before the 2002 ABA Model Rule expansion (discussed above).

- Bounds of Advocacy, Goals for Family Lawyers, American Academy of Matrimonial Lawyers, Nov. 2000 ("6.5 An attorney should disclose information relating to a client or former client to the extent the lawyer reasonably believes necessary to prevent substantial physical or sexual abuse of a child. Comment[:] Under current RPC 1.6(b)(1), an attorney may reveal information reasonably believed necessary 'to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.' Many states permit the attorney to reveal the intention of the client to commit any crime and the information necessary to prevent it. The rules do not appear to address, however, revelation of conduct that may be severely detrimental to the well being of the child, but is not criminal. Also, while engaged in efforts on the client's behalf, the matrimonial lawyer may become convinced that the client or a person with whom the client has a relationship has abused one of the children. Under traditional analysis in most jurisdictions, the attorney should refuse to assist the client. The attorney may withdraw if the client will not be adversely affected and the court grants any required permission. Disclosure of risk to a child based on past abuse would not be permitted under this analysis, however. Notwithstanding the importance of the attorney-client privilege, the obligation of matrimonial lawyer to consider the welfare of children, coupled with the client's lack of any legitimate interest in preventing his attorney from revealing information to protect the children from likely physical abuse, requires disclosure of a substantial risk of abuse and the information necessary to prevent it. If the client insists on seeking custody or unsupervised visitation, even without the attorney's assistance, the attorney should report specific knowledge of child abuse to the authorities for the protection of the child. As stated in the Comment to the ABA Ethics 2000 Commission's proposed revision of RPC 1.6(b)(1): Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from

revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Substantial bodily harm includes life-threatening or debilitating injuries and illnesses and the consequences of child sexual abuse. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. It may also be appropriate to seek the appointment of a guardian ad litem or attorney for the child or children. The entire thrust of the family law system is intended to make the child's well-being the highest priority. The vindictiveness of a parent, the ineffective legal representation of the spouse, or the failure of the court to perceive on its own the need to protect the child's interests do not justify an attorney's failure to act. However, even the appointment of a guardian or lawyer for the child is insufficient if the matrimonial lawyer is aware of physical abuse or similarly extreme parental deficiency. Nor would withdrawal (even if permitted) solve the problem if the attorney is convinced that the child will suffer adverse treatment by the client." (footnotes omitted)).

In contrast, some authorities have vehemently argued against such a requirement. At first blush, this might be surprising. But these arguments make much more sense upon reflection.

- Adrienne Jennings Lockie [Director of the Domestic Violence Advocacy Project and Visiting Professor in the Women's Rights Litigation Clinic Rutgers School of Law], Salt in the Wounds: Why Attorneys Should Not Be Mandated Reporters of Child Abuse, 36 N.M.L. Rev. 125, 126-28, 135, 135-36, 148, 148-49, 149, 150, 153 (Winter 2006) ("Hundreds of thousands of domestic violence victims with children fail to realize that they subject themselves to civil and criminal liability by seeking legal assistance such as restraining orders. Although attorneys can provide concrete legal remedies to domestic violence victims, they are often prevented from doing so because of mandatory child abuse reporting laws that require attorneys to make child abuse reports against their clients or their clients' abusive partners. Because exposing children to domestic violence may be considered child abuse, reporting laws may require attorneys to disclose details of their clients' own abuse even though this disclosure conflicts with the attorneys' duties to the clients. . . . Mandatory child abuse reporting laws present two primary harms. First, they impede the ability of attorneys to adequately represent domestic violence victims because they interfere with the attorney-client relationship by devaluing confidentiality and preventing open communication.

Second, mandatory child abuse reporting by attorneys subjects domestic violence victims to real danger and harm. Women of color and women with limited economic resources who are victims of domestic violence are particularly harmed by mandatory child abuse reporting by attorneys. Because of the detrimental consequences to domestic violence victims, attorneys who learn about child abuse in the course of their representation should not be required to report the abuse." (footnotes omitted) (emphasis added); "Today all states have some form of child abuse reporting laws. Reporting laws are premised on obligations of third parties to report child abuse with the expectation that the state, through a child protective mechanism, will investigate and take corrective action when needed. Typically, legislators did not craft these laws with attorneys in mind. Child abuse reporting laws take many forms, from permissive to mandatory. Approximately twenty-five states require specific persons, such as social workers, psychologists, or physicians, to report child abuse. Some statutes require reporting from persons ordinarily covered by specific privileges, such as priests. A handful of state statutes specifically mention attorneys either to exempt or include attorneys in the reporting statutes, or to otherwise define the reporting responsibilities of attorneys. Some statutes specifically abrogate the privilege while others require reporting without explicitly abrogating privileges. Approximately fifteen state statutes require 'all persons' or 'everyone' to report child abuse. Under each of these reporting statutes, attorneys are required to report child abuse in some form." (footnotes omitted) (emphasis added); "[M]andatory child abuse reporting by attorneys frequently conflicts with the attorney-client privilege and the duty of confidentiality. In states that require 'all persons' to report child abuse but do not exempt attorneys, the attorney is left to divine the relationship between the child abuse reporting statute, the attorney-client privilege, and the ethical guidelines to resolve a conflict when necessary. Attorneys practicing in states that require everyone to report child abuse often assume that they are mandated child abuse reporters." (footnotes omitted) (emphasis added); "[S]everal states explicitly mention privileges in the child abuse reporting statute, either to abrogate or uphold specific privileges." (footnote omitted); "[S]tatutes in several other states, including Delaware, Florida, Kentucky, New Hampshire, and Rhode Island, exclude attorneys from mandatory child abuse reporting requirements. . . . [O]ther states implicitly abrogate or uphold the attorney-client privilege." (footnotes omitted); "[I]t is clear that attorneys must report child abuse in North Carolina (except in pending child abuse cases), Oklahoma, Pennsylvania, and Utah; whereas, it appears that attorneys would not need to report child abuse in Delaware, Kentucky, Rhode Island, New Hampshire, and Florida." (footnote omitted); "Mandatory child abuse reporting by attorneys has severe consequences for victims of domestic violence, including increasing the physical danger to victims and their children, subjecting domestic violence victims to ongoing state intervention and potential criminal prosecution for abuse or neglect, and discouraging victims of domestic violence from seeking legal assistance."

These negative consequences exist even when the child abuse report is filed against someone other than the victim of domestic violence." (footnotes omitted) (emphasis added); "Reporting child abuse leads to an investigation, which could further enrage the batterer and subject the domestic violence victim and her children to further harm. If the attorney makes a child abuse report, the client may discharge the attorney or discontinue the legal matter because the client has lost trust in the attorney and the legal system. By requiring attorneys to report child abuse, society abandons domestic violence victims when they are most vulnerable." (footnotes omitted) (emphases added); "Even as a non-battering parent, the domestic violence victim may be subject to criminal liability. Reporting abuse does not immunize a client from criminal prosecution, especially if the client is charged with endangering the welfare of a child or is charged as an accomplice." (footnotes omitted) (emphasis added); "In addition to criminal liability, mandatory child abuse reporting by attorneys also exposes domestic violence victims to civil sanctions, such as an abuse or neglect charge of 'failure to protect.' Civil liability for victims of domestic violence should not be instigated by their attorneys." (footnotes omitted) (emphasis added); "Domestic violence victims are also harmed by mandatory child abuse reporting by attorneys because attorneys cannot provide sufficient advice when their clients face civil or criminal sanctions. Domestic violence victims, particularly women of color, have historically been treated poorly within the child protection system." (footnotes omitted); "[R]equiring attorneys to report child abuse ignores the ongoing presence of the batterer in the child's life and the hurdles a domestic violence victim faces in future or ongoing custody and visitation disputes. In many jurisdictions, parents' rights to visitation or 'parenting time' can only be eliminated in extreme situations. Therefore, a domestic violence victim will be forever tied to the child's other parent even if that parent has been abusive and even if that abuse occurred in the presence of the child. The client who reports an abusive partner will frequently be required to interact with the abuser, to take the child or children to visit the abuser, and to discuss parenting decisions with the abuser." (footnote omitted)).

- Nevada LEO 30 (3/25/05) ("One scholar studying the issue concluded that the benefits of mandatory child abuse reporting are far outweighed by their potential damage to the attorney-client relationship, 'particularly by the dangers inherent in approving threatened criminal sanctions as a means of transforming lawyers into mandatory reporters of crime.' Mosteller, Robert P., Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant, 42 Duke L.J. 203, 276-78 (1992). This further supports the position that the duty of confidentiality should take priority over the mandatory reporting statutes as they apply to attorneys." (emphases added)).
- Lisa Hansen, Attorneys' Duty to Report Child Abuse, Journal of the American Academy of Matrimonial Lawyers, Vol. 19, 2004 (addressing clients' child

abuse: "Mandatory reporting statutes that require an attorney to report suspected child abuse are in direct conflict with the attorney-client relationship. On the one hand, the crucial reason for the attorney-client privilege is to provide the client with a sense that the client is able to disclose anything to the attorney without fear of repercussion. On the other hand, if that attorney discovers that a child is being abused at the hands of his client the attorney may feel that he has an ethical duty to stop that from occurring. This puts the attorney in a difficult position with regard to the client. By reporting suspected child abuse by a client, the attorney may be subjecting the client to potential criminal prosecution or losing custody of a child. However, if attorneys do not report their suspicions, that leaves the child at risk for further abuse." (footnote omitted)).

In 2002, a Texas Law Review article argued against statutes requiring lawyers to report child abuse. The article started with a description of state laws as of that time.

All fifty states, as well as Puerto Rico and the Virgin Islands, have passed some type of mandatory child abuse reporting statute, which are a requirement in order for states to receive federal grants under the Child Abuse Prevention and Treatment Act. . . . The attorney-client privilege is usually preserved, but some states require attorneys to report suspected child abuse, even if it places their clients in additional legal difficulty. Attorneys who defend battered women in states that include attorneys as mandatory reporters are trapped between loyalty to their clients and the statutes that require them to report suspected child abuse. This conflict seriously undermines the criminal defense of battered women.

Brooke Albrandt, Turning in the Client: Mandatory Child Abuse Reporting Requirements and the Criminal Defense of Battered Women, 81 Tex. L. Rev. (Dec. 2002) (footnotes omitted). The article then described the Texas situation.

The Texas mandatory reporting statute provides an example of this problem. A provision of the Texas Family Code requires "professionals" to report suspected child abuse or neglect. . . . [M]andatory reporting requirements could profoundly affect the quality of the criminal defense of battered women, as well as prevent the candor and trust that are vital to getting a battered woman -- whether she does or does not abuse her children -- the help she needs.

Id. at 656-57 (footnote omitted).

The article described a large variation in state laws requiring or arguably requiring lawyers to report child abuse.

Mandatory reporting statutes generally take one of several forms. The statute may specifically include attorneys and require them to report. Alternatively, the statute may include attorneys, but exempt them from reporting under certain circumstances. Finally, the statute may simply be silent as to whether or not attorneys are included. . . . Other states handle mandatory reporting in different ways, although certain trends are identifiable. Twenty-three states have reporting statutes that provide that anyone "may" report abuse, but nearly half exempt attorneys in some way. Sixteen states require all individuals to report child abuse, but twelve of those states exempt communications covered by the attorney-client privilege. Many state statutes, however, neither explicitly include nor exclude attorneys.

Id. at 657-58 (footnotes omitted) (emphasis added).

The article then described lawyers' dilemma in states requiring or arguably requiring them to report child abuse.

Lawyers defending battered women face another difficult situation, however, when the abuser is not the battered client, but the client's spouse or partner. Reporting the child abuse may subject the client to criminal charges for failure to protect the child. Under the Texas Penal Code, for example, an individual who allows a child to suffer bodily injury by action or omission is guilty of a felony. Therefore, a battered woman could face felony charges for failing to prevent her batterer from abusing her children. This problem is the one most likely to be encountered by attorneys representing women on criminal charges. One study found that in abusive relationships also involving child abuse, the abusive man was six times more frequently the child abuser than was the battered woman.

Id. at 658-59 (footnotes omitted) (emphases added). The article provided more details.

Attorneys who work on domestic violence cases are particularly likely to encounter situations that require

reporting because child abuse is often prevalent in domestic violence cases. . . . Even if she is not the abuser of the children, a battered woman faces not only criminal prosecution for failure to protect the children from abuse, but also potential termination of the parent-child relationship. . . . Mandatory reporting requirements for attorneys present serious constitutional problems, especially in cases involving domestic violence victims facing criminal charges. The Fifth Amendment guarantees that individuals cannot be compelled to be witnesses against themselves, and the Sixth Amendment guarantees criminal defendants the assistance of counsel. These constitutional rights, together with the attorney-client privilege and confidentiality rules, generally encourage clients to be completely open and honest with their attorneys. . . . With a mandatory reporting requirement in place, however, a battered woman with abused children cannot exercise her constitutional rights to the fullest. . . . Mandatory reporting requirements for attorneys encourage a battered woman to keep information about child abuse secret, even from her attorney, to protect herself from the reporting requirement. This, in turn, undermines her Sixth Amendment right to counsel because the candor and quality of the representation are hindered. . . . In addition to creating constitutional problems, a mandatory reporting requirement is repugnant to the goals of criminal defense. One of the most important roles of a criminal defense attorney is to guarantee his or her client due process and protection from government abuse. Defense attorneys in particular often see themselves as a client's last line of defense against an abusive government; many would consider a requirement reporting their clients to the government a betrayal of their clients. . . . Moreover, attorneys are not trained to evaluate abusive situations. . . . Additionally, if a domestic violence victim mentions an occurrence of child abuse to her attorney in a state that considers attorneys to be mandatory reporters, that attorney is required to report, and the client may face criminal or civil action. It seems unlikely that an attorney could continue to represent a client whom he had reported. At that point, the client will need a new attorney to represent her.

Id. at 665-69 (footnotes omitted) (emphases added).

Although acknowledging the horrors of child abuse, the article emphasized the importance of battered women's relationship with a trusted lawyer.

The balance between two very important interests determines the wisdom of a mandatory reporting requirement. On the one hand, eliminating attorneys from the requirement means that one person in a child's life, the mother's attorney, cannot and will not report the abuse. On the other hand, the presence of a mandatory reporting requirement violates a client's constitutional rights and deprives her of legal counsel with whom she can entrust all of the horrible details of the abuse. Given the apparently negligible effect of reporting requirements on reducing child abuse, it is the position of this Note that mandatory reporting requirements should not be applied to attorneys.

Id. at 673-74 (emphases added). The article closed with a call for states to eliminate mandatory reporting requirements for lawyers.

[T]he best option for resolving this dilemma is to encourage state legislatures to recognize the importance of protecting the attorney-client relationship and exempting attorneys from mandatory reporting requirements. Child abuse is a compelling issue in society, but so is domestic violence. Domestic violence victims need a legal support system that can provide them with the resources and confidences they desperately need.

Id. at 678.

Given many experts' vehement opposition to mandatory child abuse reporting by lawyers, the issue obviously presents a more difficult analysis than one might think at first blush.

Best Answer

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

Non-Client Employees' Non-Material Misconduct

Hypothetical 9

While handling a business transaction for a corporate client, you discovered that an assistant vice president with whom you are working (and with whom you have become quite friendly) has been stealing lunch every day from the company cafeteria.

What do you do?

- (A) You must disclose the vice president's theft "up the ladder" within the corporation.
- (B) You may disclose the vice president's theft "up the ladder" within the corporation, but you don't have to.
- (C) You may not disclose the vice president's theft "up the ladder" within the corporation, unless the vice president consents.

(B) YOU MAY DISCLOSE THE VICE PRESIDENT'S THEFT "UP THE LADDER" WITHIN THE CORPORATION, BUT YOU DON'T HAVE TO

Analysis

One might expect the ethics rules to require lawyers to report essentially any important internal incident to an institutional client.

Under ABA Model Rule 1.4:

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

ABA Model Rule 1.4(3).

The end of one of ABA Model Rule 1.4 comments confirms that:

paragraph (a)(3) requires that the lawyer keep the client reasonably informed about the status of the matter, such as significant developments affecting the timing or the substance of the representation.

ABA Model Rule 1.4 cmt. [3]. This duty to communicate clearly covers any material development relating to lawyers' representation of a corporation or other organization.

Additional rules buttress this duty. For instance, ABA Model Rule 1.3's requirement that lawyers "shall act with reasonable diligence and promptness in representing a client" might require lawyers to disclose material developments within the organization to the organization's management. Of course, lawyers' fiduciary duties and other common law duties might supplement the ethics rules' obligations.

However, under ABA Model Rule 1.13, corporation lawyers' "up the ladder" disclosure duty applies only if:

an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and . . . is likely to result in substantial injury to the organization.

ABA Model Rule 1.13(b) (emphasis added).

Similarly, the Restatement recognizes such an "up the ladder" reporting obligation only if an organization's lawyer:

knows of circumstances indicating that a constituent of the organization has engaged in action or intends to act in a way that violates a legal obligation to the organization that will likely cause substantial injury to it, or that reasonably can be foreseen to be imputable to the organization and likely to result in substantial injury to it.

Restatement (Third) of Law Governing Lawyers § 96(2) (2000) (emphasis added).

Unlike the ABA Model Rules, the Restatement explains the type of wrongdoing that triggers this obligation.

Within the meaning of Subsection (2), a wrongful act of a constituent threatening substantial injury to a client organization may be of two types. One is an act or failure to act that violates a legal obligation to the organization and that would directly harm the organization, such as by unlawfully converting its assets. The other is an act or failure to act by the constituent that, although perhaps intended to serve an interest of the organization, will foreseeably cause injury to the client, such as by exposing the organization to criminal or civil liability.

In either circumstance, as stated in Subsection (2), if the threatened injury is substantial the lawyer must proceed in what the lawyer reasonably believes to be the best interests of the organization. Those interests are normally defined by appropriate managers of the organization in the exercise of the business and managerial judgment that would be exercised by a person of ordinary prudence in a similar position. The lawyer's duty of care is that of an ordinarily prudent lawyer in such a position In the face of threats of substantial injury to the organization of the kind described in Subsection (2), the lawyer must assess the following: the degree and imminence of threatened financial, reputational, and other harms to the organization; the probable results of litigation that might ensue against the organization or for which it would be financially responsible; the costs of taking measures within the organization to prevent or correct the harm; the likely efficaciousness of measures that might be taken; and similar considerations.

Restatement (Third) of Law Governing Lawyers § 96 cmt. f (2000) (emphasis added).

This is a surprisingly narrow view of corporation's lawyers' duty. In fact, normal fiduciary duties might well require disclosure of less serious incidents. And presumably most lawyers would have an interest in generating good will or avoiding malpractice by reporting employee wrongdoing that does not meet that heightened standard.

The few ethics opinions dealing with this issue normally involve fairly egregious constituent misconduct. However, as an example of the counterintuitive nature of the "up the ladder" reporting obligation, a 2008 Michigan legal ethics opinion held that a

corporation's lawyer did not have to inform management of a corporation officer's intent to destroy pertinent documents -- as long as the officer abandoned the intent.

- Michigan LEO RI-345 (10/24/08) ("An officer of a corporation has informed the corporation's lawyer of his intent to destroy documents that are subject to a judicial discovery order, and asks the lawyer to return copies of those documents in the lawyer's possession. The lawyer should first attempt to dissuade the officer from the threatened misconduct. If the officer does not recant, the lawyer should refer the matter to higher authority in the organization. The lawyer should decline to return copies of the documents in his possession until the matter is resolved so as not to assist in the unlawful destruction or concealment of evidence. The lawyer may continue representing the corporation and is not required to withdraw merely because the officer suggests improper conduct." (emphasis added)).

Upon reflection, this is a remarkable result. The Michigan Bar must not have thought that the officer was joking, because it directs the lawyer to withhold the documents from the officer "until the matter is resolved" -- whatever that means. One would think upper management would like to know that an officer made such a serious threat, even if the officer did not have a chance to carry it out because the lawyer withheld the documents.

It is unclear why the ABA Model Rules have always taken such a narrow view of lawyers' duty to report "up the ladder" within a corporate client. Although the ABA has only reluctantly allowed lawyers to disclose certain protected client information, that reluctance should not have ever affected this scenario -- in which the lawyer learns of non-clients' wrongdoing. One would think that the same duty of loyalty restricting lawyers' disclosure of protected client information would magnify lawyers' obligation to advise a corporate client about what is going on inside it.

Best Answer

The best answer to this hypothetical is **(B) YOU MAY DISCLOSE THE VICE PRESIDENT'S THEFT "UP THE LADDER" WITHIN THE CORPORATION, BUT YOU DON'T HAVE TO.**

B 4/15, 8/15

Non-Client Employees' Misconduct Unrelated to the Representation

Hypothetical 10

You have represented a medium-sized local company for over a decade, and have come to know most of its executives. As a litigator, you rarely become involved in any transactional matters (unless they result in litigation). You recently stumbled onto evidence that the company's CEO has been embezzling substantial amounts of money from the company and signing off on materially false financial statements. The CEO's misconduct is unrelated to anything you are handling for the company.

What do you do?

- (A) You must disclose the CEO's embezzlement and other misconduct "up the ladder" within the corporation.
- (B) You may disclose the CEO's embezzlement and other misconduct "up the ladder" within the corporation, but you don't have to.
- (C) You may not disclose the CEO's embezzlement and other misconduct within the corporation, unless the CEO consents.

(B) YOU MAY DISCLOSE THE CEO'S EMBEZZLEMENT AND OTHER MISCONDUCT "UP THE LADDER" WITHIN THE CORPORATION, BUT YOU DON'T HAVE TO

Analysis

One might think that a corporation's lawyers would be obligated to report any serious corporate constituent's misconduct that threatens the corporation -- even if the lawyers stumble upon misconduct unrelated to the matter the lawyer is then handling.

In fact, the ABA Task Force suggesting post-Enron changes to ABA Model Rule 1.13 suggested such a change.

The Task Force therefore recommends that Rule 1.13 be amended to make clear that it requires the lawyer to pursue

the measures outlined in Rule 1.13(c)(1) through (3) (including referring the matter to higher corporate authority), in a matter either related to the lawyer's representation (as currently provided) or that has come to the lawyer's attention through the representation, where the misconduct by a corporate officer, employee or agent involves crime or fraud, including violations of federal securities laws and regulations. Rule 1.13(b) could also be amended to emphasize in the text of the Rule itself that the list of potential remedial measures need not be pursued in sequential order, and that in circumstances involving potentially serious misconduct with significant risk to the corporation, an effort to seek reconsideration by a particular officer or employee that is unlikely to succeed should be bypassed in favor of referral to a higher authority in the corporation. Finally, the Task Force recommends that both the text of and Comments to Rule 1.13 should be revised to avoid unduly discouraging action by counsel to prevent or rectify corporate misconduct, and to encourage lawyers to take the action required by the rule.

Preliminary Report of the American Bar Association Task Force on Corporate Responsibility July 16, 2002, 58 Bus. Law. 189, 204 (Nov. 2002) (footnotes omitted)

(emphasis added). However, the Task Force eventually dropped that expansion.

Under current ABA Model Rule 1.13, corporations' lawyers face an "up the ladder" reporting requirement only for very serious misconduct "in a matter relating to the representation."

If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that

can act on behalf of the organization as determined by applicable law.

ABA Model Rules 1.13(b) (emphasis added).

The Restatement takes a different approach, not limiting such "up the ladder" reporting obligations to matters relating to the lawyer's work.

If a lawyer representing an organization knows of circumstances indicating that a constituent of the organization has engaged in action or intends to act in a way that violates a legal obligation to the organization that will likely cause substantial injury to it, or that reasonably can be foreseen to be imputable to the organization and likely to result in substantial injury to it, the lawyer must proceed in what the lawyer reasonably believes to be the best interests of the organization.

Restatement (Third) of Law Governing Lawyers § 96(2) (2000).

As a practical matter, the ABA Model Rules' limitation to matter-related constituent wrongdoing may have little impact. Corporations' lawyers presumably would report any substantially material misconduct to corporate management, even if unrelated to the matters being handled by the lawyer. In fact, not doing so might very well violate the lawyers' duties of diligence and loyalty. One would expect the lawyers' fiduciary and other duties to also require such reporting.

Best Answer

The best answer to this hypothetical is **(B) YOU MAY DISCLOSE THE CEO'S EMBEZZLEMENT AND OTHER MISCONDUCT "UP THE LADDER" WITHIN THE CORPORATION, BUT YOU DON'T HAVE TO.** .B 4/15, 8/15

Non-Client Employees' Serious Misconduct

Hypothetical 11

Your firm's largest client's executive vice president is both your closest friend and the source of nearly all your firm's work for the client. When your friend recently invited you to lunch to discuss an antitrust issue, you assumed it involved one of the cases you are handling. However, your friend instead tearfully confessed that he has been fixing prices with several competitors. He begs you not to tell anyone else about it.

What do you do?

- (A) You must disclose the vice president's wrongdoing "up the ladder" within the corporation.
- (B) You may disclose the vice president's wrongdoing "up the ladder" within the corporation, but you don't have to.
- (C) You may not disclose the vice president's wrongdoing "up the ladder" within the corporation, unless the vice president consents.

(A) YOU MUST DISCLOSE THE VICE PRESIDENT'S WRONGDOING "UP THE LADDER" WITHIN THE CORPORATION

Analysis

Under both the ethics rules and common law principles, lawyers who represent organizations have an attorney-client relationship with the incorporeal institution.

ABA Model Rule 1.13 puts it this way:

A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

ABA Model Rule 1.13(a). ABA Model Rule 1.13(g) recognizes that:

A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7 [which addresses conflicts of interest].

ABA Model Rule 1.13(g).

The parallel comment does not provide any additional useful guidance. ABA Model Rule 1.13 cmt. [12] ("Paragraph (g) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder."). Actually, the comment describes a subset of an organization's constituents that the organization's lawyer may also represent in the appropriate circumstances.

In any event, lawyers who limit their representation to the organization itself may discover constituent wrongdoing. Although it may seem counterintuitive at first, that scenario involves lawyers reporting non-clients' wrongdoing to a client.

Pre-Enron ABA Model Rules

The ABA rarely dealt with corporate lawyers' intra-corporate disclosure obligations before the Enron scandal.

Nearly 30 years before the ABA adopted its 1969 ABA Model Code, the ABA recognized a common-sense notion that an institution's lawyer should disclose a constituent's misconduct to the institution's leadership.

- ABA LEO 202 (5/25/40) (analyzing the ethics implications of a trust company's lawyer who has learned that a manager hired by trust beneficiaries to oversee property transactions and pay the proceeds to the trust company has embezzled money -- creating a liability for the trust company to the beneficiaries; explaining that a trust company officer requests the lawyer to draft a contract under which the embezzling manager will purchase the beneficial interest in the trust -- which the lawyer advises will be proper only if the trust company discloses the embezzlement to the beneficiaries; further explaining that the lawyer later learns that a manager has purchased the beneficiaries' interest at nominal prices, and without the disclosure of the embezzlement "with the apparent purpose of eliminating the beneficiaries and concealing from them [the manager's] embezzlements in the trust company's liability"; noting that the lawyer then learns that the trust company's general counsel knew of this action; concluding that the lawyer may not disclose the manager's embezzlement to the beneficiaries without

the trust company's consent, because the purchase transaction has already been consummated; also concluding that the lawyer may advise the trust company's board of directors of the situation, but may not start disciplinary proceedings against trust company officers acting as lawyers without the trust company's consent -- although the lawyer may disclose confidential client information if the trust company makes a false accusation against the lawyer; "Knowledge of the facts respecting B's defalcations, the trust company's liability therefor, and the plan to purchase the outstanding certificates was imparted to A as attorney for the trust company, and was acquired during the existence of his confidential relations with the trust company. He may not divulge confidential communications, information, and secrets imparted to him by the client or acquired during their professional relations, unless he is authorized to do so by the client."; "Had A been advised that the trust company intended to carry out the plan to purchase the outstanding certificates without making the disclosures which he advised should be made, and if such transaction would have constituted an offense against criminal law when carried out, he might have made disclosure at that time."; "But, since it does not appear that A was advised of such intention on the part of the trust company, and since the transaction has been consummated, we conclude the exception is not applicable and that A must keep the confidences of his client inviolate."; "Since, however, the board of directors of the trust company is its governing body, we think A, with propriety, may and should make disclosures to the board of directors in order that they make take such action as they deem necessary to protect the trust company from the wrongful acts of its executive officers. Such a disclosure would be to the client itself and not to a third person." (emphasis added); "We are of the opinion that A may not, without consent of the trust company, institute disciplinary action against the officers of the trust company who are members of the Bar, if to do so would involve a disclosure of confidential communications to A."; "Neither do we think A may initiate, without consent of the trust company, any proceeding to protect himself which would involve a disclosure of such confidential communications. He would be justified in making disclosure only if he should be subject to false accusation by the trust company.").

The 1983 ABA Model Rules of Professional Conduct finally addressed corporations' lawyers' obligation to undertake what is frequently called "up-the-ladder" reporting or "reporting up" of corporate constituents' misconduct. This internal reporting obligation contrasts with such lawyers' possible duty or discretion to report corporate constituents' misconduct outside the corporation. Not surprisingly, that is called "reporting out."

Because such lawyers represent the corporate entity, such disclosure to third parties often involves disclosing the client's possible wrongdoing (based on the respondeat superior doctrine or some other imputed theory liability). This is far different from the "up-the-ladder" reporting, which involves lawyers' disclosure of non-clients' (corporate employees) wrongdoing to the corporate client.

Under the long-standing version of ABA Model Rule 1.13, lawyers were required to take some action if they "knew" of any action by company employees that (1) violated the employees' legal obligation to the corporation or was a "violation of law" which could be imputed to the corporation; (2) was related to the lawyer's representation; and (3) could subject the company to "substantial injury."

When deciding how to proceed, lawyers had to consider a number of factors listed in the Rule. ABA Model Rule 1.13 offered suggested courses of conduct, including reporting up the corporate ladder all the way to the board of directors (if necessary). The lawyer could resign if the corporation's "highest authority" insisted upon action (or "a refusal to act") that was "clearly" a legal violation and was likely to result in "substantial injury" to the company. ABA Model Rule 1.13(c).

The ABA debated dramatic changes to ABA Model Rule 1.13 after Enron, but ended up passing fairly modest changes. That is discussed below.

Sarbanes-Oxley

After the Enron scandal (which was quickly followed by other similar corporate meltdowns), Congress moved quickly to impose an additional layer of government regulation. Led by Maryland Senator Sarbanes and Ohio Congressman Oxley, Congress moved with remarkable speed.

Near the very end of the congressional legislative process, North Carolina

Senator John Edwards noted lawyers' role in corporate failures.

In recent weeks we have learned about high-flying corporations that came crashing to the ground after top executives played fast and loose with the law. And we have heard how ordinary employees and shareholders can lose their life savings when millionaire managers break the rules.

...

The Securities and Exchange Commission has an essential part to play as well. For some time, the SEC promoted the basic responsibility of lawyers to take steps in order to step corporate managers from breaking the law. The rule for lawyers that the SEC promoted was simple: If you find out managers are breaking the law, you tell them to stop. And if they won't stop, you go to the board of directors, the people who represent the shareholders, and you tell them what is going on.

After promoting the simple principle that lawyers must "go up the ladder" when they learn about misconduct, the SEC gave up the fight. They gave up the fight in part because the American Bar Association opposed their efforts.

Congressional Record, Proceedings and Debates of the 107th Congress, Second Session, Vol. 148, No. 81, *S5652, June 18, 2002 (emphasis added).

About three weeks later, Senator Edwards spoke about an amendment that he and two other senators (including New Jersey's Senator Jon Corzine) intended to introduce.

For some time, the SEC actually tried to do that in the late 1970s and early 1980s. They brought legal actions to enforce this basic responsibility of lawyers -- the responsibility to take steps to make sure corporate managers didn't break the law and harm shareholders in the process. If you find out that the managers are breaking the law, you must tell them to stop. If they won't stop, you go to the board of directors, which represents the shareholders, and tell them what is going on. If they won't act

responsibility and in compliance with the law, then you go to the board and say something has to be done; there is a violation of the law occurring. It is basically going up the ladder, up the chain of command.

For years, the SEC recognized the principle that lawyers had a legal responsibility to go up the ladder if they saw wrongdoing occurring. But then they stopped. One of the reasons they stopped is because there were a lot of protests coming from the organized bar.

. . .

The time has come for Congress to act. This amendment acts in a very simple way. It basically instructs the SEC to start doing exactly what they were doing 20 years ago, to start enforcing this up-the-ladder principle.

Congressional Record, Proceedings and Debates of the 107th Congress, Second Session, Vol. 148, No. 92, *S6552, July 10, 2002 (emphasis added).

Senator Edwards' suggestion quickly became part of the fast-moving legislative process.

In 2003, George Washington University Law School Professor Thomas Morgan discussed the Sarbanes-Oxley statute and regulations. Thomas D. Morgan, Sarbanes-Oxley: A Complication, Not a Contribution, in the Effort to Improve Corporate Lawyers' Professional Conduct, 17 Geo. J. Legal Ethics 1 (Fall 2003). Among other things, Professor Morgan described how Sarbanes-Oxley came to include a provision applying to lawyers.

[O]n June 25, 2002, when Senator Sarbanes introduced Senate Bill 2673 -- the Senate version of the bill that ultimately became Sarbanes-Oxley -- there was no special provision for regulation of lawyers. On July 10, 2002, however, Senator Edwards changed that. Announcing that Chairman Pitt had not even deigned to reply to his own letter at all, Senator Edwards proposed an amendment ("Edwards Amendment") that became Section 307 of the Act and that

required the SEC, not later than 180 days after passage of the Act, to "establish rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorney appearing and practicing before the Commission in any way in the representation of public companies, including a rule requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof) and, if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors [of the issuer] or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the company, or to the board of directors."

Debate on the amendment was brief, and on July 15, it was adopted by the Senate by a vote of 97-0. The entire S. 2673, as amended, passed shortly thereafter by the same margin.

Id. at 15-16 (footnotes omitted). Professor Morgan noted how quickly the final version passed Congress.

The Act passed the House . . . on July 25, 2002, by the overwhelming vote of 423-3. It passed the Senate 99-0 on July 30. The whole legislative process had taken less than eight months from the time of the Enron bankruptcy.

Id. at 18 (footnoted omitted).

For lawyers, the most important Sarbanes-Oxley provision contained just 171 words, but generated a vigorous debate among bars, scholars, and practitioners.

Not later than 180 days after the date of enactment of this Act, the Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule -- (1) requiring an attorney to report evidence of a material violation of

securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and (2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

15 U.S.C. § 307 (2002).

Thus, Section 307 of Sarbanes-Oxley directed the Securities and Exchange Commission ("SEC") to issue regulations requiring lawyers "appearing and practicing" before the SEC who possess any "evidence" of a "material" securities law violation, breach of fiduciary duty, or "similar violation" to (1) report the evidence to the company's chief legal or executive officer; and (2) if that officer does not "appropriately respond," report the evidence to the company's audit committee, independent directors, or the full board.

The SEC's original proposed regulations would have covered a large number of lawyers (many of whom would not even know that they were "appearing and practicing" before the SEC), demanded extensive record-keeping, and sometimes required lawyers whose corporate clients engaged in misconduct to withdraw, and disavow tainted work product.

After a flurry of criticism, the SEC dropped most of these dramatic proposals.

The final rules only cover lawyers transacting business with the SEC; representing parties or witnesses in connection with an SEC investigation or proceeding; providing securities law advice about any document that the lawyer has

notice will be filed with or submitted to the SEC; or providing advice about whether an issuer must make such a filing. The new regulations explicitly exclude lawyers who engage in activities other than providing legal services.

The rules require covered lawyers to report "up the ladder" if they have "evidence of a material violation" of particular corporate wrongdoing. For obvious reasons, the linchpin of the entire regulatory scheme is the meaning of "evidence of a material violation."

On December 2, 2002, the SEC issued its proposed regulations. Among other things, the proposed regulations defined "evidence of material violation" as follows:

Evidence of a material violation means information that would lead an attorney reasonably to believe that a material violation has occurred, is occurring, or is about to occur.

Federal Register, Vol. 67, No. 231, Proposed Rules, at 71678(e), December 2, 2002 (second emphasis added).

The proposed regulation defined "reasonably believes" as follows:

Reasonably believes means that an attorney, acting reasonably, would believe the matter in question.

Id. at 71680(l) (second emphasis added).

The proposed regulations wisely invited comments about these proposed regulations.

Interested persons are invited to comment on whether this definition is sufficiently clear and whether alternative language would be an improvement.

Id.

The SEC issued its final regulations about two months later.

The final regulation's definition of "evidence of a material violation" contains a confusing series of negatives:

Evidence of a material violation means credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur.

68 Fed. Reg. 6296, 6301(e) (Feb. 6, 2003) (emphasis added; first emphasis in original).

The final definition of "reasonably believes" is about as useless as the proposed definition:

Reasonably believes means that an attorney believes the matter in question and that the circumstances are such that the belief is not unreasonable.

Id. at 6305(m) (second emphasis added).

Interestingly, five years before the SEC issued these tortured definitions, the agency promulgated clear writing guidelines -- including the following recommendations:

Write in the "positive"

Positive sentences are shorter and easier to understand than their negative counterparts.

...

Also, your sentences will be shorter and easier to understand if you replace a negative phrase with a single word that means the same thing.

...

Use short sentences:

The longer and more complex a sentence, the harder it is for readers to understand any single portion of it.

U.S. Sec. & Exch. Comm'n, Office of Investor Educ. & Assistance, A Plain English

Handbook: How to create clear SEC disclosure documents, at 27-28, Aug. 1998.

Not surprisingly, the SEC's definition has drawn academic criticism.

The SEC rules define "evidence of a material violation" in Section 205.2(e) as "credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is occurring, or is about to occur."

. . .

In deciding whether to act -- whether to report what Congress wanted to encourage lawyers to report up the corporate ladder -- the lawyer confronting the definition of "evidence of a material violation" in Section 205.2(e) must ask herself whether it would be unreasonable not to conclude that the evidence before her demonstrates a reasonable likelihood of a material violation of law. This definition, which triggers the up-the-ladder reporting duty, is troublesome because its use of a double-negative formulation makes the standard difficult to understand, interpret or apply.

Law is intended to guide action in the world. Yet it is barely possible to read the SEC's definition out loud without tripping (or, as we have discovered when presenting this definition in various fora, chuckling) over the words, let alone trying to remember the definition without reading it or trying to work out its "logic." Indeed, the provision is a gross violation of the SEC's own "plain English" rules applicable to SEC filings intended for investors. Similar language in a prospectus would not fare well.

Roger C. Cramton, George M. Cohen, and Susan P. Koniak, Legal and Ethics Duties of Lawyers After Sarbanes-Oxley, 49 Vill. L. Rev. 725, 752-53 (2004) (emphases added).

In contrast, widely-respected Professor Thomas Morgan defended the SEC's definition.

The definition of "evidence of a material violation" is not a model of clarity. It is written in a double-negative and says the term "evidence" consists of all "credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to

conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur. The wording of the definition is clumsy but not accidental. Saying that a lawyer must report everything that *any* reasonably prudent and competent attorney *could* think might violate the law would leave companies awash in such reports. This definition says more nearly that a lawyer must report only such information as *no* reasonably prudent and competent attorney would *fail* to report.

Thomas D. Morgan, Sarbanes-Oxley: A Complication, Not a Contribution, in the Effort to Improve Corporate Lawyers' Professional Conduct, 17 Geo. J. Legal Ethics¹, 20 (Fall 2003) (footnote omitted) (emphases added; emphases in original indicated by italics).

As soon as Congress passed Sarbanes-Oxley, and the SEC began considering regulations, bar groups, academicians, and practicing lawyers started a drumbeat of criticism. These attacks intensified after the SEC issued its proposed regulations, and reached a crescendo as the SEC was considering scaling back some of its proposed regulations.

The lawyers critical of Sarbanes-Oxley and the SEC's regulations focused on both process and substance.

First, the critics worried that Section 307 would begin the "federalization" of lawyer ethics rules. Lawyers are not only one of the last self-regulated professions -- they also look almost exclusively to state rather than federal law in determining their ethics obligations. There are no nationwide ethics rules. The widely quoted ABA Model Rules do not govern a single lawyer's conduct -- they merely reflect a voluntary bar association's suggested guidelines. The ABA Model Rules mean nothing unless a state bar adopts them in whole or in part to guide lawyers within that state. The critics of Section 307 worried that having a nationwide ethics obligation would start down a

slippery slope. They also fretted because Congress had imposed this new obligation by statute -- in most states, courts take the primary responsibility for adopting ethics rules.

These worries might have made sense in general, but not in the context of Sarbanes-Oxley. Government agencies, commissions, and other entities before whom lawyers practice have always prescribed rules for those lawyers. The Internal Revenue Service, the United States Patent and Trademark Office, the Securities and Exchange Commission itself, and other agencies regulate lawyers appearing before them, and Section 307 simply followed that tradition.

Second, critics of Section 307 argued that the reporting requirement would "chill" lawyers' relationship with corporate clients' employees. They reasoned that company employees would not share information with the company's lawyer, for fear that the lawyer would reveal their conversations up the corporate ladder.

On this issue, some lawyers' blasts at Sarbanes-Oxley became remarkably shrill. For instance, a New York lawyer started a column appearing in the March 23, 2003 Washington Times with the following paragraph:

April may well be the cruelest month for lawyers practicing before the Securities and Exchange Commission; that is, if the Commission has its way with a new rule, set for adoption for April 7, that many believe would strike a dagger to the heart of the attorney client relationship.

James D. Zirin, Op-Ed, Risky SEC Rule for Noisy Withdrawal?, Wash. Times, Mar. 23, 2003, at B4 (emphasis added). This is pretty harsh language -- even for a lawyer.

This criticism ignored a basic tenet of all ethics rules. When a lawyer represents an organization, the organization itself -- the institution -- is the lawyer's client. ABA Model Rule 1.13(a). A corporation's employees merely act as agents for the institutional

client. In fact, when lawyers deal with a company employee in situations where the lawyer "knows or reasonably should know" that the employee's interests are adverse to the organization's interests, the lawyer must explain the "identity of the client." ABA Model Rule 1.13(f).

Thus, lawyers sharing information they learned from company employees with company management are merely serving the institutional client -- as they must. If the critics of Section 307 believed that the reporting requirement would deter corporate employees from sharing secrets with company lawyers, they must have been advocating a system in which a company lawyer may keep secret from management any material information that the lawyer learns from company employees. This is not only contrary to well-settled ethics and agency principles, it is both inconceivable to a lawyer owing a duty of loyalty to the institution, and unworkable on a day-to-day basis.

Post-Enron ABA Task Force Initial Proposals

In the post-Enron reevaluation that many American institutions undertook, the ABA appointed a Task Force on Corporate Responsibility to examine possible revisions to Model Rule 1.13. As with the SEC's watering down of the Sarbanes-Oxley regulations, the ABA Task Force came in like a lion and went out largely like a lamb.

The Task Force's initial July 16, 2002, proposals suggested three dramatic changes in Model Rule 1.13.

First, the Task Force wanted to change the knowledge standard triggering a lawyer's up-the-ladder disclosure requirements from "know" to "reasonably should know."

[T]he mandate of Rule 1.13 applies only if the lawyer "knows" that a person associated with an organization is engaging in or intends to engage in misconduct. The Model Rules define "knows" as "actual knowledge of the fact in question." While a person's knowledge "may be inferred from the circumstances," this term presumably does not reach conduct covered by the term "reasonably should know," which is also defined in the Model Rules.

. . .

There has also been criticism of corporate lawyers for turning a blind eye to the natural consequences of what they observe and claiming that they did not 'know' that the corporate officers they were advising were engaged in misconduct. The Task Force believes that, while lawyers should not be subject to discipline for simple negligence, they should not be permitted to ignore the obvious. Instead, lawyers should be held to the 'reasonably should know' standard, defined in the Model Rules as denoting 'that a lawyer of reasonable prudence and competence would ascertain the matter in question.'

Preliminary Report of the ABA Task Force on Corporate Responsibility July 16, 2002,
58 Bus. Law. 189, 207-08 (Nov. 2002) (footnote omitted) (emphasis added).

That would have moved away from a requirement of actual knowledge toward a negligence standard, which of course would have created a duty to investigate. The final Task Force proposal (April 29, 2003) dropped that change, and kept the "know" standard.

Second, the Task Force's initial proposal would have required lawyers to report the specified wrongdoing even it was unrelated to the lawyer's representation -- again widening the lawyer's duties of investigation and disclosure.

The Task Force therefore recommends that Rule 1.13 be amended to make clear that it requires the lawyer to pursue the measures outlined in Rule 1.13(c)(1) through (3) (including referring the matter to higher corporate authority), in a matter either related to the lawyer's representation (as

currently provided) or that has come to the lawyer's attention through the representation, where the misconduct by a corporate officer, employee or agent involves crime or fraud, including violations of federal securities laws and regulations. Rule 1.13(b) could also be amended to emphasize in the text of the Rule itself that the list of potential remedial measures need not be pursued in sequential order, and that in circumstances involving potentially serious misconduct with significant risk to the corporation, an effort to seek reconsideration by a particular officer or employee that is unlikely to succeed should be bypassed in favor of referral to a higher authority in the corporation. Finally, the Task Force recommends that both the text of and Comments to Rule 1.13 should be revised to avoid unduly discouraging action by counsel to prevent or rectify corporate misconduct, and to encourage lawyers to take the action required by the rule.

Id. at 204 (footnotes omitted) (emphasis added). The final Task Force proposal retained the current "related to the representation" standard.

The third material change in the Task Force's initial proposal was the only one to survive. That proposal allows (but does not require) a lawyer to reveal (outside the company) violations by one of the corporation's constituents of a "legal obligation to the organization" or a "violation of law" that might be imputed to the organization -- if the lawyer believes the violation is "reasonably certain to result in substantial injury to the organization." Model Rule 1.13 (b), (c).

In addition to this important change, the final Task Force report recommended some fine-tuning to Model Rule 1.13.

For instance, the Task Force recommended changing some language in Model Rule 1.13 to reiterate that lawyers must take some action upon learning of reportable wrongdoing. The Task Force also suggested that parts of Model Rule 1.13 be rewritten to eliminate comments that could be interpreted as diminishing the duty of disclosure.

For instance, old Model Rule 1.13 Comment [3] formerly explained that a lawyer needed "clear justification" to go over the head of a corporate constituent with whom the lawyer deals. The Task Force's final proposal eliminated such discouraging language.

The ABA Task Force also recommended that corporations adopt policies in which general counsel periodically meet with independent board members (to discuss possible corporate wrongdoing), and that outside counsel should likewise establish a direct line of communication with the general counsel to discuss possible corporate wrongdoing.

Perhaps the most remarkable portion of the ABA Task Force's initial proposal involved changes to ABA Model Rule 1.6 -- which deals with confidentiality.

The Task Force's report noted that the ABA has just rejected two Ethics 2000 proposals that would have expanded the scope of lawyers' discretionary disclosure of client wrongdoing.

The ABA Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000") proposed in February of this year, consistent with the Restatement (Third) of the Law Governing Lawyers, that three exceptions be added to Model Rule 1.6 to permit the lawyer to disclose client confidences to third parties. The ABA House of Delegates approved one of those exceptions, permitting disclosure when necessary to prevent reasonably certain death or substantial bodily harm. It rejected the other two Ethics 2000 proposals to expand permissive disclosure under Rule 1.6. Those proposals would have permitted disclosure to prevent or rectify the consequences of a crime or fraud in which the client had used or was using the lawyer's services and that was reasonably certain to result, or had resulted, in substantial injury to the financial interests or property of another.

The Task Force recommends that the House of Delegates reconsider and adopt these Ethics 2000 proposals.

Preliminary Report of the ABA Task Force, 58 Bus. Law. at 205.

The Task Force also noted that most states had rejected the ABA's very narrow approach to a lawyer's disclosure of client wrongdoing.

Forty-one states either permit or require disclosure to prevent a client from perpetrating a fraud that constitutes a crime, and eighteen states permit or require disclosure to rectify substantial loss resulting from client crime or fraud in which the client used the lawyer's services. If existing Rule 1.6 was "out of step with public policy" a year ago, as Ethics 2000 concluded, it is even more out of step today, when public demand that lawyers play a greater role in promoting corporate responsibility is almost certainly much stronger. The Ethics 2000 proposals are an important part of an effective response to the problems that have provoked public criticism of the bar.

Id. at 206-07 (footnotes omitted).

The Task Force recommended that the ABA revisit and approve these Rule 1.6 changes.

But then the Task Force went even further -- suggesting mandatory rather than discretionary disclosure.

The Task Force further recommends amendment to Rule 1.6 to make disclosure mandatory, rather than permissive, in order to prevent client conduct known to the lawyer to involve a crime, including violations of federal securities laws and regulations, in furtherance of which the client has used or is using the lawyer's services, and which is reasonably certain to result in substantial injury to the financial interests or property of another.

Id. at 206 (emphasis added).

This would have been an astonishing change, if it had been included in the ABA Task Force's final recommendations, and adopted by the ABA House of Delegates.

The ABA has never recognized a mandatory duty to report even a client's unequivocal intent to kill someone. That has always been a discretionary provision, not mandatory. See ABA Model Code DR 4-101(C); ABA Model Rule 1.6(b)(1). If it had been adopted, the ABA Task Force's recommended provision would have required lawyers to report clients' intent to violate the federal securities laws and regulations, but not the clients' intent to murder someone. That would have been so obviously embarrassing to the ABA that one must wonder why the ABA Task Force even hinted at it, let alone included such a provision in its initial proposal.

A number of commentators have noted that during June and July of 2002 (when the ABA Task Force on Corporate Responsibility was formulating its preliminary report), Senator John Edwards and Jon Corzine were pushing for lawyer regulation in the Sarbanes-Oxley law, and Congress was debating Sarbanes-Oxley. Senator Edwards proposed the amendment that became Sarbanes-Oxley Section 307 just six days before the ABA Task Force's preliminary report, and the Senate unanimously adopted the Edwards Amendment just one day before the ABA Task Force's preliminary report. A number of commentators have surmised that the ABA Task Force floated its mandatory reporting proposal as a way to forestall more onerous congressional action.

In any event, the proposed mandatory reporting provision was not only excluded from the ABA Task Force's final report, it wasn't even mentioned in the ABA Task Force's April 29, 2003, final report.

ABA Task Force Final Report

Continuing in its back-and-forth interaction with Congress and the SEC, the ABA's Task Force on Corporate Responsibility issued its final report less than two

months after the SEC's February 6, 2003, issuance of final regulations (and "reporting out" proposal).

The Task Force's final Report did not even mention its earlier outlandish suggestion that lawyers be required to report certain past client misconduct that might cause financial damage to a third person. If the Task Force's proposal of a mandatory disclosure obligation of clients' financial crimes or frauds was designed to deter the SEC from immediately adopting its own disclosure obligation in the corporate context or more widely, the tactic worked.

The final Report also abandoned (but at least mentioned) the Preliminary Report's suggestion that lawyers' "reporting up" requirement involve sufficiently egregious corporate constituent misconduct even if unrelated to the lawyer's representation. The final Report described the reason for this shift.

In its deliberations, the Task Force considered whether the lawyer's duties under the Rule should continue to be triggered only by matters that are "related to the representation." The Task Force's Preliminary Report recommended that the Rule require the lawyer to act with respect to any known violation, even if not related to the representation. Others point out, however, that it would be unfair to hold responsible a lawyer working in one field of the law to understand that facts of which he was aware should have led to a conclusion of law violation in a field with which he was unfamiliar. The Task Force is persuaded by this analysis and recommends that this qualification be retained in the Rule.

Report of the ABA Task Force on Corporate Responsibility, 59 Bus. Law. 145, 168 (Nov. 2003) (emphasis added) (footnotes omitted).

The Task Force's final Report suggested two substantive changes to then-current ABA Model Rule 1.13.

[T]he Task Force recommends two substantive revisions to Rule 1.13(b). The first is a refinement of the definition of the circumstances that trigger the lawyer's duty to take action within the organization. The second clarifies the circumstances in which the lawyer is required to communicate with a higher authority within the organization. Currently, Rule 1.13(b) requires a lawyer for an organizational client to act when the lawyer 'knows' that a person within the organization is violating or intends to violate the law and is likely to cause substantial injury to the organization. The Task Force recommends that this prerequisite be revised to differentiate between knowledge of facts and evaluation of legal consequences. As under the current rule, the starting point of the recommended rule is subjective: the obligation to take action would arise only on the basis of the facts known to the lawyer. The proposed trigger for requiring action by the lawyer then proceeds to an objective test, namely, whether a reasonable lawyer who knows such facts would, in similar circumstances, conclude that the conduct in which a constituent is engaging or intends to engage constitutes a violation of law or duty to the organization that is likely to result in substantial injury to the organization. This standard recognizes that there is a range of reasonable conduct, and that a lawyer satisfies that standard by acting within that range. Moreover, it does not imply any duty on the lawyer's part to investigate or inquire further as to information provided by a client or the client's agent, or by a person to whom the lawyer has been referred by the client. Although the lawyer is under no duty to investigate or inquire, however, the lawyer may not simply accept such information at face value if to do so would be unreasonable in the circumstances.

The second substantive change to Rule 1.13(b) recommended by the Task Force addresses the lawyer's obligation to report wrongdoing to higher authority in the organizational client. Currently, that rule identifies 'reporting up' as a potential course of action when the lawyer has discerned an actual or threatened violation of law or violation of legal obligation to the organization, but the Rule imposes no clear obligation to pursue that course of action. The Task Force believes, however, that the Rule should more actively encourage such action, by requiring that the lawyer refer the matter to higher authority in the organization -- including if warranted, the organization's highest authority -- unless the lawyer reasonably believes that it is not necessary to do so.

Id. at 166-68 (emphases added) (footnotes omitted).

The Task Force even proposed specific language for the second proposed change.

If a lawyer for an organization knows facts from which a reasonable lawyer, under the circumstances, would conclude that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization as determined by applicable law.

Id. at 169 (emphasis added).

The Task Force's final Report also proposed a new ABA Model Rule 1.13 provision addressing lawyers' continuing obligation to "report up" even after they had withdrawn from representing the corporate client or had been terminated.

The Task Force also recommends that Rule 1.13 be amended to include a new provision to assure that the organization's highest authority is made aware that a lawyer for the organization has withdrawn or is discharged in circumstances addressed by the Rule. In some instances, the actions of the lawyer within the organization, pursuant to Rule 1.13(b), may fail to prevent or avoid action that seriously threatens the interest of the organization. Current Rule 1.13(c) provides that a lawyer, in this circumstance, may choose to withdraw. In that event, or if the organizational client discharges the lawyer because of the lawyer's actions under Rule 1.13(b) in reporting to higher authority, the lawyer's professional obligations to act in the best interest of the organization should require the lawyer to take reasonable steps to assure that the organization's

highest authority is aware of the withdrawal or discharge, and the lawyer's understanding of the circumstances that brought it about. Therefore, the Task Force recommends the adoption of a new Rule 1.13(e).

Id. (emphases added) (footnote omitted). The final Report proposed the following provision:

A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to Paragraphs (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of those Paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is Informed of the lawyer's discharge or withdrawal.

Id.

The Task Force then turned to the more generic provisions of ABA Model Rule 1.6 -- just as it had in its Preliminary Report. Here, the Task Force took the same position as it had earlier taken.

The Task Force . . . recommends that Model Rule 1.6(b) be amended, as proposed by the Ethics 2000 Commission, to provide that lawyer . . . [a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; [and] . . . to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.

Id. at 172.

In essence, this recommendation harkened back to the original 1983 Kutak Commission proposal that the ABA had rejected in 1983, had rejected again in 1993 and had rejected a third time just two years earlier -- in 2001.

2003 ABA Model Rules Changes

The ABA House of Delegates adopted the final Task Force Rule 1.13 recommendation in August, 2003. Although the vote was not very close (unlike the vote on the changes to Model Rule 1.6), some lawyers continued to resist any provision allowing lawyers to reveal information outside their organizational client. Judah Best of the well-known Washington, D.C., law firm of Debevoise & Plimpton reportedly labeled the new provision as "utterly wicked." ABA Amends Ethics Rules on Confidentiality, Corporate Clients, to Allow More Disclosures, 19 ABA/BNA Law. Manual on Prof'l Conduct 467, 469 (Aug. 13, 2003).

One academic commentator coming from a different direction has also criticized ABA Model Rule 1.13 -- but for a completely different reason.

Hostra University Law School Professor Monroe Freedman complained that corporate lawyers cannot "report up" unless doing so is in the "best interest of the organization." Professor Freedman has condemned the rule's focus on injury to the corporate client -- rather than on injury to the victims of a corporate client's wrongdoing.

[T]he lawyer is not required by MR 1.13 to go up the ladder. Indeed, she is not even permitted to refer the matter to higher authority unless the fraud is "likely to result in substantial injury to the organization." In our hypothetical case, the fraud is not likely to be detected, so there is no likely to be substantial injury to the corporation if the lawyer remains silent. Accordingly, the lawyer is forbidden to go up the ladder.

[T]he lawyer is expressly directed to act "in the best interest of the organization," and she is further told not to go up the ladder if she reasonably believes that doing so it not "necessary in the best interest of the organization." (Note again that there is not a word here about the best interests -- or any interest -- of those who are being defrauded.) Since the CEO's fraud is not likely to be detected, the lawyer could reasonably believe it to be in the best interest of the corporation not to report it to the board, on the grounds that the fewer people who know about the fraud, the better for the corporation. (This would be of particular concern whenever there are independent directors on the board.) In that event, it would not be "necessary in the best interest of the organization" to go up the ladder to the board of directors, and the lawyer would be forbidden to do so.

Monroe Freedman, The "Corporate Watch Dogs" That Can't Bark: How The New ABA Ethics Rules Protect Corporate Fraud, 8 UDC-DCSL L. Rev. 225, 229-30 (2004).

It is unclear why Professor Freedman concluded that corporations' lawyers may not "report up" in the scenario he outlined. If a lawyer jointly represents the corporate entity and the confessing constituent, there might be joint representation issues. But if the corporation's lawyer learns of some material fact from a non-client within the corporation, nothing should prevent the lawyer from disclosing the material fact to higher authorities within the corporation. ABA Model Rule 1.13 requires such disclosure under the specified circumstances, but does not seem to ever prohibit it -- even in the absence of those circumstances.

Post-Enron ABA Rules

Under current ABA Model Rule 1.13:

If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that

reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

ABA Model Rule 1.13(b). A comment provides further guidance.

In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

Id. cmt. [4]. Another comment describes the scope of such lawyers' duty to go "up the ladder."

Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Id. cmt. [5].

The next comment explicitly indicates that lawyers who represent corporations must follow all of the other applicable ethics rules.

The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1) - (6). Under paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a violation of law, and then only to the extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the violation, but it is required that the matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.

Id. cmt. [6].

Significantly, ABA Model Rule 1.13 extends such lawyers' duty beyond the lawyer's termination -- thus preventing the organization from firing the lawyer to cover-up the wrongdoing.

A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

ABA Model Rule 1.13(e). For some reason, the comment dealing with this duty is exactly the same as the black letter rule, except it uses the word "must" rather than "shall."

A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraph (b) or (c), or who withdraws in circumstances that require or permit the lawyer to take action under either of these paragraphs, must proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

ABA Model Rule 1.13 cmt. [8].

ABA Model Rule 1.13's duty is surprisingly narrow. First, a lawyer has no duty to report "up the ladder" a constituent's wrongdoing that is not "related to the representation." ABA Model Rule 1.13(b). Second, the lawyer has no duty to take such a step unless the misconduct is "likely to result in substantial injury to the organization." Id. Third, a lawyer's obligation to go "up the ladder" does not arise if the lawyer "reasonably believes that it is not necessary in the best interest of the organization to do so." Id.

Perhaps most significantly, ABA Model Rule 1.13 focuses on "substantial injury to the organization." It does not deal at all with injury to those who might have been, are being, or might in the future be, victimized by corporate employees' misconduct. Other ethics rules address the limited circumstances in which lawyers may have disclosure or remedial duties that focus on the victims rather than the perpetrators.

Restatement

The American Law Institute adopted the Restatement (Third) of Law Governing Lawyers (2000) just before the Enron scandal broke, so it does not reflect the post-Enron Sarbanes-Oxley turmoil that affected ABA Model Rule 1.13.

The Restatement acknowledges that lawyers owe their duty of loyalty to an institutional client, unless the lawyers jointly represent other constituents.

The lawyer is not prevented by rules of confidentiality from acting to protect the interests of the organization by disclosing within the organization communications gained from constituents who are not themselves clients. That follows even if disclosure is against the interests of the communicating person, of another constituent whose breach of duty is in issue, or of other constituents Such disclosure within the organization is subject to direction of a constituent who is authorized to act for the organization in the matter and who is not complicit in the breach.

Restatement (Third) of Law Governing Lawyers § 96 cmt. e (2000). Significantly, the Restatement requirement applies to any wrongdoing -- not just wrongdoing "related to the representation."

A Restatement comment confirms that an organization's lawyer must report "up the ladder" under the specified circumstances, unless the lawyer has established an

attorney-client relationship with the constituent -- even if the report harms the constituent.

The lawyer is not prevented by rules of confidentiality from acting to protect the interests of the organization by disclosing within the organization communications gained from constituents who are not themselves clients. That follows even if disclosure is against the interests of the communicating person, of another constituent whose breach of duty is in issue, or of other constituents.

Restatement (Third) of Law Governing Lawyers § 96 cmt. e (2000). The Restatement provides an illustration.

Lawyer represents Charity, a not-for-profit corporation. Charity promotes medical research through tax-deductible contributions made to it. President as chief executive officer of Charity retained Lawyer to represent Charity as outside general counsel and has extensively communicated in confidence with Lawyer on a variety of matters concerning Charity. President asks Lawyer to draft documents by which Charity would make a gift of a new luxury automobile to a social friend of President. In that and all other work, Lawyer represents only Charity and not President as a client. Lawyer concludes that such a gift would cause financial harm to Charity in violation of President's legal duties to it. Lawyer may not draft the documents. If unable to dissuade President from effecting the gift, Lawyer must take action to protect the interests of Charity Lawyer may, for example, communicate with members of Charity's board of directors in endeavoring to prevent the gift from being effectuated.

Restatement (Third) of Law Governing Lawyers § 96 illus. 1 (2000).

A Restatement provision essentially parallels ABA Model Rule 1.13.

If a lawyer representing an organization knows of circumstances indicating that a constituent of the organization has engaged in action or intends to act in a way that violates a legal obligation to the organization that will likely cause substantial injury to it, or that reasonably can be foreseen to be imputable to the organization and likely to result in substantial injury to it, the lawyer must proceed in

what the lawyer reasonably believes to be the best interests of the organization.

Restatement (Third) of Law Governing Lawyers § 96(2) (2000). The next Restatement provision explains what steps lawyers might take.

In the circumstances described in Subsection (2), the lawyer may, in circumstances warranting such steps, ask the constituent to reconsider the matter, recommend that a second legal opinion be sought, and seek review by appropriate supervisory authority within the organization, including referring the matter to the highest authority that can act in behalf of the organization.

Restatement (Third) of Law Governing Lawyers § 96(3) (2000).

A comment provides further guidance as the circumstances triggering lawyers' "up the ladder" reporting requirement.

Within the meaning of Subsection (2), a wrongful act of a constituent threatening substantial injury to a client organization may be of two types. One is an act or failure to act that violates a legal obligation to the organization and that would directly harm the organization, such as by unlawfully converting its assets. The other is an act or failure to act by the constituent that, although perhaps intended to serve an interest of the organization, will foreseeably cause injury to the client, such as by exposing the organization to criminal or civil liability.

In either circumstance, as stated in Subsection (2), if the threatened injury is substantial the lawyer must proceed in what the lawyer reasonably believes to be the best interests of the organization. Those interests are normally defined by appropriate managers of the organization in the exercise of the business and managerial judgment that would be exercised by a person of ordinary prudence in a similar position. The lawyer's duty of care is that of an ordinarily prudent lawyer in such a position In the face of threats of substantial injury to the organization of the kind described in Subsection (2), the lawyer must assess the following: the degree and imminence of threatened financial, reputational, and other harms to the organization; the probable results of litigation that might ensue against the organization or for

which it would be financially responsible; the costs of taking measures within the organization to prevent or correct the harm; the likely efficaciousness of measures that might be taken; and similar considerations.

Restatement (Third) of Law Governing Lawyers § 96 cmt. f (2000).

The same comment explains the scope of the lawyer's possible reporting requirement.

The measures that a lawyer may take are those described in Subsection (3), among others. Whether a lawyer has proceeded in the best interests of the organization is determined objectively, on the basis of the circumstances reasonably apparent to the lawyer at the time. Not all lawyers would attempt to resolve a problem defined in Subsection (2) in the same manner. Not all threats to an organization are of the same degree of imminence or substantiality. In some instances the constituent may be acting solely for reasons of self-interest. In others, the constituent may act on the basis of a business judgment whose utility or prudence may be doubtful but that is within the authority of the constituent. The lawyer's assessment of those factors may depend on the constituent's credibility and intentions, based on prior dealings between them and other information available to the lawyer.

Id. The comment emphasizes the fact-intensive nature of the lawyers' obligation in this circumstance.

The appropriate measures to take are ordinarily a matter for the reasonable judgment of the lawyer, with due regard for the circumstances in which the lawyer must function. Those circumstances include such matters as time and budgetary limitations and limitations of access to additional information and to persons who may otherwise be able to act. If one measure fails, the lawyer must, if the nature of the threat warrants and circumstances permit, take other reasonably available measures. With respect to the lawyer's possible liability to the organizational client, failure to take a particular remedial step is tested under the general standard of § 50. When the lawyer reasonably concludes that any particular step would not likely advance the best interests of the client, the step need not be taken.

Id.

Several options are described in Subsection (3). The lawyer may be able to prevent the wrongful act or its harmful consequences by urging reconsideration by the constituent who intends to commit the act. The lawyer may also suggest that the organization obtain a second legal or other expert opinion concerning the questioned activity. It may be appropriate to refer the matter to someone within the organization having authority to prevent the prospective harm, such as an official in the organization senior in authority to the constituent threatening to act. In appropriate circumstances, the lawyer may request intervention by the highest executive authority in the organization or by its governing body, such as a board of directors or the independent directors on the board, or by an owner of a majority of the stock in the organization. In determining how to proceed, the lawyer may be guided by the organization's internal policies and lines of authority or channels of communication.

Id.

Later in that comment the Restatement confirms the continuing nature of such a lawyer's obligation.

In a situation arising under Subsection (2), a lawyer does not fulfill the lawyer's duties to the organizational client by withdrawing from the representation without attempting to prevent the constituent's wrongful act. However, the lawyer's threat to withdraw unless corrective action is taken may constitute an effective step in such an attempt.

Id.

The comment also addresses the possibility of lawyers withdrawing in such awkward situations.

If a lawyer has attempted appropriately but unsuccessfully to protect the best interests of the organizational client, the lawyer may withdraw if permissible under § 32. Particularly when the lawyer has unsuccessfully sought to enlist assistance from the highest authority within the organization, the lawyer will be warranted in withdrawing either because

the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent . . . or because the client insists on taking action that the lawyer considers repugnant or imprudent On proportionality between certain grounds for withdrawal and possible harm to the organizational client that would be caused by withdrawal. . . . Following withdrawal, if the lawyer had fulfilled applicable duties prior to withdrawal, the lawyer has no further duty to initiate action to protect the interests of the client organization with respect to the matter. The lawyer continues to be subject to the duties owed to any former client, such as the duty not to become involved in subsequent adverse representations . . . or otherwise to use or disclose the former client's confidential information adversely to the former client

Id.

Unlike the ABA Model Rules, the Restatement also addresses an organization's lawyer's duty if institutional constituents become adversaries.

One constituent of an organization may owe fiduciary duties to another such constituent, for example in some instances a majority stockholder to a minority holder. A lawyer representing only the organization has no duty to protect one constituent from another, including from a breach by one constituent of such fiduciary duties, unless the interests of the lawyer's client organization are at risk. . . . However, if the lawyer represents as a client either the entity or the constituent owing fiduciary duties, the lawyer may not counsel or assist a breach of any fiduciary obligation owed by the constituent to the organization.

Restatement (Third) of Law Governing Lawyers § 96 cmt. g (2000). The Restatement provides in two illustrations such a scenario.

Lawyer represents Client, a closely held corporation, and not any constituent of Client. Under law applicable to the corporation, a majority shareholder owes a fiduciary duty of fair dealing to a minority shareholder in a transaction caused by action of a board of directors whose members have been designated by the majority stockholder. The law provides that the duty is breached if the action detrimentally and substantially affects the value of the minority shareholder's

stock. Majority Shareholder has asked the board of directors of Client, consisting of Majority Shareholder's designees, to adopt a plan for buying back stock of the majority's shareholders in Client. A minority shareholder has protested the plan as unfair to the minority shareholder. Lawyer may advise the board about the position taken by the minority shareholder, but is not obliged to advise against or otherwise seek to prevent action that is consistent with the board's duty to Client.

. . . The same facts as in Illustration 2, except that Lawyer has reason to know that the plan violates applicable corporate law and will likely be successfully challenged by minority shareholders in a suit against Client and that Client will likely incur substantial expense as a result. Lawyer owes a duty to Client to take action to protect Client, such as by advising Client's board about the risks of adopting the plan.

Restatement (Third) of Law Governing Lawyers § 96 illus. 2, 3 (2000).

After outlining these illustrations, the Restatement reiterates that the situation may be different in closely held corporations.

The foregoing discussion assumes an entity of substantial size and significant degree of organization. On the other hand, in the case of a closely held organization, some decisions have held that a lawyer may owe duties to a non-client constituent, such as one who owns a minority interest.

Restatement (Third) of Law Governing Lawyers § 96 cmt. g (2000).

The reporter's note identifies the debate about this issue.

Dissatisfaction has been expressed with the extension of the entity theory to all client-lawyer questions involving closely held and family corporations and other, similar arrangements where the identity of owners and managers is substantially identical.

Restatement (Third) of Law Governing Lawyers § 96 reporter's note, cmt. b (2000).

A Restatement comment also discusses lawyers' possible duty to disclose the wrongdoing outside the organization. That comment permits lawyers to make what

amounts to a "noisy withdrawal" by withdrawing any documents in which the lawyer might have aided the improper conduct.

The lawyer may withdraw any support that the lawyer may earlier have provided the intended act, such as by withdrawing an opinion letter or draft transaction documents prepared by the lawyer.

Restatement (Third) of Law Governing Lawyers § 96 cmt. e (2000). The next comment also addresses this issue.

Whether the lawyer may disclose a constituent's breach of legal duty to persons outside the organization is determined primarily under §§ 66-67 In limited circumstances, it may clearly appear that limited disclosure to prevent or limit harm would be in the interests of the organizational client and that constituents who purport to forbid disclosure are not authorized to act for the organization. Whether disclosure in such circumstances is warranted is a difficult and rarely encountered issue, on which this Restatement does not take a position.

Restatement (Third) of Law Governing Lawyers § 96 cmt. f (2000).

A reporter's note to Restatement § 96 briefly notes the history of this issue.

Disclosing otherwise confidential information of the client organization to persons other than constituents in order to prevent harm to the organization by a constituent was explicitly addressed in a rejected version of ABA Model Rule 1.13. See Kutak Commission Rule 1.13(c) (revised final draft, June 30, 1982): [Action to be taken by lawyer to protect the client organization] may include revealing information otherwise protected by Rule 1.6 only if the lawyer reasonably believes that: (1) the highest authority in the organization has acted to further the person or financial interests of members of that authority which are in conflict with the interest of the organization; and (2) revealing the information is necessary in the best interest of the organization.

Restatement (Third) of Law Governing Lawyers § 96 reporter's note, cmt. f (2000). The same note provides additional guidance.

Although the version of Rule 1.13 adopted by the ABA in 1983 and in most states does not include the rejected Kutak Commission language, nothing in those provisions unequivocally prohibits disclosure, although it is clearly discouraged. The third sentence of the version of Rule 1.13(b) adopted by the ABA states that any step taken by the lawyer "shall be designed to minimize . . . the risk of revealing information relating to the representation to persons outside the organization. . . ."

In the view of the Reporters, this reference should not be understood to preclude controlled disclosure beyond the organization in the limited instances where the wrongdoing is clear, the injury to the client organization is substantial, and disclosure would clearly be in the interest of the entity client. Under that view, not adopted in the Section or Comment, the lawyer would be required to limit disclosure to that reasonably appropriate to accomplish its purpose.

Id.

Conclusion

Lawyers representing organizations must report "up the ladder" under a fairly narrow range of circumstances. Lawyers must undertake the drastic step if (1) they have not established a separate representation of the constituent; (2) they have not established a joint representation of the constituent and the organization (which would trigger a different set of confidentiality and possible permissible or mandatory disclosure issues under the ethics rules; (3) the wrongdoing is "related to" the lawyer's representation of the organization; (4) the wrongdoing is "likely to result in substantial injury to the organization"; (5) the lawyer does not "reasonably believe[] that it is not necessary in the best interest of the organization" to go "up the ladder."

Of course, lawyers in this circumstance may face many other statutory, regulatory, contractual or common law duties. For instance, Sarbanes-Oxley might apply. Other federal or state regulations could also affect the lawyer's obligations.

Lawyers and an organizational client might have entered into a retainer agreement or other contractual relationships creating such a duty. Other common law duties, such as the lawyer's fiduciary duty to the organizational client might well require "up the ladder" reporting in a broader range of circumstances than the ethics rules.

Best Answer

The best answer to this hypothetical is **(A) YOU MUST DISCLOSE THE VICE PRESIDENT'S WRONGDOING "UP THE LADDER" WITHIN THE CORPORATION.**

B 5/15, 8/15, 10/15

Lawyers' Correction of Their False Statements of Fact to Tribunals

Hypothetical 12

You just obtained a tremendous result for your client after a lengthy pretrial argument. However, you are stunned by your client's sheepish admission that some of the material facts you recited in your briefing (which you obtained from the client) were incorrect. The client reacted angrily when you told her that you must now correct those facts -- and she specifically refused to let you disclose the falsity of what you had told the court.

What do you do?

- (A) You must correct your misstatement.
- (B) You may correct your misstatement, but you don't have to.
- (C) You may not correct your misstatement, unless your client consents.

(A) YOU MUST CORRECT YOUR MISSTATEMENT

Analysis

It seems self-evident that lawyers may not themselves make false statements to a tribunal. However, the issue becomes a bit more complicated if a lawyer makes a factual statement to a tribunal thinking it to be truthful, but later discovering that it was not. At that point, lawyers might have to decide between explicitly or implicitly disclosing protected client information by correcting their earlier misstatement, or maintaining confidentiality of the information -- thus allowing the court to continue in its misunderstanding.

The 1908 ABA Canons of Professional Ethics do not deal with this issue. However, the ABA later adopted a Canon emphasizing honesty to the court, but only in

much more extreme examples than that involving a lawyer's honest misstatements the lawyer later finds to be false.

When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.

ABA Canons of Professional Ethics, Canon 41. On its face, that provision could involve actual fraud by a non-client, or (less likely) some constructive fraud engaged in by a lawyer who declined to correct an earlier statement that the lawyer had found to be incorrect.

The 1969 ABA Model Code of Professional Responsibility indicated that:

[i]n his representation of a client, a lawyer shall not . . .
[k]nowingly make a false statement of law or fact.

ABA Model Code of Professional Responsibility, DR 7-102(A)(5). The ABA Model Code did not contain an Ethical Consideration that specifically dealt with this issue.

The 1983 ABA Model Rules originally prohibited lawyers from making false statements of "material" fact to a tribunal. ABA Model Rule 3.3(a)(1).

In 2002, the ABA removed the materiality limitation, and also added a duty to correct material factual misstatements that the lawyer later learns to be false.

The ABA Model Rules now require lawyers to correct their false statements of material fact to tribunals.

A lawyer shall not knowingly . . . make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

ABA Model Rule 3.3(a)(1) (emphasis added).

A comment explains that the duty of candor to the tribunal trumps any confidentiality duty.

This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.

ABA Model Rule 3.3 cmt. [2] (emphasis added).

The next comment addresses the fairly unusual situation involving lawyers' own representation to a tribunal, but without analyzing the impact of a confidentiality duty in that context.

An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer. Compare Rule 3.1. However, an assertion purporting to be on the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonably diligent inquiry. There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation.

Id. cmt. [3]. Presumably the previous comment's more general discussion applies in the context of lawyers' own representations to tribunals.

Most states follow the ABA Model Rules standard, which requires lawyers to correct material statements they make to the court and later learn to have been false -- even if that would reveal protected client information.

Notably, however the District of Columbia takes a completely different approach. In its rule governing lawyers' duty to correct their own statements to the court (which they later discover to have been false), the District of Columbia Rules explicitly indicate that the lawyer's duty of confidentiality trumps any remediation obligation.

A lawyer shall not knowingly . . . [m]ake a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer, unless correction would require disclosure of information that is prohibited by Rule 1.6.

District of Columbia Rule 3.3(a)(1) (emphasis added). A later provision takes a similarly narrow approach to others' actual fraud on the tribunal.

A lawyer who receives information clearly establishing that a fraud has been perpetrated upon the tribunal shall promptly take reasonable remedial measures, including disclosure to the tribunal to the extent disclosure is permitted by Rule 1.6(d).

District of Columbia Rule 3.3(d). Interestingly the D.C. Rules do not contain any explanatory comments about this issue.

Best Answer

The best answer to this hypothetical is **(A) YOU MUST CORRECT YOUR MISSTATEMENT.**

B 4/15, 8/15

Friendly Non-Client's False Testimony

Hypothetical 13

You have been working with lawyers from several other law firms in defending your firm's client and their clients under a common interest agreement. You prepared a friendly third-party witness for direct testimony (to be conducted by one of the other defendant's lawyers), and expected things to go well. In a way, your colleague's direct examination went too well -- the third-party witness provided very helpful testimony that you know to be false.

What do you do?

- (A) You must correct the non-client witness's false testimony.
- (B) You may correct the non-client witness's false testimony, but you don't have to.
- (C) You may not correct the non-client witness's false testimony, unless your client consents.

(A) YOU MUST CORRECT THE NON-CLIENT WITNESS'S FALSE TESTIMONY

Analysis

Lawyers learning that a friendly non-client has provided false testimony must balance duties to their client and duties to the system -- the latter of which might call for lawyers to remove any taint caused even by a non-client's helpful false testimony.

Rules Governing Presentation of Testimony or Evidence

The 1908 ABA Canons of Professional Ethics did not deal with this issue directly.

The 1969 ABA Model Code of Professional Responsibility contained several prohibitions that addressed testimony and evidence.

In his representation of a client, a lawyer shall not . . .
[k]nowingly use perjured testimony or false evidence. . . .

[or] [p]articipate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

ABA Model Code of Profession Responsibility, DR 7-102(A)(4), (6) (emphases added).

An Ethical Consideration reiterated this basic point.

The law and Disciplinary Rules prohibit the use of fraudulent, false, or perjured testimony or evidence. A lawyer who knowingly participates in introduction of such testimony or evidence is subject to discipline. A lawyer should, however, present any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured.

ABA Model Code of Profession Responsibility, EC 7-26 (footnotes omitted) (emphasis added).

These provisions contained a number of surprising internal inconsistencies. For instance, the reference to "perjured testimony or false evidence" contains two different standards. In most states, perjury requires a sufficient degree of knowledge and intent by the witness (a point the Restatement makes, as is discussed below). So the prohibition on lawyers' use of testimony only applied with this elevated level of intent, while lawyers' use of evidence applied if the evidence was "false" -- even if the evidence (such as an affidavit) did not meet the elevated intent standard of perjury. Similarly, the provision prohibiting lawyers from participating in the "creation or preservation of evidence" did not depend on the perjury standard. Because "perjured testimony" is therefore a subset of "false evidence," it is unclear why the ABA Model Code included it in the Code's prohibition.

In addition to the "knows" element of the prohibition (which parallels the prohibition on lawyers' knowing use of "perjured testimony or false evidence"), the

provision contained an undefined negligence standard. That standard prohibited lawyers from creating or preserving evidence when "it is obvious" that the evidence is false. Although that provision did not specifically speak of presenting such evidence, presumably the prohibition covered the use of evidence that the lawyer helped create or preserve. This seems to be the only logical conclusion, yet it highlights a disconnect between the prohibition on lawyers' creation or preservation of evidence under the negligence standard (when "it is obvious that the evidence is false") and the use of evidence -- which fell within the rule's prohibition only if the lawyer knew that the evidence was false.

The 1983 ABA Model Ethics Rules contain several provisions dealing with lawyers' involvement with evidence and testimony.

Starting with the most general prohibition:

[a] lawyer shall not . . . falsify evidence, counsel or assist a witness to testify falsely.

ABA Model Rule 3.4(b). This provision prohibits a lawyer's direct involvement in evidence falsification, as well as the lawyer's advice or assistance to any witness (presumably a client or a non-client) to testify falsely.

ABA Model Rule 3.3 indicates that:

[a] lawyer shall not knowingly . . . offer evidence that the lawyer knows to be false.

ABA Model Rule 3.3(a)(3) (emphases added). This prohibition applies to clients and non-clients. A comment provides a bit more guidance.

Paragraph (a)(3) requires that the lawyer refuse to offer evidence that the lawyer knows to be false, regardless of the client's wishes.

ABA Model Rule 3.3 cmt. [5].

Unlike ABA Model Rule 3.4(b), this provision contains an explicit knowledge requirement. The Ethics Rules' Terminology section contains the following definition:

"Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

ABA Model Rule 1.0(f). Thus, the prohibition on lawyers offering evidence that the lawyer "knows" to be false requires actual knowledge -- although a disciplinary authority or court could show such actual knowledge without the lawyer's confession.

The ABA Model Rules also contain a somewhat surprising comment about lawyers' presentation of evidence.

The prohibition against offering false evidence only applies if the lawyer knows that the evidence is false. A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's knowledge that evidence is false, however, can be inferred from the circumstances. See Rule 1.0(f). Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood.

ABA Model Rule 3.3 cmt. [8] (emphases added).

The ABA Model Rules provide guidance for lawyers who do not "know" that evidence is false, but suspect its falsity. In essence, the rules offer a safe harbor for lawyers who refuse to offer such evidence.

A lawyer may refuse to offer evidence . . . that the lawyer reasonably believes is false.

ABA Model Rule 3.3(a)(3) (emphasis added). This provision immunizes lawyers from criticism under other ethics rules that require lawyers to diligently represent their clients.

See ABA Model Rule 1.3.

The ABA Model Rules also provide guidance to lawyers whose clients intend to engage in egregious misconduct.

A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

ABA Model Rule 3.3(b) (emphasis added). A comment provides further guidance.

Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

ABA Model Rule 3.3 cmt. [12] (emphasis added).

This provision applies before such a "person" engages in a sufficiently egregious misconduct in connection with a proceeding. It also applies during the misconduct or after the misconduct (the latter of which is discussed below). Significantly, the provision applies only if the person intends to engage in "criminal or fraudulent conduct." That obviously is a subset of the type of misconduct mentioned elsewhere in ABA Model Rule 3.3 -- which can include a witness's innocent or negligent presentation of evidence that the lawyer knows to be false.

The Restatement takes essentially the same approach as the ABA Model Rules.

A lawyer may not . . . knowingly counsel or assist a witness to testify falsely or otherwise to offer false evidence [or] . . .

offer testimony or other evidence as to an issue of fact known by the lawyer to be false.

Restatement (Third) of Law Governing Lawyers § 120(1)(a), (c) (2000).

The Restatement provides a much more detailed and useful discussion than the ABA Model Rules of lawyers' knowledge (and ignorance) standard that trigger various requirements.

A lawyer's knowledge may be inferred from the circumstances. Actual knowledge does not include unknown information, even if a reasonable lawyer would have discovered it through inquiry. However, a lawyer may not ignore what is plainly apparent, for example, by refusing to read a document A lawyer should not conclude that testimony is or will be false unless there is a firm factual basis for doing so. Such a basis exists when facts known to the lawyer or the client's own statements indicate to the lawyer that the testimony or other evidence is false.

Restatement (Third) of Law Governing Lawyers § 120 cmt. c (2000) (emphasis added).

Post-Testimony/Evidence Presentation

Most lawyers presumably know that they cannot falsify evidence, encourage witnesses to lie while testifying, etc. However, even the most honest lawyers might confront a different dilemma -- discovering that a non-client has testified falsely. In fact, nearly every litigator has experienced witnesses testifying differently under oath than during preparation sessions.

Although one might think that this scenario does not involve protected client information (because the dilemma does not involve the client's testimony), it is worth remembering the broad scope of protected client information under the ABA Model Rules.

Under the earlier 1969 ABA Model Code of Professional Responsibility, the protected client information included only privileged communications with the client, and secrets. The latter were defined as:

information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

ABA Model Code of Professional Responsibility, DR 4-101(A). Disclosure of protected client information to correct a friendly witness's helpful but false testimony would seem to have met that standard -- because it would "be likely to be detrimental to the client" by expunging the record of the helpful testimony.

Under the 1983 ABA Model Rules, the definition of protected client information is much broader -- covering any "information relating to the representation of a client." ABA Model Rule 1.6(a). That phrase clearly encompasses information lawyers learn while preparing non-clients to testify, and information demonstrating that the friendly non-client has testified falsely.

This dramatically expanded definition of protected client information affects the analysis of lawyers' post-presentation duties -- which themselves have evolved.

The 1908 ABA Canons of Professional Ethics included a specific requirement focusing on trials.

The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities.

ABA Canons Professional Ethics, Canon 29 (emphasis added).

The ABA later added a Canon of more general application.

When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.

ABA Canons of Professional Ethics, Canon 41 (emphasis added).

Of course, requiring lawyers only to disclose "perjury" triggered a much narrower disclosure duty than requiring lawyers to correct what might have been non-clients' honest but mistaken testimony. Even the "fraud or deception" mentioned in the broader Canon required some improper intent by the witness -- thus excluding non-clients' testimony they believed to have been true.

Thus, the ABA Canons did not squarely address a situation in which a friendly third-party witness had presented testimony or other evidence that the client's lawyer knows to be false or later learns to be false.

The 1969 ABA Model Code of Professional Responsibility contained a short provision dealing with lawyers' responsibility upon learning that a non-client presented false testimony or evidence.

A lawyer who receives information clearly establishing that . . . [a] person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

ABA Model Code of Profession Responsibility, DR 7-102(B)(2) (emphasis added).

Interestingly, the ABA Model Code did not contain an accompanying Ethical Consideration.

The ABA Model Code's reference to "fraud upon a tribunal" obviously referred to non-clients' knowing or at least negligent misconduct. This paralleled the prohibition on

lawyers knowingly offering "perjured testimony." ABA Model Code DR 7-102(A)(4). However, it differed dramatically from the provisions prohibiting lawyers from using "false evidence" or participating in the creation or preservation of "false" evidence. ABA Model Code DR 7-102(A)(4), (6).

Thus, the ABA Model Code apparently did not require lawyers to take any remedial steps upon learning that a non-client's testimony or other evidence was false. Instead, lawyers' duty to take remedial steps apparently applied only when lawyers learned that non-clients had committed a "fraud" on a tribunal -- a subset of situations in which non-clients provide false testimony (out of ignorance, negligence, etc.)

The 1983 ABA Model Rules of Professional Conduct are both narrower and broader than the earlier ABA Model Code.

Under some circumstances, lawyers must take remedial steps if they find that they offered false evidence to a tribunal.

A comment describes the broad scope of this "tribunal" reference:

This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of 'tribunal.' It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.

ABA Model Rule 3.3 cmt. [1].

First, under ABA Model Rule 3.3(a)(3), lawyers must take remedial steps if they "know" (which means actual knowledge) that a "witness called by the lawyer" has presented material false evidence.

If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

ABA Model Rule 3.3(a)(3) (emphasis added).

A comment provides further guidance on lawyers' duties.

Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done -- making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

ABA Model Rule 3.3 cmt. [10] (emphases added). This comment seems odd, because it directs the lawyer to "remonstrate with the client" even in a situation where a witness provides false testimony. Perhaps the reference to non-client witnesses was added as an after-thought.

This specific ABA Model Rule differs from the ABA Model Code provisions in several ways. The ABA Model Code requires lawyers to disclose fraud on a tribunal

committed by any "person other than his client." ABA Model Code of Professional Responsibility, DR 7-102(B)(2).¹ In contrast, the ABA Model Rule covers "another witness called by the lawyer." Second, the ABA Model Code requires lawyers to report such persons' "fraud upon a tribunal." ABA Model Code of Professional Responsibility, DR 7-102(B)(2). In contrast, the ABA Model Rules require remedial steps if the "witness called by the lawyer" has offered material evidence that the lawyer later learns to be false. ABA Model Rule 3.3(a)(3). This obviously covers a much broader range of misstatements than the ABA Model Code, which limited the remedial requirement to testimony amounting to fraud (and thus presumably presented with an improper motive and knowledge of falsity).

Second, the next ABA Model Rule 3.3 provision has a catch-all phrase that applies to a more limited type of wrongdoing than the earlier ABA Model Rule 3.3 provisions.

A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

ABA Model Rule 3.3(b) (emphasis added). A comment provides further guidance.

Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures,

¹ Of course, a separate section covers a client's fraud on the tribunal. ABA Model Code of Professional Responsibility, DR 7-102(B)(1).

including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

ABA Model Rule 3.3 cmt. [12] (emphasis added).

Significantly, this duty extends only to someone who has engaged, is engaging, or will engage in "criminal or fraudulent conduct." This contrasts with ABA Model Rule 3.3(a), which addresses false material evidence. A witness might provide false evidence negligently or even innocently.

Other parts of ABA Model Rule 3.3 apply to both types of required disclosure -- upon lawyers' learning of non-clients' (1) material false evidence; or (2) criminal or fraudulent conduct.

First, lawyers' duties under both of these ABA Model Rule 3.3 provisions trump the confidentiality duty.

The duties stated in paragraphs (a) and (b) . . . apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

ABA Model Rule 3.3(c) (emphasis added).

A comment to ABA Model Rule 1.6 similarly acknowledges that compliance with a Rule 3.3 duty overrides any confidentiality duty under that rule.

Paragraph (b) permits but does not require the disclosure of information relating to a client's representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. A lawyer's decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other Rules. Some Rules require

disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, on the other hand, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).

ABA Model Rule 1.6 cmt. [17] (emphasis added).

Second, a comment acknowledges that lawyers' compliance with this disclosure duty might hurt their clients, and in some circumstances might require the lawyers' withdrawal from representing the client.

Normally, a lawyer's compliance with the duty of candor imposed by this Rule does not require that the lawyer withdraw from the representation of a client whose interests will be or have been adversely affected by the lawyer's disclosure. The lawyer may, however, be required by Rule 1.16(a) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client. Also see Rule 1.16(b) for the circumstances in which a lawyer will be permitted to seek a tribunal's permission to withdraw. In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.

ABA Model Rule 3.3 cmt. [15] (emphases added).

Third, ABA Model Rule 3.3's duty of disclosure under either of its provisions lasts until "the conclusion of the proceeding."

The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

ABA Model Rule 3.3(c) (emphasis added). A comment provides additional guidance.

A practical time limit on the obligation to rectify false evidence or false statements of law and fact has to be established. The conclusion of the proceeding is a reasonably definite point for the termination of the obligation. A proceeding has concluded within the meaning of this Rule when a final judgment in the proceeding has been affirmed on appeal or the time for review has passed.

ABA Model Rule 3.3 cmt. [13] (emphasis added).

A Restatement section parallels ABA Model Rule 3.3. However, the Restatement rule is broader in some ways than ABA Model Rule 3.3, and narrower in other ways.

Under the Restatement:

[i]f a lawyer has offered testimony or other evidence as to a material issue of fact and comes to know of its falsity, the lawyer must take reasonable remedial measures and may disclose confidential client information when necessary to take such a measure.

Restatement (Third) of Law Governing Lawyers § 120(2) (2000) (emphasis added). A comment reiterates this point.

To the extent necessary in taking reasonable remedial measures under Subsection (2), a lawyer may use or reveal otherwise confidential client information.

Restatement (Third) of Law Governing Lawyers § 120 cmt. h (2000).

Another comment confirms that the rule might require lawyers to take actions contrary their clients' interests.

A lawyer's discovery that testimony or other evidence is false may occur in circumstances suggesting complicity by the client in preparing or offering it, thus presenting the risk that remedial action by the lawyer can lead to criminal investigation or other adverse consequences for the client. At the very least, remedial action will deprive the client of whatever evidentiary advantage the false evidence would otherwise provide. It has therefore been asserted that

remedial action by the lawyer is inconsistent with the requirements of loyalty and confidentiality However, preservation of the integrity of the forum is a superior interest, which would be disserved by a lawyer's knowing offer of false evidence. Moreover, a client has no right to the assistance of counsel in offering such evidence. As indicated in Subsection (2), taking remedial measures required to correct false evidence may necessitate the disclosure of confidential client information otherwise protected under Chapter 5.

Restatement (Third) of Law Governing Lawyers § 120 cmt. b (2000) (emphases added).

A comment identifies the witnesses whose testimony the Rule covers -- which include a far broader range of witnesses than covered by ABA Model Rule 3.3.

A lawyer's responsibility for false evidence extends to testimony or other evidence in aid of the lawyer's client offered or similarly sponsored by the lawyer. The responsibility extends to any false testimony elicited by the lawyer, as well as such testimony elicited by another lawyer questioning the lawyer's own client, another witness favorable to the lawyer's client, or a witness whom the lawyer has substantially prepared to testify A lawyer has no responsibility to correct false testimony or other evidence offered by an opposing party or witness. Thus, a plaintiff's lawyer, aware that an adverse witness being examined by the defendant's lawyer is giving false evidence favorable to the plaintiff, is not required to correct it However, the lawyer may not attempt to reinforce the false evidence, such as by arguing to the factfinder that the false evidence should be accepted as true or otherwise sponsoring or supporting the false evidence.

Restatement (Third) of Law Governing Lawyers § 120 cmt. d (2000) (emphasis added).

Notably, the Restatement explicitly indicates what the ABA Model Rules imply -- that lawyers' duty to take remedial steps apply if a witness testifies falsely, even if the witness has not committed perjury (which requires the witness to know of his or her testimony's falsity).

False testimony includes testimony that a lawyer knows to be false and testimony from a witness who the lawyer knows is only guessing or reciting what the witness has been instructed to say. This Section employs the terms "false testimony" and "false evidence" rather than "perjury" because the latter term defines a crime, which may require elements not relevant for application of the requirements of the Section in other contexts. For example, although a witness who testifies in good faith but contrary to fact lacks the mental state necessary for the crime of perjury, the rule of the Section nevertheless applies to a lawyer who knows that such testimony is false. When a lawyer is charged with the criminal offense of suborning perjury, the more limited definition appropriate to the criminal offense applies.

Restatement (Third) of Law Governing Lawyers § 120 cmt. d (2000) (emphases added).

Unlike the ABA Model Rules (which call for the lawyer to "remonstrate" only with the client to correct even a non-client's witness's false testimony), the Restatement indicates that lawyers should also remonstrate with the witness.

Before taking other steps, a lawyer ordinarily must confidentially remonstrate with the client or witness not to present false evidence or to correct false evidence already presented. Doing so protects against possibly harsher consequences. The form and content of such a remonstration is a matter of judgment. The lawyer must attempt to be persuasive while maintaining the client's trust in the lawyer's loyalty and diligence. If the client insists on offering false evidence, the lawyer must inform the client of the lawyer's duty not to offer false evidence and, if it is offered, to take appropriate remedial action.

Restatement (Third) of Law Governing Lawyers § 120 cmt. g (2000) (emphasis added).

If lawyers come to know of a helpful non-client witness's false testimony, the lawyers must take remedial steps.

If the lawyer's client or the witness refuses to correct the false testimony . . . , the lawyer must take steps reasonably calculated to remove the false impression that the evidence may have made on the finder of fact Alternatively, a lawyer could seek a recess and attempt to persuade the

witness to correct the false evidence If such steps are unsuccessful, the lawyer must take other steps, such as by moving or stipulating to have the evidence stricken or otherwise withdrawn, or recalling the witness if the witness had already left the stand when the lawyer comes to know of the falsity. Once the false evidence is before the finder of fact, it is not a reasonable remedial measure for the lawyer simply to withdraw from the representation, even if the presiding officer permits withdrawal If no other remedial measure corrects the falsity, the lawyer must inform the opposing party or tribunal of the falsity so that they may take corrective steps.

Restatement (Third) of Law Governing Lawyers § 120 cmt. h (2000) (emphases added).

This comment explicitly requires what ABA Model Rule 3.3 cmt. [15] (discussed above) implicitly requires -- disclosure to the tribunal, if withdrawal would not cure the false testimony.

The Restatement recognizes that what happens next is largely out of disclosing lawyers' hands.

The lawyer has discretion as to which measures to adopt, so long as they are reasonably calculated to correct the false evidence. If the lawyer makes disclosure to the opposing party or tribunal, thereafter the lawyer must leave further steps to the opposing party or tribunal. Whether testimony concerning client-lawyer communications with respect to the false evidence can be elicited is determined under § 82 (crime-fraud exception to attorney-client privilege). The lawyer's disclosure may give rise to a conflict between the lawyer and client requiring the lawyer to withdraw from the representation.

Restatement (Third) of Law Governing Lawyers § 120 cmt. h (2000).

Not surprisingly, lawyers must take remedial steps that would least damage their clients.

[T]he lawyer must proceed so that, consistent with carrying out the measures (including, if necessary, disclosure to the

opposing party or tribunal), the lawyer causes the client minimal adverse effects.

Restatement (Third) of Law Governing Lawyers § 120 cmt. h (2000).

Unlike the ABA Model Rules, the Restatement describes the duties of lawyers who have withdrawn or been discharged.

If a lawyer is discharged by a client or withdraws, whether or not for reasons associated with the false evidence, the lawyer's obligations under this Section are not thereby terminated. In such an instance, a reasonable remedial measure may consist of disclosing the matter to successor counsel.

Restatement (Third) of Law Governing Lawyers § 120 cmt. h (2000).

Like the ABA Model Rules, the Restatement's duty to correct false evidence extends only to the end of the proceedings.

Responsibilities of a lawyer under this Section extend to the end of the proceeding in which the question of false evidence arises. Thus, a lawyer representing a client on appeal from a verdict in a trial continues to carry responsibilities with respect to false evidence offered at trial, particularly evidence discovered to be false after trial.

Restatement (Third) of Law Governing Lawyers § 120 cmt. h (2000) (emphasis added).

State Variations

Most states follow the ABA Model Rule 3.3 approach. But as in other areas, some states have gone their own way.

For instance, Massachusetts prohibits lawyers representing clients in criminal trials from disclosing helpful non-clients' knowingly false testimony.

- Massachusetts Rule 3.3(e) ("In a criminal case, defense counsel who knows that the defendant, the client, intends to testify falsely may not aid the client in constructing false testimony, and has a duty strongly to discourage the client from testifying falsely, advising that such a course is unlawful, will have substantial adverse consequences, and should not be followed. If a lawyer

discovers this intention before accepting the representation of the client, the lawyer shall not accept the representation; if the lawyer discovers this intention before trial, the lawyer shall seek to withdraw from the representation, requesting any required permission. Disclosure of privileged or prejudicial information shall be made only to the extent necessary to effect the withdrawal. If disclosure of privileged or prejudicial information is necessary, the lawyer shall make an application to withdraw ex parte to a judge other than the judge who will preside at the trial and shall seek to be heard in camera and have the record of the proceeding, except for an order granting leave to withdraw, impounded. If the lawyer is unable to obtain the required permission to withdraw, the lawyer may not prevent the client from testifying. If a criminal trial has commenced and the lawyer discovers that the client intends to testify falsely at trial, the lawyer need not file a motion to withdraw from the case if the lawyer reasonably believes that seeking to withdraw will prejudice the client. If, during the client's testimony or after the client has testified, the lawyer knows that the client has testified falsely, the lawyer shall call upon the client to rectify the false testimony and, if the client refuses or is unable to do so, the lawyer shall not reveal the false testimony to the tribunal. In no event may the lawyer examine the client in such a manner as to elicit any testimony from the client the lawyer knows to be false, and the lawyer shall not argue the probative value of the false testimony in closing argument or in any other proceedings, including appeals." (emphases added)).

- Massachusetts Rule 3.3 cmt. [10] ("Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, and except as provided for in Rule 3.3(e), the advocate must take further remedial action. Except as provided in Rule 3.3(e), if withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done - making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing." (emphases added)).

Virginia follows the old ABA Model Code formulation, but takes an odd approach that does not make much sense.

A lawyer who receives information clearly establishing that a person other than a client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

Virginia Rule 3.3(d). Virginia's definition of "clearly establishing" requires a client confession. Virginia Rule 1.6(c)(2); Virginia LEO 1347 (6/28/90). This does not make much sense in the context of non-client perjury.

States have also addressed this issue in legal ethics opinions.

A 1995 New Hampshire legal ethics opinion focused on non-clients' documentary evidence that seems to have helped the lawyer's client, which the lawyer suspected -- but did not actually know -- was false. The lawyer had not presented or endorsed the evidence. The New Hampshire Bar concluded that the lawyer could withdraw -- without investigating the non-clients' possible presentation of false evidence. Interestingly, the Bar's summary of its holding on its face seems to disclaim any duty to correct non-clients' false evidence under any circumstances.

- New Hampshire LEO 1995-96/5 (11/16/95) ("The attorney represented a client before an administrative agency. The agency was furnished with written documents by third party non-clients. The third party submitted the documents into evidence to be considered by the agency. The attorney was not furnished with copies of these documents before, during or after their submission. Through the ruling rendered by the agency, the attorney discovered that based on the submissions, the agency found that a requirement (condition A) was continuously maintained by the client for a certain period of time. The attorney has substantial evidence to believe that the condition A was not maintained by the client on a continuous basis. The attorney is unsure whether the period of time enumerated in the documents includes the suspected period of non-compliance. The attorney has withdrawn and has counseled the client to withdraw the documents if they are false." (emphasis added); "In the matter presented to the Committee, material evidence which the lawyer believes to be false was offered by a third party unbeknownst to the lawyer and the tribunal relied on this evidence in

making its decision. The lawyer did not offer the evidence. The client does not wish the falsity of this evidence to be revealed to the tribunal. Rule 3.3 does not compel disclosure of the attorney's suspicion about false evidence introduced by someone other than the attorney. Indeed, Rule 1.6 -- Confidentiality of Information -- dictates that the attorney may not disclose '. . . information relating to representation of a client unless the client consents . . .' The client in this matter does not wish for the attorney to disclose the attorney's suspicions, and the attorney may not do so." (emphasis added); "In the matter presented to the Committee, the attorney inquired as to whether the attorney has an obligation to obtain and review documents and to interview witnesses in order to determine if the evidence presented by the third party was false. Rule 3.3 prohibits an attorney from *knowingly* presenting false evidence. Rule 4.1 prohibits an attorney from *knowingly* making a false statement to others or failing to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client. Both of these rules indicate that actual knowledge or falsity dictate that an attorney must take certain action. If an attorney does not have actual knowledge that the evidence is false, then the Rules do not compel that the attorney act." (emphasis added; italics indicate emphasis in original); "In this matter, upon suspecting that false or misleading evidence had been submitted to the tribunal, the attorney withdrew from the matter and urged the client to withdraw the evidence if in fact this evidence were false. Rule 1.16 allows an attorney to withdraw '. . . if withdrawal can be accomplished without material adverse effect on the interests of the client . . .' The rules permit, but do not require, withdrawal by the attorney in this matter."; "Based on the particular circumstances of this case: (1) The Rules of Professional Conduct do not require an attorney to correct false evidence submitted to a tribunal by a third party non-client. (2) The Rules of Professional Conduct do not permit an attorney to reveal to the third party a suspicion that the evidence is false if doing so would violate confidential communications with the client. (3) The Rules of Professional Conduct do not require that an attorney thoroughly investigate the veracity of evidence submitted by a third party. (4) The rules of Professional Conduct allow an attorney to terminate representation if there is no material adverse impact on the client. In the matter before the Committee, the inquiring attorney became aware that a third party submitted evidence which may have been false to a tribunal. The attorney withdrew from the case and urged the client to correct the evidence if it were false. It is the opinion of the Committee that the attorney has no further obligation under the Rules." (emphases added)).

At least one state imposes an investigation duty on lawyers who suspect but do not "know" that a non-client has committed perjury.

- Maryland LEO 2005-15 (2005) (holding that a lawyer who learned that a favorable witness might have testified falsely must investigate; "After the trial,

the son who had testified in your client's favor called your client and your client's daughter. They asked you to speak to the witness and he told you that he needed money and that he felt entitled since he had lied to help your client's case. You have since been told by the client and his daughter that the witness has now recanted his allegation of perjury. The matter is still on appeal."; "The requirement of Rule 3.3 extends through the 'conclusion of the proceeding.' The Committee construes this requirement to include appeals of an underlying judgment and does not end with the trial itself. . . . Otherwise, the prohibition in Rule 3.3 against a lawyer making a false statement of a material fact or offering evidence that the lawyer knows to be false would be but a hollow admonition where in the appellate proceeding the lawyer could use that false evidence to support the appeal either directly or through inference."; "While these requirements direct your conduct when you know that perjury was used in a case you are handling, they provide little guidance when you are either unsure or only suspect that a witness offered perjured testimony. The Committee believes that the regulatory and aspirational goals of the Rules would not be satisfied if an attorney, who had reason to believe that a witness committed perjury in a matter the attorney handled, could simply ignore the bases for that suspicion and rely on the requirement of Rule 3.3 that the attorney's obligation is triggered only if the attorney actually becomes assured of the perjury. Instead, the Committee concludes that an attorney, who has reason to believe that a witness who has offered perjured testimony on behalf of a client, must investigate the suspicion sufficiently to either rule out the perjury or to reach a conclusion that a reasonable person would not believe the witness lied. The investigation should be promptly commenced and concluded so as not to be used to avoid the attorney's obligation by allowing the proceedings to conclude through a belated effort." (emphasis added); "In this case, the Committee believes that you must contact the witness and determine whether the witness' testimony (and recant) is more likely truthful or his statement to you that he lied under oath. If the latter, you must take appropriate remedial measures such as notifying the court of the likelihood of the witness' perjury.").

Case Law

Not many cases have dealt with lawyers' duty to correct non-client witnesses' helpful false testimony.

In 2009, the Second Circuit held that a lawyer correcting a non-client's false testimony had not provided ineffective assistance of counsel to a criminal client.

- Torres v. Donnelly, 554 F.3d 322, 323 (2d Cir. 2009) ("The basis of Torres's habeas claim stems from his defense counsel's line of questioning during

cross-examination of an identification witness, Anna Rodriguez, which inadvertently elicited testimony counsel personally knew to be inaccurate. Subsequently, to avoid becoming a witness himself and to comply with his ethical obligations to the court to correct false testimony, counsel agreed to stipulate that, contrary to Anna's testimony during cross-examination, Anna had identified Torres when counsel had shown her a photographic array prior to trial. . . . Torres asserts that defense counsel Thomas Keefe's actions gave rise to an actual conflict of interest that so adversely affected his performance that it was unnecessary to demonstrate resulting prejudice. Torres also asserts that there is a reasonable possibility that, but for the errors of defense counsel, the outcome of his trial would have been different, finding that the lawyer had acted properly").

In a widely-reported case involving perjury by disgraced Detroit Mayor Kwame Kilpatrick, a Michigan tribunal held that Kilpatrick's lawyer violated Michigan ethics rules by failing to report both his client's and a friendly third-party witness's (the Mayor's girlfriend) false testimony denying their adulterous affair.

Among other things, the tribunal held that the lawyer had "offered" the knowingly false testimony even though another lawyer had conducted the direct examination of Mayor Kilpatrick and his girlfriend. The bar also found that the proceedings had not terminated, so the lawyer's duty had not ended.

- Grievance Administrator v. McCargo, ADB Case No. 09-50-GA, at 6, 3, 72, 73, 74, 76 & n.31, 77-78, 78, 79-80, 80 (Mich. Attorney Discipline Bd. Mar. 1, 2010) (finding that a lawyer for disgraced former Detroit Mayor Kwame Kilpatrick violated ethics rules while representing the Mayor in a case brought by a former city employee claiming that they had been wrongfully fired victims of the Whistle-blowers' Protection Act after reporting "the Mayor's dalliances."; concluding that McCargo was not guilty of violating a number of ethics rules, but violated other rules; "[T]he panel unanimously concludes that (1) McCargo violated MRPC 3.4(a) by participating in an attempted coverup of the settlement agreement and other documents in the Brown/Nelthrope case [lawsuit by the fired police officers alleging violations of the Whistleblowers Protection Act] and by his participation in the efforts to keep various aspects of the agreement secret; (2) McCargo violated MRPC 3.3 by failing to disclose to Judge Callahan the false testimony concerning the reasons why Brown and Nelthrope were removed from their positions; (3) McCargo violated MRPC 1.2(c) by assisting to cover up false testimony given by Kilpatrick and Beatty [Kilpatrick's paramour]; and (4) McCargo

violated MRPC 8.1(a) by not responding truthfully to the Request for Investigation as it related to McCargo's knowledge of the Free Press' Freedom of Information Act requests (FOIA). By majority vote (Urso and Gruskin), we conclude that McCargo violated MRPC 3.3(a)(4) by failing to disclose to Judge Callahan the false testimony by Kilpatrick and Beatty concerning their relationship. (emphasis added); "During the hearing, the parties debated whether McCargo violated MRPC 3.3 by not taking appropriate steps once he had evidence of Kilpatrick's and Beatty's false testimony concerning their relationship. However, in our view there is an issue which did not receive as much attention as the relationship, but which clearly demonstrates that MRPC 3.3 was violated-the reasons why Brown and Nelthrope were removed from their positions."; "We do not agree with McCargo's arguments asserting that he did not 'offer' the testimony by Beatty or Kilpatrick on this (or the relationship) issue, and thus cannot have violated MRPC 3.3. McCargo argues that since he did not call Kilpatrick or Beatty as a witness on these issues, he cannot be said to have 'offered' their testimony. McCargo is correct when he asserts that there is no controlling Michigan case law or decisions on this issue. However, when one's client has offered false testimony, the 'offered' language of Rule 3.3(a)(4) has been met regardless of which attorney called the client to the witness stand or scheduled the deposition, or which attorney asked the particular question. See, e.g., Hazard and Hodes, The Law of Lawyering, Section 29.12. The rationale for this conclusion is that the attorney receives the benefit or has the opportunity to benefit from that testimony." (emphasis added); "We also note that McCargo, Colbert-Osamuede, and Copeland met prior to Kilpatrick's and Beatty's trial testimony and decided amongst themselves as to which of the three of them would question the witness as to their alleged romantic relationship. It was decided that Colbert-Osamuede would question Kilpatrick on this issue. Her questioning of Kilpatrick elicited the final denial at the close of his testimony that he and Beatty had always conducted themselves as professionals 'in a non-sexual way.'" (citation omitted); "McCargo was clearly involved in the strategy and decisionmaking with regard to Kilpatrick's testimony on his relationship with Beatty, as well as the reasons why Brown and Nelthrope were removed. We decline to interpret MRPC 3.3(a)(4) in such a way that evidence is not 'offered' by an attorney if he has a co-counsel or opposing counsel ask the questions that solicited false testimony by the client rather than himself. Thus, we conclude that McCargo 'offered' the false testimony for purposes of MRPC 3.3." (emphasis added); "We also reject McCargo's argument that MRPC 3.3 no longer applied because the proceedings had concluded. We hold that, at a minimum, a proceeding is not concluded for purposes of MRPC 3.3 until entry of a final judgment. In this case, that did not occur until December 2007, long after the events discussed here occurred. Other authorities suggest that the rule applies for an even longer period. See Hazard and Hodes, The Law of Lawyering, Section 29.23 ('The 'conclusion' of a proceeding for purposes of Rule 3.3(c) should be the point where the time to

appeal has normally expired, or the point of affirmance if there has been an appeal.')" (emphasis added); "Given our conclusion, the next question we address is whether McCargo took appropriate remedial action once he knew about the false testimony. We hold that he did not do so. MRPC 3.3(a)(4) provides that when a lawyer has knowledge that a client gave false testimony, a lawyer has certain duties to take remedial measures as an officer of the court that trump the lawyer's duties as an advocate. As Professor Dubin noted, MRPC 3.3 recognizes that as an officer of the court, a lawyer cannot maintain confidentiality if by doing so he becomes an instrument of a perpetration of a fraud on a court."; "We conclude that McCargo violated MRPC 3.3(a)(4) with respect to the false testimony concerning the reasons for Brown's and Nelthrope's removals by not making disclosure to the court, and letting the court decide if further action was required. By doing nothing when he had knowledge of the false testimony, McCargo failed to comply with his obligations under MRPC 3.3(a)(4) and usurped what should have been Judge Callahan's decision as to whether further action should be taken in light of the false testimony. In this instance, the fact that confidential information about Kilpatrick was involved was explicitly trumped by McCargo's duty to take appropriate remedial action." (emphases added); finding a violation of Michigan Rule 3.3; also finding a violation of Michigan Rule 3.4(a); "Much of the focus on MRPC 3.3 at the hearing concerned the text messages which showed that Kilpatrick and Beatty falsely testified at trial about their relationship. The only separate issue we address here is whether this issue was material within the meaning of MRPC 3.3. A majority of the panel believes it was, and finds that McCargo violated MRPC 3.3 by not taking appropriate remedial action once he was aware of the text messages involving Kilpatrick's relationship with Beatty. At its core, the fact that Kilpatrick and Beatty were having a romantic relationship supported the plaintiffs' theory that they were removed from their positions because their investigations were too close to discovering Kilpatrick's relationships with other women, including Beatty. It is at a minimum evidence of motive, which we hold was material to plaintiffs' whistleblower claim. We discussed our rationale for finding this issue material in further detail in our findings of fact, and incorporate that discussion here by reference. See pp. 11-15, supra. Using the same analysis we discussed above relating to the false testimony about the reasons for Brown's and Nelthrope's removal, we also conclude that McCargo violated MRPC 3.3 when he did not bring evidence of the false testimony concerning Kilpatrick's relationship with Beatty to Judge Callahan so the judge could decide what further action, if any, to take."; "We hold that McCargo's participation in the separation of the October 17, 2007 Settlement Agreement into two new documents to avoid a FOIA request was a violation of MRPC 3.4(a). Rule 3.4(a) provides that a lawyer cannot unlawfully obstruct another party's access to evidence, unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value, or conceal or assist another person to do any such act. We agree with

Professor Dubin that MRPC 3.4(a) was initially violated when McCargo took steps to create two new documents, one for public disclosure and the one that would be kept secret."; "As Professor Dubin noted, obstructing another parties' access to evidence under MRPC 3.4(a) does not require there to be litigation between the two parties. It merely requires potential evidence that could be involved in litigation or may be involved in litigation. We believe it follows that under MRPC 3.4(a), a lawyer cannot do anything to conceal material that has potential evidentiary value. McCargo admitted that the text messages had potential evidentiary value."; "Mitchell's involvement in the matter provides further support for our conclusion. McCargo involved Mitchell in the matter so that Mitchell could be the recipient of the text messages from the safe deposit box, which would later be turned over to Kilpatrick, and never disclosed. . . . This was a further act by McCargo in improperly obstructing access to evidence. Further, in finding that McCargo violated MRPC 3.4, we also rely on our discussion above of McCargo's conduct in concluding that he violated MRPC 3.3.33.").

In 2002, a South Carolina court dealt with this issue in a criminal trial, which thus implicated constitutional issues. The court upheld the conviction of a client who insisted on calling a friendly witness the lawyer knew would present perjurious testimony. The lawyer repeatedly sought to withdraw as counsel, but the trial court refused. The client decided to examine the witness himself.

- Lucas v. State, 572 S.E.2d 274, 277, 277-78, 278 (S.C. 2002) (addressing a lawyer's responsibility when a trial court refused to let the lawyer withdraw after concluding that the client intended to call a witness who would present perjurious testimony; affirming the criminal client's conviction, despite an ineffective assistance of counsel claim; "We find attorney Thrower's actions in the present case consistent with the South Carolina Rules of Professional Conduct. As noted previously, Thrower was prohibited by Rule 3.3 from offering evidence he reasonably believed was false, was authorized by Rule 1.6(b) to reveal confidences necessary to prevent a criminal act, and was permitted to withdraw pursuant to Rule 1.16(a). We find no ethical violation. Moreover, we find no prejudice to Lucas as a result of the trial court's denial of counsel's motion to be relieved." (footnote omitted); "While an attorney has an ethical duty not to perpetrate a fraud upon the court by knowingly presenting perjured testimony, the defendant has a constitutional right to representation by counsel. . . . Had the trial judge allowed the withdrawal, any new attorney he appointed would, if faced with the same conflict, have moved to withdraw, potentially resulting in a perpetual cycle of eleventh-hour motions to withdraw. Worse, new counsel might fail to recognize the problem and unwittingly present false evidence."; "Here, it is patent that any

new attorney would have been confronted with the same dilemma. Moreover, the motion to be relieved came nearly half way through a very serious trial. We find no abuse of discretion in the trial court's denial of the motions to be relieved and for a mistrial."; "Finally, we find Lucas has demonstrated no prejudice from denial of counsel's motion to be relieved. Although Lucas himself decided to cross-examine his witnesses, he did so of his own volition, with counsel at his side at all times ready to assist in his defense."; "Further, counsel made all appropriate motions at the close of both the state's case and the close of evidence, and gave a closing statement to the jury. Accordingly, Lucas has failed to demonstrate in what manner his defense was prejudiced by denial of counsel's motion to be relieved.").

Best Answer

The best answer to this hypothetical is **(A) YOU MUST CORRECT THE NON-CLIENT WITNESS'S FALSE TESTIMONY.**

B 4/15, 8/15

Unfriendly Non-Clients' Harmful False Testimony

Hypothetical 14

Early on in the case you are handling, you learned that one of your client's neighbors had a real "grudge" against your client. However, you were surprised at how strong the "grudge" must be -- because the hostile neighbor just provided harmful material testimony against your client that you know to a certainty to be false. Given the witness's demeanor, you think he might believe to be true what he just said on the stand.

What do you do?

- (A) You must correct the non-client witness's false testimony.
- (B) You may correct the non-client witness's false testimony, but you don't have to.
- (C) You may not correct the non-client witness's false testimony, unless your client consents.

(B) YOU MAY CORRECT THE NON-CLIENT WITNESS'S FALSE TESTIMONY, BUT YOU DON'T HAVE TO

Analysis

One might think that concern for the institutional integrity of the judicial process would require lawyers to remedy any witness's false testimony. But perhaps the greater concern is that lawyers will "game" the system by either encouraging or acquiescing in non-client's knowingly false testimony. That concern focuses only on clients and friendly third-party witnesses, not adverse witnesses.

The 1908 ABA Canons of Professional Ethics require lawyers to disclose a fairly narrow range of misconduct by anyone in a trial setting.

The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to

bring the matter to the knowledge of the prosecuting authorities.

ABA Canons of Professional Ethics, Canon 29 (emphasis added). This narrow duty probably triggered very few disclosure obligations. However, on its face it would apply even to harmful testimony from unfriendly non-clients.

The 1969 ABA Model Code of Professional Responsibility contained a remedial provision covering a broad range of witnesses, but a narrow range of conduct.

A lawyer who receives information clearly establishing that . . . [a] person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

ABA Model Code of Profession Responsibility, DR 7-102(B)(2) (emphasis added).

Unfortunately, the ABA Model Code did not contain an Ethical Consideration that provided any guidance. The black letter rule covered any "person" other than the lawyer's client.¹ Thus, it covered both friendly and unfriendly witnesses. However, the disclosure duty only arose upon such a third-party witness's "fraud upon a tribunal." The provision thus covered a very narrow range of particularly egregious misconduct, and presumably did not cover a witness's innocent or negligent false testimony.

The 1983 ABA Model Rules of Professional Conduct requires lawyers to take "reasonable remedial measures" if they come to know of material false evidence offered by the lawyer, the lawyer's client "or a witness called by the lawyer."

¹ Another provision covered clients' fraud on a tribunal. ABA Model Code of Profession Responsibility, DR 7-102(B)(1) ("A lawyer who receives information clearly establishing that . . . [h]is client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.").

If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

ABA Model Rule 3.3(a)(3)² (emphasis added).

A comment provides further guidance.

Having offered material evidence in the belief that it was true, a lawyer may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client, or another witness called by the lawyer, offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. In such situations, the advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done -- making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing.

ABA Model Rule 3.3 cmt. [10] (emphasis added).

Although theoretically the black letter rule covers material false evidence presented by an adverse witness "called by the lawyer," the comment clearly focuses

² A comment describes the broad scope of this "tribunal" reference. ABA Model Rule 3.3 cmt. [1] ("This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of 'tribunal.' It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.").

on helpful testimony that lawyers have offered. Among other things, the comment refers to a non-client witness's testimony "either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer." That situation seems limited to a non-client witness lawyers will directly examine, not a hostile witness lawyers will only cross-examine. In addition, the comment explains that lawyers must first "remonstrate with the client" about correcting the record. That step seems limited to situations in which the false testimony has assisted the client. Thus, although the black letter rule on its face seems to cover material false testimony by any witness "called by the lawyer" -- even a hostile witness -- the comment implies that the lawyer's disclosure duty only applies to friendly non-client witnesses.

Another catch-all ABA Model Rules provision might also apply. However, this catch-all provision only requires lawyers to report a non-client witness's very serious misconduct -- "criminal or fraudulent conduct."

A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

ABA Model Rule 3.3(b) (emphasis added).

This would require lawyers to remedy an unfriendly non-client witness's perjury or other knowingly false testimony, but not simply false testimony without the knowledge requirement making it criminal or fraudulent. In fact, the ABA Model Rule 3.3 comment focusing on that provision points in another direction.

Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a

witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

ABA Model Rule 3.3 cmt. [12] (emphasis added). Thus, the catch-all provision triggers lawyers' disclosure duty only if the lawyer "knows" that the non-client witness has engaged in conduct involving a criminal or fraudulent state of mind. This seems unlikely in scenarios involving unfriendly non-clients.

The Restatement starts with a general provision that parallels ABA Model Rule 3.3(a)(3), but eventually explains that lawyers must disclose protected client information only to correct friendly non-client witnesses' false testimony. On its face, the black letter rule has a broad reach.

If a lawyer has offered testimony or other evidence as to a material issue of fact and comes to know of its falsity, the lawyer must take reasonable remedial measures and may disclose confidential client information when necessary to take such a measure.

Restatement (Third) of Law Governing Lawyers § 120(2) (2000).

But a comment explicitly excludes from lawyers' disclosure duty false testimony offered by an unfriendly witness.

A lawyer's responsibility for false evidence extends to testimony or other evidence in aid of the lawyer's client offered or similarly sponsored by the lawyer. The responsibility extends to any false testimony elicited by the lawyer, as well as such testimony elicited by another lawyer questioning the lawyer's own client, another witness favorable to the lawyer's client, or a witness whom the lawyer has substantially prepared to testify A lawyer

has no responsibility to correct false testimony or other evidence offered by an opposing party or witness.

Restatement (Third) of Law Governing Lawyers § 120 cmt. d (2000) (emphasis added).

An illustration confirms this:

Lawyer, representing Plaintiff, takes the deposition of Witness, who describes the occurrence in question in a way unfavorable to Plaintiff. From other evidence, Lawyer knows that Witness is testifying falsely. Subsequently, the case is settled, and Lawyer never discloses the false nature of Witness's deposition testimony. Lawyer's conduct does not violate this Section.

Restatement (Third) of Law Governing Lawyers § 120 illus. 4 (2000) (emphases added).

In fact, lawyers themselves may elicit false evidence from such adverse witnesses.

The prohibitions against false evidence address matters offered in aid of the lawyer's client. . . . It is not a violation to elicit from an adversary witness evidence known by the lawyer to be false and apparently adverse to the lawyer's client. The lawyer may have sound tactical reasons for doing so, such as eliciting false testimony for the purpose of later demonstrating its falsity to discredit the witness. Requiring premature disclosure could, under some circumstances, aid the witness in explaining away false testimony or recasting it into a more plausible form.

Restatement (Third) of Law Governing Lawyers § 120 cmt. e (2000) (emphasis added).

A section from the reporter's note repeats this concept.

The prohibition stated in the Comment extends only to aiding and abetting a client by eliciting false testimony. The Comment thus rejects one implication of *In re Federal Grievance Comm.*, 847 F.2d 57 (2d Cir. 1988). Under that reading of *Doe*, a lawyer in the circumstances stated in Illustration 4 is required to take reasonable remedial steps with respect to known false testimony of an adverse witness. As indicated in the Comment and Illustration, no such duty should be exacted.

Restatement (Third) of Law Governing Lawyers § 120 cmt. e, reporter's note (2000)

(emphasis added).

Interestingly, and predictably, lawyers may not take advantage of such unfriendly non-clients' false testimony -- even if they need not remedy it.

[T]he lawyer may not attempt to reinforce the false evidence, such as by arguing to the factfinder that the false evidence should be accepted as true or otherwise sponsoring or supporting the false evidence.

Restatement (Third) of Law Governing Lawyers § 120 cmt. d (2000).

Thus, the Restatement explicitly indicates what the ABA Model Rules implicitly endorse -- limiting lawyers' duty to disclose protected client information only to correct friendly non-client witnesses' testimony that the lawyer learns to be false after it has been presented.

This seems contrary to general principles that might require lawyers as "officers of the court" to remove the taint of false testimony from the court's record. However, this approach is consistent with the acutely adversarial nature of the litigation process.

- Texas LEO 589 (9/2009) (holding that Texas generally does not require a lawyer to report illegal conduct by an adverse party or witness; "In connection with representing a client, a lawyer learns facts strongly indicating that the opposing party and an adverse witness may be involved in illegal activity in which the client is not involved. The lawyer is considering reporting this information to the appropriate law enforcement authorities."; "This opinion addresses only a lawyer's obligations under the Texas Disciplinary Rules of Professional Conduct. It is beyond the scope of this opinion to discuss any limitations or requirements imposed on a lawyer under other applicable laws or rules. An example of a law that requires the reporting of certain possibly illegal activities is section 261.101 of the Texas Family Code, which provides that all persons having cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person are required to make a report to appropriate authorities. It should be noted that, if, by failing to report criminal activity of an adverse party or witness, the lawyer is himself committing a serious criminal act or obstructing justice, then Rule 8.04(a)(2) and (4) would be implicated. A

lawyer violates Rule 8.04(a)(2) if the lawyer commits 'a serious crime' or 'any other criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects' Rule 8.04(a)(4) prohibits a lawyer from engaging in conduct that constitutes obstruction of justice. The Texas Disciplinary Rules of Professional Conduct do not specifically require a lawyer to report possibly illegal activity of an adverse party or witness. Assuming that such reporting is not contrary to the interests of the lawyer's client and would not improperly reveal or use a client's confidential information and that there is no law requiring the reporting of the activity, the Texas Disciplinary Rules of Professional Conduct would permit, but would not require, a lawyer to report the information to the appropriate legal authorities unless the only substantial purpose for doing so was to embarrass, delay or burden a third person or the sole purpose for such reporting was to gain an advantage in a civil matter." (emphasis added).

Best Answer

The best answer to this hypothetical is **(B) YOU MAY CORRECT THE NON-CLIENT WITNESS'S FALSE TESTIMONY, BUT YOU DON'T HAVE TO.**

B 4/15, 8/15

Unfriendly Non-Clients' Helpful False Testimony

Hypothetical 15

Although you have tried many cases, you have never confronted the situation you faced this morning. A hostile witness being examined by your adversary's lawyer must not have fully understood the case -- because she provided testimony that you knew to be false, but which helps rather than hurts your client. The client wants you to remain silent and not correct the false testimony, but you worry about your role as an "officer of the court."

What do you do?

- (A) You must correct the non-client witness's false testimony.
- (B) You may correct the non-client witness's false testimony, but you don't have to.
- (C) You may not correct the non-client witness's false testimony, unless your client consents.

(B) YOU MAY CORRECT THE NON-CLIENT WITNESS'S FALSE TESTIMONY, BUT YOU DON'T HAVE TO

Analysis

Lawyers dealing with non-clients' testimony can face a number of different scenarios, depending on the witnesses' friendliness and their testimony's helpfulness. Lawyers must correct false but helpful testimony by witnesses they call (the ABA Model Rules standard) or whom they have prepared to testify (the Restatement standard). This rule makes sense, because it prevents lawyers from taking advantage of helpful testimony they know to be false.

Lawyers generally do not have a similar duty to correct unhelpful false testimony presented by unfriendly witnesses. This rule also makes sense, because the lawyer's client has not gained any advantage from the false testimony. One might think that

lawyers acting as officers of the court should have a duty to remove the taint caused by any false testimony, but as a practical matter courts might also worry that lawyers would always be "blowing the whistle" on their adversaries' supporting witnesses.

The third possibility involves unfriendly witnesses who provide testimony that helps the lawyers' client. Requiring disclosure of such false testimony would eliminate the advantage that it brings to lawyers' clients. However, the clients' lawyers have not played any role in sponsoring the false testimony.

The 1908 ABA Canons of Professional Ethics required lawyers to disclose a fairly narrow range of misconduct by anyone in a trial setting.

The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities.

ABA Canons of Professional Ethics, Canon 29 (emphasis added).

The 1969 ABA Model Code of Professional Responsibility similarly contained a remedial rule covering any non-client witness, but a narrow range of misconduct.

A lawyer who receives information clearly establishing that . . . [a] person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

ABA Model Code of Profession Responsibility, DR 7-102(B)(2) (emphasis added).

The ABA Model Rules' central provision explicitly excludes such witnesses from lawyers' disclosure duty.

If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

ABA Model Rule 3.3(a)(3)¹ (emphasis added). A catch-all ABA Model Rule provision likewise seems unlikely to apply in this context -- given its limitation to crimes and frauds.

A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

ABA Model Rule 3.3(b) (emphasis added). Thus, the ABA Model Rules do not seem to cover a scenario in which an unfriendly non-client provides helpful testimony.

In contrast, the Restatement clearly indicates that:

A lawyer has no responsibility to correct false testimony or other evidence offered by an opposing party or witness. Thus, a plaintiff's lawyer, aware that an adverse witness being examined by the defendant's lawyer is giving false evidence favorable to the plaintiff, is not required to correct it.

Restatement (Third) of Law Governing Lawyers § 120 cmt. d (2000) (emphases added).

Thus, under the Restatement lawyers do not have a duty to correct helpful but false testimony presented by unfriendly non-client witnesses.

Not surprisingly, lawyers may not use such testimony to their clients' advantage.

However, the lawyer may not attempt to reinforce the false evidence, such as by arguing to the factfinder that the false evidence should be accepted as true or otherwise sponsoring or supporting the false evidence.

¹ A comment describes the broad scope of this "tribunal" reference. ABA Model Rule 3.3 cmt. [1] ("This Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal. See Rule 1.0(m) for the definition of 'tribunal.' It also applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition. Thus, for example, paragraph (a)(3) requires a lawyer to take reasonable remedial measures if the lawyer comes to know that a client who is testifying in a deposition has offered evidence that is false.").

Id. Thus, lawyers presumably cannot cross-examine such witnesses to repeat or buttress the helpful false testimony, or include it in closing arguments.

Best Answer

The best answer to this hypothetical is **(B) YOU MAY CORRECT THE NON-CLIENT WITNESS'S FALSE TESTIMONY, BUT YOU DON'T HAVE TO.**

B 5/15, 8/15

Other Proceeding Participants' Misconduct

Hypothetical 16

You are representing the defendant in a newsworthy case, and arranged for a public relations agency to continually monitor press coverage of the trial. Although you did not ask the agency to monitor the electronic social media of jurors serving in the case, one of the agency's folks told you that a juror just posted a message on her public Facebook page indicating that she had conducted some research into the plaintiff's earlier litigation history. You know that the juror's research will reveal some unsavory facts about the plaintiff, but now you wonder whether you have to advise the court of the juror's research -- because it violates the court's strong preliminary warning to jurors not to engage in such research.

What do you do?

- (A) You must disclose the juror's misconduct.
- (B) You may disclose the juror's misconduct, but you don't have to.
- (C) You may not disclose the juror's misconduct, unless your client consents.

(B) YOU MAY DISCLOSE THE JUROR'S MISCONDUCT, BUT YOU DON'T HAVE TO

Analysis

Misconduct in the trial setting can include actions other than testimony. For instance, witnesses, jurors, or even judges might accept bribes, bailiffs knowingly or negligently allow jurors to overhear conversations they should not, etc. In fact, the types of non-testimonial misconduct that might occur in a trial setting are limited only by the imagination of nefarious lawyers and non-lawyers.

The 1908 ABA Canons of Professional Ethics required lawyers to report only certain non-client (and non-lawyer) misconduct.

The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to

bring the matter to the knowledge of the prosecuting authorities.

ABA Canons of Professional Ethics, Canon 29 (emphasis added). This presumably focused primarily on testimony, although jurors might perjury themselves if asked whether they researched issues on their smartphones, etc.

The 1969 ABA Model Rules of Professional Responsibility required lawyers to disclose non-clients' egregious misconduct.

A lawyer who receives information clearly establishing that . . . [a] person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

ABA Model Code of Professional Responsibility, DR 7-102(B)(2) (emphasis added).

The phrase "fraud upon a tribunal" does not seem to extend to improper juror research or even communications -- although a juror might engage in such misconduct if he or she falsely answered any questions from the court about the juror's actions. The American Trial Lawyers' 1982 proposed ethics rules (providing that group's contribution to the national debate resulting in the 1983 ABA Model Rules) suggested a predictably narrow confidentiality duty exception for some third parties' tribunal-related misconduct.

A lawyer may reveal a client's confidence when the lawyer knows that a judge or juror in a pending proceeding in which the lawyer is involved has been bribed or subjected to extortion. In such a case, the lawyer shall use all reasonable means to protect the client, consistent with preventing the case from going forward with a corrupted judge or juror.

Am. Lawyer's Code of Conduct, Proposed Revision of the Code of Prof'l Responsibility, Rule 1.4, Comm'n on Prof'l Responsibility, Roscoe Pound-Am. Trial Lawyers Found., Revised Draft (May 1982).

Given that group's strong emphasis on confidentiality, it should come as no surprise that the commentary almost apologizes for even that limited confidentiality exception.

The corruption cases are an appropriate exception because the corruption of the impartial judge or jury vitiates the adversary system itself. Since cases of corruption are infrequent, the exception should not have significant impact on the lawyer-client relationship. By contrast, cases of false testimony are more frequent, and the adversary system anticipates and is specifically designed to cope with false testimony through cross-examination, rebuttal, and observation of demeanor during testimony.

Id. at Ch. 1 cmt.

As originally adopted in 1983, the ABA Model Rules focused on clients' tribunal-related wrongdoing.

A lawyer shall not knowingly . . . fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.

Original ABA Model Rule 3.3(a)(2).

A comment from the original 1983 ABA Model Rules provided some guidance.

Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process, such as bribing, intimidating or otherwise unlawfully communicating with a witness, juror, court official or other participant in the proceeding, unlawfully destroying or concealing documents or other evidence or failing to disclose information to the tribunal when required by law to do so. Thus, paragraph (b) requires a lawyer to take reasonable remedial measures, including disclosure if necessary, whenever the lawyer knows that a person, including the lawyer's client, intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding.

ABA Model Rule 3.3 cmt. [12] (emphasis added).

In 2002, the ABA added a broader catch-all provision that requires lawyers' disclosure of anyone's "criminal or fraudulent conduct related to the proceeding."

A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

ABA Model Rule 3.3(b) (emphasis added).

Not surprisingly, courts and bars have focused much more rarely on this provision than on testimonial-based ABA Model Rules provisions.

In ABA LEO 466 (4/24/14), the ABA dealt with lawyers' possible duty to disclose juror misconduct.¹ ABA LEO 466 first explained that lawyers may undertake what the ABA called a "passive review" of jurors' electronic social media ("ESM"). In a footnote, the ABA noted that some states have required such a review as within the scope of lawyers' ethics duty of competence.

¹ ABA LEO 466 (4/24/14) (explaining that although the line between "properly investigating jurors and improperly communicating with them" is "increasingly blurred," lawyers may (and in some states must) engage in a "passive review" of jurors' electronic social media (which is similar to "driving down the street where the prospective juror lives to observe the environs in order to glean publicly available information that could inform the lawyer's jury-selection decisions"); concluding that an electronically sent electronic source media ("ESM") feature notifying a juror that a lawyer has conducted such a search is not a prohibited "communication" to the juror (instead it "is akin to a neighbor's recognizing a lawyer's car driving down the juror's street and telling the juror that the lawyer had been seen driving down the street"); noting in contrast that lawyers may not send an "access request" to a juror, because that would be a prohibited communication ("akin to driving down the juror's street, stopping the car, getting out, and asking the juror for permission to look inside the juror's house because the lawyer cannot see enough when just driving past"); explaining that trial judges can "dispel any juror misperception that a lawyer is acting improperly" when conducting such a search by discussing with jurors "the likely practice of trial lawyers reviewing jurors' ESM."; advising that lawyers learning through a search of jurors' ESM that a juror has engaged in "criminal or fraudulent conduct related to the proceeding" must take remedial action, including reporting the misconduct to the court; explaining that the Ethics 2000 Commission apparently intended to expand the disclosure duty to such a person's "improper conduct," but Model Rule 3.3(b) is still limited to "criminal or fraudulent" conduct; concluding that lawyers' disclosure duty upon learning of a juror's misconduct such as improper communications during jury service "will depend on the lawyer's assessment of those postings in light of court instructions and the elements of the crime of contempt or other applicable criminal statutes.").

While this Committee does not take a position on whether the standard of care for competent lawyer performance requires using Internet research to locate information about jurors that is relevant to the jury selection process, we are also mindful of the recent addition of Comment [8] to Model Rule 1.1. This comment explains that a lawyer "should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology." See also Johnson v. McCullough, 306 S.W.3d 551 (Mo. 2010) (lawyer must use "reasonable efforts" to find potential juror's litigation history in Case.net, Missouri's automated case management system); N. H. Bar Ass'n, Op. 2012-13/05 (lawyers "have a general duty to be aware of social media as a source of potentially useful information in litigation, to be competent to obtain that information directly or through an agent, and to know how to make effective use of that information in litigation"); Ass'n of the Bar of the City of N. Y. Comm. on Prof'l Ethics, Formal Op. 2012-2 ("Indeed, the standards of competence and diligence may require doing everything reasonably possible to learn about jurors who will sit in judgment on a case.").

ABA LEO 466 (4/24/14).

ABA LEO 466 then turned to lawyers' responsibility if they learn of juror misconduct through such research, or in some other way.

Interestingly, ABA LEO 466 noted that the Ethics 2000 Commission intended to expand the type of misconduct subject to lawyers' disclosure duty, but ended up not doing so.

Part of Ethics 2000's stated intent when it amended Model Rule 3.3 was to incorporate provisions from Canon 7 of the ABA Model Code of Professional Responsibility (Model Code) that had placed an affirmative duty upon a lawyer to notify the court upon learning of juror misconduct:

This new provision incorporates the substance of current paragraph (a)(2), as well as ABA Model Code of Professional Responsibility DR 7-102(B)(2) ("A lawyer who receives information clearly establishing that a person other than the client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal") and DR 7-108(G)

("A lawyer shall reveal promptly to the court improper conduct by a venireperson or juror, or by another toward a venireperson or juror or a member of the venireperson's or juror's family, of which the lawyer has knowledge").
Reporter's Explanation of Changes, Model Rule 3.3.14

However, the intent of the Ethics 2000 Commission expressed above to incorporate the substance of DR 7-108(G) in its new subsection (b) of Model Rule 3.3 was never carried out. Under the Model Code's DR 7-108(G), a lawyer knowing of "improper conduct" by a juror or venireperson was required to report the matter to the tribunal. Under Rule 3.3(b), the lawyer's obligation to act arises only when the juror or venireperson engages in conduct that is fraudulent or criminal. While improper conduct was not defined in the Model Code, it clearly imposes a broader duty to take remedial action than exists under the Model Rules. The Committee is constrained to provide guidance based upon the language of Rule 3.3(b) rather than any expressions of intent in the legislative history of that rule.

Id. (footnotes omitted) (emphases added).

After discussing recent efforts to discourage jurors' improper communications and research, ABA LEO 466 acknowledged the difficulty of drawing the line between (1) criminal or fraudulent conduct that must be reported to the court, and (2) less severe misconduct that would not require disclosure.

By passively viewing juror Internet presence, a lawyer may become aware of a juror's conduct that is criminal or fraudulent, in which case, Model Rule 3.3(b) requires the lawyer to take remedial measures including, if necessary, reporting the matter to the court. But the lawyer may also become aware of juror conduct that violates court instructions to the jury but does not rise to the level of criminal or fraudulent conduct, and Rule 3.3(b) does not prescribe what the lawyer must do in that situation. While considerations of questions of law are outside the scope of the Committee's authority, applicable law might treat such juror activity as conduct that triggers a lawyer's duty to take remedial action including, if necessary, reporting the juror's conduct to the court under current Model Rule 3.3(b).

Id. (footnote omitted) (emphasis added).

In a footnote, ABA LEO 466 cited examples of improper juror communications amounting to criminal conduct.

U.S. v. Juror Number One, 866 F.Supp.2d 442 (E.D. Pa. 2011) (failure to follow jury instructions and emailing other jurors about case results in criminal contempt). The use of criminal contempt remedies for disregarding jury instructions is not confined to improper juror use of ESM. U.S. v. Rowe, 906 F.2d 654 (11th Cir. 1990) (juror held in contempt, fined, and dismissed from jury for violating court order to refrain from discussing the case with other jurors until after jury instructions delivered).

Id.

ABA LEO 466 provided some guidelines for characterizing jurors' misconduct.

While any Internet postings about the case by a juror during trial may violate court instructions, the obligation of a lawyer to take action will depend on the lawyer's assessment of those postings in light of court instructions and the elements of the crime of contempt or other applicable criminal statutes. For example, innocuous postings about jury service, such as the quality of the food served at lunch, may be contrary to judicial instructions, but fall short of conduct that would warrant the extreme response of finding a juror in criminal contempt. A lawyer's affirmative duty to act is triggered only when the juror's known conduct is criminal or fraudulent, including conduct that is criminally contemptuous of court instructions. The materiality of juror Internet communications to the integrity of the trial will likely be a consideration in determining whether the juror has acted criminally or fraudulently. The remedial duty flowing from known criminal or fraudulent juror conduct is triggered by knowledge of the conduct and is not preempted by a lawyer's belief that the court will not choose to address the conduct as a crime or fraud.

Id. (emphasis added).

Given the fact-specific nature of contempt findings, lawyers may find it nearly impossible to determine in advance what juror misconduct amounts to reportable

"criminal or fraudulent" conduct. Although presumably lawyers would have an easier time checking substantive criminal law, even that might be difficult in a juror misconduct setting.

Best Answer

The best answer to this hypothetical is **(B) YOU MAY DISCLOSE THE JUROR'S MISCONDUCT, BUT YOU DON'T HAVE TO.**

B 5/15, 8/15

Lawyers Subject to the Disclosure Duty

Hypothetical 17

After practicing in the fairly cloistered setting of a large law firm, you joined your state bar's "ethics hotline" team. Among other things, this has forced you to deal with ethics issues confronting lawyers in many varied roles that you never considered while at a big law firm. Several questions have come into the ethics hotline about lawyers' possible duty to report another lawyer's serious ethics violation.

Must a lawyer acting in the following roles report another lawyer's serious ethics violation?

- (a) Defense lawyer representing another lawyer already charged by the bar with an ethics breach?

(B) NO

- (b) Lawyer participating in a local lawyers assistance program?

(B) NO (PROBABLY)

- (c) Judge?

(A) YES (PROBABLY)

- (d) Lawyer acting as a mediator?

MAYBE

Analysis

When analyzing lawyers' possible duty to report other lawyers' ethics violations, it makes sense to start the analysis by determining which lawyers face such a duty.

ABA Canons, Code and Rules

The 1908 ABA Canons of Professional Ethics contained two very specific provisions focusing on particular lawyer wrongdoing.

The first sentence appeared in Canon 28, which was entitled "Stirring Up Litigation, Directly or Through Agents."

A duty to the public and to the profession devolves upon every member of the Bar having knowledge of such practices upon the part of any practitioner immediately to inform thereof to the end that the offender may be disbarred.

ABA Canons of Professional Ethics, Canon 28 (emphasis added). Thus, this duty to report another lawyer arose only if a lawyer "stirred up" litigation.

The second sentence appeared in the next Canon, which was entitled "Upholding the Honor of the Profession."

Lawyers should expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, and should accept without hesitation employment against a member of the Bar who has wronged his client.

ABA Canons of Professional Ethics, Canon 29 (emphasis added). The "should" standard contrasted with the "duty" standard involving "stirring up" litigation, and therefore presumably suggested rather than required lawyers to report wrongdoers.

The 1969 ABA Model Code of Professional Responsibility contained a much more general duty.

A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

ABA Model Code of Professional Responsibility, DR 1-103(A) (emphasis added). ABA Code DR 1-102 was the "catch-all" description of ethics violations.

A lawyer shall not: (1) Violate a Disciplinary Rule. (2) Circumvent a Disciplinary Rule through actions of another. (3) Engage in illegal conduct involving moral turpitude. (4) Engage in conduct involving dishonesty, fraud,

deceit, or misrepresentation. (5) Engage in conduct that is prejudicial to the administration of justice. (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

ABA Model Code of Professional Responsibility, DR 1-102(A)(1-6).

Thus, subject to the "unprivileged knowledge" standard, the ABA Model Code required lawyers to report other lawyers' DR 1-102 violations.

An Ethical Consideration provided additional guidance:

The integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials. A lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyers which he believes clearly to be in violation of the Disciplinary Rules.

ABA Model Code of Professional Responsibility, EC 1-4 (emphasis added).

This Ethical Consideration ("EC") contained several interesting phrases. First, the EC indicated that lawyers "should reveal voluntarily" other lawyers' misconduct (emphasis added). This appeared to be a discretionary standard, although the black letter used the phrase "shall report." Second, the EC did not define the "proper officials" to whom a lawyer must report misconduct. Presumably, that term referred to bar disciplinary officials. Third, the EC defined the reportable misconduct as that which the reporting lawyer "believes clearly" to violate the Disciplinary Rules. That "clearly" standard did not appear in the black letter rule. Fourth, the comment referred to "the Disciplinary Rules" in general, while the black letter rule specifically mentioned ABA Model Code DR 1-102. This may not have been a significant variation, because DR 1-102 was the catch-all provision.

The 1983 ABA Model Rules of Professional Responsibility also contains a reporting requirement.

A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

ABA Model Rule 8.3(a)¹ (emphasis added).

A comment emphasizes the importance of self-regulation.

Self-regulation of the legal profession requires that members of the profession initiate disciplinary investigation when they know of a violation of the Rules of Professional Conduct.

ABA Model Rule 8.3 cmt. [1] (emphasis added).

Thus, the black letter ABA Model Rule applies to all lawyers.

Restatement

The Restatement section dealing with this issue essentially parallels the ABA Model Rules approach.

A lawyer who knows of another lawyer's violation of applicable rules of professional conduct raising a substantial question of the lawyer's honesty or trustworthiness or the lawyer's fitness as a lawyer in some other respect must report that information to appropriate disciplinary authorities.

Restatement (Third) of Law Governing Lawyers § 5(3) (2000).

Thus, on its face the general Restatement provision also applies to all lawyers.

¹ Although lawyers rarely deal with the ethics rules governing their duty to disclose fellow lawyers' serious misconduct, the ABA issued a flurry of legal ethics opinions in a very short period of time that deal with the issue: ABA LEO 429 (6/11/03) ("Obligations with Respect to Mentally Impaired Lawyer in the Firm"); ABA LEO 431 (8/8/03) ("Lawyer's Duty to Report Rule Violations by Another Lawyer Who May Suffer from Disability or Impairment"); ABA LEO 433 (8/25/04) ("Obligation of a Lawyer to Report Professional Misconduct by a Lawyer Not Engaged in the Practice of Law"); ABA LEO 449 (8/9/07) ("Lawyer Concurrently Representing Judge and Litigant Before the Judge in Unrelated Matters"). The ABA rarely deals so frequently with the same topic in such a short period of time.

Lawyers Subject to the Reporting Duty

Despite the majority view imposing a reporting obligation on all lawyers, the ethics rules and other law clearly exclude some lawyers from the reporting duty -- and have generated debate about the reporting obligation's application to other lawyers.

(a) It should go without saying that the reporting duty does not apply to lawyers retained to represent lawyers in connection with alleged ethics violations.

The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the Rules applicable to the client-lawyer relationship.

ABA Model Rule 8.3 cmt. [4].

(b) Most ethics rules explicitly exclude from any reporting obligation information that lawyers learn while helping in an approved lawyers assistance programs.

The ABA Model Rules include an explicit provision exempting certain information from lawyers' reporting obligation.

This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

ABA Model Rule 8.3(c) (emphasis added).

A comment provides an explanation:

Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek

assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

ABA Model Rule 8.3 cmt. [5] (emphasis added).

Similarly, the Restatement acknowledges that:

Lawyer codes also commonly provide an exception for information learned in counseling another lawyer in a substance-abuse or similar program.

Restatement (Third) of Law Governing Lawyers § 5 cmt. i (2000). The reporter's note describes the exception's origin:

Following ABA Model Rule 8.3(c), as amended by the ABA House of Delegates in 1991, several jurisdictions also except information about another lawyer learned in the course of an approved lawyers assistance program, such as those dealing with substance abuse.

Restatement (Third) of Law Governing Lawyers § 5 reporter's note, cmt. i.

Some states take the same approach.

- New Mexico Rule 16-803(E) ("The reporting requirements set forth in Paragraphs A and B of this rule do not apply to any communication concerning alcohol or substance abuse by a judge or lawyer that is: (1) made for the purpose of reporting substance abuse or recommending, seeking or furthering the diagnosis, counseling or treatment of a judge or an attorney for alcohol or substance abuse; and (2) made to, by or among members or representatives of the Lawyer's Assistance Committee of the State Bar, Alcoholics Anonymous, Narcotics Anonymous or other support group recognized by the Judicial Standards Commission or the Disciplinary Board; recognition of any additional support group by the Judicial Standards Commission or the Disciplinary Board shall be published in the Bar Bulletin. This exception does not apply to information that is required by law to be reported, including information that must be reported under Paragraph F of this rule, or to disclosures or threats of future criminal acts or violations of these rules.").

- Virginia Rule 8.3(d) ("This rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge who is a member of an approved lawyer's assistance program, or who is a trained intervenor or volunteer for such a program or committee, or who is otherwise cooperating in a particular assistance effort, when such information is obtained for the purposes of fulfilling the recognized objectives of the program.").
- Virginia Rule 8.3 cmt. [5] ("Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in or cooperation with an approved lawyers or judges assistance program. In that circumstance, providing for the confidentiality of such information encourages lawyers and judges to seek treatment through such program. Conversely, without such confidentiality, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. The duty to report, therefore, does not apply to a lawyer who is participating in or cooperating with an approved lawyer assistance program such as the Virginia Bar Association's Committee on Substance Abuse and who learns of the confidences and secrets of another lawyer who is the object of a particular assistance effort when such information is obtained for the purpose of fulfilling the recognized objectives of the program. Such confidences and secrets are to be protected to the same extent as the confidences and secrets of a lawyer's client in order to promote the purposes of the assistance program. On the other hand, a lawyer who receives such information would nevertheless be required to comply with the Rule 8.3 reporting provisions to report misconduct if the impaired lawyer or judge indicates an intent to engage in illegal activity, for example, the conversion of client funds to personal use.").
- New Hampshire LEO 2011-12/4 (2011) ("A lawyer-mediator is mediating a dispute between a lawyer and that lawyer's client involving the fees charged and the work performed by that lawyer in a matter. The lawyer and client have generally reached agreement on the resolution of all issues. However, the lawyer insists that as a condition of settlement, the client must agree not to file any professional conduct complaints against the lawyer."; "One other issue stemming from this inquiry is of note. If one of the issues in dispute involves conduct by the lawyer proposing a release of claims which raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer, a question arises as to whether the lawyer-mediator could be exposed to disciplinary action for failure to report that lawyer's misconduct. NHRPC 8.3(a) requires that a lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct which raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, must report that lawyer to the Attorney Discipline Office. The failure to do so is a professional conduct violation itself. There

are exceptions to this requirement if the information is otherwise protected by professional conduct rules pertaining to confidentiality (NHRPC 1.6), as well as for work by lawyers on the New Hampshire Bar Association Ethics Committee and the New Hampshire Lawyers Assistance Committee. See NHRPC 8.3(c). However, none of those exceptions applies here. Likewise, there are court rules and generally accepted principles concerning mediation which require that mediators maintain the confidentiality of all information obtained in mediation unless otherwise required by law. See e.g. ABA Model Rules of Conduct for Mediators, Standard V, Confidentiality (adopted September 8, 2005) and Superior Court Rule 170(E)(1). As of the issuance of this opinion, there has been no determination by the New Hampshire Supreme Court or the Professional Conduct Committee analyzing the interplay of NHRPC 8.3(a) upon lawyer-mediators." (emphasis added)).

- Kentucky LEO E-430 (1/16/10) ("In addition to the exception for information protected by Rule 1.6, Rule 8.3(c) does not require disclosure of information obtained while participating in a lawyer assistance program. The Kentucky Lawyer Assistance Program (KYLAP) was established to protect the public and to assist lawyers who suffer from actual or potential impairment. SCR 3.990 provides that 'all communications to KYLAP and all information gathered, records maintained and actions taken by KYLAP shall be confidential, shall be kept in strict confidence by KYLAP's staff and volunteers, shall not be disclosed by KYLAP to any person or entity, including any agency of the Court and any department of the Association, and shall be excluded as evidence in any proceeding before the Board of Governors or the Offices of Bar Admissions....' Rule 8.3 recognizes the confidentiality of information obtained while participating in the KYLAP program. KYLAP staff and volunteers need not report misconduct about which they first learned through KYLAP. This reporting exception does not relieve a lawyer who is not a KYLAP staff member or volunteer from reporting an impaired lawyer or judge whose conduct raises a substantial question as honesty, trustworthiness or fitness. The rule attempts to balance the goal of assisting impaired lawyers by providing a confidential support network, with the need to protect the public." (footnote omitted)).
- Utah LEO 98-12 (12/04/98) ("A lawyer is required to report to the Utah State Bar any unlawful possession or use of controlled substances by another lawyer if two conditions are satisfied: (1) the lawyer has actual knowledge of the illegal use or possession, and (2) the lawyer has a reasonable, good-faith belief that the illegal use or possession raises a substantial question as to the offending lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. A lawyer is excused from this reporting requirement only if (i) the lawyer learns of such use or possession through a bona fide attorney-client relationship with the offending lawyer, or (ii) the lawyer becomes aware of the unlawful use or possession through providing services to the offending lawyer under the auspices of the Lawyers Helping Lawyers program of the

Bar."; "The somewhat inartful wording of Rule 8.3(d) raises the question of whether a lawyer fulfills the Rule 8.3(a) requirement by simply reporting an offending lawyer's illegal actions to the Lawyers Helping Lawyers Committee. We conclude that the focus of the Rule 8.3(d) exception only extends to those lawyers who receive or discover information in connection with their active participation on the Lawyers Helping Lawyers Committee. This committee is a volunteer operation sponsored by the Utah State Bar, but it possesses no authority over lawyers who may need assistance. Indeed, lawyers who may need substance-abuse help, for example, are under no obligation to participate in the program, even when contacted by that organization. Merely reporting information to Lawyers Helping Lawyers does not satisfy the reporting lawyer's Rule 8.3(a) obligation." (emphases added)).

One state has explicitly recognized a parallel principle -- similarly lawyers involved in that state's ethics hotline from any reporting obligation.

- Kentucky LEO E-430 (1/16/10) ("Rule 8.3(c) also provides that information conveyed in the course of Hotline inquiries is confidential under SCR 3.530(3). It provides that a member of the Hotline does not have a duty to report or disclose information obtained as a result of participation in the Ethics Hotline.").

(c) States take different positions on whether judges (who are, after all, still lawyers) must report lawyer misconduct -- although most states require judges to report sufficiently egregious lawyer misconduct.

During the course of discovery or a support trial, a judge learns that a witness or a party has unreported 'under-the-table' income. Instinctively, a trial judge may recoil: The federal and state taxing authorities should be informed. But the judicial decision to report tax evasion or other illegal conduct to 'appropriate authorities' is more complicated, with an overlay of ethical rules and practical complications that caution judicial restraint. . . . Every state requires judges to maintain the integrity and independence of the judiciary and avoid impropriety or its appearance. Judges in New York have a clear duty to 'take appropriate action' if there is 'a substantial likelihood of any attorney violations of the Rules of Professional Conduct.' Judges may assume that the same duty extends to witnesses and parties that appear before them but, in New York, the duty to report illegal conduct is not mandatory and rests instead within the judge's

discretion. In a 1988 opinion, the New York Advisory Committee on Judicial Ethics held: in the absence of any statutory requirement, the trial judges are not obligated to report the apparent misconduct; they may exercise their discretion in determining whether to report the actions. The committee described 'mandatory reporting' as 'undesirable' because it would dissuade witnesses from truth-telling and encourage the use of a threat of criminal prosecution in settlement discussions. A chorus of later ethical opinions provide some guidance for judicial discretion, leaving it up to trial judges on whether to report a litigant's alien status, allegations that a lawyer-husband misused his Interest on Lawyer's Account (IOLA), a positive drug test by a doctor in a divorce matter; the receipt of unreported income to a divorce party who received Social Security disability benefits, the filing of a false instrument, statutory rape or even an open bench warrant. Even after issuance of these opinions, some trial judges have nonetheless assumed that the judge has an 'obligation' to report potential tax evasion by a divorcing spouse to appropriate authorities. In Hashimoto v. La Rosa[, 798 N.Y.S.2d 344 (N.Y.Sup. Ct. 2004)], the Supreme Court, New York County, after reading an affidavit from the husband in which he admitted tax evasion, held that it was 'obligated to report admissions of tax evasion or fraud to the authorities.' . . . Most state judicial ethics codes follow the 'discretion to report' maxim. But in exercising that discretion, New York courts should carefully consider the experience in New Jersey. A seminal 1991 decision holds that New Jersey judges are bound by ethical considerations to report 'illegal conduct' when 'it comes to the attention of the court.' . . . New Jersey's experience demonstrates that if a judge decides to report 'wrongdoing,' -- either under a mandate to do so or at their discretion -- the courts can end up engulfed in deciding, at least on a threshold basis, countless taxing questions, such as reporting bartering transactions and erroneous use of child-care deductions, even though these may be complex federal taxing questions outside the usual ken of state trial judges.

Richard A. Dollinger, Reporting Tax Evasion in Support Cases, N.Y. L. J., May 27, 2014, at 4 (emphases added).

A 2015 New York Judicial Ethics Opinion provided some guidance to judges who are not certain whether a lawyer's sufficiently egregious misconduct has been reported, despite extensive media coverage.

- New York Judicial Ethics Opinion 15-180 (11/18/15) ("This responds to your inquiry (15-180) asking whether you must report an attorney for misconduct. You say you have substantial knowledge of a substantial violation of the Rules of Professional Conduct committed by an attorney who appeared before you, and you have further concluded that reporting is mandatory under the circumstances presented (see Opinion 10-85 [threshold for mandatory reporting is a 'violation that seriously calls into question the attorney's honesty, trustworthiness or fitness to practice law'])). However, the improper conduct has been covered extensively in the media, and the attorney's former employer issued a press release that the attorney no longer worked for the employer. Although you believe the attorney's former employer has reported the attorney to the grievance committee, you have not confirmed this belief."; "The Committee has previously advised that, when reporting is mandated under Section 100.3(D)(2), a judge must report the misconduct unless he/she knows it has already been reported. Thus, unless you know that the specific conduct you have described has been reported, you should report the conduct. However, you are not required to conduct an investigation to determine whether the attorney has previously been reported and/or disciplined for this specific conduct. Rather, under the circumstances presented, if you are uncertain whether a complaint has been made to an appropriate entity, you should simply report the attorney." (emphases added)).

(d) Perhaps the most important debate about the reporting requirement's coverage involves lawyers acting as mediators. Determining whether lawyer-mediators must report other lawyers' misconduct involves balancing the profession's self-policing principle and the critical role of mediation confidentiality.

A 1997 law review article noted the inherent inconsistency between mediation, confidentiality and the disclosure duty.

Mediation and alternative dispute resolution processes have enjoyed epic growth in recent years; however, in the midst of this growth, some serious ethical quandaries have surfaced for the attorney-mediator. If the mediation process is to continue to grow and flourish in a productive manner,

obligations of the attorney-mediator must be made clear for the protection of the mediator, the parties, and the process. This Article addresses one crucial issue facing attorney-mediators today: the conflict between confidentiality and professional responsibility in the mediation process.

The mediation process must be confidential to work effectively, and most states have enacted legislation granting confidentiality to the mediation process. However, the vast majority of these confidentiality rules are in direct conflict with attorney rules of professional conduct that require attorneys to report misconduct by fellow attorneys to disciplinary authorities. Attorney-mediators are placed in an intolerable conflict when holding that discipline is mandated for a lawyer who fails to report, to showing surprising leniency in construing disclosure requirements in certain cases.

Pamela A. Kentra, Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators Between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct, 1997 BYU L. Rev. 715, 717-18 (footnotes omitted) (emphases added).

Interestingly, the article explained that neither the ABA Model Rules nor the various mediation rules deal with the conflict between confidentiality and the disclosure duty.

At least one of the drafters of the Model Rules admitted that the Kutak Commission, the body that debated and drafted the Model Rules, never considered the conflict created when a lawyer-mediator gains knowledge of another lawyer's misconduct during the mediation process. As such, no comment on this precarious conflict situation "appears in the comment to [Rule] 8.3 or the legislative history of the Model Rules."

...

[T]he American Bar Association, the American Arbitration Association, and the Society of Professionals in Dispute Resolution have drafted Model Standards for Mediator

conduct. Unfortunately, this code also does not specifically address the conflict between the duty to maintain confidentiality in the mediation session versus attorney misconduct reporting requirements.

Id. at 750 (footnotes omitted) (emphasis added).

As of that article's 1997 publication, only one state had adopted a statute dealing with the issue.

A survey of all state statutes granting confidentiality to the mediation process reveals only one statute that contemplates the conflict between the duty to maintain confidentiality and the duty to report fellow attorney misconduct. The Minnesota statute creates a privilege for alternative dispute resolution program participants, forbidding them from testifying in any subsequent civil proceeding or administrative hearing as to any statement, conduct, decision, or ruling occurring at or in conjunction with the alternative dispute resolution proceeding.

Id. at 751 (footnote omitted) (emphasis added).

The conflicting interests described in the 1997 law review article seem unresolved even now.

The American Arbitration Association Commercial Arbitration Rules and Mediation Procedure emphasize mediator confidentiality duties.

- Subject to applicable law or the parties' agreement, confidential information disclosed to a mediator by the parties or by other participants (witnesses) in the course of the mediation shall not be divulged by the mediator. The mediator shall maintain the confidentiality of all information obtained in the mediation, and all records, reports, or other documents received by a mediator while serving in that capacity shall be confidential. The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum. The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding the following, unless agreed to by the parties or required by applicable law: (i) Views expressed or suggestions made by a party or other participant with respect to a possible settlement of the dispute; (ii) Admissions made by a party or other participant in the course of the mediation proceedings; (iii)

Proposals made or views expressed by the mediator; or (iv) The fact that a party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

States have also struggled with this issue.

- New Hampshire LEO 2011-12/4 (2011) ("A lawyer-mediator is mediating a dispute between a lawyer and that lawyer's client involving the fees charged and the work performed by that lawyer in a matter. The lawyer and client have generally reached agreement on the resolution of all issues. However, the lawyer insists that as a condition of settlement, the client must agree not to file any professional conduct complaints against the lawyer."; "One other issue stemming from this inquiry is of note. If one of the issues in dispute involves conduct by the lawyer proposing a release of claims which raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer, a question arises as to whether the lawyer-mediator could be exposed to disciplinary action for failure to report that lawyer's misconduct. NHRPC 8.3(a) requires that a lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct which raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, must report that lawyer to the Attorney Discipline Office. The failure to do so is a professional conduct violation itself. There are exceptions to this requirement if the information is otherwise protected by professional conduct rules pertaining to confidentiality (NHRPC 1.6), as well as for work by lawyers on the New Hampshire Bar Association Ethics Committee and the New Hampshire Lawyers Assistance Committee. See NHRPC 8.3(c). However, none of those exceptions applies here. Likewise, there are court rules and generally accepted principles concerning mediation which require that mediators maintain the confidentiality of all information obtained in mediation unless otherwise required by law. See e.g. ABA Model Rules of Conduct for Mediators, Standard V, Confidentiality (adopted September 8, 2005) and Superior Court Rule 170(E)(1). As of the issuance of this opinion, there has been no determination by the New Hampshire Supreme Court or the Professional Conduct Committee analyzing the interplay of NHRPC 8.3(a) upon lawyer-mediators." (emphasis added)).

The mediation process can involve several different reporting obligation issues.

First, bars have addressed the reporting obligation of lawyers who learn of some reportable misconduct while they are acting as mediators. Second, bars have addressed the reporting obligation's applicability to information about misconduct that comes to the attention of lawyers who are acting as legal advisors in mediation process.

The first issue focuses on the lawyers subject to the reporting obligation, while the second issue focuses on the source of the information coming to the attention of lawyers who are acting in their traditional role as legal advisors.

Some states continue to recognize a very strong mediation confidentiality principle -- which explicitly or implicitly trumps any possible disclosure duty.

- Virginia Code § 8.01-581.22 ("All memoranda, work products and other materials contained in the case files of a mediator or mediation program are confidential. Any communication made in or in connection with the mediation, which relates to the controversy being mediated, including screening, intake, and scheduling a mediation, whether made to the mediator, mediation program staff, to a party, or to any other person, is confidential. However, a written mediated agreement signed by the parties shall not be confidential, unless the parties otherwise agree in writing. Confidential materials and communications are not subject to disclosure in discovery or in any judicial or administrative proceeding except (i) where all parties to the mediation agree, in writing, to waive the confidentiality, (ii) in a subsequent action between the mediator or mediation program and a party to the mediation for damages arising out of the mediation, (iii) statements, memoranda, materials and other tangible evidence, otherwise subject to discovery, which were not prepared specifically for use in and actually used in the mediation, (iv) where a threat to inflict bodily injury is made, (v) where communications are intentionally used to plan, attempt to commit, or commit a crime or conceal an ongoing crime, (vi) where an ethics complaint is made against the mediator by a party to the mediation to the extent necessary for the complainant to prove misconduct and the mediator to defend against such complaint, (vii) where communications are sought or offered to prove or disprove a claim or complaint of misconduct or malpractice filed against a party's legal representative based on conduct occurring during a mediation, (viii) where communications are sought or offered to prove or disprove any of the grounds listed in § 8.01-581.26 in a proceeding to vacate a mediated agreement, or (ix) as provided by law or rule. The use of attorney work product in a mediation shall not result in a waiver of the attorney work product privilege.").
- Virginia Rule 8.3(c) ("If a lawyer serving as a third party neutral receives reliable information during the dispute resolution process that another lawyer has engaged in misconduct which the lawyer would otherwise be required to report but for its confidential nature, the lawyer shall attempt to obtain the parties' written agreement to waive confidentiality and permit disclosure of such information to the appropriate professional authority.").

- Virginia Rule 8.3 cmt. [3a] ("In court-related dispute resolution proceedings, a third party neutral cannot disclose any information exchanged or observations regarding the conduct and demeanor of the parties and their counsel during the proceeding. Mediation sessions are covered by another statute, which is less restrictive, covering 'any communication made in or in connection with the mediation which relates to the controversy being mediated.' Thus a lawyer serving as a mediator or third party neutral may not be able to discharge his or her obligation to report the misconduct of another lawyer if the reporting lawyer's information is based on information protected as confidential under the statutes. However, both statutes permit the parties to agree in writing to waive confidentiality." (emphasis added)).
- Virginia Rule 8.3 cmt. [3b] ("The Rule requires a third party neutral lawyer to attempt to obtain the parties' written consent to waive confidentiality as to professional misconduct, so as to permit the lawyer to reveal information regarding another lawyer's misconduct which the lawyer would otherwise be required to report.").
- Cassel v. Superior Court, 244 P.3d 1080, 1083, 1083-84, 1084 (Cal. 2011) ("In order to encourage the candor necessary to a successful mediation, the Legislature has broadly provided for the confidentiality of things spoken or written in connection with a mediation proceeding. With specified statutory exceptions, neither 'evidence of anything said,' nor any 'writing,' is discoverable or admissible 'in any arbitration, administrative adjudication, civil action, or other noncriminal proceeding in which . . . testimony can be compelled to be given,' if the statement was made, or the writing was prepared, 'for the purpose of, in the course of, or pursuant to, a mediation . . . ' (Evid. Code, § 1119, subs. (a), (b).) 'All communications, negotiations, or settlement discussions by and between participants in the course of a mediation . . . shall remain confidential.' (Id., subd. (c).) We have repeatedly said that these confidentiality provisions are clear and absolute. Except in rare circumstances, they must be strictly applied and do not permit judicially crafted exceptions or limitations, even where competing public policies may be affected." (footnote omitted); "The issue here is the effect of the mediation confidentiality statutes on private discussions between a mediating client and attorneys who represented him in the mediation. Petitioner Michael Cassel agreed in mediation to the settlement of business litigation to which he was a party. He then sued his attorneys for malpractice, breach of fiduciary duty, fraud, and breach of contract. His complaint alleged that by bad advice, deception, and coercion, the attorneys, who had a conflict of interest, induced him to settle for a lower amount than he had told them he would accept, and for less than the case was worth. Prior to trial, defendant attorneys moved, under the statutes governing mediation confidentiality, to exclude all evidence of private attorney-client discussions immediately preceding, and during, the mediation concerning mediation settlement strategies and defendants' efforts to persuade petitioner to reach a settlement

in the mediation."; "We must apply the plain terms of the mediation confidentiality statutes to the facts of this case unless such a result would violate due process, or would lead to absurd results that clearly undermine the statutory purpose. No situation that extreme arises here. Hence, the statutes' terms must govern, even though they may compromise petitioner's ability to prove his claim of legal malpractice.").

- Florida Mediator Ethics Advisory Committee Opinion 2006-005 (3/10/08) ("I have been recently involved in a mediation and during the mediation it was learned that there was an expenditure from funds held in escrow by one of the attorneys representing a party to the litigation." (emphasis added); " For purposes of this discussion, we assume that the expenditure from escrow funds was improper."; "To answer your question, one must first determine whether the communication regarding the escrow funds is a 'mediation communication' pursuant to Florida Statutes. A mediation communication means 'an oral or written statement . . . by or to a mediation participant made during the course of a mediation. . .' Section 44.403(1), Florida Statutes. The communication you describe clearly fits this definition. Having determined that the statement was a mediation communication, one must next determine whether it fits within any of the listed statutory exceptions to confidentiality. One of the listed statutory exceptions to the confidentiality of mediation communications is a communication 'offered to report, prove or disprove **professional misconduct occurring during the mediation**, solely for the internal use of the body conducting the investigation of the conduct.' Section 44.405(4)(a)6. Emphasis added. Since the misconduct which would be the subject of the report, the escrow violation, did not occur during the mediation, the misconduct statutory exception does not apply." (emphasis denoted by underline added); "As to the issue of whether the referenced communication is required to be reported to The Florida Bar by an attorney mediator, the Committee notes that rule 10.650 provides that in the course of providing mediation services, mediation rules control over conflicting ethical standards. Given that the mediation communication does not appear to fit into any of the specified exceptions, the attorney mediator would be prohibited from making the disclosure to The Florida Bar. Your second question, whether an attorney litigant's action is prohibited is beyond the scope of the Committee's function since it would involve an interpretation of the attorney ethics code. Finally, the Committee cautions that a mediator is prohibited from revealing information obtained during caucus without the consent of the disclosing party. Doing so would be an ethical violation of confidentiality under rule 10.360(b) and may also be a violation of impartiality under rule 10.330(a)." (footnote omitted) (emphasis added)).

In contrast, at least one state has imposed a reporting requirement on lawyer-mediators.

- Illinois LEO 11-01 (1/2011) ("Under Illinois Rule of Professional Conduct 8.3 (a), a mediator who is also a lawyer licensed in Illinois must report another lawyer when the lawyer-mediator knows the other lawyer has engaged in conduct that violates 8.4 (c). This duty to report exists even though the lawyer-mediator is not acting as a lawyer representing a client during the mediation. Further, the Committee believes the confidentiality provisions of the Uniform Mediation Act and the Not-for-Profit Dispute Resolution Center Act do not abrogate the lawyer-mediator's obligation to report the other lawyer's misconduct." (emphasis added)).

Commercial Arbitration Rules & Mediation Procedures, Am. Arbitration Ass'n Oct. 1, 2013 (emphases added).

Best Answer

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

B 5/15, 8/15, 2/17

Lawyers Whose Misconduct Must Be Reported

Hypothetical 18

You have always tried to get along with other local lawyers, although you know that you might have a duty to report lawyers who are guilty of certain egregious ethics violations. You are wondering how far that duty extends.

- (a) Must you report serious ethics violations by lawyers acting in a non-legal capacity?

(A) YES

- (b) Must you report serious misconduct by judges?

(A) YES

- (c) Must you report serious ethics violations by one of your own partners?

(A) YES

- (d) Must you report your own serious ethics violation?

(B) NO (PROBABLY)

Analysis

Lawyers considering their possible reporting duty must assess whether it varies with the misbehaving lawyer's role.

Interestingly, all but a few states' ethics rules allow for punishment of (and therefore reporting of) only individual lawyers' misconduct. To be sure, law firm supervisors and management can be independently sanctioned for failing to put institutional safeguards in place, and can face derivative liability for subordinates' ethics violations in certain circumstances. ABA Model Rule 5.1. However, nearly every state's ethics rules impose ethics requirements on individual lawyers rather than law firms.

New York represents the main exception. New York's general misconduct prohibition begins with the phrase "[a] lawyer or law firm shall not" New York Rule 8.4 (emphasis added). However, New York's Rule 8.3 requires only the reporting of other lawyers' sufficiently egregious misconduct, and does not mention reporting law firms.

(a) Because so many people authorized to practice law actually engage in non-legal activities, lawyers considering their reporting obligation may have to determine if the obligation covers them.

The 1908 ABA Canons of Professional Ethics' specific reporting obligations covered only lawyers "stirring up litigation" (Canon 28) or engaging in some trial misconduct (Canon 29). This apparently covered lawyers playing their traditional role.

The 1969 ABA Model Code required lawyers "possessing unprivileged knowledge of a violation of DR 1-102" to report such misconduct to a tribunal or other appropriate authority. ABA Model Code DR 1-103(A).

DR 1-102 listed various types of wrongdoing, some of which did not necessarily involve lawyers acting in a legal capacity.

A lawyer shall not: (1) Violate a Disciplinary Rule. (2) Circumvent a Disciplinary Rule through actions of another. (3) Engage in illegal conduct involving moral turpitude. (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. (5) Engage in conduct that is prejudicial to the administration of justice. (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

ABA Model Code of Professional Responsibility, DR 1-102(A)(1-6) (footnotes added) (emphases added). Thus, the ABA Model Code clearly covered other lawyers' misconduct unrelated to their legal advisor role.

The 1983 ABA Model Rules of Professional Conduct contain a similar provision.

Under ABA Model Rule 8.3:

A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

ABA Model Rule 8.3(a). Thus, the black letter ABA Model Rule covers a misbehaving lawyer's violation of any Rule of Professional Conduct, in contrast to the ABA Model Code's specific reference to DR 1-102 (the catch-all misconduct rule of the ABA Model Code). As explained below, several ABA Model Rules apply to conduct (or misconduct) by lawyers acting in non-legal roles.

In 2004, the ABA issued an extensive opinion on lawyer's reporting duty's application to lawyers not engaged in the practice of law.

ABA LEO 433 (8/25/04)¹ explained that lawyers engaging in misconduct unrelated to the practice of law might still violate the ABA Model Rules.

Most, but by no means all, ethical duties under the Model Rules spring from a lawyer's representation of clients. A lawyer also may violate the Model Rules when he or she engages in misconduct unrelated to the practice of law. Model Rules 8.4(a) provides that it is professional misconduct for a lawyer "to violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce

¹ ABA LEO 433 (8/25/04) (explaining that because lawyers may violate the Model Rules when they engage in misconduct (such as criminal activity), "unrelated to the practice of law," lawyers must report professional misconduct of a licensed but non-practicing lawyer ("even if it involves activity completely removed from the practice of law") if the lawyer "knows" of the ethics violation and the violation raises a "substantial question" as to the wrongdoer's honesty, trustworthiness or fitness as a lawyer; "Voluntary reporting made in good faith always is permissible." If reporting another lawyer's misconduct would disclose information protected by Rule 1.6, the client must consent to the disclosure meaning that "the hands of lawyers are often effectively tied in these situations by the wishes or even whims of their clients."; emphasizing that "it would be contrary to the spirit of the Model Rules for the lawyer not to discuss with the client the lawyer's ethical obligation to report violations of the Rules" (because "this would allow the lawyer to circumvent them").).

another to do so, or do so through the acts of another."
Model Rule 8.4(c) provides that it is professional misconduct for a lawyer "to engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

ABA LEO 433 (8/25/04) (emphasis added).

ABA LEO 433 pointed first to criminal misconduct:

The most obvious, and perhaps the most serious type of misconduct in which a non-practicing lawyer might engage, is criminal activity. Criminal conduct by a lawyer is addressed in Rule 8.4(b), which indicates that lawyers are subject to professional discipline for criminal conduct if the conduct 'reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.' Lawyers committing the crimes of stalking, harassing, and willfully failing to file a tax form have been found to have violated Rule 8.4(b). Similarly, crimes involving the use of alcohol or drugs, sex-related crimes, and crimes of violence, including domestic violence, can result in a violation of the Model Rules whether or not the lawyer is convicted or even charged with a crime. 'Even criminal conduct that is arguably minor or personal may be found to fall within the Rule if a court finds that such conduct tends to exhibit a disregard of legal obligations.' Whether the conduct exhibits such a disregard with depend upon the nature of the act and the circumstances of its commission.

Id. (footnotes omitted) (emphasis added). ABA LEO 433 then noted that possible misconduct can include non-criminal misbehavior as well.

Rule 8.4(c) addresses conduct that may or may not be criminal in nature, and prohibits a very broad range of dishonest, fraudulent, or deceitful conduct, or misrepresentation. This expansive provision reaches any activity or aspect of the lawyer's personal or professional life. For example, willful and material misrepresentations on the lawyer's personal applications for employment, credit, or insurance would violate Rule 8.4(c), as would personal insurance claims fraudulently submitted by the lawyer.

Id. n.10 (footnotes omitted) (emphasis added).

The Restatement section dealing with this issue essentially parallels the ABA Model Rules approach.

A lawyer who knows of another lawyer's violation of applicable rules of professional conduct raising a substantial question of the lawyer's honesty or trustworthiness or the lawyer's fitness as a lawyer in some other respect must report that information to appropriate disciplinary authorities.

Restatement (Third) of Law Governing Lawyers § 5(3) (2000). Thus, at least on its face the Restatement would also cover misconduct by lawyers acting in a non-legal capacity.

Courts and bars have also required lawyers to report sufficiently egregious misconduct by lawyers acting in a non-legal capacity.

- In re Admin. Suspension for Failure to Comply with Continuing Legal Educ. Requirements, 771 S.E.2d 850, (S.C. 2015) (holding that a lawyer must report another lawyer's misconduct during his suspension; "[A]ny lawyer who is aware of any violation of this suspension shall report the matter to the Office of Disciplinary Counsel. Rule 8.3, Rules of Professional Conduct for Lawyers, Rule 407, SCACR.>").
- Kentucky LEO E-430 (1/16/2010) ("Comment [2] to Rule 8.4 provides some guidance in observing that 'although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust or serious interference with the administration of justice are in that category.' Thus, for example, a lawyer could be disciplined for fraud in connection with the sale of a personal residence, falsification of documents for personal use, or embezzlement from a non-profit organization with which the lawyer does volunteer work. All of these examples raise a substantial question as to the lawyer's honesty and trustworthiness. Similarly, a lawyer would have a duty to report a judge who engaged in the activities described above, because they would raise a substantial question as to the judge's fitness for office. Whether a lawyer has a duty to report activities unrelated to the practice of law or judicial responsibilities will depend on the nature of the act and the circumstances under which it was committed. Clearly, theft, fraud or other serious misrepresentation, even when unrelated to professional activities, must be reported." (footnote omitted)).
- In re Silva, 636 A.2d 316, 316, 316-17, 317 (R.I. 1994) ("The board found that Silva violated several provisions of the Rules of Professional Conduct

when he failed to report a diversion of mortgage funds by his long-time friend Edward Medeiros. Silva served as counsel to Medeiros's mortgage company, Medcon Mortgage Corporation (MEDCON), and Suncoast Savings and Loan of Hollywood, Florida (Suncoast). In his capacity as closing attorney for Suncoast, Silva received wire transfers of mortgage proceeds in his client account. Upon receipt of the wire transfers from Suncoast, Silva simply turned the proceeds over to Medeiros and/or MEDCON for disbursement. In the fall of 1990 Silva learned that Medeiros had diverted funds from a closing funded by Suncoast in which Silva acted as closing attorney."; "The respondent's position before the board and this court is that he was prohibited from disclosing Medeiros's defalcation by the provisions of Rule 1.6 of the Rules of Professional Conduct. Respondent also took the position that he had no obligation to protect Suncoast's interests. We do not agree with either of his contentions."; "Silva did not appear to appreciate and understand to whom he owed the duty of confidentiality. It is apparent from this record, however, that he was counsel to the corporate entity MEDCON, and therefore, it was to MEDCON he owed the duty of confidentiality. Silva's dealings with Medeiros did not establish the attorney/client relationship that would trigger the application of the prohibitions against disclosure encompassed in Rule 1.6. Therefore, Silva's obligations to both Suncoast and MEDCON required him to disclose Medeiros's overt criminal act of conversion of the funds."; inexplicably failing to discuss the Rule 1.13 implications.).

In some situations, lawyers might learn of egregious misconduct by a non-lawyer individual (or an entity) who may have been assisted by a lawyer. In those scenarios, lawyers have no duty to report the non-lawyer's misconduct, but may have a duty to report any assistance by the lawyer.

- North Carolina LEO 2009-2 (4/24/09) (indicating that a lawyer who believes that a title company has committed the unauthorized practice of law by preparing a deed and closed the transaction may report other lawyer's misconduct if the lawyer's client consents; also explaining that the lawyer did not have the duty to report the non-lawyer title company for any UPL violations, but would have a duty to report another lawyer who has assisted the title company in the UPL violation; "No opinion is expressed on the legal question of whether ABC Title Company is engaged in the unauthorized practice of law. For the purpose of responding to this inquiry, however, it is assumed that buyer/borrower's counsel reasonably believes that ABC is engaged in the unauthorized practice of law."; "Rule 8.3(a) requires a lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, to inform

the North Carolina State Bar or a court having jurisdiction over the matter. Rule 8.3 only requires the lawyer to report rule violations of 'another lawyer.' There is no requirement under Rule 8.3 to report the unauthorized practice of law by a non-lawyer or company. Nevertheless, Rule 5.5(d) of the Rules of Professional Conduct prohibits a lawyer from assisting another person in the unauthorized practice of law."; "If buyer/borrower's counsel suspects that John Doe is assisting ABC Title Company in the unauthorized practice of law, he should communicate his concerns to John Doe and advise John Doe that he may wish to contact the State Bar for an ethics opinion as to his future transactions with ABC Title Company. If, after communicating with John Doe buyer/borrower's counsel reasonably believes that John Doe is knowingly assisting the title company in the unauthorized practice of law, and plans to continue participating in such conduct, buyer/borrower's counsel must report John Doe to the State Bar. Rule 8.3(a).").

Because ABA Model Rule 8.3 and state counterparts require reporting sufficiently egregious misconduct by a "lawyer," the reporting obligation presumably covers the specified misconduct by lawyers whose licenses have been suspended -- but who are still technically "lawyers." A 2010 Kentucky legal ethics opinion indicated as much.

- Kentucky LEO E-430 (1/16/10) ("A lawyer who has been suspended is still subject to application of certain Rules of Professional Conduct. If a suspended lawyer engages in unprofessional conduct, including the unauthorized practice of law, then a lawyer who knows of that misconduct has a duty to report. It is particularly important to report suspended lawyers who have engaged in misconduct because they may ultimately apply for reinstatement. One of the primary considerations on the application for reinstatement will be whether the suspended lawyer complied with the terms of suspension, and the rules during the period of suspension." (footnote omitted)).

In the next paragraph of this 2010 Legal Ethics Opinion, the Kentucky Bar took the next logical step -- indicating that a disbarred lawyer is not technically still a "lawyer" and therefore is not covered by other lawyers' reporting obligation.

- Kentucky LEO E-430 (1/16/10) ("A disbarred lawyer is no longer a lawyer, and not subject to the Rules of Professional Conduct. Thus, there would generally be nothing to report. The Kentucky Bar Association has no authority over a disbarred lawyer's general conduct, but it does have the authority to investigate unauthorized practice and initiate proceedings. If a lawyer is involved in a matter in which a disbarred lawyer is engaged in the

unauthorized practice of law, the failure to report the unauthorized practice of law could result in the lawyer's violation of SCR 3.470 and SCR 3.130 (5.5(a)), which prohibit a lawyer from assisting another in the unauthorized practice of law. Good practice requires that lawyers not only disassociate themselves from the disbarred lawyer, but also report the unauthorized practice to the Executive Director of the Kentucky Bar Association. The interests of both the public and the profession are best served by reporting the disbarred lawyer who is engaged in the unauthorized practice of law." (footnotes omitted)).

Theoretically, the broad reach of the ethics rules' reporting obligation would require a lawyer not acting in legal capacity to report the sufficiently egregious misconduct by another lawyer who is not acting in a legal capacity. No ethics opinions seem to have addressed such an extreme example.

(b) Lawyers must also report sufficiently egregious misconduct by judges (most if not all of whom are also lawyers).

The ABA Model Rules explicitly require lawyers to report judges' misconduct.

A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority.

ABA Model Rule 8.3(b).

The Restatement contains the same duty.

As an officer of the court, a lawyer must report to appropriate disciplinary authorities a known violation by a judge of an applicable rule of judicial conduct that raises a substantial question of the judge's fitness for judicial office. In jurisdictions where judges remain subject to discipline as lawyers, a report to an appropriate lawyer disciplinary agency may also be independently required by terms of the rule applicable to reporting lawyer violations.

Restatement (Third) of Law Governing Lawyers § 5 cmt. i (2000).

Thus, lawyers must report sufficiently egregious judicial misconduct.

- In re Arnold, M.R. 10462, Ill. Attorney Registration & Disciplinary Comm'n (Nov. 30, 1994) (suspending for one year a lawyer found guilty of using marijuana and buying marijuana from a judge; also finding that the lawyer had violated the ethics rule requiring him to report the judge's drug use; stating, in the June 3, 1994, Disciplinary Board hearing that "Count I alleged that the Respondent began smoking marijuana with Attorney William Mark Dalton in the early 1980's. Thereafter, Respondent purchased quantities of marijuana from Mr. Dalton on various occasions until July 4, 1985. On July 4, 1985, Mr. Dalton became an Associate Circuit Judge in the Circuit Court for the Eleventh Judicial Circuit, Woodford County, Illinois, and Respondent thereafter continued to purchase quantities of marijuana from Judge Dalton. On August 16, 1991, Respondent delivered \$2,400.00 in cash to Judge Dalton for the purposes of acquiring 10 oz. of marijuana."; "Count II further alleges that throughout said time, Respondent did not report his knowledge of Judge Dalton's possession and or sale of marijuana to any tribunal or other authority empowered to investigate such conduct, even though Respondent knew that Judge Dalton's conduct was illegal and in violation of State and Federal Drug Laws. Count II further alleges that prior to August 1, 1990, Respondent engaged in misconduct by failing to report knowledge of a violation of Rule 1-102(a)(3) or (4) (CPR) and engaged in conduct prejudicial to the administration of justice in violation of Rule 1-102(a)(5) (CPR); that after August 1, 1990, by such conduct, Respondent violated Rule 8.3(b) (RPC) by failing to report to the proper authorities knowledge which is not protected as a confidence that a Judge has committed a violation of the Code of Judicial Conduct, which violations raise questions as to the Judge's fitness for office to wit: failure to observe high standards of conduct so the integrity and independence of the judiciary may be preserved in violation of Rule 61; failure to respect and comply with the law in violation of Rule 62A; failure to refrain from financial and business dealings which tend to reflect adversely on the judge's impartiality, interfere with proper performance of judicial duties, or involve him in frequent transactions with the lawyer likely to become before the Court on which he serves in violation of Rule 65C(1) and that the Respondent's conduct was prejudicial to the administration of justice in violation of Rule 8.4(a)(5) (RPC)."; "The Hearing Panel further unanimously finds that, as charged in Count II, that prior to August 1, 1990, the Respondent was in violation of Rule 1-103(a) and Rule 1-102(a)(5) of the Illinois Code of Professional Responsibility (1980), and that after August 1, 1990, the Respondent engaged in misconduct in violation of Rule 8.3(b) of the Illinois Rules of Professional Conduct (1990), (In re Himmel, 125 Ill.2d 531) by failing to report to appropriate authorities nonprivileged knowledge of a judge's violation of the Code of Judicial Conduct (Rule 61, 61A and 65C (1)), and that his conduct was prejudicial to the administration of justice in violation of Rule 8.4(a)(5).").

This reporting duty becomes more difficult to assess if the lawyer has an attorney-client relationship with the misbehaving judge.

A 2007 ABA legal ethics opinion dealt with lawyers simultaneously representing a judge before whom the lawyer is appearing. In ABA LEO 449 (8/9/07),² the ABA addressed the possible reporting duty of a lawyer representing a judge who does not

² ABA LEO 449 (8/9/07) (explaining that a lawyer considering whether to represent a judge who is simultaneously presiding over a matter involving a client may proceed "only if the lawyer reasonably believes that he will be able to provide competent and diligent representation to each affected client, and each affected client gives informed consent, confirmed in writing."; also explaining that a judge considering whether to retain a lawyer who might appear before the judge must recuse himself if the representation would create "a personal bias or prejudice concerning a party or a party's lawyer" (this is a non-waivable ground for disqualification under the new judicial code); concluding that a judge represented by a lawyer appearing before him and who determines that he does not have such a personal bias or prejudice may continue presiding if the judge discloses on the record the lawyer's representation of the judge on an unrelated matter, and if the parties and their lawyers consider "out of the presence of the judge and court personnel" whether to weigh the disqualification, and unanimously agree that the judge may continue presiding; noting that a lawyer's silence in the face of a judge's failure to comply with this process himself violates the prohibition on assisting a judge in an ethics violation; explaining that a lawyer's reminder to the judge of his duty does not violate the ex parte contact prohibition; concluding that if the judge still does not make the required disclosure after such a reminder, the lawyer representing the judge in an unrelated matter may not disclose the representation (which is protected by the ethics duty of confidentiality, although not by the attorney-client privilege); also concluding that even if otherwise permissible, such a disclosure would not comply with the process mandated by the judicial code; also concluding that "the judge's misconduct cannot be cured by reliance on the fact that all parties to the matter already might be aware of the lawyer's representation of the judge in another matter."; explaining that if the lawyer discovers that one of his firm's clients is appearing before a judge that the lawyer is representing, "the Committee believes that, at least presumptively, the representation begun later in time is the one from which withdrawal would be required," and that the lawyer might also have to withdraw from representing the client, either because the judge might "develop a bias" against the lawyer or his partner, or because the lawyer cannot obtain his other client's consent to the continuation of the representation despite the judge's possible bias (because the lawyer cannot disclose his or his partner's representation of the judge); warning that the lawyer may not report the judge (his client) to the judicial disciplinary authority, because Rule 1.6 trumps the duty to report a judge's misconduct; advising that neither the lawyer nor judicial ethics rules "prescribe specific time periods" that a lawyer "ought not to appear before the judge on behalf of a client" if the lawyer had previously represented the judge, and that the issue depends on "whether a reasonable person would believe, in light of the time that had elapsed, that the judge's fairness and impartiality could still be questioned."; explaining that in making that determination, the lawyer should assess the nature of his representation of the judge (whether it was consequential as a judicial disciplinary proceeding as inconsequential as a real estate transaction), the size of the fee, whether the representation was isolated or one of a series of matters "and whether the representation was in a matter that was highly confidential or highly publicized."; noting that lawyers considering representing judges might ask the judge to sign an engagement letter pledging to follow the judicial code process, or an engagement letter with "an advance waiver of confidentiality.").

comply with the obligation to advise litigants before the judge that the judge's lawyer is representing one of those litigants.

Thus, the lawyer involved in that scenario possessed information about the client's (judge's) misconduct that deserved protection under the basic Rule 1.6 confidentiality rule.

We do not believe that in the circumstances presented here, a lawyer can report his own client, the judge, to a disciplinary authority. As we stated in Formal Op. 04-433, Rule 1.6 takes precedence over any duty to report a client to a disciplinary authority. Nor do we believe that any of the exceptions for permissive disclosure under Rule 1.6(b) apply. The judge's failure to recuse never would, as a practical matter, result in death or substantial bodily harm. It also is difficult to imagine any circumstance in which the judge's failure to recuse constituted a crime or fraud that would result in substantial financial injury to another, in furtherance of which the judge is using the lawyer's services. The lawyer may, of course, under Rule 1.6(b)(4), reveal the judge's confidential information to another lawyer from whom the lawyer is seeking counsel as to his ethical obligations.

ABA LEO 449 (8/9/07) (footnote omitted) (emphasis added).

Absent such an unusual situation, lawyers must report judges' sufficiently serious ethics violations -- subject to the pertinent ethics rules standards (such as those involving client confidences).

(c) As awkward as it normally would be, the ethics rules' reporting duty covers lawyers' own colleagues.

It is worth initially noting that the ABA Model Rules contain other provisions addressing lawyers' duties to assure both lawyer and non-lawyer colleagues' compliance with ethics rules, and the circumstances under which lawyers may be held ethically responsible for colleagues' ethics violations.

The ABA Model Rules define supervising lawyers' responsibilities.

A partner in a law firm, or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

ABA Model Rule 5.1(a).

Thus, lawyers who manage other lawyers must take reasonable steps to put in place "measures" that provide at least reasonable assurance that lawyers in the firm comply with the ethics rules. Comment [2] to that rule mentions such "internal policies and procedures" as those designed to identify conflicts, assure that filing and other deadlines are met, provide for proper trust account processes, etc. ABA Model Rule 5.1 cmt. [2].

Comment [3] explains that the measures lawyers may take to comply with this managerial responsibility can vary according to the size of the law firm.

In a small firm of experienced lawyers, informal supervision and periodic review of compliance with the required systems ordinarily will suffice. In a large firm, or in practice situations in which difficult ethical problems frequently arise, more elaborate measures may be necessary. Some firms, for example, have a procedure whereby junior lawyers can make confidential referral of ethical problems directly to a designated senior partner or special committee. . . . Firms, whether large or small, may also rely on continuing legal education in professional ethics. In any event, the ethical atmosphere of a firm can influence the conduct of all its members, and the partners may not assume that all lawyers associated with the firm will inevitably conform to the Rules.

ABA Model Rule 5.1 cmt. [3].

ABA Model Rule 5.1(b) applies to lawyers who have "direct supervisory authority" over another lawyer, and predictably requires more immediate steps to assure that other lawyers comply with the ethics rules.

A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

ABA Model Rule 5.1(b).

A different rule applies essentially the same standard to managers and direct supervisors of non-lawyers.

With respect to a non-lawyer employed or retained by or associated with a lawyer:

(a) A partner or a lawyer who individually or together with other lawyers possesses managerial authority in a law firm shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that the person's conduct is compatible with the professional obligations of the lawyer; and

(b) A lawyer having direct supervisory authority over the non-lawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.

ABA Model Rule 5.3 (a)-(b). It is not clear how far away from lawyer ethics rules a non-lawyer can stray and still be considered to have acted in a way "compatible" with the lawyer ethics rules.

The ABA Model Rules also explain the standard for holding a supervising lawyer responsible for a subordinate lawyer's ethics breach.

A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ABA Model Rule 5.1(c) (emphases added).

Not surprisingly, the same basic rules apply to a supervising lawyer's responsibility for a non-lawyer's ethics breach.

[A] lawyer shall be responsible for conduct of such a person [non-lawyer employed or retained by or associated with a lawyer] that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has managerial authority in the law firm in which the person is employed, or has direct supervisory authority over the person, and knows or should have known of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

ABA Model Rule 5.3(c).

Thus, lawyers may face direct bar discipline for ethical violations by their subordinates. In most situations, lawyers will face such punishment only if they have some complicity, either before or after the wrongdoing. However, the "should have known" standard could trigger a lawyer's discipline under what amounts to a negligence standard.

Neither the 1969 ABA Model Code of Professional Responsibility nor the 1983 ABA Model Rules of Professional Conduct explicitly describe this coverage. But the general black letter rules do not exclude lawyers practicing law with the reporting lawyer.

A Restatement comment discusses the logistics of lawyers reporting their own colleagues, thus implicitly confirming the reporting duty's application.

Subsection (3) states the rule found in the lawyer code of most jurisdictions. The rule is applicable to violations by lawyers whether or not in the same firm. In the case of a junior lawyer in a firm who knows of misconduct by a senior lawyer, including a supervisory lawyer . . . , reporting the violation to the firm's managing body or another senior lawyer does not satisfy the requirement (unless the junior lawyer reasonably assumes in the circumstances that those informed will report the offense), but may impose a similar requirement on other lawyers thus informed.

Restatement (Third) of Law Governing Lawyers § 5 cmt. i (2000) (emphasis added).

In 2003, the ABA issued a legal ethics opinion focusing primarily on lawyers' obligations when dealing with mentally impaired colleagues. ABA LEO 429 (6/11/03).³

Among other things, ABA LEO 429 addressed lawyers' obligation to report such colleagues' ethics violations.

The partners in the firm or supervising lawyer may have an obligation under Rule 8.3(a) to report violations of the ethics rules by an impaired lawyer to the appropriate professional authority. Only violations of the Model Rules that raise a substantial question as to the violator's honesty, trustworthiness, or fitness as a lawyer must be reported. If the mental condition that caused the violation has ended, no report is required. Thus, if partners in the firm and the

³ ABA LEO 429 (6/11/03) (explaining that lawyers practicing in law firms, law departments or similar organizations must establish policies and procedures assuring that all lawyers in the organization fulfill their ethical requirements and protect their clients -- even if a lawyer becomes impaired by substance abuse, mental illness, etc.; warning that lawyers learning of ethics violations by an impaired lawyer may have an obligation to report the violation; noting that even if not obligated to report violations, lawyers may choose to reveal information about violations or the impairment -- unless confidentiality duties to clients or some other rules prohibit the disclosure; explaining that lawyers in a firm or other organization from which an impaired lawyer has withdrawn may have an obligation to reveal the impairment if clients are deciding whether to retain the now departed impaired lawyer; acknowledging that the law firm or other organization does not have a duty to reveal the impairment if a client has already shifted its relationship to the departed lawyer, but must avoid any endorsement of the departed lawyer's ability to represent the client (such as a joint letter from the law firm and the departed lawyer regarding the transaction, which "could be seen as an implicit endorsement by the firm of the departed lawyer's competence").

supervising lawyer reasonably believe that the previously impaired lawyer has resolved a short-term psychiatric problem that made the lawyer unable to represent clients competently and diligently, there is nothing to report. Similarly, if the firm is able to eliminate the risk of future violations of the duties of competence and diligence under the Model Rules through close supervision of the lawyer's work, it would not be required to report the impaired lawyer's violation. If, on the other hand, a lawyer's mental impairment renders the lawyer unable to represent clients competently, diligently, and otherwise as required by the Model Rules and he nevertheless continues to practice, partners in the firm or the supervising lawyer must report that violation.

ABA LEO 429 (6/11/03) (footnotes omitted) (emphasis added). Later in the opinion, ABA LEO 429 confirmed that lawyers' reporting duty only arose upon another lawyer's ethics violation.

No obligation to report exists under Rule 8.3(a) if the impairment has not resulted in a violation of the Model Rules. Thus, if the firm reasonably believes that it has succeeded in preventing the lawyer's impairment from causing a violation of a duty to the client by supplying the necessary support and supervision, n26 there would be no duty to report under Rule 8.3(a).

Id. (footnote omitted).

ABA LEO 429 warned law firms that they may not automatically transfer a matter to a replacement lawyer.

If the matter in which the impaired lawyer violated his duty to act competently or with reasonable diligence and promptness still is pending, the firm may not simply remove the impaired lawyer and select a new lawyer to handle the matter. Under Rule 1.4(b), there may be a responsibility to discuss with the client the circumstances surrounding the change of responsibility. In discussions with the client, the lawyer must act with candor and avoid material omissions, but to the extent possible, should be conscious of the privacy rights of the impaired lawyer. Even if the matter in which the impaired lawyer violated the Model Rules no longer is pending, partners and lawyers in the firm with comparable

managerial authority and lawyers with direct supervisory authority over the impaired lawyer may have obligations to mitigate any adverse consequences of the violation.

Id.

Similarly, law firms may have continuing duties even if the impaired lawyer leaves the firm.

The responsibility of the firm to the client does not end with the resignation from the firm, or the firm's termination of, the impaired lawyer. If the impaired lawyer resigns or is removed from the firm, clients of the firm may be faced with the decision whether to continue to use the firm or shift their relationship to the departed lawyer. Rule 1.4 requires the firm to advise existing clients of the facts surrounding the withdrawal to the extent disclosure is reasonably necessary for those clients to make an informed decision about the selection of counsel. In doing so, the firm must be careful to limit any statements made to ones for which there is a reasonable factual foundation. The firm has no obligation under the Model Rules to inform former clients who already have shifted their relationship to the departed lawyer that it believes the departed lawyer is impaired and consequently is unable to personally handle their matters competently. However, the firm should avoid any communication with former clients who have transferred their representation to the departed lawyer that can be interpreted as an endorsement of the ability of the departed lawyer to handle the matter. For example, a joint letter from the firm and the departed lawyer regarding the transition could be seen as an implicit endorsement by the firm of the departed lawyer's competence.

Id. (footnotes omitted) (emphasis added).

Just one year later, the ABA again dealt with lawyers' reporting obligations⁴ -- primarily focusing on lawyers engaging in misconduct outside the practice of law.

⁴ Although lawyers rarely deal with the ethics rules governing their duty to disclose fellow lawyers' serious misconduct, the ABA issued a flurry of legal ethics opinions in a very short period of time that deal with the issue: ABA LEO 429 (6/11/03) ("Obligations with Respect to Mentally Impaired Lawyer in the Firm"); ABA LEO 431 (8/8/03) ("Lawyer's Duty to Report Rule Violations by Another Lawyer Who May Suffer from Disability or Impairment"); ABA LEO 433 (8/25/04) ("Obligation of a Lawyer to Report

Among other things, in ABA LEO 433 (8/25/04),⁵ the ABA discussed lawyers reporting their own colleagues -- confirming such a duty despite the inherent emotional difficulty.

The Committee is mindful of the awkwardness and potential discomfort of reporting the misconduct of a colleague. The difficulty confronting the lawyer in that situation may be even more acute if the lawyer to be reported is a superior of the lawyer making the report. Whether employed in a law firm, a corporate law department, on a law school faculty, elsewhere, the lawyer may be facing the same dilemma: jeopardize her career by making the report, or jeopardize it by remaining silent in violation of the rules of ethics. In this regard, however, the Committee notes the instruction of the Preamble to the Model Rules, Comment [12]: 'Every lawyer is responsible for observance of the Model Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.

Id. (footnote omitted) (emphases added).

Ethics opinions and cases have reached the same conclusion -- requiring lawyers to report sufficiently egregious misconduct by colleagues or former colleagues.

- Sheri Qualters, Lawyer Gets Home Confinement For Failing To Report Boss's Mortgage Fraud, Nat'l L. J., Jan. 29, 2013 ("A federal judge has sentenced a lawyer who used to practice in Massachusetts to eight months of home confinement for not reporting a mortgage fraud scheme at his former firm."; "On January 28, Chief Judge Patti Saris of the District of

Professional Misconduct by a Lawyer Not Engaged in the Practice of Law"); ABA LEO 449 (8/9/07) ("Lawyer Concurrently Representing Judge and Litigant Before the Judge in Unrelated Matters"). The ABA rarely deals so frequently with the same topic in such a short period of time.

⁵ ABA LEO 433 (8/25/04) (explaining that because lawyers may violate the Model Rules when they engage in misconduct (such as criminal activity), "unrelated to the practice of law," lawyers must report professional misconduct of a licensed but non-practicing lawyer ("even if it involves activity completely removed from the practice of law") if the lawyer "knows" of the ethics violation and the violation raises a "substantial question" as to the wrongdoer's honesty, trustworthiness or fitness as a lawyer; "Voluntary reporting made in good faith always is permissible . . ." If reporting another lawyer's misconduct would disclose information protected by Rule 1.6, the client must consent to the disclosure meaning that "the hands of lawyers are often effectively tied in these situations by the wishes or even whims of their clients."; emphasizing that "it would be contrary to the spirit of the Model Rules for the lawyer not to discuss with the client the lawyer's ethical obligation to report violations of the Rules" (because "this would allow the lawyer to circumvent them").).

Massachusetts sentenced Sean Robbins, 39, who now lives in New York, to that period of home confinement as part of three years of probation. Saris also ordered Robbins to pay \$300,000 in restitution."; "Last September, Robbins pleaded guilty to 24 counts of misprision of felony -- the failure to report knowledge of a felony to authorities."; "Robbins knew about and concealed mortgage fraud cooked up by his former employer, Marc Foley, who had a law firm in Needham, Massachusetts."; "Also in September, a jury convicted Foley of 33 counts of wire fraud and five counts of money laundering. According to the evidence, Foley defrauded six mortgage lenders who provided a collective \$4.9 million in real estate loans for condominium units in a building in Dorchester, Massachusetts, in December 2006 and January 2007."; "In December 2012, Judge Richard Stearns of the District of Massachusetts sentenced Foley to 72 months in prison and three years of supervised release. He also issued a special assessment of \$3,800 and ordered Foley to pay nearly \$2.2 million restitution. Foley's appeal is pending."; "Robbins' criminal actions took place in December 2006 and January 2007, while he was an associate at Foley's firm."; "Robbins knew Foley fraudulently led lenders to believe the firm collected \$449,000 in down payments and other expenses from buyers who bought condominiums. He conducted some of the closings, hid the crimes and failed to report Foley's firm.").

- Board of Overseers v. Warren, 34 A.3d 1103, 1111, 1113 (Me. 2011) (holding that the law firm's partners who knew of but did not correct a rogue partner's wrongful acts violated the ethics rules; "For many lawyers, the initial report of Duncan's actions certainly would have raised a substantial question as to his honesty, trustworthiness, or fitness as a lawyer in other respects. Nevertheless, each of the six attorneys testified that it never even occurred to him or her that Duncan's mishandling of funds gave rise to an obligation to report Duncan pursuant to Rule 3.2(e). Each flatly admitted that despite hearing of Duncan's conduct, no one discussed whether they should review the Bar Rules or whether they should consult the firm's counsel." (footnote omitted); "We recognize that these six attorneys, comprising Verrill Dana's executive committee, were caught completely 'off guard' by Duncan's conduct. We also recognize that they dealt with Duncan with compassion, and there is no suggestion of bad faith in their failure to refer his conduct to Bar Counsel or to individuals in the firm who were more capable of assessing the need for action, such as the firm's own counsel. However, we cannot ignore that, when faced with the significant malfeasance of a self destructing partner, none of the attorneys even recognized that the Maine Code of Professional Responsibility required them to contemplate reporting that partner's conduct and subsequent breakdown. Notwithstanding the single justice's factual findings, when a firm's practices and policies do not require the firm's leadership to at least consider whether it has an ethical obligation to report a colleague in the circumstances presented by this case, we are compelled to find, as a matter of law, that the firm failed to have in effect

'measures giving reasonable assurance that all lawyers in the firm conform to the Code of Professional Responsibility.'" (quoting Maine Rule § 3.13(a)(1)).

- New York LEO 854 (3/11/11) ("Lawyer A must report the conduct of his former employer, Lawyer P, to an appropriate authority if all four of the following criteria are met: (1) Lawyer A has knowledge or a clear belief concerning the pertinent facts (i.e., he has more than a reasonable belief or mere suspicion); (2) Lawyer A's report will not reveal confidential information protected by Rule 1.6 or information that Lawyer A gained while participating in a bona fide lawyer assistance program; (3) the conduct of Lawyer P constitutes a violation of one or more Rules of Professional Conduct; and (4) the violation raises a substantial question as to Lawyer P's honesty, truthworthiness or fitness as a lawyer."; "If all four of these criteria are met, Lawyer A may also report such misconduct to the affected clients of Lawyer P -- but before informing the clients, Lawyer A should carefully weigh both dangers to Lawyer P's attorney-client relationships if the affected clients are informed against the countervailing dangers to the clients if they are not informed."; "Even if Lawyer A is not satisfied that all four criteria have been met, Lawyer A may nevertheless report a good faith belief or suspicion of Lawyer P's alleged misconduct to an appropriate authority, provided that the report of the suspected misconduct does not require the disclosure of confidential information or information that Lawyer A gained while participating in a bona fide lawyer assistance program. But Lawyer A may not inform Lawyer P's clients about mere suspicions of Lawyer P's misconduct.").
- Kentucky LEO E-430 (1/16/10) ("A lawyer's obligation under Rule 8.3 may require a lawyer to report a partner or associate. This may have consequences for the reporting lawyer, but there is nothing in the rule to suggest that the duty to report does not extend to one with whom the reporting lawyer is or was associated. For example, if a lawyer knows that another lawyer in the firm falsified material documents for trial, the lawyer is obligated to report that misconduct unless one of the exceptions applied." (footnote omitted)).
- South Carolina LEO 05-21 (11/18/05) (posing the following questions: "Does a lawyer's fiduciary duty to his partner/former partner mitigate against his duty to: [1] Inform the Bar/Court of his partner's/former partner's unethical conduct and/or [2] His partner's potential/actual criminal conduct?"; answering as follows: "No. The inquirer's duty under the Rules of Professional Conduct with regard to reporting violations of the Rules by another member of the Bar is not affected by any professional or fiduciary relationship between the inquirer and the member in question.").
- In re Anderson, 769 A. 2d 1282, 1284-85 (Vt. 2000) (issuing a public reprimand of a lawyer for not having promptly reported a partner's trust

account violation; rejecting the lawyer's argument that he did not have to investigate the partner's reported violations; "Respondent's second argument is related to his first; he argues that the Board erred in concluding that he had a duty to investigate the irregularities in the trust account in November 1993. Consistent with the Board's finding, however, it could conclude that respondent knew or should have known that there were irregularities in Cantini's handling of the client trust account as early as November 1993. Thus, it was not error for the Board to conclude that DR 9-102(B)(3) and 9-102(C) imposed a duty on respondent to investigate Cantini's activities and take whatever steps were necessary to protect client funds and property.").

- Texas LEO 522 (10/97) (holding that a lawyer must report a new colleague's misrepresentation about his licensing status; "A law firm has discovered that one of its partners who recently joined the firm provided false information to the firm, its lawyers, clients, and potential clients about his background. Specifically, the partner claimed to be a graduate of a law school from which he did not graduate. He claimed to have degrees (MBA and LL.M.) which he has not earned. He also claimed to be licensed in several jurisdictions in which he is not licensed. Although the firm assumed the partner to be licensed in Texas, he is not. He has, since joining the firm, applied for admission to the State Bar of Texas."; "Is the firm obligated to notify the State Bar of Texas or state and federal courts where the lawyer is currently licensed of the false statements? If the person who provided the false information is in fact 'licensed' in other state or federal courts, it is incumbent upon the law firm to report such conduct to the appropriate disciplinary authorities. Rule 8.03 requires in part that a lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authorities. In this particular case, other appropriate authorities would include the Board of Law Examiners, Admissions Committee, and the Unauthorized Practice of Law Committee of Texas and other states to which he may have applied for admission.").
- District of Columbia LEO 270 (03/97) (explaining that a lawyer must report a colleague's conduct involving deception to clients; "Inquirer, a lawyer, was hired through a temporary employment agency to work for a sole practitioner on a particular matter. In the course of the first few days of inquirer's work, the employing lawyer informed her that his client in the matter had recently insisted that he write an aggressive letter to a third party, despite the lawyer's advice that sending such a letter was imprudent. The employing lawyer further advised inquirer that when the client made such demands in the past, his practice was to draft a letter that would satisfy the client's wishes but not send it to the addressee. Instead, the employing lawyer sent a copy of the letter to the client to make it appear to the client that the letter had been sent to the addressee. The employing lawyer did not explain when these events

had taken place and did not ask inquirer to draft a fictitious letter."; "Where a subordinate lawyer learns that an employing lawyer has sent a client what purports to be copies of correspondence written on the client's behalf, but where the letters were, in fact, never sent, the subordinate lawyer has a duty to assure that the client is informed of the deception and to report the employing lawyer to disciplinary authorities. These duties continue after the subordinate lawyer resigns upon learning of the deception."; "It is clear that a subordinate lawyer could report the violation without disclosing client confidences or secrets. The only 'secret' here was that the employing lawyer was deceiving the client.").

- Bohatch v. Butler & Binion, 977 S.W.2d 543, 544, 547 (Tex. 1998) ("Partnerships exist by the agreement of the partners; partners have no duty to remain partners. The issue in this case is whether we should create an exception to this rule by holding that a partnership has a duty not to expel a partner for reporting suspected overbilling by another partner. The trial court rendered judgment for Colette Bohatch on her breach of fiduciary duty claim against Butler & Binion and several of its partners (collectively, 'the firm'). The court of appeals held that there was no evidence that the firm breached a fiduciary duty and reversed the trial court's tort judgment; however, the court of appeals found evidence of a breach of the partnership agreement and rendered judgment for Bohatch on this ground. . . . We affirm the court of appeals' judgment."; "We emphasize that our refusal to create an exception to the at-will nature of partnerships in no way obviates the ethical duties of lawyers. Such duties sometimes necessitate difficult decisions, as when a lawyer suspects overbilling by a colleague. The fact that the ethical duty to report may create an irreparable schism between partners neither excuses failure to report nor transforms expulsion as a means of resolving that schism into a tort."; "We hold that the firm did not owe Bohatch a duty not to expel her for reporting suspected overbilling by another partner." (emphasis added)).

Courts disagree about whether lawyers may file wrongful termination suits against law firms which fired them for insisting that the firm report colleagues' misconduct.

- Wieder v. Skala, 609 N.E.2d 105, 109 (N.Y. 1992) (holding that a lawyer could sue his former firm for discharging him after he insisted that a colleague's misconduct be reported to the bar; "To assure that the legal profession fulfills its responsibility of self-regulation, DR 1-103(A) places upon each lawyer and Judge the duty to report to the Disciplinary Committee of the Appellate Division any potential violations of the Disciplinary Rules that raise a 'substantial question as to another lawyer's honesty, trustworthiness, or fitness in other respects'. Indeed, one commentator has that noted, '[t]he

reporting requirement is nothing less than essential to the survival of the profession."; "Moreover, as plaintiff points out, failure to comply with the reporting requirement may result in suspension or disbarment (see, e.g., Matter of Dowd, 160 AD2d 78). Thus, by insisting that plaintiff disregard DR 1-103(A) defendants were not only making it impossible for plaintiff to fulfill his professional obligations but placing him in the position of having to choose between continued employment and his own potential suspension and disbarment. We agree with plaintiff that these unique characteristics of the legal profession in respect to this core Disciplinary Rule make the relationship of an associate to a law firm employer intrinsically different from that of the financial managers to the corporate employers in Murphy [Murphy v. Am. Home Prods. Corp., 448 N.E.2d 86 (N.Y. 1983)] and Sabetay [Sabetay v. Sterling Drug, Inc., 506 N.E.2d 919 (N.Y. 1987)]. The critical question is whether this distinction calls for a different rule regarding the implied obligation of good faith and fair dealing from that applied in Murphy and Sabetay. We believe that it does in this case, but we, by no means, suggest that each provision of the Code of Professional Responsibility should be deemed incorporated as an implied in law term in every contractual relationship between or among lawyers.").

(d) The 1908 ABA Canons did not deal with a possible self-reporting duty.

The 1969 ABA Model Code of Professional Responsibility similarly does not explicitly address this. However, the ABA Model Code's reference to "unprivileged knowledge" as triggering the reporting duty would seem to have limited the reporting duty to other lawyers rather than extend it to self-reporting. ABA Model Code of Professional Responsibility, DR 1-103(A).

The 1983 ABA Model Rules are clear. The ABA Model Rule requiring disclosure of other lawyers' sufficiently egregious misconduct mandates reporting of "another lawyer." ABA Model Rule 8.3(a) (emphasis added).

The Restatement likewise excludes a self-reporting duty.

By its terms, the [reporting] rule is inapplicable to a lawyer's own violation.

Restatement (Third) of Law Governing Lawyers § 5 cmt. i (2000).

Most courts and bars take the same approach.

- Kentucky LEO E-430 (1/16/10) ("Rule 8.3 requires a lawyer to report certain misconduct of 'another lawyer' or 'judge.' As a general rule, a lawyer does not have to self-report. This is not to say that a lawyer should not self-report and in some circumstances it may be the best course of action." (footnote omitted); "However, self-reporting is required under SCR 3.453, which provides that lawyers must report discipline from other jurisdictions, including federal court. In addition, SCR 3.166 requires a lawyer who has pleaded 'guilty to a felony, including a no contest plea or a plea in which the member allows conviction but does not admit the commission of a crime, or is convicted by a judge or jury of a felony, in this state or in any other jurisdiction' to self-report.").
- State v. Ankerman, 840 A.2d 1182, 1186, 1188-89, 1189, 1190 (Conn. App. Ct. 2004) (explaining that lawyers do not have a duty to self-report, so his confession to the bar was not "compelled" for purposes of analyzing a lawyer's constitutional reference; "On July 6, 1998, the defendant wrote a letter to the statewide grievance committee (committee), with a copy to Zemetis [defendant's lawyer], in which he admitted to overdrawing the legal fees account and characterized his conduct as wrongdoing."; "The defendant first claims that the court improperly denied his motion to suppress the letter he wrote to the committee on July 6, 1998. Prior to commencement of the trial, the court, Lager, J., held a hearing on the defendant's motion to suppress. Certain facts were stipulated to, including the following: When the defendant wrote the letter, he had not been ordered to do so by the probate judge, the committee itself or the committee's counsel; when he wrote the letter, the defendant was not under investigation by the committee; and when he wrote the letter, the defendant was not under arrest or in custody, and the letter was not the product of an interrogation."; "The claim made by the defendant before the trial court and repeated in his brief to this court was that he was obligated under certain ethical duties imposed by the Rules of Professional Conduct and our rules of practice to report to the committee what he had done. The defendant argues, therefore, that his statement was compelled."; "[A] lawyer is bound to try to protect our profession by reporting violations on *the part of other lawyers* that come to his or her attention." (emphasis added; italics denote emphasis in original); "In the present case, the defendant was not under a duty to report his own misconduct to the committee. We agree, therefore, with the court that the letter written by the defendant was voluntary and not the result of any state compulsion." (emphasis added)).

As with many other rules, some states take a different approach.

- Ohio LEO 2016-2 (4/8/16) (analyzing lawyers' duty to report other lawyers' misconduct under Ohio's unique Rule 8.3, which does not contain the word "substantial" in describing the question that the other lawyer's misconduct raises, and excepting from the reporting obligation "privileged" information

the reporting lawyer possesses; "Prof.Cond.R. 8.3 also requires lawyers to report their own misconduct." (emphasis added)).

- Kansas LEO 14-01 (7/1/14) (holding that a lawyer was not obligated to report a former colleague's memory lapses, as long as the lawyer was unaware of any ethics violation by the forgetful former colleague; "This Rule contrasts strikingly with the Model Rule adopted in most of the other states. The Model version of Rule 8.3(a) provides: '(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.'"; "The Model Rule applies only to conduct by 'another lawyer,' (i.e. not to the reporting lawyer himself). Moreover, the duty to report under the Model Rule does not apply to all Rule violations, but only to those violations which raise 'a substantial question' as to that other lawyer's 'honesty, trustworthiness or fitness as a lawyer.' Those limitations were all removed from the Kansas version of the Rule in 1999. In Kansas, lawyers have a duty to report themselves, and they have a duty to report even KRPC violations that do not implicate the lawyer's honesty, trustworthiness or fitness." (footnote omitted) (emphasis added)).
- Ohio LEO 2007-1 (02/09/07) ("A lawyer is required to self-report his or her professional misconduct, as well as report others' misconduct, that raises a question as to honesty, trustworthiness, or fitness as a lawyer. Comment [1] to Rule 8.3 explains that reporting is required 'when the lawyer knows of a violation of the Ohio Rules of Professional Conduct involving that lawyer or another lawyer. A lawyer has a similar obligation with respect to judicial misconduct.'"; "A lawyer, licensed in Ohio, also has a duty under Gov.Bar R. V(11)(F)(1), to provide written notification to the Disciplinary Counsel and to the Clerk of the Supreme Court of Ohio of the issuance of a disciplinary order in another jurisdiction. The notification is to be made within thirty days of the issuance of the disciplinary order." (emphasis added)).

Not surprisingly, disciplinary authorities seem more inclined to lessen punishment of self-reporting lawyers.

- In re Fayssoux, 675 S.E.2d 428, 431 (S.C. 2009) (issuing a public reprimand of a real estate lawyer who self-reported his misconduct; "The misconduct reported in this opinion would normally warrant the imposition of a suspension from the practice of law. However, because respondent self-reported his misconduct to ODC, fully cooperated with the disciplinary investigation, and has served the Bar of this State for more than thirty years with no prior disciplinary history, we find that a public reprimand is warranted." (emphasis added)).

On the other hand, lawyers who self-report only when caught (or about to be caught) normally do not receive any favorable consideration by disciplinary authorities.

- Attorney Grievance Comm'n v. Palmer, 9 A.3d 37, 54 n.15 (Md. 2010) (disbarring a lawyer who self-reported, but only after his partners confronted him with his misconduct; "At oral argument, members of the Court asked questions and/or offered remarks that could be said fairly to raise the spectre of mitigating the sanction to an indefinite suspension because of Respondent's 'self-reporting' of his misconduct. The record of this case does not support the notion, however, that solely Respondent's conscience led him to self-report all of his misconduct where it otherwise would have gone undiscovered. Rather, attorneys at his former firm discovered that claimed action had not been taken on various cases to which Respondent had been assigned, and it was not until the firm confronted him about that misconduct (which Palmer denied initially) that Respondent ultimately disclosed to the partners at a December 2008 face-to-face meeting the full extent of his dereliction and other misconduct. Even assuming pure self-reporting, while we suggest that it can and should be considered by this Court in mitigation, see ABA Standards for Imposing Lawyer Sanctions § 9.32(e) (1992) (listing 'full and free disclosure to disciplinary board' as a factor to be considered in mitigation), we decline to adopt a per se rule of mitigation from disbarment to indefinite suspension in cases involving intentional misappropriation of client funds and intentional dishonesty. This view is in accord with other jurisdictions that have considered the weight that self-reporting should be given in misappropriation cases.").
- In re Ellis, 204 P.3d 1161, 1163 (Kan. 2009) (issuing a public censure of an in-house lawyer who admitted stealing food from his client/employer, but only after he was confronted with misconduct; "Mr. Holden and Ms. Morris directed the Respondent to self-report his conduct to the Disciplinary Administrator's office. On October 11, 2007, the Respondent sent a letter to the Disciplinary Administrator." (internal citation omitted)).

Some states require lawyers to self-report any sanctions imposed by other jurisdictions.

- Illinois Rule 8.3 cmt. [6] ("Rule 8.3(d) requires a lawyer to bring to the attention of the Illinois Attorney Registration and Disciplinary Commission any disciplinary sanction imposed by any other body against that lawyer. The Rule must be read in conjunction with Illinois Supreme Court Rule 763.").
- Pete Brush, SDNY, EDNY Impose Self-Reporting For Disciplined Attys, Law360, Feb. 25, 2013 ("Attorneys practicing in the Southern and Eastern federal districts of New York are required to report any disciplinary order

against them entered elsewhere, including disclosing if they were suspended, under a new rule that takes effect Monday. The two bustling jurisdictions officially tacked a new section, Local Rule 1.5(h), to their disciplinary guidelines after officials adopted the revisions in December and a period for public comment expired. [Local Civil Rule 1.5. Discipline of Attorneys (h) Duty of Attorney to Report Discipline. (1) In all cases in which any federal, state or territorial court, agency or tribunal has entered an order disbaring or censuring an attorney admitted to the bar of this Court, or suspending the attorney from practice, whether or not on consent, the attorney shall deliver a copy of said order to the Clerk of this Court within fourteen days after the entry of the order. (2) In all cases in which any member of the bar of this Court has resigned from the bar of any federal, state or territorial court, agency or tribunal while an investigation into allegations of misconduct against the attorney was pending, the attorney shall report such resignation to the Clerk of this Court within fourteen days after the submission of the resignation. (3) In all cases in which this Court has entered an order disbaring or censuring an attorney, or suspending the attorney from practice, whether or not on consent, the attorney shall deliver a copy of said order within fourteen days after the entry of the order to the clerk of each federal, state or territorial court, agency and tribunal in which such attorney has been admitted to practice. (4) Any failure of an attorney to comply with the requirements of this Local Civil Rule 1.5(h) shall constitute a basis for discipline of said attorney pursuant to Local Civil Rule 1.5(c).] Regardless of whether a lawyer consented, he or she is required to report any suspension, disbarment or censure order by any federal, state or territorial court, agency or tribunal to the clerk of relevant court or courts within 14 days, the rule says. 'Any failure of an attorney to comply with the requirements of this [rule] shall constitute a basis for discipline of said attorney,' the notice said.").

Of course, by the time some other jurisdiction has sanctioned the lawyer, any wrongdoing has become either publicly known or at least known to disciplinary authorities.

Best Answer

The best answer to (a) is (A) YES; the best answer to (c) is (A) PROBABLY YES; the best answer to (c) is (A) YES; the best answer to (d) is (B) PROBABLY NO.

B 5/15, 8/15, 2/17

Knowledge Standard Triggering Lawyers' Reporting Duty

Hypothetical 19

You just moved from a small town to a big city, and have found that the lawyers' conduct is much "sharper" than you were used to. You never even thought of reporting any lawyers where you formerly practiced, but now you wonder about what standard applies.

- (a) Do you have a duty to report another lawyer for what you suspect to be coaching one of her witnesses to lie?

(B) NO

- (b) Do you have a duty to investigate what seems to be another lawyer's egregious ethics violation?

MAYBE

- (c) If you know that another lawyer has engaged in sufficiently egregious misconduct, do the ethics rules require you to report that lawyer (rather than give you discretion to do so)?

(A) YES (PROBABLY)

Analysis

The ethics rules requiring lawyers' reporting of other lawyers' misconduct combines apparently mandatory requirements with various limitations that in most cases relieve lawyers of any duty.

The main limitation involves lawyers' confidentiality duty trumping any mandatory disclosure obligation. However, there are other limits as well.

- (a) Lawyers' disclosure duty arises only if they have some level of knowledge that other lawyers have engaged in sufficiently egregious misconduct.

The 1908 ABA Canons of Professional Ethics included specific provisions requiring lawyers to report other lawyers' misconduct in two particular scenarios. Canon 28 required lawyers "having knowledge of" other lawyers' stirring up of litigation to report them "to the end that the offender may be disbarred." Canon 29 explained that lawyers "should expose" other lawyers' "corrupt or dishonest conduct" without "fear or favor before the proper tribunals." Thus, one of the ABA Canons contained a "knowledge" requirement, while the other did not.

The 1969 ABA Code of Professional Responsibility indicated that:

A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

ABA Model Code of Professional Responsibility, DR 1-103(A) (emphasis added). The phrase "unprivileged knowledge" also appeared in the accompanying Ethical Consideration.

The integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials. A lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyers which he believes clearly to be in violation of the Disciplinary Rules. A lawyer should, upon request serve on and assist committees and boards having responsibility for the administration of the Disciplinary Rules.

ABA Model Code of Professional Responsibility, EC 1-4 (emphasis added).

The ABA Code did not define "knowledge," but presumably that standard required more than a mere suspicion.

The 1983 ABA Model Rules of Professional Conduct take the same approach. ABA Model Rule 8.3 also uses a "knows" standard.

A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

ABA Model Rule 8.3(a) (emphasis added).

Although the word "knows" is not addressed in any accompanying comment, the ABA Model Rules define "knows" elsewhere.

"Knowingly," "known," or "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances.

ABA Model Rule 1.0(f) (emphasis added).

Interestingly, the word "substantial" does not modify the knowledge requirement, but instead refers to the misconduct's seriousness.

The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.

ABA Model Rule 8.3 cmt. [3]. However, at least one state has appeared to interpret that term as going to the knowledge requirement.

- Warren Cty. Bar Ass'n v. Vardiman, 2016-Ohio-352, at ¶ 21 (suspending a lawyer, but acknowledging that the lawyer's ADHD was a mitigating factor; "While Vardiman's misconduct consisted of filing one or more fraudulent documents in two different courts rather than a multistep scheme to defraud, we agree that it is comparable in nature and severity to Shaffer's [Disciplinary Counsel v. Shaffer, 785 N.E.2d 429 (Ohio 2003)] misconduct. And while Shaffer was ostensibly motivated by his desire to assist his client, who was caring for his incapacitated grandmother, Vardiman's conduct was at least partially driven by his recently diagnosed ADHA, which his treating psychologist described as an 'inborn neurological problem.' Given Vardiman's acceptance of responsibility for his actions; his active participation in OLAP and effective treatment of this disorder; and numerous letters attesting to his good character, reputation, and professional competence, we agree that a one-year suspension, with the final six months stayed on conditions, is the appropriate sanction for his misconduct.").

- Board of Overseers v. Warren, 34 A.3d 1103, 1110 (Me. 2011) (holding that the law firm's partners who knew of but did not correct a rogue partner's wrongful acts violated the ethics rules; "Whether an attorney has a 'substantial question' about a colleague's honesty, trustworthiness, or fitness to practice law is a subjective test that requires a determination of what the attorney's actual belief was at the time.").

The Restatement follows the ABA's approach to the knowledge requirement.

A lawyer who knows of another lawyer's violation of applicable rules of professional conduct raising a substantial question of the lawyer's honesty or trustworthiness or the lawyer's fitness as a lawyer in some other respect must report that information to appropriate disciplinary authorities.

Restatement (Third) of Law Governing Lawyers § 5(3) (2000) (emphasis added).

A comment provides further guidance:

The requirement applies when a lawyer has knowledge, which may be inferred from the circumstances Knowledge is assessed on an objective standard. It includes more than a suspicion that misconduct has occurred, and mere suspicion does not impose a duty of inquiry. . . . Knowledge exists in an instance in which a reasonable lawyer in the circumstances would have a firm opinion that the conduct in question more likely than not occurred.

Restatement (Third) of Law Governing Lawyers § 5 cmt. i (2000) (emphases added).

Thus, the Restatement adopts the same high "knowledge" standard as the ABA Model Rules, and emphasizes that lawyers do not have a duty to investigate suspicious conduct by other lawyers.

In its 2003 legal ethics opinion dealing with lawyers' reporting obligation involving impaired lawyers, the ABA confirmed that lawyers do not have a duty to report suspicions.

A lawyer need not act on rumors or conflicting reports about a lawyer. Moreover, knowing that another lawyer is drinking heavily or is evidencing impairment in social settings is not itself enough to trigger a duty to report under Rule 8.3. A

lawyer must know that the condition is materially impairing the affected lawyer's representation of clients.

ABA LEO 431 (8/8/03) (emphases added).

ABA LEO 431 did not impose a duty of investigation on lawyers suspecting other lawyers' impairment. Although the legal ethics opinion explained how lawyers may investigate such conduct, that section of the legal ethics opinion uses discretionary rather than mandatory language.

In deciding whether an apparently impaired lawyer's conduct raises a substantial question of her fitness to practice, a lawyer might consider consulting with a psychiatrist, clinical psychologist, or other mental health care professional about the significance of the conduct observed or of information the lawyer has learned from third parties. He might consider contacting an established lawyer assistance program. In addition, the lawyer also might consider speaking to the affected lawyer herself about his concerns. In some circumstances, that may help a lawyer understand the conduct and why it occurred, either confirming or alleviating his concerns. In such a situation, however, the affected lawyer may deny that any problem exists or maintain that although it did exist, it no longer does. This places the lawyer in the position of assessing the affected lawyer's response, rather than the affected lawyer's conduct itself. Care must be taken when acting on the affected lawyer's denials or assertions that the problem has been resolved. It is the knowledge of the impaired conduct that provides the basis for the lawyer's obligations under Rule 8.3; the affected lawyer's denials alone do not make the lawyer's knowledge non-reportable under Rule. 8.3.

Id. (footnotes omitted) (emphases added). ABA LEO 431 even suggested that lawyers talk to the possibly impaired lawyer's colleagues.

If the affected lawyer is practicing within a firm, the lawyer should consider speaking with the firm's partners or supervising lawyers. If the affected lawyer's partners or supervising lawyers take steps to assure that the affected lawyer is not representing clients while materially impaired, there is no obligation to report the affected lawyer's past

failure to withdraw from representing clients. If, on the other hand, the affected lawyer's firm is not responsive to the concerns brought to their attention, the lawyer must make a report under Rule 8.3. We note that there is no affirmative obligation to speak with either the affected lawyer or her firm about her conduct or condition before reporting to the appropriate authority.

Id. (footnote omitted) (emphasis added). The ABA's extensive discussion of discretionary steps a lawyer might consider probably reflects the ABA's laudable encouragement of lawyers to arrange substance abuse or mental health assistance for troubled colleagues -- rather than shove them into the disciplinary process.

A 2004 ABA legal ethics opinion discussion of the reporting obligation's application to lawyers not practicing law also addressed the "knowledge" standard.

When Rule 8.3 is read in conjunction with Rule 8.4, then it is apparent that lawyers must report a wide variety of misconduct. Two threshold must be reached, however, before the lawyer's obligation arises: the lawyer must "know" of the violation; and the misconduct must raise a "substantial question" as to the lawyer's honesty, trustworthiness or fitness as a lawyer. Therefore, we now turn to a discussion of these two requirements.

Rule 1.0(f) in the Terminology section of the Model Rules states that the term "knows" denotes "actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances."

Most cases and ethics opinions conclude that "knowledge" is determined by an objective standard. The following analysis by the Mississippi Supreme Court typifies this approach: "The standard must be an objective one . . . not tied to the subjective beliefs of the lawyer in question. The supporting evidence must be such that a reasonable lawyer under the circumstances would have formed a firm opinion that the conduct in question had more likely than not occurred."

ABA LEO 433 (8/25/04) (emphases added).

States have addressed the knowledge standard that triggers lawyers' reporting duty.

- Ohio LEO 2016-2 (4/8/16) (analyzing lawyers' duty to report other lawyers' misconduct under Ohio's unique Rule 8.3, which does not contain the word "substantial" in describing the question that the other lawyer's misconduct raises, and excepting from the reporting obligation "privileged" information the reporting lawyer possesses; "Additionally, in order to invoke the reporting requirement, a lawyer must have actual knowledge that another lawyer has violated a Rule of Professional Conduct. This requires more than a "mere suspicion" that misconduct has occurred. The term "knows" denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." Prof.Cond.R. 1.0(g); Adv. Op. 2007-01. See DC Bar Op. 246, citing N.Y. State Bar Opinion No. 635. Furthermore, a lawyer's duty to report is not removed when the lawyer being reported does not admit liability or even denies any misconduct.").
- Pennsylvania LEO 2014-025 (07/14/14) (analyzing a lawyer's disclosure duty upon learning that a new client lied while being represented by a previous lawyer; noting that the previous lie would necessarily require misconduct by the new lawyer; "In this case, Client failed to tell the truth about his immigration status until after you pressed him for more information. At that point, he told you in confidence that his prior lawyer gave him improper advice – to lie to the USCIS about his length of stay in the U.S. prior to the application for his fiancé visa. You claim that the prior attorney has a reputation in your legal community 'for shoddy and fraudulent work.' If Client's allegation is true, and viewed in light of the prior lawyer's reputation, there appears to be a substantial question about the prior lawyer's honesty, trustworthiness or fitness as a lawyer in violation of Rule 8.3(a). Nevertheless, Client's credibility is questionable and you do not know for a fact that the prior lawyer advised him to lie to the USCIS or to continue to lie in the application for the conditional green card. Therefore, you are not required to report the alleged misconduct to the Disciplinary Board."; "However, while investigating whether Client's false statement is contained in a document or record of an interview, you may learn that Client's allegation is true. If you acquire the knowledge that the prior attorney advised Client to lie to the USCIS, then you must report the misconduct to the Disciplinary Board. But, even if you have knowledge that the prior lawyer advised Client to lie to the USCIS, that information is confidential under Rule 1.6 because Client revealed it to you during the course of your legal representation. According to Comment [2] to Rule 8.3, you may only disclose the information about the false statement to the Disciplinary Board if you obtain Client's consent. Finally, you should encourage Client to provide you with that informed consent, but only if prosecution of the prior attorney will not substantially prejudice Client's interests before the USCIS." (emphases added)).

- Philadelphia LEO 2005-7 (05/2005) ("During the course of discovery in litigation, the inquirer has come to strongly suspect - based on the opinion of a forensic accounting expert - that the plaintiff in the matter (the opposing party) committed tax fraud and fraud on the bankruptcy court. The inquirer also feels that it is possible that opposing counsel either aided the fraud or knew of the fraud but did not reveal it."; "[A]ny uncertainty as to whether there has been fraud, compounded with the inquirer's assessment that it is only possible that opposing counsel either purposefully or negligently failed to report that fraud, relieves the inquirer of any obligation to inform the Disciplinary Board. Rule 8.3 (a)." (emphasis added)).
- Vermont LEO 2004-01 (2004) (analyzing the knowledge requirement for a lawyer's duty to report another lawyer's misconduct; "As to the meaning of the term 'knowledge', our committee has addressed that term in Opinion 87-08. The opinion was decided under the Code but we believe the standards discussed there remain the same under the Vermont Rules. We stated there that 'knowledge' as used in the Code exists where the facts and circumstances of which an attorney is aware give rise to a 'good faith or substantial belief on the part of the attorney . . . that a violation has occurred.'" (emphasis added)).
- Texas LEO 520 (05/1997) (analyzing the following question: "Does Rule 8.03 of the Texas Disciplinary Rules of Professional Conduct require a lawyer to report suspected misconduct by another lawyer, when the first lacks solid proof that the second lawyer engaged in the suspected conduct?"; "Rule 8.03(a) of the Texas Disciplinary Rules of Professional Conduct is limited to those disciplinary violation that must be revealed by the disclosing lawyer in order for that lawyer to avoid violating the rules. As recognized in the commentary, however, Rule 8.03(a) is not intended to limit the actual or suspected violations that a lawyer may report to an appropriate disciplinary authority. Before reporting an alleged violation, however, Rule 8.03(a) requires that a lawyer have knowledge that another lawyer has in fact committed a violation of the rules. A report of misconduct must therefore be based upon such objective facts that are likely to have evidentiary support. It is beyond the scope of this opinion to comment on specific facts that would constitute sufficient basis for a report of misconduct." (emphases added)).

One state has explicitly adopted a different standard.

- Louisiana LEO 06-RPCC-010 (06/01/06) (analyzing Louisiana lawyers' duty to report another lawyer's misconduct; "In some cases, a lawyer will not have clear and convincing evidence of a colleague's wrongdoing. The Rule relaxes the standard of certainty to one in which a reasonable lawyer could infer that improper behavior more than likely occurred. It is important to keep in mind, however, that a report of misconduct should not be based on a mere suspicion. A lawyer should have a legitimate degree of knowledge of

another's misconduct in order to file a report with the Office of Disciplinary Counsel." (footnote omitted); "It is noteworthy that the current Louisiana version of Rule 8.3(a) left out the word 'substantial' that is utilized in the ABA Model Rule."; "Louisiana's Rule 8.3(a) requires misconduct to be reported if it raises a question – as opposed to the ABA Model Rule, which requires the conduct to raise a **substantial** question – as to the lawyer's fitness to practice law. This distinction leads to greater potential for reporting of misconduct under the Louisiana Rule when compared to the ABA Model Rule because all acts of unethical behavior pertaining to the designated qualities must be reported, not just those unethical acts deemed 'substantial'. By excluding the word 'substantial,' the Louisiana Rule continues to 'impose a more expansive reporting requirement' than the ABA Model Rule, in that all misconduct pertaining to a lawyer's 'honesty, trustworthiness or fitness as a lawyer' must be reported, rather than only those acts having a 'substantial' impact on the legal profession."; "The rationale for Rule 8.3(a) is self-evident. Self-regulation of the legal profession assists in ensuring the integrity of the profession. At many times, a lawyer is in the best position to discover unethical behavior and is obligated to report this knowledge, despite the reluctance for policing one another. Until the Court further clarifies the substantiality issue, practitioners should note that a failure to report knowledge of unethical conduct that bears on honesty, trustworthiness or fitness by a fellow lawyer may be a violation of the Rules of Professional Conduct." (emphasis added)).

One state has adopted an odd standard that might be difficult to apply.

- Kansas Rule 8.3(a) ("A lawyer having knowledge of any action, inaction, or conduct which in his or her opinion constitutes misconduct of an attorney under these rules shall inform the appropriate professional authority." (emphasis added)).
- Kansas City LEO 14-01 (7/1/14) (holding that a lawyer was not obligated to report a former colleague's memory lapses, as long as the lawyer was unaware of any ethics violation i.e. forgetful former colleague; "Rule 8.3(a), KRPC, provides as follows: '(a) A lawyer having knowledge of any action, inaction, or conduct which in his or her opinion constitutes misconduct of an attorney under these rules shall inform the appropriate professional authority.'"; "This Rule contrasts strikingly with the Model Rule adopted in most of the other states. The Model version of Rule 8.3(a) provides: '(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.'" (emphasis added); "The Model Rule applies only to conduct by 'another lawyer,' (i.e. not to the reporting lawyer himself). Moreover, the duty to report under the Model Rule does not apply to all Rule violations, but only to those violations which raise 'a substantial

question' as to that other lawyer's 'honesty, trustworthiness or fitness as a lawyer.' Those limitations were all removed from the Kansas version of the Rule in 1999. In Kansas, lawyers have a duty to report themselves, and they have a duty to report even KRPC violations that do not implicate the lawyer's honesty, trustworthiness or fitness." (footnote omitted) (emphasis added)).

(b) ABA Model Rule 8.3 does not explicitly require lawyers to investigate another lawyers' possible ethics violation that might trigger a reporting obligation.

However, other rules might require such an investigation. One state has pointed to several of its rules in recognizing such an investigation duty.

- Kentucky LEO E-430 (1/16/10) ("In order to trigger the reporting requirement, absolute certainty is not required; but mere suspicion is insufficient to trigger the reporting requirement. While lawyers cannot turn a blind eye to obviously questionable conduct, as a general rule they do not have a duty to investigate. However, there may be circumstances where another rule or principle of law may impose an independent duty to investigate. For example, under SCR 3.130 (5.3) a supervising lawyer who suspects a subordinate lawyer is engaging in unethical conduct would have a duty to investigate further. Similarly, an independent duty to investigate misconduct might arise under SCR 3.130 (1.5), which permits the division of fees between unrelated lawyers, but requires the lawyers to assume joint ethical and financial responsibility for the representation, as if they were partners." (emphasis added; footnote omitted)).

(c) The 1908 ABA Canons of Professional Ethics included two specific provisions requiring lawyers to report other lawyers' misconduct in two particular scenarios.

Canon 28 required lawyers "having knowledge of" other lawyers' stirring up of litigation to report them "to the end that the offender may be disbarred." Canon 29 explained that lawyers "should expose" other lawyers' "corrupt or dishonest conduct" without "fear or favor before the proper tribunals." Thus, Canon 28 seems to describe a mandatory reporting duty, while Canon 29 uses the word "should."

The 1969 ABA Model Code of Professional Responsibility contained a mandatory reporting obligation under the described circumstances.

A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

ABA Model Code of Professional Responsibility, DR 1-103(A) (emphasis added).

Interestingly, the accompanying Ethical Consideration seemed to include a discretionary standard.

The integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials. A lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyers which he believes clearly to be in violation of the Disciplinary Rules.

ABA Model Code of Professional Responsibility, EC 1-4 (emphasis added).

The 1983 ABA Model Rules of Professional Conduct contain a mandatory reporting requirement in defined circumstances.

A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

ABA Model Rule 8.3(a) (emphasis added).

The Restatement takes the same approach.

A lawyer who knows of another lawyer's violation of applicable rules of professional conduct raising a substantial question of the lawyer's honesty or trustworthiness or the lawyer's fitness as a lawyer in some other respect must report that information to appropriate disciplinary authorities.

Restatement (Third) of Law Governing Lawyers § 5(3) (2000) (emphasis added).

Not every state has adopted ABA Model Rule 8.3's formulation.

Some states have adopted a broader reporting obligation than the ABA Model Rules contain.

A lawyer having knowledge of any action, inaction, or conduct which in his or her opinion constitutes misconduct of an attorney under these rules shall inform the appropriate professional authority.

Kansas Rule 8.3(a) (emphasis added). Interestingly, the Kansas Rules do not contain a comment explaining this provision's significant variation from the ABA Model Rules.

A 2014 Kansas City legal ethics opinion described Kansas' unique reporting rule.

- Kansas City LEO 14-01 (7/1/14) (holding that a lawyer was not obligated to report a former colleague's memory lapses, as long as the lawyer was unaware of any ethics violation i.e. forgetful former colleague; "Rule 8.3(a), KRPC, provides as follows: '(a) A lawyer having knowledge of any action, inaction, or conduct which in his or her opinion constitutes misconduct of an attorney under these rules shall inform the appropriate professional authority.'"; "This Rule contrasts strikingly with the Model Rule adopted in most of the other states. The Model version of Rule 8.3(a) provides: '(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.'" (emphasis added); "The Model Rule applies only to conduct by 'another lawyer,' (i.e. not to the reporting lawyer himself). Moreover, the duty to report under the Model Rule does not apply to all Rule violations, but only to those violations which raise 'a substantial question' as to that other lawyer's 'honesty, trustworthiness or fitness as a lawyer.' Those limitations were all removed from the Kansas version of the Rule in 1999. In Kansas, lawyers have a duty to report themselves, and they have a duty to report even KRPC violations that do not implicate the lawyer's honesty, trustworthiness or fitness." (footnote omitted) (emphasis added)).

In contrast, some states' ethics rules essentially gut any reporting duty.

A lawyer who knows that another lawyer . . . has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's . . . honesty, trustworthiness or fitness as a lawyer . . . in other respects, should inform the appropriate professional authority.

Washington Rule 8.3(a) (emphasis added). A comment reinforces the discretionary nature of Washington's reporting provision.

Lawyers are not required to report the misconduct of other lawyers . . . or judges. Self-regulation of the legal profession, however, creates an aspiration that members of the profession report misconduct to the appropriate disciplinary authority when they know of a serious violation of the Rules of Professional Conduct.

Washington Rule 8.3 cmt. [1] (emphases added).

Georgia also explicitly rejects a mandatory reporting obligation in favor of a discretionary standard.

A lawyer having knowledge that another lawyer has committed a violation of the Georgia Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, should inform the appropriate professional authority. . . . There is no disciplinary penalty for violation of this Rule.

Georgia Rule 8.3(a) (emphasis added).

A 2013 article condemned the Georgia approach as "toothless."

- Grady O. "Jed" Morton, Jr., Georgia's "Rule" On Reporting Misconduct is Toothless, Daily Report, Aug. 15, 2013 ("The August 12 article, Clients Claim Atlanta Lawyer Stole \$150,000, reported that a legal ethics expert pointed out that Georgia has a rule requiring lawyers to report misconduct. Georgia, in fact, has no such rule."; "Georgia Rule of Professional Conduct 8.3 requires nothing of a lawyer who knows another lawyer has acted unethically: 'A lawyer having knowledge that another lawyer has committed a violation of the Georgia Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, should inform the appropriate professional authority.'" (emphasis added); "Use of the word 'should' renders Rule 8.3 a non-Rule -- it is, at best, an exhortation. If that's not enough, Georgia's ethics rules establish maximum penalties for violations. The maximum penalty for violating non-Rule 8.3 is no penalty." (emphasis added); "In other words, there is no penalty for not doing what has not been made mandatory to start with."; "Contrast Georgia's non-Rule 8.3 with Model Rule 8.3: 'a lawyer who knows that another lawyer has committed a violation of the Rules

of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.' Furthermore, unlike Georgia's gutted non-rule, the penalty for violating Model Rule 8.3 is left to the judgment of a disciplinary authority."; "The Comment to Georgia non-Rule 8.3 reminds us, in lofty language, that self-regulation requires lawyers to initiate disciplinary investigations when we know of a violation. Yet the rule itself is hortatory, requiring nothing. The irony would be humorous in a work of fiction." (emphases added)).

Best Answer

The best answer to (a) is (B) NO, the best answer to (b) is MAYBE; and the best answer to (c) is (A) PROBABLY YES.

B 5/15, 8/15, 2/17

Misconduct Lawyers Must Report

Hypothetical 20

You have reluctantly concluded that you have a duty to report another lawyer's ethics violations, if they are sufficiently serious. You wonder where the rules draw that line.

- (a) Must you report another lawyer's unethical use of a trade name in marketing her law firm?

(B) NO (PROBABLY)

- (b) Must you report another lawyer's conflicts of interest violation, which you discovered in connection with your job as an adjunct law professor?

MAYBE

- (c) Must you report another lawyer's uncivil comment to your law firm's receptionist about what a jerk she has been for not bringing in coffee immediately upon his arrival at your law firm for a deposition?

NO (PROBABLY)

- (d) Must you report another lawyer's social use of cocaine, which you saw at a cocktail party?

MAYBE

- (e) Must you report another lawyer's theft of valuable artwork from your city's art museum, which you saw during your bar's annual Christmas party - but which the lawyer perpetrated while clearly impaired by alcohol?

YES

- (f) Must you report another lawyer's recitation of a very racist joke during a social gathering of your local bar association?

MAYBE

Analysis

ABA Model Rules

The 1908 ABA Canons of Professional Ethics included two specific provisions requiring lawyers to report other lawyers' misconduct in two particular scenarios. Canon 28 required lawyers "having knowledge of" other lawyers' stirring up of litigation to report them "to the end that the offender may be disbarred." Canon 29 explained that lawyers "should expose" other lawyers' "corrupt or dishonest conduct" without "fear or favor before the proper tribunals." Thus, the Canons' provisions essentially defined the misconduct that should be reported.

The 1969 ABA Model Code of Professional Responsibility mandated reporting of any violation of a specified disciplinary rule.

A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

ABA Model Code of Professional Responsibility, DR 1-103(A).

DR 1-102 contained a list of lawyer misconduct.

A lawyer shall not: (1) Violate a Disciplinary Rule. (2) Circumvent a Disciplinary Rule through actions of another. (3) Engage in illegal conduct involving moral turpitude. (4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. (5) Engage in conduct that is prejudicial to the administration of justice. (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

ABA Model Code of Professional Responsibility, DR 1-102(A)(1-6).

On its face, the 1969 ABA Model Code therefore required lawyers to report any violation by another lawyer of DR 1-102, regardless of the severity of the violation or its

reflection on the lawyer's fitness in other respects. ABA Model Code of Professional Responsibility, DR 1-103(A).

The accompanying Ethical Consideration referred generically to the Disciplinary Rules, rather than just one rule.

The integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials. A lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyers which he believes clearly to be in violation of the Disciplinary Rules. A lawyer should, upon request serve on and assist committees and boards having responsibility for the administration of the Disciplinary Rules.

ABA Model Code of Professional Responsibility, EC 1-4 (emphasis added).

ABA Model Rule 8.3(a) lawyers' duty to report other lawyers' ethics violation only arises if the other lawyers' violation:

raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects.

ABA Model Rule 8.3(a).

There seems to be some confusion about what the term "substantial question" means in ABA Model Rule 8.3(a). That rule requires lawyers to report an ethics violation that "raises a substantial question" about the a lawyer's "honesty, trustworthiness or fitness as a lawyer in other respects." ABA Model Rule 8.3(a). The accompanying comment explains that:

[t]he term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.

ABA Model Rule 8.3 cmt. [3]. Thus, the term "substantial" goes to the seriousness of the offense, not the level of the reporting lawyer's knowledge.

A comment to ABA Model Rule 8.3 notes this limitation and the reason for the limitation.

If a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense. Such a requirement existed in many jurisdictions but proved to be unenforceable. This Rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to prevent. A measure of judgment is, therefore, required in complying with the provisions of this Rule. The term "substantial" refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.

ABA Model Rule 8.3 cmt. [3] (emphasis added).

Another comment emphasizes two points.

An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover. Reporting a violation is especially important where the victim is unlikely to discover the offense.

ABA Model Rule 8.3 cmt. [1] (emphasis added).

Restatement

The Restatement essentially follows the ABA Model Rules approach.

A lawyer who knows of another lawyer's violation of applicable rules of professional conduct raising a substantial question of the lawyer's honesty or trustworthiness or the lawyer's fitness as a lawyer in some other respect must report that information to appropriate disciplinary authorities.

Restatement (Third) of Law Governing Lawyers § 5(3) (2000).

A comment explores the mental state of the lawyer engaging in the wrongdoing, and its effect on the reporting lawyer's obligation.

As with criminal offenses, disciplinary offenses are defined in terms of a particular mental state of a lawyer actor. On familiar legal principles, a lawyer's claimed ignorance of a lawyer-code rule is no defense to a charged violation. Most

disciplinary offenses involve acts that, in themselves, reflect a concern with moral blame-worthiness and thus require that the lawyer's conduct be knowing. An example is the prohibition against introduction of perjured testimony What a lawyer knows may be inferred from the circumstances. Accordingly, a finding of knowledge does not require that the lawyer confess to or otherwise admit the state of mind required for the offense.

Some disciplinary offenses do not require knowledge. Some few offenses, such as those requiring maintenance of office books and records . . . , are absolute in form, thus warranting a finding of a violation if the requirement is not met, no matter what the lawyer's state of mind. Some few other offenses are sufficiently proved by evidence that the lawyer was negligent. Other requirements are stated in terms of an exercise of reasonable judgment, an objective standard that is assessed on the standard of the judgment that would be brought to the decision by a lawyer of ordinary skill and competence.

Restatement (Third) of Law Governing Lawyers § 5 cmt. d (2000) (emphases added).

A reporter's note provides more guidance.

Some decisions have employed the catch-all prohibition against conduct "prejudicial to the administration of justice" for a wide variety of acts, including those having little to do with interference with ongoing proceedings.

Restatement (Third) of Law Governing Lawyers § 5 reporter's note, cmt. c (2000).

State Variations

Some state rules have deliberately expanded the type of misconduct that a lawyer must report.

Kansas has taken the most extreme approach -- requiring Kansas lawyers to report lawyers' ethics violations even if they do not implicate the lawyers' honesty, trustworthiness or fitness.

- Kansas Rule 8.3(a) ("A lawyer having knowledge of any action, inaction, or conduct which in his or her opinion constitutes misconduct of an attorney

under these rules shall inform the appropriate professional authority."
(emphasis added)).

- Kansas City LEO 14-01 (7/1/14) (holding that a lawyer was not obligated to report a former colleague's memory lapses, as long as the lawyer was unaware of any ethics violation i.e. forgetful former colleague; "Rule 8.3(a), KRPC, provides as follows: '(a) A lawyer having knowledge of any action, inaction, or conduct which in his or her opinion constitutes misconduct of an attorney under these rules shall inform the appropriate professional authority.'"; "This Rule contrasts strikingly with the Model Rule adopted in most of the other states. The Model version of Rule 8.3(a) provides: '(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.'" (emphasis added); "The Model Rule applies only to conduct by 'another lawyer,' (i.e. not to the reporting lawyer himself). Moreover, the duty to report under the Model Rule does not apply to all Rule violations, but only to those violations which raise 'a substantial question' as to that other lawyer's 'honesty, trustworthiness or fitness as a lawyer.' Those limitations were all removed from the Kansas version of the Rule in 1999. In Kansas, lawyers have a duty to report themselves, and they have a duty to report even KRPC violations that do not implicate the lawyer's honesty, trustworthiness or fitness." (footnote omitted) (emphasis added)).

Louisiana has taken a middle ground between the ABA Model Rules and Kansas. Louisiana's Rule 8.3 does not include the "substantial" qualification. This means that insubstantial misconduct must be reported, although the misconduct must reflect on the lawyer's honesty, trustworthiness or fitness.

- Louisiana LEO 06-RPCC-010 (06/01/06) (analyzing Louisiana lawyers' duty to report another lawyer's misconduct; "In some cases, a lawyer will not have clear and convincing evidence of a colleague's wrongdoing. The Rule relaxes the standard of certainty to one in which a reasonable lawyer could infer that improper behavior more than likely occurred. It is important to keep in mind, however, that a report of misconduct should not be based on a mere suspicion. A lawyer should have a legitimate degree of knowledge of another's misconduct in order to file a report with the Office of Disciplinary Counsel." (footnote omitted); "It is noteworthy that the current Louisiana version of Rule 8.3(a) left out the word 'substantial' that is utilized in the ABA Model Rule."; "Louisiana's Rule 8.3(a) requires misconduct to be reported if it raises a question – as opposed to the ABA Model Rule, which requires the conduct to raise a substantial question – as to the lawyer's fitness to practice law. This distinction leads to greater potential for reporting of

misconduct under the Louisiana Rule when compared to the ABA Model Rule because all acts of unethical behavior pertaining to the designated qualities must be reported, not just those unethical acts deemed 'substantial'. By excluding the word 'substantial,' the Louisiana Rule continues to 'impose a more expansive reporting requirement' than the ABA Model Rule, in that all misconduct pertaining to a lawyer's 'honesty, trustworthiness or fitness as a lawyer' must be reported, rather than only those acts having a 'substantial' impact on the legal profession."; "The rationale for Rule 8.3(a) is self-evident. Self-regulation of the legal profession assists in ensuring the integrity of the profession. At many times, a lawyer is in the best position to discover unethical behavior and is obligated to report this knowledge, despite the reluctance for policing one another. Until the Court further clarifies the substantiality issue, practitioners should note that a failure to report knowledge of unethical conduct that bears on honesty, trustworthiness or fitness by a fellow lawyer may be a violation of the Rules of Professional Conduct." (emphasis added)).

Ohio also eliminated the "substantial" modifier, but that state's most recent legal ethics opinion does not (like Louisiana's legal ethics opinion mentioned above) explicitly emphasize the distinction between the Ohio ethics rules and the ABA Model Rules.

- Ohio LEO 2016-2 (4/8/16) (analyzing lawyers' duty to report other lawyers' misconduct under Ohio's unique Rule 8.3, which does not contain the word "substantial" in describing the question that the other lawyer's misconduct raises, and excepting from the reporting obligation "privileged" information the reporting lawyer possesses; "The Rules of Professional Conduct do not contain a strict reporting requirement that a lawyer report all misconduct of which the lawyer has unprivileged knowledge. Rather, Prof.Cond.R. 8.3 requires a lawyer to report misconduct only when 1) the lawyer has unprivileged knowledge, and 2) it raises a question as to another lawyer's "honesty, trustworthiness, or fitness as a lawyer in other respects.").

In a series of legal ethics opinions decided in a little over a year, the ABA addressed several scenarios involving lawyers' reporting obligations.¹ Several of these opinions addressed the type of misconduct that triggers the reporting duty.

¹ Although lawyers rarely deal with the ethics rules governing their duty to disclose fellow lawyers' serious misconduct, the ABA issued a flurry of legal ethics opinions in a very short period of time that deal with the issue: ABA LEO 429 (6/11/03) ("Obligations with Respect to Mentally Impaired Lawyer in the Firm"); ABA LEO 431 (8/8/03) ("Lawyer's Duty to Report Rule Violations by Another Lawyer Who May Suffer from Disability or Impairment"); ABA LEO 433 (8/25/04) ("Obligation of a Lawyer to Report Professional Misconduct by a Lawyer Not Engaged in the Practice of Law"); ABA LEO 449 (8/9/07)

In 2003, the ABA dealt with the standard for reporting impaired lawyers' ethics violations. ABA LEO 429 (6/11/03).²

Among other things, ABA LEO 429 dealt with the "substantial question" standard.

Only violations of the Model Rules that raise a substantial question as to the violator's honesty, trustworthiness, or fitness as a lawyer must be reported. If the mental condition that caused the violation has ended, no report is required. Thus, if partners in the firm and the supervising lawyer reasonably believe that the previously impaired lawyer has resolved a short-term psychiatric problem that made the lawyer unable to represent clients competently and diligently, there is nothing to report. Similarly, if the firm is able to eliminate the risk of future violations of the duties of competence and diligence under the Model Rules through close supervision of the lawyer's work, it would not be required to report the impaired lawyer's violation. If, on the other hand, a lawyer's mental impairment renders the lawyer unable to represent clients competently, diligently, and otherwise as required by the Model Rules and he nevertheless continues to practice, partners in the firm or the supervising lawyer must report that violation.

ABA LEO 429 (6/11/03) (footnotes omitted) (emphases added).

("Lawyer Concurrently Representing Judge and Litigant Before the Judge in Unrelated Matters"). The ABA rarely deals so frequently with the same topic in such a short period of time.

² ABA LEO 429 (6/11/03) (explaining that lawyers practicing in law firms, law departments or similar organizations must establish policies and procedures assuring that all lawyers in the organization fulfill their ethical requirements and protect their clients -- even if a lawyer becomes impaired by substance abuse, mental illness, etc.; warning that lawyers learning of ethics violations by an impaired lawyer may have an obligation to report the violation; noting that even if not obligated to report violations, lawyers may choose to reveal information about violations or the impairment -- unless confidentiality duties to clients or some other rules prohibit the disclosure; explaining that lawyers in a firm or other organization from which an impaired lawyer has withdrawn may have an obligation to reveal the impairment if clients are deciding whether to retain the now departed impaired lawyer; acknowledging that the law firm or other organization does not have a duty to reveal the impairment if a client has already shifted its relationship to the departed lawyer, but must avoid any endorsement of the departed lawyer's ability to represent the client (such as a joint letter from the law firm and the departed lawyer regarding the transaction, which "could be seen as an implicit endorsement by the firm of the departed lawyer's competence").

Just a few months later, the ABA dealt with the reporting obligation's role in lawyers' interactions with possibly impaired lawyers. In ABA LEO 431 (8/8/03), the ABA discussed the "substantial question" standard.

Under Rule 8.3(a), a lawyer with knowledge that another lawyer's conduct has violated the Model Rules in a way that "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects" must inform the appropriate professional authority. Although not all violations of the Model Rules are reportable events under Rule 8.3, as they may not raise a substantial question about a lawyer's fitness to practice law, a lawyer's failure to withdraw from representation while suffering from a condition materially impairing her ability to practice, as required by Rule 1.16(a)(2), ordinarily would raise a substantial question requiring reporting under Rule 8.3.

ABA LEO 431 (8/8/03) (footnotes omitted). The ABA explained that lawyers' impairment might trigger a series of misconduct that in cumulative form would trigger the reporting obligation.

When considering his obligation under Rule 8.3(a), a lawyer should recognize that, in most cases, lack of fitness will evidence itself through a pattern of conduct that makes clear that the lawyer is not meeting her obligations under the Model Rules, for example, Rule 1.1 (Competence) or Rule 1.3 (Diligence). A lawyer suffering from an impairment may, among other things, repeatedly miss court deadlines, fail to make filings required to complete a transaction, fail to perform tasks agreed to be performed, or fail to raise issues that competent counsel would be expected to raise. On occasion, however, a single act by a lawyer may evidence her lack of fitness.

Id.

One year later, the ABA issued yet another legal ethics opinion exploring a reporting obligation -- this time focusing on possible misconduct by lawyers who are not

engaged in the practice of law. Among other things, in ABA LEO 433 (8/25/04),³ the ABA addressed the reporting obligation's threshold.

When Rule 8.3 is read in conjunction with Rule 8.4, then it is apparent that lawyers must report a wide variety of misconduct. Two thresholds must be reached, however, before the lawyer's obligation arises: the lawyer must 'know' of the violation; and the misconduct must raise a 'substantial question' as to the lawyer's honesty, trustworthiness or fitness as a lawyer. Therefore, we now turn to a discussion of these two requirements.

...

If a lawyer 'knows' that another licensed lawyer violated the Rules, she must report such misconduct only if the violation raises a 'substantial question' as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. As Comment [3] to Rule 8.3 points out, '[t]he term "substantial" refers to the seriousness of the possible offense and not the quantum or evidence of which the lawyer is away.'

Criminal conduct that violates Rule 8.4(b) often will raise a 'substantial question' as to the lawyer's fitness. Whether particular non-criminal conduct raises such a question, however, will almost invariably require 'a measure of judgment.'

If the lawyer, after assessing all of the circumstances, remains uncertain whether she has a duty to report, she nevertheless may opt to do so. Voluntary reporting made in good faith always is permissible, subject to the guidance of Rule 8.3(c) regarding information protected by Rule 1.6 or

³ ABA LEO 433 (8/25/04) (explaining that because lawyers may violate the Model Rules when they engage in misconduct (such as criminal activity), "unrelated to the practice of law," lawyers must report professional misconduct of a licensed but non-practicing lawyer ("even if it involves activity completely removed from the practice of law") if the lawyer "knows" of the ethics violation and the violation raises a "substantial question" as to the wrongdoer's honesty, trustworthiness or fitness as a lawyer; "Voluntary reporting made in good faith always is permissible . . ." If reporting another lawyer's misconduct would disclose information protected by Rule 1.6, the client must consent to the disclosure meaning that "the hands of lawyers are often effectively tied in these situations by the wishes or even whims of their clients."; emphasizing that "it would be contrary to the spirit of the Model Rules for the lawyer not to discuss with the client the lawyer's ethical obligation to report violations of the Rules" (because "this would allow the lawyer to circumvent them").).

gained by a lawyer or judge while participating in an approved lawyers assistance program.

ABA LEO 433 (8/25/04) (footnotes omitted) (emphases added).

Not surprisingly, it can be difficult to determine when lawyers' misconduct becomes sufficiently egregious to trigger the reporting obligation.

Misconduct That Must Be Reported

Bars and courts have identified misconduct that lawyers must report.

False statement to government agencies.

- Massachusetts LEO 99-2 (1999) (explaining a lawyer must report misconduct that would otherwise require client permission under Rule 1.6, because the Rule 1.6 exception permitted a disclosure; "A lawyer ["L"] who learns that her partners, without their clients' knowledge, have intentionally made material misrepresentations to state and federal agencies to prevent imposition of substantial penalties on firm clients for the law firm's failure to file timely reports must report her partners' misconduct to the clients, act to avoid the consequences of the fraud on the state agency, and report the misconduct to Bar Counsel. Rule 1.4 mandates informing the clients. The permission granted in Rule 1.6(b)(1) to disclose confidential information of firm clients to prevent fraudulent acts means that such information is not protected by Rule 1.6 from disclosure to the state agency and Bar Counsel in these circumstances."; "In this inquiry, however, a report would not violate Rule 1.6 because, as discussed above, L has discretion to reveal the fraud. Since the information is not protected, L must inform Bar Counsel's office of the violation. That is the meaning of the language in Rule 1.6(b) that a lawyer may reveal, and to the extent required by . . . Rule 8.3, must reveal, such information. . . .' (emphasis added). Indeed, Comment [21] to Rule 1.6 states, 'The reference to Rule 3.3, 4.1(b), and 8.3 in the opening phrase of Rule 1.6(b) has been added to emphasize that Rule 1.6(b) is not the only provision of these rules that deals with the disclosure of confidential information and that in some circumstances disclosure of such information may be required and not merely permitted.'" (emphases added)).

Trust account violations.

- North Dakota LEO 01-05 (08/15/01) (holding that a bank's in-house lawyer must report another lawyer's misuse of trust account funds, although the duty was subject to the bank's lawyer Rule 1.6 Confidentiality Obligation; "Attorney A is an attorney and an employee/agent of a bank. Through

Attorney A's work in the bank, he has learned that Attorney B is transferring funds from Attorney B's IOLTA account to cover overdrafts on Attorney B's law office account or personal account. Attorney A asks whether he is to report Attorney B to the disciplinary system."; "The Committee does believe that mishandling of client funds is a matter of seriousness which does reflect upon a lawyer's honesty, trustworthiness, and fitness."; "If Attorney A, who is also a banker, has knowledge of misuse of IOLTA funds by Attorney B. and Attorney A determines the violation is substantial, Attorney A must initiate disciplinary proceedings, unless to disclose the information would violate the prohibitions of Rule 1.6."; "Rule 1.6, would bar the disclosure if the information came to Attorney A in his role as attorney unless the client consents to the disclosure. Attorney A should encourage the client to consent unless to do so would substantially harm the client.").

In re Anderson, 769 A.2d 1282, 1284 (Vt. 2000) (publicly reprimanding a lawyer for not earlier reporting a law firm colleague's trust account violation; "Respondent first argues that the Board erred in concluding that he took too long to report the mishandling of the client trust account by Cantini. He claims that the stipulation of facts does not support a finding that he learned of the trust account misconduct before July 1994. We disagree. The stipulation of facts disclosed a conflict between the recollection of respondent and that of his secretary and bookkeeper, and the Board was necessarily required to resolve the conflict. Indeed, the stipulation states that respondent 'was again told about trust account irregularities' . . . in 1994, making it clear that respondent had notice of trust account irregularities earlier, but does not now recall that notice. Thus, there was evidence to support the Board's finding that respondent was warned that there was a problem with the trust account nine months before he reported the irregularities to the Board. On this point, we discern no error.").

However, some bars seem surprisingly forgiving about possible financial misconduct, citing the possibility that the lawyer has simply made a mistake.

- North Carolina LEO RPC 127 (4/17/92) (answering the following question: "Is Attorney D required by Rule 1.3(a) to inform the North Carolina State Bar if it comes to his attention that the settlement check has or may have been delivered, or that proceeds from the settlement check have or may have been disbursed, by Attorney P without meeting a condition required for any such delivery or disbursement?"; responding as follows: "Not necessarily. Rule 1.3(a) requires only the reporting of violations of the Rules of Professional Conduct that raise substantial questions as to the offending lawyer's 'honesty, trustworthiness or fitness as a lawyer in other respects....' A willful failure on the part of the attorney to whom such funds were entrusted to satisfy the conditions of tender would raise a substantial question about the lawyer's trustworthiness and would necessitate a report of the apparent

violations to the State Bar. If, however, it appears that the failure to satisfy the conditions of tender resulted from mistake, as opposed to knowing disregard, a report of the misconduct would not be required. It should be noted that Rule 1.3 does not, in any case, require disclosure of confidential information. Rule. 1.3(c)." (emphasis added)).

False statement to a client that the lawyer had sent an adversary an aggressive letter that the client insisted be sent.

- District of Columbia LEO 270 (03/97) (explaining that a lawyer must report a colleague's conduct involving deception to clients; "Inquirer, a lawyer, was hired through a temporary employment agency to work for a sole practitioner on a particular matter. In the course of the first few days of inquirer's work, the employing lawyer informed her that his client in the matter had recently insisted that he write an aggressive letter to a third party, despite the lawyer's advice that sending such a letter was imprudent. The employing lawyer further advised inquirer that when the client made such demands in the past, his practice was to draft a letter that would satisfy the client's wishes but not send it to the addressee. Instead, the employing lawyer sent a copy of the letter to the client to make it appear to the client that the letter had been sent to the addressee. The employing lawyer did not explain when these events had taken place and did not ask inquirer to draft a fictitious letter."; "Where a subordinate lawyer learns that an employing lawyer has sent a client what purports to be copies of correspondence written on the client's behalf, but where the letters were, in fact, never sent, the subordinate lawyer has a duty to assure that the client is informed of the deception and to report the employing lawyer to disciplinary authorities. These duties continue after the subordinate lawyer resigns upon learning of the deception."; "It is clear that a subordinate lawyer could report the violation without disclosing client confidences or secrets. The only 'secret' here was that the employing lawyer was deceiving the client.").

Unethical solicitation of clients.

- In Re Brigandi, 843 So. 2d 1083, 1088 (La. 2003) (suspending for two years a lawyer who had failed to report his former employer's misconduct; "The rule violations in the Cuccia [lawyer's former employer] matter largely hinge on the question of whether respondent had knowledge of Mr. Cuccia's solicitation actions at the time of his sworn statement to the ODC. The hearing committee made a factual finding based on the evidence before it that Mr. Cuccia's solicitation activities permeated Mr. Cuccia's office to such a degree that respondent had to have known of them. Respondent did not testify at the hearing, but, in oral argument before this court, vigorously asserts that he had no firsthand knowledge of any illegal activities on the part of Mr. Cuccia. However, respondent's oral argument before this court does not constitute part of the record, and his failure to testify deprived the hearing

committee of an opportunity to evaluate his credibility. Based on the record developed in these proceedings, we cannot say the hearing committee was clearly wrong when it determined respondent had knowledge of Mr. Cuccia's activities, but failed to report this misconduct to the ODC or make a full disclosure to the ODC during his sworn . . . statement. Therefore, we find respondent's failure to report Mr. Cuccia's misconduct constituted a violation of Rules 8.3 and 8.4 and his failure to make full disclosure to the ODC violated Rules 8.1 and 8.4.").

False statement about the lawyer's license status.

- Texas LEO 522 (10/97) (holding that a lawyer must report a new colleague's misrepresentation about his licensing status; "A law firm has discovered that one of its partners who recently joined the firm provided false information to the firm, its lawyers, clients, and potential clients about his background. Specifically, the partner claimed to be a graduate of a law school from which he did not graduate. He claimed to have degrees (MBA and LL.M.) which he has not earned. He also claimed to be licensed in several jurisdictions in which he is not licensed. Although the firm assumed the partner to be licensed in Texas, he is not. He has, since joining the firm, applied for admission to the State Bar of Texas."; "Is the firm obligated to notify the State Bar of Texas or state and federal courts where the lawyer is currently licensed of the false statements? If the person who provided the false information is in fact 'licensed' in other state or federal courts, it is incumbent upon the law firm to report such conduct to the appropriate disciplinary authorities. Rule 8.03 requires in part that a lawyer having knowledge that another lawyer has committed a violation of applicable rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate disciplinary authorities. In this particular case, other appropriate authorities would include the Board of Law Examiners, Admissions Committee, and the Unauthorized Practice of Law Committee of Texas and other states to which he may have applied for admission.").

False statement about whether the lawyer represented someone -- intended to induce a settlement.

- Massachusetts LEO 12-01 (5/17/12) (analyzing a lawyer's duty to report another lawyer's misconduct, in light of Massachusetts's unique Rule 1.6; presenting the scenario: "Out-of-state attorney A threatened suit on behalf of B against C in Massachusetts. C hired Massachusetts Lawyer (ML) who filed a declaratory judgment action on behalf of C against B, alleging A's threat and seeking a declaration of no liability on C's part. B then advised C and ML that A was not, and had never been, B's lawyer and that B never intended to sue C. ML contacted A, who provided what ML regarded as an incoherent response to B's accusation and then claimed that attorney-client

privilege prevented further explanation. C then directed ML to discontinue the declaratory judgment action. ML asks whether she has a duty under Rule 8.3 to notify Bar Counsel about A's conduct or whether, per Comment 3 to that Rule, such a report is optional."; concluding as follows: "The conduct of an out-of-state attorney who deliberately misrepresented that he was representing a client in order to induce Lawyer's client to settle a matter falls within the requirement of Rule 8.3(a) mandating that Lawyer report the conduct to Bar Counsel of the Board of Bar Overseers. On the facts of this inquiry, however, the Lawyer's information is protected by Rule 1.6, and therefore under Rule 8.3(c) Lawyer needs client consent to make such a report."; "The exclusion of generally known or widely available information from the information protected by this rule explains the addition of the word 'confidential' before the word 'information' in Rule 1.6(a) as compared to the comparable ABA Model Rule. It also explains the elimination of the words 'or is generally known' in Rule 1.9(c)(1) as compared to the comparable ABA Model Rule. The elimination of such information from the concept of protected information in that subparagraph has been achieved more generally throughout the rules by the addition of the word 'confidential' in this rule. It might be misleading to repeat the concept in just one specific subparagraph. Moreover, even information that is generally known may in some circumstances be protected, as when the client instructs the lawyer that generally known information, for example, spousal infidelity, not be revealed to a specific person, for example, the spouse's parent who does not know of it."; "The specific information at issue is the fraudulent conduct of A, his false representation that he was attorney for B and authorized to assert a claim against C. The falsity of that statement was neither generally known nor widely available. Nor did ML learn of it in a fashion that any ordinary citizen might have learned of it, as a witness so to speak. ML learned of it only in his capacity as C's lawyer. It therefore appears to falls within the very broad boundaries of 'confidential information,' as discussed to in the Comments to Rule 1.6(a).").

- Wieder v. Skala, 609 N.E.2d 105, 109 (N.Y. 1992) (holding that a lawyer could sue his former firm for discharging him after he insisted that a colleague's misconduct be reported to the bar; "To assure that the legal profession fulfills its responsibility of self-regulation, DR 1-103(A) places upon each lawyer and Judge the duty to report to the Disciplinary Committee of the Appellate Division any potential violations of the Disciplinary Rules that raise a 'substantial question as to another lawyer's honesty, trustworthiness, or fitness in other respects'. Indeed, one commentator has that noted, '[t]he reporting requirement is nothing less than essential to the survival of the profession.'"; "Moreover, as plaintiff points out, failure to comply with the reporting requirement may result in suspension or disbarment (see, e.g., Matter of Dowd, 160 AD2d 78). Thus, by insisting that plaintiff disregard DR 1-103(A) defendants were not only making it impossible for plaintiff to fulfill his professional obligations but placing him in the position of having to

choose between continued employment and his own potential suspension and disbarment. We agree with plaintiff that these unique characteristics of the legal profession in respect to this core Disciplinary Rule make the relationship of an associate to a law firm employer intrinsically different from that of the financial managers to the corporate employers in Murphy [Murphy v. Am. Home Prods. Corp., 448 N.E.2d 86 (N.Y. 1983)] and Sabetay [Sabetay v. Sterling Drug, Inc., 506 N.E.2d 919 (N.Y. 1987)]. The critical question is whether this distinction calls for a different rule regarding the implied obligation of good faith and fair dealing from that applied in Murphy and Sabetay. We believe that it does in this case, but we, by no means, suggest that each provision of the Code of Professional Responsibility should be deemed incorporated as an implied in law term in every contractual relationship between or among lawyers.").

Violation of a settlement agreement's confidentiality provision.

- South Carolina LEO 02-15 (2002) (explaining that a lawyer must report his colleague's violation of a settlement agreement's confidentiality provision, although the duty would be limited by the duty of confidentiality to the affected client; "Based upon the facts presented it appears that Attorney B discussed Employee's case with Attorney C. If so, Attorney B violated Rule 1.6[1] and Rule 1.8(b)[2] when he counseled Attorney C on how best to pursue a claim against Client. Such advice was based, presumably, upon knowledge gained in his prior representation of Client. The question then becomes whether Attorney B's violation of Rule 1.6 and Rule 1.8 does, in fact, raise a substantial question as to his honesty, trustworthiness, or fitness as a lawyer."; "This Committee would submit that such violation of Rule 1.6 and Rule 1.8 does, in fact, raise a substantial question as to Attorney B's 'honesty, trustworthiness, or fitness as a lawyer.' Without question, loyalty is an essential element in an attorney's relationship with a client. Attorney B's advice to Attorney C, his friend, and his admission of the same demonstrates that his loyalties lie with his friend, and not with Client as the Rules of Professional Conduct require. His casual disregard for Client certainly raises a question as to Attorney B's trustworthiness and fitness as a lawyer. The question is substantial because his conduct constitutes more than a mere technical violation of the Rules of Professional Conduct. In fact, this conduct belies his very purpose as a lawyer. Therefore, Attorney A has a duty to report Attorney B's conduct under Rule 8.3(a)." (footnote omitted); "Based upon the facts presented, Attorney D and his client were required to keep their settlement with Client confidential. By participating with his client in an interview regarding the specific details of this 'confidential' settlement agreement, Attorney D may have engaged in conduct violating Rules 8.4(d) and (e)."; "However, even if Attorney A has a duty to report Attorney D's conduct under Rule 8.3(a), she may not disclose this information without Client's consent pursuant to Rule 8.3(c) and Rule 1.6. As discussed above, the scope of information covered by Rule 1.6 is construed broadly and would

certainly include information pertaining to a confidential settlement agreement and the breach thereof. Rule 1.6 requires Attorney A to consult Client about the breach of the confidentiality and to obtain Client's consent prior to reporting Attorney D's conduct to the bar.").

Improper diversion of mortgage funds.

- In re Silva, 636 A.2d 316, 316, 316-17, 317 (R.I. 1994) ("The board found that Silva violated several provisions of the Rules of Professional Conduct when he failed to report a diversion of mortgage funds by his long-time friend Edward Medeiros. Silva served as counsel to Medeiros's mortgage company, Medcon Mortgage Corporation (MEDCON), and Suncoast Savings and Loan of Hollywood, Florida (Suncoast). In his capacity as closing attorney for Suncoast, Silva received wire transfers of mortgage proceeds in his client account. Upon receipt of the wire transfers from Suncoast, Silva simply turned the proceeds over to Medeiros and/or MEDCON for disbursement. In the fall of 1990 Silva learned that Medeiros had diverted funds from a closing funded by Suncoast in which Silva acted as closing attorney."; "The respondent's position before the board and this court is that he was prohibited from disclosing Medeiros's defalcation by the provisions of Rule 1.6 of the Rules of Professional Conduct. Respondent also took the position that he had no obligation to protect Suncoast's interests. We do not agree with either of his contentions."; "Silva did not appear to appreciate and understand to whom he owed the duty of confidentiality. It is apparent from this record, however, that he was counsel to the corporate entity MEDCON, and therefore, it was to MEDCON he owed the duty of confidentiality. Silva's dealings with Medeiros did not establish the attorney/client relationship that would trigger the application of the prohibitions against disclosure encompassed in Rule 1.6. Therefore, Silva's obligations to both Suncoast and MEDCON required him to disclose Medeiros's overt criminal act of conversion of the funds."; inexplicably failing to discuss the Rule 1.13 implications.).

Unreasonably high contingent fee.

- New Mexico LEO 2005-2 (05/30/05) (explaining that the lawyer must report another lawyer's unreasonably high fee; inexplicably failing to mention Rule 1.6 ("[T]he lawyer representing the insurance carrier questioned the reasonableness and potential misconduct based on a \$1,000,000.00 contingent fee for work that the lawyer believed mostly involved phone calls, was not novel or difficult, was in an uncontested matter, and was not time-consuming."; "Does a lawyer have an obligation to report what the lawyer believes to be an unreasonable fee charged by another lawyer?"; "Yes. A lawyer has a mandatory duty pursuant to Rule 16-803 to report professional misconduct. Charging an unreasonable fee is misconduct under the New

Mexico Rule of Professional Conduct. Lawyers also have a duty to diligently represent their client, which includes challenging an unreasonable fee.").

Unauthorized practice of law.

- North Carolina LEO 2009-2 (4/24/09) (holding that a lawyer must report an unauthorized practice of law by a title company, but may close the transaction before doing so; "Buyer/borrower's counsel is preparing for closing. The day prior to closing a draft of a deed is forwarded to buyer/borrower's counsel by ABC Title Company. At or near the top of the draft deed it states in writing, 'This deed was prepared by ABC Title Company under the supervision of John Doe, attorney at law.' ABC Title Company is not a bank or a law firm. John Doe is not employed by ABC Title Company. Buyer/borrower's counsel believes that the deed is actually being prepared by a non-lawyer employee or independent contractor of the ABC Title Company who then forwards the deed to John Doe for his review and approval. John Doe does not directly employ the non-legal staff person who prepares the deed, nor is that person an independent contractor hired by John Doe for the purpose of assisting John Doe with the legal work he performs on behalf of his clients."; "What are the ethical obligations of buyer/borrower's counsel as to John Doe and ABC Title Company?"; "If buyer/borrower's counsel suspects that John Doe is assisting ABC Title Company in the unauthorized practice of law, he should communicate his concerns to John Doe and advise John Doe that he may wish to contact the State Bar for an ethics opinion as to his future transactions with ABC Title Company. If, after communicating with John Doe, buyer/borrower's counsel reasonably believes that John Doe is knowingly assisting the title company in the unauthorized practice of law, and plans to continue participating in such conduct, buyer/borrower's counsel must report John Doe to the State Bar. Rule 8.3(a)."; "Buyer/borrower's counsel has an obligation to do what is in the best interest of his client while not assisting in the unauthorized practice of law. The lawyer should advise the client of his concerns about ABC's unauthorized practice of law and any harm that such conduct may pose to the client. However, if buyer/borrower's counsel determines that the deed appears to convey marketable title and the client decides to proceed with the closing after receiving his lawyer's advice, buyer/borrower's counsel may close the transaction. . . . Buyer/borrower's participation in the closing does not further the unauthorized practice of law by ABC Title Company." (emphasis added)).

Failure to disclose a client's death.

- Robison v. Orthotic & Prosthetic Lab, Inc., 27 N.E.3d 182, 186-87 (Ill. App. Ct. 2015) (holding that a defense lawyer should have reported a plaintiff's lawyer for failing to advise the defendant that the plaintiff had died; "[W]e believe that the material omissions and misrepresentations made by Mr.

Gilbreth [plaintiff's lawyer], which were detailed earlier in this decision, constitute serious violations of Rule 8.4. We also believe that defense counsel possessed sufficient knowledge to trigger a duty to report Mr. Gilbreth's misconduct to the ARDC and that the failure to report the misconduct constitutes a potential violation of Rule 8.3. See Himmel, 125 Ill. 2d at 540-43, 533 N.E.2d at 793-94 [In re Himmel, 533 N.E.2d 790 [(Ill. 1988)]. Therefore, we will direct the clerk of this court to transmit a copy of this opinion to the Attorney Registration and Disciplinary Commission for its consideration of the actions of the attorneys in this case.").

Other examples.

A 2010 Kentucky legal ethics opinion described other lawyer misconduct that might trigger Kentucky lawyers' reporting obligation under that state's Rule 8.3.

- Kentucky LEO E-430 (1/16/10) ("It would be impossible to list all of the situations in which a lawyer would be obligated to report. Clearly any conduct that would result in disbarment or suspension must be reported. Typical examples of conduct which have led to disbarment or suspension in Kentucky include theft, conversion, abandonment of clients, credit card fraud, perjury, tampering with evidence, comingling of client funds, fraud, failure to act with reasonable diligence or keep client reasonably informed, mishandling of trust accounts, refusal to return unearned fees, and failing to take appropriate action to protect the client upon withdrawal or termination. This list is by no means exclusive." (footnotes omitted); "It may also be useful to look at cases in other jurisdictions in which courts and ethics committees have stated that there is a duty to report under rules which are similar to Kentucky's. Typical examples include cases involving lawyers who have made materially false statements, including offering false evidence to a state grievance committee, making false statements about the filing of pleadings and back-dating documents, signing false acknowledgments or forging documents, preparing false billing statements, or improper suppression of evidence." (footnotes omitted); "Although most situations which require reporting involve dishonesty and untrustworthiness, Rule 8.3 also contains a catch-all provision, which requires reporting when conduct raises a substantial question as to the lawyer's 'fitness in other respects....' Reported examples include breach of a confidentiality agreement, egregious conflicts of interest, improper contact with jurors, and misconduct by a suspended lawyer. The catch-all provision may also apply to chronic neglect. Examples include situations in which a lawyer has repeatedly, and without explanation, missed court dates, failed to comply with court orders or failed to honor deadlines imposed by the court or the rules. In addition, any conduct which results in a contempt order by the court would normally fall within the catch-all provision and trigger the duty to report." (footnotes omitted); "Misconduct, particularly neglect of duty, often arises when a

lawyer is suffering from some kind of impairment. Impairment may arise as a consequence of senility, dementia, alcoholism, drug addiction, substance abuse, chemical dependency or mental illness. While not all impairments must be reported, any impairment that materially affects the fitness of the lawyer or the judge must be reported, unless one of the exceptions described below applies." (footnote omitted)).

Misconduct That Need Not Be Reported

Bars have also identified misconduct that they believe lawyers should report -- implying that the lawyers are not obligated to report.

Agreement to act as the adversary's "consultant" as part of a settlement, which would bar the lawyer from handling other cases against the settling defendants.

- North Dakota LEO 98-02 (2/23/98) (explaining facts indicating that a lawyer had offered to refrain from representing other claimants against the company in return for being hired by the company as a consultant 'strongly suggest[ed]' that the lawyer must report such misconduct; "As the California attorney described the deal, he would agree not to represent any additional claimants against the North Dakota corporation if the corporation would pay him \$60,000.00 and retain him as a 'consultant.'"; "The Committee will not offer a final opinion regarding whether there is an obligation to report under Rule 8.3 in this instance. The Committee does believe that the facts described by the North Dakota attorney strongly suggest that the attorney has an obligation to report under Rule 8.3."; "The Committee further concludes that, although a North Dakota attorney who may have information suggesting ethical violations by a California attorney has no duty to report potential violations to California disciplinary authorities, Rule 8.3 of the North Dakota Rules of Professional Conduct may require the North Dakota attorney to initiate disciplinary proceedings in North Dakota against the California attorney." (emphasis added)).

Continued use of a former partner's picture and bio on a law firm's website.

- Missouri Informal LEO 20060074 ("Attorney's former law firm continues to post Attorney's picture and biographical profile on their website even though Attorney has not been with the firm for several months. Attorney wants the information removed from the website. Is there an ethical rule which prohibits firms from committing acts such as this? How can this situation be resolved without having it mushroom into professional misconduct that must be reported and investigated?"; "It is recommended that Attorney review Rule 4-7.1 and bring that rule to the attention of Attorney's former firm. Attorney should document the communications to the former firm requesting

that information about Attorney be removed from the firm's website. If the former firm does not remove Attorney's information within a reasonable time frame and does not provide a reasonable explanation for the failure to do so, under Rule 8.3. Attorney should report this matter to ODCD so they can investigate to determine whether a violation has occurred. An opinion about the conduct of the attorneys in the firm cannot be formed without the opportunity for those attorneys to provide information." (emphasis added)).

Bars have also identified misconduct that does not rise to the level requiring disclosure.

Affidavit admitting ineffective assistance of counsel in a criminal case.

- Arizona LEO 98-02 (01/1998) ("The filing of an affidavit acknowledging ineffective assistance of counsel does not necessarily give rise to a duty to report under ER 8.3. The analysis set out in our Opinion Nos. 89-06 and 90-13 still operates to determine whether the affidavit acknowledges conduct that raises a 'substantial' question regarding another lawyer's 'honesty, trustworthiness or fitness as a lawyer in other respects.' In sum, the duty under ER 8.3 to report a violation to the State Bar requires the exercise of an attorney's sound professional judgment on a case-by-case basis." (emphasis added)).

Tardy filing of a final divorce judgment.

- Rhode Island LEO 2006-04 (10/12/06) ("An attorney's failure to file final judgments in divorce matters after the ninety-day waiting period, in and of itself, does not create an ethical obligation to report for the inquiring attorneys having knowledge of it.").

Failure to segregate a referral fee owed to a bar association.

- Illinois LEO 01-04 (01/2002) (holding that a lawyer had no duty to report another lawyer's failure to segregate a referral fee which the lawyer owed to the bar association under a bar association referral service, and which had been upheld by a court after the lawyer unsuccessfully challenged the referral fee amount; "The failure to segregate these funds does not rise to the level of a crime, fraud, deceit or misrepresentation. Although it may amount to a 'conversion' under the disciplinary rules, it does not amount to a criminal conversion because there is no proof of intent. Until the petition for adjudication of the lien is resolved, the bar association has no right to absolute and immediate possession. Thus, there is no tort of conversion."; "The reporting duty under Rule 8.3 obliges lawyers to report other lawyers only for specific types of misconduct, certain crimes, fraud, deceit, and misrepresentation. The lawyer's adjudication of the lien and appeal raised a

serious ethical issue. The attorney possessed a good faith basis for filing the petition to adjudicate the lien. While in hindsight the bar association possessed a right to the \$31,250, that was not clear at the time she filed her petition to adjudicate the lien."; "While the bar association certainly may report this possible violation of Rule 1.15(c), their failure to report the attorney should not result in discipline."; "While the failure to segregate money held by a lawyer but claimed by a third party violates Rule 1.15(c) of the Rules of Professional Conduct, there is no duty to report this violation."; "Even assuming a perfected lien, when the lawyer continues to keep the money even after the court decides the money belongs to the association, there is no duty to report the conduct to the ARDC absent other facts that show the intent to permanently deprive.").

Improper notarization of a spouse's signature.

- North Dakota LEO 96-14 (12/9/96) ("The act by an attorney of notarizing the signature of a spouse, unless otherwise demonstrated by the attending circumstances, does not raise a substantial question as to a lawyer's honesty, trustworthiness, and fitness as a lawyer; and, therefore, it does not constitute a violation of the North Dakota Rules of Professional Conduct which must be reported.").

Memory lapses that do not rise to the level of ethics violations.

- Kansas LEO 14-01 (07/01/14) ("Law firm had a partner with 'possible cognitive degeneration,' evidenced by memory lapses. These lapses include an inability to dial in to a conference call, a client reporting that the lawyer required a re-orientation to the facts of the representation, and multiple staff members reporting the lawyer's failure to recall prior discussions. No violations of the KRPC are reported, but the law firm believes that the subject lawyer's perceived memory lapses 'could impact clients.'"; "The subject lawyer has now left the law firm, but continues to practice. The law firm questions whether – now that the lawyer has left the firm -- it has a duty to report the subject lawyer to the Kansas Disciplinary Administrator under Rule 8.3."; "On this basis the, the Committee concludes: . . . A lawyer has no duty to report another lawyer for perceived memory lapses which have not resulted in acts or omissions which, in the lawyer's opinion, represent violations of the KRPC.").

(a) When one thinks of the type of egregious lawyer misconduct that triggers a reporting obligation, marketing usually does not spring to mind.

In 2013, the Texas Bar predictably concluded that a lawyer did not have a duty to report another lawyer's improper use of a trade name (which Texas ethics rules prohibit).

- Texas LEO 632 (7/2013) ("The Texas Disciplinary Rules of Professional Conduct do not require a Texas lawyer to report to the appropriate disciplinary authority another Texas lawyer's use of a trade name that is based on the name of the city where the second lawyer practices even though use of such trade name is prohibited by the Texas Disciplinary Rules. A report concerning another lawyer's use of a trade name that is prohibited under the Texas Disciplinary Rules would be required only if the Texas lawyer who considered making such a report concluded that in the particular circumstances the other lawyer's use of the trade name raised a substantial question as to such lawyer's honesty, truthworthiness or fitness as a lawyer in other respects.").

On the other hand, it would be easy to envision a reporting obligation arising from another lawyer's aggressive in-person solicitation of an accident victim in the hospital, a lawyer's secret cash payments to ambulance drivers to steer accident victims to the lawyer's office, etc.

(b) Most conflicts of interest issues play out in court during disqualification disputes. Occasionally a disgruntled client files an ethics charge against a lawyer the client alleges to have violated the conflicts rules. However, conflicts violations rarely if ever rise to the level of sufficiently egregious conduct requiring other lawyers to report.

But, in some situations, even a conflict of interest can meet the required disclosure standard.

- South Carolina LEO 02-15 (2002) (holding that a lawyer could not assist another lawyer who was a close friend, and who was pursuing a case against the first lawyer's client; "Based upon the facts presented it appears that Attorney B discussed Employee's case with Attorney C. If so, Attorney B violated Rule 1.6 and Rule 1.8(b) when he counseled Attorney C on how best to pursue a claim against Client. Such advice was based, presumably, upon knowledge gained in his prior representation of Client. The question then becomes whether Attorney B's violation of Rule 1.6 and Rule 1.8 does, in

fact, raise a substantial question as to his honesty, trustworthiness, or fitness as a lawyer. While Attorney B may not have disclosed 'confidential' information to Attorney C, the scope of information protected from disclosure under Rule 1.6 is intentionally broad. Rule 1.6, which is based upon the model rule, has been interpreted by the American Bar Association to cover all information relating to the representation of a client, whatever the source of the information and regardless of when the information is obtained. ABA Formal Op. # 90-358. Therefore, Attorney B's disclosure of information on how best to pursue a claim against Client is no less a violation of Rule 1.6 than if he had disclosed 'confidential' information. This Committee would submit that such a violation of Rule 1.6 and Rule 1.8 does, in fact, raise a substantial question as to Attorney B's 'honesty, trustworthiness, or fitness as a lawyer.' Without question, loyalty is an essential element in an attorney's relationship with a client. Attorney B's advice to Attorney C, his friend, and his admission of the same demonstrates that his loyalties lie with his friend, and not with Client as the Rules of Professional Conduct require. His casual disregard for Client certainly raises a question as to Attorney B's trustworthiness and fitness as a lawyer. The question is substantial because his conduct constitutes more than a mere technical violation of the Rules of Professional Conduct. In fact, his conduct belies his very purpose as a lawyer. Therefore, Attorney A has a duty report Attorney B's conduct under Rule 8.3(a). However, even if Attorney A has a duty to report Attorney B's conduct under Rule 8.3(a), she may not disclose this information without Client's consent pursuant to Rule 8.3(c). When the Rules of Professional Conduct were promulgated in 1990, the reporting requirement now embodied in Rule 8.3 was explicitly made subject to Rule 1.6 to protect information relating to the representation of a client. While Client's consent must be obtained before the violation may be reported, the official comments to Rule 1.6 suggest that Attorney A should encourage Client to consent to disclosure if it would not substantially prejudice Client's interests." (footnotes omitted) (emphases added)).

(c) Many states' provisions have professional civility (often called "creeds" for some reason) exhorting lawyers to act with courtesy and civility.

Nearly all of these state provisions are aspirational rather than mandatory. In those states, other lawyers' discourteous behavior would not trigger any reporting obligation -- unless it is so extreme as to violate the anti-harassment provision typically found elsewhere in states' ethics rules that parallel ABA Model Rule 4.4(a).

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

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

ABA Model Rule 4.4(a).

At least one state tried to mandate professional/courteous behavior, but saw a courts reject that standard.

- United States v. Wunsch, 84 F.3d 1110, 1113, 1114 n.6, 1120 (9th Cir. 1996) (addressing a lawyer's communication to a female adversary stating as follows: "MALE LAWYERS PLAY BY THE RULES,. DISCOVER TRUTH AND RESTORE ORDER. FEMALE LAWYERS ARE OUTSIDE THE LAW, CLOUD TRUTH AND DESTROY ORDER."; addressing a then -- existing California statute: "Section 6068(f) of California's Business and Professions Code reads, in relevant part: "It is the duty of an attorney . . . to abstain from all offensive personality"; finding the law unconstitutionally vague; "[W]e conclude that Cal. Bus. & Prof. Code § 6068(f)'s provision regarding "offensive personality" is unconstitutionally vague, and its incorporation by Local Rule 2.5.1 requires us to set aside that portion of the district court's holding in reliance thereon.").

Some states continue to require civil conduct in their bar admission oaths.

- Indiana Rules of Court for Admission to the Bar & Discipline of Attorneys, Rule 22 ("Upon being admitted to practice law in the state of Indiana, each applicant shall take and subscribe to the following oath or affirmation: 'I do solemnly swear for affirm that: I will support the Constitution of the United States and the Constitution of the State of Indiana; I will maintain the respect due to courts of justice and judicial officers; I will not counsel or maintain any action, proceeding, or defense which shall appear to me to be unjust, but this obligation shall not prevent me from defending a person charged with crime in any case; I will employ for the purpose of maintaining the causes confided to me, such means only as are consistent with truth, and never seek to mislead the court or jury by any artifice or false statement of fact or law; I will maintain the confidence and preserve inviolate the secrets of my client at every peril to myself; I will abstain from offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged; I will not encourage either the commencement or the continuance of any action or proceeding from any motive of passion or interest; I will never reject, from any consideration personal to myself, the cause of the defenseless, the oppressed or those who cannot afford adequate legal assistance; so help me God.'" (emphasis added)).

- New Mexico Board of Examiners, Rules Governing Admission to the Bar, Article 3-15-304 ("I will maintain civility at all times, abstain from all offensive personality, and advance no fact prejudicial to the honor or reputation of a party or witness unless required by the justice of the cause with which I am charged.").
- South Carolina Judicial Department, Rule 402 ("I do solemnly swear (or affirm) that: 'To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.").

Florida added such a phrase in 2011.

- In re Oath of Admission to the Fla. Bar, 73 So. 3d 149, 149-50, 150 (Fla. 2011) ("Today we revise the Oath of Attorney administered to new members of The Florida Bar to recognize '[t]he necessity for civility in the inherently contentious setting of the adversary process.'" (citation omitted); "Since 2003, the Lawyer's Oath sworn by admittees of the South Carolina Bar has contained the following pledge: 'To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.' S.C. App. Ct. R. 402(k)(3). We have determined that a similar pledge should be added to Florida's oath."; "'To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.'" (citation omitted); "I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged.").

In recent years, several states have adopted mandatory ethics rules provisions requiring lawyers to act with civility.

- David A. Grenardo, Making Civility Mandatory: Moving From Aspired to Required, Cardozo Pub. L. Pol'y & Ethics J. 239, 242-243 ("The lack of civility by attorneys caused no less than 140 state and local bar associations to adopt civility codes. These civility codes serve as aspirational guidelines that attorneys 'should' follow during their practice. Despite these civility codes, incivility persists. As these civility codes remain guidelines, attorneys need not adhere to them. Waiting for all attorneys to come to their senses and become inspired to follow civility guidelines remains a naïve and passive approach to an issue that needs to be resolved for several reasons." (footnotes omitted); "A handful of state bar associations sought to deal with uncivil conduct, going one step further than the guidelines, by adding civility to their oaths of admission. Several other states and jurisdictions took the last step in responding to incivility by making civility mandatory." (footnote omitted); "The time for mandatory civility has long come, and all state bars

should follow the lead of the few jurisdictions that made civility mandatory. Simply suggesting that attorneys follow civility guidelines does not adequately alter attorney behavior. Systemic behavior change will more likely occur when civil behavior is required and negative consequences accompany the failure to adhere to the required behavior in appropriate cases. Accordingly, if the legal profession truly wants to reduce unnecessary legal costs and provide greater respect for, and confidence in, the legal system and those who safeguard it, then each state bar should made civility mandatory by using specific civility rules.").

- New Jersey Supreme Court Administrative Determinations by the Supreme Court on the Report and Recommendations of the Special Committee on Attorney Ethics and Admissions (4/14/16) ("The Special Committee recommended a new rule on civility and professional conduct to be added to Rule of Professional Conduct 8.4 (Misconduct) providing: 'A lawyer shall treat with courtesy and respect all persons involved in the legal process.' The Special Committee found that there is a need to reinforce, in the text of the Rules, the fundamental and overarching obligation of lawyers to conduct themselves professionally and civilly inside and outside court." (emphasis added); "The Supreme Court agrees that lawyers should conduct themselves civilly inside and outside court but decided not to codify that existing professional obligation in a new rule of ethics." (emphasis added)).
- Erin Coe, New Calif. Lawyers Must Vow To Be Civil, Law360, May 2, 2014 ("Before being admitted to the California bar, new lawyers will be required to pledge that they will conduct themselves in a courteous and dignified manner based on a rule change by the state's highest court, according to a Thursday release."; "The California Supreme Court said it adopted a rule to include a so-called civility provision to the oath taken by new lawyers, and it will go into effect May 23. The move was pushed by the State Bar of California and the American Board of Trial Advocates (ABOTA), which is rallying for the oath change on a national scale."; "Previously, lawyers had to pledge the following oath: 'I solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of California and that I will faithfully discharge the duties of an attorney and counselor at law to the best of my knowledge and ability.'"; "But now, lawyers will be required to make one more vow -- that they will strive to conduct themselves at all times 'with dignity, courtesy and integrity.'"; "Douglas DeGrave, former president of the California chapters of the ABOTA, hailed the oath revision as 'an historic moment for the legal community.'"; "This change in the oath should remind us of our obligations beyond that of zealous advocacy on behalf of our clients,' he said in a statement. As professionals, we have an obligation to conduct ourselves with dignity, courtesy and integrity. Many have forgotten these very principles to which we, as professionals, should always adhere.'"; "Patrick Kelly, whose term as president of the state bar ended in October, pressed for the civility provision in a president's message in the July 2013

issue of the California Bar Journal."; "Unfortunately, as a litigator, I have all too often witnessed attorneys who claim to be zealously representing their clients but who in fact cross the civility line,' he wrote at the time. 'Such activities include needless and ineffective histrionics during depositions, refusal to grant the other side an extension of time for no good reason, confirming in writing positions that were never taken and even trying to bully the judge in his or her own courtroom.'"; "Kelly said in a statement Thursday that the new oath will serve as an added reinforcement for attorneys entering the bar to remember the principles of professionalism that brought them to the practice of law in the first place and in particular, in their dealings with clients, other attorneys and judges.").

- Carolina Bolado, Unprofessional Attorneys Face New Complaint Process In Florida, Law360, June 6, 2013 ("Florida's Supreme Court on Thursday formalized the process of handling complaints regarding an attorney's lack of professionalism for offenses that might not rise to violations of the state's rules for attorney conduct. The high court adopted the recommendation of a Commission on Professionalism to have the chief judges in each circuit create local professionalism panels that will receive, screen and act upon any complaints of unprofessional conduct and send them along to the Florida Bar Association if necessary. The court also set up the existing Attorney Consumer Assistance and Intake Program of the Florida Bar as the mechanism for resolving complaints. Resolutions could range from mere conversations or written communications to more severe sanctions under the Florida Code of Professional Responsibility, according to the opinion. The high court said that the state has traditionally followed a passive, academic approach to improving professionalism in the industry with legal education programs, speeches, contests and meetings. Many of these were implemented after a 1996 Florida Bar report said that professionalism among attorneys appeared to be in a 'steep decline.' But while the programs likely stemmed any further decline in professionalism, the Florida Bar's Commission on Professionalism told the high court that significant problems persisted and that more practical measures were necessary, according to the opinion. 'Surveys of both lawyers and judges continue to consistently reflect that professionalism is one of the most significant adverse problems that negatively impacts the practice of law in Florida today,' the high court said. Commission member Paige Greenlee of Tampa firm Sivyer Barlow & Watson PA said the new procedures should help curb unprofessional conduct by providing a clear-cut way to deal with complaints before they become larger problems. Unprofessional conduct could include an attorney's failing to ever respond to a client's phone calls or emails, or an attorney's overly aggressive or rude behavior toward opposing counsel, according to Greenlee. The latter issue has become a larger problem in recent years, she said, prompting the Florida Supreme Court in 2011 to amend the oath taken by all attorneys in the state to include a pledge of civility to all opposing parties and their counsel.").

- In re S.C. Bar, 709 S.E. 2d 633, 635, 636-37 (S.C. 2011) ("In this attorney discipline matter, the Hearing Panel (the Panel) determined Respondent was subject to discipline for violating Rule 7(a)(5), RLDE, Rule 413, SCACR, and Rule 8.4(e), RPC, Rule 407, SCACR, both of which provide that a lawyer may be disciplined for engaging in conduct tending to pollute the administration of justice or bring the legal profession into disrepute, and Rule 7(a)(6), RLDE, Rule 413, SCACR, which provides it is a ground for discipline for an attorney to violate the attorney's oath of office. A majority of the Panel concluded Respondent's action warranted an admonition and would require Respondent to pay the costs of this proceeding, while one member of the Panel recommended Respondent receive a Letter of Caution with a finding of minor misconduct. We find that Respondent did violate the rules outlined above, but we disagree with the majority of the Panel's recommendation. We find Respondent's acknowledgement of misconduct and remorse to be sincere and effective in the mitigation of our sanction. Accordingly, we issue a private Letter of Caution with a finding a minor misconduct to Respondent."; "We agree with the Panel that Respondent's e-mail was conduct tending to bring the legal profession into disrepute and was prejudicial to the administration of justice. By sending the 'Drug Dealer' e-mail to Attorney Doe, Respondent was doing a disservice to Respondent's client. An e-mail such as the one sent by Respondent can only inflame the passions of everyone involved, make litigation more intense, and undermine a lawyer's ability to objectively represent his or her client. This kind of personal attack against a family member of opposing counsel with no connection to the litigation brings into question the integrity of the judicial system and prejudices the administration of justice.").
- Dondi Props. Corp. v. Commerce Sav. & Loan Assoc., 121 F.R.D. 284, 285, 287, 287-88 (N.D. Tex. 1988) ("We sit en banc to adopt standards of litigation conduct for attorneys appearing in civil actions in the Northern District of Texas."; "We next set out the standards to which we expect litigation counsel to adhere."; "The Dallas Bar Association recently adopted 'Guidelines of Professional Courtesy' and a 'Lawyer's Creed' that are both sensible and pertinent to the problems we address here. From them we adopt the following as standards of practice to be observed by attorneys appearing in civil actions in this district: '(A) In fulfilling his or her primary duty to the client, a lawyer must be ever conscious of the broader duty to the judicial system that serves both attorney and client.'; '(B) A lawyer owes, to the judiciary, candor, diligence and utmost respect.'; '(C) A lawyer owes, to opposing counsel, a duty of courtesy and cooperation, the observance of which is necessary for the efficient administration of our system of justice and the respect of the public it serves.'; '(D) A lawyer unquestionably owes, to the administration of justice, the fundamental duties of personal dignity and professional integrity.'; '(E) Lawyers should treat each other, the opposing party, the court, and members of the court staff with courtesy and civility and conduct themselves in a professional manner at all times.'; [sic] cifically

mentioned he [sic] no right to demand that counsel abuse the opposite party or indulge in offensive conduct. A lawyer shall always treat adverse witnesses and suitors with fairness and due consideration.'; '(G) In adversary proceedings, clients are litigants and though ill feeling may exist between clients, such ill feeling should not influence a lawyer's conduct, attitude, or demeanor towards opposing lawyers.'; '(H) A lawyer should not use any form of discovery or the scheduling of discovery, as a means of harassing opposing counsel or counsel's client.'; '(I) Lawyers will be punctual in communications with others and in honoring scheduled appearances, and will recognize that neglect and tardiness are demeaning to the lawyer and to the judicial system.'; '(J) If a fellow member of the Bar makes a just request for cooperation, or seeks scheduling accommodation, a lawyer will not arbitrarily or unreasonably withhold consent.'; '(K) Effective advocacy does not require antagonistic or obnoxious behavior and members of the Bar will adhere to the higher standard of conduct which judges, lawyers, clients, and the public may rightfully expect.'")

(d) Lawyers' drug use has generated numerous state rules variations and dilemmas.

If a lawyer's drug use adversely affects clients, such illegal activity presumably would meet the mandatory reporting requirement (assuming all of the other conditions apply).

States have struggled with determining whether illegal drug use by itself meets the mandatory disclosure standards.

- Utah LEO 98-12 (12/04/98) ("A lawyer is required to report to the Utah State Bar any unlawful possession or use of controlled substances by another lawyer if two conditions are satisfied: (1) the lawyer has actual knowledge of the illegal use or possession, and (2) the lawyer has a reasonable, good-faith belief that the illegal use or possession raises a substantial question as to the offending lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. A lawyer is excused from this reporting requirement only if (i) the lawyer learns of such use or possession through a bona fide attorney-client relationship with the offending lawyer, or (ii) the lawyer becomes aware of the unlawful use or possession through providing services to the offending lawyer under the auspices of the Lawyers Helping Lawyers program of the Bar."; "The somewhat inartful wording of Rule 8.3(d) raises the question of whether a lawyer fulfills the Rule 8.3(a) requirement by simply reporting an offending lawyer's illegal actions to the Lawyers Helping Lawyers Committee. We conclude that the focus of the Rule 8.3(d) exception only extends to

those lawyers who receive or discover information in connection with their active participation on the Lawyers Helping Lawyers Committee. This committee is a volunteer operation sponsored by the Utah State Bar, but it possesses no authority over lawyers who may need assistance. Indeed, lawyers who may need substance-abuse help, for example, are under no obligation to participate in the program, even when contacted by that organization. Merely reporting information to Lawyers Helping Lawyers does not satisfy the reporting lawyer's Rule 8.3(a) obligation.").

Many if not most ethics rules explicitly exclude from any reporting obligation information lawyers learn in lawyer assistance programs.

The ABA Model Rules include an explicit provision exempting certain information from lawyers' reporting obligation.

This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

ABA Model Rule 8.3(c) (emphasis added).

A comment provides an explanation:

Information about a lawyer's or judge's misconduct or fitness may be received by a lawyer in the course of that lawyer's participation in an approved lawyers or judges assistance program. In that circumstance, providing for an exception to the reporting requirements of paragraphs (a) and (b) of this Rule encourages lawyers and judges to seek treatment through such a program. Conversely, without such an exception, lawyers and judges may hesitate to seek assistance from these programs, which may then result in additional harm to their professional careers and additional injury to the welfare of clients and the public. These Rules do not otherwise address the confidentiality of information received by a lawyer or judge participating in an approved lawyers assistance program; such an obligation, however, may be imposed by the rules of the program or other law.

ABA Model Rule 8.3 cmt. [5] (emphasis added).

Similarly, the Restatement acknowledges that:

Lawyer codes also commonly provide an exception for information learned in counseling another lawyer in a substance-abuse or similar program.

Restatement (Third) of Law Governing Lawyers § 5 cmt. i (2000). The reporter's note describes the exception's origin.

Following ABA Model Rule 8.3(c), as amended by the ABA House of Delegates in 1991, several jurisdictions also except information about another lawyer learned in the course of an approved lawyers assistance program, such as those dealing with substance abuse.

Restatement (Third) of Law Governing Lawyers § 5 reporter's note, cmt. i, (2000).

Many states take the same approach.

- Utah LEO 98-12 (12/04/98) ("A lawyer is required to report to the Utah State Bar any unlawful possession or use of controlled substances by another lawyer if two conditions are satisfied: (1) the lawyer has actual knowledge of the illegal use or possession, and (2) the lawyer has a reasonable, good-faith belief that the illegal use or possession raises a substantial question as to the offending lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. A lawyer is excused from this reporting requirement only if (i) the lawyer learns of such use or possession through a bona fide attorney-client relationship with the offending lawyer, or (ii) the lawyer becomes aware of the unlawful use or possession through providing services to the offending lawyer under the auspices of the Lawyers Helping Lawyers program of the Bar."; "The somewhat inartful wording of Rule 8.3(d) raises the question of whether a lawyer fulfills the Rule 8.3(a) requirement by simply reporting an offending lawyer's illegal actions to the Lawyers Helping Lawyers Committee. We conclude that the focus of the Rule 8.3(d) exception only extends to those lawyers who receive or discover information in connection with their active participation on the Lawyers Helping Lawyers Committee. This committee is a volunteer operation sponsored by the Utah State Bar, but it possesses no authority over lawyers who may need assistance. Indeed, lawyers who may need substance-abuse help, for example, are under no obligation to participate in the program, even when contacted by that organization. Merely reporting information to Lawyers Helping Lawyers does not satisfy the reporting lawyer's Rule 8.3(a) obligation.").
- New Mexico Rule 16-803(E) ("The reporting requirements set forth in Paragraphs A and B of this rule do not apply to any communication concerning alcohol or substance abuse by a judge or lawyer that is: (1) made for the purpose of reporting substance abuse or recommending,

seeking or furthering the diagnosis, counseling or treatment of a judge or an attorney for alcohol or substance abuse; and (2) made to, by or among members or representatives of the Lawyer's Assistance Committee of the State Bar, Alcoholics Anonymous, Narcotics Anonymous or other support group recognized by the Judicial Standards Commission or the Disciplinary Board; recognition of any additional support group by the Judicial Standards Commission or the Disciplinary Board shall be published in the Bar Bulletin. This exception does not apply to information that is required by law to be reported, including information that must be reported under Paragraph F of this rule, or to disclosures or threats of future criminal acts or violations of these rules.")

- North Carolina LEO 2003-2 (10/24/03) ("The report of misconduct should be made to the Grievance Committee of the State Bar if a lawyer's impairment results in a violation of the Rules that is sufficient to trigger the reporting requirement. The lawyer must be held professionally accountable. See, e.g., Rule .0130(e) of the Rules on Discipline and Disability of Attorneys, 27 N.C.A.C. 1B, Section .0100 (information regarding a member's alleged drug use will be referred to LAP [Lawyer Assistance Program]; information regarding the member's alleged additional misconduct will be reported to the chair of the Grievance Committee)."; "Making a report to the State Bar, as required under Rule 8.3(a), does not diminish the appropriateness of also making a confidential report to LAP. The bar's disciplinary program and LAP often deal with the same lawyer and are not mutually exclusive. The discipline program addresses conduct; LAP addresses the underlying illness that may have caused the conduct. Both programs, in the long run, protect the public interest." (emphasis added)).

Significantly, reporting lawyers' misconduct to such organizations normally does not substitute for reporting to a bar or other designated disciplinary authority.

Commentators have predicted that the aging population of compulsive lawyers will increase the frequency of this type of violation.

- Mark Dubois, When Attorneys Are 'A Little Off,' Conn. L. Tribune, Nov. 6, 2013 ("I was running with a colleague the other day and she described another lawyer as follows: 'He's like you; smart, but a little off.' Thanks! I think."; "I was musing over that comment recently as I participated in a symposium on impaired lawyers. (The subject of the meeting also included impaired judges, but we really did not go there. Dealing with lawyers was enough.) So what do you do if a colleague is more than a little off? Do you have a duty to say something?"; "With the creation of the lawyers' assistance program, funded by our client security fund payments and administered by Lawyers Concerned for Lawyers, we as a profession have begun to

acknowledge the 600-pound gorilla at the bar -- that many of us have problems, and we pay precious little attention to our health, both mental and physical, until bad things happen."; "When the lawyers' assistance program began, I and many others thought it would just be a redo of the extant AA program that worked for years quietly attending to the problems of lawyers addicted to alcohol and, to a lesser extent, drugs. No one realized that eight years or so into it, the program would be spending much of its resources on other forms of impairment, including those arising from mental and physical illnesses."; "Problems such as depression, anxiety, and stress bring many of us to a bad place. Other less known but equally serious troubles such as eating disorders, process addiction (gambling, shopping), workaholicism, and other sequellae of the Type A personality have led to bad results and shortened careers. Even things such as diabetes, endocrine disorders and the effects of chemotherapy have cause[d] some lawyers to run into trouble."; "We are also now seeing the leading edge of the 'senior tsunami' heading none too smoothly into the natural decline associated with aging, compounded with more pronounced problems caused by the effects of degenerative processes like Alzheimer's.").

(e) Although lawyers' sufficiently egregious misconduct caused by alcohol or other impairment triggers possible other steps, such misconduct does not change the reporting lawyer's obligation.

In 2003, the ABA acknowledged that lawyers' impairment might cause them to violate the ethics rules and trigger other lawyers' reporting obligation.

- ABA LEO 431 (8/8/03) ("When considering his obligation under Rule 8.3(a), a lawyer should recognize that, in most cases, lack of fitness will evidence itself through a pattern of conduct that makes clear that the lawyer is not meeting her obligations under the Model Rules, for example, Rule 1.1 (Competence) or Rule 1.3 (Diligence). A lawyer suffering from an impairment may, among other things, repeatedly miss court deadlines, fail to make filings required to complete a transaction, fail to perform tasks agreed to be performed, or fail to raise issues that competent counsel would be expected to raise. On occasion, however, a single act by a lawyer may evidence her lack of fitness.").

If a lawyer's misconduct triggers a reporting obligation, that obligation is not relieved by the misbehaving lawyer's obvious impairment.

- Kentucky LEO E-430 (1/16/10) ("Misconduct, particularly neglect to duty, often arises when a lawyer is suffering from some kind of impairment.

Impairment may arise as a consequence of senility, dementia, alcoholism, drug addiction, substance abuse, chemical dependency or mental illness. While not all impairments must be reported, any impairment that materially affects the fitness of the lawyer or the judge must be reported, unless one of the exceptions described below applies." (footnote omitted)).

Not surprisingly, courts and bars have been fairly lenient with lawyers whose reportable misconduct was caused by their impairment.

- Warren Cty. Bar Ass'n v. Vardiman, 2016-Ohio-352, at ¶ 21 (suspending a lawyer, but acknowledging that the lawyer's ADHD was a mitigating factor; "While Vardiman's misconduct consisted of filing one or more fraudulent documents in two different courts rather than a multistep scheme to defraud, we agree that it is comparable in nature and severity to Shaffer's [*Disciplinary Counsel v. Shaffer*, 785 N.E.2d 429 (Ohio 2003)] misconduct. And while Shaffer was ostensibly motivated by his desire to assist his client, who was caring for his incapacitated grandmother, Vardiman's conduct was at least partially driven by his recently diagnosed ADHA, which his treating psychologist described as an 'inborn neurological problem.' Given Vardiman's acceptance of responsibility for his actions; his active participation in OLAP and effective treatment of this disorder; and numerous letters attesting to his good character, reputation, and professional competence, we agree that a one-year suspension, with the final six months stayed on conditions, is the appropriate sanction for his misconduct.").
- Disciplinary Counsel v. Williams, No. 2015-0293, 2016 Ohio LEXIS 596 (Ohio March 8, 2016) (suspending for six months a lawyer who sought mitigation for his improper conduct based on his girlfriend's abusive behavior toward the lawyer; "Williams testified that he had no intention of continuing to serve as the magistrate in A.B.'s eviction case after their relationship had begun but that he did not know the proper procedure for recusing himself. He further testified that A.B. abused him throughout their relationship and that her abuse contributed to his stipulated misconduct. Williams entered into a five-year contract with the Ohio Lawyers Assistance Program ('OLAP') on July 16, 2013, and reported that he was diagnosed with post-traumatic stress disorder ('PTSD') as a result of A.B.'s abuse."; "Williams first challenges the board's failure to accord any mitigating effect to the abuse he suffered at the hands of A.B., which included threats of physical harm and emotional pain. Williams testified that A.B. stabbed him on four separate occasions, that he twice sought medical care for knife wounds, and that their arguments were related to A.B.'s demands that he withdraw funds from his client trust account and use them for her personal benefit. He contends that the abuse he suffered clouded his judgment and emphasizes that he not only moved across the state to extricate himself from the unhealthy relationship but also sought assistance from OLAP -- including mental-health counseling -

- in an effort to save his once successful legal career."; "And although Williams did not establish that his PTSD was a mitigating factor pursuant to BCGD Prog. Reg. 10(B)(2)(g), we acknowledge that he practiced law without incident for more than 20 years before he commenced his improper relationship with A.B., and we conclude that the abuse he endured during their relationship contributed significantly to his stipulated misconduct. Therefore, we sustain Williams's objections to the board's recommended sanction and conclude that a two-year suspension, with 18 months stayed on stringent conditions, is the appropriate sanction for Williams's misconduct.").

- In re Merritt-Bagwell, 122 A.3d 874, 874-75, 875 (D.C. 2015) (finding that a D.C. lawyer had engaged in numerous ethics violations; ordering a three-year probation because she suffered from chronic depression; "[R]espondent, Andrea Merritt-Bagwell, violated District of Columbia Rules of Professional Conduct 1.1 (b) (failure to act with skill and care); 1.15 (a) (intentional or reckless misappropriation); 1.3(a) (failure to act zealously and diligently); 1.3 (b)(2) (intentionally damaging or prejudicing a client); 1.3 (c) (failure to act promptly); 8.4 (c) (dishonesty); and 8.4 (d) (serious interference with administration of justice).; "[T]he Board determined that respondent was entitled to mitigation under In re Kersey, 520 A.2d 321 (D.C. 1987), because she suffered from dysthymia [caused by a range of serious health and other problems suffered by respondent and her immediate family] and this misconduct would not have occurred but for her dysthymia. See, e.g., In re Katz, 801 A.2d 982 (D.C. 2002) (establishing that respondent's depression and dysthymia were mitigating factors); In re Verra, 932 A.2d 503, 505 (D.C. 2007). To her credit, respondent admitted that she committed all of the violations, including intentional or reckless misappropriation, she has shown remorse for her misconduct, and she has been substantially rehabilitated as a result of psychotherapy treatment. Thus, while it recommends disbarment, the presumptive sanction for cases of intentional misappropriation, see In re Addams, 579 A.2d 190 (D.C. 1990) (en banc), the Board further recommends that disbarment be stayed in favor of three years of probation.").
- Leigh Jones, Discipline Varies Widely for Addicted Attorneys, Nat'l L. J., Sept. 20, 2010 ("An Indiana lawyer shows up at the courthouse drunk and gets into a car accident. His license is suspended, but stayed, for 180 days. A New Hampshire attorney and admitted alcoholic takes on what turns out to be a meritless case and conceals the defeat from clients. He is disbarred."; "An Iowa attorney and a self-described alcohol abuser involved in a series of disciplinary actions, including taking a client's money and abandoning a divorce case, gets a license suspension. He can apply to renew it in six months. Meanwhile, a Florida attorney who's been sober and in a 12-step program since his arrest on drug charges in 2004 is disbarred for the six-year-old offense."; "Each of the four cases involved substance abuse -- and each had a very different outcome. The decisions, all from the past two

years, show how broad the inconsistencies are in the way courts dole out punishment for substance-abusing attorneys. Whether because of uneven precedent, murky ethics issues or a hard-line stance against recognizing addiction as a mitigating factor in misconduct, courts can give attorneys little more than a slap on the wrist in some cases. In others, careers are finished.").

(f) Bars have struggled with the ethics rules' application to misconduct involving race, religion and sexual orientation, etc.

On August 9, 2016, the ABA House of Delegates overwhelmingly approved changes to ABA Model Rule 8.4, intended to prohibit certain discrimination. It will be interesting to see how any states adopting this new rule implement its crystal-clear per se prohibition.

Before this change, the ABA Model Rules dealt with specified misconduct in an ABA Model Rule 8.4 Comment.

A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice. Legitimate advocacy respecting the foregoing factors does not violate paragraph (d). A trial judge's finding that peremptory challenges were exercised on a discriminatory basis does not alone establish a violation of this rule.

Former ABA Model Rule 8.4 cmt. [3] (emphasis added).

This former ABA Model Rule Comment was fairly limited. First, it applied only to a lawyers' conduct "in the course of representing a client." Other ABA Model Rule prohibitions begin with the same or similar phrase, such as the prohibition on false statements of material fact (ABA Model Rule 4.1), or the prohibition on ex parte communications with represented persons (ABA Model Rule 4.2). This limiting

language contrasts with the introductory phrase of ABA Model Rule 8.4: "It is professional misconduct for a lawyer to" Those prohibitions apply whenever the lawyer acts in any context, professionally or personally. Second, the former ABA Model Rule Comment prohibited only "knowing" misconduct. Third, the former ABA Model Rule Comment did not prohibit discrimination. It prohibited "bias or prejudice," if such conduct was "based upon" the stated attributes. The ABA Model Rules did not define those two terms, but presumably, they describe improper (and perhaps even unlawful) conduct that is a subset of discrimination. If the terms were meant to describe the more generic conduct of "discrimination," the ABA could have used that one word rather than the two words. Fourth, the former ABA Model Rule Comment prohibited the misconduct only when it was "prejudicial to the administration of justice." That vague standard paralleled the black letter ABA Model Rule 8.4(d)'s prohibition on any "conduct that is prejudicial to the administration of justice." In fact, the general language of ABA Model Rule 8.4(d) thus already prohibited the specific conduct described in former ABA Model Rule 8.4 cmt. [3].

The new ABA Model Rule 8.4 provision appears in the black letter rule.

It is professional misconduct for a lawyer to: engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law.

ABA Model Rule 8.4(g) (emphasis added).

The new black letter rule provision expands the scope of the previous Comment. First, the rule applies to lawyers' conduct "related to the practice of law." This is far broader than conduct lawyers undertake "in the course of representing a client." But it

is still narrower than other ABA Model Rule 8.4 provisions, which apply to all of lawyers' professional and private conduct. Second, the rule applies when a lawyer "knows or reasonably should know" that she is engaged in the articulated misconduct. This contrast with the previous Comment's "knowing" standard. Third, the rule prohibits "discrimination" -- in contrast to the old Comment's "bias or prejudice." As explained below, inclusion of this prohibition on any and all "discrimination" is the most interesting new addition. Fourth, the rule prohibits the described conduct whether or not it is "prejudicial to the administration of justice."

Immediately following its prohibitory language, the new black rule includes two exceptions.

This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.6. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

Id. As explained below, the ABA's inclusion of these exceptions in the black letter rule itself sheds light on the Comments accompanying the new black letter rule.

ABA Model Rule 8.4(g) is also notable for a word that is missing from the black letter rule. The language could have the word "unlawfully" in describing the prohibited conduct. New York's and California's ethics rules both prohibit lawyers from "unlawfully" discriminating in practicing law. New York Rule 8.4(g); California Rule 2-400(B); proposed California Rule 8.4.1(b). Adding that word presumably would have imported into the ABA Model Rule prohibition constitutional and other case law drawing the line between permissible and impermissible consideration of race, sex, etc. Instead, ABA Model Rule 8.4(g) contains a per se prohibition of any such consideration.

The new ABA Model Rule is supplemented by two comments.

One explains the ill effects of discrimination and harassment, and then provides examples.

Discrimination and harassment by lawyers in violation of paragraph (g) undermine confidence in the legal profession and the legal system. Such discrimination includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature. The substantive law of antidiscrimination and anti-harassment statutes and case law may guide application of paragraph (g).

ABA Model Rule 8.4 cmt. [3] (emphasis added). Notably, this Comment's description of improper "discrimination" does not purport to define discrimination, or limit its definitional reach -- but merely provides several examples.

The second Comment explains the broader reach of the new black letter rule's discrimination ban, which now extends beyond lawyers' dealings with clients.

Conduct related to the practice of law includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law; operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law.

ABA Model Rule 8.4 cmt. [4] (emphases added).

ABA Model Rule 8.4(g)'s flat prohibition covers any discrimination on the basis of race, sex, or any of the other listed attributes.

It is worth exploring the last sentence of Comment [4] to assess its possible impact on the per se prohibition in ABA Model Rule 8.4(g).

Lawyers may engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations.

ABA Model Rule 8.4 cmt. [4].

This sentence appears to weaken the blanket anti-discrimination language in the black letter rule, but on a moment's reflection it does not – and could not -- do that.

First, as the ABA Model Rules themselves explain:

[t]he Comments are intended as guides to interpretation, but the text of each Rule is authoritative.

ABA Model Rules Scope [21]. In fact, that apparently is why the ABA moved its anti-discrimination provision into the black letter rules. An ABA Journal article describing the new ABA Model Rule 8.4(g) language quoted Professor Myles Lynk, then chair of the ABA Standing Committee on Ethics and Professional Responsibility. In describing why that Committee recommended a change to the black letter rule instead of relying on a Comment, Professor Lynk explained "[c]omments are only guidance or examples . . . [t]hey are not themselves binding." ABA J., Oct. 2016, at 60. So the last sentence of Comment [4] is not binding -- the black letter rule's per se discrimination ban is binding.

Perhaps that sentence was meant to equate "diversity" with discrimination on the basis of race, sex, etc. But that would be futile -- because it would fly in the face of the explicit authoritative prohibition in the black letter rule. It would also be remarkably cynical, by forbidding discrimination in plain language while attempting to surreptitiously allow it by using a code word.

Second, the ABA clearly knew how to include exceptions to the binding black letter anti-discrimination rule. ABA Model Rule 8.4(g) itself contains two exceptions. If

the ABA wanted to identify certain discriminatory conduct permitted by the black letter rule, it would have included a third exception in the black letter rule.

Third, Comment [4]'s last sentence says nothing about discrimination. It describes efforts to promote diversity and inclusion. Even if that language could overrule the black letter rule, the sentence does not describe activities permitting discrimination on the basis of the listed attributes. There are numerous types of diversity and inclusion that have nothing to do with ABA Model Rule 8.4(g)'s listed attributes. Some examples include political viewpoint diversity, geographic diversity, and law school diversity. Comment [4] allows such diversity and inclusion efforts. Those types of diversity and inclusion efforts would not involve discrimination prohibited in the black letter rule.

State Ethics Rules

Several states have adopted their own anti-discrimination rules.

- Texas Rules of Prof'l Conduct 5.08 (2015) ("(a) A lawyer shall not willfully, in connection with an adjudicatory proceeding, except as provided in paragraph (b), manifest, by words or conduct, bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation towards any person involved in that proceeding in any capacity."; "(b) Paragraph (a) does not apply to a lawyer's decision whether to represent a particular person in connection with an adjudicatory proceeding, nor to the process of jury selection, nor to communications protected as confidential information under these Rules. See Rule 1.05(a),(b). It also does not preclude advocacy in connection with an adjudicatory proceeding involving any of the factors set out in paragraph (a) if that advocacy: (i) is necessary in order to address any substantive or procedural issues raised by the proceeding; and (ii) is conducted in conformity with applicable rulings and orders of a tribunal and applicable rules of practice and procedure."; "Comment: 1. Subject to certain exemptions, paragraph (a) of this Rule prohibits willful expressions of bias or prejudice in connection with adjudicatory proceedings that are directed towards any persons involved with those proceedings in any capacity. Because the prohibited conduct only must occur 'in connection with' an adjudicatory proceeding, it applies to misconduct transpiring outside

of as well as in the presence of the tribunal's presiding adjudicatory official. Moreover, the broad definition given to the term 'adjudicatory proceeding' under these Rules means that paragraph (a)'s prohibition applies to many settings besides conventional litigation in federal or state courts. See Preamble: Terminology (definitions of 'Adjudicatory Proceeding' and 'Tribunal'). 2. The Rule, however, contains several important limitations and exemptions. The first, found in paragraph (a), is that a lawyer's allegedly improper words or conduct must be shown to have been 'willful' before the lawyer may be subjected to discipline. 3. In addition, paragraph (b) sets out four exemptions from the prohibition of paragraph (a). The first is a lawyer's decision whether to represent a client. The second is any communication made by the lawyer that is 'confidential' under Rule 1.05(a) and (b). The third is a lawyer's communication that is necessary to represent a client properly and that complies with applicable rulings and orders of the tribunal as well as with applicable rules of practice or procedure. 4. The fourth exemption in paragraph (b) relates to the lawyer's words or conduct in selecting a jury. This exemption ensures that a lawyer will be free to thoroughly probe the venire in an effort to identify potential jurors having a bias or prejudice towards the lawyer's client, or in favor of the client's opponent, based on, among other things, the factors enumerated in paragraph (a). A lawyer should remember, however, that the use of peremptory challenges to remove persons from juries based solely on some of the factors listed in paragraph (a) raises separate constitutional issues." B 6/16

Such anti-discrimination rules have obviously complicated issues about lawyer discipline.

- Indiana LEO No. 1 of 2015 (2015) (holding that a lawyer could not be sanctioned for a membership in a discriminatory organization but could be disciplined for leadership in such an organization; addressing the following hypothetical: "Attorney A is a member of a nonprofit organization that excludes women from membership and admits only white men who practice a certain religion. The attorney is asked to assume a position on the governing board of the organization and to serve as one of its officers."; "An attorney's active participation in an organization that has gender, religious or racial requirements for membership is not an inherent violation of Rule 8.4(g) of the Indiana Rules of Professional Conduct. But, there may be particular circumstances where an attorney's participation in such organizations may be viewed as misconduct when he or she acts in a 'professional capacity.' As the Indiana Supreme Court has yet to define the exact scope and meaning of 'professional capacity,' lawyers should be attentive to the mission and nature of such an organization and the role(s) the lawyer may be asked to fulfill for the organization."; "Indiana is one of 10 states that includes a separate anti-discrimination clause in their rules governing misconduct." (footnote omitted); "There is similar language in Comment [3] to ABA Model

Rule 8.4 suggesting that discriminatory speech is 'prejudicial to the administration of justice' in violation of Rule 8.4(d), but the ABA comment limits application to actions that occur while 'in the course of representing a client.' One commentator has correctly noted that the distinction between acting 'in a professional capacity' and 'in the course of representing a client' is not clear. Nevertheless, it seems reasonably obvious that 'acting in a professional capacity,' as that term is used in Rule 8.4(g) is at least as broad and perhaps broader than 'while representing a client.'" (footnote omitted); "If Rule 8.4(g) were limited to behavior occurring 'in the course of representing a client,' as the ABA comment is limited, the Committee's analysis would end with the observation that in the absence of an attorney-client relationship with the organization no violation of Rule 8.4(g) could occur. However, Indiana's version of 8.4(g) is not limited in this way, so it is necessary to consider whether Rule 8.4(g) has any application to situations outside of those that involve representing a client."; "Unfortunately, there is simply not enough direction from the Indiana Supreme Court to allow any firm conclusions as to precisely how far Rule 8.4(g) may reach. Certainly it touches all activity by an attorney arising out of the broad representative functions describe in the Preamble to the Rules so long as a client is involved while simultaneously allowing an exemption for legitimate advocacy. But when there is no client involved, the Rule still has some application to behavior where the lawyer's status as a lawyer is a relevant part of the picture and the lawyer can be deemed to have intentionally engaged in types of discriminatory behavior proscribed by the Rule."; "An attorney who merely participates in his personal capacity in an organization that has gender, religious or racial requirements for membership and does not participate in his or her capacity as a lawyer would not be in violation of Rule 8.4(g) of the Indiana Rules of Professional Conduct simply by virtue of the connection to such as association."; "The Committee also does not believe that a lawyer violates Rule 8.4(g) merely by providing legal representation to an organization with discriminatory requirements, policies or beliefs, both because such representation can often be accomplished without the lawyer personally making discriminatory comments or engaging in discriminatory conduct and because the 'legitimate advocacy' exception is likely to cover situations where the lawyer cannot avoid such statements or conduct. Gratuitous discriminatory statements or conduct in the course of a representation stand on a different footing."; "However, participation is different from representation in this context. So, a lawyer should be mindful of the particular practices of such an organization if the lawyer intends to personally participate in activities that advance any of its discriminatory requirements, policies or beliefs. The lawyer should proceed with particular caution if the lawyer's status as a lawyer is connected to his or her participation in the organization's activities. Accepting a leadership role in such an organization or using one's status as a lawyer in support of the organization creates more ethical risk than mere membership. But in either case, the nature of the organization and the lawyer's role in the organization are critical to the outcome of any ethical analysis. In light of the

delicate balance between constitutional rights and the necessity of fairness in the administration of justice, it is the Committee's hope that the Indiana Supreme Court may offer further clarification on the scope of 'professional capacity' by the way of an official Comment to Rule 8.4(g).").

Best Answer

The best answer to (a) is **(A) PROBABLY NO**; the best answer to (b) is **MAYBE**; the best answer to (c) is **PROBABLY NO**; the best answer to (d) is **MAYBE**; the best answer to (e) is **YES**; and the best answer to (f) is **MAYBE**.^{B 5/15, 8/15, 2/17}

Lawyers' Reporting Duty Logistics

Hypothetical 21

You think it is likely that you will soon have a duty to report another lawyer's serious litigation-related ethics misconduct. Now you wonder about the logistics.

- (a) If you determine that the ethics rules require you to report the other lawyer's misconduct, to whom do you report?
- (A) Court?
 - (B) Bar?
 - (C) Lawyers assistance program (for misconduct caused by alcohol or other impairment)?

(B) THE BAR (PROBABLY)

- (b) If the judge handling the litigation announces in open court that she intends to report the other lawyer's violations, must you also report the other lawyers violations?

(A) YES

- (c) If a newspaper reporter hears the judge describe the other lawyer's ethics violations (and his intent to report them), and the newspaper publishes a front page story about the judge's intent, must you nevertheless report the other lawyer's violations?

(A) YES (PROBABLY)

Analysis

The logistics of lawyers' reporting obligation can be as counter-intuitive and varied as the substantive issues that arise in such circumstances.

- (a) The 1908 ABA Canons of Professional Ethics included two specific provisions requiring lawyers to report other lawyers' misconduct in two particular scenarios.

Canon 28 required lawyers "having knowledge of" other lawyers' stirring up of litigation to report them "to the end that the offender may be disbarred." Canon 29 explained that lawyers "should expose" other lawyers' "corrupt or dishonest conduct" without "fear or favor before the proper tribunals." Thus, one of the Canons seemed to indicate that lawyers would report to the bar (who could disbar misbehaving lawyers), while the other Canon focused on tribunals).

The 1969 ABA Code of Professional Responsibility mentioned reporting to either a tribunal or "other authority" (presumably a bar).

A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

ABA Model Code of Professional Responsibility, DR 1-103(A) (emphasis added).

The 1983 ABA Model Rule of Professional Conduct require reporting to the bar.

A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

ABA Model Rule 8.3(a) (emphasis added).

A comment discusses this in more detail.

A report should be made to the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances.

ABA Model Rule 8.3 cmt. [3] (emphasis added).

The Restatement follows the same approach.

A lawyer who knows of another lawyer's violation of applicable rules of professional conduct raising a substantial question of the lawyer's honesty or trustworthiness or the

lawyer's fitness as a lawyer in some other respect must report that information to appropriate disciplinary authorities.

Restatement (Third) of Law Governing Lawyers § 5(3) (2000).

Of course, nothing prevents lawyers from reporting other lawyers' misconduct to more than one place. For instance, it might be appropriate to report litigation-related misconduct to the tribunal and to the bar.

Some ethics opinions acknowledge the possibility that lawyers must report other lawyers' sufficiently egregious misconduct to different places, depending on the misconduct.

- New York LEO 822 (6/27/08) ("A lawyer who satisfies the prerequisites to trigger mandatory reporting of a Disciplinary Rule by another lawyer must report such conduct to an appropriate authority, such as a tribunal (in a litigated matter) or to the appropriate Grievance Committee. Filing a report with a lawyer assistance program is not sufficient." (emphasis added)).

Some ethics opinions mention various reporting possibilities.

- Ohio LEO 2016-2 (4/8/16) (analyzing lawyers' duty to report other lawyers' misconduct under Ohio's unique Rule 8.3; "If a lawyer has reservations as to whether to report the misconduct, the Board recommends the lawyer err on the side of reporting"; "Lawyers are required to report misconduct to a disciplinary authority empowered to investigate or act upon such violation. Prof.Cond.R. 8.3(a). In Ohio, the proper disciplinary authority is the Office of Disciplinary Counsel or a bar association's certified grievance committee. The reporting duty is not fulfilled by reporting a lawyer's misconduct to a tribunal, since a tribunal does not have the authority to investigate or act upon reports of lawyer misconduct. However, in certain circumstances a lawyer may be required under another Rule of Professional Conduct to report the misconduct to the tribunal. See, Prof.Cond.R. 3.3, Adv. Op. 2007-1." (emphasis added)).
- Ohio LEO 2007-1 (02/09/07) ("[U]nder Rule 8.3(a) of the Ohio Rules of Professional Conduct, a lawyer's reporting duty is fulfilled by reporting professional misconduct to either the Office of Disciplinary Counsel or to a certified grievance committee of a bar association."; "The reporting duty is not fulfilled by reporting a lawyer's misconduct to a tribunal. A tribunal is not a disciplinary authority empowered to investigate or act upon reports of lawyer misconduct. A tribunal has authority to supervise members of the bar

appearing before it, including the power to disqualify attorneys in specific cases, but that authority is distinct from the exclusive disciplinary authority vested in the Supreme Court of Ohio through its inherent and constitutional powers."; "But, a lawyer also has a duty of candor to a tribunal. A lawyer's duty of candor toward a tribunal is distinct from a lawyer's duty to report professional misconduct to a disciplinary authority." (emphasis added)).

- North Carolina LEO 2003-2 (10/24/03) ("Attorney B must report to the State Bar, or a court having jurisdiction, any violation of the Rules that raises a substantial question about another lawyer's fitness to practice law. A lawyer's violation of the duty of competent representation, set forth in Rule 1.1, may raise a substantial question about a lawyer's fitness to practice law and, therefore, be sufficient to trigger the reporting requirement under Rule 8.3(a)."; "If a disclosure of client confidential information is necessary to make the report, the client's consent must be obtained. Rule 8.3(c). Whether the opposing counsel's conduct alone constitutes confidential client information is debatable. See Rule 1.6(a). The clear incompetence of opposing legal counsel may afford an apparent advantage to Attorney B's client in the matter at hand, and reporting (and thereby possibly terminating) such incompetent representation arguably would be contrary to the client's interests. However, the termination of a somewhat conjectural individual advantage gained through the obvious incompetence of opposing counsel is not the kind of detriment to the client that would normally preclude reporting particularly when the failure to report may produce disproportionate future harm to current and future clients of Attorney A." (emphasis added)).
- Skolnick v. Altheimer & Gray, 730 N.E.2d 4, 15 (Ill. 2000) (analyzing a lawyer's argument that he could satisfy the reporting obligation by advising the tribunal rather than the Bar of a colleagues misconduct; "[T]he Skolnicks argue that Kass [defendant] can discharge her ethical duty to report lawyer misconduct by informing the trial court of the alleged misbehavior, and that Kass need not alert the ARDC to her suspicions of Skolnick's supposed wrongdoing."; "Kass is correct in arguing that she was required to report the claimed misconduct to the ARDC. . . Her duty to report cannot be discharged by reporting the suspected misconduct to the trial court." (emphasis added)).
- Iowa LEO 97-30 (05/28/98) (holding that lawyer licensed in Iowa but assigned to the U.S. government and working outside Iowa may report any other lawyer's misconduct to the government agency; "It is the opinion of the Board that your reporting the violation concerned to the Chief Administrative Law Judge of the agency by which you are employed is [in] compliance with the Iowa Code of Professional Responsibility DR 1-103 and that such Judge constitutes 'other authority empowered to investigate or act upon such violation' as provided in DR 1-103."; "This Board does not have authority or jurisdiction to determine the propriety of a memorandum issued by the

federal agency or administration which forbids you from reporting ethical violations by an attorney to any other bar or supreme court." (emphasis added)).

Determining to whom a lawyer must report another lawyer's sufficiently egregious misconduct can also raise geographic issues.

- Mississippi LEO 247 (11/16/00) ("With regard to whether the reporting of misconduct in a foreign jurisdiction is sufficient so that Attorney A need not report the misconduct, one must again look at the clear language of M.R.P.C. 8.3. M.R.P.C. 8.3 states that attorney misconduct shall be reported to 'the appropriate professional authority'. If the conduct occurred in the State of Mississippi, then the conduct must be reported to The Mississippi Bar. See M.R.P.C. 8.5. Reporting attorney misconduct which occurred in the State of Mississippi to a foreign disciplinary authority is not sufficient. However, if Attorney B is also licensed in other jurisdictions, the conduct must also be reported to those jurisdictions." (emphasis added)).
- North Dakota LEO 98-02 (2/23/98) (explaining facts indicating that a lawyer had offered to refrain from representing other claimants against the company in return for being hired by the company as a consultant 'strongly suggest[ed]' that the lawyer must report such misconduct; "As the California attorney described the deal, he would agree not to represent any additional claimants against the North Dakota corporation if the corporation would pay him \$60,000.00 and retain him as a 'consultant.'"; "The Committee will not offer a final opinion regarding whether there is an obligation to report under Rule 8.3 in this instance. The Committee does believe that the facts described by the North Dakota attorney strongly suggest that the attorney has an obligation to report under Rule 8.3."; "The Committee further concludes that, although a North Dakota attorney who may have information suggesting ethical violations by a California attorney has no duty to report potential violations to California disciplinary authorities, Rule 8.3 of the North Dakota Rules of Professional Conduct may require the North Dakota attorney to initiate disciplinary proceedings in North Dakota against the California attorney." (emphasis added)).

Several bars have indicated that reporting egregious misconduct to a lawyers assistance program does not satisfy the reporting obligation.

- N.C. State Bar Ethics Op. 2013-8 (2014), Inquiry No. 3 (If an impaired lawyer has committed misconduct that a lawyer must report under Rule 8.3(a), a lawyer may not fulfill that reporting duty by reporting the impaired lawyer to a lawyers assistance program, but not the Attorney Grievance Committee of the State Bar).).

- Kentucky LEO E-430 (1/16/10) ("In addition to the exception for information protected by Rule 1.6, Rule 8.3 (c) does not require disclosure of information obtained while participating in a lawyer assistance program. The Kentucky Lawyer Assistance Program (KYLAP) was established to protect the public and to assist lawyers who suffer from actual or potential impairment. SCR 3.990 provides that 'all communications to KYLAP and all information gathered, records maintained and actions taken by KYLAP shall be confidential, shall be kept in strict confidence by KYLAP's staff and volunteers, shall not be disclosed by KYLAP to any person or entity, including any agency of the Court and any department of the Association, and shall be excluded as evidence in any proceeding before the Board of Governors or the Offices of Bar Admissions....' Rule 8.3 recognizes the confidentiality of information obtained while participating in the KYLAP program. KYLAP staff and volunteers need not report misconduct about which they first learned through KYLAP. This reporting exception does not relieve a lawyer who is not a KYLAP staff member or volunteer from reporting an impaired lawyer or judge whose conduct raises a substantial question as honesty, trustworthiness or fitness. The rule attempts to balance the goal of assisting impaired lawyers by providing a confidential support network, with the need to protect the public.").
- New York LEO 822 (6/27/08) ("A lawyer who satisfies the prerequisites to trigger mandatory reporting of a Disciplinary Rule by another lawyer must report such conduct to an appropriate authority, such as a tribunal (in a litigated matter) or to the appropriate Grievance Committee. Filing a report with a lawyer assistance program is not sufficient." (emphasis added)).
- Utah LEO 98-12 (12/04/98) ("A lawyer is required to report to the Utah State Bar any unlawful possession or use of controlled substances by another lawyer if two conditions are satisfied: (1) the lawyer has actual knowledge of the illegal use or possession, and (2) the lawyer has a reasonable, good-faith belief that the illegal use or possession raises a substantial question as to the offending lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. A lawyer is excused from this reporting requirement only if (i) the lawyer learns of such use or possession through a bona fide attorney-client relationship with the offending lawyer, or (ii) the lawyer becomes aware of the unlawful use or possession through providing services to the offending lawyer under the auspices of the Lawyers Helping Lawyers program of the Bar."; "The somewhat inartful wording of Rule 8.3(d) raises the question of whether a lawyer fulfills the Rule 8.3(a) requirement by simply reporting an offending lawyer's illegal actions to the Lawyers Helping Lawyers Committee. We conclude that the focus of the Rule 8.3(d) exception only extends to those lawyers who receive or discover information in connection with their active participation on the Lawyers Helping Lawyers Committee. This committee is a volunteer operation sponsored by the Utah State Bar, but it possesses no authority over lawyers who may need assistance. Indeed,

lawyers who may need substance-abuse help, for example, are under no obligation to participate in the program, even when contacted by that organization. Merely reporting information to Lawyers Helping Lawyers does not satisfy the reporting lawyer's Rule 8.3(a) obligation." (emphasis added)).

Bars have disagreed about a lawyer's possible duty to warn clients that a lawyer to whom they referred the client (or who might otherwise represent the client) suffers from an impairment that might involve ethics violations.

- South Carolina LEO 02-13 (2002) ("If the Attorney A has knowledge that Attorney B has violated Rules 1.1 and 1.16 (a) (2) due to a medical condition materially impairing the attorney's ability to represent a client or clients, and the violations raise a substantial question as to Attorney B's fitness as a lawyer, Attorney A shall inform the appropriate professional authority, unless the reporting would disclose information protected by Rule 1.6."; "Since the referrals have evolved out of Attorney A's representation of his or her clients, Attorney A is obligated to advise clients concerning changes in his or her opinion, especially if Attorney A's reservations concerning the attorney[']s fitness have reached a level where Attorney A is contemplating reporting a violation, which could lead to disciplinary action regarding Attorney B's fitness or transfer to incapacity inactive status."; "If Attorney A has knowledge that Attorney B has violated Rules 1.1 and 1.16(a) (2) due to a physical condition materially impairing the attorney's ability to represent a client or clients, and the violations raise a substantial question as to Attorney B's fitness as a lawyer, Attorney A should inform the appropriate professional authority, unless the reporting would disclose information protected by Rule 1.6. Attorney A could also meet with Attorney B and encourage him to seek professional help."; "Does the Attorney A have an obligation to report his knowledge concerning Attorney B to his or her clients previously referred to the attorney? The attorney-client relationship involves both actions taken on behalf of the client, as well as opinions rendered to a client. The fact that the Attorney A's communication may interfere with the attorney-client relationship between clients and Attorney B does not under the Rules of Professional Conduct prohibit reporting attorney from communications with clients concerning changes in opinions rendered to them, but to the contrary would demand it. Since the referrals have evolved out of Attorney A's representation of his or her clients, Attorney A is obligated to advise those clients concerning his conclusions and change of opinion, especially if Attorney A's substantial reservations concerning the Attorney B's fitness have reached a level where the Attorney A is contemplating reporting a violation, which could lead to disciplinary action regarding Attorney B's fitness."; "This would not be the case if the referral by Attorney A did not arise out of an attorney-client relationship." (emphasis added)).

- Philadelphia LEO 2000-12 (12/2000) ("The firm is dissolving. W [50% partner in firm] has a permanent reading disability and some memory impairment as a result of several strokes. Once the firm is dissolved both inquirer and W intend to solicit the present clients of the firm. Inquirer knows that W will be suggesting as part of the solicitation to the clients that he (W) will be handling their cases. However, inquirer also knows that W does not intend to inform the clients of his disability, his strokes, or the fact that he has not been involved in handling cases since his strokes. In view of these facts, inquirer asks whether he has an obligation to disclose to the clients W's disability. Inquirer also expresses a concern that W's conduct in soliciting clients violates Rules of Professional Conduct 7.1 and 8.4(c); he also cites Rules 1.16(a)(2) and 1.1, which presumably will be violated if W succeeds in obtaining the representation of any of the firm's present clients. Citations of the Rules of Professional Conduct will hereinafter be referred to as 'Rule' or 'Rules.'"; "Under the facts that inquirer has asked the Professional Guidance Committee to assume, the inquirer may have a Rule 8.3(a) duty to inform the Disciplinary Board of the Pennsylvania Supreme Court of W's proposed conduct. The inquirer should also consider a direct approach to W urging that W not go forward with a solicitation of the firm's clients which includes an indication that W would handle their cases in any substantive way. In view of the Committee, there does not, however, appear to be an obligation under the Rules to inform the clients to be solicited of W's disability and his consequent inability to personally handle their matters." (emphasis added)).

One state has provided very specific guidelines about the logistics of reporting.

- Kentucky LEO E-430 (1/16/10) ("The Rules of Professional Conduct do not address the form of the communication to Bar Counsel or the Judicial Conduct Commission. There is nothing to prohibit the reporting lawyer from contacting Bar Counsel or the Judicial Conduct Commission by telephone in order to discuss the matter initially. However, SCR 4.170 requires a complaint against a judge to be in writing and good practice dictates that all reports be reduced to writing.").

(b) The ABA Model Code, ABA Model Rules, and the Restatement do not on their face relieve lawyers of their reporting obligation simply because someone else might -- or even already has -- reported sufficiently egregious lawyer misconduct.

As a practical matter, it seems ridiculous to require multiple reporting of the same lawyer misconduct. It would be understandable for a lawyer to herself avoid sanctions for failing to report another lawyer (in the appropriate circumstances) by arguing that

she thought someone else would report the other lawyer's misconduct. But if someone else already has reported the misconduct, it does not make much sense to insist that the misconduct be reported again.

The Alaska reporting obligation contains an explicit exception lawyers otherwise mandated to report lawyer misconduct "reasonably believes" someone else will do it.

- Alaska Rule 8.3 (4/15/2009) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate disciplinary authority unless the lawyer reasonably believes that the misconduct has been or will otherwise be reported." (emphasis added)).

Alaska Rules of Professional Conduct 8.3.

It is always dangerous to rely on the unique Illinois ethics rules and history when analyzing lawyers' reporting obligation logistics, but in several instances the Illinois Bar has punished lawyers despite the fact that others had already reported the misconduct.

In the famous Himmel case,¹ the Illinois Supreme Court rejected Himmel's contention that his failure to report another lawyer's misconduct was immaterial, because the lawyer's own client had already reported the misconduct.

We begin our analysis by examining whether a client's complaint of attorney misconduct to the Commission can be a defense to an attorney's failure to report the same misconduct. Respondent offers no authority for such a defense and our research has disclosed none. Common sense would dictate that if a lawyer has a duty under the Code, the actions of a client would not relieve the attorney of his own duty. Accordingly, while the parties dispute whether or not respondent's client informed the Commission, that question is irrelevant to our inquiry in this case. We have held that the canons of ethics in the Code constitute a safe guide for professional conduct, and attorneys may be

¹ In re Himmel, 533 N.E.2d 790 (Ill. 1988).

disciplined for not observing them. (In re Yamaguchi (1987), 118 Ill. 2d 417, 427, citing In re Taylor (1977), 66 Ill. 2d 567.) The question is, then, whether or not respondent violated the Code, not whether Forsberg [client] informed the Commission of Casey's misconduct.

In re Himmel, 533 N.E.2d 790, 792 (Ill. 1988) (emphases added).

Since the Himmel decision, Illinois has taken the same position in other cases.

- Illinois LEO 90-28 (3/9/91) (concluding if the prosecutor had such a duty to report the other lawyer's misconduct, it would not be relieved by the fact that another lawyer had already done so; "If disclosure were mandated by Rule 8.3, we do not believe that the Lawyer A's report would excuse the prosecutor from performing that obligation. The respondent in In re Himmel, 125 Ill.2d 519 (1988), was accused of violating former Rule 1-103 by failing to disclose a criminally dishonest act by another lawyer. Himmel sought to excuse his non-disclosure by showing that his client had reported the matter before he learned of it. The Supreme Court held that he had not stated a defense: 'Respondent offers no authority for such a defense and our research has disclosed none. Common sense would dictate that if a lawyer has a duty under the Code, the actions of a client would not relieve the attorney of his own duty.' (125 Ill.2d at 538) In a proper case, a confirmatory report to the ARDC may serve an important function. It may alert that agency to the existence of evidence corroborating the initial complaint. It also may minimize the possibility that a complaint may be misinterpreted, lost or overlooked." (emphasis added); also noting that the lawyer did not have a duty to investigate the lawyer's misconduct; "The prosecutor's status as a lawyer, standing alone, neither obligates nor authorizes him to attempt to confirm Lawyer A's information. Rule 8.3 does not cast the members of the legal profession in the role of investigators. That responsibility rests with the appropriate public agencies. We do not possess sufficient facts to offer an opinion as to whether the prosecutor's official position imposes an independent duty to investigate the matter. See A.B.A. Standards Relating to the Administration of Criminal Justice, The Prosecution Function, Standard 3-3.1(a)." (emphases added)).
- In re Daley, No. 98 SH 2, Ill. Attorney Registration & Disciplinary Comm'n Review Bd. (Aug. 8, 2000) (recommending sanctions for a lawyer based on, among other things, failure to report a another lawyer's misconduct; "Respondent testified that he did not report Cueto's violation of Rule 8.4(a)(4) in using a false court order because he did not feel it necessary inasmuch as it had been disclosed to the FBI, Illinois State Police, Illinois Liquor Commission, U.S. Attorney's office and St. Clair County State's Attorney's office. Respondent testified that he knew that State's Attorney Robert Haida was aware of the order because he received the order and produced

Robinson [Liquor Commission investigator] in response to the order. Further, Respondent was under the impression that the use of the court order had been disclosed within the hearing itself. Respondent described Cueto as openly boastful of his action and stated that Cueto called a newspaper reporter who was present. The next day, the press widely reported the injunction hearing and that Robinson was an undercover FBI agent; however, the record does not show that the fact that Robinson's testimony was procured by means of a false court order was reported in the newspaper. Respondent testified that he assumed that if the FBI was investigating the matter before Judge Radcliffe, whatever led to Robinson's subpoena had been made known to the FBI. The hearing transcript was not part of the record in this disciplinary proceeding, but the record shows that on October 28, 1992, Cueto sent a copy of the hearing transcript with a letter to various government officials, including the State's Attorney's office. Respondent testified that if he ever were in a similar situation again, he would report the attorney's misconduct to the ARDC."; "Respondent's position is that he had no duty to report Cueto's conduct, however, because it was disclosed in a public forum, a court proceeding, and was widely disseminated the next day in the press, and was disclosed to various law enforcement agencies including the FBI, Illinois State Police, Illinois Liquor Commission, United State's Attorney and St. Clair County State's Attorney's office."; "In this case, the Hearing Board was of the opinion that the record did not support the Respondent's defense that Cueto's misconduct was a matter of general knowledge by the Bench or Bar which might relieve the Respondent of the duties under Himmel [In re Himmel, 533 N.#.2d 790 (Ill. 1989)]. We adopt the Hearing Board's analysis and affirm its finding of a violation of Rule 8.3(a).11" (emphasis added)).

It is unclear whether other states would follow this approach, which does not make much sense. However, the absence of any black letter or comment exception to lawyers' reporting duty may preclude a common-sense application of the requirement. Of course, bar discipline authorities may rely on such a "no harm no foul" approach when determining whether and how severely to punish a lawyer who violates the reporting requirement rule.

(c) The Illinois Bar took the position that even widespread publicity about sufficiently egregious lawyer misconduct did not relieve another lawyer with knowledge of the misconduct of the duty to report it.

- In re Daley, No. 98 SH 2, Ill. Attorney Registration & Disciplinary Comm'n (Aug. 8, 2000) (suspending for nine months a lawyer for failing to report another lawyer's misconduct; rejecting the lawyer's argument that the misconduct was widely known; "Respondent admitted that he knew that the use of a false court order violated Rule 8.4(a)(4), which prohibits dishonesty, fraud, deceit, or misrepresentation. Respondent's position is that he had no duty to report Cueto's conduct, however, because it was disclosed in a public forum, a court proceeding, and was widely disseminated the next day in the press, and was disclosed to various law enforcement agencies including the FBI, Illinois State Police, Illinois Liquor Commission, United State's Attorney and St. Clair County State's Attorney's office. In Skolnick v. Alzheimer & Gray, [730 N.E.2d 4 (Ill.) 2000], the Supreme Court described the attorney's obligation to report knowledge of misconduct, not protected as a confidence, as 'absolute' [730 N.E.2d at 13] and rejected the argument that disclosure to a trial court discharges the attorney's duty to report misconduct to the Supreme Court or its delegated agent, the ARDC. In neither Skolnick nor In re Himmel, 125 Ill. 2d 531, 533 N.E.2d 790, 127 Ill. Dec. 708 (1989) was the argument advanced, because misconduct by lawyer A was widely known by the bench and bar, lawyer B would be relieved of the reporting requirement under Rule 8.3(a)." (emphasis added)).

Best Answer

The best answer to (a) is (B) **BAR**; the best answer to (b) is (A) **YES**; and the best answer to (c) is (A) **PROBABLY YES**. B 5/15, 8/15, 2/17

Timing and Risk of Reporting Other Lawyers' Misconduct

Hypothetical 22

You have actual knowledge of a local lawyer's very serious litigation-related ethics violation, and you are wondering about the timing of your duty to report him, and what risks you face.

- (a) May you wait until the end of a nasty piece of litigation before reporting the adversary's lawyer's fraud on the tribunal?

(A) YES (PROBABLY)

- (b) Would you risk an ethics violation yourself if you report the other lawyer's serious ethics violation too early?

(A) YES

- (c) Would you risk an ethics violation yourself if you report the other lawyer's serious ethics violation too late?

(A) YES

Analysis

Applying the logistics of the ABA Model Rules' reporting obligation complicates lawyers' duty.

- (a) Neither the ABA Model Code nor the ABA Model Rules address the timing of lawyers' obligation to report other lawyers' sufficiently egregious ethics violations.

In contrast, the Restatement explains that lawyers may wait until the end of litigation or negotiations to fulfil their reporting obligation.

With respect to timing of a report of wrongdoing, the requirement is commonly interpreted not to require a lawyer involved in litigation or negotiations to make a report until the conclusion of the matter in order to minimize harm to the reporting lawyer's client.

Restatement (Third) of Law Governing Lawyers § 5 cmt. i (2000).

This approach certainly makes sense, because it avoids a possible sideshow in the litigation, and also precludes a lawyer's reliance on the reporting obligation to justify a step which might provide leverage in litigation.

Some states have adopted explicit provisions essentially assuring lawyers that they can wait until the end of litigation before reporting some other lawyer's reportable ethics violations.

Although paragraph (c)(3) requires that authorized disclosure be made promptly, a lawyer does not violate this Rule by delaying in reporting attorney misconduct for the minimum period of time necessary to protect a client's interests. For example, a lawyer might choose to postpone reporting attorney misconduct until the end of litigation when reporting during litigation might harm the client's interests.

Virginia Rule 1.6 cmt. [14].

One states' legal ethics opinion understandably suggested that lawyers consider the impact of any reporting on their client's interests -- which might justify the lawyer's delay.

- Kentucky LEO E-430 (1/16/10) ("The rule does not address the question of when one must make the report. Because the purpose of the rule is to protect the public, under most circumstances the report should be made within a reasonable time after discovery. There may be cases in which a report might have a detrimental impact on the reporting lawyer's client. This might be the case where there are on-going relationships between the client and the lawyer who has engaged in misconduct. Assuming that the information came to the reporting lawyer in the course of the representation of the client, it would be protected by Rule 1.6; absent client consent, the lawyer could not report. To the extent that the client's interests are not protected by the Rule 1.6 exception, it is the view of the Committee that where an immediate report would have a detrimental impact on the client, the lawyer may delay reporting to protect the client's interests. The lawyer would be well served to document any discussions with the client and the reasons for delaying the reporting.").

However, as explained below, lawyers who wait too long to report lawyer misconduct might themselves face discipline.

In the widely reported discipline of two lawyers in connection with disgraced former Detroit Mayor Kwame Kilpatrick, the Michigan Disciplinary Authority found that the lawyer representing plaintiffs suing Kilpatrick had not acted improperly in waiting two months after the litigation ended before reporting Kilpatrick's perjury.

- Grievance Administrator v. Stefani, ADB Case No. 07-47-GA, at 2, 17-18, 26, 27, 29, 31, 32, 3, 19, 33, 34, 35, 35-36, 36-37, 37, 39, 39-40, 40 (Mich. Attorney Discipline Bd. Mar. 2, 2010) (addressing alleged ethics violations by the lawyer who represented two Detroit police officers claiming that they had been were fired in retaliation for reporting Detroit Mayor Kwame Kilpatrick's adulterous affair with a city employee; concluding that the lawyer had violated the ethics rules by serving discovery subpoenas on the city's communications provider, without serving the subpoenas on Kilpatrick and the city -- thus giving him and his clients access to Kilpatrick's text messages showing Kilpatrick had engaged in the affair and then lied about it under oath; concluding that the lawyer was not guilty of failing to report Kilpatrick's perjury -- noting that he had reported Kilpatrick's perjury two months after the end of litigation in which the lawyer had represented the two policemen and in which Kilpatrick had lied under oath; "When Stefani received the text messages from Skytel in October 2007 he had knowledge that another lawyer, Kilpatrick, had committed a significant violation of the Rules of Professional Conduct in that Kilpatrick had committed perjury during his deposition and trial testimony in the Brown/Nelthrope case, and Stefani did not report this fact to the AGC [Michigan Attorney Grievance Commission] until February 2008."; rejecting Stefani's ignorance defense; "Stefani said that he then went to the Michigan Rules of Professional Conduct ('MRPC'), since he was not familiar with the rule that required an attorney to report possible perjury by another attorney. He said the primary reason that he did not report Kilpatrick to the AGC back in October-November of 2007 was because he was not aware of a rule that required him to do so. . . . He also said he did not report it because he did not have a transcript of Kilpatrick's testimony, who gave very evasive answers, and he did not feel he had 'good enough information to report a lawyer -- to report that a lawyer committed perjury when I only had the messages and not the transcript.' . . . He also said that sometime in November of 2007 the Free Press reporter told him that he might have an obligation under the Rules of Professional Conduct to report Kilpatrick. Stefani said he researched the rules, did not believe he had an obligation, and the more he thought about it, he believed he really did not have the proof to report the matter. Then when he learned of experts who

pointed out more specific provisions of the rules, he took another look, and believed he missed the appropriate rule on his first review in November, 2007. . . . Stefani did not believe reporting Kilpatrick's perjury to the AGC would violate the confidentiality agreement."; finding that Stefani did not violate Michigan Rule 8.3 by waiting two months after the litigation ended before contacting the Bar; "The central facts pertaining to this issue are not in dispute: Stefani became aware that Kilpatrick was a licensed Michigan attorney during the discovery phase of the Nelthrope/Brown litigation. . . . Stefani admitted at the hearing of this matter that he had first reviewed the text messages that exposed the falsity of Kilpatrick's testimony in early October, 2007. . . . The Nelthrope/Brown case was settled and the terms of the settlement were placed on the record before the Honorable Michael Callahan on December 11, 2007. . . . The record further shows that Stefani did not report Kilpatrick's wrongdoing until he filed a Request for Investigation on February 13, 2008." (emphasis added); "Michigan Rule of Professional Conduct 8.39(a) requires attorneys to report wrongdoing by other attorneys to the AGC: '(a) lawyer having knowledge that another lawyer has committed a significant violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer shall inform the Attorney Grievance Commission.' . . . However, the Rule is silent with regard to a time frame within which the attorney must notify the agency and our research has not disclosed any Michigan case that address how soon after learning of another lawyer's misconduct the attorney must contact the AGC." (emphasis added); "[I]t is clear that the duty to report another attorney's misconduct must be harmonized with another essential duty that arises in litigation: when serving as an advocate, a lawyer 'should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.'" MRPC 1.3, Comment. He or she must '. . . zealously assert the client's position under the rules of the adversary system.' MRPC 1.0, Preamble. In the context of the issue of Stefani's duty to report, The Restatement (Third) of the Law Governing Lawyers, Section 5, provides that the requirement to report misconduct '. . . is commonly interpreted not to require a lawyer involved in litigation or negotiations to make a report until the conclusion of the matter in order to minimize harm to the reporting lawyer's client.' Id." (emphasis added); "The issue before this Panel is not limited to the question of when Stefani acquired sufficient knowledge to trigger his duty to report, because he also had a concomitant duty under the Rules of Professional Conduct in his role as an advocate for his clients. This Panel also believes that the nature of Kilpatrick's professional misconduct influences the outcome of this matter."; "At the time Stefani obtained knowledge of the false testimony in October of 2007, the Nelthrope/Brown case was still in active litigation. The record reflects that the Nelthrope/Brown litigation was not settled and dismissed with prejudice until December 11, 2007. . . . Until the conclusion of that litigation, Stefani had a clear duty as an advocate to 'act with commitment and dedication to the interests of the client and with zeal in

advocacy upon the client's behalf . . . [and to] zealously assert the client's position under the rules of the adversary system.' MRPC 1.3, Comment; MRPC 1.0, Preamble." (emphasis added); "Viewing Stefani's conduct in terms of his role as an advocate, it was not unreasonable for him to refrain from reporting the false testimony until the litigation had ended in order to protect what he considered his clients' best interests. MRPC 1.3, Comment; MRPC 1.0, Preamble. This conclusion is also consistent with The Restatement (Third) of the Law Governing Lawyers, Section 5, which provides that a lawyer's duty to report another attorney's misconduct ' . . . is commonly interpreted not to require a lawyer involved in litigation or negotiations to make a report until the conclusion of the matter in order to minimize harm to the reporting lawyer's client.' Id. The case was finally settled and dismissed with prejudice on December 11, 2007. Accordingly, a period of some 2 months elapsed between the end of the litigation and Stefani's contact with the AGC. This Panel has concluded that a delay of that length does not convert Stefani's actions into a failure to report pursuant to MRPC 8.3(a)." (emphasis added); also noting the Bar charged Stefani for entering into a confidentiality agreement with the City, which had the effect of hiding Kilpatrick's and his paramour Beatty's perjury; "Stefani executed a confidentiality agreement in which he promised to keep the text messages between Kilpatrick and Beatty confidential in return for an \$8.4 million dollar settlement of the Brown/Nelthrope and Harris cases, and [the Bar charged] that this conduct constituted the misdemeanor of compounding or concealing a crime in violation of MCL 750.149."; "Returning to the issue of the settlement, Stefani testified that he was not certain why McCargo [lawyer for Detroit Mayor Kwame Kilpatrick who was also disciplined Bar in connection with this case] requested that the original settlement agreement be redrafted to include a settlement agreement and a separate confidentiality agreement with Kilpatrick and Beatty, and that decision was made solely by McCargo."; finding that Stefani had not violated Michigan Rule 8.4 or a Michigan Rule 9 provision; "MRPC 8.4(b) provides that it is 'professional misconduct for a lawyer to [commit] a violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer.' Similarly, MCR 9.104(A) (5) provides that a lawyer shall not engage in 'conduct that violates a criminal law of a state or of the United States.'"; "The specific criminal statute which Stefani is alleged to have violated is MCL 750.149, entitled 'Compounding or Concealing Offense.' It provides in pertinent part: 'Any person having knowledge of the commission of any offense punishable by imprisonment in the state prison, who shall take any money, or any gratuity or reward, . . . upon an agreement or understanding, express or implied, to compound or conceal such offense, or not to prosecute thereof, or not to give evidence thereof, shall, where such offense, of which he or she so had knowledge, was punishable in any other manner, he or she is guilty of a misdemeanor.'"; "The issue before this Panel is whether the AGC has carried its burden of proof that these [settlement and confidentiality] agreements by Respondent violated MCL 750.149."; "The first element of

concealing an offense is an agreement to 'conceal a crime, or to decline to provide evidence in a criminal prosecution'. . . In this case, the alleged offense being concealed was the perjury committed by Kilpatrick and Beatty in their depositions and testimony during the Brown/Nelthrope trial. The record contains no evidence concerning the criminal charges actually filed against Kilpatrick and Beatty nor the actual offenses to which they pleaded guilty. There is no evidence that Respondent declined to provide evidence in the criminal prosecution."; "The second element of concealing an offense is that the party has knowledge of the commission of a crime. During his testimony Stefani testified he did not have a trial transcript of Kilpatrick or Beatty at the time he obtained the text messages and he did not have extensive notes from Kilpatrick's trial testimony. Thus, he claimed he did not have sufficient information to establish perjury."; "While Stefani may not have had sufficient evidence to establish a crime by Kilpatrick or Beatty beyond a reasonable doubt, the Panel is persuaded that he had sufficient evidence that they may have committed perjury, and thus Respondent had 'knowledge of the commission of a crime,' sufficient to satisfy the second element of the offense under MCL 750.149."; "As to the third element, this Panel is not persuaded that the AGC has carried its burden of proof that Respondent received any 'valuable consideration' over and above what he was entitled to under his fee agreement with his clients."; concluding that Stefani had not violated Michigan Rule 8.4 by having his client enter into a settlement agreement that included an implicit agreement not to pursue criminal charges against Kilpatrick and his paramour Beatty; "The Complaint also raises the broader issue of whether attorneys in negotiating the settlement of civil actions may either threaten criminal proceedings against an opposing party, or enter into a settlement agreement to either explicitly or impliedly refrain from instigating a prosecution."; "This Panel has reviewed American Bar Association Formal Opinion 92-363 issued by the Standing Committee on Ethics and Professional Responsibility ('ABA Opinion') which has been favorably quoted by the Attorney Discipline Board in Grievance Administrator v Oehmke, ABD No. 91-96-GA (1993). The ABA Opinion dealt with this issue under the Model Rules of Professional Responsibility which are identical to MRPC 8.4(b). The ABA Opinion held in pertinent part: 'The Model Rules do not prohibit a lawyer from agreeing, or having the lawyer's client agree, in return for satisfaction of the client's civil claim, to refrain from presenting criminal charges against the opposing party as part of a settlement agreement, provided that such agreement does not violate applicable law. (ABA Opinion, p. 1).'; "While the ABA Opinion acknowledges that a lawyer must not run afoul of any criminal statute involving compounding or concealing a crime, it points out that the Model Penal Code dealing with compounding or concealing crime allows 'an affirmative defense to prosecution under this Section that the pecuniary benefit did not exceed an amount which the actor believed to be due as restitution or indemnification for harm caused by the offense.' (ABA Opinion, p. 3). As previously discussed, this Panel finds that Respondent did not

violate MCL 750.149 based on the facts in this record."; "In negotiating settlements which are in the best interests of their clients, lawyers are confronted with the dual responsibilities of acting with all reasonable diligence in representing a client within the bounds of their professional responsibility. (MRPC 1.3). The Official Comments to MRPC 1.3 provide that a lawyer must 'take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor' and must act with 'zeal in advocacy upon the client's behalf.' In this case, Stefani testified that he had clear instructions from his clients to settle the cases rather than fight an appeal which would take years to resolve through the appellate process."; "As such, this Panel finds that the agreement by Stefani to turn over the text messages to Kilpatrick's counselor representative did not violate the general obligations imposed upon attorneys under MCR 9.104(A)(1)-(3)."; finding that Stefani violated a rule by requesting incriminating text messages between Kilpatrick and Beatty without serving a copy on opposing counsel and having the text messages sent to the court as required by a court order. (emphases added)).

The same principle can apply in the transactional setting.

- North Carolina LEO 2009-2 (4/24/09) (holding that a lawyer must report an unauthorized practice of law by a title company, but may close the transaction before doing so; "Buyer/borrower's counsel is preparing for closing. The day prior to closing a draft of a deed is forwarded to buyer/borrower's counsel by ABC Title Company. At or near the top of the draft deed it states in writing, 'This deed was prepared by ABC Title Company under the supervision of John Doe, attorney at law.' ABC Title Company is not a bank or a law firm. John Doe is not employed by ABC Title Company. Buyer/borrower's counsel believes that the deed is actually being prepared by a non-lawyer employee or independent contractor of the ABC Title Company who then forwards the deed to John Doe for his review and approval. John Doe does not directly employ the non-legal staff person who prepares the deed, nor is that person an independent contractor hired by John Doe for the purpose of assisting John Doe with the legal work he performs on behalf of his clients."; "What are the ethical obligations of buyer/borrower's counsel as to John Doe and ABC Title Company?"; "If buyer/borrower's counsel suspects that John Doe is assisting ABC Title Company in the unauthorized practice of law, he should communicate his concerns to John Doe and advise John Doe that he may wish to contact the State Bar for an ethics opinion as to his future transactions with ABC Title Company. If, after communicating with John Doe, buyer/borrower's counsel reasonably believes that John Doe is knowingly assisting the title company in the unauthorized practice of law, and plans to continue participating in such conduct, buyer/borrower's counsel must report John Doe to the State Bar. Rule 8.3(a)."; "Buyer/borrower's counsel has an obligation to do what is in the best interest of his client while not assisting in the unauthorized practice of

law. The lawyer should advise the client of his concerns about ABC's unauthorized practice of law and any harm that such conduct may pose to the client. However, if buyer/borrower's counsel determines that the deed appears to convey marketable title and the client decides to proceed with the closing after receiving his lawyer's advice, buyer/borrower's counsel may close the transaction. . . . Buyer/borrower's participation in the closing does not further the unauthorized practice of law by ABC Title Company." (emphasis added)).

In the transactional context, lawyers might face a greater risk. In litigation, lawyers analyzing their reporting duty are not likely to have assisted the adversary's lawyer's misconduct. If anything, the reporting lawyer might be tempted to "blow the whistle" on the other side's lawyer. However, a transactional lawyer who knows of the other side's lawyer's misconduct might be accused of assisting that misconduct by consummating the transaction.

(b) Ironically, lawyers might face discipline themselves if they report (or discuss reporting) another lawyers' sufficiently egregious misconduct too early.

This issue involves lawyers' possible misuse for tactical purposes of information about another lawyer's misconduct. Such tactical misuse can involve one of two ethical violations by the reporting lawyer.

First, the lawyer might threaten to report another lawyer's misconduct in a situation where the reporting was not necessary or even in a situation where the other lawyer had not engaged in any misconduct. This is a kind of harassment or threat that could be designed to gain some advantage (in litigation or in other situations) by making the other lawyer worried about having to defend an ethics charge when he or she has done nothing wrong – or at least has not engaged in sufficiently egregious misconduct to really worry about bar discipline.

Second, the reporting lawyer might have information that triggers a mandatory reporting obligation, but instead decide to use the information for some tactical advantage. In that situation, the reporting lawyer is engaging in a type of blackmail -- explicitly or implicitly offering to refrain from "blowing the whistle" on otherwise reportable misconduct in return for some benefit. The reporting lawyer's delay (or eventual decision not to report the other lawyer's sufficiently egregious misconduct at all) could subject a reporting lawyer to an ethics violation herself -- by failing to comply with the mandatory reporting obligation.

Lawyers who overplay their hand under the first scenario, (fabricating or exaggerating the other lawyer's supposed ethics violation) might back into the second situation. If they have threatened to report (or even mentioned the possibility of reporting) some supposed ethics violation by another lawyer, but failed to do so, the reporting lawyer might himself or herself be guilty of violating the reporting obligation. It is unclear whether bars examining that ironic situation would independently assess the egregiousness of the other lawyer's misconduct, or whether bars would take a sort of karma approach -- taking the threatening lawyer's word that the other lawyer has engaged in such an egregious ethics violation that it must have been reported.

The 1969 ABA Model Code of Professional Responsibility contained a prohibition on lawyers' involvement in asserting criminal charges, if the lawyer had an improper motive.

A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.

ABA Model Code of Professional Responsibility, DR 7-105(A).

When the ABA adopted its Model Rules in 1983, it deliberately dropped that provision.

The ABA explained its reasoning in a LEO issued about ten years later.

The deliberate omission of DR 7-105(A)'s language or any counterpart from the Model Rules rested on the drafters' position that "extortionate, fraudulent, or otherwise abusive threats were covered by other, more general prohibitions in the Model Rules and thus that there was no need to outlaw such threats specifically." C. W. Wolfram, Modern Legal Ethics (1986) § 13.5.5, at 718, citing Model Rule 8.4 legal background note (Proposed Final Draft, May 30, 1981), (last paragraph). Model Rules that both provide an explanation of why the omitted provision DR 7-105(A) was deemed unnecessary and set the limits on legitimate use of threats of prosecution are Rules 8.4, 4.4, 4.1 and 3.1.

ABA LEO 363 (7/6/92) (footnote omitted).

In defending its decision, ABA LEO 363 first dealt with the possibility that such threats could amount to extortion. ABA LEO 363 noted that:

[i]t is beyond the scope of the Committee's jurisdiction to define extortionate conduct, but we note that the Model Penal Code does not criminalize threats of prosecution where the "property obtained by threat of accusation, exposure, lawsuit or other invocation of official action was *honestly claimed as restitution for harm done in the circumstances to which such accusation, exposure, lawsuit or other official action relates, or as compensation for property or lawful services.*" Model Penal Code, sec. 223.4 (emphasis added); see also sec. 223.2(3) (threats are not criminally punishable if they are based on a claim of right, or if there is an honest belief that the charges are well founded.) As to the crime of compounding, we also note that the Model Penal Code, § 242.5, in defining that crime, provides that:

A person commits a misdemeanor if he accepts any pecuniary benefit in consideration of refraining from reporting to law enforcement authorities the commission of any offense or information relating to an offense. It is an affirmative defense to prosecution under this Section that the

pecuniary benefit did not exceed an amount which the actor believed to be due as restitution or indemnification for harm caused by the offense.

Id. (emphases added; emphases in original indicated by italics).

ABA LEO 363 also explained that wrongful threats of criminal prosecution could amount to violations of other ABA Model Rules, such as:

Rule 8.4(d) and (e) provide that it is professional misconduct for a lawyer to engage in conduct prejudicial to the administration of justice and to state or imply an ability improperly to influence a government official or agency.

Rule 4.4 (Respect for Rights of Third Persons) prohibits a lawyer from using means that "have no substantial purpose other than to embarrass, delay, or burden a third person. . . ." A lawyer who uses even a well-founded threat of criminal charges merely to harass a third person violates Rule 4.4. See also Hazard & Hodes, supra, § 4.4:104.

Rule 4.1 (Truthfulness in Statements to Others) imposes a duty on lawyers to be truthful when dealing with others on a client's behalf. A lawyer who threatens criminal prosecution, without any actual intent to so proceed, violates Rule 4.1.

Finally, Rule 3.1 (Meritorious Claims and Contentions) prohibits an advocate from asserting frivolous claims. A lawyer who threatens criminal prosecution that is not well founded in fact and in law, or threatens such prosecution in furtherance of a civil claim that is not well founded, violates Rule 3.1.

Id.

ABA LEO 363 concluded as follows:

The Committee concludes, for reasons to be explained, that the Model Rules do not prohibit a lawyer from using the possibility of presenting criminal charges against the opposing party in a civil matter to gain relief for her client, provided that the criminal matter is related to the civil claim, the lawyer has a well-founded belief that both the civil claim and the possible criminal charges are warranted by the law and the facts, and the lawyer does not attempt to exert or

suggest improper influence over the criminal process. It follows also that the Model Rules do not prohibit a lawyer from agreeing, or having the lawyer's client agree, in return for satisfaction of the client's civil claim for relief, to refrain from pursuing criminal charges against the opposing party as part of a settlement agreement, so long as such agreement is not itself in violation of law.

Id.

The Restatement acknowledges the issue:

Some lawyers have objected to the duty to disclose another lawyer's wrongdoing. Failure to comply subjects a lawyer to professional discipline, and the objection has been made that threats to report an opposing lawyer are used unfairly by unprincipled lawyers on the pretense that the disclosure rule requires it.

Restatement (Third) of Law Governing Lawyers § 5 cmt. i (2000).

However, the Restatement also deliberately excluded the prohibition -- tangentially dealing with the issue in an obscure comment to the rule governing statements to non-clients:

Beyond the law of misrepresentation, other civil or criminal law may constrain a lawyer's statements, for example, the criminal law of extortion. In some jurisdictions, lawyer codes prohibit a lawyer negotiating a civil claim from referring to the prospect of filing criminal charges against the opposing party.

Restatement (Third) of Law Governing Lawyers § 98 cmt. f (2000) (emphases added).

The Restatement provision governing lawyers' reporting duty (§ 5(3)) points elsewhere to:

a reporting lawyer's immunity from libel and similar retaliatory actions by a lawyer who is reported to a disciplinary agency.

Restatement (Third) of Law Governing Lawyers § 5 cmt. i (2000).

Despite the ABA's 1983 abandonment of the prohibition on lawyers threatening criminal charges to gain some litigation advantage, many if not most state ethics rules have retained it.

In fact, states take widely varying approaches. Some states have expanded the prohibition, including both criminal and disciplinary charges in their rule's coverage.

- Virginia Rule 3.4(i) ("A lawyer shall not . . . [p]resent or threaten to present criminal or disciplinary charges solely to obtain an advantage in a civil matter.").

Some states have taken a more restrictive approach, prohibiting only the threat of charges, not their presentation.

- California Rule 5-100(A) ("A member shall not threaten to present criminal, administrative, or disciplinary charges to obtain an advantage in a civil dispute.")

Unfortunately, it can be very difficult to locate the pertinent rule in states which have continued the general prohibition.

Because the ABA has dropped the prohibition, states deciding to retain it must determine where in their rules they will insert the prohibition. Of course, states do not have this problem when adopting a variation of an ABA Model Rule -- because they use the same rule number, but include a different substance. With the prohibition on threatening criminal prosecution or disciplinary charges, there is no ABA Model Rule to use as a guide.

This presents a challenge to practitioners seeking to determine if a particular state continues to prohibit such conduct.

- Some states include the provision in their Rule 3.4 (entitled "Fairness to Opposing Party and Counsel"): Connecticut Rule 3.4(7); Florida Rule 4-3.4(g); Georgia Rule 3.4(h); New York Rule 3.4(e); Virginia Rule 3.4(i).

- Some states include the provision in their Rule 4.4 (entitled "Respect for Rights of Third Persons"): Tennessee Rule 4.4(a)(2); Texas Rule 4.04(b).
- Some states include the provision in their Rule 8.4 (entitled "Misconduct"). D.C. Rule 8.4(g); Illinois Rule 8.4(g).
- Those states having unique rules also must find a place to put a prohibition that they wish to retain: California Rule 5-100(A).

To make matters more confusing, some states follow essentially the same approach -- but use legal ethics opinions rather than rules.

- New York City LEO 2015-5 (06/15) ("An attorney who intends to threaten disciplinary charges against another lawyer should carefully consider whether doing so violates the New York Rules. Although disciplinary threats do not violate Rule 3.4(e), which applies only to threats of criminal charges, they may violate other Rules. For example, an attorney who is required by Rule 8.3(a) to report another lawyer's misconduct may not, instead, threaten a disciplinary complaint to gain some advantage or concession from the lawyer. In addition, an attorney must not threaten disciplinary charges unless she has a good faith belief that the other lawyer is engaged in conduct that has violated or will violate an ethical rule. An attorney must not issue a threat of disciplinary charges that has no substantial purpose other than to embarrass or harm another person or that violates other substantive laws, such as criminal statutes that prohibit extortion.").
- North Carolina LEO 2009-5 (1/22/09) ("[A] lawyer may serve the opposing party with discovery requests that require the party to reveal her citizenship status, but the lawyer may not report the status to ICE unless required to do so by federal or state law."; "It is unlikely that Lawyer's impetus to report Mother to ICE is motivated by any purpose other than those prohibited under these principles. The Ethics Committee has already determined that a lawyer may not threaten to report an opposing party or a witness to immigration to gain an advantage in civil settlement negotiations. 2005 FEO 3. Similarly, Lawyer may not report Mother's illegal status to ICE in order to gain an advantage in the underlying medical malpractice action." (emphasis added)).
- West Virginia LEO 2000-01 (5/12/00) (finding that threatening criminal prosecution can be improper if the threatening party seeks more than restitution).

Thus, threatening to report an ethics violation (without following through) can itself constitute an ethics violation -- especially if there is an explicit quid pro quo.

- State ex rel. Counsel for Discipline v. Koenig, 769 N.W.2d 378, 383 (Neb. 2009) (suspending for 120 days a lawyer who threatened to disclose the fact that a county attorney was violating the same motor vehicle registration rule that the lawyer's client was allegedly violating; finding that the lawyer had engaged in conduct "prejudicial to the administration of justice" by promising to keep the county attorney's violation secret if the authorities dropped the case against his client).
- In re Lehman, 861 N.E.2d 708, 709 (Ind. 2007) (suspending a lawyer for 120 days; "While representing clients in a personal injury action, Respondent learned that opposing counsel had served as judge pro tem in the court on two brief occasions after the clients' litigation began. Opposing counsel had not taken any action or considered any matters relating to the personal injury action. On October 7, 2004, Respondent moved to disqualify any judge in the court and to have the case referred to another court. Respondent also informed his clients that he believed the judge and opposing counsel had significant ethical problems. The motion to disqualify was denied on October 13."; "On October 12, 2004, Respondent filed an emergency request for a continuance of the trial. On October 15, Respondent called opposing counsel and told him that his clients wanted to report opposing counsel for unethical conduct, but if opposing counsel agreed to the continuance, Respondent thought he could dissuade his clients. Opposing counsel refused to consent to the continuance, and the judge denied the motion for a continuance. Respondent then filed a motion to reconsider the motion to disqualify. The case, however, settled without a trial."; "The parties agree that Respondent violated Professional Conduct Rule 8.4(d), which prohibits conduct prejudicial to the administration of justice, by communicating to opposing counsel a willingness to attempt to dissuade his clients from filing a complaint against opposing counsel as a quid pro quo for opposing counsel's agreement to a continuance of the trial." (emphasis added)).
- Virginia LEO 1755 (5/7/01) (explaining that a lawyer's letter warning an adversary's lawyer against ex parte contacts with the lawyer's client and threatening to "take the matter up with Judge and the Commonwealth's Attorney" if the ex parte calls continue, (1) violated the first prong of the prohibition on threatening criminal charges "solely to obtain an advantage in a civil matter," because reference to the Commonwealth's Attorney "presents a definite threat of criminal prosecution"; (2) did not violate the second prong (that the threat be made "solely to obtain an advantage in a civil matter"), because "[t]he letter does not make the usual demand for payment/settlement by threatening prosecution," but instead was "meant to stop a certain action" (the ex parte contacts) that was itself improper; noting that the lawyer apparently believed that the adversary's lawyer (rather than the adversary itself) was initiating the ex parte contacts; explaining that "[w]hile a party is free on his own initiative to contact the opposing party, a

lawyer may not avoid the dictate of Rule 4.2 by directing his client to make contact with the opposing party.").

- Wisconsin LEO E-01-01 (03/05/01) ("The responsibility of a lawyer to report the misconduct of another lawyer is governed by SCR 20:8.3 and the obligation of all members of a self-regulating profession to assure observance of the Rules by their fellow professionals. Reporting misconduct of other lawyers must be accomplished within the framework for behavior established by the very Rules this obligation is meant to protect. This includes due attention to the lawyer's duty of confidentiality, SCR 20:8.3(c); not advancing claims or factual positions that the lawyer knows are frivolous, SCR 20:3.1; not using means that have no substantial purpose other than to embarrass, delay, or burden a third person, SCR 20: 4.4; or engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation, SCR 20:8.4(c)."; "A lawyer who seeks to gain a bargaining advantage by threatening to report another lawyer's misconduct commits misconduct even if that lawyer believes that the other lawyer's conduct raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness. Seeking such a bargaining advantage in such circumstances is inappropriate because reporting such misconduct is an obligation imposed by the Rules. SCR 20:8.3(a). See ABA Formal Ethics Opinion 94-383. Likewise, a lawyer commits misconduct by entering into any agreement to not report such misconduct. See In re Himmel, 125 Ill. 2d 531, 533 N.E.2d 790 (Ill.1988)." (emphasis added)).

Not surprisingly, lawyers cannot resolve a dispute with a client under which the client agrees not to file an ethics charge against the lawyer.

- Utah LEO 16-02 (3/23/16) ("A lawyer may neither request nor agree to limit his or her duties to the administration of justice regarding filing or participating in a bar complaint."; "A lawyer may not request that a present or former client refrain from filing or participating in a bar complaint as a condition to settling disputes between the client and the lawyer."; "A lawyer may not participate in an agreement that limits the lawyer's liability for malpractice or prohibits the lawyer from accepting future clients except as permitted by rule or law.").

Lawyers cannot seek an agreement from another party or lawyer in which the party or lawyer pledges not to file an ethics charge.

- Missouri LEO 122 (03/08/06) ("It is the opinion of the Advisory Committee that an attorney who enters into, a settlement that includes a term that a party to the agreement will withdraw, refrain from filing, or decline to cooperate regarding, a complaint under Supreme Court Rule 5 violates Rule

4-8.4(d) by engaging in conduct prejudicial to the administration of justice."; "[T]he agreement cannot provide that the complainant will withdraw a complaint, refrain from filing a complaint, or decline to cooperate with attorney discipline authorities. Under Rule 5.17, a complainant, does not have the ability to withdraw a complaint, even if it were appropriate to request that a complainant do so." (footnote omitted) (emphasis added)).

Some states have followed the Restatement approach in explicitly immunizing lawyers' reports of other lawyers' misconduct.

- Kentucky Rule SCR 3.130(8.3) ("A lawyer acting in good faith in the discharge of the lawyer's professional responsibilities required by paragraphs (a) and (b) or when making a voluntary report of other misconduct shall be immune from any action, civil or criminal, and any disciplinary proceeding before the Bar as a result of said report, except for conduct prohibited by Rule 3.4(f).").

In addition to these ethics provisions immunizing lawyers from professional discipline if they report other lawyers' egregious misconduct, they may be relieved of other possible liability by specific statutory regulatory provisions.

For instance, some states have adopted specific statutory provisions immunizing lawyers from reporting other lawyers' or would-be lawyers' misconduct.

- Shestul v. Moeser, 344 F. Supp. 2d 946, 951 (E.D. Va. 2004) (assessing defamation claim based on allegations that the plaintiff engaged in improper conduct during a bar exam by looking at the answer sheet of her neighbor; holding that statements made to bar examiners are absolutely privileged; "It is generally accepted that the Virginia Board of Bar Examiners performs a judicial function on behalf of the Supreme Court of Virginia. . . . Therefore, an absolute privilege should attach to any statements made to the Board of Bar Examiners in connection with an applicant to the Virginia bar. Although there seem to be no Virginia cases on point, the court agrees with other jurisdictions that have afforded such a privilege to these communications. It is certainly in the interest of any state's bar licensure committee to have full information regarding the applicants before them").

(c) Any discussion of lawyers being punished for not reporting other lawyers' misconduct (or reporting too late) usually focuses on the famous (or infamous) Illinois case of In re Himmel, 533 N.E.2d 790 (Ill. 1988).

However, before turning to Himmel, it is worth noting that other lawyers have been sanctioned for not reporting lawyers' sufficiently egregious misconduct.

- Board of Overseers v. Warren, 34 A.3d 1103, 1111 (Me. 2011) (holding that the law firm's partners who knew of but did not correct a rogue partner's wrongful acts violated the ethics rules; "For many lawyers, the initial report of Duncan's actions certainly would have raised a substantial question as to his honesty, trustworthiness, or fitness as a lawyer in other respects. Nevertheless, each of the six attorneys testified that it never even occurred to him or her that Duncan's mishandling of funds gave rise to an obligation to report Duncan pursuant to Rule 3.2(e). Each flatly admitted that despite hearing of Duncan's conduct, no one discussed whether they should review the Bar Rules or whether they should consult the firm's counsel." (footnote omitted)).
- In re Riehlmann, 891 So. 2d 1239, 1246, 1247-48, 1248 (La. 2005) (upholding a public reprimand of a lawyer who waited five years to disclose a dying friend's confession that he had engaged in prosecutorial misconduct; "The American legal profession has long recognized the necessity of reporting lawyers' ethical misconduct. When the American Bar Association adopted its first code of ethics in 1908, Canon 29 of the Canons of Professional Ethics, entitled 'Upholding the Honor of the Profession,' encouraged lawyers to 'expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession, . . . ' Charles W. Wolfram, Modern Legal Ethics 683 n. 16 (1986). More than sixty years later, the ABA enacted Disciplinary Rule 1-103(A) of the Model Code of Professional Responsibility, the predecessor of the current Rule 8.3(a) of the Model Rules of Professional Conduct. Both the 1969 Code, in DR 1-103(A), and the 1983 Model Rules, in Rule 8.3(a), make it clear that the duty to report is not merely an aspiration but is mandatory, the violation of which subjects the lawyer to discipline."; "This court first adopted Rule 8.3 on December 18, 1986, effective January 1, 1987. Louisiana's rule is based on ABA Model Rule 8.3; however, there are several differences between the Model Rule and the Louisiana Rule that was in effect in 2001, at the time the formal charges were filed in this case. Most significantly, Model Rule 8.3 requires a lawyer to report the misconduct of another lawyer only when the conduct in question 'raises a substantial question' as to that lawyer's fitness to practice. Louisiana's version of Rule 8.3 imposed a substantially more expansive reporting requirement, in that our rule required a lawyer to report all unprivileged knowledge of any ethical violation by a lawyer, whether the violation was, in the reporting lawyer's view, flagrant and substantial or minor and technical." (footnote omitted); "We find the ODC proved by clear and convincing evidence that respondent violated Rule 8.3(a). First, we find that respondent should have known that a reportable event occurred at the time of his 1994 barroom conversation with Mr. Deegan. Stated another way,

respondent's conversation with Mr. Deegan at that time gave him sufficient information that a reasonable lawyer under the circumstances would have formed a firm opinion that the conduct in question more likely than not occurred. Regardless of the actual words Mr. Deegan said that night, and whether they were or were not 'equivocal,' respondent understood from the conversation that Mr. Deegan had done something wrong." (emphasis added); "We also find that respondent failed to promptly report Mr. Deegan's misconduct to the disciplinary authorities. As respondent himself acknowledged, he should have reported Mr. Deegan's statements sooner than he did. There was no reason for respondent to have waited five years to tell the ODC about what his friend had done." (emphases added)).

- In re Anderson, 769 A.2d 1282, 1283, 1283-84, 1284 (Vt. 2000) (affirming a public reprimand that a lawyer waited too long (nine months) before reporting his partner's trust account misconduct; explaining the factual background, without any irony that the lawyer himself had been a member of the Vermont Professional Conduct Board; "The facts were stipulated to by the parties. Respondent is licensed to practice law in Vermont, and he was a member of the Board from 1983 to 1993, acting as chair from 1989 to 1993. He shared operating and trust accounts with attorney Gerald P. Cantini and another lawyer from 1991 until February 1994. The shared trust account had a joint ledger and was the only trust account used by these lawyers. The office used printed letterhead that read 'Law Office of Cantini, Anderson & Oakman' and later just 'Law Offices of Cantini & Anderson.' These attorneys were listed as a partnership in Martindale-Hubbel's directory and obtained liability insurance as a partnership between 1991 and 1993. In March 1994, the notice 'Not a Partnership' was added to the letterhead."; explaining that the lawyer learned of the other lawyer's trust account irregularities, but did not investigate; "Respondent recalled being told about the fee checks, but he did not recall being told about the trust fund irregularities at this time. Respondent did check his own client trust account records for accuracy but did not check Cantini's records, even though they used the same account. Respondent spoke with Cantini, who assured him there was no need for concern."; noting that approximately six months later he again received notice of his colleague's trust account irregularities, and eventually filed a bar complaint; "Later, in July 1994, a new associate informed respondent that Cantini had improperly taken money from the trust account for travel expenses that were never incurred, and that there were other irregularities in Cantini's handling of funds. On July 21, 1994, respondent admitted to another attorney that the account did not balance and that he was trying to determine what should be done. Respondent filed an ethics complaint against Cantini on August 30, 1994, stating that he believed Cantini was taking money from the client trust account without proper accounting."; rejecting the lawyer's argument that he had not waited too long; "Respondent first argues that the Board erred in concluding that he took too long to report the mishandling of the client trust account by Cantini. He claims that the

stipulation of facts does not support a finding that he learned of the trust account misconduct before July 1994. We disagree. The stipulation of facts disclosed a conflict between the recollection of respondent and that of his secretary and bookkeeper, and the Board was necessarily required to resolve the conflict. Indeed, the stipulation states that respondent 'was again told about trust account irregularities' . . . in 1994, making it clear that respondent had notice of trust account irregularities earlier, but does not now recall that notice. Thus, there was evidence to support the Board's finding that respondent was warned that there was a problem with the trust account nine months before he reported the irregularities to the Board. On this point, we discern no error." (emphasis added)).

In In re Himmel, 533 N.E.2d 790 (Ill. 1988), Illinois lawyer James Himmel represented Tammy Forsberg. She hired Himmel to represent her in dealing with her former lawyer John Casey -- who had represented Forsberg in a personal injury and property damage case following her motorcycle accident. Casey had settled Forsberg's case for \$35,000, but kept the entire amount himself instead of sending two-thirds of it to Forsberg.

Forsberg hired Himmel in an effort to obtain two-thirds of the settlement to which she was entitled. Himmel's retainer agreement entitled him to one third of any funds that he recovered above the settlement amount to which Forsberg was entitled. Himmel reached an agreement with Casey, under which Casey was to pay \$75,000 to Forsberg, and Forsberg "agreed not to initiate any criminal, civil, or attorney disciplinary action against Casey." Id. at 791.

However, Casey violated this agreement too, and Himmel represented Forsberg in obtaining a \$100,000 judgment against Casey for breaching that agreement. Himmel's efforts yielded \$15,400 from Casey (it is unclear when or how this payment occurred). Because Himmel did not recover any amount for his client Forsberg above

the settlement amount to which she was originally entitled, he recovered no fee for the representation.

Forsberg eventually complained about Casey to Illinois Attorney Registration and Disciplinary Commission ("ARDC").

The ARDC suspended and disbarred Casey -- then pursued its own complaint against Himmel for not having reported Casey's misappropriation of Forsberg's settlement money.

Ironically, the Illinois Supreme Court eventually punished Himmel more harshly than the ARDC had recommended.

The Hearing Board concluded that Himmel had received 'unprivileged information' about Casey's violations and therefore should have reported his actions to the disciplinary authorities. However, because Himmel had practiced law for eleven years, had no prior record of any complaints, and did not even receive a fee for recovering what money he could for Ms. Forsberg, the Hearing Board (the initial disciplinary authority of the ARCD) said that it recommended only a private reprimand. The administrator of the ARDC appealed that decision to the Review Board. On this level the ARCD was even less successful, for the Review Board recommended that the complaint be dismissed. First, the Review Board concluded that the disciplinary authorities already had knowledge of Casey's problem, from Ms. Forsberg herself. Second, it noted that Ms. Forsberg had specifically instructed Himmel not to report Casey to the disciplinary authorities or to anybody else. Then, the administrator of the ARDC filed before the Illinois Supreme Court a petition for leave to file exceptions. He argued, among other things, that there was misconduct in failing to inform the disciplinary commission of Casey's conversion of Ms. Forsberg's fund and that this conduct warranted at least a censure under the law. The Illinois Supreme Court responded by imposing a much more severe sanction: it suspended Himmel for one year.

Ronald D. Rotunda, The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of Himmel, 1988 U. Ill. L. Rev. 977 (emphases added).

The Illinois Supreme Court rejected all of Himmel's arguments before suspending him for one year.

First, the court rejected Himmel's contention that his failure to report Casey was immaterial, because Forsberg reported him.

We begin our analysis by examining whether a client's complaint of attorney misconduct to the Commission can be a defense to an attorney's failure to report the same misconduct. Respondent offers no authority for such a defense and our research has disclosed none. Common sense would dictate that if a lawyer has a duty under the Code, the actions of a client would not relieve the attorney of his own duty. Accordingly, while the parties dispute whether or not respondent's client informed the Commission, that question is irrelevant to our inquiry in this case. We have held that the canons of ethics in the Code constitute a safe guide for professional conduct, and attorneys may be disciplined for not observing them. (In re Yamaguchi (1987), 118 Ill. 2d 417, 427, citing In re Taylor (1977), 66 Ill. 2d 567.) The question is, then, whether or not respondent violated the Code, not whether Forsberg informed the Commission of Casey's misconduct.

In re Himmel, 533 N.E.2d at 792 (emphasis added).

Second, the court rejected Himmel's argument that his failure to report Casey should not be punished because Forsberg had directed him to refrain from reporting Casey.

As to respondent's argument that he did not report Casey's misconduct because his client directed him not to do so, we again note respondent's failure to suggest any legal support for such a defense. A lawyer, as an officer of the court, is duty-bound to uphold the rules in the Code. The title of Canon 1 (107 Ill. 2d Canon 1) reflects this obligation: 'A lawyer should assist in maintaining the integrity and competence of the legal profession.' A lawyer may not

choose to circumvent the rules by simply asserting that his client asked him to do so.

Id. at 792-93.

Third, the court rejected Himmel's argument that his knowledge of Casey's wrongdoing did not fall within the reach of Illinois' then-current ethics rule requiring disclosure.

"A lawyer possessing unprivileged knowledge of a violation of Rule 1 -- 102(a)(3) or (4) shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation."

Id. at 793 (emphasis added) (internal citation omitted).

The court found that Himmel's knowledge was not protected by the attorney-client privilege.

The question whether the information that respondent possessed was protected by the attorney-client privilege, and thus exempt from the reporting rule, requires application of this court's definition of the privilege. We have stated that "(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived." . . . We agree with the Administrator's argument that the communication regarding Casey's conduct does not meet this definition. The record does not suggest that this information was communicated by Forsberg to the respondent in confidence. We have held that information voluntarily disclosed by a client to an attorney, in the presence of third parties who are not agents of the client or attorney, is not privileged information. . . . In this case, Forsberg discussed the matter with respondent at various times while her mother and her fiancé were present. Consequently, unless the mother and fiancé were agents of respondent's client, the information communicated was not privileged. Moreover, we have also stated that matters intended by a client for disclosure by the client's attorney to

third parties, who are not agents of either the client or the attorney, are not privileged. . . . The record shows that respondent, with Forsberg's consent, discussed Casey's conversion of her funds with the insurance company involved, the insurance company's lawyer, and with Casey himself. Thus, under Werhollick [People v. Werhollick, 259 N.E.2d 265 (1970)] and probably Williams [People v. Williams, 454 N.E.2d (1983)], the information was not privileged.

Id. at 794 (emphases added).

Fourth, the court rejected Himmel's argument that he should not be punished because "he has received no fee for his representation of Forsberg." Id. at 793.

Though respondent repeatedly asserts that his failure to report was motivated not by financial gain but by the request of his client, we do not deem such an argument relevant in this case. This court has stated that discipline may be appropriate even if no dishonest motive for the misconduct exists.

Id. at 794 (emphasis added).

Himmel made quite a splash in Illinois.

Himmel is significant not only because it disciplines a lawyer solely for the failure to report (there were no other disciplinary charges filed against Mr. Himmel) but primarily because it interprets the word 'privilege' in Illinois Rule 1-103(a) very narrowly and differently than the way the ABA uses the very same term in the Model Code. Illinois interprets 'privileged' in its ethics code to exclude the ethical privilege. It is now clear under Illinois law that a lawyer who has knowledge of another lawyer's disciplinary violations must report those violations unless that knowledge is protected by the very narrow attorney-client evidentiary privilege. Attorneys should now realize that if they fail their reporting obligation under Himmel they have no protection based on the claim that they were obeying the 'secret' requirement of Illinois Rule 4-101(a).

Ronald D. Rotunda, The Lawyer's Duty to Report Another Lawyer's Unethical Violations in the Wake of Himmel, 1988 U. Ill. L. Rev. 977 (footnote omitted).

Not surprisingly, after Himmel Illinois lawyers' reporting of other lawyers' ethics violations rose dramatically.

In In re Himmel, the Illinois Supreme Court penalized an attorney to a one-year suspension for the sole purpose of failing to report the misconduct of another attorney. This decision sent shock waves through the legal community because it was the first instance of a lawyer receiving a substantial penalty for failing to comply with the duty to report. The incidences of an attorney reporting another attorney's professional misconduct skyrocketed in Illinois after Himmel. The year before Himmel, 154 Illinois attorneys reported the misconduct of other attorneys to disciplinary authorities. The following year, after Himmel, the number of attorneys reporting ethical violations jumped to 922. Illinois continues to have the highest rate of attorney complaints regarding the misconduct of other attorneys.

Nikki A. Ott & Heather F. Newton, A Current Look at Model Rule 8.3: How Is It Used and What Are Courts Doing About It, 16 Geo. J. Legal Ethics 747, 756-57 (2003)
(footnotes omitted) (emphasis added).

Illinois disciplinary lawyers apparently attributed the increase to lawyers' decision to report violations they might have otherwise kept secret.

The year after the Himmel decision, the Illinois Attorney Registration and Disciplinary Commission received 922 complaints from lawyers reporting other practitioners' alleged misconduct. While disciplinary authorities had not previously kept track of the percentage of complaints originated by lawyers, they acknowledge the number was skyrocketing. 'It was almost like a cathartic experience, that lawyers were hiding stuff and feeling bad about it,' says James Grogan, chief counsel of the state agency.

Laura Gatland, The Himmel Effect, 83 A.B.A.J. 24 (1997) (emphasis added).

The ABA and the Restatement have distanced themselves from the Himmel result -- focusing on the unique Illinois Rule that required disclosure of other lawyers' misconduct despite the ethics confidentiality duty.

There are few reported decisions where a lawyer has been disciplined solely for failing to report the misconduct of another lawyer. These decisions are not particularly instructive in the context of this opinion. The most widely known decision is *In re Himmel*, 533 N.E. 2d 79 (Ill. 1988). Himmel, however, was not decided under the Model Rules, but rather under the Illinois version of the Model Code of Professional Responsibility. The Illinois Supreme Court limited the confidentiality afforded by the Illinois Code of information protected by the attorney-client privilege. This is much narrower than the scope of protection afforded to confidential information by the Model Rules. A second decision, *In re Condit*, No. SB-94-0021-D (Ariz. Mar. 14, 1995) is an unpublished decision of the Arizona Supreme Court in which the court publicly censured a lawyer for violating the Arizona analog of Model Rule 8.3. Due to the procedural nature of the case, the court acknowledged, but did not address, the tension between Rules 1.6 and 8.3.).

ABA LEO 433 (8/25/04) (emphasis added).

The Restatement also distinguishes Himmel from its provisions.

On the confidentiality exception, the Comment rejects the position of the well-known case of *In re Himmel*, 533 N.E.2d 790 (Ill.1988). While disclosure was required by the court, even if it involved disclosure of confidential client information, it would not have been required under the confidentiality exception stated in Subsection (3) and the Comment. The court limited the confidentiality exception to only such information as was protected against disclosure under the attorney-client privilege. However, the exception stated in the lawyer codes of the great majority of states is much broader. In those states, most information known within a law firm will be subject to the general confidentiality obligation. Thus, the disclosure requirement operates for one lawyer with respect to the wrongdoing of another only with respect to wrongdoing of such a nature when its revelation would either (1) not be materially adverse to the interests of the client whose information would be involved in the disclosure or (2) involve only information that is not confidential.

Restatement (Third) of Law Governing Lawyers § 5 reporter's note, cmt. i (2000)

(emphasis added).

Illinois adopted new ethics rules on January 1, 2010, incorporating its unique Himmel approach in the new rules. The current Illinois Rule 8.3 states as follows:

A lawyer who knows that another lawyer has committed a violation of Rule 8.4(b) or Rule 8.4(c) shall inform the appropriate professional authority.

Illinois Rule 8.3(a).

A commentator explained the reach of the new Illinois rule.

The new rules largely follow the old rules in continuing Illinois's unique approach to a lawyer's duty to report another lawyer's misconduct. The new rules differ in some respects from the old rules, and differ dramatically from the ABA Model Rules. A comment to the new rules cites the famous Himmel case, which highlighted Illinois's unique approach to this issue.

The new rules follow the old rules in articulating an exception to the reporting requirement but use a different phrase that could generate some confusion. The new rules require a lawyer to report another lawyer's misconduct, under the specified circumstances, unless, among other things, the information deserves protection under the "attorney-client privilege or by law." The old rules required reporting unless the information deserved protection "as a confidence by these Rules or by law." This recognition of privileged rather than confidential communications as an exception to the reporting requirement is consistent with Illinois legal ethics opinions.

However, it is important to note that the old rules defined "confidence" as "information protected by the lawyer-client privilege under applicable law." That term appeared in the old rules' formulation of a lawyer's basic duty of confidentiality, which covered "a confidence or secret of the client."

That old formulation, taken from the old ABA Model Code, has now been replaced in the basic confidentiality provision with the broader ABA Model Rules formulation, "information relating to the representation of a client." Under this new formulation, the new rules do not contain a definition of the term "confidence." Thus, switching the phrase "confidence"

to "attorney-client privilege" does not change the meaning, but instead follows the old approach.

Thomas E. Spahn, A Practical Road Map to the New Illinois Ethics Rules, 35 S. Ill. U. L.

J. 27, 116-17 (2010) (footnotes omitted).

The new rules contain a slight revision.

The new rules differ from the old rules in one way. The new rules require reporting to "the appropriate professional authority." A comment to the new rules explains that lawyers should report another lawyer's misconduct to the Illinois Attorney Registration and Disciplinary Commission unless another "agency is more appropriate in the circumstances." The old rules required reporting to "a tribunal or other authority empowered to investigate or act upon such violation."

The removal of the "tribunal" reference follows the ABA Model Rules approach, and provides more specific guidance to lawyers analyzing their duties. The change also relieves tribunals of both the burden of handling ethics charges and the uncertainty of what remedies they might impose.

Id. at 117.

Illinois's version of Rule 8.3 differs from the ABA Model Rules approach in several other ways.

The new rules differ dramatically from the ABA Model Rule in eight ways. First, the new rules require a lawyer to report to "the appropriate professional authority" another lawyer's criminal act "that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respect" or other conduct "involving dishonesty, fraud, deceit or misrepresentation." The ABA Model Rules require a lawyer to report another lawyer's ethics violation only if it "raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects."

Although that phrase is embedded in the new rules' reference to criminal wrongdoing, it does not appear in the new rules reference to "conduct involving dishonesty, fraud, deceit, or misrepresentation." This means that under the

new rules a lawyer must report such misconduct even if it does not meet the higher "substantial question" standard. Thus, the new rules are broader than the ABA Model Rules.

Second, the new rules only require a lawyer to report another lawyer's violation of the two specific ethics rules mentioned immediately above. The ABA Model Rules require reporting another lawyer's violation of any ethics rule. Thus, the new rules seem to have a narrower range than the ABA Model Rules. However, the absence of the ABA Model Rule's "substantial question" standard as a practical matter expands a lawyer's reporting obligation under the new rules.

Third, the new rules do not require a lawyer to report another lawyer's misconduct if it would require disclosure of information "otherwise protected by the attorney-client privilege or by law." The ABA Model Rules relieve a lawyer of a reporting obligation if it would disclose information otherwise protected by the basic confidentiality duty, which covers all "information relating to the representation of a client."

This ABA Model Rule exception covers a much broader range of information than the attorney-client privilege, which generally protects only communications between lawyers and clients. An ABA Model Rule comment explains that the basic confidentiality duty "applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."

The new rules therefore require a lawyer to report another lawyer's misconduct if the disclosure would reveal information that the reporting lawyer learns from anyone but a client while the ABA Model Rules would not require reporting in that circumstance, because such information might not be privileged, but would still be "information relating to the representation of a client" that falls within the basic confidentiality duty. Thus, to this extent the reporting requirement in the new rules is broader than the ABA Model Rules.

Fourth, the new rules relieve a lawyer's obligation to disclose another lawyer's misconduct if it would require disclosure of information gained from the lawyer's participation in "an approved lawyers' assistance program" or court-approved

"intermediary program" handling "nondisciplinary complaints" against lawyers. The ABA Model Rules refer only to "an approved lawyers assistance program." This difference does not seem material.

Fifth, a lawyer disciplined by any body other than the Illinois Attorney Registration and Disciplinary Commission must report that discipline to the Commission. The ABA Model Rules do not contain a similar provision.

Sixth, a comment to the new rules explains that lawyers should report another lawyer's misconduct to the Illinois Attorney Registration and Disciplinary Commission, unless another "agency is more appropriate in the circumstances." The ABA Model Rules do not contain a similar provision.

Seventh, the new rules contain a comment exempting from the reporting requirement a lawyer retained by another lawyer to advise whether that lawyer had a duty to report a third lawyer's misconduct. The ABA Model Rules exemption only covers a lawyer retained to represent a lawyer "whose professional conduct is in question," not a lawyer seeking advice about her reporting obligations.

This added exemption seems unnecessary, because the attorney-client privilege exception presumably would cover communications between the lawyer/client seeking advice about her reporting obligations and the lawyer providing such advice.

Eighth, the new rules prohibit lawyers from entering into an agreement with current or former clients limiting their right to file a bar complaint about the lawyer's conduct. The ABA Model Rules do not contain such a provision, although such an agreement might violate other more general ethics rules.

Id. at 117-19.

Thus, the Illinois version of ABA Model 8.3 has a narrower reach than the ABA Model Rules, but a more explicit duty if another lawyer's ethics violation falls within the narrow range of misconduct requiring such a report.

First, Illinois lawyers' duty to report another lawyer's ethics violation arises only if the other lawyer is engaged in (1) "a criminal act," or (2) conduct "involving dishonesty, fraud, deceit or misrepresentation." Ill. Rule 8.4(b)-(c). Lawyers' duty to report the first type of misconduct arises only if the violation meets the ABA Model Rules standard of raising "a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects." ABA Model Rule 8.3. However, lawyers' obligation to report the second type of misconduct does not contain that qualifier. In essence, lawyers have an absolute duty to report such misconduct by another lawyer, even if it does not raise such a "substantial question." In contrast, ABA Model Rule 8.3 requires lawyers to report another lawyer's violation of any ethics rule -- applying the "substantial question" standard to such a reporting obligation.

Second, the Illinois Rule forgives lawyers for failing to report another lawyer's sufficiently egregious ethics violations only if the information they possess is privileged. In contrast, the ABA Model Rules forgive a failure to report if the lawyer's information falls within the much broader ABA Model Rule 1.6 definition of protected client information -- any "information relating to the representation of a client" (even if that information is not privileged). ABA Model Rule 1.6(a).

Best Answer

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

B 5/15, 8/15, 2/17

Confidentiality Duty's Role

Hypothetical 23

You represent the ex-wife of a prominent local lawyer, who has been receiving substantial alimony payments since the divorce. Your client just told you that her ex-husband has been stealing from his clients' trust accounts to pay her alimony. For obvious reasons, she does not want you to report her ex-husband to the bar.

What do you do?

- (A) You must disclose the trust account theft.
- (B) You may disclose the trust account theft, but you don't have to.
- (C) You may not disclose the trust account theft, unless your client consents.

(C) YOU MAY NOT DISCLOSE THE TRUST ACCOUNT THEFT, UNLESS YOUR CLIENT CONSENTS (PROBABLY)

Analysis

Among the most important limitations on lawyers' reporting duty involves the source of the information alerting the reporting lawyer of another lawyer's sufficiently egregious misconduct.

ABA Canons, Code and Rules

The 1908 ABA Canons of Professional Ethics included two specific provisions requiring lawyers to report other lawyers' misconduct in two particular scenarios. Canon 28 required lawyers "having knowledge of" other lawyers' stirring up of litigation to report them "to the end that the offender may be disbarred." Canon 29 explained that lawyers "should expose" other lawyers' "corrupt or dishonest conduct" without "fear or favor before the proper tribunals."

Thus, the Canons did not explicitly address confidentiality's role in the analysis. However, given the very specific scenarios covered by the Canons, it seems unlikely that the reporting lawyer's information would have met any standard of confidentiality -- given the litigation-related nature of the misconduct.

Under the 1969 ABA Model Code of Professional Responsibility:

A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

ABA Model Code of Professional Responsibility, DR 1-103(A) (emphasis added).

Use of the term "unprivileged knowledge" was more significant than one might have thought at first blush. Under the ABA Model Code, lawyers' confidentiality duty extended to "confidences and secrets." ABA Model Code of Professional Responsibility, DR 4-101(B).

The ABA Model Code defined those terms very precisely:

'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

ABA Model Code of Professional Responsibility, DR 4-101(A) (emphasis added).

One would have thought that the ABA Model Code's reporting rule would have used the term "confidence," because it is defined in the core ABA Model Code provisions.

In any event, taking the reporting rule at face value would require lawyers to report other lawyers' misconduct if their knowledge met the "secrets" standard under the

ABA Model Code but not the narrower "confidence" standard. As a practical matter, this meant that a wider array of information could have triggered lawyers' reporting obligation than that protected by the general confidentiality duty.

Like the earlier ABA Model Code, the 1983 ABA Model Rules of Professional Conduct relieve lawyers of any reporting obligation if their knowledge of other lawyers' misconduct falls within a defined range.

This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

ABA Model Rule 8.3(c) (emphasis added).

Significantly, this array of information that does not trigger lawyers' reporting obligations extends far beyond that in the earlier ABA Model Code.

As explained above, the ABA Model Code only relieved lawyers of a reporting obligation if they learned of other lawyers' misconduct in privileged communications. This is a very narrow type of communication between clients and their lawyers, taking place in confidence and maintained in confidence. In sharp contrast, the ABA Model Rules' confidentiality duty protects all "information relating to the representation of a client." ABA Model Rule 1.6(a).

A comment explains that this type of protected client information includes information acquired from someone other than the client.

The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule

of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

ABA Model Rule 1.6 cmt. [3] (emphasis added).

The ABA Model Rules thus relieve lawyers of a reporting duty if they learn of other lawyers' misconduct from information acquired in a much broader context than under the ABA Model Code. This has the effect of diminishing lawyers' reporting obligation.

An interesting mismatch between the black letter ABA Model Rule 8.3 and an explanatory comment might result in some confusion about the role of confidentiality in analyzing lawyers' reporting obligation.

ABA Model Rule 8.3(c) indicates that a reporting obligation does not include information "otherwise protected by Rule 1.6."

This rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

ABA Model Rule 8.3(c) (emphasis added)). This would seem to exclude from the reporting obligation information that is defined as protected under ABA Model Rule 1.6.

But there are several exceptions to ABA Model Rule 1.6 that either require or permit disclosure of information that is protected by ABA Model Rule 1.6. The black letter ABA Model Rule 8.3(c) would seem to ignore those exceptions -- because it excludes from the reporting obligation the information initially covered by ABA Model Rule 1.6 -- before considering the mandatory or discretionary exceptions.

However, the pertinent ABA Model Rule 8.3 comment makes it clear that the black letter rule only excepts from the mandatory disclosure obligation information still protected by ABA Model Rule 1.6 after considering the exceptions.

A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

ABA Model Rule 8.3 cmt. [2] (emphasis added)).

Thus, the mandatory reporting obligation's confidentiality exception does not really include all information protected by ABA Model Rule 1.6. Instead, it extends only to information that must not be disclosed or may not be disclosed without the client's consent. This obviously covers a much smaller range of information than that initially protected by ABA Model Rule 1.6.

The ABA Model Rules suggest that lawyers seek their clients' consent to disclosure of other lawyers' sufficiently egregious misconduct.

A report about misconduct is not required where it would involve violation of Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

ABA Model Rule 8.3 cmt. [2] (emphasis added).

Restatement

The Restatement section dealing with this issue essentially parallels the ABA Model Rules approach.

A lawyer who knows of another lawyer's violation of applicable rules of professional conduct raising a substantial question of the lawyer's honesty or trustworthiness or the lawyer's fitness as a lawyer in some other respect must report that information to appropriate disciplinary authorities.

Restatement (Third) of Law Governing Lawyers § 5(3) (2000).

The Restatement acknowledges a debate about the confidentiality duty's interaction with the disclosure duty.

The rule is . . . criticized on the ground that it may require a lawyer to take action contrary to the best interests of the lawyer's client, unless the confidentiality exception is interpreted so broadly as to make the requirement quite narrow in scope. The rule is defended as important for effective disciplinary enforcement because lawyers are much more likely than others to be aware of such violations and as an aspect of lawyer self-regulation.

Restatement (Third) of Law Governing Lawyers § 5 cmt. i (2000).

Like the ABA Model Rules, the Restatement explains that the confidentiality duty trumps the reporting obligation.

The duty to disclose wrongdoing by another lawyer typically does not require disclosure of confidential client information protected as stated in § 60. If disclosure of such information is subject to an exception, for example because a client has consented to its disclosure for that purpose . . . , the duty to disclose applies.

Restatement (Third) of Law Governing Lawyers § 5 cmt. i (2000) (emphasis added).

Of course, the Restatement takes a narrower view of the type of information covered by lawyers' confidentiality duty.

Among other things, the Restatement's definition of protected client information excludes information that is "generally known."

Confidential client information does not include information that is generally known. Such information may be employed by lawyer who possesses it in permissibly representing other clients . . . and in other contexts where there is a specific justification for doing so Information might be generally known at the time it is conveyed to the lawyer or might become generally known thereafter. At the same time, the fact that information has become known to some others does not deprive it of protection if it has not become generally known in the relevant sector of the public.

Restatement (Third) of Law Governing Lawyers § 59 cmt. d (2000) (emphasis added).

ABA Legal Ethics Opinions

In 1940, an ABA legal ethics opinion warned that a lawyer's confidentiality duty prevented the lawyer from reporting misconduct by a trust company client's officers who were bar members.

- ABA LEO 202 (5/25/40) (analyzing the ethics implications of a trust company's lawyer who has learned that a manager hired by trust beneficiaries to oversee property transactions and pay the proceeds to the trust company has embezzled money -- creating a liability for the trust company to the beneficiaries; explaining that a trust company officer requests the lawyer to draft a contract under which the embezzling manager will purchase the beneficial interest in the trust -- which the lawyer advises will be proper only if the trust company discloses the embezzlement to the beneficiaries; further explaining that the lawyer later learns that a manager has purchased the beneficiaries' interest at nominal prices, and without the disclosure of the embezzlement "with the apparent purpose of eliminating the beneficiaries and concealing from them [the manager's] embezzlements in the trust company's liability"; noting that the lawyer then learns that the trust company's general counsel knew of this action; concluding that the lawyer may not disclose the manager's embezzlement to the beneficiaries without the trust company's consent, because the purchase transaction has already been consummated; also concluding that the lawyer may advise the trust company's board of directors of the situation, but may not start disciplinary proceedings against trust company officers acting as lawyers without the trust company's consent -- although the lawyer may disclose confidential

client information if the trust company makes a false accusation against the lawyer; "Knowledge of the facts respecting B's defalcations, the trust company's liability therefor, and the plan to purchase the outstanding certificates was imparted to A as attorney for the trust company, and was acquired during the existence of his confidential relations with the trust company. He may not divulge confidential communications, information, and secrets imparted to him by the client or acquired during their professional relations, unless he is authorized to do so by the client."; "Had A been advised that the trust company intended to carry out the plan to purchase the outstanding certificates without making the disclosures which he advised should be made, and if such transaction would have constituted an offense against criminal law when carried out, he might have made disclosure at that time."; "But, since it does not appear that A was advised of such intention on the part of the trust company, and since the transaction has been consummated, we conclude the exception is not applicable and that A must keep the confidences of his client inviolate."; "Since, however, the board of directors of the trust company is its governing body, we think A, with propriety, may and should make disclosures to the board of directors in order that they make take such action as they deem necessary to protect the trust company from the wrongful acts of its executive officers. Such a disclosure would be to the client itself and not to a third person."; "We are of the opinion that A may not, without consent of the trust company, institute disciplinary action against the officers of the trust company who are members of the Bar, if to do so would involve a disclosure of confidential communications to A." (emphasis added); "Neither do we think A may initiate, without consent of the trust company, any proceeding to protect himself which would involve a disclosure of such confidential communications. He would be justified in making disclosure only if he should be subject to false accusation by the trust company." (emphasis added)).

In several legal ethics opinions issued over a multi-year period in the early 2000s, the ABA repeatedly addressed the confidentiality issue.¹

¹ Although lawyers rarely deal with the ethics rules governing their duty to disclose fellow lawyers' serious misconduct, the ABA issued a flurry of legal ethics opinions in a very short period of time that deal with the issue: ABA LEO 429 (6/11/03) ("Obligations with Respect to Mentally Impaired Lawyer in the Firm"); ABA LEO 431 (8/8/03) ("Lawyer's Duty to Report Rule Violations by Another Lawyer Who May Suffer from Disability or Impairment"); ABA LEO 433 (8/25/04) ("Obligation of a Lawyer to Report Professional Misconduct by a Lawyer Not Engaged in the Practice of Law"); ABA LEO 449 (8/9/07) ("Lawyer Concurrently Representing Judge and Litigant Before the Judge in Unrelated Matters"). The ABA rarely deals so frequently with the same topic in such a short period of time.

In ABA LEO 429, the ABA addressed lawyers' obligations in connection with impaired law firm colleagues. In discussing the law firm's possible obligation to report ethics breaches by the impaired colleague, the ABA addressed the confidentiality issue.

Subject to the prohibition against disclosure of information protected by Rule 1.6, however, partners in the firm may voluntarily report to the appropriate authority its concern that the withdrawing lawyer will not be able to function without the ongoing supervision and support the firm has been providing.

ABA LEO 429 (6/11/03) (emphasis added).

Later that year, the ABA dealt with the reporting obligation's applicability to lawyers who might be suffering from an impairment in ABA LEO 431. Among other things, ABA LEO 431 emphasized the confidentiality issue.

If a lawyer concludes there is material impairment that raises a substantial question about another lawyer's fitness to practice, his obligation ordinarily is to report to the appropriate professional authority. As we said in ABA Formal Opinion 03-429, however, if information relating to the representation of one's own client would be disclosed in the course of making the report to the appropriate authority, that client's informed consent to the disclosure is required.

ABA LEO 431 (8/8/03) (emphasis added).

ABA LEO 431 then offered an analysis that seem incorrect on its face.

In the usual case, information gained by a lawyer about another lawyer is unlikely to be information protected by Rule 1.6, for example, observation of or information about the affected lawyer's conduct in litigation or in the completion of transactions. Given the breadth of information protected by Rule 1.6, however, the reporting lawyer should obtain the client's informed consent to the disclosure in cases involving information learned in the course of representation through interaction with the affected lawyer.

Id. (footnote omitted) (emphasis added).

It is odd that the ABA would indicate that ABA Model Rule 1.6 is "unlikely" to cover information such as a lawyer's "observation of or information about the affected lawyer's conduct in litigation or in the completion of transactions." That information would seem to fall squarely within a ludicrously overbroad definition of protected client information of Rule 1.6: "information relating to the representation of a client." This type of statement highlights what seems to be the ABA's buyer's remorse about having adopted such an overbroad confidentiality duty.

Just one year later, the ABA dealt with the reporting obligation's application to lawyers who are not practicing law in ABA LEO 433. Among other things, the ABA acknowledged ABA Model Rule 1.6's preeminence.

According to the Annotation to Rule 8.3, "[t]he duty to report misconduct is subordinate to the duty of confidentiality set forth in Rule 1.6." Stated more bluntly, Rule 1.6 trumps Rule 8.3.

ABA LEO 433 (8/25/04) (footnote omitted) (emphases added).

ABA 433 then elaborated on that blunt theme.

We also note that Rule 1.6 is not limited to communications protected by the attorney-client privilege or work-product doctrine. Rather, it applies to all information, whatever its source, relating to the representation. Indeed, the protection afforded by Rule 1.6 is not forfeited even when the information is available from other sources or publicly filed, such as in a malpractice action against the offending lawyer.

Within a corporate environment, the reach of Rule 1.6 is particularly wide. Its protection includes any information relating to the representation of any client or any communication with the organization's lawyer by a constituent of the organization in the constituent's organizational capacity.

As a practical matter, clients have the ultimate authority when it comes to protecting confidential information. Hence,

however salutary and indeed important the reporting of misconduct of lawyers may be, under the Model Rules the hands of lawyers are often effectively tied in these situation by the wishes or even whims of their clients.

Id. (footnotes omitted) (emphasis added). ABA 433 then noted that ABA Model Rule 1.6's exceptions would not normally overrule lawyers' primary confidentiality duty.

Although paragraph (b) of Rule 1.6 sets forth a number of exceptions to the prohibition contained in paragraph (a), those exceptions seldom will come into play in the context of reporting the misconduct of another lawyer. For example, Rule 1.6(b)(1) allows a lawyer to reveal information relating to the representation of a client, but only "to prevent reasonably certain death or substantial bodily harm," a circumstance that will most likely be rare. The exception in paragraphs (b)(4), which permits revelations "to comply with other law or court order," also is of limited application in the present context. "Other law" refers to law extraneous to the Model Rules, such as the substantive or procedural law of the jurisdiction.

Id. (footnotes omitted).

This emphasis on ABA Model Rule 1.6's broad scope and narrow exceptions contrasted sharply from recently-issued ABA LEO 431's off-hand but erroneous assurance that ABA Model Rule 1.6 normally would not protect information triggering lawyers' reporting duty.

If the lawyer determines that the information necessary to report the misconduct is protected by Rule 1.6, what should the lawyer do? Comment [2] to Rule 8.3 entreats a lawyer to 'encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.' Any discussion of consent to disclosure, therefore, must include the potential adverse impact that disclosure may have on the client, including the effect on the client's ultimate recovery in a malpractice action, for example.

Clients may have a variety of reasons for not wanting to consent to disclosure of information. For example, they may

be embarrassed by the matter, hesitant to become entangled in the controversy, or simply want the matter to come to an end. As a practical matter, there may be little benefit for the client in consenting to report the misconduct to the disciplinary authorities.

Nevertheless, we believe it would be contrary to the spirit of the Model Rules for the lawyer not to discuss with the client the lawyer's ethical obligation to report violations of the Rules. In essence, this would allow the lawyer to circumvent them.

Id. (footnotes omitted) (emphases added).

As in other areas, ABA LEO 433's lofty reference to the rules' "spirit" means that the rules themselves have totally missed the boat. And ABA LEO 433's acknowledgment that lawyers understandably relying on the rules rather than some amorphous "spirit" can "circumvent" their reporting obligations demonstrates that the ABA Model Rules' gap has real consequences.

Just a few years later, the ABA again dealt with the reporting obligation in ABA LEO 453 -- in connection with law firms' in-house lawyers. ABA LEO 453 acknowledged the confidentiality issues.

Rule 8.3 does not apply if the lawyer's knowledge of the misconduct is 'information relating to the representation of a client' as protected by Rule 1.6. Whether the ethics counsel's only client is the firm or is both the firm and one or more constituent lawyers, in most cases the information the ethics counsel has about a constituent lawyer's misconduct will be information relating to the representation of the ethics counsel's client, the law firm, and therefore the mandatory reporting requirement of Rule 8.3(a) will be subject to the firm's consent. The knowledge might also be based on the confidential information of the firm's client, also protected by Rule 1.6, and thus subject to the client's consent.

ABA LEO 453 (10/17/08) (emphasis added).

As in previous legal ethics opinions, ABA LEO 453 encouraged lawyers to seek their clients' consent to disclosure of other lawyers' misconduct.

Although the ethics counsel may not be required to report certain violations of professional conduct rules, Rule 8.3 Comment [2] exhorts a lawyer 'to encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.' Accordingly, the ethics counsel should encourage the law firm and, if appropriate, the client, to report the misconduct of a firm member where doing so would not have a substantial adverse effect on their respective interests. In the rare situation where the ethics counsel represents both the individual lawyer and the law firm, adherence to Comment [2] will be problematic, because encouraging the law firm to disclose the misconduct would conflict with the ethics counsel's duty to protect the interests of the consulting lawyer. Ethics counsel would be required in that situation by Rule 1.7(b)(1) to withdraw from continuing to represent either the law firm or the consulting lawyer in the matter, and, absent an exception to Rule 1.6, would not be allowed to disclose the misconduct.

Id. (footnotes omitted) (emphasis added).

Significantly, ABA LEO 453 then explained that firm lawyers other than the firm's in-house lawyer cannot rely on the confidentiality exception -- unless their information comes from firm clients.

The reporting exception for the ethics counsel does not apply to lawyers involved in the law firm's management or to other lawyers in the firm. They do not have a client-lawyer relationship with their errant colleague, and they are not excused from reporting to the disciplinary authority unless their knowledge is based on confidential information of a firm client. If the misconduct is sufficiently serious, under Rule 1.4(a)(1), the firm client should be informed that reporting one's colleague is required by Rule 8.3(a), subject to the client's consent as required by Rule 8.3(c). In Formal Op. 04-433, we acknowledged the awkwardness and potential discomfort associated with reporting the misconduct of a colleague, particularly a superior. Despite the difficulty of reporting, the Preamble to the Model Rules, paragraph [12],

reminds lawyers that: "Every lawyer is responsible for observance of the Model Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves."

Id. (footnote omitted) (emphasis added).

State Variations

States' various approaches to lawyers' confidentiality duty define the type of information that can trump lawyers' reporting duty.

The broader the confidentiality duty, the narrower the reporting requirement.

Of course, if the information does not fall under a jurisdiction's Rule 1.6, a lawyer must comply with the reporting requirement without regard to any countervailing confidentiality duty.

- District of Columbia LEO 270 (03/97) (explaining that a lawyer must report a colleague's conduct involving deception to clients; "Inquirer, a lawyer, was hired through a temporary employment agency to work for a sole practitioner on a particular matter. In the course of the first few days of inquirer's work, the employing lawyer informed her that his client in the matter had recently insisted that he write an aggressive letter to a third party, despite the lawyer's advice that sending such a letter was imprudent. The employing lawyer further advised inquirer that when the client made such demands in the past, his practice was to draft a letter that would satisfy the client's wishes but not send it to the addressee. Instead, the employing lawyer sent a copy of the letter to the client to make it appear to the client that the letter had been sent to the addressee. The employing lawyer did not explain when these events had taken place and did not ask inquirer to draft a fictitious letter."; "Where a subordinate lawyer learns that an employing lawyer has sent a client what purports to be copies of correspondence written on the client's behalf, but where the letters were, in fact, never sent, the subordinate lawyer has a duty to assure that the client is informed of the deception and to report the employing lawyer to disciplinary authorities. These duties continue after the subordinate lawyer resigns upon learning of the deception."; "It is clear that a subordinate lawyer could report the violation without disclosing client confidences or secrets. The only 'secret' here was that the employing lawyer was deceiving the client." (emphasis added)).

- In re Silva, 636 A.2d 316, 316, 316-17, 317 (R.I. 1994) ("The board found that Silva violated several provisions of the Rules of Professional Conduct when he failed to report a diversion of mortgage funds by his long-time friend Edward Medeiros. Silva served as counsel to Medeiros's mortgage company, Medcon Mortgage Corporation (MEDCON), and Suncoast Savings and Loan of Hollywood, Florida (Suncoast). In his capacity as closing attorney for Suncoast, Silva received wire transfers of mortgage proceeds in his client account. Upon receipt of the wire transfers from Suncoast, Silva simply turned the proceeds over to Medeiros and/or MEDCON for disbursement. In the fall of 1990 Silva learned that Medeiros had diverted funds from a closing funded by Suncoast in which Silva acted as closing attorney."; "The respondent's position before the board and this court is that he was prohibited from disclosing Medeiros's defalcation by the provisions of Rule 1.6 of the Rules of Professional Conduct. Respondent also took the position that he had no obligation to protect Suncoast's interests. We do not agree with either of his contentions."; "Silva did not appear to appreciate and understand to whom he owed the duty of confidentiality. It is apparent from this record, however, that he was counsel to the corporate entity MEDCON, and therefore, it was to MEDCON he owed the duty of confidentiality. Silva's dealings with Medeiros did not establish the attorney/client relationship that would trigger the application of the prohibitions against disclosure encompassed in Rule 1.6. Therefore, Silva's obligations to both Suncoast and MEDCON required him to disclose Medeiros's overt criminal act of conversion of the funds."; inexplicably failing to discuss the Rule 1.13 implications." (emphasis added)).

Most states follow the ABA Model Rule approach.

- Oregon LEO 2005-95 (Revised 4/14) (analyzing the effect of a lawyer's Rule 1.6 confidentiality duty on the reporting obligation; presenting the scenario: "During the course of representing Client, Lawyer A learns that Lawyer B, who formerly represented Client, and Lawyer C, who never represented Client, have violated the Oregon RPCs."; "When Lawyer A discusses these observations with Client, Client informs Lawyer A that Client does not wish Lawyer A to report these violations to the Oregon State Bar because doing so could embarrass Client or could otherwise harm Client."; ultimately concluding that Rule 1.6 reporting obligations trumped the reporting obligation; "Pursuant to this rule, a lawyer may not report another lawyer's Oregon RPC violation if the source of knowledge of the violation is protected by Oregon RPC 1.6 or ORS 9.460(3), unless one of the exceptions permitting disclosure is present." (emphasis added)).
- Pennsylvania LEO 2014-025 (07/14/14) (analyzing a lawyer's disclosure duty upon learning that a new client lied while being represented by a previous lawyer; noting that the previous lie would necessarily require misconduct by the new lawyer; "In this case, Client failed to tell the truth about his

immigration status until after you pressed him for more information. At that point, he told you in confidence that his prior lawyer gave him improper advice – to lie to the USCIS about his length of stay in the U.S. prior to the application for his fiancé visa. You claim that the prior attorney has a reputation in your legal community 'for shoddy and fraudulent work.' If Client's allegation is true, and viewed in light of the prior lawyer's reputation, there appears to be a substantial question about the prior lawyer's honesty, trustworthiness or fitness as a lawyer in violation of Rule 8.3(a).

Nevertheless, Client's credibility is questionable and you do not know for a fact that the prior lawyer advised him to lie to the USCIS or to continue to lie in the application for the conditional green card. Therefore, you are not required to report the alleged misconduct to the Disciplinary Board.";

"However, while investigating whether Client's false statement is contained in a document or record of an interview, you may learn that Client's allegation is true. If you acquire the knowledge that the prior attorney advised Client to lie to the USCIS, then you must report the misconduct to the Disciplinary Board. But, even if you have knowledge that the prior lawyer advised Client to lie to the USCIS, that information is confidential under Rule 1.6 because Client revealed it to you during the course of your legal representation. According to Comment [2] to Rule 8.3, you may only disclose the information about the false statement to the Disciplinary Board if you obtain Client's consent.

Finally, you should encourage Client to provide you with that informed consent, but only if prosecution of the prior attorney will not substantially prejudice Client's interests before the USCIS." (emphasis added)).

- Kentucky LEO E-430 (1/16/10) ("Rule 8.3 provides a number of exceptions to the duty to report. A lawyer may not, without the client's consent, report misconduct of another if the knowledge is based on information protected by Rule 1.6. In the context of Rule 8.3, the lawyer's duty of confidentiality takes precedence over any obligation to report misconduct." (footnote omitted); "Having recognized the exception for knowledge protected by Rule 1.6, two points must be made. First, the rule specifically authorizes the client to consent to disclosure, thus permitting the lawyer to report. 'Informed consent' is defined by the Rule 1.0(e) [Terminology] as follows: 'Informed consent' denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.' Reporting is designed to protect the public and lawyers are encouraged to discuss possible waiver and reporting with their clients, especially where the public faces a serious risk of harm."; Secondly, although a lawyer cannot report information protected by Rule 1.6, the lawyer does have a duty to report information from an independent source unrelated to the representation, if it raises a substantial question as to the lawyer's honesty, trustworthiness or fitness.").

- North Carolina LEO 2003-2 (10/24/03) ("Attorney B must report to the State Bar, or a court having jurisdiction, any violation of the Rules that raises a substantial question about another lawyer's fitness to practice law. A lawyer's violation of the duty of competent representation, set forth in Rule 1.1, may raise a substantial question about a lawyer's fitness to practice law and, therefore, be sufficient to trigger the reporting requirement under Rule 8.3(a)."; "If a disclosure of client confidential information is necessary to make the report, the client's consent must be obtained. Rule 8.3(c). Whether the opposing counsel's conduct alone constitutes confidential client information is debatable. See Rule 1.6(a). The clear incompetence of opposing legal counsel may afford an apparent advantage to Attorney B's client in the matter at hand, and reporting (and thereby possibly terminating) such incompetent representation arguably would be contrary to the client's interests. However, the termination of a somewhat conjectural individual advantage gained through the obvious incompetence of opposing counsel is not the kind of detriment to the client that would normally preclude reporting particularly when the failure to report may produce disproportionate future harm to current and future clients of Attorney A." emphasis added)).
- South Carolina LEO 02-13 (2002) ("If the Attorney A has knowledge that Attorney B has violated Rules 1.1 and 1.16 (a) (2) due to a medical condition materially impairing the attorney's ability to represent a client or clients, and the violations raise a substantial question as to Attorney B's fitness as a lawyer, Attorney A shall inform the appropriate professional authority, unless the reporting would disclose information protected by Rule 1.6. . . . Since the referrals [by A to B] have evolved out of Attorney A's representation of his or her clients, Attorney A is obligated to advise clients concerning changes in his or her opinion, especially if Attorney A's reservations concerning the attorneys fitness have reached a level where Attorney A is contemplating reporting a violation, which could lead to disciplinary action regarding Attorney B's fitness or transfer to incapacity inactive status.").
- North Dakota LEO 01-05 (08/15/01) (holding that a bank's in-house lawyer must report another lawyer's misuse of trust account funds, although the duty was subject to the bank's lawyer Rule 1.6 Confidentiality Obligation; "Attorney A is an attorney and an employee/agent of a bank. Through Attorney A's work in the bank, he has learned that Attorney B is transferring funds from Attorney B's IOLTA account to cover overdrafts on Attorney B's law office account or personal account. Attorney A asks whether he is to report Attorney B to the disciplinary system."; "The Committee does believe that mishandling of client funds is a matter of seriousness which does reflect upon a lawyer's honesty, trustworthiness, and fitness."; "If Attorney A, who is also a banker, has knowledge of misuse of IOLTA funds by Attorney B. and Attorney A determines the violation is substantial, Attorney A must initiate disciplinary proceedings, unless to disclose the information would violate the prohibitions of Rule 1.6."; "Rule 1.6, would bar the disclosure if the

information came to Attorney A in his role as attorney unless the client consents to the disclosure. Attorney A should encourage the client to consent unless to do so would substantially harm the client." (emphasis added)).

- Michigan LEO RI-314 (10/19/99) (explaining that a lawyer's Rule 1.6 confidentiality duty trumps the duty to disclose another lawyer's misconduct; "Lawyers A, B, C and Z are employed at law firm. Lawyer A, while auditing a law firm client's file, discovered Lawyer Z had billed for work that Lawyer Z had not done. Lawyer A reported Lawyer Z's conduct to Lawyers B and C, also employed at law firm. Lawyers B and C confronted Lawyer Z, who denied any intentional misbilling. Lawyers B and C determined that Lawyer Z could not have unintentionally billed client. Lawyer C terminated Lawyer Z's employment with law firm. Lawyer B informed client of what occurred and credited the client for the work Lawyer Z had billed for, but had not done. Lawyer C and inquirer (lawyer who represents law firm and Lawyers A, B, and C) have determined that Lawyer Z's conduct involved violations of the Michigan Rules of Professional Conduct that were subject to MRPC 8.3(a)'s reporting requirement."; "Because a full report to the Attorney Grievance Commission would require disclosure of information arguably protected by MRPC 1.6, Lawyer B contacted client and requested client's consent for the disclosures necessary in making such a report. Lawyer B explained the seriousness of Lawyer Z's misconduct and encouraged client to consent to the necessary disclosures. In particular, Lawyer B requested consent to disclose client's identity, the billings involved, and the file materials in client's files related to the work at issue. Because the work involved sensitive product information, client instructed Lawyer B that law firm was to keep the files confidential and not to include client's identity in any reporting of Lawyer Z's misconduct."; "Because client instructed Lawyer B that law firm was to keep client's files confidential and not to include client's identity in any reporting of Lawyer Z's misconduct, any information or documents falling within this umbrella, without addressing what may also be a 'confidence,' are, at least, a 'secret' under MRPC 1.6(a). This specifically includes the client's identity. RI-77. Therefore, because the facts provided by this inquirer do not fall within one of the discretionary exceptions in MRPC 1.6(c), disclosure of the protected information to the Attorney Grievance Commission is not required."; "While a client may not prevent a lawyer from reporting misconduct that should be reported, a client can prevent the client's lawyer from relying on confidential information in doing so. Generally, this means that the client will be able to exercise a practical veto, since typically the would-be reporting lawyer will have only confidential information at the lawyer's disposal."; "While reluctant to do so, this committee believes a would-be reporting lawyer is also excused from submitting a redacted or generic report to the Attorney Grievance Commission if that redacted or generic report would lead to the disclosure of information the client has requested be held inviolate. For example, lawyer inquirer could submit a

redacted report to the Attorney Grievance Commission containing the facts as stated in this opinion with one exception, Lawyer Z's name is identified. Obviously, Lawyer Z would defend the charges, and in the process, Lawyer Z would disclose the information law firm client asked to be held inviolate, in large part." (emphasis added)).

- Utah LEO 98-12 (12/04/98) ("A lawyer is required to report to the Utah State Bar any unlawful possession or use of controlled substances by another lawyer if two conditions are satisfied: (1) the lawyer has actual knowledge of the illegal use or possession, and (2) the lawyer has a reasonable, good-faith belief that the illegal use or possession raises a substantial question as to the offending lawyer's honesty, trustworthiness or fitness as a lawyer in other respects. A lawyer is excused from this reporting requirement only if (i) the lawyer learns of such use or possession through a bona fide attorney-client relationship with the offending lawyer, or (ii) the lawyer becomes aware of the unlawful use or possession through providing services to the offending lawyer under the auspices of the Lawyers Helping Lawyers program of the Bar."; "The somewhat inartful wording of Rule 8.3(d) raises the question of whether a lawyer fulfills the Rule 8.3(a) requirement by simply reporting an offending lawyer's illegal actions to the Lawyers Helping Lawyers Committee. We conclude that the focus of the Rule 8.3(d) exception only extends to those lawyers who receive or discover information in connection with their active participation on the Lawyers Helping Lawyers Committee. This committee is a volunteer operation sponsored by the Utah State Bar, but it possesses no authority over lawyers who may need assistance. Indeed, lawyers who may need substance-abuse help, for example, are under no obligation to participate in the program, even when contacted by that organization. Merely reporting information to Lawyers Helping Lawyers does not satisfy the reporting lawyer's Rule 8.3(a) obligation." emphasis added)).
- Philadelphia LEO 97-12 (10/1997) ("This opinion addresses whether, in the circumstances presented, it is permissible under the Rules of Professional Conduct for a lawyer to participate in an agreement, as part of a settlement and release of his or her client's claims, not to report opposing counsel to the Disciplinary Board of the Supreme Court of Pennsylvania."; "Upon the Inquirer's contact with Lawyer B, Lawyer B disclosed that he had acted as the title agent in the subsequent sale and that he had abstracted the title at that time himself. When asked why the judgment lien was not paid at the time, Lawyer B said that his review of the title must have been an error and that he had failed to pick up the lien of the judgment as to each partner in the original Purchaser."; "Lawyer B paid all outstanding principal, interest, costs, and attorneys' fees provided that a full, general release would be executed. Lawyer B stipulates that the release contains a covenant not to make any report to any governmental agency, including specifically the Disciplinary Board of the Supreme Court of Pennsylvania."; "The Inquirer asks whether he or she may participate in the provision of such release."; "Rule 8.3 makes

clear, however, that '[t]his rule does not require disclosure of information protected by Rule 1.6.' That rule prohibits a lawyer (with certain exceptions not applicable here) from revealing 'information relating to representation of a client unless the client consents after consultation.'"; "The information which the Inquirer is being asked not to report, clearly relates to the Inquirer's representation of her or his client. Accordingly, unless and until the client consents, after consultation, to disclosure of the necessary information to the Disciplinary Board, Rule 1.6(a) precludes the Inquirer from making such a report. No further analysis is required, except to note that the official Comment to Rule 8.3 states that 'a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.' Once the client agrees not to report Lawyer B, the disclosure itself could prejudice the client's interests by exposing the client to a possible claim of breach of contract." (emphases added); "Since the Inquirer has learned of the circumstances in connection with representing a client, the Inquirer is under no duty to report, and in fact may not report, the matter unless the client waives the confidentiality of the information -- R.P.C. 1.6(a); 8.3(c). If, however, after consultation with the Inquirer, the client waives the confidentiality, the Inquirer should review carefully the pertinent portions of the official Comment to R.P.C. 8.3, along with the substantive provisions of R.P.C. 8.4 and 1.1, to determine whether Rule 8.3(a) requires a report to the Disciplinary Board. The Committee does not opine whether the conduct you have described is required to be reported to the appropriate professional authority under R.P.C. 8.3, or whether the non-reporting provision of the release violates any civil or criminal statute." (emphases added)).

As in nearly every other ethics area, some states vary from the general approach articulated in ABA Model Rule 8.3.

At the extreme end of the spectrum, one state has eliminated the confidentiality exception.

- Mississippi LEO 247 (11/16/00) (noting that Mississippi eliminated any Rule 1.6 application to the reporting requirement; "With regard to the question as to whether M.R.P.C. 1.6 supersedes M.R.P.C. 8.3, that question need not be addressed since M.R.P.C. 8.3 was amended in 1994 deleting the M.R.P.C. 1.6 prohibition. Therefore, M.R.P.C. 1.6 is not relevant to the question presented and thus the desire of Attorney A's client is immaterial." (emphasis added)).

Other states have not gone that far, but have retained the old ABA Model Code exception -- which covers only privileged information, not the more expansive exception for all confidential information defined in the states' Rule 1.6.

- Illinois Rule 8.3(c) ("This Rule does not require disclosure of information otherwise protected by the attorney-client privilege or by law or information gained by a lawyer or judge while participating in an approved lawyers assistance program or an intermediary program approved by a circuit court in which non-disciplinary complaints against judges or lawyers can be referred." (emphasis added)).
- Ohio Rule 8.3(a) ("A lawyer who possesses unprivileged knowledge of a violation of the Ohio Rules of Professional Conduct that raises a question as to any lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform a disciplinary authority empowered to investigate or act upon such a violation.").
- Ohio LEO 2016-2 (4/8/16) (analyzing lawyers' duty to report other lawyers' misconduct under Ohio's unique Rule 8.3, which excepts from the reporting obligation "privileged" information the reporting lawyer possesses; "Prof.Cond.R. 1.6 should be consulted when determining whether information is privileged or unprivileged. Under Prof.Cond.R. 1.6(a), a lawyer is prohibited from revealing any information related to the representation, including information protected by the attorney-client privilege, without client consent. However, Prof.Cond.R. 1.6(b) allows, but does not require, a lawyer to disclose confidential client information that may be protected by the attorney-client privilege to accomplish the limited purposes contained in Prof.Cond.R. 1.6(b)(1)-(b)(6). See, Prof.Cond.R. 1.6, cmt. [17]."; "Consequently, a lawyer's duty under Prof.Cond.R. 8.3(a) to report the misconduct of a client's prior lawyer is conditioned on the possession by the lawyer of unprivileged knowledge. This requires the use of professional judgment to determine whether the information is privileged or unprivileged. If the information is unprivileged, the duty to report misconduct under Prof.Cond.R. 8.3 is triggered. However, if the information is privileged, the lawyer is not required to report under Prof.Cond.R. 8.3, but may encourage the client to consent to the disclosure of the privileged information if it would not substantially prejudice the client's interests. If a lawyer determines that he or she has a duty to report unprivileged knowledge of another lawyer's misconduct, failure to report is itself a violation of Prof.Cond.R. 8.3.").

Of course, a state's Rule 1.6 formulation affects the reporting analysis.

- Massachusetts LEO 12-01 (5/17/12) (analyzing a lawyer's duty to report another lawyer's misconduct, in light of Massachusetts's unique Rule 1.6;

presenting the scenario: "Out-of-state attorney A threatened suit on behalf of B against C in Massachusetts. C hired Massachusetts Lawyer (ML) who filed a declaratory judgment action on behalf of C against B, alleging A's threat and seeking a declaration of no liability on C's part. B then advised C and ML that A was not, and had never been, B's lawyer and that B never intended to sue C. ML contacted A, who provided what ML regarded as an incoherent response to B's accusation and then claimed that attorney-client privilege prevented further explanation. C then directed ML to discontinue the declaratory judgment action. ML asks whether she has a duty under Rule 8.3 to notify Bar Counsel about A's conduct or whether, per Comment 3 to that Rule, such a report is optional."; concluding as follows: "The conduct of an out-of-state attorney who deliberately misrepresented that he was representing a client in order to induce Lawyer's client to settle a matter falls within the requirement of Rule 8.3(a) mandating that Lawyer report the conduct to Bar Counsel of the Board of Bar Overseers. On the facts of this inquiry, however, the Lawyer's information is protected by Rule 1.6, and therefore under Rule 8.3(c) Lawyer needs client consent to make such a report."; "The exclusion of generally known or widely available information from the information protected by this rule explains the addition of the word 'confidential' before the word 'information' in Rule 1.6(a) as compared to the comparable ABA Model Rule. It also explains the elimination of the words 'or is generally known' in Rule 1.9(c)(1) as compared to the comparable ABA Model Rule. The elimination of such information from the concept of protected information in that subparagraph has been achieved more generally throughout the rules by the addition of the word 'confidential' in this rule. It might be misleading to repeat the concept in just one specific subparagraph. Moreover, even information that is generally known may in some circumstances be protected, as when the client instructs the lawyer that generally known information, for example, spousal infidelity, not be revealed to a specific person, for example, the spouse's parent who does not know of it."; "The specific information at issue is the fraudulent conduct of A, his false representation that he was attorney for B and authorized to assert a claim against C. The falsity of that statement was neither generally known nor widely available. Nor did ML learn of it in a fashion that any ordinary citizen might have learned of it, as a witness so to speak. ML learned of it only in his capacity as C's lawyer. It therefore appears to falls within the very broad boundaries of 'confidential information,' as discussed to in the Comments to Rule 1.6(a)." (emphasis added)).

A state's Rule 1.6 formulation can dramatically affect the reporting requirement if the state has retained the old ABA Model Code definition of confidential information.

A number of states continue the basic ABA Model Code confidentiality formulation in their Rule 1.6 -- which includes "confidences" (defined as privileged

communications) and "secrets" (the information the client has asked to be kept confidential, or the disclosure of which would harm the client). To the extent that these states hold that their Rule 1.6 confidentiality duty trumps the reporting obligation, they recognize a broader reporting obligation than the ABA Model Code did (because that only excluded "privileged" information) but much less than the ABA Model Rules (which defines as protected client information any "information relating to the representation of a client").

Virginia is one of those middle ground states, and dealt with an interesting scenario in a 1992 legal ethics opinion.

In Virginia LEO 1468, the Bar dealt with the following question:

You have indicated that a lawyer was retained to represent the ex-wife of an attorney in a domestic relations case. As part of the preparation for the trial, the lawyer subpoenaed the attorney's general and trust account records (only some of which were provided) and reviewed other financial information from other sources. You indicate further that apparent irregularities, including the apparent payment of personal expenses from the trust account and the making of personal loans to the attorney from the trust account, were uncovered through the examination of those records. You advise that there also appears to have been no adherence to DR 9-102 and DR 9-103 regarding record keeping and segregating of funds.

Virginia LEO 1468 (12/14/92) (emphases added). The lawyer seeking the opinion noted that the court already knew of these issues.

[Y]ou indicate that the irregularities have been called to the attention of a Circuit Court judge, to whom the ex-husband/attorney has offered explanations. A seal on the Circuit Court file exists, preventing disclosure of such documentation to the public, and the Circuit Court judge has ordered that no documentation provided to the wife's attorney, as a result of a subpoena to the attorney's partner, shall be publicly disseminated, and that the wife's attorney

must return the originals and all copies of such documents in the attorney's possession at the end of the case.

Id.

Not surprisingly, the lawyer's client did not want her ex-husband's trust account violations reported, because it might result in his inability to pay alimony.

[Y]ou indicate that it is the client's desire that no disclosure be made regarding her ex-husband's finances or trust accounts and the client has directed the attorney not to do so. The lawyer believes that it is not in the client's best interest to disclose information regarding her ex-husband's trust accounts since the apparent irregularities in those records may cause the attorney business problems, thus reducing or terminating the client's support.

Id. (emphases added). Virginia LEO 1468 recognized the lawyer's obvious dilemma.

[T]he Committee is cognizant of the dilemma which arises as a result of the lawyer's tension between his duty, on the one hand, to report another attorney's misconduct in order to protect the integrity of and encourage public confidence in the profession and his duty, on the other hand, to preserve the client's secrets and confidences and not to intentionally prejudice or damage his client.

Id.

Although noting that a serious trust account violation normally "constitutes a per se violation which must be reported," Virginia LEO 1468 ultimately concluded that the lawyer had to follow his client's wishes and keep her husband's trust account violations secret.

[T]he Committee is of the opinion that the information as to the ex-husband/attorney's misconduct does constitute a secret as defined by DR 4-101, since such information was gained in the course of the professional relationship [with the ex-wife]; the ex-wife/client has requested that it be held inviolate; and the disclosure of it would be likely to be detrimental to the ex-wife/client.

Id. (emphasis added).

Thus, Virginia LEO 1468 concluded as follows:

In response to the three questions you raise, under the facts you present, the Committee believes it would be improper and violative of the attorney's ethical responsibility to preserve the client's secret if the attorney disclosed the information in derogation of the client's wishes since DR 1-103(A) exempts from obligatory reporting any information which is protected by DR 4-101. Since the Committee is of the opinion that the attorney's duty to preserve such secret information is paramount to the attorney's duty to report misconduct, precluding the wife's attorney from informing the Bar of the apparent irregularities, your first and second questions, regarding the seal on the file and the wife's attorney's reliance on disclosure to the Court, are rendered moot.

Id. (emphasis added).

Because clients obviously can consent to their lawyers' disclosure of protected client information, an obvious question arises: must or should lawyers seek such consent so they can report another lawyer's sufficiently egregious misconduct?

As explained above, a comment to ABA Model Rule 8.3 encourages lawyers to seek clients' consent to disclose otherwise protected client confidential information if that is required to report other lawyers' sufficiently egregious misconduct.

A report about misconduct does not require where it would involve violation Rule 1.6. However, a lawyer should encourage a client to consent to disclosure where prosecution would not substantially prejudice the client's interests.

ABA Model Rule 8.3 cmt. [2].

A 2008 ABA Legal Ethics Opinion emphasized this suggestion as well.

Although the ethics counsel may not be required to report certain violations of professional conduct rules, Rule 8.3 Comment [2] exhorts a lawyer 'to encourage a client to

consent to disclosure where prosecution would not substantially prejudice the client's interests.' Accordingly, the ethics counsel should encourage the law firm and, if appropriate, the client, to report the misconduct of a firm member where doing so would not have a substantial adverse effect on their respective interests. In the rare situation where the ethics counsel represents both the individual lawyer and the law firm, adherence to Comment [2] will be problematic, because encouraging the law firm to disclose the misconduct would conflict with the ethics counsel's duty to protect the interests of the consulting lawyer. Ethics counsel would be required in that situation by Rule 1.7(b)(1) to withdraw from continuing to represent either the law firm or the consulting lawyer in the matter, and, absent an exception to Rule 1.6, would not be allowed to disclose the misconduct.

Id. (footnotes omitted) (emphasis added). ABA LEO 453 (10/17/08).

State bars take the same approach.

- Pennsylvania LEO 2014-025 (07/14/14) (analyzing a lawyer's disclosure duty upon learning that a new client lied while being represented by a previous lawyer; noting that the previous lie would necessarily require misconduct by the new lawyer; "In this case, Client failed to tell the truth about his immigration status until after you pressed him for more information. At that point, he told you in confidence that his prior lawyer gave him improper advice -- to lie to the USCIS about his length of stay in the U.S. prior to the application for his fiancé visa. You claim that the prior attorney has a reputation in your legal community 'for shoddy and fraudulent work.' If Client's allegation is true, and viewed in light of the prior lawyer's reputation, there appears to be a substantial question about the prior lawyer's honesty, trustworthiness or fitness as a lawyer in violation of Rule 8.3(a). Nevertheless, Client's credibility is questionable and you do not know for a fact that the prior lawyer advised him to lie to the USCIS or to continue to lie in the application for the conditional green card. Therefore, you are not required to report the alleged misconduct to the Disciplinary Board."; "However, while investigating whether Client's false statement is contained in a document or record of an interview, you may learn that Client's allegation is true. If you acquire the knowledge that the prior attorney advised Client to lie to the USCIS, then you must report the misconduct to the Disciplinary Board. But, even if you have knowledge that the prior lawyer advised Client to lie to the USCIS, that information is confidential under Rule 1.6 because Client revealed it to you during the course of your legal representation. According to Comment [2] to Rule 8.3, you may only disclose the information about the false statement to the Disciplinary Board if you obtain Client's consent.

Finally, you should encourage Client to provide you with that informed consent, but only if prosecution of the prior attorney will not substantially prejudice Client's interests before the USCIS. (emphasis added)).

- North Dakota LEO 01-05 (08/15/01) (holding that a bank's in-house lawyer must report another lawyer's misuse of trust account funds, although the duty was subject to the bank's lawyer Rule 1.6 Confidentiality Obligation; "Attorney A is an attorney and an employee/agent of a bank. Through Attorney A's work in the bank, he has learned that Attorney B is transferring funds from Attorney B's IOLTA account to cover overdrafts on Attorney B's law office account or personal account. Attorney A asks whether he is to report Attorney B to the disciplinary system."; "The Committee does believe that mishandling of client funds is a matter of seriousness which does reflect upon a lawyer's honesty, trustworthiness, and fitness."; "If Attorney A, who is also a banker, has knowledge of misuse of IOLTA funds by Attorney B. and Attorney A determines the violation is substantial, Attorney A must initiate disciplinary proceedings, unless to disclose the information would violate the prohibitions of Rule 1.6."; "Rule 1.6, would bar the disclosure if the information came to Attorney A in his role as attorney unless the client consents to the disclosure. Attorney A should encourage the client to consent unless to do so would substantially harm the client." (emphasis added)).

Virginia addresses its reporting obligation in the standard place (Virginia Rule 8.3), but also in Virginia Rule 1.6 itself -- in an awkwardly worded provision.

When the information necessary to report the misconduct is protected under this Rule [1.6], the attorney, after consultation, must obtain client consent. Consultation should include full disclosure of all reasonably foreseeable consequences of both disclosure and non-disclosure to the client.

Virginia Rule 1.6(c)(2). (emphasis added). Although this Rule indicates that a Virginia lawyer "must obtain client consent" to report other lawyers' sufficiently egregious misconduct, the rule could not mean that. The language obviously means that the lawyer may not disclose such client confidences without consent. The Rule meant to say that lawyers must request such consent. The accompanying comment makes this clear.

- Virginia Rule 1.6 [cmt. 13] ("Self-regulation of the legal profession occasionally places attorneys in awkward positions with respect to their obligations to clients and to the profession. Paragraph (c)(2) requires an attorney who has information indicating that another attorney has violated the Rules of Professional Conduct, learned during the course of representing a client and protected as a confidence or secret under Rule 1.6, to request the permission of the client to disclose the information necessary to report the misconduct to disciplinary authorities. In requesting consent, the attorney must inform the client of all reasonably foreseeable consequences of both disclosure and non-disclosure.").

Interestingly, a unique Virginia Rule 8.3 Comment also requires lawyers/mediators to seek consent of the mediation parties to report sufficiently egregious lawyer misconduct.

- Virginia Rule 8.3 cmt. [3b] ("The Rule requires a third party neutral lawyer to attempt to obtain the parties' written consent to waive confidentiality as to professional misconduct, so as to permit the lawyer to reveal information regarding another lawyer's misconduct which the lawyer would otherwise be required to report.").

Best Answer

The best answer to this hypothetical is **(C) YOU MAY NOT DISCLOSE THE TRUST ACCOUNT THEFT, UNLESS YOUR CLIENT CONSENTS (PROBABLY).**

B 5/15. 8/15, 2/17