CONFIDENTIALITY: PART I (STRENGTH AND SCOPE OF THE DUTY)

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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Strength of the Ethics Duty

Hypothetical 1

Last week a young man called you to discuss the possibility of your representing him in a matter that he said over the phone was tremendously important. You met with the prospective client for about two hours in your office. The prospective client told you that he formerly worked at a large company that deliberately adds radioactive raw material to a widely-sold consumer product. He knows firsthand about this practice, although he was not personally involved in it. You quickly agreed to help him determine how best to "blow the whistle" on this wrongdoing. However, this morning he called to say that he had decided not to "go public" with his former employer's practice -- because his wife worries that his former employer might target him for retribution.

What do you do?

(A) You must disclose the public health hazard.

(B) You may disclose the public health hazard, but you don't have to.

(C) You may not disclose the public health hazard.

(C) YOU MAY NOT DISCLOSE THE PUBLIC HEALTH HAZARD (PROBABLY)

Analysis

No profession enforces as strong a confidentiality duty as the legal profession. Although the ethics rules and the parallel evidentiary attorney-client privilege contain some exceptions, both doctrines take an otherwise absolutist approach.

Societal Benefit and Cost

The 1969 ABA Model Code of Professional Responsibility articulated the societal purpose of the confidentiality duty.

> Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer

> and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

ABA Model Code of Professional Responsibility, Canon 4, EC 4-1 (emphasis added) (footnotes omitted).

The 1983 ABA Model Rules contain essentially the same explanation.

> A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. . . . . This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

ABA Model Rule 1.6 cmt. [2] (emphases added).

Although the Restatement contains a narrower duty of confidentiality than the ABA Model Rules, a Restatement provision also recognizes the important societal interests involved. Unlike the ABA Model Code and the ABA Model Rules, the Restatement acknowledges the societal cost of such a strong confidentiality duty.

> The broad prohibition against divulging confidential client information comes at a cost to both lawyers and society. Lawyers sometimes learn information that cannot be disclosed because of the rule of confidentiality but that would be highly useful to other persons. Those may include persons whose personal plight and character are much more sympathetic than those of the lawyer's client or who could accomplish great public good or avoid great public detriment if the information were disclosed. Moreover, the free-speech interests of lawyers is impinged by a broad rule of confidentiality. Nonetheless, despite those costs, the confidentiality rule reflects a considered judgment that high net social value justifies it. It is recognized that the rule better protects legitimate client expectations about communications to their lawyers and that permitting divulgence would be inconsistent with the goal of furthering the lawful objectives of clients.

Restatement (Third) of Law Governing Lawyers § 60 cmt. b (2000) (emphases added).

As if to emphasize the societal cost that comes with the benefit, the Restatement provides an illustration highlighting the downside of the rule forcing lawyers to remain silent.

> Lawyer is appointed to represent Client, a person who has been accused of murder. During confidential conferences between them, Client informs Lawyer that Client in fact committed not only the murder charged but two others as well. Client gives Lawyer sufficient detail to confirm beyond question that Client's story is true. The two other murders involve victims whose bodies have not yet been discovered. Because of similarities between the circumstances of the murders, parents of one of the victims approach Lawyer and beg for any information about their child. Lawyer realizes the personal anguish of the victim's parents and the peace the information that he knows could bring them. Unless Client consents to disclosure . . . , Lawyer must respond that Lawyer has no information to give them.

Restatement (Third) of Law Governing Lawyers § 60 cmt. b, illus. 1 (2000) (emphases added). This illustration comes from a well-known incident that occurred in upstate New York several decades ago.

Case Law and Ethics Opinions

Case law and ethics opinions provide other examples of the confidentiality duty's strength.

A 1962 Minnesota case addressed defense lawyers' obligation upon learning from a doctor that the plaintiff suffered from an aorta aneurysm possibly caused by the accident underlying plaintiff's lawsuit.[1] Although allowing the plaintiff to rescind a settlement agreement he made without knowing of the aneurysm, the court could not have been any clearer about the defense lawyers' ethics duty.

> [N]o canon of ethics or legal obligation may have required them [defense lawyers] to inform plaintiff or his counsel with respect thereto, or to advise the court therein.

[1] Spaulding v. Zimmerman, 116 N.W.2d 704, 706, 710 (Minn. 1962) (addressing the following situation: "On appeal defendants contend that the court was without jurisdiction to vacate the settlement solely because their counsel then possessed information, unknown to plaintiff herein, that at the time he was suffering from an aorta aneurysm which may have resulted from the accident, because (1) no mutual mistake of fact was involved; (2) no duty rested upon them to disclose information to plaintiff which they could assume had been disclosed to him by his own physicians."; explaining that the injured passenger filed a lawsuit, and filed another lawsuit after learning about the diagnosis; explaining that the court could essentially void the settlement; "The court may vacate such a settlement for mistake even though the mistake was not mutual in the sense that both parties were similarly mistaken as to the nature and extent of the minor's injuries, but where it is shown that one of the parties had additional knowledge with respect thereto and was aware that neither the court nor the adversary party possessed such knowledge when the settlement was approved."; "It is undisputed that neither he nor his counsel nor his medical attendants were aware that at the time settlement was made he was suffering from an aorta aneurysm which may have resulted from the accident. The seriousness of this disability is indicated by Dr. Hannah's report indicating the imminent danger of death therefrom. This was known by counsel for both defendants but was not disclosed to the court at the time it was petitioned to approve the settlement. While no canon of ethics or legal obligation may have required them to inform plaintiff or his counsel with respect thereto, or to advise the court therein, it did become obvious to them at the time that the settlement then made did not contemplate or take into consideration the disability described. This fact opened the way for the court to later exercise its discretion in vacating the settlement and under the circumstances described we cannot say that there was any abuse of discretion on the part of the court in so doing under Rule 60.02(6) of the Civil Procedure.").

Spaulding v. Zimmerman, 116 N.W.2d 704, 710 (Minn. 1962).

About 20 years later, the California Bar dealt with a lawyer's obligation upon learning from his retained engineer that a non-client's structure "may be unstable in the event of an earthquake."[2] The Bar acknowledged that it was not dealing with a situation in which the lawyer was "satisfied beyond a reasonable doubt" that there was an immediate danger to human life. Nevertheless, the Bar noted the lawyer's moral dilemma -- and emphasized the lawyer's duty of confidentiality.

> The attorneys here are in a difficult position. Morally, they may want to warn third parties of potential risks. Personally, they may want to protect themselves against future claims. Professionally, however, the standards of professional ethics and Business and Professions Code section 6068, subdivision (e), both require that the attorneys' primary responsibility is to maintain their own loyalty to their client and to protect the client's secret. This responsibility may not ultimately give the attorneys a safe harbor from liability to third parties, but their duty is to safeguard the client's secret regardless of the risk to themselves. . . . If the nondisclosure of the information ultimately results in the attorneys becoming liable to third parties, that is a risk of practicing law. The primary responsibility of the attorneys here is to their client, and not to third parties. Being the recipient of the client's secrets, the attorneys must safeguard those secrets, even if they ultimately incur liability to third parties because they fulfill their ethical and statutory duties.

California LEO 1981-58 (1981) (emphases added).

In 2007, a Los Angeles County legal ethics opinion reached essentially the same conclusion about a plaintiff's lawyer who discovered that the defendant overpaid the lawyer's client after settling a matter. The court indicated that the lawyer should "use

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[2] California LEO 1981-58 (1981).

every effort to cause the client to disclose the overpayment,"[3] but ultimately concluded that

> the duty to preserve secrets obligates Counsel to abide by his or her client's wishes not to disclose the overpayment

Los Angeles County LEO 520 (6/18/07).

The Virginia Bar dealt with a particularly acute situation in a 1994 legal ethics opinion.[4] The lawyer's question to the Virginia Bar described an alarming situation.

> A former employee of a major [redacted] company visits an attorney's office, and advises counsel that he wishes assistance in making public certain information he has about irregular, and possibly illegal actions of his former employer. The client alleges that, <u>following the melt down of a nuclear reactor in a major Eurasian nation</u>, his former employer <u>purchases large quantities of fallout-tainted product</u> [redacted] with highly elevated radiation levels, and despite the company's own awareness of the product [redacted] was so contaminated, <u>inserted a portion of their purchase into a [redacted] brand, and sold the rest to other companies for possible consumer use.</u> The client is completely innocent of complicity of any sort in the company's decisions or actions in this matter, having gained knowledge of the circumstances inadvertently.
>
> Several days later, the client's wife prevails on the client not to risk his new employment situation (the former employer may have some leverage with the current employer) by making public his knowledge of these events, and the <u>client advises counsel not to go forward in making the information public.</u>

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[3] Los Angeles County LEO 520 (6/18/07).

[4] Virginia LEO 1607 (9/16/94) (explaining that a former employee hired a lawyer to assist in disclosing "irregular, and possibly illegal actions of his former employer" involving the company's knowing use of radioactive materials in consumer products; noting that former employee learned of this conduct inadvertently, and was not involved in the company's wrongful actions; concluding that when the former employee later decided not to disclose the company's wrongful conduct, the lawyer must follow the client's direction to keep the information confidential despite the public health risk, because none of the exceptions to the confidentiality rule apply.).

> Counsel is now [redacted] deeply concerned about his obligation to society, as opposed to his obligation to the client. There may be hundreds of thousands [redacted] who should be made aware of the fact that they may have consumed products with high radiation levels, such that they can consider having physical checkups [redacted] more often than they might have had otherwise, to detect early any illness which might have been caused by the product. [redacted] Stated another way, the release of this information to the public now has the hypothetical potential to save many lives later. Yet, to release the information without the original client's permission could be viewed as a breach of confidentiality, and could conceivably result in him losing his present employment.

Request for Legal Ethics Opinion to the Va. State Bar Standing Comm. On Legal Ethics, June 23, 1994 (emphases added).

The lawyer clearly sought the Bar's permission to disclose the possibility that hundreds of thousands of consumers may be harmed by radiation poisoning.

> The future health effects to large numbers of persons morally outweighs the possible effects the release of this information may have on the client's job. Had counsel been told the client's employer planted small nuclear devices in locations all over the country which might 'go off' at any point in the future, counsel believes that he should be obligated to reveal such information, even if his client was not criminally liable, and counsel believes that the analogy is apt.
>
> Lives currently at risk should be more important than attorney-client privilege.

Id. (emphases added).

The Virginia Bar bluntly rejected the lawyer's plea, emphasizing the lawyer's absolute duty of confidentiality.

> You have asked the committee to opine whether, under the facts of the inquiry, counsel may make public the information he was provided by the client, in the absence of the client's permission.

> The appropriate and controlling Disciplinary Rule related to your inquiry is DR 4-101, which provides for the preservation of client confidences and secrets.
>
> The information possessed by counsel is confidential, received within the attorney-client relationship. Canon 4 provides, with few exceptions, for the preservation of such client confidences and secrets.
>
> The facts indicate that the client is innocent of any complicity in the company's decisions or actions in the matter. The facts do not indicate that the client has perpetrated a fraud upon a tribunal, or that he intends to commit a crime, related to this matter. Therefore, the exceptions to maintaining confidentiality, Under DR 4-101(D) do not apply.
>
> Thus, the committee opines that counsel may not reveal the information provided by the client, regardless of counsel's motivation, absent the client's permission.

Letter from Va. State Bar Standing Comm. on Legal Ethics Opinion No. 1607 (9/16/94) (emphasis added).

It is difficult to imagine a more appropriate scenario for recognizing that public health trumps lawyers' confidentiality duty. However, the Virginia Bar's holding highlighted lawyers' absolute confidentiality duty.

Some states have adopted other rules that might permit disclosure of such information, even in the absence of client consent.

However, the Virginia Rules would still prohibit this lawyer's disclosure. Virginia follows the archaic formulation of the pertinent exception.

> A lawyer shall promptly reveal . . . the intention of a client, as stated by the client, to commit a crime and the information necessary to prevent the crime, but before revealing such information, the attorney shall, where feasible, advise the client of the possible legal consequences of the action, urge the client not to commit the crime, and advise the client that the attorney must reveal the client's criminal intention unless

> thereupon abandoned, and, if the crime involves perjury by the client, that the attorney shall seek to withdraw as counsel.

Virginia Rule 1.6(c)(1) (emphasis added). Thus, unlike most states, Virginia continues to focus on the client's actions. In the Virginia hypothetical, the client had not committed a wrongdoing and did not intend to commit a future wrongdoing.

Even under the more modern ABA Model Rules formulation, lawyers' discretion to disclose client information extends only "to the extent the lawyer reasonably believes necessary . . . to prevent reasonably certain death or substantial bodily harm." ABA Model Rule 1.6(b)(1) (emphasis added). In the scenario addressed by the Virginia Bar, it is unclear whether the lawyer requesting the legal ethics opinion could satisfy such a standard.

Best Answer

The best answer to this hypothetical is **(C) YOU MAY NOT DISCLOSE THE PUBLIC HEALTH HAZARD (PROBABLY)**.

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Strength of the Attorney-Client Privilege

Hypothetical 2

You know that lawyers' ethics duty of confidentiality imposes essentially an absolute obligation to preserve client confidences. However, you are not as sure about the evidentiary attorney-client privilege.

Can the attorney-client privilege be "trumped" by some societal or other interest?

(B) NO

Analysis

Although the attorney-client privilege protection contains exceptions that generally parallel the ethics duty exceptions, at its core the attorney-client privilege provides absolute protection. Thomas E. Spahn, The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide, Ch. 2.4 (3d. ed. 2013), published by Virginia CLE Publications.

Best Answer

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

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Source of the Information

Hypothetical 3

Your state's chief justice just appointed you to a Commission charged with examining and possibly amending your state's ethics rules. You start tackling the confidentiality issues first, because every Commission member recognizes that duty's importance.

Your Commission must first decide whether lawyers' confidentiality duty extends to information from various sources.

Should lawyers' ethics confidentiality duty protect information relating to the client that the lawyer obtains:

(a) From the client, even if the client does not ask the lawyer to maintain its confidentiality?

(A) YES

(b) From sources other than the client?

(A) YES

(c) From the client or other sources, even if the information is "generally known"?

MAYBE

(d) From the client or other sources, even if the information is in the public record?

MAYBE

Analysis

Ethics rules and other authorities defining the scope of client-related information lawyers must protect focus on three variables: (1) the information's source; (2) the time at which the lawyer obtained the information; and (3) the information's content (judged by whether disclosure would harm the client). The first two variables involve what could

be seen as the information's input to lawyers, and the third variable involves lawyers' output.

This hypothetical addresses the first element -- the information's source.

Source of Guidance

Since 1908, the ABA ethics rules' evolution has dramatically increased the scope of information subject to lawyers' confidentiality duty.

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

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

ABA Canons of Professional Ethics, Canon 6 (8/27/1908) (emphasis added).

Perhaps the absence of a separate confidentiality provision reflected the original canons' focus on litigation ethics. Still, it is somewhat surprising that the first ABA statement of lawyers' ethics duties did not explicitly emphasize confidentiality.

This original ABA pronouncement on confidentiality mentioned "secrets or confidences" -- a phrase which carried over to the 1969 ABA Model Code of Professional Responsibility.

On July 26, 1928, the ABA adopted an explicit confidentiality canon, which it later amended on September 30, 1937.

> It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the

> private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even tough [sic] there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

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

Thus, this 1937 ABA pronouncement seemed to focus on information lawyers learned from clients. The reference to "other available sources of such information" implied that the lawyer could obtain the information from other sources, but not that the lawyer had initially obtained the information from other sources.

ABA Model Code. The 1969 ABA Model Code of Professional Responsibility contained a much more detailed description of lawyers' confidentiality duty.

> [A] lawyer shall not knowingly:
>
> (1) Reveal a confidence or secret of his client.
>
> (2) Use a confidence or secret of his client to the disadvantage of the client.
>
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

ABA Model Code of Professional Responsibility, DR 4-101(B) (footnotes omitted) (emphases added).

A Disciplinary Rule defined the information subject to this duty.

> 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).

The black letter rule thus focused on information lawyers obtained from their clients. With very few exceptions, privileged communications must involve a client -- so the term "confidence" presumably referred exclusively or nearly exclusively to information lawyers obtained in such private communications with clients. The ABA Model Code also protected "secrets" -- defined as certain "other information gained in the professional relationship." That phrase also seemed to limit the protection to communications between lawyers and clients, although perhaps not deserving attorney-client privilege evidentiary protection.

Reinforcing this approach, the definition used the term "gained in" rather than the term "gained during" (which some states ethics rules use, such as New York's). The former focuses on the client as the source of protected information -- while the latter would have emphasized the temporal aspect, implicitly recognizing non-client sources of protect information.

However, an Ethical Consideration took a more expansive view than the black letter rule.

> The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. <u>This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge.</u> A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, he should avoid professional discussions in the presence of persons to whom the privilege does not extend. A lawyer owes an obligation

> to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.

ABA Model Code of Professional Responsibility, EC 4-4 (emphasis added).

This was a surprisingly broad statement to include in an Ethical Consideration, rather than in the black letter rule. It would be understandable to include within lawyers' confidentiality duty information that non-clients might also know. That would justifiably prohibit lawyers from publicly disclosing damaging information about a client just because the client might have shared it with some intimate acquaintance who would never disclose it any further. However, the phrase "without regard to the . . . source of information" represented a dramatic expansion from the implicit approach found in the ABA Canons and the black letter ABA Code provision. That phrase clearly referred to information lawyers obtained from someone other than their clients.

When the ABA changed its rules again in 1983, that Ethical Consideration sentence became the applicable rule's entire theme.

ABA Model Rules. The 1983 ABA Model Rules of Professional Conduct contain a remarkably broad view of information subject to lawyers' confidentiality duty.

> A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent [or] the disclosure is impliedly authorized [by the Rule's exceptions].

ABA Model Rule 1.6(a) (emphasis added).

Two comments provide guidance.

> 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.
>
> Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

ABA Model Rule 1.6 cmt. [3], [4] (emphases added).

Thus, the 1969 ABA Model Code's small phrase "without regard to the . . . source of information" became a full-blown principle in the 1983 ABA Model Rules. As explained below, ethics opinions have taken the ABA Model Rules language at its word -- and included even accidentally obtained information and information in the public record (among other types of information) within lawyers' confidentiality duty.

Comparison of the ABA Model Code and the ABA Model Rules

A 2009 Nevada legal ethics opinion provided an excellent description of the ABA Model Rules' expansion of lawyers' confidentiality duty over that defined by the earlier ABA Model Code.

> In contrast to predecessor Rule DR-4-101, the language of Rule 1.6(a) has three remarkable omissions from the historical rule of confidentiality.; The first is the omission of

> the qualifier "confidential" between "reveal" and "information." As a result, all information relating to the representation of the client is thereby made confidential. Rule DR 4-101 protected the client from the lawyer's disclosure of "secrets," defined as: (1) information that the client "has requested to be held inviolate" . . . and (2) information that would be "embarrassing" or "likely to be detrimental" if revealed.; The second remarkable aspect of Rule 1.6(a) is that the confidential information need not be information that is "adverse" to the client. Rule DR 4-101(B)(3) did not prohibit the disclosure of nonadverse client information.; The final remarkable omission from Rule 1.6 is an exception for information already generally known or public. This element is contained in the Restatement's definition of "confidential client information," but omitted from Rule 1.6.; Thus, the language of Rule 1.6(a) is so broad that it is -- at least on its face -- without limitation. Rule 1.6(a) requires that ALL information relating to the representation of a client is confidential and protected from disclosure.

Nevada LEO 41 (6/24/09) (emphases added).

The Nevada legal ethics opinion explained the practical consequences of the ABA Model Rules' more expansive definition.

> The Rule applies: (1) Even if the client has not requested that the information be held in confidence or does not consider it confidential. Thus, it operates automatically; (2) Even though the information is not protected by the attorney-client privilege; (3) Regardless of *when* the lawyer learned of the information -- even before or after the representation; (4) Even if the information is *not* embarrassing or detrimental to client; (5) Whatever the *source* of the information; i.e., whether the lawyer acquired the information in a confidential communication from the client or from a third person or accidentally; and (6) (In contrast to the attorney-client privilege) even if the information is already generally known -- or even public information.

Id. (emphasis added indicated by underscore).

The Nevada legal ethics opinion then provided some examples of how lawyers might violate the ABA Model Rules confidentiality duty.

> The following are examples of common situations which raise issues under Rule 1.6(a) *in the absence of client consent*. They are offered -- not as examples of Rule 1.6 violations *per se* -- but as "food for thought" for all lawyers before communicating any information related to the representation of a client: (1) Phoning a client when the client is not at home and leaving a message about the representation on client's answering machine or discussing the matters with the roommate, or spouse of the client; (2) Submitting a copy of the lawyer's client billing statements in support of an application for fees, such as a post-judgment motion or at the end of a probate; (3) Submitting a client list (revealing the identity of the client) to a bank to support the lawyer's loan application; (4) Listing some clients in a law firm brochure (revealing the identity of the clients); (5) Processing a credit card payment (revealing the identity of the client) to the credit card company; (6) Telling a story to friends about a recent trial without revealing the identity of the client or any other fact not contained in the public record of the case; (7) A lawyer taking a client file or batch of discovery documents to the local photocopy shop for copying; (8) A law firm employing an outside computer tech support person to trouble shoot the firm's computer system; (9) The auditing of insurance defense attorney billing statements by an insurance company auditor; (10) A request for attorney billing statements by a homeowner to the lawyer for the homeowner's association; (11) A request for attorney billing statements by a disgruntled shareholder of a corporation represented by the lawyer in litigation; (12) A request for attorney billing statements under the Open Records Act to a public entity represented by outside counsel; and (13) The law firm's listing of its 'best' clients in Martindale-Hubbell.

Id. (footnotes omitted) (emphases added indicated by underscore).

The Nevada legal ethics opinion concluded that disciplinary authorities must apply "common sense" when enforcing the confidentiality provisions.

> By a literal reading of Rule 1.6, even a laudatory comment about a client or the client's achievement may violate the letter of the Rule. However, the Committee believes that the absolute wording of Rule 1.6 is not literally meant to make *every* disclosure of the most innocuous bit of client information an ethical violation; but rather it is intended to strongly caution the lawyer to give consideration to the rule of client confidentiality -- and whether the informed consent of the client should be obtained -- whenever the lawyer makes any verbal, written or electronic communication relating to the client. For example, a lawyer advising his or her spouse that the lawyer will be traveling overnight to a distant city to defend the deposition of Client A in case A vs. B, is technically the revelation of information relating to representation of a client" without client consent. The Committee suggests that common sense should be part of Rule 1.6 and the lawyer should not be disciplined for a harmless disclosure.

Id. (footnotes omitted) (emphasis added indicated by underscore).

One would think that lawyers of all people would be able to draft ethics rules that can be enforced as they are written -- rather than rules that must be tempered by a "common sense" but knowing disregard for their literal language.

A 2012 article in the ABA publication Litigation stressed the same theme as the 2009 Nevada legal ethics opinion, essentially concluding that the expansive ABA Model Rules' confidentiality duty could never be enforced as it is written.

> Most lawyers know that they owe a duty of confidentiality to their clients, and they think about the duty as encompassing two concepts. They have a good working knowledge of the attorney-client privilege, and they know that they are not supposed to reveal privileged communications. They also understand, but in a vaguer way, that a client may have confidences or secrets that are not privileged but that a lawyer should not reveal. For example, a lawyer may learn via a non-privileged communication that a client is quietly working on an invention or planning to leave her employment. The lawyer would understand that the client may not want to reveal such

> nonpublic information, and the lawyer would guard the secret.
>
> Most lawyers think that their duties end with such confidences and secrets. If you were to ask lawyers if they could talk freely about the identities of clients they are publicly representing (e.g., in a lawsuit) or about the facts of a case as described in open court or published opinions, most would say they could share anything that was in the public record without violating Rule. 1.6.

Edward W. Feldman, Be Careful What You Reveal, Model Rule of Professional Conduct 1.6, Litigation, Summer/Fall 2012, at 35 (emphasis added).

The Litigation article shared the Nevada legal ethics opinion's disdain for the ABA Model Rules' confidential duty.

> Your initial reaction to this might be similar to mine: The Model Rule can't possibly mean what it says. Read literally, it seems boundless. What is 'information relating to the representation of a client'? Or, more aptly, what isn't? Is it not at least any information in the lawyer's entire file, including pleadings, correspondence, and the full range of non-privileged material that makes its way into a file? In most instances, the information would not be in the file if it did not relate to the representation.

Id. (emphases added).

The Litigation article concluded with half-hearted praise for the Model Rules' expansive language, to the extent that it prompts lawyers to be careful.

> "Stop, think, and use common sense" is hardly a clear standard. But the advice highlights how the breadth of the rule bumps into the natural gregariousness of lawyers. They want to share their stories, both to learn and to socialize. As a practical matter, it is unlikely that most such stories would lead to discipline unless the lawyer revealed some secret or other information that led to harm to a client (essentially the position of the Restatement). Yet, most lawyers want to comport with government ethical standards and steer clear of violations, even ones that fly below the disciplinary radar.

> Individual lawyers will need to make their own decisions about how much information they feel comfortable 'revealing' about their cases.
>
> In the end, there is a benefit to increasing circumspection within the profession. If lawyers spend less time talking about their cases and more time talking about subjects like politics, art, or sports, Model Rule 1.6 might have the unintended consequence of making lawyers more interesting to their friends and relatives, and maybe even to one another.

Id. at 39 (emphasis added). Thus, the Litigation article ultimately contended that perhaps the ABA Model Rule's broad confidentiality duty's main societal benefit is to make lawyers more well-rounded human beings. That is damning with faint praise.

Restatement. The 2000 Restatement (Third) of Law Governing Lawyers takes a dramatically different approach from the ABA Model Rules in defining the source of information that deserves confidentiality protection.

The Restatement excludes from its definition of protected information that which is "generally known." As discussed above, the ABA Model Rules' confidentiality duty explicitly extends to information from sources other than the client -- presumably including even "generally known" information, or information contained in the public record.

About 40 years before the American Law Institute drafted the Restatement (Third) of Law Governing Lawyers, it adopted another Restatement defining agents' confidentiality duty to their principals.

> Unless otherwise agreed, an agent is subject to a duty to the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency or in violation of his duties as agent, in competition with or to the

> injury of the principal, on his own account or on behalf of another, although such information does not relate to the transaction in which he is then employed, unless the information is a matter of general knowledge.

Restatement (Second) of the Law Agency § 395 (1958) (emphasis added).

The Restatement (Third) of Law Governing Lawyers follows this agency principle -- defining "confidential client information" as follows:

> Confidential client information consists of information relating to representation of a client, other than information that is generally known.

Restatement (Third) of Law Governing Lawyers § 59 (2000) (emphasis added).

Several accompanying comments provide some guidance on the definition's scope.

> This definition covers all information relating to representation of a client, whether in oral, documentary, electronic, photographic, or other forms. It covers information gathered from any source, including sources such as third persons whose communications are not protected by the attorney-client privilege . . . . It includes work product that the lawyer develops in representing the client, such as the lawyer's notes to a personal file, whether or not the information is immune from discovery as lawyer work product . . . . It includes information acquired by a lawyer in all client-lawyer relationships . . . , including functioning as inside or outside legal counsel, government or private-practice lawyer, counselor or litigator, advocate or intermediary. It applies whether or not the client paid a fee, and whether a lawyer learns the information personally or through an agent, for example information acquired by a lawyer's partners or associate lawyers or by an investigator, paralegal, or secretary. Information acquired by an agent is protected even if it was not thereafter communicated to the lawyer, such as material acquired by an investigator and kept in the investigator's files.

Restatement (Third) of Law Governing Lawyers § 59 cmt. b (2000) (emphases added).

> The definition includes information that becomes known by others, so long as the information does not become generally known. . . . The fact that information falls outside the attorney-client privilege or work-product immunity does not determine its confidentiality under this Section.

Id. (emphasis added).

> A lawyer may learn information relevant to representation of a client in the course of representing another client, from casual reading or in other accidental ways. . . . In the course of representation, a lawyer may learn confidential information about the client that is not necessary for the representation but which is of a personal or proprietary nature or other character such that the client evidently would not wish it disclosed. Such information is confidential under this Section.

Id. (emphasis added).

However, the Restatement then turns away from this broad approach, and focuses on the "generally known" standard which plays no role in the ABA Model Rules' definition.

> 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) (emphases added).

The Restatement explicitly describes a particular type of "generally known" information, which common sense would indicate that lawyers may freely disclose and use without clients' consent.

> Confidential client information does not include what a lawyer learns about the law, legal institutions such as courts and administrative agencies, and similar public matters in the course of representing clients. Such information is part of the general fund of information available to the lawyer. During legal research of an issue while representing a client, a lawyer may discover a particularly important precedent or devise a novel legal approach that is useful both in the immediate matter and in other representations. The lawyer and other members of the lawyer's firm may use and disclose that information in other representations, so long as they thereby disclose no confidential client information except as permitted by [another section]. A lawyer may use such information -- about the state of the law, the best way to approach an administrative agency, the preferable way to frame an argument before a particular judge -- in a future, otherwise unrelated representation that is adverse to the former client.

Restatement (Third) of Law Governing Lawyers § 59 cmt. e (2000) (emphases added).

Interestingly, information in the public record might not be "generally known."

> Whether information is generally known depends on all circumstances relevant in obtaining the information. Information contained in books or records in public libraries, public-record depositaries such as government offices, or in publicly accessible electronic-data storage is generally known if the particular information is obtainable through publicly available indexes and similar methods of access. Information is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense. Special knowledge includes information about the whereabouts or identity of a person or other source from which the information can be acquired, if those facts are not themselves generally known.

Id. (emphasis added).

The Restatement's reporter's note emphasizes the Restatement's rejection of the ABA Model Rules formulation. The note then explains the Restatement's reliance in the

current client context on the ABA Model Rules approach to a lawyer's confidentiality duty to former clients (defined in ABA Model Rule 1.9).

> ABA Model Rule 1.9(b) . . . excepts from its requirement of confidentiality information that "has become generally known." No similar exception is contained, however, in the general-purpose analog to ABA Model Rule 1.9(b), ABA Model Rule 1.8(b) ("A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3."). Commentators have differed over the wisdom of the ABA Model Rule approach. Compare, e.g., C. Wolfram, Modern Legal Ethics §§ 6.7.4, 7.4.2(c), at 364-65 (1986) (arguing against excepting public information from duty to safeguard confidential client information), with, e.g., 1 G. Hazard & W. Hodes, The Law of Lawyering § 1.6:401, at 311-12 (2d ed.1990 & Supp.1994) (defending exception of generally known from ABA Model Code definition of confidential client information for conflict-of-interest purposes).
>
> . . .
>
> The position taken in the Section and Comment -- that "generally known" information is not part of the definition of confidential client information for either present or past clients -- adheres to ABA Model Rule 1.9(b). The absence of a similarly limiting provision in ABA Model Rule 1.8(b), which applies to ongoing representations, is not inconsistent. Any such lawyer use would be impermissible on the broad ground (see ABA Model Rule 1.7) that a lawyer may not use even publicly known information to the detriment of a current client, whether to further a personal interest of the lawyer . . . or to further the interest of another client . . . . Revealing client information adversely in a way that is gratuitous or negligent would violate the duty to take all reasonably available steps to advance the client's lawful objectives.

Restatement (Third) of Law Governing Lawyers § 59 reporter's note cmt. d (2000).

The Restatement's reporter's note even acknowledges that its "generally known" standard does not find support in any case law.

> No judicial decisions have been found that specifically address the issues raised here [in Comment (e)]. The Section is based on the principles behind the concept of generally known information, the customary and accepted practices of lawyers, and the public interest in effective professional practice consistent with the general protection of confidential client information.

Restatement (Third) of Law Governing Lawyers § 59 cmt. e (2000) (emphasis added).

The Restatement's "generally known" standard almost surely reflects the approach that most lawyers would find more logical than the ABA Model Rules approach -- and which many lawyers undoubtedly follow in their day-to-day conduct.

State Variations. Most states have adopted the ABA Model Rules' expansive definition of confidential client information -- regardless of its source. Some states continue to follow the ABA Model Code formulation, which took a narrower approach.

Although there are many state variations, it is worth focusing on two jurisdictions with large concentrations of lawyers.

The District of Columbia's ethics rules match the ABA Model Code's definition.

- District of Columbia Rule 1.6(b) ("'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.").

A 2004 District of Columbia legal ethics opinion noted the difference between the District of Columbia rules and the ABA Model Rules.

- District of Columbia LEO 324 (5/2004) ("D.C. Rule 1.6(a) provides that a lawyer may not reveal 'a confidence or secret of the lawyer's client,' except under certain specified circumstances. Rule 1.6(b) defines a 'confidence' as 'information protected by the attorney-client privilege under applicable law,' and 'secret' as any '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.'

> Thus, unlike ABA Model Rule 1.6 and the rules of many other jurisdictions, D.C. Rule 1.6 does not define as confidential all information relating to legal representation. Material that is not privileged under applicable evidentiary law and does not meet the definition of a 'secret' under D.C. Rule 1.6(b) may be disclosed. See D.C. Rule 1.6 Comment [6]" (footnote omitted) (emphasis added)).

The New York ethics rules follow the Restatement approach.

- New York Rule 1.6(a) (b) ("A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person . . . . 'Confidential information' consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. 'Confidential information' does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates." (emphases added)).

Thus, the New York ethics rules adopt the Restatement's exclusion of information that is "generally known" from its definition of protected information.

A 2013 New York legal ethics opinion provided some guidance about this approach, which mirrors the Restatement's analysis.

- New York LEO 991 (11/12/13) ("The fact that foreclosure proceedings are a matter of public record does not make the information 'generally known' (which would take it outside the purview of 'confidential information'). Comment [4A] to Rule 1.6 says, in relevant part: Information that is generally known in the local community or in the trade, field or profession to which the information relates is also not protected, unless the client and the lawyer have otherwise agreed. ***Information is not 'generally known' simply because it is in the public domain or available in a public file***. [Emphasis added]"; "The emphasized sentence in the quoted language is significant because in 2011 it replaced the following two sentences that were originally in Comment [4A]: 'Information that is in the public domain is not protected unless the information is difficult or expensive to discover. For example, a public record is confidential information when it may be obtained only through great effort or by means of a Freedom of Information request or other process.'"; "These two original sentences were criticized as inaccurate, and the New York State Bar Association therefore removed them from Comment [4A] in 2011 and

substituted the single sentence in today's Comment [4A] (emphasized above). This legislative history strongly suggests that information in the public domain may be protected as confidential information even if the information is not 'difficult or expensive to discover' and even if it could be obtained without 'great effort' and without a Freedom of Information request or other formal process."; "Here, we think the information in question cannot be 'generally known.' In our view, information is generally known only if it is known to a sizeable percentage of people in 'the local community or in the trade, field or profession to which the information relates.' Given that hundreds or thousands of homes are in foreclosure in any locale at any given time, we do not believe that the identity of particular properties that would make sound investments is 'generally known' within the meaning of Rule 1.6(a)."). (Emphasis added indicated by underscore.).

Case Law. Cases applying the broad ABA Model Rules approach have readily extended lawyers' confidentiality duty to information in the public record.

- In re Anonymous, 932 N.E.2d 671, 672, 674 (Ind. 2010) (issuing a private reprimand of a lawyer for disclosing confidences that the lawyer learned from a social acquaintance before anyone at the lawyer's firm represented the social acquaintance as a client; explaining that "Respondent [lawyer] represented an organization that employed 'AB.' Respondent became acquainted with AB though this connection. In December 2007, AB and her husband were involved in an altercation to which the police were called, during which, AB's husband asserted, she threatened to harm him."; rejecting the lawyer's argument that the information was not confidential because it was in the public record; "There is no evidence that this information was contained in any public record. Moreover, the Rules contain no exception allowing revelation of information relating to a representation even if a diligent researcher could unearth it through public sources." (emphasis added)).

- Bd. of Attorneys Prof'l Responsibility v. Harman (In re Harman), 628 N.W.2d 351, 358, 359, 360, 361 (Wis. 2001) (suspending for six months a lawyer who was consulted by a prospective client about representing her in a malpractice action; explaining that the lawyer obtained the prospective client's medical file from her former lawyer, and later used it to help her boyfriend defend a claim by the prospective client; "In connection with that potential legal malpractice claim, Attorney Harman obtained S.W.'s case files, which included her medical records, from her former attorney. Those medical records had previously been part of the court file in the Wood County action but had been disposed of by the Wood County clerk in 1995 after that action was dismissed." (footnote omitted); "Attorney Harman referred to materials contained in S.W.'s case file in her Wood County medical malpractice claim including her medical records. In that letter, Attorney Harman wrote: 'The

records I have (which were part of the public record in Wood County) show [S.W.] to have drug and alcohol dependence and a history of self-abusive behavior. I will bring these records with me when we visit about this file.'"; "A few weeks later, Attorney Harman sent copies of S.W.'s medical records to the district attorney's office, the clerk of court, the public defender's office, the guardian ad litem, and a women's shelter."; explaining the bar's disciplinary charge; "'Count 5: By his April 1, 1998, disclosure of the content of [S.W.'s] medical records to a prosecutor, [Harman] revealed information relating to representation of a client . . . without her consent, in violation of SCR 20:1.6(a).'"; rejecting the lawyer's argument that she did not violate her confidentiality duties because the medical records were public; "On appeal, Attorney Harman contends that the referee erred in refusing to allow into evidence two documents he claims would have established that S.W.'s medical records that he released were, in fact, public records and therefore S.W. could not claim any privilege with respect to their release."; "We reject this argument because, as the Board correctly argues in its response, it is irrelevant whether S.W.'s medical records were confidential medical records. Supreme Court Rule 20.1.6(a), the disciplinary rule Attorney Harman was charged with violating in Count 5, prohibits revealing or using information relating to a former representation of a client. Moreover, the comment to that rule notes that it is a 'fundamental principle' in the client-lawyer relationship that the lawyer maintain confidentiality of 'information relating to the representation.' The comment explains that the rule of client-lawyer confidentiality applies not only to matters communicated in confidence by the client, ' . . . but also to all information relating to the representation whatever its source.' S.W. did not authorize Attorney Harman to release her medical records to anyone. His disclosure of information that he obtained while representing S.W. violated client-lawyer confidentiality." (emphasis added); "Regardless of whether S.W.'s medical records lost their 'confidentiality' because they had been made part of the Wood County medical malpractice action, the fact remains that Attorney Harman obtained those records while he was representing S.W. and he then disseminated those records without her consent." (emphasis added)).

- Virginia LEO 1609 (9/14/95) ("Under DR 4-101(B), information regarding the judgments, even though available in the public record, is a secret, learned within the attorney-client relationship, and the disclosure of such information would likely be detrimental to client A. Thus, the information must be protected by the law firm." (emphasis added)).

Conclusion

The ABA ethics rules have continually expanded the source of information that can be protected by lawyers' confidentiality duty. The 1908 and 1937 ABA Canons

focused on information lawyers obtained from their clients. The 1969 ABA Model Code seemed to have taken the same approach, but a reference in an Ethical Consideration apparently signaled a broader reach. The ABA Model Rules explicitly cover information "relating to a representation," regardless of its source.

Several authors have noted the illogical and unreasonable reach of the ABA Model Rules approach, and concluded that bars must bring some common sense to bear in the disciplinary process.

Following agency principles, the Restatement takes what seems like a more logical approach -- excluding from lawyers' duty of confidentiality generally known information. Among other states, New York deliberately chose this approach when amending its ethics rules in 2009.

(a) The ABA Model Code and ABA Model Rules protect information a lawyer obtains from a client. The Restatement would also protect such information, unless it has become "generally known." None of these require clients to ask their lawyers to maintain the information as confidential.

(b) The ABA Model Code, ABA Model Rules, and the Restatement all protect information from sources other than the client, under the right circumstances.

(c) The ABA Model Rules extend lawyers' confidentiality duty to include "generally known" information, but the Restatement does not.

(d) The ABA Model Rules extend lawyers' duty of confidentiality even to information in the public record. The Restatement takes a more nuanced approach. Information in the public record that is not generally known deserves confidentiality

protection, while information in the public record that is generally known does not deserve such protection.

Best Answer

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

b 2/14

Timing of the Information

Hypothetical 4

You frequently socialize with real estate developers -- some of whom hire you to handle discrete short-term projects. A few recent incidents have prompted questions about whether your confidentiality duty extends to information you learn before or after representing a client.

(a) If you begin to represent a developer in a shopping center project, does your confidentiality duty cover information you learned from the developer at a wine tasting event six month before the developer approached you to represent him?

MAYBE

(b) Two years ago, you represented a local landowner in winning a breach of contract action, but have not represented her since then. Yesterday, you received a letter from one of the jurors in that case, who accused your client of improper contacts with the juror during the trial. Does your confidentiality duty cover that information?

MAYBE

Analysis

Ethics rules and other authorities defining the scope of client-related information lawyers must protect focus on three variables: (1) the information's source; (2) the time at which the lawyer obtained the information; and (3) the information's content (judged by whether disclosure would harm the client). The first two variables involve what could be seen as the information's input to lawyers, and the third variable involves lawyers' output.

(a)-(b) This hypothetical addresses the second element -- the time at which the lawyer obtained the information.

The issue here involves information lawyers learn before a client approaches the lawyer to raise the possibility of an attorney-client relationship.

Source of Guidance

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

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

ABA Canons of Professional Ethics, Canon 6 (8/27/1908) (emphasis added).

Thus, the 1908 Canon did not deal with the timing of the lawyer's acquisition of client "secrets or confidences." However, the Canon seemed focused on the attorney-client relationship, which in turn implied that lawyers' duty of confidentiality covered information acquired during that relationship -- rather than before or after.

On July 26, 1928, the ABA adopted an explicit confidentiality canon, which it later amended on September 30, 1937.

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

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

The reference to "client's confidences" implied that the lawyer acquired the protected information while there was an attorney-client relationship -- although the rule did not explicitly indicate that.

ABA Model Code. The 1969 ABA Model Code of Professional Responsibility contained a much more detailed description of lawyers' confidentiality duty.

> [A] lawyer shall not knowingly:
>
> (1) Reveal a confidence or secret of his client.
>
> (2) Use a confidence or secret of his client to the disadvantage of the client.
>
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

ABA Model Code of Professional Responsibility, DR 4-101 (B) (footnotes omitted).

That same Disciplinary Rule defined the information subject to this duty.

> 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). The pertinent EC did not shed any light on this timing issue. ABA Model Code of Professional Responsibility, EC 4-4.

The black letter rule's reference to "confidence," which explicitly parallels the attorney-client privilege, seemed to limit the protection to communications occurring

during the attorney-client relationship or communications between a prospective client and the lawyer. The definition of "secret" explicitly referred to other information "gained in the professional relationship." This also seemed to limit lawyers' confidentiality duty to information gained during the attorney-client relationship -- not before or after it.

ABA Model Rules. The 1983 ABA Model Rules of Professional Conduct contain a remarkably broad view of information subject to lawyers' confidentiality duty.

> A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent [or] the disclosure is impliedly authorized [by the Rule's exceptions].

ABA Model Rule 1.6(a) (emphasis added).

Interestingly, a comment to the ABA Model Rule governing lawyers' confidentiality duty to former clients uses the old ABA Model Code formulation. ABA Model Rule 1.9(c) indicates that lawyers who formerly represented a client may not "reveal information relating to the representation" or "use information relating to the representation" to the former client's disadvantage, unless the information "has become generally known." ABA Model Rule 1.9(c)(2), (1). A comment to that Rule inexplicably uses a different formulation.

> Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client.

ABA Model Rule 1.9 cmt. [8] (emphasis added). Perhaps the use of that phrase simply represents a holdover from the old ABA Model Code articulation. Given the black letter rule's use of the ABA Model Rule 1.6 formulation, the comment presumably does not limit the scope of protected client information.

Under the current ABA Model Rules approach, lawyers' confidentiality duty can extend to information the lawyer acquired before a formal attorney-client relationship begins, and even before the client approaches the lawyer to discuss the possibility of establishing such a relationship. Similarly, most bars applying the ABA Model Rules agree that lawyers' confidentiality duty can even extend to information the lawyer acquires after the attorney-client relationship ends. Despite the literal language of ABA Model Rule 1.9 cmt. [8], lawyers' confidentiality duty covering that pre- and post-relationship information clearly does not evaporate once the relationship ends.

Thus, the ABA Model Rules do not contain the apparently temporal limiting language of the ABA Model Code. Although the ABA Model Rules' confidentiality duty does not explicitly cover information the lawyer obtains before or after the attorney-client relationship, the broad horizontal scope of protected information probably signals an equally broad temporal approach.

Comparison of the ABA Model Code and the ABA Model Rules

An extensive 2009 Nevada legal ethics opinion reads the ABA Model Rules this way.

> The [Nevada] Rule [1.6] applies: (1) Even if the client has not requested that the information be held in confidence or does not consider it confidential. Thus, it operates automatically; (2) Even though the information is not protected by the attorney-client privilege; (3) Regardless of *when* the lawyer learned of the information -- even before or after the representation; (4) Even if the information is *not* embarrassing or detrimental to client; (5) Whatever the source of the information; i.e., whether the lawyer acquired the information in a confidential communication from the client or from a third person or accidentally; and (6) (In contrast to the attorney-client privilege) even if the

> information is already generally known -- or even public information.

Nevada LEO 41 (6/24/09) (emphasis added indicated by underscore).

Restatement. The Restatement explicitly adopts a broad temporal approach.

> Information acquired during the representation or before or after the representation is confidential so long as it is not generally known . . . and relates to the representation. Such information, for example, might be acquired by the lawyer in considering whether to undertake a representation.

Restatement (Third) of Law Governing Lawyers § 59 cmt. c (2000) (emphasis added).

The Restatement provides an illustration of protected information the lawyer learns before an attorney-client relationship.

> Lawyer represents Employer in defending against a claim of employment discrimination by Plaintiff. Plaintiff has joined both Employer and Personnel Director as defending parties. Lawyer extensively confers with Inside Legal Counsel, general counsel of Employer, who provides information about the claim as it relates to Personnel Director. Subsequently, Inside Legal Counsel authorizes Lawyer to represent Personnel Director as a co-client. Information acquired by Lawyer relating to representation of Personnel Director prior to forming the client-lawyer relationship is confidential client information under this Section.

Restatement (Third) of Law Governing Lawyers § 59 cmt. c, illus. 1 (2000).

The Restatement also provides an illustration of protected information the lawyer learns after an attorney-client relationship.

> Lawyer represented Defendant in civil litigation, in which Defendant prevailed. Two years after the representation ended, a Juror in the case writes a letter to Lawyer stating that Defendant approached Juror and several other jurors in a recess during their deliberations and improperly provided them with new evidence that persuaded the jury to find for Defendant. Juror states in the letter that Juror wishes Lawyer to show the letter to the Judge who presided at the

> trial. Although not subject to the attorney-client privilege . . . , the letter relates to Lawyer's representation of Defendant and is thus confidential under this Section.

Restatement (Third) of Law Governing Lawyers § 59 cmt. c, illus. 2 (2000).

This Restatement section's reporter's note provides the following explanation of this broad temporal approach:

> On the time period during which receipt of confidential information about a client is protected, compare DR 4-101(A) (information "gained in the professional relationship") with ABA Model Rule 1.6(a) (information "relating to representation of a client" apparently without regard to time at which lawyer learns of it). See generally 1 G. Hazard & W. Hodes, The Law of Lawyering § 1.6:201, at 258 (2d ed.1990, Supp.1992 & 1994). This Section is based upon the ABA Model Rules definition. Both the Code (EC 4-6) and the ABA Model Rules (Comment P21 ("The duty of confidentiality continues after the client-lawyer relationship has terminated.")) assume that the confidentiality duty endures indefinitely.

Restatement (Third) of Law Governing Lawyers § 59 reporter's note cmt. c (2000).

Of course, it is understandable that the Restatement could take such a broad temporal approach to protected client information. Other Restatement provisions prohibit lawyers from disclosing protected information only if the client has asked the lawyer not to disclose it, or if there is a "reasonable prospect that [disclosing or using client information] will adversely affect a material interest of the client." Restatement (Third) of Law Governing Lawyers § 60(1)(a) (2000). Given this back-end check on lawyers' disclosure of protected client information (which is absent in the ABA Model Rules), the Restatement can take a broad approach to its definition of protected information without running the risk of irrational over breadth -- which seems apparent in the ABA Model Rules approach.

State Variations. Most states follow the ABA Model Rules approach, which seems to have no temporal limitation.

However, some states still follow a variation of the ABA Model Code approach.

- North Carolina Rule 1.6(a) ("A lawyer shall not reveal information acquired during the professional relationship of the client." (emphasis added); otherwise following the general ABA Model Rules formulation).

- Virginia Rule 1.6(a) ("A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or 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 unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation." (emphasis added)).

- District of Columbia Rule 1.6(b) ("'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." (emphasis added)).

- Georgia Rule 1.6(a) ("A lawyer shall maintain in confidence all information gained in the professional relationship with a client, including information which the client has requested to be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client." (emphasis added)).

New York follows its own unique approach, using both the ABA Model Code and the ABA Model Rules approach -- which presumably has the effect of taking the latter's broad view.

- New York Rule 1.6(a) (b) ("A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person . . . . 'Confidential information' consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. 'Confidential information' does not ordinarily

include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates." (emphasis added)).

A 2013 New York legal ethics opinion provided some guidance.

- New York LEO 991 (11/12/13) (analyzing the following situation: "A lawyer who handles foreclosure matters in mediation and at trial desires to provide leads on desirable properties to friends in the real estate business. The lawyer must not reveal confidential information to the disadvantage of a client or to the advantage of the lawyer or a third party unless the client gives informed consent. If a reasonable lawyer would perceive a significant risk that the lawyer's own financial, business, or other personal interests will adversely affect the lawyer's professional judgment on the client's behalf, then the lawyer may not continue the representation unless the conflict is consentable and the client gives informed consent, confirmed in writing. In any event, the lawyer may not use litigation tactics that have no substantial purpose other than delay."; explaining that information about properties in foreclosure amounted to protected confidential information; "The first of these multiple criteria is whether the information has been 'gained during *or* relating to the representation of the client . . . .' Here, information about whether properties would be sound investments is plainly 'gained during' the representation of the Lender, and is information 'relating to' the representation. Only one of these is necessary." (emphases added indicated by underscore)).

Case Law. A 2010 Indiana case held that information a lawyer acquired from a social acquaintance became retroactively covered by the lawyer's confidentiality duty when one of the lawyer's partners began to represent the acquaintance.

- In re Anonymous, 932 N.E.2d 671, 672, 673, 673-74, 674 (Ind. 2010) (issuing a private reprimand of a lawyer for disclosing confidences that the lawyer learned from a social acquaintance before anyone at the lawyer's firm represented the social acquaintance as a client; explaining that "Respondent [lawyer] represented an organization that employed 'AB.' Respondent became acquainted with AB though this connection. In December 2007, AB and her husband were involved in an altercation to which the police were called, during which, AB's husband asserted, she threatened to harm him. In January 2008, AB phoned Respondent and told her about her husband's allegation and that she and her husband had separated."; noting that AB later hired a lawyer in the same firm to represent her; "In a second phone call that month, AB asked Respondent for a referral to a family law attorney. Respondent gave AB the name of an attorney in Respondent's firm."; noting

that AB and her husband later reconciled; relating that the respondent lawyer later disclosed in a social setting what he had learned from AB during their conversation before AB hired the lawyer's firm; "In March or April 2008, Respondent was socializing with two friends, one of whom was also a friend of AB's. Unaware of AB's reconciliation with her husband, Respondent told her two friends about AB's filing for divorce and about her husband's accusation. Respondent encouraged AB's friend to contact AB because the friend expressed concern for her. When AB's friend called AB and told her what Respondent had told him, AB became upset about the revelation of the information and filed a grievance against Respondent."; rejecting the respondent lawyer's argument that he had learned the information from AB outside a professional relationship, which meant that the information was not covered by the respondent lawyer's ethics duty of confidentiality; "Respondent's revelation of the information at issue was a violation of Rule 1.9(c)(2). Respondent argued to the hearing officer that AB initially gave her the information at issue for the purpose of seeking *personal* rather than professional advice and only later phoned her again to ask for an attorney referral. Thus, she argued, the information was not confidential when AB first disclosed it to her, subsequent events did not change its nature, and she violated no ethical obligation in later revealing it." (emphasis added indicated by underscore); holding that the information became subject to the respondent lawyer's ethics duty of confidentiality when AB hired a lawyer in his firm; "The information at issue, however, was disclosed to Respondent not long before the second call in which AB asked for an attorney referral and Respondent recommended an attorney from her firm. At that point, if not before, AB became a prospective client under Rule 1.18. The formation of an attorney-client relationship with Respondent's firm followed immediately thereafter, and the information at issue was highly relevant to the representation. Respondent then revealed the information with knowledge that her firm had been retained to represent AB in the matter. Under these circumstances, we conclude that once AB became a prospective client, the information became subject to the confidentiality protections of the Rules." (emphases added); also rejecting the respondent lawyer's argument that the information must not have been confidential because AB shared it with others; "Respondent presented evidence that AB disclosed the information at issue to others, including some of AB's co-workers. Respondent argued to the hearing officer that AB's disclosure of the information to others indicated that AB's disclosure to Respondent in the first phone conversation was personal rather than professional in nature and not intended to be confidential. However, the fact that a client may chose [sic] to confide to others information relating to a representation does not waive or negate the confidentiality protections of the Rules, which we have found apply to the information at issue."; also rejecting the lawyer's argument that the information was not confidential because it was in the public record; "There is no evidence that this information was contained in any public record.

> Moreover, the Rules contain no exception allowing revelation of information relating to a representation even if a diligent researcher could unearth it through public sources.").

Conclusion

As in other areas, the ABA Model Rules take a far broader approach than the ABA Model Code. The ABA Model Rules seem to place no temporal limitation on the information lawyers must maintain as confidential. The Restatement agrees with the ABA Model Rules approach on this issue.

Best Answer

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

b 2/14

Content of the Information

Hypothetical 5

Your law firm recently hosted a cocktail party for members of your local bar association. Some of the guests seemed to be a bit tipsy by the end of the party, and you wonder whether some of them violated their confidentiality duty.

(a) Did one of your guests violate the ethics rules by identifying one of her clients, and telling you that the client is secretly planning to divorce his socialite wife next year?

(A) YES

(b) Did one of your guests violate the ethics rules by identifying one of his clients, and telling you that the client was born in Nebraska (after you tell him that you were born in Nebraska)?

MAYBE

(c) Did one of your guests violate the ethics rules by identifying one of his clients, and telling you that the client's picture was on the front page of the morning newspaper -- cheering for the Green Bay Packers at a subzero game being played at Lambeau Field?

MAYBE

Analysis

Ethics rules and other authorities defining the scope of client-related information lawyers must protect focus on three variables: (1) the information's source; (2) the time at which the lawyer obtained the information; and (3) the information's content (judged by whether disclosure would harm the client). The first two variables involve what could be seen as the information's input to lawyers, and the third variable involves lawyers' output.

(a)-(c) This hypothetical addresses the third element -- the information's content (judged by whether disclosure would harm the client).

This factor can act independently of the others. For instance, a lawyer might harm her client by disclosing information that is generally known or on the public record. On the other hand, a lawyer might not harm her client by disclosing private information that no one else knows.

Source of Guidance

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

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

ABA Canons of Professional Ethics, Canon 6 (8/27/1908).

Thus, the original ABA pronouncement of confidentiality mentioned both "secrets or "confidences" -- a phrase which carried over to the 1969 ABA Model Code of Professional Responsibility. The 1908 Canon's use of the term "secrets" implied that the client might be harmed by the disclosure of that information. The word "confidences" implied the same thing, although perhaps not as strongly.

On July 26, 1928, the ABA adopted an explicit confidentiality canon, which it later amended on September 30, 1937.

> It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the

> private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even tough [sic] there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

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

Thus, the 1937 ABA Canon prohibited disclosure that might have one of two effects: (1) helping the lawyer or the lawyer's employees (presumably even if that would not disadvantage the client); or (2) acting to the client's disadvantage.

ABA Model Code. The 1969 ABA Model Code of Professional Responsibility prohibited disclosure of "confidences" or "secrets."

> 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).

Although the term "confidence" did not explicitly include information whose disclosure would harm the client, that term covered a very narrow range of privileged communications between clients and lawyers. It would be easy to presume in nearly every situation that disclosing privileged communications would harm the client. After all, the privilege arose in Roman times and continues to exist today mainly to encourage clients' complete and totally frank disclosure of facts to their lawyers -- which enables the lawyers to provide helpful and socially beneficial advice to the clients.

The ABA Code's definition of "secret" included information the client asked the lawyer not to disclose, as well as information whose disclosure would harm the client.

The former presumably covered information that the client believed would cause him or her harm if disclosed -- which is why the client would request the lawyer not to disclose it. Although it is possible that a client might have an idiosyncratic desire to avoid even harmless facts about the client being disclosed, it generally would seem safe to conclude that clients would only ask lawyers to keep confidential information that would cause some harm if the lawyer disclosed it.

Of course, most tellingly, the ABA Model Code applied lawyers' confidentiality duty to any information whose disclosure "would be embarrassing or would be likely to be detrimental to the client." This included information that the client did not specifically ask the lawyer to keep confidential, thus requiring the lawyer's judgment about the information's content and the likely effect of its disclosure.

In contrast to the ABA Model Rules (discussed below), the ABA Model Code covered information completely unrelated to the representation -- if the lawyer gained the information "in the professional relationship" and the client either asked the lawyer not to disclose it or the disclosure "would be embarrassing or would be likely to be detrimental to the client." ABA Model Code DR 4-101(A). This presumably included personal information not related to the representation.

All in all, the ABA Model Code generally took the position that the ethics rules mostly prohibited disclosure that would harm the client in some way.

ABA Model Rules. The ABA Model Rules approach to the content issue seems ludicrously overinclusive and underinclusive at the same time.

The ABA Model Rules seem overinclusive because the main confidentiality rule says nothing about the content of the information that might or might not be disclosed, or any possible ill effects on the client.

> A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent [or] the disclosure is impliedly authorized [by the Rule's exceptions].

ABA Model Rule 1.6(a) (emphasis added).

Similarly, the two pertinent comments do not address the information's content or the effect of its disclosure.

> 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. See also Scope.
>
> Paragraph (a) prohibits a lawyer from revealing information relating to the representation of a client. This prohibition also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person. A lawyer's use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.

ABA Model Rule 1.6 cmt. [3], [4].

Thus, the ABA Model Rules prohibit disclosure of "information relating to the representation of a client" regardless of its content, and regardless of any harm that the disclosure might cause the client.

A lawyer would therefore face punishment under the ABA Model Rules for disclosing some harmless fact about the client, such as her hometown.

At the same time, the ABA Model Rules' definition of protected information seems grossly underinclusive. The definition covers "information relating to the representation of a client" -- which presumably excludes from confidential treatment information not related to the representation. This could include the client's confession of some personal wrongdoing, prejudice, or other embarrassing information unrelated to the representation. For instance, a transactional lawyer assisting a dentist in incorporating the dentist's practice might hear the dentist use the "N" word when referring to someone walking by the office, or see the dentist later checking into a cheap hotel with someone who is not his wife. That sort of information does not seem "relat[ed] to the representation," and therefore presumably falls outside the ABA Model Rules' definition of protected information.

If the ABA Model Rules definition of protected information intended to capture that type of embarrassing information in its definition, it would have used the phrase "information relating to a client" -- rather than the narrower phrase "information relating to the representation of a client." Or the Rules could have used the ABA Model Code formulation -- including within the definition "information gained in a professional relationship." Or the Rules could have used a formulation similar to the New York rule

formulation -- including within the definition "information gained during or relating to the representation of a client." New York Rule 1.6(a) (emphasis added).

So it seems clear that the phrase "relating to the representation of a client" represents a deliberately narrow formulation. Under the only reasonable reading of the ABA Model Rules, lawyers are thus apparently free to disclose their client's use of the "N" word in private, or the fact that their client seems to be carrying on an affair at a cheap hotel.

Under the narrow ABA Model Rules' definition of protected client information, even a lawyer's "use" of such embarrassing information would not violate the ABA Model Rules' prohibition on using protected information. ABA Model Rule 1.8(b).

To be sure, lawyers' disclosure or use of such information might violate other rules, such as those governing loyalty, diligence or other duties that lawyers owe their clients. Lawyers might justifiably expect that the core confidentiality rule would independently prohibit lawyers' disclosure of such undeniably detrimental information. But having chosen the inexplicably narrow "information relating to the representation of a client" standard, the ABA Model Rules seem to have missed the point.

Interestingly, a comment to ABA Model Rule 1.9 uses a slightly different formulation. ABA Model Rule 1.9(c) indicates that lawyers who formerly represented a client may not "reveal information relating to the representation" or "use information relating to the representation" to the former client's disadvantage, unless the information "has become generally known." ABA Model Rule 1.9(c)(2), (1).

A comment to that Rule inexplicably uses a different formulation.

> Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client.

ABA Model Rule 1.9 cmt. [8] (emphasis added). In using the ABA Model Code formulation, that comment arguably includes information that is not "relating to" the representation. However, the black letter rule itself uses the ABA Model Rule 1.6 formulation, so at most the comment seems to describe a subset of that information.

And if the ABA Model Rule 1.9 comment intended to expand the scope of protected information, it would lead to the ironic result that former clients would have greater confidentiality rights than current clients. ABA Model Rule 1.6 and ABA Model Rule 1.8 (which addressed lawyers' use of client information) on their face do not prohibit lawyers from gratuitously disclosing or using damaging information lawyers obtain from their clients -- but which is not "relating to the representation."

Thus, the ABA Model Rules' definition of protected client-related information's content, and its failure to focus on disclosure's detrimental impact, manage to prohibit completely harmless disclosures -- while permitting horribly embarrassing disclosures.

Comparison of the ABA Model Code and the ABA Model Rules

A 2009 Nevada legal ethics opinion provided an excellent description of the ABA Model Rules' expansion of lawyers' confidentiality duty over that imposed by the earlier ABA Model Code.

> In contrast to predecessor Rule DR-4-101, the language of Rule 1.6(a) has three remarkable omissions from the historical rule of confidentiality.; The first is the omission of the qualifier "confidential" between "reveal" and "information." As a result, all information relating to the representation of the client is thereby made confidential.

> Rule DR 4-101 protected the client from the lawyer's disclosure of "secrets," defined as: (1) information that the client "has requested to be held inviolate" . . . and (2) information that would be "embarrassing" or "likely to be detrimental" if revealed.; The second remarkable aspect of Rule 1.6(a) is that the confidential information need not be information that is "adverse" to the client. Rule DR 4-101(B)(3) did not prohibit the disclosure of nonadverse client information.; The final remarkable omission from Rule 1.6 is an exception for information already generally known or public. This element is contained in the Restatement's definition of "confidential client information," but omitted from Rule 1.6.; Thus, the language of Rule 1.6(a) is so broad that it is -- at least on its face -- without limitation. Rule 1.6(a) requires that ALL information relating to the representation of a client is confidential and protected from disclosure.

Nevada LEO 41 (6/24/09) (emphasis added).

The Nevada legal ethics opinion explained the practical consequences of the ABA Model Rules' more expansive definition.

> The Rule applies: (1) Even if the client has not requested that the information be held in confidence or does not consider it confidential. Thus, it operates automatically; (2) Even though the information is not protected by the attorney-client privilege; (3) Regardless of *when* the lawyer learned of the information -- even before or after the representation; (4) Even if the information is *not* embarrassing or detrimental to client; (5) Whatever the *source* of the information; i.e., whether the lawyer acquired the information in a confidential communication from the client or from a third person or accidentally; and (6) (In contrast to the attorney-client privilege) even if the information is already generally known -- or even public information.

Id. (emphasis added indicated by underscore).

The Nevada legal ethics opinion also provided numerous examples of harmless disclosures of "information relating to the representation of a client," concluding that

> [t]he Committee suggests that common sense should be part of Rule 1.6 and that lawyers should not be disciplined for a harmless disclosure.

Id.

A 2012 article in the ABA publication Litigation stressed the same theme as the 2009 Nevada legal ethics opinion, essentially concluding that the expansive ABA Model Rules' confidentiality duty could never be enforced as it is written.

> Most lawyers know that they owe a duty of confidentiality to their clients, and they think about the duty as encompassing two concepts. They have a good working knowledge of the attorney-client privilege, and they know that they are not supposed to reveal privileged communications. They also understand, but in a vaguer way, that a client may have confidences or secrets that are not privileged but that a lawyer should not reveal. For example, a lawyer may learn via a non-privileged communication that a client is quietly working on an invention or planning to leave her employment. The lawyer would understand that the client may not want to reveal such nonpublic information, and the lawyer would guard the secret.
>
> Most lawyers think that their duties end with such confidences and secrets. If you were to ask lawyers if they could talk freely about the identities of clients they are publicly representing (e.g., in a lawsuit) or about the facts of a case as described in open court or published opinions, most would say they could share anything that was in the public record without violating Rule. 1.6.

Edward W. Feldman, Be Careful What You Reveal, Model Rule of Professional Conduct 1.6, Litigation, Summer/Fall 2012, at 35 (emphasis added).

The Litigation article concluded with a prediction that bars' disciplinary authorities would not punish lawyers' disclosures that would plainly violate the ABA Model Rules -- but not cause the client any harm.

> "Stop, think, and use common sense" is hardly a clear standard. But the advice highlights how the breadth of the rule bumps into the natural gregariousness of lawyers. They want to share their stories, both to learn and to socialize. As a practical matter, it is unlikely that most such stories would lead to discipline unless the lawyer revealed some secret or other information that led to harm to a client (essentially the position of the Restatement). Yet, most lawyers want to comport with government ethical standards and steer clear of violations, even ones that fly below the disciplinary radar. Individual lawyers will need to make their own decisions about how much information they feel comfortable 'revealing' about their cases.
>
> In the end, there is a benefit to increasing circumspection within the profession. If lawyers spend less time talking about their cases and more time talking about subjects like politics, art, or sports, Model Rule 1.6 might have the unintended consequence of making lawyers more interesting to their friends and relative, and maybe even to one another.

Id. at 34 (emphasis added) It seems remarkable that a profession dedicated to writing specific and clearly articulated rules governing people's conduct could not draft rules that can be applied literally to its own members' own conduct.

Restatement. The Restatement explicitly ties the prohibition on disclosure to an adverse effect on the client. This theme appears in three separate Restatement provisions.

First, in its discussion of "confidential" information that might deserve protection, the Restatement acknowledges that lawyers might learn confidential information of a personal nature that the client would not want disclosed -- even if does not relate to the representation.

> In the course of representation, a lawyer may learn confidential information about the client that is not necessary for the representation but which is of a personal or

> proprietary nature or other character such that the client evidently would not wish it disclosed. Such information is confidential under this Section.

Restatement (Third) of Law Governing Lawyers § 59 cmt. b (2000) (emphasis added). This provision's phrase "not necessary for the representation" does not exactly match the ABA Model Rule's phrase "relating to the representation." Interestingly, it doesn't even match the Restatement's main provision on confidentiality, which also uses the phrase "information relating to representation of a client." Id. § 59. However, presumably this provision would also cover information "of a personal or proprietary nature or other character" that does not even relate to the representation.

Thus, the Restatement requires lawyers to use their judgment about the impact of disclosing client information. This type of information might fall outside the ABA Model Rules' definition of "information relating to the representation of a client" (as discussed above). The Restatement approach seems much more protective of clients' interests than the ABA Model Rules approach.

Second, the Restatement follows the ABA Model Code's approach in adding an additional level of protection to information of any sort that the client has asked the lawyer to keep confidential.

> [I]f a current client specifically requests that information of any kind not be used or disclosed in ways otherwise permissible, the lawyer must either honor that request or withdraw from the representation.

Restatement (Third) of Law Governing Lawyers § 59 cmt. d (2000). This concept appears again in the next Restatement section, as if to emphasize its importance.

> Even in the absence of a reasonable prospect of risk of harm to a client, use or disclosure is also prohibited if the affected

> client instructs the lawyer . . . not to use or disclose information. Such a direction is the client's definition of the client's interests . . . , which controls . . . . Such an instruction may also limit a lawyer's implied authority to use or disclose confidential client information to advance a client's interests.

Restatement (Third) of Law Governing Lawyers § 60 cmt. c(ii) (2000).

Thus, the Restatement justifiably insists that lawyers respect their clients' decisions about the information clients do not want disclosed. This follows the ABA Model Code approach, but not the ABA Model Rules approach. The latter makes no mention of the clients' wishes. And the ABA Model Rules' narrow definition of protected information as that "relating to the representation of a client" on its face excludes the type of legally irrelevant but personally embarrassing information that lawyers might learn about clients from third parties or even from clients themselves.

Third, the Restatement's main provision prohibiting disclosure of client confidential information begins with an emphasis on the disclosure's effect.

> [T]he lawyer may not use or disclose confidential client information . . . if there is a reasonable prospect that doing so will adversely affect a material interest of the client or if the client has instructed the lawyer not to use or disclose such information

Restatement (Third) of Law Governing Lawyers § 60(1)(a) (2000) (emphasis added).

The Restatement's comment on that section repeats the basic theme.

> A lawyer is prohibited from using or disclosing confidential client information if either of two conditions exists -- risk of harm to the client or client instruction.

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

The Restatement then explains the type of client harm a lawyer must consider in determining whether the lawyer may disclose client information.

> What constitutes a reasonable prospect of adverse effect on a material client interest depends on the circumstances. Whether such a prospect exists must be judged from the perspective of a reasonable lawyer based on the specific context of the client matter. Some representations involve highly secret client information; others involve routine information as to which secrecy has little or no material importance. In most representations, some information will be more sensitive than other information. In all representations, the relevant inquiry is whether a lawyer of reasonable caution, considering only the client's objectives, would regard use or disclosure in the circumstances as creating an unreasonable risk of adverse effect either to those objectives or to other interests of the client. For example, a lawyer advising a client on tax planning for a gift that the client intends to keep anonymous from the donee would violate this Section if the lawyer revealed the client's purpose to the donee. If there is a reasonable ground to doubt whether use or disclosure of a client's confidential information would have the described effect, the lawyer should take reasonable steps to ascertain whether adverse effect would result, including consultation with the client when appropriate. Alternatively, the lawyer in such circumstances may obtain client consent to the use or disclosure . . . .
>
> Adverse effects include all consequences that a lawyer of reasonable prudence would recognize as risking material frustration of the client's objectives in the representation or material misfortune, disadvantage, or other prejudice to a client in other respects, either during the course of the present representation or in the future. It includes consequences such as financial or physical harm and personal embarrassment that could be caused to a person of normal susceptibility and a normal interest in privacy.

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

The Restatement also takes a swipe at the ABA Model Rules' prohibition on disclosure of client information that would not harm the client.

> Subject to exceptions . . . use or disclosure of confidential client information is generally prohibited if there is a reasonable prospect that doing so will adversely affect a material interest of the client or prospective client. Although the lawyer codes do not express this limitation, such is the accepted interpretation. For example, under a literal reading of ABA Model Rules of Professional Conduct, Rule 1.6(a) (1983), a lawyer would commit a disciplinary violation by telling an unassociated lawyer in casual conversation the identity of a firm client, even if mention of the client's identity creates no possible risk of harm. Such a strict interpretation goes beyond the proper interpretation of the rule.

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

The Restatement's approach to this issue paralleled the 1958 Restatement (Second) of the Law Agency.

> Unless otherwise agreed, an agent is subject to a duty to the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency or in violation of his duties as agent, in competition with or to the injury of the principal, on his own account or on behalf of another, although such information does not relate to the transaction in which he is then employed, unless the information is a matter of general knowledge.

Restatement (Second) of the Law Agency § 395 (1958) (emphasis added). A comment provided guidance.

> The relation of principal and agent permits and requires great freedom of communication between the principal and the agent; because of this, the agent is often placed in a position to obtain information of great use in competing with the principal. To permit an agent to use, for his own benefit or for the benefit of others in competition with the principal, information confidentially given or acquired by him in the performance of or because of his duties as agent would tend to destroy the freedom of communication which should exist between the principal and the agent. The agent also has a duty not to use information acquired by him as agent or by means of opportunities which he has as agent to acquire it,

> or acquired by him through a breach of duty to the principal, for any purpose likely to cause his principal harm or to interfere with his business, although it is information not connected with the subject matter of his agency. Thus, an agent who is told by the principal of his plans, or who secretly examines books or memoranda of the employer, is not privileged to use such information at his principal's expense.

Restatement (Second) of the Law Agency § 395 cmt. a (1958) (emphasis added). The next comment made the same point.

> The rule stated in this Section applies not only to those communications which are stated to be confidential, but also to information which the agent should know his principal would not care to have revealed to others or used in competition with him. It applies to unique business methods of the employer, trade secrets, lists of names, and all other matters which are peculiarly known in the employer's business. It does not apply to matters of common knowledge in the community nor to special skill which the employee has acquired because of his employment.

Restatement (Second) of the Law Agency § 395 cmt. b (1958) (emphasis added).

Thus, the Restatement takes what seems like a much more common-sense approach than the ABA Model Rules -- focusing on lawyers' disclosure of client information that might harm the client, and not prohibiting the type of harmless disclosure that undoubtedly occurs every day among lawyers.

State Variations. Most states have moved to the ABA Model Rules formulation, which prevents disclosure of any protected client information, even if the disclosure would not harm the client.

As in so many other areas, states continue to revise their ethics rules. For instance, Illinois moved from the ABA Model Code formulation to the ABA Model Rules

formulation on January 1, 2010. New York changed its rules on April 1, 2009, but did not move to the ABA Model Rules formulation.

Some states continue to use the old ABA Code formulation, or a variation of that approach.

New York takes such an approach.

- New York Rule 1.6(a) (b) ("A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person . . . . 'Confidential information' consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. 'Confidential information' does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates." (emphasis added)).

A 2013 New York legal ethics opinion discussed protection for information that the client has asked to be kept confidential.

- New York LEO 991 (11/12/13) ("Regarding client expectations, if the Lender has requested that information about the properties in foreclosure be kept confidential, then the information is presumptively confidential even if it is not privileged and even if disclosing the information is not likely to be detrimental to the client. Moreover, if the Associate's law firm has assured the Lender that all such information will be kept confidential, then that is equivalent to the Lender's request that the information be kept confidential even if the Lender has not expressly made such a request." (emphasis added)).

The same opinion discussed the prohibition on disclosure that would disadvantage the client.

- New York LEO 991 (11/12/13) ("Regarding detriment to the client, if the Lender's interests differ in any material way from the LLC's interests, then revealing confidential information about desirable investment properties to the LLC is 'likely to be detrimental' to the Lender. In the context of confidentiality, we understand the term 'likely' in Rule 1.6(a) to indicate a 'significant risk' that revealing or using the information will harm the client. (This understanding

> borrows a concept from Rule 1.7(a)(2)). In other words, we think the phrase 'likely to be detrimental' falls somewhere in between 'probable' (meaning 'more likely than not') and 'possible' (meaning that it can't be completely ruled out). If there is a significant risk that revealing or using the information will disadvantage the client, then it is 'likely to be detrimental' within the meaning of Rule 1.6(a). And the more sensitive the information to be disclosed, the more significant the risk, because the detriment to the client will increase as the sensitivity of the information increases." (emphasis added)).

Other states take a similar approach, but appear not to have addressed the issue as thoroughly as New York has.

- Minnesota Rule 1.6(b)(2) ("A lawyer may reveal information relating to the representation of a client if . . . the information is not protected by the attorney-client privilege under applicable law, the client has not requested that the information be held inviolate, and the lawyer reasonably believes the disclosure would not be embarrassing or likely detrimental to the client." (emphasis added)).

- District of Columbia Rule 1.6(a), (b) ("[A] lawyer shall not knowingly: (1) reveal a confidence or secret of the lawyer's client; (2) use a confidence or secret of the lawyer's client to the disadvantage of the client; (3) use a confidence or secret of the lawyer's client for the advantage of the lawyer or of a third person."; "'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." (emphasis added)).

Cases and opinions from these states focus on a disclosure's detrimental effect -- even of information in the public record.

- Iowa Supreme Court Attorney Disciplinary Bd. v. Plumb, 766 N.W.2d 626, 630 (Iowa 2009) (indefinitely suspending the license of a lawyer who disclosed client information that was on the public record, because the information involved "domestic abuse history" and its disclosure would be "a distinct embarrassment").

- Los Angeles County LEO 520 (6/18/07) (addressing a plaintiff's lawyer's ethics obligations upon discovering that pursuant to a complicated settlement defendant had overpaid; explaining that plaintiff's lawyer first had an obligation to advise the plaintiff of the erroneous payment, including "the

possible risks of keeping the funds paid to Plaintiff in error"; also dealing with the possible duty to advise the defendant of its error; "The scope of this duty of secrecy is broader than the attorney-client privilege. It extends to all information gained in the professional relationship that the client has requested be kept secret or the disclosure of which likely would be detrimental or embarrassing to the client. . . . The rule applies even where the facts are already part of the public records or where there are other sources of information."; directing that the lawyer "use every effort to cause the client to disclose the overpayment," but ultimately holding that "the duty to preserve secrets obligates Counsel to abide by his or her client's wishes not to disclose the overpayment"; also concluding that "Counsel is not obligated to continue representing the client," and therefore may withdraw) (emphasis added).

- Akron Bar Assoc. v. Holder, 810 N.E.2d 426, 434, 435 (Ohio 2004) (suspending for two years, although suspending the last 18 months of the suspension, a lawyer who disclosed information in the public record during a fee dispute with a former client; "Under DR 4-101(A), a client 'confidence' refers to 'information protected by the attorney-client privilege under applicable law,' and a client 'secret' includes 'other information gained in the professional relationship that would be embarrassing or would be likely to be detrimental to the client.' Under DR 4-101(B), a lawyer cannot 'knowingly [r]eveal' either a confidence or a secret unless permitted by DR 4-101(C). Respondent argues that Wright's criminal record was not a 'secret,' inasmuch as it was a matter of public record and a matter that Wright had himself revealed to others, including the ECA director whom he had recommended to Client A. Respondent further contends that his disclosure, even if it was of a secret, was not likely to be detrimental, considering the criminal background check to which Wright might have been subjected as a condition of being offered a service contract. We reject these arguments." (emphasis added); "For the purpose of DR 4-101, a 'confidence' is information learned directly from the client, whereas a 'secret' is defined more broadly. . . . A client secret necessarily includes embarrassing or detrimental information that the client reveals, but the term also extends to embarrassing or detrimental information that is available from other sources, such as witnesses or investigative research."; "There being an ethical duty to maintain client secrets available from sources other than the client, it follows that an attorney is not free to disclose embarrassing or harmful features of a client's life just because they are documented in public records or the attorney learned of them in some other way." (emphasis added); "Accordingly, we find that respondent improperly disclosed the secrets of Wright's past after Wright divulged them in response to opposing counsel's questioning during Wright's deposition. As for detrimental effect, DR 4-101(A) requires no more than a probability that the disclosure of a client's secret will be 'embarrassing.' And here, respondent disclosed Wright's criminal record and other background

information, not for any of the reasons that require disclosure under DR 4-101(C), but to warn Client A and others about Wright. Respondent acted to protect those involved in the ECA project from doing business with Wright for what he believed was their own good and the good of the school.").

Some state ethics rules follow a "belt and suspenders" approach.

- Georgia Rule 1.6(a) ("A lawyer shall maintain in confidence all information gained in the professional relationship with a client, including information which the client has requested to be held inviolate or the disclosure of which would be embarrassing or would likely be detrimental to the client.").

An interesting 2013 Virginia Supreme Court case added a constitutional dimension to the issue. Virginia follows the ABA Model Code approach.

- Virginia Rule 1.6(a) ("A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or 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 unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation." (emphasis added)).

In 2013, the Virginia Supreme Court dealt with a Richmond lawyer who blogged about criminal cases, including his own cases. The Virginia Supreme Court concluded that the lawyer had a First Amendment right to disclose what was on the public record -- even if it would embarrass his former criminal clients.

- Hunter v. Va. State Bar ex rel. Third Dist. Comm., 285 Va. 485, 501, 502, 502-03, 503 (Va. 2013) (holding that a lawyer who published a blog about criminal cases, including his own successful cases, must include a disclaimer required of lawyers' advertisement of their own successes, but was not prohibited by Virginia's Rule 1.6 from including in the blog information in the public record, despite the lawyer's former clients' complaint that the publication was embarrassing; noting that the Virginia State Bar held that the lawyer had violated Rule 1.6 by "'disseminating client confidences'" without the clients' consent, but that the three-judge panel of the circuit court had found that the Bar's interpretation of Rule 1.6 violated the First Amendment; quoting Virginia's Rule 1.6(a), which prohibits lawyers from revealing information protected by the attorney-client privilege "'or 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'" absent the client's consent; noting that "Hunter argues that the VBS's interpretation of Rule 1.6 is unconstitutional because the matters discussed in his blogs had previously been revealed in public judicial proceedings and, therefore, as concluded matters, were protected by the First Amendment. Thus, we are called upon to answer whether the state may prohibit an attorney from discussing information about a client or former client that is not protected by attorney-client privilege without express consent from that client. We agree with Hunter that it may not." (emphasis added); "It is settled that attorney speech about public information from cases is protected by the First Amendment, but it may be regulated if it poses a substantial likelihood of materially prejudicing a pending case."; "All of Hunter's blog posts involved cases that had been concluded. Moreover, the VSB concedes that all of the information that was contained within Hunter's blog was public information and would have been protected speech had the news media or others disseminated it."; "State action that punishes the publication of truthful information can rarely survive constitutional scrutiny. . . . The VSB argues that it can prohibit an attorney from repeating truthful information made in a public judicial proceeding even though others can disseminate this information because an attorney repeating it could inhibit clients from freely communicating with their attorneys or because it would undermine public confidence in the legal profession. Such concerns, however, are unsupported by the evidence. To the extent that the information is aired in a public forum, privacy considerations must yield to First Amendment protections. In that respect, a lawyer is no more prohibited than any other citizen from reporting what transpired in the courtroom. Thus, the circuit court did not err in concluding that the VSB's interpretation of Rule 1.6 violated the First Amendment." (emphasis added); upholding the three-judge panel's finding that the Bar's interpretation of Rule 1.6 violated the First Amendment).

The Virginia Supreme Court's 2013 decision has generated considerable criticism.

- Richard Zitrin, Viewpoint: Guard Your Clients' Public Secrets, Recorder, June 7, 2013 ("On his blog, Hunter wrote about his own cases in some detail. He used the real names of clients who were acquitted, and the names of clients for whom he negotiated favorable plea bargains to lesser charges. And he acknowledged that he used the names without his clients' consent. So what's wrong with that? All of the information that Hunter posted on his blog was about past cases, and could be found in the public record of criminal proceedings. As the Virginia Supreme Court noted, 'To the extent that the information is aired in a public forum, privacy considerations must yield to First Amendment protections. In that respect, a lawyer is no more prohibited than any other citizen from reporting what transpired in the courtroom.' Thus, concluded the court, Hunter could not violate Rule 1.6."; "Imagine this

> situation: Charlie Client is charged with armed robbery, but his lawyer wins a motion to suppress evidence illegally seized from Client's girlfriend's apartment. As a result of this suppression and given the weakness of the remaining case, the District Attorney offers Client a plea to simple misdemeanor possession of stolen property. Client takes this favorable deal and is placed on probation. It is an ordinary, run-of-the-mill case that receives no press attention, but all of the events -- the charging document, the motion to suppress, the final plea and admonishment to and waiver of the defendant -- are part of the court file. No one is interested in this case. No one cares. Client goes about his business, and perhaps even rehabilitates himself, going to junior college and getting a good job as a computer programmer or restaurant manager. And then Client's lawyer publishes a blog with the details of the case, how the hard-charging lawyer won the motion to suppress using the important protections of the Fourth Amendment, and how Client thus got to plead guilty to only a misdemeanor. If you were Charlie Client, how would you feel? Embarrassed? Hugely. That the information disclosed by your lawyer is detrimental to you? You bet. And that is why the Virginia State Bar was right in disciplining Horace Hunter for violating his duty of confidentiality to his clients, even though he disclosed the information only after the cases were over. As the California statute eloquently puts it, it is the duty of every lawyer to 'maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.' [Bus. & Profs. Code §6068(e)(1).] Those 'secrets' include anything embarrassing or likely to be detrimental to the client. The fact that the information is available to the public doesn't mean it is known by the public. And it is there that an attorney's duty lies and continues, both before and after the end of the case. <u>The core of where the Virginia court went wrong was its conclusion that 'a lawyer is no more prohibited than any other citizen' from talking about an old case. Not so. A lawyer remains at all times a lawyer.</u>" (emphasis added)).

<u>Conclusion</u>

Much like the ethics rules' and <u>Restatement's</u> disagreement about "generally known" information, the ABA Model Code and the <u>Restatement</u> seem to take a much more logical and realistic approach than the ABA Model Rules in defining protected information's content.

As explained above, under the ABA Model Rules a lawyer could be sanctioned for disclosing the identity of her client without the client's consent, even if the disclosure

would not harm the client in any way. In fact, given the ABA Model Rules' astoundingly broad approach, that lawyer could face professional discipline for disclosing the client's identity even if the lawyer's representation of the client had been widely publicized in the local newspaper's headlines every day for a month.

And the ABA Model Rules' failure to focus on a disclosure's detrimental impact results in an apparently deliberate but perverse possibility -- allowing lawyers to disclose embarrassing information about clients, as long as it is not information "relating to representation" of that client.

Best Answer

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

b 2/14

Use of the Information

Hypothetical 6

For the past two years, you have represented a company which locates and develops cell phone tower sites. Not surprisingly, you have learned quite a bit about your city's zoning laws and real estate market.

Of course, you know that you cannot use such information to your client's disadvantage -- such as advising another client of prime real estate that has just come on the market and which your client would want to purchase.

However, you wonder whether you can use such information to assist another client or to your own advantage -- if that use would not disadvantage your client.

(a) If you discovered what appears to be a "loophole" in your city's zoning laws while working for the cell phone tower client, may you use that "loophole" to assist a client who builds nursing homes?

MAYBE

(b) If you found a prime cell phone tower site that your client tells you it has no interest in purchasing (because it will never need that site), may you purchase the site yourself -- with the hopes of earning a profit on its resale to a retailer?

MAYBE

Analysis

As with the issues of source, timing and content of protected client information, the various permutations of the ABA's ethics principles and the Restatement governing the use of client information reflect an amazing variation.

(a)-(b) In sum: (1) the pertinent 1908 ABA Canon did not deal with use of client information; (2) the 1937 ABA Canon indicated that lawyers could not use client information to the client's disadvantage or to their own advantage, but did not deal with using the information to help another client; (3) the ABA Model Code flatly prohibited

lawyers from using client information to the client's disadvantage, to a third person's advantage or to their own advantage; (4) the ABA Model Rules prohibit lawyers from using client information to the client's disadvantage, but allow lawyers to use client information to a third person's advantage or to their own advantage; (5) the Restatement prohibits lawyers from using client information to the client's disadvantage or to their own advantage, but allow lawyers to use the information to assist a third party.

Source of Guidance

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

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

ABA Canons of Professional Ethics, Canon 6 (8/27/1908) (emphasis added). Thus, the original ABA pronouncement on confidentiality dealt only with disclosure of clients' "secrets or confidences" -- but did not mention lawyers' use of such information.

A July 26, 1928, ABA Canon (amended in 1937) added the lawyers' use of client confidences to the list of prohibited activities. The Canons prohibited a lawyer from using clients' information to the client's disadvantage or to the lawyer's advantage, but did not explicitly address the lawyer's use of such information to help other clients.

> It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the

> private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even tough [sic] there are other available sources of such information. A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.

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

ABA Model Code. The 1969 ABA Model Code prohibited lawyers from using client confidences or secrets to help the lawyer or "a third person."

> [A] lawyer shall not knowingly:
>
> . . .
>
> (2) Use a confidence or secret of his client to the disadvantage of the client.
>
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

ABA Model Code of Professional Responsibility, DR 4-101(B)(2), (3) (emphasis added).

Thus, the ABA Model Code could not have been any clearer. Lawyers could not use client confidences or secrets to a third person's or to the lawyer's own advantage. Even the ABA Model Code's grammatical construction added clarity to these prohibitions. As explained below, the Restatement (Second) of the Law Agency (1958) contains an awkward construction that creates ambiguity.

An Ethical Consideration provided some guidance, although it inexplicably failed to mention one of the prohibitions mentioned in the black letter Disciplinary Rule -- the lawyer's use of client confidences to assist a third person.

> A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes.

ABA Model Code of Professional Conduct, EC 4-5 (emphasis added).

Interesting, the Restatement (Second) of the Law Agency (1958), which the Restatement issued in between the ABA Canons and the ABA Model Code, mentions all three prohibitions on lawyers' use of client confidences, but its wording creates ambiguity.

> Unless otherwise agreed, an agent is subject to a duty to the principal not to use or to communicate information confidentially given him by the principal or acquired by him during the course of or on account of his agency or in violation of his duties as agent, in competition with or to the injury of the principal, on his own account or on behalf of another, although such information does not relate to the transaction in which he is then employed, unless the information is a matter of general knowledge.

Restatement (Second) of the Law Agency § 395 (1958) (emphasis added). This black letter rule seemed to take the same position as the later ABA Model Code -- prohibiting lawyers' use of confidential information to the disadvantage of the client, or to the advantage of a third party or the lawyer. However, a comment seems to extend the prohibition on the last two types of use only in situations that would disadvantage the client.

> The relation of principal and agent permits and requires great freedom of communication between the principal and the agent; because of this, the agent is often placed in a position to obtain information of great use in competing with the principal. To permit an agent to use, for his own benefit or for the benefit of others in competition with the principal, information confidentially given or acquired by him in the

> performance of or because of his duties as agent would tend to destroy the freedom of communication which should exist between the principal and the agent. The agent also has a duty not to use information acquired by him as agent or by means of opportunities which he has as agent to acquire it, or acquired by him through a breach of duty to the principal, for any purpose likely to cause his principal harm or to interfere with his business, although it is information not connected with the subject matter of his agency. Thus, an agent who is told by the principal of his plans, or who secretly examines books or memoranda of the employer, is not privileged to use such information at his principal's expense.

Restatement (Second) of the Law Agency § 395 cmt. a (1958) (emphasis added).

The black letter rule takes the same grammatical approach as the ABA Model Code -- mentioning lawyers' use of client confidential information to the client's disadvantage first, followed by a reference to the lawyers' use of such information to the advantage of a third person or to the lawyer's own advantage. This construction seems to extend the prohibition to all three uses. However, the comment reverses the order, mentioning lawyers' use of client confidential information to the advantage of a third person or to their own advantage -- followed by a reference to such use to the client's disadvantage. This construction seems to prohibit lawyers' use of client confidential information to the advantage of a third person or to their own advantage only if it would disadvantage the client. This is the approach taken by the 1983 ABA Model Rules, discussed below.

ABA Model Rules. The ABA Model Rules take a far different approach to lawyers' use of client information -- in both the placement of the Rule and in its content.

Unlike the ABA Canons and the ABA Model Code, the ABA Model Rules inexplicably address lawyers' use of client information in a different rule from that which addresses lawyers' disclosure of such information.

The ABA Model Rules address lawyers' disclosure of client information in Rule 1.6, but lawyers' use of client information in Rule 1.8.

> A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

ABA Model Rule 1.8(b) (emphasis added). It is unclear why the ABA Model Rules made this dramatic move in placing these parallel duties so far apart.

In addition to this logistical difference, the ABA Model Rules vary from the ABA Model Code in their content. While the ABA Model Code flatly prohibited lawyers' use of client confidential information to the client's disadvantage or to the advantage of a third person or the lawyer, the ABA Model Rules focus only on the first of those three elements.

> Use of information relating to the representation to the disadvantage of the client violates the lawyer's duty of loyalty. Paragraph (b) applies when the information is used to benefit either the lawyer or a third person, such as another client or business associate of the lawyer. For example, if a lawyer learns that a client intends to purchase and develop several parcels of land, the lawyer may not use that information to purchase one of the parcels in competition with the client or to recommend that another client make such a purchase. The Rule does not prohibit uses that do not disadvantage the client. For example, a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients. Paragraph (b) prohibits disadvantageous use of client

> information unless the client gives informed consent, except as permitted or required by these Rules.

ABA Model Rule 1.8 cmt. [5] (emphases added).

Comparison of the ABA Model Code and the ABA Model Rules

The ABA Model Rules follow the ABA Model Code's obvious prohibition on lawyers using (not just disclosing) client information to the client's disadvantage. The 1908 ABA Canon did not contain such a restriction, but the 1937 Canon added that concept.

But the ABA Model Rules differ dramatically from the ABA Model Code in dealing with lawyers' use of client information to help a third person or to help themselves.

Under the ABA Model Code approach, lawyers could not use client information to help third persons or themselves under any circumstances -- even if that use would not disadvantage the client.

The ABA Model Rules prohibit lawyers' use of client information only if it would disadvantage the client. In other words, under the ABA Model Rules approach, lawyers apparently can use client information to assist other clients or enrich themselves -- as long that does not harm the client. To this extent, the ABA Model Rules are more liberal than the ABA Model Code or even the Restatement (discussed below).

One might think that the ABA Model Rules' more liberal approach to lawyers' use of information to help a third party or themselves might result from the Rules' more expansive definition of protected client information than that found in the ABA Model Code. That might account for some difference. For instance, the ABA Model Rules' broad definition of protected client information includes information that is "generally

known" or even in the public record. It would be nonsensical to prohibit lawyers from using such information to assist third persons or themselves.

But the ABA Model Rules' liberal provision governing lawyers' use of protected client information does not just cover such widely known information. Under the ABA Model Rules, lawyers presumably can also use to a third person's advantage or their own advantage even the most intimate client confidential information -- as long as such use does not disadvantage the client. So the ABA Model Rules' expansive definition of protected client information does not seem to fully account for the Rules' expansive approach to lawyers' use of protected client information.

Restatement. In other areas involving client confidentiality, the Restatement takes a more limited view than the ABA Model Rules on both the source and content of information subject to lawyers' confidentiality duty. For instance, unlike the ABA Model Rules, the Restatement does not include "generally known" information in defining lawyers' confidentiality duty, and does not prohibit lawyers' disclosure of client information if the disclosure would not harm the client.

In contrast to this generally more liberal approach on those issues, the Restatement takes a far more restrictive approach to lawyers' use of client information. While the ABA Model Rules allow lawyers to use client confidences to a third party's advantage or to their own advantage, the Restatement allows the former while prohibiting the latter. In taking this mixed approach, the Restatement also differs from the ABA Model Code -- which prohibited both types of use.

In its format, the Restatement follows the ABA Model Code approach rather than the ABA Model Rules approach. It addresses lawyers' use of client information in the same provisions as those discussing lawyers' disclosure of client information.

The main Restatement provision dealing with lawyers' disclosure of client information treats lawyers' use in the same way as the lawyers' disclosure -- which is different from the ABA Model Rules approach discussed above.

> [T]he lawyer may not use or disclose confidential client information . . . if there is a reasonable prospect that doing so will adversely affect a material interest of the client or if the client has instructed the lawyer not to use or disclose such information

Restatement (Third) of Law Governing Lawyers § 60(1)(a) (2000) (emphasis added). A comment repeats this parallel approach.

> A lawyer is prohibited from using or disclosing confidential client information if either of two conditions exists -- risk of harm to the client or client instruction.

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

The Restatement reporter's note confirms the obvious.

> All authorities agree that lawyer use, even without disclosure, of confidential client information adverse to the material interests of a client is prohibited.

Restatement (Third) of Law Governing Lawyers § 60 reporter's note cmt. c(i) (2000).

A Restatement comment discusses what the term "use" means in this setting.

> Both use and disclosure adverse to a client are prohibited. As the term is employed in the Section, use of information includes taking the information significantly into account in framing a course of action, such as in making decisions when representing another client or in deciding whether to make a personal investment. Disclosure of information is revealing the information to a person not authorized to

> receive it and in a form that identifies the client or client matter either expressly or through reasonably ascertainable inference. Revealing information in a way that cannot be linked to the client involved is not a disclosure prohibited by the Section if there is no reasonable likelihood of adverse effect on a material interest of the client. Use of confidential client information can be adverse without disclosure. For example, in representing a subsequent client against the interests of a former client in a related matter, a lawyer who shapes the subsequent representation by employing confidential client information gained about the original client violates the duty . . . not to use that information, even if the lawyer does not disclose the information to anyone else.

Restatement (Third) of Law Governing Lawyers § 60 cmt. c(i) (2000) (emphases added).

The Restatement's comments to this section also discuss how a lawyer can gauge whether the use of client information will disadvantage the client -- in the same comments dealing with disclosure's adverse effect.

> What constitutes a reasonable prospect of adverse effect on a material client interest depends on the circumstances. Whether such a prospect exists must be judged from the perspective of a reasonable lawyer based on the specific context of the client matter. Some representations involve highly secret client information; others involve routine information as to which secrecy has little or no material importance. In most representations, some information will be more sensitive than other information. In all representations, the relevant inquiry is whether a lawyer of reasonable caution, considering only the client's objectives, would regard use or disclosure in the circumstances as creating an unreasonable risk of adverse effect either to those objectives or to other interests of the client. For example, a lawyer advising a client on tax planning for a gift that the client intends to keep anonymous from the donee would violate this Section if the lawyer revealed the client's purpose to the donee. If there is a reasonable ground to doubt whether use or disclosure of a client's confidential information would have the described effect, the lawyer should take reasonable steps to ascertain whether adverse

> effect would result, including consultation with the client when appropriate. Alternatively, the lawyer in such circumstances may obtain client consent to the use or disclosure.
>
> Adverse effects include all consequences that a lawyer of reasonable prudence would recognize as risking material frustration of the client's objectives in the representation or material misfortune, disadvantage, or other prejudice to a client in other respects, either during the course of the present representation or in the future. It includes consequences such as financial or physical harm and personal embarrassment that could be caused to a person of normal susceptibility and a normal interest in privacy.

Restatement (Third) of Law Governing Lawyers § 60 cmt. c(i) (2000) (emphases added).

While the Restatement therefore follows the ABA Model Code and the ABA Model Rules in justifiably prohibiting lawyers from using client information to the clients' disadvantage, it then differs from both of them when addressing other possible uses.

Like the ABA Model Rules, but unlike the ABA Model Code, the Restatement permits lawyers to use client confidences to assist other third persons -- as long as that use does not disadvantage the client. The Restatement does not explicitly deal in its black letter section with lawyers' use of client information to assist a third person. But a comment explains why the rules should permit lawyers to assist other clients by using client information, while prohibiting them from personally profiting from such use (discussed below).

> It is not inconsistent with Subsection (2) for a lawyer to use one client's confidential information for the benefit of another client in the course of representing the other client, even if doing so might also redound to the lawyer's gain, such as by enhancing a contingent-fee recovery. In all such instances, of course, the lawyer may not do so when it would create a

> material risk of harm to the original client. Thus, if otherwise permissible, a lawyer representing a plaintiff who has acquired extensive confidential information about the manner in which a defendant manufactured a product may employ that information for the benefit of another client with a claim against the same defendant arising out of a defect in the same product.

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

In addressing lawyers' use of client information to their own advantage, the Restatement follows the ABA Model Code rather than the ABA Model Rules approach -- totally prohibiting such use.

> [A] lawyer who uses confidential information of a client for the lawyer's pecuniary gain other than in the practice of law must account to the client for any profits made.

Restatement (Third) of Law Governing Lawyers § 60(2) (2000).

On its face, that rule seems to require a lawyer's payment to a client whose information the lawyer has used, rather than prohibit such use. However, the Restatement's comment about that rule describes a prohibition -- not just a remedy.

> Subsection (2) prohibits a lawyer from using or disclosing confidential client information for the lawyer's personal enrichment, regardless of lack of risk of prejudice to the affected client. The duty is removed by client consent . . . . The sole remedy of the client for breach of the duty is restitutionary relief in the form of disgorgement of profit.
>
> . . .
>
> The strict confidentiality duty of the Subsection is warranted for prophylactic purposes. A lawyer who acquires confidential client information as the result of a representation should not be tempted by expectation of profit to risk a possibly incorrect assessment of future harm to a client. There is no important social interest in permitting lawyers to make unconsented use or revelation of

> confidential client information for self-enrichment in personal transactions.

Restatement (Third) of Law Governing Lawyers § 60 cmt. j (2000) (emphases added).

This is an unusual disconnect. One would expect the black letter rule to match the pertinent comment's content.

The reporter's note provides an obvious example of such self-use.

> A clear instance of lawyer liability for use of confidential client information even in the absence of harm to a client is insider trading in a client's stock.

Restatement (Third) of Law Governing Lawyers § 60 reporter's note cmt. j (2000).

The Restatement discusses the difference between the ABA Model Code approach and the ABA Model Rules approach to lawyers' use of client information for personal gain -- noting that the former contains an absolute prohibition, while the latter prohibits such self-use only if it would harm the client.

> The lawyer codes differ with respect to whether lawyer self-dealing in confidential client information is impermissible if not shown to be harmful to the client. ABA Model Rules of Professional Conduct, Rule 1.9(b) (1983) provides that ("a lawyer who has formerly represented a client in a matter shall not . . . (b) use information relating to the representation to the disadvantage of the former client except as rule 1.6 would permit with respect to a client or when the information has become generally known."). See also id. Rule 1.8(b) ("A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3.") ABA Model Code of Professional Responsibility, DR 4-101(B)(3) (1969) contains a stricter rule: "a lawyer shall not knowingly . . . (3) use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure." The prohibition of the ABA Model Code does not require a showing that the

> lawyer's self-profiting use was to the disadvantage of the client, while the ABA Model Rules do require that showing.
>
> The merits of the differing approaches in the lawyer codes have been debated. Compare, e.g., 1 G. Hazard & W. Hodes, The Law of Lawyering § 1.8:300, at 266-67 (2d ed.1990 & Supp.1993) (advancing the position taken in the ABA Model Rules), with, e.g., C. Wolfram, Modern Legal Ethics § 6.7.6 and § 7.4.2(c), at 364-65 (1986) (arguing that all self-dealing of lawyers in client information, regardless of harm to client, should be prohibited).

Restatement (Third) of Law Governing Lawyers § 60 reporter's note cmt. j (2000) (emphases added).

Thus, the Restatement prohibits lawyers' use of protected client information to the client's disadvantage or to the lawyer's advantage, but allows such use to a third party's advantage (as long as it does not harm the client). This contrasts with the ABA Model Code (which prohibited all three types of use) and the ABA Model Rules (which prohibit the first type of use but permits the other two types of use).

State Variations. Most states have now adopted the ABA Model Rules approach, which prohibits lawyers' use of client information to the client's disadvantage, but allows such use to the advantage of third persons or to the lawyer's own advantage.

However, some states retaining all or some of the ABA Model Code's formulation have also kept the same approach as the ABA Model Code.

- District of Columbia Rule 1.6(a) ("[A] lawyer shall not knowingly: (1) reveal a confidence or secret of the lawyer's client; (2) use a confidence or secret of the lawyer's client to the disadvantage of the client; (3) use a confidence or secret of the lawyer's client for the advantage of the lawyer or of a third person." (emphasis added)).

Some states which take a hybrid approach have ended up with an odd combination of ABA Model Code and ABA Model Rules principles.

New York typifies this approach. It deals with the use of protected client information in both its Rule 1.6 and its Rule 1.8. Under New York Rule 1.6(a)

> A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person.

New York Rule 1.6(a) (emphasis added). This sounds just like the ABA Model Code. But New York's rule's definition of "confidential information" contains both the Restatement's limited approach to protected sources (excluding "generally known" information from the definition) and the ABA Model Code's limited approach to content (including within the definition only information the client has asked to be kept confidential or the disclosure of which would harm the client).

> "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates."

Id. Thus, New York's expansive definition of protected client information obviously affects the application of New York Rule 1.6 -- despite that Rule's use of the ABA Model Code formulation.

But New York also has a Rule 1.8 -- unlike the ABA Model Code, but like the ABA Model Rules.

> [A] lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client

> gives informed consent, except as permitted or required by these Rules.

New York Rule 1.8(b) (emphasis added). This language parallels the ABA Model Rules. It would seem to be a repetition of New York Rule 1.6, but it isn't -- because it uses the broader ABA Model Rules' definition of protected information ("information relating to representation of a client"), rather than the more restrictive definition in New York Rule 1.6.

A 2013 New York legal ethics opinion explained this difference.

- New York LEO 991 (11/12/13) ("At first glance, Rule 1.8(b) appears to duplicate the prohibition in Rule 1.6(a) against using confidential information 'to the disadvantage of a client.' But Rule 1.8(b) -- unlike Rule 1.6(a) -- applies to <u>all</u> information 'relating to representation of a client,' whether or not the information is protected by the attorney-client privilege, whether or not disclosure would not be embarrassing or detrimental to the client, and whether or not the client has not requested that the information be held inviolate, and whether or not the information has become 'generally known.' Under Rule 1.8(b), a lawyer simply may not use information relating to the representation of a client unless either (i) 'the client gives informed consent' (discussed above) or (ii) disclosure is 'permitted or required by these Rules' (an exception that does not apply here).").

Thus, under New York Rule 1.8, lawyers cannot use <u>any</u> information relating to the client (presumably under the broad ABA Model Rule 1.6 definition) to the client's disadvantage. Under New York Rule 1.6, lawyers likewise cannot use a subset of that information to the client's disadvantage. To that extent, Rule 1.6's reference to use seems to be surplus.

In addressing lawyers' use of client information to the advantage of a third person or to their own advantage, the New York Rules prohibit only such use of "confidential information," as narrowly defined in New York Rule 1.6. Thus, lawyers may use client information in both of those ways -- unless the information is privileged, the client has

asked for it to be kept confidential, or the disclosure of the information would harm the client.

Virginia takes essentially the same approach. Virginia's definition of protected information parallels the ABA Model Code approach.

- Virginia Rule 1.6(a) ("A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or 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 unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation." (emphasis added)).

Virginia's Rule 1.8 uses the ABA Model Rule "information relating to representation of a client" language, but contains the ABA Model Code prohibition on lawyers using such information.

- Virginia Rule 1.8(b) ("A lawyer shall not use information relating to representation of a client for the advantage of the lawyer or of a third person or to the disadvantage of the client unless the client consents after consultation.").

Case Law and Ethics Opinions. There are few cases or ethics opinions dealing with these issues.

In 2002, the South Carolina Bar explained how a lawyer could use a client's information to the client's disadvantage, even without disclosing any client information.

- 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)).

Not surprisingly, a lawyer using a client's information to enrich himself or herself might violate other duties, such as fiduciary duties to the client.

- Country Club Partners, LLC v. Goldman, 913 N.Y.S.2d 803, 805 (N.Y. App. Div. 2010) (holding that a client could not sue a law firm for breach of fiduciary duty although a law firm purchased a piece of land that the client had earlier attempted to purchase; "To recover on its claim, plaintiff is required to 'prove both the breach of a duty owed to it and damages sustained as a result. . . . That is, a client must establish 'actual and ascertainable damages.'" (citation omitted); "Here, summary judgment dismissing plaintiff's cause of action alleging a breach of fiduciary duty was properly granted since defendants met their burden on their motion and, in opposition, plaintiff failed to raise a question of fact that defendants' breach proximately caused it any ascertainable damages.").

Best Answer

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

b 2/14

Comparison with the Attorney-Client Privilege

Hypothetical 7

You recently took the redeye from Los Angeles to Dulles. For the first hour of the flight, the two passengers next to you vigorously discussed a proposed business transaction. It quickly became obvious that one of the passengers was a lawyer, and the other passenger was his client. Besides being annoyed by the noisy exchange, the incident raised several questions in your mind.

(a) Does the lawyer who engaged in the conversation have an ethical duty to keep confidential what he learned from his client during that conversation?

(A) YES

(b) Does the attorney-client privilege protect the communications you overheard on the airplane?

(B) NO

Analysis

The ethics confidentiality duty differs dramatically from the evidentiary attorney-client privilege.

The attorney-client privilege applies as a defensive doctrine lawyers must rely on to protect certain communications when a third party seeks them in discovery. This contrasts with the ethics confidentiality duty, which essentially follows the lawyer everywhere.

The attorney-client privilege only protects intimate communications between clients and their lawyers, made in confidence and preserved in confidence. The protection rests on the content of the communication -- and only covers communications primarily motivated by the client's request for legal advice from the lawyer.

(a)-(b) The ABA Model Code contained an ethical consideration that contrasted the two protections.

> The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, he should avoid professional discussions in the presence of persons to whom the privilege does not extend. A lawyer owes an obligation to advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.

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

The ABA Model Rules contain a more helpful comment.

> 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.

ABA Model Rule 1.6 cmt. [3] (emphasis added).

The Restatement similarly indicates that "[t]he fact that information falls outside the attorney-client privilege or work-product immunity does not determine its confidentiality." Restatement (Third) of Law Governing Lawyers § 59 cmt. b (2000).

State legal ethics opinions also recognize these distinctions.

- Florida LEO 10-3 (2/1/11) ("Although a lawyer's ethical obligation of confidentiality and the evidentiary matter of attorney-client privilege are related, the two issues are distinct. Confidentiality is much broader than privilege. According to Rule 4-1.6, Rules of Professional Conduct, all information relating to a client's representation is confidential and may not be voluntarily disclosed by the lawyer without either the client's consent or the application of a relevant exception to the confidentiality rule. The comment to Rule 4-1.6 provides further guidance, in stating: '[t]he confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.' On the other hand, privilege is much narrower as an evidentiary matter set forth in Florida Statutes § 90.502, which provides generally that a lawyer cannot be compelled to disclose communications between a lawyer and client that were made for the purpose of seeking and/or receiving legal advice without the client's consent or other waiver. Questions of confidentiality arise any time a lawyer is asked to disclose information relating to a client's representation. The question of privilege only arises when a lawyer is compelled by a court, i.e. via subpoena, to disclose confidential communications made for the purpose of obtaining legal advice." (emphases added)).

- Nevada LEO 41 (6/24/09) ("Rule 1.6 prohibits a lawyer from volunteering any information relating to representation of a client; the attorney-client prohibits a lawyer from being compelled to reveal confidential communications between a lawyer and a client." (emphases omitted)).

Perhaps the most dramatic contrast between the ethics confidentiality duty and the attorney-client privilege involves background facts about the attorney-client relationship and about attorney-client communications. The ethics duty covers nearly all of those, while the attorney-client privilege hardly ever does. Thomas E. Spahn, The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide, Ch. 11 (3d. ed. 2013), published by Virginia CLE Publications.

Best Answer

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

b 2/14

Unsolicited Communications from Would-Be Clients

Hypothetical 8

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

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

(A) You must tell your client about what you read.

(B) You may tell your client about what you read, but you don't have to.

(C) You cannot tell your client about what you read, but instead must maintain its confidentiality.

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

Analysis

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

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

This hypothetical addresses the first phase.

Application of Confidentiality and Loyalty Duties

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

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

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

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

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

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

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

Effect of Electronic Communications

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

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

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

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

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

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

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

Would-Be Clients' Unilateral Communications to a Lawyer

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

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

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

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

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

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

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

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

State Bar Opinions

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

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

In dealing with the confidentiality issue, the New York City Bar acknowledged that a lawyer would have to maintain the confidentiality of information acquired even from an unsolicited would-be client, absent some disclaimer of confidentiality. However,

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

the Bar then provided a crystal clear roadmap for lawyers wishing to disclaim such a duty. The New York City Bar assured lawyers that a law firm website disclaimer which

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

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

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

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

Id.

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

- Arizona LEO 02-04 (9/2002) ("An attorney does not owe a duty of confidentiality to individuals who unilaterally e-mail inquiries to the attorney when the e-mail is unsolicited. The sender does not have a reasonable

expectation of confidentiality in such situations. Law firm websites, with attorney e-mail addresses, however, should include disclaimers regarding whether or not e-mail communications from prospective clients will be treated as confidential.").

- California LEO 2005-168 (2005) (addressing the ramifications of a law firm's receipt of an unsolicited email from a woman seeking a divorce lawyer; noting that the law firm's website included the statement: "I agree that I am not forming an attorney-client relationship by submitting this question. I also understand that I am not forming a confidential relationship."; explaining that the law firm already represented the husband in domestic relations matters; holding that the law firm's web site's warnings "were not adequate to defeat her reasonable belief that she was consulting Law Firm for the purpose of retaining Law Firm"; "Wife's agreement that she would not be forming a 'confidential relationship' does not, in our view, mean that Wife could not still have a reasonable belief that Law Firm would keep her information confidential. We believe that this statement is potentially confusing to a lay person such as Wife, who might reasonably view it as a variant of her agreement that she has not yet entered into an attorney-client relationship with Law Firm. . . . Without ruling out other possibilities, we note that had Wife agreed to the following, she would have had, in our opinion, no reasonable expectation of confidentiality with Law Firm: 'I understand and agree that Law Firm will have no duty to keep confidential the information I am now transmitting to Law Firm.' Another way in which Law Firm could have proceeded that would have avoided the confidentiality issue entirely would have been to request from web site visitors only that information that would allow the firm to perform a conflicts check." (footnote omitted); "A lawyer who provides to web site visitors who are seeking legal services and advice a means for communicating with him, whether by e-mail or some other form of electronic communication on his web site, may effectively disclaim owing a duty of confidentiality to web-site visitors only if the disclaimer is in sufficiently plain terms to defeat the visitors' [sic] reasonable belief that the lawyer is consulting confidentially with the visitor. Simply having a visitor agree that an 'attorney-client relationship' or 'confidential relationship' is not formed would not defeat a visitor's reasonable understanding that the information submitted to the lawyer on the lawyer's web site is subject to confidentiality. In this context, if the lawyer has received confidential information from the visitor that is relevant to a matter in which the lawyer represents a person with interests adverse to the visitor, acquisition of confidential information may result in the lawyer being disqualified from representing either.").

- Nevada LEO 32 (3/25/05) (holding that a prospective client generally cannot create an attorney-client relationship through a "unilateral act" such as "sending an unsolicited letter containing confidential information to the attorney"; warning that such a relationship might arise if a lawyer solicits such

information; explaining that "[a]n attorney who advertises or maintains a web-site may be deemed to have solicited the information from the prospective client, thereby creating a reasonable expectation on the part of the prospective client that the attorney desires to create an attorney-client relationship"; "Most attorneys have addressed this issue by posting disclaimers to the effect that nothing contained on the web-site or communicated through it by the prospective client will create an attorney-client relationship. . . . This should be effective, since no one responding to the web-site could -- in the face of such an express disclaimer -- reasonably believe that an attorney-client relationship had been created."; explaining that "[i]t is presently unclear, however, whether the duty of confidentiality also attaches to communications which are unsolicited where no attorney-client relationship (either express or implied) exists. A recent opinion of the State Bar of Arizona ethics committee states that unsolicited communications to an attorney (not in response to an advertisement or web-site) are not confidential, since the sender could not have a reasonable expectation of privacy in the communication. Arizona State Bar Committee on the Rules of Professional Conduct, Op. No. 02-04. The opinion contains a well-reasoned dissent which argues otherwise, however."; noting that Nevada was considering a new rule based on ABA Model Rule 1.18, which deals with such a situation).

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

> circumstance there would be an "inference" that "private information divulged to the attorney would be confidential"; a dissenting opinion argues that "I would err on the side of the consumer and find that there is a reasonable expectation of confidentiality on behalf of the consumer sending an e-mail to an attorney with the information necessary to seek legal advice").

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

> [W]hen an e-mail is sent using a link on a law firm's web site, the firm has an opportunity to set conditions on the flow of information. Using readily available technology, the firm may require a prospective client to review and "click" his assent to terms of use before using an e-mail link. Such terms of

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

> use might include a provision that any information communicated before the firm agrees to represent the prospective client will not be treated as confidential. Or the terms of use could provide that receipt of information from a prospective client will not prevent the firm from representing someone else in the matter.

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

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

Id.

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

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

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

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

> In its version of these provisions, New Hampshire's rule eliminates the terminology of 'discussion' or 'consultation' and extends the protections of the rule to persons who, in a good faith search for representation, provide information unilaterally to a lawyer who subsequently receives and reviews the information. This change recognizes that persons frequently initiate contact with an attorney in writing, by e-mail, or in other unilateral forms, and in the process disclose confidential information that warrants protection.
>
> Not all persons who communicate information to an attorney unilaterally are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship (see ABA Model Rule comment No. 2); or for the purpose of disqualifying an attorney from participation in a matter; or through contemporaneous contact with numerous attorneys; is not a 'prospective client' within the meaning of paragraph (a).

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

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

- Iowa LEO 07-02 (8/8/07) (assessing the effect of lawyers receiving unsolicited emails from prospective clients; noting that "[g]one are the days when professional relationships begin with an in person consultation"; warning lawyers to consider whether any communication on their website or otherwise would lead a reasonable person to believe that the lawyer will maintain the confidentiality of any information that the prospective clients sends the lawyer; advising lawyers considering their "public marketing strategy" to "consider some form of notice from which would could [sic] be used to set the confidentiality expectation level of potential clients"; "For example, an Internet web page which markets the lawyer's services and gives contact details does not in and of itself support a claim that the lawyer somehow requested or consented to the sharing of confidential information. However, an Internet web page that is designed to allow a potential client to submit specific questions of law or fact to the lawyer for consideration would constitute bilateral communication with an expectation of confidentiality. A telephone voice mail message that simply ask [sic] the caller for their contact details

would not in and of it self [sic] rise to the level of a bilateral communication but a message that encouraged the caller to leave a detailed message about their case could in some situations be considered bilateral.").

- Virginia LEO 1842 (9/30/08) (because the duty of confidentiality attaches (according to the Virginia Rules Preamble) "when the lawyer agrees to consider whether a client-lawyer relationship shall be established," lawyers may use to their client's advantage (and represent the adversary of a prospective client who sent) a prospective client's (1) unsolicited voicemail message containing confidential information, sent to a lawyer who advertises in the local Yellow Pages and includes his office address and telephone number; (2) unsolicited email containing confidential information, sent to a law firm which "maintains a passive website which does not specifically invite consumers to submit confidential information for evaluation or to contact members of the firm by e-mail"; someone submitting such confidential information does not have a reasonable basis for believing that the lawyer will maintain the confidentiality of the information, simply because the lawyer uses "a public listing in a directory" or a passive website; the lawyer in that situation had "no opportunity to control or prevent the receipt of that information" and "it would be unjust for an individual to foist upon an unsuspecting lawyer a duty of confidentiality, or worse yet, a duty to withdraw from the representation of an existing client"; lawyers might create a reasonable expectation of confidentiality if they include in advertisements or in their website language that implies "that the lawyer is agreeing to accept confidential information" in contrast to lawyers who merely advertise in the Yellow Pages or maintain a passive website; a lawyer would have to keep confidential (and would be prohibited from representing a client adverse to a prospective client which supplies) information provided by a prospective client who completes an on-line form on a law firm website which "offers to provide prospective clients a free evaluation of their claims"; law firms "may wish to consider" including appropriate disclaimers on their website or external voicemail greeting, or including a "click-through" disclaimer "clearly worded so as to overcome a reasonable belief on the part of the prospective client that the information will be maintained as confidential").

- Florida LEO 07-3 (1/16/09) ("A person seeking legal services who sends information unilaterally to a lawyer has no reasonable expectation of confidentiality regarding that information. A lawyer who receives information unilaterally from a person seeking legal services who is not a prospective client within Rule 4-1.18, has no conflict of interest if already representing or is later asked to represent an adversary, and may use or disclose the information. If the lawyer agrees to consider representing the person or discussed the possibility of representation with the person, the person is a prospective client under Rule 4.1.18, and the lawyer does owe a duty of confidentiality which may create a conflict of interest for the lawyer. Lawyers

should post a statement on their websites that the lawyer does not intend to treat as confidential information sent to the lawyer via the website, and that such information could be used against the person by the lawyer in the future.").

- Wisconsin LEO EF-11-03 (7/29/11) ("A person who sends a unilateral and unsolicited communication has no reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship. Consequently, the duties a lawyer owes prospective clients are not triggered by an unsolicited e-mail communication that 'the lawyer receives out of the blue from a stranger in search of counsel, as long as the lawyer did not do or publish anything that would lead reasonable people to believe that they could share private information with the lawyer without first meeting [the lawyer] and establishing a lawyer-client relationship.' To avoid creating ethical duties to a person in search of counsel, a lawyer who places advertisements or solicits email communications must take care that these advertisements or solicitations are not interpreted as the lawyer's agreement that the lawyer-client relationship is created solely by virtue of the person's response and that the person's response is confidential. The most common approach is the use of disclaimers. These disclaimers must have two separate and clear warnings: that there is no lawyer-client relationship and that the e-mail communications are not confidential. Moreover, these warnings should be short and easily understood by a layperson. Use of nonlawyer staff to screen or communicate with prospective client will not relieve a lawyer of responsibilities arising under SCR 20:1.18." (citation omitted); providing several examples of appropriate disclaimer language at the end of the opinion).

ABA Model Rule 1.18

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

ABA Model Rule 1.18 (called "Duties to Prospective Client") now starts with the bedrock principle: lawyers owe duties only to someone who is a "prospective client." And a would-be client will be considered a "prospective client" only if he or she

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

ABA Model Rule 1.18(a).

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

A revised comment provides more guidance.

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

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

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

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

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

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

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

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

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

These principles raise another question. If a law firm's website contains the type of disclaimer envisioned under ABA Model Rule 1.18 as precluding any confidentiality duty or privilege protection, can an adverse third party later rely on that disclaimer in seeking discovery of the unsolicited communications from a would-be client to a lawyer -- even if the client ultimately hires the lawyer? Somewhat surprisingly, the answer seems to be no.

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

- California LEO 2005-168 (2005) (holding that a lawyer must maintain the confidentiality of a visitor to the lawyer's website, because the lawyer had not adequately warned visitors that the lawyer would not maintain the confidentiality of what they submitted to the law firm; explaining the scenario "[a] lawyer who provides to web site visitors who are seeking legal services and advice a means for communicating with him, whether by e-mail or some other form of electronic communication on his web site, may effectively disclaim owing a duty of confidentiality to web-site visitors only if the disclaimer is in sufficiently plain terms to defeat the visitors' reasonable belief that the lawyer is consulting confidentially with the visitor. Simply having a visitor agree that an "attorney-client relationship" or "confidential relationship" is not formed would not defeat a visitor's reasonable understanding that the information submitted to the lawyer on the lawyer's web site is subject to confidentiality. In this context, if the lawyer has received confidential information from the visitor that is relevant to a matter in which the lawyer represents a person with interests adverse to the visitor, acquisition of confidential information may result in the lawyer being disqualified from

representing either." (emphasis added); explaining that the visible "Terms" listed on the law firm's website included the following: "I agree that I am not forming an attorney-client relationship by submitting this question. I also understand that I am not forming a confidential relationship. I further agree that I may only retain Law Firm or any of its attorneys as my attorney by entering into a written fee agreement, and that I am not hereby entering into a fee agreement. I understand that I will not be charged for the response to this inquiry."; noting that a visitor had to click his or her agreement with the terms before sending the inquiry; explaining that the law firm was already representing the visitor's husband; "Upon receiving Wife's inquiry, the law firm discovered that Husband had already retained Law Firm to explore the possibility of a divorce from Wife. The next day, an attorney in Law Firm sent Wife an e-mail, which stated: 'We regret we will be unable to accept you as a client because there is a conflict with one of our present clients. Good luck with your case.' We address whether Law Firm may be precluded from representing Husband as a result of the firm's contact with Wife on the ground that Law Firm has obtained material confidential information."; concluding that the law firm's effort to avoid a confidentiality duty was unsuccessful "We do not believe that a prospective client's agreement to Law Firm's terms prevented a duty of confidentiality from arising on the facts before us, because Law Firm's disclosures to Wife were not adequate to defeat her reasonable belief that she was consulting Law Firm for the purpose of retaining Law Firm. First, our assumption that Law Firm did not form an attorney-client relationship with Wife is not conclusive concerning Law Firm's confidentiality obligations to Wife. An attorney-client relationship is not a prerequisite to a lawyer assuming a duty of confidentiality in such a situation." (emphasis added); A lawyer can owe a duty of confidentiality to a prospective client who consults the lawyer in confidence for the purpose of retaining the lawyer. Thus, that an attorney-client relationship did not arise from Wife's consultation with Law Firm did not prevent Law Firm from taking on a duty of confidentiality to Wife. Second, Wife's agreement that she would not be forming a 'confidential relationship' does not, in our view, mean that Wife could not still have a reasonable belief that Law Firm would keep her information confidential. We believe that this statement is potentially confusing to a lay person such as Wife, who might reasonably view it as a variant of her agreement that she has not yet entered into an attorney-client relationship with Law Firm."; "Regardless of the precise language used, it is important that lawyers who invite the public to submit questions on their web sites, and do not want to assume a duty of confidentiality to the inquirers, plainly state the legal effect of a waiver of confidentiality."; "A lawyer may avoid incurring a duty of confidentiality to persons who seek legal services by visiting the lawyer's web site and disclose[ing] confidential information only if the lawyer's web site contains a statement in sufficiently plain language that any information submitted at the web site will not be confidential." (emphasis added); "After typing in her contact information, Wife explained that she was

> interested in obtaining a divorce. She related that her Husband, a Vice-President at Ace Incorporated in Los Angeles, was cohabiting with a co-worker. She also stated that her 13-year-old son was living with her and asked if she could obtain sole custody of him. She noted that Husband was providing some support but that she had to take part-time work as a typist, and was thinking about being re-certified as a teacher. She revealed that she feared Husband would contest her right to sole custody of her son and that, many years ago, she had engaged in an extra-marital affair herself, about which Husband remained unaware. Wife stated that she wanted a lawyer who was a good negotiator, because she wanted to obtain a reasonable property settlement without jeopardizing her goal of obtaining sole custody of the child and keeping her own affair a secret. She concluded by noting she had some money saved from when she was a teacher, and stating, "I like your web site and would like you to represent me.").

In the same year, the Ninth Circuit applied the same rule to a website that seemed to come closer to the effective type of disclaimer envisioned in Rule 1.18. Although dealing with privilege protection rather than the confidentiality duty, the Ninth Circuit's analysis would presumably apply to both. Given the setting, perhaps the Ninth Circuit's conclusion should have come as no surprise -- the court prohibited a pharmaceutical company defendant from discovering communications from a would-be client to a plaintiff's law firm.

- Barton v. United States District Court for the Central District of California, 410 F.3d 1104, 1106, 1107 & n.5, 1108, 1110, 1111, 1112 (9th Cir. 2005) (finding that defendants could not obtain access to plaintiffs' electronic communications to their law firm, despite the law firm's website's warnings that prospective clients' communications to the law firm would not be treated as confidential; "Plaintiffs sued SmithKline Beecham Corporation, which does business as GlaxoSmithKline. They claim injury from Paxil, a medication manufactured by SmithKline. Plaintiffs did not initiate contact with their lawyers by walking into the law office. Instead, the law firm posted a questionnaire on the internet, seeking information about potential class members for a class action the law firm contemplated. The district court ordered plaintiffs to produce the four plaintiffs' answers to the questionnaire. Plaintiffs seek, and we grant, a writ of mandamus vacating the district court's order compelling production." (footnotes omitted) (emphasis added); explaining that the law firm's website included the following warning: "'I agree that the above does not constitute a request for legal advice and that I am not

forming an attorney client relationship by submitting this information. I understand that I may only retain an attorney by entering into a fee agreement, and that I am not hereby entering into a fee agreement. I agree that any information that I will receive in response to the above questionnaire is general information and I will not be charged for a response to this submission. I further understand that the law for each state may vary, and therefore, I will not rely upon this information as legal advice. Since this matter may require advice regarding my home state, I agree that local counsel may be contacted for referral of this matter.'" (emphasis added); essentially finding that the law firm's disclaimer did not destroy privilege protection; "More important than what the law firm intended is what the clients thought. Here, there is ambiguity. On the one hand, the form can be filled out by 'a loved one' rather than by the potential client, and the person sending it in has to acknowledge that he is not requesting legal advice and is not forming an attorney client relationship by sending it in. The form also states that the person will not have retained an attorney until he signs a fee agreement and that 'local counsel may be contacted for referral of this matter.' The form states that its purpose is to 'gather information about potential class members,' not to consider accepting them as clients. On the other hand, the stated purpose of gathering 'information about potential class members' suggests that the firm is indeed trolling for clients."; "The district court concluded that the attorney-client privilege did not apply because the disclaimer established that the communications were not 'confidential' and that checking the 'yes' box waived the privilege." (emphasis added); "The opponent of the privilege in this case is GlaxoSmithKline, and it thus has the burden of showing that the answers to the questionnaires were not intended to be confidential. The district court found that GlaxoSmithKline had met this burden because of the disclaimer at the bottom of the questionnaire which disclaimed any formation of an attorney-client relationship. The district court clearly erred in treating the disclaimer of an attorney-client relationship as a disclaimer of confidentiality." (emphasis added); "The check box on the law firm's website protected the law firm by requiring the questionnaire submitter to disclaim a purpose of 'requesting legal advice,' and to acknowledge that the submitter is not 'forming an attorney client relationship' by sending in the answers. But the box does not disclaim the purpose of 'securing legal service.' The questionnaire is designed so that a person filling it out and submitting it is likely to think that he is requesting that the law firm include him in the class action mentioned at the beginning of the form. Prospective clients' communications with a view to obtaining legal services are plainly covered by the attorney-client privilege under California law, regardless of whether they have retained the lawyer, and regardless of whether they ever retain the lawyer." (emphasis added); "There is nothing anomalous about applying the privilege to such preliminary consultations. Without it, people could not safely bring their problems to lawyers unless the lawyers had already been retained. 'The rationale for this rule is compelling,' because 'no

person could ever safely consult an attorney for the first time with a view to his employment if the privilege depended on the chance of whether the attorney after hearing his statement of the facts decided to accept the employment or decline it.' . . . The privilege does not apply where the lawyer has specifically stated that he would not represent the individual and in no way wanted to be involved in the dispute, but the law firm did not do that in this case -- it just made it clear that it did not represent the submitter yet." (footnote omitted); "We are influenced by how fundamental the lawyer-client privilege is to the operation of an adversarial legal system. Potential clients must be able to tell their lawyers their private business without fear of disclosure, in order for their lawyers to obtain honest accounts on which they may base sound advice and skillful advocacy. There would be no room for confusion had the communication been in the traditional context of a potential client going into a lawyer's office and talking to the lawyer. The changes in law and technology that allow lawyers to solicit clients on the internet and receive communications from thousands of potential clients cheaply and quickly do not change the applicable principles." (footnote omitted) (emphasis added); "GlaxoSmithKline cannot be permitted access to a communication that a plaintiff made confidentially to his lawyer in order to compare it to what the same individual said at a deposition. But that is exactly what GlaxoSmithKline seeks. It must be conceded that if a plaintiff says one thing to his lawyer, and says another at his deposition, keeping the first disclosure secret creates a risk to the honest and accurate resolution of the dispute. That risk is mitigated by the plaintiffs' lawyers [sic] ethical duties of candor toward the tribunal and fairness to the opposing party and counsel. The privilege does not mean that the plaintiffs may lie about their symptoms, or that their lawyers may allow them to lie. A lawyer can be disbarred for offering evidence that the lawyer knows to be false, failing to disclose a material fact when disclosure is necessary to prevent a fraud by the client, or assisting a witness to testify falsely. Most lawyers' sense of honor would prevent them from doing these things even if they were not at risk of losing their licenses if they did. These restraints of honor and ethics, rather than court-ordered disclosure of confidential communications, are the means that our system uses to deal with the risk of clients saying one thing to their lawyers and another to opposing counsel, the judge, or the jury." (footnotes omitted)).

Conclusion

The timing of the ABA Model Rules' 2002 adoption of Rule 1.18 seems to reinforce the conclusion that new forms of electronic communication required a

relatively new approach. The ABA's 2012 switch from the term "discusses" to "consults" clearly reflects the ubiquitous use of impersonal electronic communication.

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

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

Best Answer

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

b 2/14

Information from Prospective Clients

Hypothetical 9

You and several of your colleagues recently met with executives from a company planning to move its headquarters to your city. It was obvious that the executives were interviewing a number of law firms before deciding which firm to hire for several projects. The company ended up hiring another firm, and you wonder about your duty to keep confidential what the executives told you -- and the possible effect on your ability to represent the company's adversaries once it moves to town.

(a) Does your ethics confidentiality duty extend to information you learned during the interview?

(A) YES

(b) May you and your colleagues represent the company's adversaries in matters unrelated to those you discussed during the interview?

(A) YES

(c) May you and your colleagues represent the company's adversary in a specific matter the executives described during the interview?

MAYBE

(d) If you and your colleagues would be disqualified from representing the company's adversary in the specific matter, may other lawyers at your firm represent the adversary?

(A) YES

Analysis

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

the latter; and (3) after the would-be client and the lawyer agree to create an attorney-client relationship.

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

This hypothetical addresses the second phase.

Source of Guidance

ABA Model Rules. In addressing the second phase, ABA Model Rule 1.18(a) -- adopted in 2002 -- indicates that

> A person who consults with a lawyer about the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

ABA Model Rule 1.18(a). ABA Model Rule 1.18 cmt. [2] explicitly indicates that absent such consultation a lawyer does not owe any duties (of confidentiality, loyalty or anything else) to the would-be client.

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

If such a consultation occurs, the rest of ABA Model Rule 1.18 applies.

If a prospective client passes that hurdle, lawyers who have acquired information must treat the prospective client as a former client -- because the lawyers clearly do not currently represent him or her.

> Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client.

ABA Model Rule 1.18(b) (emphasis added).

Under ABA Model Rule 1.9, lawyers may never disclose information learned from a former client, but may use such information -- even adverse to the former client -- if the information becomes "generally known." ABA Model Rule 1.9(c).

A comment to ABA Model Rule 1.18 explains why prospective clients receive this limited type of confidentiality protection.

> Prospective clients, like clients, may disclose information to a lawyer, place documents or other property in the lawyer's custody, or rely on the lawyer's advice. A lawyer's consultations with a prospective client usually are limited in time and depth and leave both the prospective client and the lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

ABA Model Rule 1.18 cmt. [1] (emphases added). Another comment confirms the lawyer's confidentiality duty.

> It is often necessary for a prospective client to reveal information to the lawyer during an initial consultation prior to the decision about formation of a client-lawyer relationship. The lawyer often must learn such information to determine whether there is a conflict of interest with an existing client and whether the matter is one that the lawyer is willing to undertake. Paragraph (b) prohibits the lawyer from using or revealing that information, except as permitted by Rule 1.9, even if the client or lawyer decides not to proceed with the

> representation. The duty exists regardless of how brief the initial conference may be.

ABA Model Rule 1.18 cmt. [3] (emphases added).

Comments to ABA Model Rule 1.18 provide helpful guidance to lawyers engaging in such interviews with prospective clients -- reminding them of their right to place conditions on the discussions, and to arrange for a prospective consent.

> In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose. Where the information indicates that a conflict of interest or other reason for non-representation exists, the lawyer should so inform the prospective client or decline the representation. If the prospective client wishes to retain the lawyer, and if consent is possible under Rule 1.7, then consent from all affected present or former clients must be obtained before accepting the representation.
>
> A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

ABA Model Rule 1.18 cmts. [4], [5] (emphases added).

Absent such an agreement between the lawyer and the prospective client, the individual lawyer might be individually disqualified from representing the prospective client's adversary -- but only if that individual lawyer received "significantly harmful" information from the prospective client.

> A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the

> lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

ABA Model Rule 1.18(c) (emphasis added). In that situation, the individual lawyer may represent the adversary only with informed consent of the prospective client and the adversary, confirmed in writing. ABA Model Rule 1.18(d)(1).

Absent such informed written consent, other lawyers in the individually disqualified lawyer's law firm may represent the adversary -- under three conditions.

> [T]he lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and
>
> [T]he disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and
>
> [W]ritten notice is promptly given to the prospective client.

ABA Model Rule 1.18(d)(2)(i), (ii) (emphases added). A comment provides additional guidance.

> Under paragraph (c), the prohibition in this Rule is imputed to other lawyers as provided in Rule 1.10, but, under paragraph (d)(1), imputation may be avoided if the lawyer obtains the informed consent, confirmed in writing, of both the prospective and affected clients. In the alternative, imputation may be avoided if the conditions of paragraph (d)(2) are met and all disqualified lawyers are timely screened and written notice is promptly given to the prospective client. See Rule 1.0(k) (requirements for screening procedures). Paragraph (d)(2)(i) does not prohibit the screened lawyer from receiving a salary or partnership share established by prior independent agreement, but that

> lawyer may not receive compensation directly related to the matter in which the lawyer is disqualified.

ABA Model Rule 1.18 cmt. [7]. Another comment provides guidance about the type of notice that passes muster.

> Notice, including a general description of the subject matter about which the lawyer was consulted, and of the screening procedures employed, generally should be given as soon as practicable after the need for screening becomes apparent.

ABA Model Rule 1.18 cmt. [8].

Restatement. The Restatement acknowledges lawyers' confidentiality duty in this situation.

> Information acquired during the representation or before or after the representation is confidential so long as it is not generally known . . . and relates to the representation. Such information, for example, might be acquired by the lawyer in considering whether to undertake a representation.

Restatement (Third) of Law Governing Lawyers § 59 cmt. c (2000) (emphasis added).

However, the Restatement does not contain a provision similar to ABA Model Rule 1.18.

The same concept has appeared for many years in another Restatement.

> A person who, in view of a prospective agency, invites a confidence from or permits prospective principal to reveal confidential information to him, is subject to the same duties with respect to such information as if, at the time the confidence was given, he were in fact an agent.

Restatement (Second) of the Law Agency § 395 cmt. d (1958).

State Variations

Most states have adopted ABA Model Rule 1.8.

However, some states have explicitly taken a different approach when adopting their version of Rule 1.18. The variations seem to focus on three elements.

The first variation focuses on the act which renders a would-be client a "prospective" client. ABA Model Rule 1.18 originally used the word "discusses," but in 2012 changed to the word "consults."

New Hampshire takes a far broader approach.

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

New Hampshire Rule 1.18(a) (emphasis added).

> The New Hampshire rule expands upon the ABA Model Rule in one area. The ABA Model Rule 1.18(a) defines a prospective client as one who 'discusses' possible representation with an attorney. Similarly, ABA Model Rule 1.18(b) establishes a general rule for protection of information received in 'discussions' or 'consultations'.
>
> In its version of these provisions, New Hampshire's rule eliminates the terminology of 'discussion' or 'consultation' and extends the protections of the rule to persons who, in a good faith search for representation, provide information unilaterally to a lawyer who subsequently receives and reviews the information. This change recognizes that persons frequently initiate contact with an attorney in writing, by e-mail, or in other unilateral forms, and in the process disclose confidential information that warrants protection.
>
> Not all persons who communicate information to an attorney unilaterally are entitled to protection under this Rule. A person who communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship (see ABA Model Rule comment No. 2); or for the purpose of disqualifying an attorney from participation in a matter; or through contemporaneous contact with numerous attorneys; is not a 'prospective client' within the meaning of paragraph (a).

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

A New Hampshire legal ethics opinion explained that state's unique approach.

- New Hampshire LEO 2009-2010/1 (6/2010) (analyzing a lawyer's duty to prospective clients, under New Hampshire Rule 1.18, which is different from the ABA Model Rule 1.18; noting that the New Hampshire approach would impute an individually disqualified lawyer to the entire firm unless the firm took steps to restrict the receipt of information beyond that required to run a conflicts check; "Before the advent of the information superhighway, law firms had an easier time controlling the flow of potentially disqualifying information. Initial interviews with prospective clients were conducted in person or over the phone. Lawyers could more easily set the ground rules. They could control the prospective clients' expectations that the lawyer would or could maintain the confidentiality of any information disclosed during the initial consultation, and discourage the unilateral disclosure of compromising confidences by limiting disclosure to information needed to complete a conflicts check and confirm the lawyer's subject matter competence."; "Sending an unsolicited email is a unilateral act. The information that a person puts into an unsolicited email should not trigger confidentiality obligations if a lawyer, with no expectation that the sender is seeking legal representation or disclosing confidences, opens the email. When the law firm's website invites a member of the public to contact one of the firm's lawyers in an email, however, any disclosure made in the email looks less unilateral. Current technology restricts the attorney's ability to manage expectations and the flow of information."; "The ABA's Model Rule 1.18 applies only to persons who have made disclosures in 'discussions' and 'consultation' with a lawyer, and does not explicitly address the status of persons who send emails to a law firm via its website. New Hampshire's Rule 1.18 does not specifically address emails either, but it is broader than the ABA's model rule and covers any disclosure made in a good faith pursuit of legal representation." (emphasis added); "Though the opportunity to screen an otherwise disqualified attorney helps protect clients' freedom to choose their own counsel, law firms cannot casually rely on after-the-fact screening procedures to limit their obligations to good faith prospective clients. Screening is available to avoid imputed disqualification only if the lawyer took reasonable measures to limit his review of information from the prospective client to that which is reasonably necessary to determine whether to offer representation. The firm, therefore, should maintain and reinforce clear procedures to be followed during initial interactions with potential clients so that its lawyers gather only that information needed to rule out any conflict with existing clients and determine whether the matter is one that the firm is willing to undertake. The firm's lawyers should obviously know to stop reviewing materials as soon as they discern that the information contained in them exceed these limits."; "The firm will have to prove that prior consent -- which the prospective client indicated by 'clicking' acceptance of the terms of a website disclaimer purporting to waive confidentiality and potential conflicts of interest -- was sufficiently 'informed' to be effective. After one of the firm's lawyers has received and reviewed the prospective client's confidential information, informed consent to

representation of an adverse party will not be easily obtained. The firm's ability to continue to represent even a longstanding client, if it has interests adverse to the prospective client, will likely depend on the reasonableness of the measures taken to avoid disqualifying disclosures, and the effectiveness and timeliness of any screening procedures.").

The second variation involves the type of information that will disqualify an individual lawyer. ABA Model Rule 1.18 uses the term "significantly harmful."

The District of Columbia version of Rule 1.18 uses a broader term ("confidence or secret"), and Florida Rule 1.18 uses even a broader term (information that could be "used to the disadvantage" of the would-be client).

- District of Columbia Rule 1.18 ("(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client. (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as permitted by Rule 1.6. (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received a <u>confidence or secret</u> from the prospective client, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d). (d) When the lawyer has received a confidence or secret from the prospective client, representation is permissible if: (1) both the affected client and the prospective client have given informed consent, or (2) the disqualified lawyer is timely screened from any participation in the matter." (emphasis added)).

- Florida Rule 1.18 ("(a) Prospective Client. A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client. (b) Confidentiality of Information. Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as rule 4-1.9 would permit with respect to information of a former client. (c) Subsequent Representation. A lawyer subject to subdivision (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received <u>information from the prospective client that could be used to the disadvantage of that person in the matter</u>, except as provided in subdivision (d). If a lawyer is disqualified from representation under this rule,

no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in subdivision (d). (d) Permissible Representation. When the lawyer has received disqualifying information as defined in subdivision (c), representation is permissible if: (1) both the affected client and the prospective client have given informed consent, confirmed in writing; or (2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and (ii) written notice is promptly given to the prospective client." (emphasis added)).

The third variation involves the effect of an individual lawyer's disqualification.

ABA Model Rule 1.18 normally allows screening.

Idaho Rule 1.18 does not allow such screening.

- Idaho Rule 1.18 ("(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client. (b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client. (c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter, except as provided in paragraph (d). <u>If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d). (d) Representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing.</u>" (emphasis added); not permitting a screen to avoid imputed disqualification).

<u>Application of the "Significantly Harmful" Standard</u>

Under ABA Model Rule 1.18, a lawyer will be individually disqualified from adversity to a prospective client only if a lawyer has obtained "significantly harmful" information from the prospective client.

Courts and bars have analyzed the meaning of the "significantly harmful" standard.

- New York City Bar Ass'n Formal Op. 2013-1 (2013) ("Rule 1.18 codifies the established principle that New York lawyers owe duties to prospective clients even when no lawyer-client relationship ensues. Under the Rule, a lawyer who learns confidential information in a consultation with a prospective client may not use or reveal the information except to the extent permitted with confidential information of a former client, and the lawyer may not take on a materially adverse representation in the same or a substantially related matter when the information, if used in the matter, could be significantly harmful to the prospective client. These duties are less restrictive than the comparable duties owed to former and current clients in several respects, and ethical screens may be used to take on otherwise adverse representations. Application of the Rule will depend on the nature of the information received from the prospective client: is it confidential and would its use by the lawyer disadvantage or be significantly harmful to the prospective client?"; "Several courts in New York have addressed the 'significantly harmful' test in Rule 1.18. See Zalewski v. Shelroc Homes, LLC, 856 F. Supp. 2d 426 (N.D.N.Y. Mar. 6, 2012) (disqualifying lawyer from representing plaintiff in lawsuit against prospective client that had explained to the lawyer its views on various settlement issues, including price and timing; although subject to change, such information could provide 'an unfair advantage' and 'ultimately control the great stakes ahead'); Miness v. Ahuja, 762 F. Supp. 2d 465 (E.D.N.Y. July 31, 2010) (disqualifying lawyer from representing defendant in a lawsuit by prospective client who, in context of a social relationship, had shared his 'personal accounts of each relevant event shortly after it happened' and his 'strategic thinking concerning how to manage the situation'); Van Acker Constr. Corp. v. Hance, 2011 NY Slip Op. 30092 (N.Y. S. Ct. Jan. 11, 2011) (disqualifying law firm from representing defendant in lawsuit by prospective client where firm, in an 18-minute phone call with the prospective client-plaintiff had 'outlined potential claims' against defendant and 'discussed specifics as to the amount of money needed to settle the case').").

- O Builders & Assocs., Inc. v. Yuna Corp., 19 A.3d 966, 970, 976 (N.J. 2011) (refusing to disqualify a lawyer based on an initial interview; applying New Jersey Rule 1.18; noting that the would-be client could not describe any specific confidential information conveyed to the lawyer during the interview; "In short, although Attorney Lee, Mrs. Kang and Dr. Lee all agree that they met and discussed whether Attorney Lee would assume the representation on behalf of Mrs. Kang in the Koryeo Corp. lawsuit -- a representation Attorney Lee declined the very next day -- Attorney Lee denies anything further of substance was discussed, while Mrs. Kang and Dr. Lee claim that

matters concerning Mrs. Kang's 'business, pending legal disputes, finances, and other confidential matters' were discussed, albeit without providing any details, specificity or corroboration thereof."; "[I]n respect of the latter term, we conclude that, in order for information to be deemed 'significantly harmful' within the context of RPC 1.18, disclosure of that information cannot be simply detrimental in general to the former prospective client, but the harm suffered must be prejudicial in fact to the former prospective client within the confines of the specific matter in which disqualification is sought, a determination that is exquisitely fact-sensitive and -specific." (emphasis added)).

- In re Perry, 293 P.3d 170, 176-77 (Mont. 2013) (applying Montana ethics Rule 1.20, which is parallel to ABA Model Rule 1.18; finding that a wife had not disclosed significantly harmful information to a lawyer she was interviewing, which meant that the lawyer's firm could represent the husband in a divorce case; "Karen did not establish that any information she divulged to Goheen in the telephone calls several years earlier could have any impact on the proceeding, particularly since, as discussed below, Goheen was not associated as counsel until three years into the proceeding, by which time substantially more information had been disclosed than the information Karen claims to have shared during those phone calls. We therefore conclude that the District Court did not abuse its discretion in denying Karen's motion to disqualify under Rule 1.20.").

- In re James, 679 S.E.2d 702 (W. Va. 2009) (holding that lawyer could be adverse to a potential client who had met with a lawyer to discuss a possible representation; noting that the lawyer and client had never entered into a formal relationship, and that the lawyer had not acquired any material confidential information).

Prospective Clients' Improper Attempts to Disqualify Adversaries' Potential Lawyers

As tempting as it might be for a prospective client to interview several lawyers in an effort to disqualify them from representing the prospective client's adversary, such a tactic generally does not work.

ABA Model Rule 1.18 cmt. [2] explicitly indicates that "a person who communicates with a lawyer for the purpose of disqualifying a lawyer is not a 'prospective client.'"

A number of ethics opinions have found such tricky tactics unsuccessful, and sometimes found unethical a lawyer's suggestion that a client engage in such a strategy.

- Texas LEO 585 (9/2008) (assessing the following situation: "A lawyer represents a party in a lawsuit filed in a community where there are a limited number of local lawyers. The lawyer proposes to counsel his client to hire all of the lawyers in that community with the result that the opposing party would not be able to employ a local lawyer for representation in the lawsuit."; ultimately concluding that "[c]ounseling a client to hire all the local lawyers in a community where a lawsuit is filed would violate the Texas Disciplinary Rules of Professional Conduct if such course of conduct had no substantial purpose other than to delay or burden the opposing party" (emphasis added)).

- Virginia LEO 1794 (6/30/04) (explaining that a husband planning to divorce his wife interviewed a number of lawyers in town, "but with no intent to hire them," because he already knew he would retain another lawyer; noting that the wife later interviewed the lawyer whom her husband had already secretly selected, and signed a disclaimer confirming that her initial interview "does not create an attorney/client relationship"; explaining that lawyers must maintain the confidentiality of information they acquire from prospective clients, and that the lawyer's disclaimer did not eliminate that duty -- because it did not address the confidentiality issue: "To be effective, the disclaimer must clearly demonstrate that the prospective client has given informed consent to the attorneys' use of confidential information protected under Rule 1.6"; concluding that the lawyer interviewed by the wife therefore could not represent the husband in the divorce unless the wife consented; also concluding that the husband's interviews of other lawyers (including the one ultimately hired by the wife) did not create a duty of confidentiality, because the husband's "primary purpose in meeting with Attorney B [hired by the wife] was to preclude him from representing the wife."; explaining that a lawyer would be acting unethically if the lawyer were "to direct a new client to undertake this sort of strategic elimination of attorneys for the opposing party." (emphasis added)).

- North Carolina RPC 244 (1/24/97) (inexplicably holding that a lawyer may not rely on an agreement signed by a prospective client allowing the lawyer to represent the adversary if the prospective client does not retain the lawyer; also holding that "[i]t is also unethical for a lawyer to encourage his or her client to seek to disqualify other lawyers from representing the client's adversary by arranging a series of initial consultations with the client in which confidential information is revealed. This is true whether it is the client or the lawyer who first suggests this of action." (emphasis added)).

The bars taking this common sense approach do not deal with a fascinating logistical dilemma. Because the lawyers who have been approached by such an unscrupulous prospective client must generally maintain the confidentiality of their discussions, how can the wronged adversary ever discover the prospective client's shenanigans? Presumably, the adversary would grow suspicious if every lawyer in town advised that he or she had a conflict. But the adversary would still have to point to a legal theory under which he or she could discover the substance of communications that created the conflict. Bars seem not to have dealt with this.

Possible Remedial Steps

Law firms hoping to avoid the harsh results of their state's version of ABA Model Rule 1.18 have a number of options, but must be careful.

First, lawyers can try to receive information from prospective clients that is not "significantly harmful," and which therefore would not disqualify the lawyers who receive only that information. However, this can be difficult, especially if the prospective client is unsophisticated. It would take just one moment for such a prospective client to blurt out such significantly harmful information.

ABA Model Rule 1.18 allows a law firm to handle a matter after screening an individually disqualified lawyer only if that lawyer "took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary" to run a conflicts check. ABA Model Rule 1.18(d)(2). Presumably, such steps could include the lawyer's warning to the prospective client not to disclose "significantly harmful" information.

Second, the lawyer can try to avoid any duty of confidentiality (or loyalty) by insisting that prospective clients explicitly disclaim such duties if no attorney-client relationship ensues. As explained above, an ABA Model Rule 1.18 comment suggests this approach.

> A lawyer may condition a consultation with a prospective client on the person's informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter. See Rule 1.0(e) for the definition of informed consent. If the agreement expressly so provides, the prospective client may also consent to the lawyer's subsequent use of information received from the prospective client.

ABA Model Rule 1.18 cmt. [5] (emphases added). However, such disclaimers normally must specifically mention and exclude any duty of confidentiality -- not just disclaim an attorney-client relationship.

The Virginia Bar took this position in Virginia LEO 1794 (6/30/04) (discussed above). A Virginia state court case decided the previous year also took this approach -- finding that the lawyer had not used an effective disclaimer.

- Joslyn v. Joslyn, CH 03-596, slip op. at 2, 3-4, 4, VLW 004-8-049 (Roanoke Cnty. Cir. Ct. Dec. 5, 2003) (disqualifying a lawyer from representing a husband after the wife had consulted with the lawyer about a domestic relations matter, but specifically noting that the husband's lawyer acted in good faith; noting that the lawyer arranged for the wife to sign a form with the following declaimer before their interview; "'I acknowledge that the initial consultation does not create an attorney/client relationship & until an attorney from this Firm is retained, no such relationship is established.'"; noting that a Virginia CLE program suggested such a disclaimer; concluding that the wife had not established the existence of an attorney-client relationship with the lawyer based on the interview, but that the lawyer nevertheless had a duty to keep confidential what the wife had shared with the lawyer; "In the matter before the Court, although no attorney/client relationship existed, the evidence shows that the Wife approached the Counsel in regards to initiating divorce proceedings against the Husband. The evidence also suggests that the Wife imparted some information regarding certain aspects of her marriage

> and the marital assets. The Court finds that it is probable that during the initial interview the Wife disclosed certain incidents of her marriage and her desires regarding the potential divorce about which she would have a reasonable expectation of confidentiality. While it is likely that much of the information discussed would be discoverable during the divorce proceedings, thereby obviating any harm stemming from the possession by the Husband's lawyer of confidential information, the likelihood of a potential conflict of interest remains if the lawyer continues to represent the Husband in this matter. As importantly, the Court finds that permitting the lawyer to continue to representing the Husband in litigation against the Wife creates an unwarranted appearance of impropriety that could easily be avoided. Accordingly, the Court grants the Wife's motion for the removal of the Husband's lawyer in this matter."; also noting that "the Court finds that the lawyer's actions were made in good faith, based on incorrect advice obtained at the Annual Domestic Relations Seminar, and under the unique facts of this case do not constitute a knowing violation of the rules of ethics governing attorneys.").

Third, law firms might arrange for a useful but logistically awkward system of having what amounts to a "call screener" initially interview prospective clients.

- Butler v. Romanova, 953 A.2d 748, 750 (Me. 2008) (declining to disqualify a lawyer from representing the wife in a divorce action, despite the husband's allegation that he earlier spoke to that lawyer about a possible separation; noting that the law firm's "protocol" called for prospective clients to be transferred to a "scheduling secretary" who screened the new client for conflicts; concluding that it was unlikely that communication with the lawyer actually took place).

Conclusion

Under ABA Model Rule 1.18, such an interview triggers a duty of confidentiality to such "prospective clients" **(question a)**.

If the prospective client does not retain the lawyer, the client receives the confidentiality rights of a former client -- which prohibits lawyers from adversity on the same or "substantially related" matters -- thus allowing lawyers to take unrelated adverse matters against the prospective clients who never hired the lawyer **(question b)**.

If lawyers consulting with "prospective clients" do not receive "significantly harmful information," those lawyers themselves can represent the prospective clients' adversaries even in the matters they discussed **(question c)**.

If the individual lawyers received such "significantly harmful" information, other lawyers at the firm can represent the adversaries if they screen the individually disqualified lawyers **(question d)**.

Best Answer

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

b 2/14

Comparison with the Duty of Loyalty

Hypothetical 10

You just received a call from a very distraught prospective client, who wants you to file a malpractice claim against a law firm in another city. She had approached the other law firm about handling a high-stakes fraud case. The law firm interviewed her for over an hour, gathering confidential (and significantly harmful) information about her situation, and her fraud case against the proposed defendant. However, several days later the firm advised her that the firm represented the proposed defendant on unrelated matters, and therefore had a conflict of interest preventing it from handling her case.

By the time she interviewed another law firm, the statute of limitations for the fraud claim had expired. She just learned that lawyers in that firm knew that her statute of limitations on the fraud case was about to expire, but did not advise her to quickly retain another lawyer to bring the fraud claim. She wants to sue that law firm for not at least advising her to quickly hire another lawyer.

Does your prospective client have a valid cause of action against the other law firm for failing to advise her to quickly interview another lawyer about the fraud case, which it could not handle because of its conflict?

MAYBE

Analysis

The ethics rules clearly define when a lawyer's confidentiality duty begins in connection with a would-be client's approach to, consultation with, and eventual retention of, a lawyer.

In contrast, the ethics rules impose all of the other ethics duties only when an attorney-client relationship begins. Thus, duties such as loyalty, diligence, communication, etc., normally begin only after creation of an attorney-client relationship.

Courts disagree about prospective clients' ability to file malpractice claims for lawyers' alleged negligence during their preliminary discussions.

Some courts seem to permit such actions.

- Togstad v. Vesely, 291 N.W.2d 686, 690, 694 (Minn. 1980) (affirming a malpractice judgment by a plaintiff against a Minnesota law firm; noting that the plaintiff had interviewed the law firm in connection with a possible malpractice claim arising from her husband's injury during a hospital stay; explaining that the plaintiff had met with the law firm for approximately forty-five minutes to one hour, at the conclusion of which the lawyer told the plaintiff that "he did not think we have a legal case," but would discuss matters with his partner and would call the plaintiff back if he changed his mind; noting that "[n]o fee arrangements were discussed, no medical authorizations were requested, nor was [plaintiff] billed for the interview"; explaining that the plaintiff did not interview another law firm until after the statute of limitations had run on her claim; also noting that the lawyer testified that he had advised the plaintiff to ask for another opinion "promptly," and had discussed the possibility of the claim with a more experienced malpractice lawyer, who agreed with his assessment that there was no claim; holding that the malpractice verdict was supported by plaintiff's expert, who testified that a lawyer being interviewed by such a possible malpractice plaintiff should have at a minimum reviewed the medical records; also holding that the lawyer "was also negligent in failing to advise [plaintiff] of the two-year medical malpractice limitations").

Some courts require an attorney-client relationship before permitting such actions.

- Allen v. Steele, 252 P.3d 476, 479-80, 479 (Colo. 2011) ("Jack Steele was injured in an automobile accident, and he and his wife purportedly met with attorney Katherine Allen to discuss filing a negligence suit against the other driver. The Steeles claim that Allen provided them with incorrect information regarding a statute of limitations, which caused them to miss a filing deadline. They sued Allen and her professional corporation, Katherine Allen, P.C., based upon two claims: (1) legal malpractice, and (2) negligent misrepresentation. The Steeles' complaint alleges that Allen told them that their negligence claims against the other driver were subject to a five-year statute of limitations and that they needed to settle any workers' compensation claims prior to filing suit. Their complaint asserts that both statements were false and that a three-year statute of limitations ultimately time-barred their action against the other driver. The complaint does not allege that the Steeles formed an attorney-client relationship with Allen. Likewise, the complaint does not set forth the circumstances in which the Steeles met with or discussed their case with Allen -- except for the statement that Allen 'gave such information to Plaintiffs in the course of Defendants' business, profession, and employment.'"; "In this appeal we review the court of appeals' decision that plaintiffs Jack and Danette Steele stated a claim for negligent misrepresentation against an attorney with whom they did not have

> an attorney-client relationship. . . . The Steeles allege that attorney Katherine Allen provided them incorrect information about a statute of limitations, which led to their missing the filing deadline in a negligence suit."; "Negligent misrepresentation requires, in part, that the misrepresentation be 'for the guidance of others in their business transactions.' We hold as a matter of law that an initial consultation to discuss a potential civil lawsuit is not sufficient to meet the element 'guidance of others in their business transactions'; therefore, the Steeles did not plead sufficient facts to state a claim of negligent misrepresentation. Next, we address the court of appeals' reliance on section 15(1)(c) of the Third Restatement, which imposes liability for legal malpractice in the absence of an attorney-client relationship. We hold that a claim of negligent misrepresentation may not be founded upon the requirement in section 15(1)(c) of the Third Restatement that attorneys owe a duty of reasonable care to prospective clients." (emphases added)).

An interesting scenario involves a prospective client's claim of malpractice based on a preliminary discussion -- after which the lawyer declined the representation because of a conflict.

The California Supreme Court dealt with this issue in 1994. In Flatt v. Superior Court, 885 P.2d 950 (Cal. 1994),[1] the California Supreme Court decided in a 4-3

[1] Flatt v. Superior Court, 885 P.2d 950, 952, 959, 959-60, 962, 964 (Cal. 1994) (in a 4-3 decision, holding that plaintiff could not assert a malpractice action against a law firm with whom he briefly spoke about filing a malpractice case against his previous lawyer, before being advised by the law firm that it had a conflict; "The latter claim alleged that Flatt had breached a duty to Daniel to advise him of the statute of limitations governing his claims against Hinkle and to seek other counsel in order to avoid having those claims time-barred."; "Flatt's decision not to represent Daniel in light of her firm's ongoing representation of the Hinkle firm thus placed her in an ethical dilemma: on severing -- as she must -- the relationship with Daniel, what if any duty did she have to advise him respecting his contemplated lawsuit, advice that would almost inevitably harm Hinkle's interests to some extent? We have no difficulty in concluding that under these circumstances any advice to Daniel regarding the statute of limitations governing his claim against Hinkle would have run counter to the interests of an existing client of Flatt and her firm and of their obligation of undivided loyalty to him. We therefore conclude that she had no duty to give Daniel any such advice."; "Not only would the advisory duty argued for by Daniel have been contrary to the principle of attorney loyalty, it would as a practical matter have placed both Hinkle and Flatt in an insupportably awkward position, one that was bound to damage Hinkle's relationship with the firm and hobble the firm's effectiveness in representing him. It is not difficult to imagine Hinkle's reaction on learning that, in the course of severing her professional relationship, however infant, with Daniel, Flatt had advised Hinkle's would-be adversary of the statute of limitations governing the timing of his lawsuit and that, Flatt having refused to take his case, it was prudent to seek alternative counsel lest Daniel's claim against Hinkle be barred by the passage of time."; "Under such circumstances, we think any client -- even an attorney such as Hinkle -- would be entitled to wonder whether the law's sense of casuistry had gone seriously wrong."; "Neither, we conclude, did Flatt have a duty under the circumstances to advise Daniel that it was prudent to seek other counsel promptly. Having sought an attorney to plead his case against

decision that a prospective client could not assert a malpractice cause of action against a law firm with which she had interviewed, but which had declined to take her case because the firm had a conflict.

Ironically, the prospective client (Daniel) had interviewed the Flatt law firm about representing him in a malpractice case against his previous lawyer. Unlike the earlier Minnesota case, the Flatt law firm could not represent Daniel because it had a conflict of interest -- the firm was currently representing the law firm Daniel wanted to sue.

> Flatt's [law firm] decision not to represent Daniel [prospective client] in light of her firm's ongoing representation of the Hinkle firm [law firm Daniel wanted to sue] thus placed her in an ethical dilemma: on severing -- as she must -- the relationship with Daniel, what if any duty did she have to advise him respecting his contemplated lawsuit, advice that would almost inevitably harm Hinkle's interests to some extent? We have no difficulty in concluding that under these circumstances <u>any advice to Daniel regarding the statute of limitations governing his claim against Hinkle would have run counter to the interests of an existing client of Flatt and her</u>

Hinkle and having been turned down by Flatt, Daniel obviously knew that he had to continue the search for representation if he intended to pursue the claim. . . . Not only is the average client's understanding of the practical realities of obtaining representation to defend or vindicate interests adequate to protect against the risks at stake, but the insoluble ethical dilemma raised by imposing on a fiduciary a duty to provide advice that is against the interests of an existing client argues conclusively against a contrary holding."; the three dissenting judges viewed the issue differently: "While acknowledging, for purposes of summary judgment, that Daniel was Attorney Flatt's client, the majority fails to recognize that the inevitable consequence of Daniel's status as a client is that Flatt owed Daniel the same duty of care that she owed Hinkle and every other client."; "Even if, as the majority concludes, Flatt would have violated her duty of loyalty to her client Hinkle by giving advice to Daniel when she withdrew from representing him, that fact does not absolve her of her duty of care to Daniel and it does not exonerate her from liability if she has breached that duty. That Flatt may have been forced to choose between her responsibilities to two clients provides no justification for immunizing her from liability if she did not act with the skill, prudence, and diligence that other members of the profession would have exercised under the circumstances. Daniel did not create the conflict. He was deprived of the services of the counsel of his choice through no fault of his own. The majority has advanced no reason why he should bear the loss resulting from the attorney's resolution of the conflict."; "Nor . . . has Flatt shown that her duty to Daniel did not require her, under the facts of this case, to advise Daniel regarding the applicable statute of limitations. Because the record does not conclusively show either that Flatt owed no duty to Daniel, or that she did not breach the duty of care that she allegedly owed him, the trial court properly denied Flatt's motion for summary judgment. I would therefore affirm the judgment of the Court of Appeal denying Flatt's petition for a writ of mandate.").

> firm and of their obligation of undivided loyalty to him. We therefore conclude that she had no *duty* to give Daniel any such advice.

Flatt v. Superior Court, 885 P.2d 950, 952 (Cal. 1994) (emphasis added indicated by underscore).

The majority specifically rejected Daniel's argument that the Flatt firm at least had a duty to advise him to seek another lawyer quickly, to avoid expiration of the statute of limitations.

> Neither, we conclude, did Flatt have a duty under the circumstances to advise Daniel that it was prudent to seek other counsel promptly. Having sought an attorney to plead his case against Hinkle and having been turned down by Flatt, Daniel obviously knew that he had to continue the search for representation if he intended to pursue the claim. . . . Not only is the average client's understanding of the practical realities of obtaining representation to defend or vindicate interests adequate to protect against the risks at stake, but the insoluble ethical dilemma raised by imposing on a fiduciary a duty to provide advice that is against the interests of an existing client argues conclusively against a contrary holding.

Id. at 291 (emphases added).

The three dissenting judges disagreed, arguing that the Flatt firm owed Daniel the same duty of loyalty as the firm owed any of its other clients.

> [T]he majority fails to recognize that the inevitable consequence of Daniel's status as a client is that Flatt owed Daniel the same duty of care that she owed Hinkle and every other client. . . . Even if, as the majority concludes, Flatt would have violated her duty of loyalty to her client Hinkle by giving advice to Daniel when she withdrew from representing him, that fact does not absolve her of her duty of care to Daniel and it does not exonerate her from liability if she has breached that duty. That Flatt may have been forced to choose between her responsibilities to two clients provides no justification for immunizing her from liability if she did not

> act with the skill, prudence, and diligence that other members of the profession would have exercised under the circumstances. Daniel did not create the conflict. He was deprived of the services of the counsel of his choice through no fault of his own. The majority has advanced no reason why he should bear the loss resulting from the attorney's resolution of the conflict.

Id. at 294-95 (emphasis added).

Although the Flatt case involved a close question, the result highlights the different starting times for lawyers' duties of confidentiality and of loyalty when interacting with prospective clients.

Best Answer

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

b 2/14

Duty to Former Clients

Hypothetical 11

Having very recently attended a magnificent ethics program on the duty of confidentiality, you now know the strength and scope of the ABA Model Rules' and most states' confidentiality duty. For instance, you know that under the ABA Model Rules the duty covers all "information relating to the representation," even if that information is generally known or in the public record.

Now you are wondering about your confidentiality duty to former clients. You recognize that your duty extends beyond the attorney-client relationship, but have questions about the possible disclosure or use of client information after the relationship ends.

(a) May you disclose a former client's information to assist a new client, as long as that disclosure does not harm the former client?

(B) NO

(b) Can you ever use a former client's information to the disadvantage of the former client?

(A) YES (IF THE INFORMATION IS "GENERALLY KNOWN")

Analysis

(a)-(b) Every ABA ethics rules' variation and every state's ethics rules confirm that lawyers' confidentiality duty lasts beyond the attorney-client relationship. After that, the issue becomes more subtle.

Source of Guidance

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

> The obligation to represent the client with undivided loyalty and not to divulge his secrets or confidences forbids also the subsequent acceptance of retainers or employment from

> others in matters adversely affecting any interest of the client with respect to which confidence has been reposed.

ABA Canons of Professional Ethics, Canon 6 (8/27/1908) (emphasis added). Thus, the original 1908 ABA Canon warned about the disqualifying impact of confidential information, but did not provide any useful guidance about what a lawyer could or could not do with client information after the representation ended.

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

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

ABA Canons of Professional Ethics, Canon 37, amended Sept. 30, 1937 (emphasis added). Thus, the 1938 ABA Canon specifically addressing confidentiality did not provide any more useful guidance than the earlier 1908 Canon.

<u>ABA Model Code.</u> The 1969 ABA Model Code did not distinguish between lawyers' confidentiality duty to current and former clients.

> [A] a lawyer shall not knowingly:
>
> (1) Reveal a confidence or secret of his client.
>
> (2) Use a confidence or secret of his client to the disadvantage of the client.

> (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

ABA Model Code of Professional Responsibility, DR 4-101 (B) (footnotes omitted).

This provision presumably applied to both current and former clients. A comment indicated that "no employment should be accepted that might require" disclosure "of the confidences and secrets of one client to another." ABA Model Code Canon 4, EC 4-5. A 1936 ABA LEO explained that "'an attorney must not accept professional employment against a client or a former client which will, or even *may*, require him to use confidential information obtained by the attorney in the course of his professional relations with such client regarding the subject matter of the employment.'" ABA LEO 165 (8/23/36) (emphasis added indicated by underscore).

The only ABA Model Code provision specifically addressing former clients dealt with lawyers' duty to protect former clients' confidences and secrets when the lawyers retired.

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

ABA Model Code of Professional Responsibility, EC 4-6 (emphasis added).

Thus, like the earlier ABA Canons, the ABA Model Code treated current and former clients essentially the same way. This made sense in the context of its general

approach -- prohibiting disclosure or use of client information only if it would disadvantage the client (or former client).

ABA Model Rules. The ABA Model Rules articulate a dramatically different scope of duty from the ABA Model Code, and therefore had to fine-tune lawyers' confidentiality duty to former clients.

Unlike the ABA Model Code, the ABA Model Rules protect all "information relating to a representation." ABA Model Rule 1.6(a). The protected information even includes information that is generally known or is in the public record.

Given the ABA Model Rules' expanded source and content of information subject to lawyers' confidentiality duty, it is not surprising that the Rules could not automatically apply that duty to former clients.

Instead, the ABA Model Rules continue forever the prohibition on disclosure of client information, but permit the use of client information, as long as the client would not be disadvantaged. And lawyers may use information even adverse to the former client if it has become "generally known."

A comment to the main ABA Model Rule dealing with confidentiality confirms that

> [t]he duty of confidentiality continues after the client-lawyer relationship has terminated.

ABA Model Rule 1.6 cmt. [20].

ABA Model Rule 1.9 deals initially with lawyers' ability or inability to represent clients adverse to the lawyers' former clients. ABA Model Rule 1.9(a), (b). However, that Rule also confirms that lawyers' confidentiality duty applies regardless of the type of

disqualification issue that might result from an arguably improper representation adverse to a former client.

> Independent of the question of disqualification of a firm, a lawyer changing professional association has a continuing duty to preserve confidentiality of information about a client formerly represented.

ABA Model Rule 1.9 cmt. [7] (emphasis added).

ABA Model Rule 1.9(c) describes lawyers' confidentiality duty to former clients.

> A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

ABA Model Rule 1.9(c) (emphases added). One might have expected the Rule to deal first with disclosure and then with use, but the order is not material.

Thus, under ABA Model Rule 1.9 (absent consent), lawyers may never disclose a former client's information (absent some rule exception) -- but may use a former client's information except if the use would disadvantage the former client. And lawyers can use information adverse to a former client if it has become generally known.

A comment provides some explanation.

> Paragraph (c) provides that information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from

> using generally known information about that client when later representing another client.

ABA Model Rule 1.9 cmt. [8] (emphasis added).

Restatement. The Restatement ultimately takes essentially the same approach as the ABA Model Rules, although it starts in a far different place.

The Restatement uses the "generally known" standard in defining lawyers' basic confidentiality duty in all circumstances -- allowing lawyers to disclose and use generally known information even if they acquire it in connection with a current representation. See Restatement (Third) of Law Governing Lawyers § 59 (2000).

A comment to that basic section discusses a particular kind of information that lawyers can use in future representations that are adverse to a former client -- even though lawyers' duties to former clients appears in another Restatement section.

> Confidential client information does not include what a lawyer learns about the law, legal institutions such as courts and administrative agencies, and similar public matters in the course of representing clients. Such information is part of the general fund of information available to the lawyer. During legal research of an issue while representing a client, a lawyer may discover a particularly important precedent or devise a novel legal approach that is useful both in the immediate matter and in other representations. The lawyer and other members of the lawyer's firm may use and disclose that information in other representations, so long as they thereby disclose no confidential client information except as permitted by [another section]. A lawyer may use such information -- about the state of the law, the best way to approach an administrative agency, the preferable way to frame an argument before a particular judge -- in a future, otherwise unrelated representation that is adverse to the former client.

Restatement (Third) of Law Governing Lawyers § 59 cmt. e (2000) (emphasis added).

This is not a surprising principle. The ABA Model Rules might recognize the same

concept, under the provision allowing use of "generally known" information adverse to a former client.

The main Restatement provision dealing with disclosure or use of protected client information explicitly indicates that the prohibition on lawyers' disclosure or use of protected client information in the defined way applies "during and after representation of a client." Restatement (Third) of Law Governing Lawyers § 60 (2000) (emphasis added). However, most of that section's discussion deals with the information, and not specifically with lawyers' duty of confidentiality to former clients.

Another comment deals specifically with lawyers' use of information after a representation ends.

> Even if a subsequent representation does not involve the same or a substantially related matter, a lawyer may not disclose or use confidential information of a former client in violation of § 60.

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

The Restatement's analysis of lawyers' confidentiality duty to former clients necessarily involves a simpler approach than that in the ABA Model Rules. The Restatement: (1) never protects "generally known" information; and (2) allows disclosure of client information if a disclosure would not disadvantage the client. The Restatement takes the same approach to current and former clients, and therefore essentially matches up with the ABA Model Rules approach to former clients.

The Restatement approach parallels the description of an agent's duties to former principals articulated in Restatement (Second) of the Law Agency (1958).

> Unless otherwise agreed, after the termination of the agency, the agent:

> (a) has no duty not to compete with the principal;
>
> (b) has a duty to the principal not to use or to disclose to third persons, on his own account or on account of others, in competition with the principal or to his injury, trade secrets, written lists of names, or other similar confidential matters given to him only for the principal's use or acquired by the agent in violation of duty. The agent is entitled to use general information concerning the method of business of the principal and the names of the customer retained in his memory, if not acquired in violation of his duty as agent.

Restatement (Second) of the Law Agency § 396(a)-(b) (1958)

State Variations. Most states generally follow the ABA Model Rules approach.

States unanimously agree that lawyers' confidentiality duty survives the end of an attorney-client relationship. States following the ABA Model Rules also agree that lawyers may never disclose former clients' protected information, but may use "generally known" information adverse to a former client, as long as the lawyer is not prohibited by other rules from taking a matter adverse to the former client.

Of course, those few states following the "generally known" standard for all client information end up in the same place when applying that general approach to lawyers' possible disclosure or use of former clients' confidences.

Case Law and Ethics Opinions. In 2000, the ABA issued an ethics opinion addressing lawyers' confidentiality duty to former clients.

- ABA LEO 417 (4/7/00) (addressing the following question: "The Committee has been asked whether, under the ABA Model Rules of Professional Conduct, a lawyer representing a party in a controversy may agree to a proposal by opposing counsel that settlement of the matter be conditioned on the lawyer not using any of the information learned during the current representation in any future representation against the same opposing party. The proposed settlement would be favorable to the lawyer's client. The Committee notes that, while this particular situation is most likely to arise in litigation, it could also arise in transactional matters."; explaining that the

proposed limitation would amount to a restriction on the lawyer's practice; "In this case, the proposed settlement provision would not be a direct ban on any future representation. Rather, it would forbid the lawyer from using information learned during the representation of the current client in any future representations against this defendant. As a practical matter, however, this proposed limitation effectively would bar the lawyer from future representations because the lawyer's inability to use certain information may materially limit his representation of the future client and, further, may adversely affect that representation."; explaining the difference between a permissible restriction on the lawyer's disclosure of client confidences and an impermissible restriction on the lawyer's use of client confidences; "A proposed settlement provision, agreed to by the client, that prohibits the lawyer from disclosing information relating to the representation is no more than what is required by the Model Rules absent client consent, and does not necessarily limit the lawyer's future practice in the matter accomplished by a restriction on the use of information relating to the opposing party in the matter. Thus, Rule 5.6(b) would not proscribe offering or agreeing to a nondisclosure provision."; "Although the Model Rules also place a restraint on the 'use' of information relating to the former client's representation, it applied only to use of the information to the disadvantage of the former client. Even in this circumstance, the prohibition does not apply when the information has become generally known or when the limited exceptions of Rule 1.6 or 3.3 (Candor Towards the Tribunal) apply. This prohibition has been interpreted to mean that a lawyer may not use confidential information against a former client to advance the lawyer's own interests, or advance the interests of another client adverse to the interests of the former client. If these circumstances are not applicable, using information acquired in a former representation in a later representation is not a violation of Rule 1.9(c). Thus, from a policy point of view, the subsequent use of information relating to the representation of a former client is treated quite liberally as compared to restrictions regarding disclosure of client information." (footnotes omitted) (emphases added); concluding that "[a]lthough a lawyer may participate in a settlement agreement that prohibits him from revealing information relating to the representation of his client, the lawyer may not participate or comply with a settlement agreement that would prevent him from using information gained during the representation in later representations against the opposing party, or a related party, except to the limited extent described above. An agreement not to use information learned during the representation would effectively restrict the lawyer's right to practice and hence would violate Rule 5.6(b).").

It is unclear whether the ABA meant to totally prohibit lawyers' use of a former client's protected information to advance the lawyers' own interests under any

circumstance, or only prohibit self-use of former clients' information if that use is adverse to the former clients' interests. The punctuation in that sentence seems to take the former position, although the rule itself seems more consistent with the latter interpretation.

Several cases have addressed the "generally known" standard. It is not surprising that these cases arise in a former client context, because only a handful of states use the "generally known" standard in defining the scope of lawyers' confidentially duty in the context of current clients.

In any event, several cases have provided a fascinating analysis of the "generally known" standard.

- Sobel v. Sells (In re Gordon Props., LLC), Ch. 11 Case No. 09-18086-RGM, Adv. No. 12-1562-RGM, 2013 Bankr. LEXIS 728, at *7 & n.6 (E.D. Va. Feb. 25, 2013) (analyzing the "generally known" standard under Rule 1.9, and ultimately disqualifying the law firm from Reed Smith under that section; "A lawyer may not disclose privileged or secret information and may not use case-related information to the disadvantage of his client unless it has become 'generally known.' Rule 1.9(c)(1). . . . 'Generally known' does not mean information that someone can find. It means information that is already generally known. For example, a lawyer may have drafted a property settlement agreement in a divorce case and it may in a case file in the courthouse where anyone could go, find it and read it. It is not 'generally known.' In some divorce cases, the property settlement agreement may become generally known, for example, in a case involving a celebrity, because the terms appear on the front page of the tabloids. 'Generally known' does not require publication on the front page of a tabloid, but it is more than merely sitting in a file in the courthouse. *See* Virginia State Bar Legal Ethics Opinion 1609 (information regarding a judgment obtained by a law firm on behalf of a client, "'even though available in the public record, is a secret, learned within the attorney-client relationship.'" (emphasis added)).

- Disciplinary Counsel v. Cicero, 982 N.E.2d 650, 653, 654, 655 (Ohio 2012) (suspending for one year an Ohio lawyer -- and former Ohio State football player -- who improperly disclosed to then Ohio State football coach Jim Tressel confidential information the lawyer had learned from a prospective client; quoting one of the three emails that the lawyer sent to Tressel; "Take

care. I will keep you posted as relevant information becomes available to me. Just keep our emails confidential."; "We agree with the board that relator has proved by clear and convincing evidence that Rife was a prospective client of Cicero. As the panel found, the two discussed the possibility of a client-lawyer relationship; Cicero admitted this in his e-mails to Tressel, and Rife testified as to the discussion. Rife's testimony was corroborated by Palmer [lawyer ultimately hired by Rife], who testified that Rife had told him soon after the meeting with Cicero that Cicero had quoted him a fee. Rife met with Cicero on April 15 to discuss his case, and Cicero offered legal advice in response to Rife's questions."; "In his objections to the board's report, Cicero argues that the information he communicated to Tressel was 'generally known' and that the communication was therefore permitted by Prof. Cond. R. 1.9(c)(1). A close examination of the April 16 e-mails, however, reveals that Cicero disclosed not only generally known information-for example, that Rife's home had been raided by federal agents -- but also a number of specific details about Rife's case that Cicero could only have learned during his consultation with Rife. This information does not fall into the 'generally known' exception of Prof. Cond. R. 1.9(c)(1). Cicero violated Prof. Cond. R. 1.18(b) when he disclosed to Tressel confidential information about Rife's case learned during the April 15 meeting." (emphases added)).

A 1993 Eastern District of Pennsylvania case addressed this issue before the dawn of the electronic age.

- Cohen v. Wolgin, Civ. A. No. 87-2007, 1993 U.S. Dist. LEXIS 9040, at *7-8, *8-9, *10, *12-13 (E.D. Pa. June 23, 1993) (addressing whether information is "generally known" for purposes of determining whether a lawyer can use a former client's information adverse to that client; explaining that information in magazines, newspapers and published cases was "generally known"; concluding that even an old magazine article met the standard; "Anyone interested in finding out about defendant Jack L. Wolgin could go to a public library and discover the article by using public indexes such as the *Readers' Guide to Periodic Literature*. The newspaper articles cited by the plaintiff could be discovered in the same fashion. Conducting such a search would not require special knowledge or substantial difficulty or expense." (emphasis added); explaining that older cases also met the standard; "While that information could not be located in a publicly accessible index such as the *Readers' Guide to Periodic Literature*, it could be obtained from a computer database such a[s] Westlaw or Lexis simply by using defendant Jack L. Wolgin's name. Yet, it is certainly possible that an individual not learned in legal research techniques would not know of the existence of the computer databases that could assist him. For this reason, finding the Third Circuit cases would not be as easy as locating the articles published in the press.

> However, the court is not convinced that knowledge of the existence of those databases is 'special knowledge'." (emphasis added) indicated by underscore; concluding that information in pleadings and exhibits also met the standard; "Whether the information contained in the pleadings and exhibits filed in, or the testimony given in, or any settlement agreements reached in the previous litigation involving HRA in state and federal court is generally known, is a more difficult question. It is certainly true that, as the previous litigation in the Eastern District of Pennsylvania, any pleadings filed are accessible to the public simply by going to the clerk's office and requesting that copies be made. While access to these pleadings might entail some cost, the court does not believe that the copying costs charged by the clerk's office would constitute a substantial expense. In any event, the parties have not argued that the copying costs are a substantial expense and would be a reason to determine that the information contained in pleadings is not 'generally known[.'] Further, since the pleadings are accessible to the public upon demand, it is concluded that any information that is contained in the pleadings filed in prior state or federal litigation regarding Hotel Rittenhouse Association ('HRA') is 'generally known'." (footnote omitted) (emphasis added); finally, concluding that information available from the Italian Embassy was not "generally known"; "Finally, it is concluded that information about the Italian Bond Recovery that the plaintiff asserts could have been acquired from the Italian Embassy in Philadelphia, the American Embassy in Italy, or the Italian court in which the litigation that was the subject matter of the recovery was filed is not 'generally known'." (emphasis added)).

The rise of social media and easily accessible public records presumably reshape this "generally known" standard -- providing another example of how new forms of electronic communication affect the ethics rules and their application.

Conclusion

The ABA Code treated lawyers' duty of confidentiality to current and former clients exactly the same way. The ABA Model Rules cannot take that approach, given the remarkable breadth of lawyers' confidentiality duty in the Model Rules. However, it seems strange that the ABA Model Rules did not adopt the ABA Model Code's approach -- prohibiting lawyers' use of former clients' information to their disadvantage. Instead, the ABA Model Rules allows such adverse use, but only if the information is

"generally known." That concept appears in the Restatement, but inexplicably focuses on the type of information rather than on the use's effect on former clients. That approach seems inconsistent with the otherwise client-centric (and in some provisions the unjustifiably extreme client-centric) approach found elsewhere in the ABA Model Rules. Like the ABA Model Code, the Restatement treats lawyers' confidentiality duty to current and former clients the same, which seems more intellectually consistent than the ABA Model Rules' differing standards.

Best Answer

The best answer to **(a)** is **(B) NO**; the best answer to **(b)** is **(A) YES (IF INFORMATION IS "GENERALLY KNOWN")**.

b 2/14

Possible Expiration of the Confidentiality Duty

Hypothetical 12

One law school classmate always tended to be a "bookworm," and decided to become a law librarian rather than a practicing lawyer. Over a recent dinner, he argued that lawyers' duty of confidentiality to former clients should eventually "expire." For purposes of the argument, your classmate contends that the duty should last no more than 100 years. This would allow historians access to treasure-troves of significant information, while protecting any legitimate interest that former clients might have.

Should lawyers' duty of confidentiality expire after 100 years?

(B) NO (UNDER CURRENT ETHICS RULES)

Analysis

Every state's ethics rules currently take the position that lawyers' confidentiality duty lasts forever. There seems to be no sign of retreat from that position.

The Restatement hints at a possible loosening of this absolute precept, although not suggesting an expiration of the confidentiality duty.

> A lawyer may cooperate with reasonable efforts to obtain information about clients and law practice for public purposes, such as historical research, when no material risk to a client is entailed, such as financial or reputational harm. A lawyer thereby cooperates in furthering public understanding of the law and law practice.

Restatement (Third) of Law Governing Lawyers § 60 cmt. h (2000). The reporter's note provides an explanation.

> With respect to divulgence for the purpose of cooperating in historical research, it may be desirable to create special legal mechanisms by which lawyers may obtain clearance to disclose confidential client information to assist such research. Such a procedure should provide for notice to the client or a representative of a deceased or defunct client and for the right of the client or the client's representative to

> intervene. The procedure could permit a weighing of the relative importance of releasing the information in the circumstances and the magnitude of any risk of impairing confidentiality interests.

Restatement (Third) of Law Governing Lawyers § 60 reporter's note cmt. h (2000) (emphases added). Of course, the Restatement does not consider "generally known" information to be within the scope of lawyers' confidentiality duty, so this approach is consistent with the Restatement's fairly open attitude toward client confidences.

So far, no bar has moved in the direction of loosening the confidentiality duty after a certain lapse of time.

- Virginia LEO 1664 (2/9/96) (explaining that because a lawyer's duty to maintain confidences and secrets survives the client's death, a lawyer may not provide a former client's historically significant files to a university without either obtaining the client's consent or determining that the files contain no confidences or secrets; acknowledging that a lawyer may give limited information to an outside agency if it is necessary for the lawyer to perform the lawyer's job, but the lawyer must be careful in selecting the agency and instruct the agency that the information must be kept confidential).

- Virginia LEO 1307 (11/13/89) (explaining that a lawyer's files may be reviewed to determine if non-legal documents may be given to an institution (for historic archives) as long as the attorney-client privilege is not breached by having an outsider examine the files.).

This is not for lack of trying by law librarians and historical researchers. A footnote in a brief (discussed below) predicted an eventual expiration of the confidentiality duty.

> It is reasonable to assume that laws governing the confidentiality of client files may change at some point in the future. There have been studies to determine where various members of the legal community stand on the issue of setting time limits on the attorney-client confidentiality, resulting in the proposition that access be granted to client files after fifty years unless a party makes a strong case otherwise. *See* Marsha Trimble, *Archives and Manuscripts:*

> *New Collecting Areas for Law Libraries*, 83 Law Libr. J. 429 (1991) at 441-442; Akiba J. Covitz, *Providing Access to Lawyers' Papers: The Perils . . . and The Rewards*, Legal Reference Services Q., Vol. 20, No. 1/2, 2001, at 162. Certain researchers devoted to the subject of access to lawyers' papers have attempted to establish and implement procedures to provide reasonable ethical access to lawyers' papers. *See* Jon Gerter, *The Lex Files, What's To Be Done With Lawyers' Private Papers After Their Death?*, AMERICAN LAWYER, June 1998 at 76; Hiller Zobel, Alfred Konefsky, & Jerold Auerbach, *Lawyers Papers as a Source of Legal History*, 69 Law Libr. J. 303-328 (1976).

Notice of Motion & Motion for Order [Regarding Abandonment of Digital Records] at 13 n.6, In re Brobeck, Phleger & Harrison, LLP., Chapter 7 Case No. 03-32713-DM7 (N.D. Cal. July 18, 2006 [hearing date]) (emphasis added indicated by underscore).

The Northern District of California bankruptcy court may not have agreed with this prediction, but it allowed preservation and limited use of an enormous set of electronic documents amassed by the law firm of Brobeck, Phleger & Harrison. The Brobeck, Phleger firm was founded in 1926, but dissolved in 2003.

In the firm's 77 years history, Brobeck collected 200,000 boxes of paper records, and 20-40 million pages of text in electronic form. David A. Kirsch, Paths Toward a Public Interest in Private Records & the Future of Business History, PowerPoint presentation to Library of Congress, Mar. 17, 2009.

The University of Maryland, in conjunction with the Library of Congress, asked the bankruptcy court to allow preservation of the firm's files, and limited use by legitimate historians researching the dot-com bubble and its burst.

An article by the University of Maryland professor spearheading this effort described the challenges this project faced.

Brobeck, Phleger, & Harrison was a San Francisco law firm founded in 1926. By 2001, it had become regarded as one of the top two Silicon Valley firms representing newly emerging dot com ventures, as well as established corporations such as Cisco, Sun Microsystems, and Nokia. Brobeck expanded heavily during this period, serving thousands of technology clients and incurring upward of $100 million in debt that (among other causes) would result in its dissolution in February 2003 and subsequent filing for bankruptcy protection (September 2007). Over the course of its seventy-seven years, Brobeck amassed a fortune of historical client records, both in paper and, later, in digital format.

. . .

Brobeck represented several thousand technology companies during the 1990s. Given the focus of the larger digital archive on the activities of firms founded in this period to commercialize the Internet, we believed that the Brobeck corpus would include the records of many hundreds of target firms and set out to explore the possibility of preserving the Brobeck records as part of the Digital Archive of the Birth of the Dot Com Era. When first contacted about the Brobeck Archive, many casual observers dismissed the effort as a lost cause. How, they wondered, could we save materials that retained legal privilege and confidentiality without abrogating those rights?

. . .

While the Business Plan Archive was initially conceived and implemented at the University of Maryland, the Brobeck Archive required we engage the larger community of digital preservation, including the Center for History and New Media at George Mason University (http://chnm.gmu.edu), the National Digital Information Infrastructure and Preservation Program of the Library of Congress (http://www.digitalpreservation.gov), the Estate of the failed law firm, Gallivan, Gallivan, & O'Melia (http://www.digitalwarroom.com), and a blue-ribbon advisory council including experts in privilege, confidentiality, legal ethics, bankruptcy, venture law, and the management of data enclaves.

. . .

Most fundamentally, we believe that clients never had any reasonable expectation that their records would be destroyed -- only that they would be shielded from public disclosure. In fact, most law firms (including Brobeck) have policies requiring client records to be kept indefinitely, even (and often especially) if clients request they be destroyed. Brobeck's dissolution interrupted this indefinite preservation, and our designated archive will respect confidentiality by preserving client records *in the same manner* as did Brobeck.

. . .

These challenges are reflected in the court order that officially sanctioned the creation of the Brobeck Closed Archive. On August 9, 2006, in recognition of the extraordinary efforts of the project team and the historic nature of the Brobeck records, Judge Dennis Montali of the U.S. Bankruptcy Court, Northern District of California, San Francisco Division, authorized the creation of a Closed Archive allowing a large subset of these records to be preserved at the direction of the Library of Congress. The court approved a high-level set of principles -- the 'Closed Archive Methodology' -- that establishes the guidelines under which the Brobeck Closed Archive will operate. Certain categories of records, which we have no expectation to ever have reason or right to access, will be separated from the collection and destroyed . . . . For finer grained distinctions among different types of client and law firm records, general bankruptcy practice was followed. We were required to privately and publicly notice all parties of the expected creation of the Closed Archive. However, rather than requiring former clients and other rights holders to 'opt in' to an open archive, the methodology instead allows rights holders to 'opt out' (at any time) but assumes that many clients will not be able to respond and therefore impounds all remaining materials in the Closed Archive and places strict limits on access to and disclosure of specific, attributable materials. This arrangement was necessitated by our desire to maintain the integrity of the overall corpus and the fact that so many of the rights holders had ceased to exist. Indeed, the project mailed out approximately 11,000 copies of the court notice; more than 3,400 (30 percent) were returned as 'undeliverable,' implying that this subset of former clients may not have received the intended notice.

> For the sake of comparison, had Judge Montali limited the collection to those clients who opted in, we would today have open access to the records of less than fifteen clients. We also recognized that even if the bulk of the Brobeck Archive would need to remain off-limits to historians, potentially into perpetuity, the scale and breadth of the collection could support social science research to answer a host of interesting questions without requiring that specific, confidential information be disclosed. The closed archive methodology approved by Judge Montali expressly envisions such research under an access model similar to that employed by the U.S. Bureau of the Census' Research Data Centers. As with the Business Plan Archive, project staff is working to establish the representativeness of the Brobeck Archive and account for any systematic distortions arising from the pattern of opt outs received . . . . Current plans call for the creation of an experimental access site in 2008–9 to enable social science research. Under this model, access will be restricted to archivists or scholars who have signed strict non-disclosure agreements and whose proposals will have been vetted by our advisory council. Initially, access will take place in an on-site, non-networked, institutional setting, and only for enumerated purposes. Archivists administering the Closed Archive will log search queries and document retrievals to ensure that users are complying with the narrow boundaries of their approved access and will only allow aggregated or redacted data to leave the secure area. We believe that this solution is workable and balances the need to safeguard confidentiality and privilege while still permitting approved scholarly access.

David A. Kirsch, The Record of Business & the Future of Business History: Establishing a Public Interest in Private Business Records, Library Trends, Winter 2009, at 360-63 (footnote omitted) (emphases added indicated by underscore).

Only 367 former Brobeck clients opted out of the electronic archive -- representing less than 12 percent of the total number of objects in the database. David A. Kirsch, Paths Toward a Public Interest in Private Records & the Future of Business History, PowerPoint presentation to Library of Congress, Mar. 17, 2009.

Best Answer

The best answer to this hypothetical is **(B) NO (UNDER CURRENT ETHICS RULES)**.

b 2/14

Deceased Individual Clients' Successors

Hypothetical 13

An abused wife hired you about three months ago to represent her in a divorce. You quickly began interviewing neighbors, friends, and co-workers, chronicling all of the evidence you would need to show her husband's horribly abusive behavior. About a week before your client had planned to file for divorce, you received a call from her husband. He cavalierly told you (1) that his wife just committed suicide; (2) that he noticed in his late-wife's checkbook that she had hired you about three months ago; (3) that he was his late wife's executor, and (4) that he wanted all of your files.

Must you turn over your files to your deceased client's executor?

(B) NO (PROBABLY)

Analysis

Any analysis of lawyers' duty of confidentiality to former clients might at some point focus on who steps into the shoes of the client if the client dies (in the case of an individual), is sold, or ceases to exist (in the case of a corporation).

States usually deal with the individual deceased client's situation in statutes or other state regulations. Most, but not all, states grant successorship to deceased individual clients' executors. In nearly every situation, this transition works very smoothly. However, state variations can result in somewhat surprising scenarios.

States' differing approach to this issue was highlighted in a 2003 North Carolina opinion.

- In re Investigation of Death of Miller, 584 S.E.2d 772, 776, 777, 779, 780 & n.1, 781-82, 785, 788, 789, 790, 791 (N.C. 2003) ("This case involves the attorney-client privilege and raises the primary question of whether, in the context of a pretrial criminal investigation, there can be a viable basis for the application of an interest of justice balancing test or an exception to the privilege which would allow a trial court to compel disclosure of confidential communications where the client is deceased, an issue of first impression for

this Court."; explaining that Dr. Miller had died from arsenic in beer he had consumed, providing the factual background; "On the evening of 15 November 2000, Dr. Miller went bowling at AMF Bowling Center in Raleigh, North Carolina, with several of Mrs. Miller's co-workers. While at the bowling alley, Dr. Miller partially consumed a cup of beer given to him by Mrs. Miller's co-workers Derril H. Willard (Mr. Willard). Dr. Miller commented to those present that the beer had a bad or 'funny' taste." (emphasis added); explaining that the police ultimately determined that Willard had been having an affair with Dr. Miller's wife, and that Willard had killed himself shortly after speaking with a lawyer; confirming that the attorney-client privilege survives the death of the client; noting that Willard's wife (executrix of his estate) submitted an affidavit "purporting to waive the privilege on Mr. Willard's behalf" (emphasis added); however, noting that contrasting a North Carolina rule with the law in many other states; "We find it noteworthy that whereas many jurisdictions have enacted provisions empowering a personal representative to claim and exercise (and by necessary inference also waive) the decedent's attorney-client privilege, the North Carolina General Assembly has enacted no such provision." (emphasis added); rejecting the state's contention that Willard's widow could or did waive the privilege; "[T]he record more strongly suggests that Mr. Willard's estate was reopened in order to enable Mrs. Willard to submit an affidavit to further the ongoing criminal investigation, and that Mrs. Willard's decision to waive the attorney-client privilege was not for a purpose related to the preservation of Mr. Willard's estate. . . . We therefore conclude that because Mr. Willard's will did not expressly grant the executrix the power to waive his attorney-client privilege, or any powers similar thereto, Mrs. Willard does not have the power to waive Mr. Willard's attorney-client privilege."; ultimately adopting a "strict balancing test" in these circumstances; "A strict balancing test involving the attorney-client privilege, in the context of the present case after the client's death, subjects the client's reasonable expectation of nondisclosure to a process without parameters or standards, with an end result no more predicable in any case than a public opinion poll, the weather over time, or any athletic contest. Such a test, regardless of how well intentioned and conducted it may be, or how exigent the circumstances, would likely have, in the immediate future and over time, a corrosive effect on the privilege's traditionally stable application and the corresponding expectations of clients."; "The practical consequences of a balancing test include the difficulty of demonstrating equality of treatment, the decline of judicial predictability, and the facilitation of judicial arbitrariness."; "We therefore conclude that, in the instant case, the trial court's decision to conduct an in camera review of the communications between respondent and Mr. Willard was procedurally correct. The trial court did not err in ordering respondent to provide the trial court with a sealed affidavit containing the communications which transpired between Mr. Willard and respondent, for the purpose of determining whether the attorney-client privilege applies to any portion of the communication. Upon such review on

remand, the trial court's threshold inquiry is to determine whether the information communicated between respondent and Mr. Willard, or any portion thereof, is in fact privileged."; explaining that "we hold that when a trial court, after conducting an in camera review as described below, determines that some or all of the communications between a client and an attorney do not relate to a matter that affected the client at the time the statements were made, about which the attorney was professionally consulted within the parameters of the McIntosh [State v. McIntosh, 444 S.E.2d 438 (N.C. 1994)] test, such communications are not privileged and may be disclosed."; "Therefore, at the time Mr. Willard made the statements, anything he said relating his collaborative involvement with a third party in the death of Dr. Miller was covered by the attorney-client privilege."; "If, on the other hand, the trial court should determine that the communications asserted to be privileged would have no negative impact on Mr. Willard's interests, the purpose for the privilege no longer exists. When application of the privilege will no longer safeguard the client's interests, no reason exists in support of perpetual nondisclosure."; "In summary then, we hold that when a client is deceased, upon a nonfrivolous assertion that the privilege does not apply, with a proper, good-faith showing by the party seeking disclosure of communications, the trial court may conduct an in camera review of the substance of the communications. To the extent any portion of the communications between the attorney and the deceased client relate solely to a third party, such communications are not within the purview of the attorney-client privilege. If the trial court finds that some or all of the communications are outside the scope of the attorney-client privilege, the trial court may compel the attorney to provide the substance of the communications to the State for its use in the criminal investigation, consistent with the procedural formalities set forth below. To the extent the communications relate to a third party but also affect the client's own rights or interests and thus remain privileged, such communications may be revealed only upon a clear and convincing showing that their disclosure does not expose the client's estate to civil liability and that such disclosure would not likely result in additional harm to loved ones or reputation."; remanding to the trial court for an in camera review; later affirming the trial court's conclusion; In re Investigation of Death of Miller, 595 S.E.2d 120, 123 (N.C. 2004) ("We affirm the trial court's finding in the 'Order [Sealed by the Court]' that 'no information provided to Attorney Gammon by Derril Willard incriminated Mr. Willard in any manner, directly or indirectly, in the death of Eric Miller. . . . We affirm the trial court's finding in the 'Order [Sealed by the Court]' that 'Derril Willard did provide to Attorney Gammon information concerning activities and statements of a third person regarding the death of Eric Miller. Such information concerning this third person did not reveal any collaborative involvement of Willard and did not implicate Willard in any way in the death of Eric Miller.'" (citation omitted); "[T]he 'Order [Sealed by the Court]' finds and concludes 'that the non-privileged information concerning a third party which is specifically set forth in

> numbered paragraph 12 of Attorney Gammon's affidavit should be disclosed to the District Attorney for the 10th Judicial District in its entirety.' We affirm this finding and conclusion. In addition, the trial court found and concluded 'that all other information contained in the affidavit is privileged and should not be disclosed.' We likewise affirm this finding and conclusion.").

North Carolina's failure to statutorily provide executors and personal representatives power over decedents' privilege and confidentiality duty required the North Carolina Supreme Court to essentially "thread the needle" -- allowing a limited look at client confidences in certain specific cases.

Several legal ethics opinions have dealt with situations in which a deceased individual's executor's interests diverged from that of the deceased individual. Given many folks' laxity in keeping their estate documents up to date, perhaps this is not surprising.

This handful of legal ethics opinions offer at least some discretion to lawyers who had represented the deceased individuals, and sometimes conclude by suggesting that those lawyers seek a court's guidance.

- Florida LEO 10-3 (2/1/11) ("A lawyer’s ethical obligations regarding a request for confidential information of a deceased client by the personal representative, beneficiaries or heirs-at-law of a decedent’s estate, or their counsel, will vary depending on the circumstances. A lawyer may disclose confidential information to serve the deceased client’s interests, unless the deceased client previously instructed the lawyer not to disclose the information. Whether and what information may be disclosed will depend on who is making the request, the information sought, and other factors. Doubt should be resolved in favor of nondisclosure. When compelled to disclose information via subpoena, a lawyer must disclose all information sought that is not privileged, and raise privilege as to any information for which there is a good faith basis to do so."; "[I]f a beneficiary or heir-at-law asks for specific information and the decedent’s lawyer determines that voluntary disclosure of the information would serve the decedent’s interests, the lawyer may disclose that specific information. For example, a lawyer might provide a copy of the decedent’s will or disclose information relating to the execution of a will to a beneficiary or heir-at-lawthe cent if the lawyer reasonably believes that

disclosure of the information would forestall litigation by the beneficiary or heir-at-law, thereby conserving assets of the estate in the exercise of the lawyer's professional discretion. However, information that the decedent specifically required the lawyer not to disclose to others may not be disclosed by the lawyer to the beneficiary or heir-at-law, regardless of whether the information is privileged. For example, a deceased client may have specifically instructed the lawyer not to disclose information to anyone about a child born out of wedlock or an extra-marital relationship." (emphasis added)).

- Maine LEO 192 (6/20/07) (holding that a lawyer who had represented a client who has since died may not simply disclose information at the request of the court-appointed personal representative, but must instead independently analyze the situation; "In the situation presented by the Question, the PR [personal representative] has decided not to 'claim' the attorney-client privilege on behalf of the Decedent, but has instead decided to waive the privilege. In such a situation, we believe the attorney from whom the confidential information is sought may not rely exclusively upon the waiver by the PR, but must undertake an independent analysis pursuant to M. Bar R. 3.6(h) as to his or her own obligations with respect to the requested disclosure." (emphasis added); "In many cases, the attorney's disclosure of information at the request of a PR will fall within the first safe harbor of M. Bar R. 3.6(h). For example, disclosure of information regarding a will's execution or a decedent's testamentary intent would ordinarily further the attorney's representation of the client."; "PR may waive the attorney[-]client privilege on behalf of a decedent, because the PR is interested in the protection of the decedent's estate and 'would consent to the waiver of the privileged communication only for the purpose of securing that end.'"; "If however, the attorney believes that the information sought to be disclosed would not further the client's purpose or would be detrimental to a material interest of the client, the attorney may waive the privilege only as required by law or by court order. Thus, despite a PR's waiver of the attorney-client privilege, the attorney may still be ethically obligated to claim the privilege on behalf of his former client if, for example, the information had been specifically sought to be kept unqualifiedly confidential by the client or if disclosure of the information would embarrass or otherwise be detrimental to a material interest of the client. See M.R. Evid. 502(c). The only safe harbor available to the attorney in that case would be a court order allowing disclosure of the information requested by the PR. See M. Bar R. 3.6(h)(1). Because the PR is the one seeking disclosure of the information, the PR will likely be the one seeking the court order compelling disclosure." (emphasis added)).

- Philadelphia LEO 2007-6 (4/2007) ("The inquirer is a lawyer who represented a husband and wife for many years having drafted their Wills and other estate documents. The husband died two years ago and the wife recently passed away. The husband's will was never probated and an estate was never

raised because his entire estate was held by the entireties with his wife."; "The husband had no personal representative ever appointed for him, so no person, by operation of law, succeeded to the husband's right to waive a privilege or consent to divulgence of confidential information protected by Rule 1.6."; "[A] practitioner in the position of the inquirer must exercise his reasonable professional judgment and decide if the husband impliedly authorized revealing the contents of his will to his daughter. If the inquirer feels that doing so would likely promote the husband's estate plan, forestall litigation, preserve assets, and further his daughter's understanding of his intentions then it would be permissible. However, if the inquirer does not feel that there is such implied authorization, then without being required by the Court to produce the will, he may not disclose its contents. The Committee notes that even if the inquirer concludes that he has implied authorization to reveal the contents of the will that he is not required to do so, only that he may choose to do so." (emphasis added)).

- District of Columbia LEO 324 (5/18/04) ("When a spouse who is executor of a deceased spouse's estate requests that the deceased spouse's former attorney turn over information obtained in the course of the professional relationship between the deceased spouse and the former attorney, the former attorney may provide such information to the spouse/executor, if (1) the attorney concludes that the information is not a confidence or secret, or, (2) if it is a confidence or secret, the attorney has reasonable grounds for believing that release of the information is impliedly authorized in furthering the interests of the former client in settling her estate. Where these conditions are not met, the deceased spouse's former attorney should seek instructions from a court as to the disposition of materials reflecting confidences or secrets obtained in the course of the professional relationship with the former client. In the absence of such a court order, the attorney should dispose of the materials according to the guidance in Opinion 283 [advising lawyers to carefully protect client confidences in closed files]." (emphasis added); "To take a hypothetical example: Imagine that a wife's will states that she wishes to divide her property equally among her children. The wife later consults another attorney ("second attorney") and confides to this second attorney that, prior to her current marriage, she gave birth to a child about which she has not informed her current husband, and wishes to provide for that child in her will without disclosing the nature of her relationship to this individual. The second attorney begins to prepare a new draft of her will, but the wife unexpectedly dies before it is finalized and signed. After the wife's death, the husband, who is executor of the wife's estate, asks the second attorney for information about the representation. The second attorney must decide whether she has information that is a confidence or a secret. In the example, the fact of the wife's prior child is probably both: the wife told the second attorney this information in the course of seeking legal advice, and stated that she did not want this information disclosed to her husband. But

whether the wife would want her wishes to provide for this individual to be known after her death is a more difficult question. The wife expressed to the second attorney her wish that all of her children be provided for, on the one hand, but may wish that her husband not learn of her prior child, on the other. The decision about what to do in such a situation will require the attorney to exercise her best professional judgment. An attorney who reasonably believes that she knows what her client would have wanted, on the basis of either what the client told her or the best available evidence of what the client's instructions would have been, should carry out her client's wishes. The attorney will usually be best situated to make this determination. In rare situations, however, the attorney may wish to seek an order from the court supervising disposition of the estate and present the materials at issue for the court's in camera consideration."; "In sum, the proper disposition of the documents the wife's former attorney retains from the prior representation depends on the husband/executor's status in relation to the matter handled in the prior representation. If the matter relates to the husband's fiduciary duties in handling the disposition of the wife's estate, and if disclosure of the information is impliedly authorized in order to further the deceased client's interests as the former attorney can best ascertain them, then the attorney should furnish the materials to the husband/executor. On the other hand, if these conditions are not met, the wife's former attorney should not turn over the documents. If the attorney reasonably believes that the correct course of conduct is uncertain, she should seek instructions from a court. If no such instructions are forthcoming, the attorney should dispose of the documents according to the guidelines in our Opinion 283. The same analysis applies on the inquirers' question whether the former wife's attorney may speak to the executor/husband. An attorney may disclose a deceased former client's secrets and confidences in any manner, including oral conversation, only if the conditions discussed in this opinion have been met." (emphasis added)).

At least one bar has described a scenario in which the executor's interests clearly differed from the deceased client's interests.

- Nassau County LEO 03-4 (6/17/03) (analyzing the following situation: "Client-Wife retained the Inquiring Attorney for her law firm in May to commence an action for a divorce against her Husband. The Wife advised the Attorney on numerous occasions she did not want her Husband to know about her plans for a divorce nor to serve him with any papers until after she had advised their children and they had finished their pending college semesters. The Client-Wife agreed that the action be commenced and an index number purchased, but apparently before that could be done, ten days later she suddenly died. About one month later, the Husband required the Attorney provide him with information concerning the legal representation, having learned of it from one of his Wife's check stubs, showing her payment of a retainer fee. The

> Attorney informed the Husband that a sizeable refund of the retainer would be made. The attorney also informed the husband through the husband's attorney, representing him as executor of the Wife's estate, that the attorney-client privilege would bar disclosure of any detailed information or communications between Attorney and Client-Wife concerning the representation." (emphasis added); "Assuming that the detailed billing information requested contains the content of confidential communications or secrets gained in the legal representation of the Client-Wife by the Inquiring Attorney, the attorney may not disclose these confidences or secrets, unless and until either (a) the Inquiring Attorney is fully satisfied the Husband has made a valid and fully informed knowing waiver of the Attorney-Client Privilege and consents to disclosure of the Wife's secrets in his fiduciary capacity and wholly in the interests of his Wife and her estate; or (b) in compliance with a judicial determination (presumably based on an in camera examination of the requested detailed billing information) and a court order mandating such disclosure." (emphasis added)).

Lawyers finding themselves in this awkward position might have to seek judicial guidance. The Restatement suggests that the guidance should not come from a probate court, but rather from the court addressing whatever substantive issue might require assessment of the arguably privileged communications.

> It would be desirable that a tribunal be empowered to withhold the privilege of a person then deceased as to a communication that bears on a litigated issue of pivotal significance. The tribunal could balance the interest in confidentiality against any exceptional need for the communication. The tribunal also could consider limiting the proof or sealing the record to limit disclosure. Permitting such disclosure would do little to inhibit clients from confiding in their lawyers. The fortuity of death prevents waiver of the privilege by the client. Appointing a personal representative to consider waiving the privilege simply transforms the issue into one before a probate court. It would be more direct to permit the judge in the proceeding in which the evidence is offered to make a determination based on the relevant factors.

Restatement (Third) of Law Governing Lawyers § 77 cmt. d (2000).

Best Answer

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

b 2/14

Corporate Context

Hypothetical 14

You recently represented shareholders in selling all of a corporation's stock to a competitor. The competitor now claims that your clients defrauded it during that transaction. The buyer's search of the computers and other files in its new acquisition's headquarters building has uncovered many confidential and privileged communications between you and your clients about the sale transaction. When the buyer's lawyer alerts you to that discovery, you claim privilege protection. The buyer claims that it owns all of those confidential and privileged communications -- because it purchased them when it purchased all of your former clients' stock.

Does the buyer now own your privileged communications with your clients, even those related to the sale transaction?

MAYBE

Analysis

This issue generally arises in the context of the attorney-client privilege protection rather than the ethics confidentiality duty. This is not surprising, because the case law usually involves adversaries' efforts to obtain discovery of the lawyers' files in these circumstances. Thomas E. Spahn, The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide, Ch. 6.4, 6.5 (3d. ed. 2013), published by Virginia CLE Publications.

This scenario arose in a 2013 Delaware case.

- Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP, 80 A.3d 155, 156, 160, 161 (Del. Ch. 2013) (analyzing a situation in which the buyer of a corporation claimed that the selling shareholders had defrauded it in the purchase transaction; noting that the buyer discovered privileged communications between the seller and its outside counsel Perkins Coie in the company's computer system; acknowledging that the seller had not removed those documents from its computer system before the closing, and had "done nothing to get these computer records back" since the closing a year earlier; noting that the sellers claimed that the attorney-client privilege

> nevertheless protected those communications "on the ground that it, and not the surviving corporation [buyer], retained control of the attorney-client privilege."; rejecting sellers' privilege claim -- relying on the Delaware General Corporation Law's clear statement that after a merger the surviving company (the buyer here) owns "'all'" property, privileges, etc.; holding that the buyer could read and use the communications; explaining how future sellers could avoid this situation; noting that an earlier Delaware decision had indicated that sellers can "negotiate[] special contractual agreements to protect themselves and prevent certain aspects of the privilege from transferring to the surviving corporation in the merger."; pointing to a 2008 Delaware decision approving a purchase transaction provision specifically excluding from a sale "'all rights of the Sellers under this Agreement and all agreements and other documentation relating to the transactions contemplated hereby.'" (quoting Postorivo v. AG Paintball Holdings, Inc., Consol. Civ. A. Nos. 2911- & 3111-VCP, 2008 Del. Ch. LEXIS 17, at *6 n.5 (Del. Ch. Feb. 7, 2008) (unpublished opinion)); reiterating that "the answer to any parties worried about facing this predicament in the future" is to "exclude from the transferred assets the attorney-client communications they wish to retain as their own.").

The case law is surprisingly muddled on whether transactional parties can affect ownership of the attorney-client privilege and the parallel ethics confidentiality duty.

Thomas E. Spahn, The Attorney-Client Privilege and the Work Product Doctrine: A Practitioner's Guide, Ch. 6.7 (3d. ed. 2013), published by Virginia CLE Publications.

Best Answer

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

b 2/14

Duty to Protect Client Confidences in the Electronic Age

Hypothetical 15

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

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

(A) YES

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

(A) YES

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

(A) YES

(d) May a lawyer ethically store confidential client communications using WIFI?

(A) YES

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

(A) YES

Analysis

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

Introduction

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

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

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

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

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

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

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

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

> A lawyer should also provide for the protection of the confidences and secrets of his client following the

> termination of the practice of the lawyer, whether termination is due to death, disability, or retirement. For example, a lawyer might provide for the personal papers of the client to be returned to him and for the papers of the lawyer to be delivered to another lawyer or to be destroyed. In determining the method of disposition, the instructions and wishes of the client should be a dominant consideration.

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

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

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

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

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

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

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

Two comments describe predictable requirements.

> Paragraph (c) requires a lawyer to <u>act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer</u> or other persons who are participating in the representation of the client or who are subject to the lawyer's supervision.

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

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

> state and federal laws that govern data privacy, is beyond the scope of these Rules.

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

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

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

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

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

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

ABA Model Rule 1.9 cmt. [1].

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

The Restatement takes essentially the same approach.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- Max Stendahl, Tipsy Lawyer Disclosed Secret $3.6B Pfizer Deal, Securities and Exchange Commission Says, Law360, Sept. 20, 2013 ("A Washington attorney drunkenly passed confidential information to a friend about Pfizer Inc.'s planned $3.6 billion acquisition of a pharmaceutical industry client in 2010, the United States Securities and Exchange Commission (SEC) said in a Friday complaint." (emphasis added); "The SEC filed an insider trading suit in Florida federal court against Tibor Klein, an investment adviser who allegedly bought shares of King Pharmaceuticals Inc. shortly before the firm was acquired by Pfizer Inc. for $3.6 billion. Klein learned about the planned acquisition in August 2010 from an attorney and investment advisory client named Robert M. Schulman, according to the SEC. Schulman, who was not named as a defendant in the suit, learned about the deal because he represented King Pharmaceuticals in separate litigation, the SEC said." (emphasis added); "Hunton & Williams LLP employs a partner in its Washington office named Robert M. Schulman who represented King Pharmaceuticals in a patent case in Virginia federal court. That case was dismissed in August 2010 following a settlement." (emphasis added); "When reached by phone Friday afternoon, the Hunton & Williams partner said, 'I can't talk to you.'" (emphasis added); "The complaint alleged that Schulman and Klein, a Long Island resident, 'enjoyed a close professional and personal relationship.' Beginning in 2002, Klein made a habit of visiting Schulman and Schulman's wife at their home at least three to four times a year, the complaint said. During those visits, Klein enjoyed meals with the Schulmans and reviewed their investment accounts, and Klein often stayed overnight as a guest, according to the SEC."; "In early August 2010, Schulman learned about the planned Pfizer deal through his work as an attorney representing King, the SEC alleged. Shortly thereafter, Klein visited the Schulmans at their Washington, D.C., home, the SEC said. That is allegedly when the improper disclosure took place."; "'During a meal with Klein at their home that weekend, Schulman drank several glasses of wine and became intoxicated. He blurted out to Klein, 'It would be nice to be King for a day.' Schulman intended to imply he was a 'big shot' who knew 'some kind of information' about King Pharmaceuticals,' the complaint said." (emphasis added); "Following that weekend visit, Klein purchased thousands of shares of King Pharmaceuticals for himself and his clients, including Schulman, the SEC alleged. Klein also allegedly tipped off a friend named Michael Shechtman who purchased his own King Pharmaceutical shares." (emphasis added)).

- Jill Lawless, J.K. Rowling's Law Firm Leaks Her Alter Ego, Associated Press, July 19, 2013 ("The mystery has been solved. A British law firm admitted Thursday that one of its partners inadvertently revealed that J.K. Rowling had authored a mystery novel, 'The Cuckoo's Calling.'"; "The Sunday Times newspaper revealed over the weekend that the 'Harry Potter' author had penned the book under the pseudonym Robert Galbraith. The newspaper said it had received a tip-off on Twitter, and there was speculation that

Rowling or her publisher were behind the revelation - which has sent sales of the thriller skyrocketing."; "But law firm Russells said Thursday that one of its partners, Chris Gossage, had let the information slip to his wife's best friend, Judith Callegari - the woman behind the tweet. Her Twitter account has now been deleted. A phone message left for Callegari was not immediately returned."; "Russells said in a statement that 'we apologize unreservedly' to Rowling. It said that while Gossage was culpable, 'the disclosure was made in confidence to someone he trusted implicitly.'"; "Rowling said that 'only a tiny number of people knew my pseudonym and it has not been pleasant to wonder for days how a woman whom I had never heard of prior to Sunday night could have found out something that many of my oldest friends did not know.'" (emphasis added); "'To say that I am disappointed is an understatement,' she added. 'I had assumed that I could expect total confidentiality from Russells, a reputable professional firm, and I feel very angry that my trust turned out to be misplaced.'" (emphasis added)).

- Richard Vanderford, Ex-BakerHostetler Atty's Hubby Traced On Pillow Talk: SEC, Law360, Feb. 6, 2013 ("The U.S. Securities and Exchange Commission (SEC) on Wednesday sued a Houston man who allegedly traded ahead of Texas Instruments Inc.'s [TI] 2011 purchase of National Semiconductor Corporation using inside information from his wife, then a partner at BakerHostetler."; "The SEC claims James W. Balchan, 48, made $30,000 in illicit profits trading ahead of TI's acquisition of National after his wife tipped him that National's general counsel had canceled an appearance at a social function to work on the deal." (emphasis added); "'The SEC alleges that the very next morning, Balchan misappropriated the confidential information he learned about the acquisition and purchased 2,000 National Semiconductor shares,' the commission said in a statement."; "The commission did not name Balchan's wife or her firm, but marriage records and an engagement announcement in a Houston-area newspaper identify her as Tonya Jacobs, a University of Houston Law Center graduate who worked at BakerHostetler from 1994 until January 2012." (emphasis added); "Balchan has agreed to pay about $60,000 to resolve the SEC action."; "According to the SEC complaint, which outlines the claims against Balchan but omits the names of the other parties, the tip originated in the cancellation of weekend social events. Another partner at BakerHostetler was organizing 'wine and dine' functions to honor National's then-general counsel, Todd Duchene. The partner was close to Jacobs and was acquainted with Balchan, and invited both of them to the parties, which had been slated for the first weekend in April 2011." (emphasis added); "A few days before the big weekend, Duchene allegedly called the partner to cancel his appearances, saying he was tied up working on the TI deal. The partner allegedly passed the information on to Jacobs, who mentioned it to Balchan when they were discussing weekend plans." (emphasis added)).

- Brian Baxter, Associate's Failure to Keep Secrets a Cautionary Tale for Young Lawyers, AmLaw Daily, Nov. 30, 2012 ("Call it a cautionary tale for young corporate lawyers who might be inclined to discuss their work in what they think is an innocent fashion." (emphasis added); "On Thursday, federal prosecutors in Manhattan charged two former stockbrokers, Thomas Conradt of Denver and David Weishaus of Baltimore, with running an insider trading scheme that yielded more than $1 million in illicit profits based on confidential information about International Business Machines' (IBM's) $1.2 billion acquisition of analytics software maker SPSS in 2009." (emphasis added); "According to the complaints filed by the Justice Department and the SEC, the scheme allegedly hatched by Conradt and Weishaus began in May 2009 when the unnamed lawyer met an individual identified by federal prosecutors as 'CC-3' and the SEC as the 'Source' for what is variously described as brunch or lunch. The source, identified as an Australian citizen who worked as a research analyst at a major international financial services firm in Stamford, Connecticut, is described by the SEC as the associate's 'closest friend in New York.'" (emphasis added); "During the get-together in late May 2009, the lawyer, who had been at his firm [identified elsewhere as Cravath, Swaine & Moore] for eight months and had just been assigned to work on the IBM–SPSS deal, discussed with his friend his new role on the looming transaction as part of a broader conversation about what working on such a major M&A deal might mean for his career at the firm." (emphasis added); "It was not an uncommon exchange between the two—or one that the lawyer had any reason to think might lead to wrongdoing, according to the government's complaints against Conradt and Weishaus."; "Indeed, the associate and the source 'frequently shared both personal and professional confidences with one another and had a history of maintaining and not betraying those confidences,' according to the SEC's civil complaint. 'Based on their history, pattern, and practice of sharing confidences, each knew or reasonably should have known that the other expected such information to be maintained in confidence.'" (emphasis added); "The SEC states that over the course of their friendship, the associate never revealed or traded on any confidential information that the source shared.").

- In the Matter of Woodward, 661 N.Y.S.2d 614, 615, 616, 615-616, 616, 615 (N.Y. App. Div. 1997) (suspending for three years lawyer improperly disclosed client confidences to his brother, who then traded on those confidences; "Respondent committed the underlying misconduct between May 1990 and December 1994, while an associate in the corporate department at the firm Cravath, Swaine & Moore. During the time, respondent provided material, nonpublic information about merger and acquisition activities of firm clients to his brother, John Woodward, and to his friend, Warren Eizman." (emphasis added); "Respondent . . . testified on his own behalf, expressing sincere remorse for his wrongdoing and admitting that he should have 'kept his mouth shut'. While respondent was unable to give a conclusive explanation for why

he disclosed the information, he denied having done so intentionally or for the purpose of illegal trading. He suggested that his indiscretions were prompted by his own 'awe' and 'amazement' at the financial magnitude of the cases on which he was working . . . . He also stated that he was initially unaware that the men were using the information for illegal trades and, on one occasion, after learning that they had done so, asked them both to rescind the trades." (emphasis added); "The Federal investigation into this matter revealed that the insider information that respondent divulged was actually used for illegal trading and proved highly profitable to both his brother and his friend. John Woodward earned about $255,000 while Warren Eizman earned about $132,000 and passed the information on to 11 of his friends and relatives, who earned another $165,000 collectively. However, there was no finding that respondent ever personally traded with the information or profited from the illegal trading." (emphasis added); "[R]espondent, informed the Panel that he is a Mormon and is actively involved in church activities, such as teaching Sunday school and working with youth programs. Respondent added that the church has played a major role in his life since college, which he spent two years working as a voluntary missionary near Seattle, Washington."; "Respondent was sentenced to five months' home detention, two years' probation, 150 hours of community service, and a special assessment of $50. Respondent also paid $25,000 in restitution as a result of a civil proceeding commenced by the United States Securities and Exchange Commission (SEC) relating to his criminal conduct." (emphasis added)).

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

- Debra Cassens Weiss, Did Lawyer's E-Mail Goof Land $1B Settlement on New York Time's Front Page?, ABA J., Feb. 6, 2008 ("An outside lawyer for Eli Lilly & Company apparently has two people named 'Berenson' in her e-mail address book. One is a reporter for the New York Times and the other is her co-counsel assisting in confidential negotiations on a possible $1 billion settlement between the pharmaceutical company and the government." (emphasis added); "The question is whether her e-mail to the wrong Berenson spurred last week's front-page New York Times story revealing talks to resolve criminal and civil investigations into the company's marketing of the anti-psychotic drug Zyprexa, as Portfolio.com reports."; "The unidentified lawyer who wrote the e-mail works at Pepper Hamilton in Philadelphia, the story says. She was trying to e-mail Bradford Berenson of Sidley Austin rather than Times reporter Alex Berenson." (emphasis added); "Eli Lilly had initially believed that federal officials leaked the information. 'As the company's lawyers began turning over rocks closer to home, however, they discovered what could be called A Nightmare on E-mail Street,' the Portfolio story says." (emphasis added); "A Lilly spokeswoman told

Portfiolio.com that the company will continue to retain Pepper Hamilton. A search for the words 'Eli Lilly' on the firm's Web site shows that two of the firm's lawyers are scheduled to speak on the subject of Resolving Ethical Concerns and Preserving Attorney-Client Privilege When Faced With Fraud and Abuse Charges at an April conference.") (emphasis added); analyzing the source of information included in the following article: Alex Berenson, Lilly in Settlement Talks With U.S., N.Y. Times, Jan. 30, 2008 ("Eli Lilly and federal prosecutors are discussing a settlement of a civil and criminal investigation into the company's marketing of the antipsychotic drug Zyprexa that could result in Lilly's paying more than $1 billion to federal and state governments."; "If a deal is reached, the fine would be the largest ever paid by a drug company for breaking the federal laws that govern how drug makers can promote their medicines."; "Lilly may also plead guilty to a misdemeanor criminal charge as part of the agreement, the people involved with the investigation said. But the company would be allowed to keep selling Zyprexa to Medicare and Medicaid, the government programs that are the biggest customers for the drug. Zyprexa is Lilly's most profitable product and among the world's best-selling medicines, with 2007 sales of $4.8 billion, about half in the United States."; "Lilly would neither confirm nor deny the settlement talks.").

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

- Megan Leonhardt, Ex-Dewey Attorneys May Be Liable For Client Privacy Breaches, Law360, July 16, 2012 ("Former Dewey & LeBoeuf LLP partners could face malpractice suits should clients experience privacy breaches as the bankrupt firm starts to look for ways to cut costs by quickly disposing of hundreds of thousands of client files, experts said Monday." (emphasis added); "While the issue of storage costs may seem like small potatoes in a bankruptcy with listed debts of $245 million and assets of $193 million, experts said Monday that the issue could have gigantic privacy and liability consequences for clients and former partners if handled improperly."; "'If you [incorrectly] disposed of a single file, it could result in a multimillion[-dollar] malpractice suit,' said Steven J. Harper, a retired Kirkland & Ellis LLP partner and adjunct professor at Northwestern University's School of Law."; "On Friday, United States Bankruptcy Judge Martin Glenn partially approved a move by Dewey's attorneys to start notifying former clients and partners of the processes in place in order to retrieve their files, but refused to approve any measures regarding the future disposal of client files currently in storage."; "Dewey has faced initial opposition from clients, former partners and its file storage facilities over who would be required to take on the responsibility of disposing of the files, including paying for the continued storage of files or future shredding. And while the order failed to resolve the issue of who was

responsible for the cost and associated liability with getting rid of the files, Judge Glenn said the firm should retain an expert in legal ethics to submit a document verifying that it had gone through the proper procedures for dealing with such a task."; "In its petition seeking court approval for its plan, Dewey said the continued storage of thousands of client files was unnecessary and burdened the collapsed firm with fees of up to $20,000 a month from a single storage facility. The firm cited previous law firm bankruptcies and ethical codes in order to come up with a plan that would 'strike an appropriate balance' between its duties to its creditors and to former clients, according to the motion.").

- Disciplinary Counsel v. Shaver, 904 N.E.2d 883, 884 (Ohio 2009) (issuing a public reprimand against a lawyer (and Mayor of Pickerington, Ohio) for discarding client files in a dumpster, and leaving approximately 20 boxes of other client files next to the dumpster; noting that the tenant who had moved into the office that was vacated by the lawyer "had misgivings about the propriety of respondent's disposal method," "examined the contents of several of the boxes left by the dumpster," and moved the boxes back into a garage that the lawyer continued to lease; also explaining that "[n]either of the property owners nor the new tenant contacted respondent again about his failure to remove all the contents of the garage. An anonymous tipster, however, contacted a television station about the incident, and the tip led to television news and newspaper stories."; publicly remanding the lawyer for violations of Rules 1.6(a) and 1.9(c)(2) -- which prohibit lawyers from revealing client confidences).

- United States v. Scott, 975 F.2d 927, 929, 930 (1st Cir. 1992) (explaining that a criminal defendant argued that the government violated his Fourth Amendment rights by conducting a warrantless seizure and reconstruction of shredded documents from trash bags he had left outside his home; concluding that the defendant could have no expectation of privacy after placing the shredded documents "in a public area accessible to unknown third parties."; holding that "[i]n our view, shredding garbage and placing it in a public domain subjects it to the same risks regarding privacy, as engaging in a private conversation in public where it is subject to the possibility that it may be overheard by other persons."), cert. denied, 507 U.S. 1042 (1993).

- Suburban Sew 'N Sweep, Inc. v. Swiss-Bernina, Inc., 91 F.R.D. 254 (N.D. Ill. 1981) (explaining that the plaintiff sifted through the defendant's trash dumpster for two years, which yielded hundreds of discarded privileged documents; holding that the defendants had not taken reasonable steps to ensure complete obliteration of the documents -- such as shredding -- and, therefore, had expressly waived the privilege.).

Other courts have taken a more forgiving approach.

- Sparshott v. Feld Entm't, Inc., Civ. A. No. 99-0551 (JR), 2000 U.S. Dist. LEXIS 13800, at *2-3 (D.D.C. Sept. 21, 2000) (finding that a discharged employee had not waived the attorney-client privilege covering a dictaphone tape recording of conversations with his lawyer by failing to take the tape from his office after he was fired; "A reasonable analysis of the record compels the conclusion that Smith simply forgot the tape on March 7 and, under pressure (and under scrutiny) to clear out his office a few days later, forgot it then as well. That set of facts does not amount to a waiver of Smith's attorney-client privilege. Smith's ejection from the building and lockout from his office was indeed involuntary, and his neglect or failure to recall that the tape was in the dictaphone was not an affirmative act such as, for example, throwing a confidential document into the garbage").

- McCafferty's, Inc. v. Bank of Glen Burnie, 179 F.R.D. 163, 169-70 (D. Md. 1998) (finding that client had not waived the attorney-client privilege by discarding a privileged document by tearing it into sixteen pieces and throwing it in the trash; "To be sure, there were additional precautions which Joyner could have taken. . . . BGB could have used a paper shredder. . . . Joyner could have burned the pieces of the memo before throwing the ashes away. She could have torn it into smaller pieces, or distributed the pieces into several trash cans in different locations. However, the issue is not whether every conceivable precaution which could have been taken was taken, but whether reasonable precautions were taken. Under the facts of this case, Joyner would have had to anticipate that someone would trespass onto BGB's private property, look through an entire dumpster of trash, remove sealed bags of garbage, sift through them looking for torn up documents, and then piece them together. Even in an age where commercial espionage is increasingly common, the likelihood that someone will go to the unseemly lengths which Mariner did to obtain the Serotte memo is not sufficiently great that I can conclude that the precautions Joyner took were not reasonable. Although the precautions taken in this case were not perfect, they were sufficient to preserve the attorney-client privilege against the clandestine assault by Mariner's 'dumpster diver.'" (citation omitted)).

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

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

- Iowa LEO 95-30 (5/16/96) ("[S]ensitive material must be encrypted to avoid violation of DR 4-101 and pertinent Ethical Considerations of the Iowa Code

of Professional Responsibility for Lawyers and related Formal Opinions of the Board." (emphasis added)).

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

- Iowa LEO 96-01 (8/29/96) ("[W]ith sensitive material to be transmitted on E-mail counsel must have written acknowledgment by client of the risk of violation of DR 4-101 which acknowledgment includes consent for communication thereof on the Internet or non-secure Intranet or other forms of proprietary networks, or it must be encrypted or protected by password/firewall or other generally accepted equivalent security system."), amended by Iowa LEO 97-01 ("[W]ith sensitive material to be transmitted on e-mail counsel must have written acknowledgment by client of the risk of violation of DR 4-101 which acknowledgment includes consent for communication thereof on the Internet or non-secure Intranet or other forms of proprietary networks to be protected as agreed between counsel and client.").

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

- New Hampshire LEO 1991-92/6 (4/19/92) ("In using cellular telephones or other forms of mobile communications, a lawyer may not discuss client confidences or other information relating to the lawyer's representation of the client unless the client has consented after full disclosure and consultation. (Rule 1.4; Rule 1.6; Rule 1.6(a)). An exception to the above exits [sic], where a scrambler-descrambler or similar technological development is used. (Rule 1.6).").

- Iowa LEO 96-01 (8/29/96), as amended by Iowa LEO 97-01 (9/18/97) ("[W]ith sensitive material to be transmitted on E-mail counsel must have written acknowledgment by client of the risk of violation of DR 4-101 which acknowledgment includes consent for communication thereof on the Internet or non-secure Intranet or other forms of proprietary networks, as agreed between counsel and client.").

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

- North Carolina LEO RPC 215 (7/21/95) ("A lawyer has a professional obligation, pursuant to Rule 4 of the Rules of Professional Conduct, to protect

and preserve the confidences of a client. This professional obligation extends to the use of communications technology. However, this obligation does not require that a lawyer use only infallibly secure methods of communication. Lawyers are not required to use paper shredders to dispose of waste paper so long as the responsible lawyer ascertains that procedures are in place which 'effectively minimize the risks that confidential information might be disclosed.' RPC 133. Similarly, a lawyer must take steps to minimize the risks that confidential information may be disclosed in a communication via a cellular or cordless telephone. First, the lawyer must use reasonable care to select a mode of communication that, in light of the exigencies of the existing circumstances, will best maintain any confidential information that might be conveyed in the communication. Second, if the lawyer knows or has reason to believe that the communication is over a telecommunication device that is susceptible to interception, the lawyer must advise the other parties to the communication of the risks of interception and the potential for confidentiality to be lost." (emphasis added)).

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

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

- Arizona LEO 97-04 (1997) ("Lawyers may want to have the e-mail encrypted with a password known only to the lawyer and the client so that there is no inadvertent disclosure of confidential information. Alternatively, there is encryption software available to secure transmissions. E-mail should not be considered a 'sealed' mode of transmission. See American Civil Liberties Union v. Reno, 929 F. Supp. 824, 834 (E.D. Pa. 1996). At a minimum, e-mail transmissions to clients should include a cautionary statement either in the 're' line or beginning of the communication, indicating that the transmission is 'confidential' 'Attorney/Client Privileged', similar to the cautionary language currently used on facsimile transmittals. Lawyers also may want to caution clients about transmitting highly sensitive information via e-mail if the e-mail is not encrypted or otherwise secure from unwanted interception.").

- South Carolina LEO 97-08 (6/1997) ("A lawyer should discuss with a client such options as encryption in order to safeguard against even inadvertent disclosure of sensitive or privileged information when using e-mail.").

- Pennsylvania Informal Op. 97-130 (9/26/97) ("A lawyer may use e-mail to communicate with or about a client without encryption; the lawyer should

advise a client concerning the risks associated with the use of e-mail and obtain the client's consent either orally or in writing."; "A lawyer should not use unencrypted e-mail to communicate information concerning the representation, the interception of which would be damaging to the client, absent the client's consent after consultation."; "A lawyer may, but is not required to, place a notice on client e-mail warning that it is a privileged and confidential communication."; "If the e-mail is about the lawyer or the lawyer's services and is intended to solicit new clients, it is lawyer advertising similar to targeted, direct mail and is subject to the same restrictions under the Rules of Professional Conduct.").

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

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

- N.Y. City LEO 1994-11 (10/21/94) ("Lawyers should consider taking measures sufficient to ensure, with a reasonable degree of certainty, that communications are no more susceptible to interception than standard land-line telephone calls. At a minimum, given the potential risks involved, lawyers should be circumspect and discreet when using cellular or cordless telephones, or other similar means of communication, to discuss client matters, and should avoid, to the maximum reasonable extent, any revelation

of client confidences or secrets. . . . A lawyer should exercise caution when engaging in conversations containing or concerning client confidences or secrets by cellular or cordless telephones or other communication devices readily capable of interception, and should consider taking steps sufficient to ensure the security of such conversations.").

- Vermont LEO 97-5 (1997) ("[T]he Committee decides that since (a) e-mail privacy is no less to be expected than in ordinary phone calls, and (b) unauthorized interception is illegal, a lawyer does not violate DR 4-101 by communicating with a client by e-mail, including the internet, without encryption. In various instances of a very sensitive nature, encryption might be prudent, in which case ordinary phone calls would obviously be deemed inadequate.").

- Illinois LEO 96-10 (5/16/97) ("In summary, the Committee concludes that because (1) the expectation of privacy for electronic mail is no less reasonable than the expectation of privacy for ordinary telephone calls, and (2) the unauthorized interception of an electronic message subject to the ECPA is illegal, a lawyer does not violate Rule 1.6 by communicating with a client using electronic mail services, including the Internet, without encryption. Nor is it necessary, as some commentators have suggested, to seek specific client consent to the use of unencrypted e-mail. The Committee recognizes that there may be unusual circumstances involving an extraordinarily sensitive matter that might require enhanced security measures like encryption. These situations would, however, be of the nature that ordinary telephones and other normal means of communication would also be deemed inadequate.").

- South Carolina LEO 97-08 (6/1997) ("There exists a reasonable expectation of privacy when sending confidential information through electronic mail (whether direct link, commercial service, or Internet). Use of electronic mail will not affect the confidentiality of client communications under South Carolina Rule of Professional Conduct 1.6. . . . . The Committee concludes, therefore, that communication via e-mail is subject to a reasonable expectation of privacy. Because the expectation is no less reasonable that [sic] the expectation of privacy associated with regular mail, facsimile transmissions, or land-based telephone calls and because the interception of e-mail is now illegal under the Electronic Communications Privacy Act, 18 U.S.C. §§2701(a) and 2702(a), use of e-mail is proper under Rule 1.6.").

- North Dakota LEO 97-09 (9/4/97) ("More recent and, in the view of this Committee, more reasoned opinions, have concluded that a lawyer may communicate routine matters with clients, and/or other lawyers jointly representing clients, via unencrypted electronic mail (e-mail) transmitted over

commercial services . . . or the Internet without violating the aforesaid rule [1.6] unless unusual circumstances require enhanced security measures.").

- Philadelphia LEO 98-6 (3/1998) ("A thoughtful practitioner can communicate with persons on the Internet as the inquirer intends and steer clear of ethical violations as long as he or she is mindful of the rules.").

- District of Columbia LEO 281 (9/18/98) ("In most circumstances, transmission of confidential information by unencrypted electronic mail does not per se violate the confidentiality rules of the legal profession. However, individual circumstances may require greater means of security.").

- Maine LEO 195 (6/30/08) ("The Commission concludes that, as a general matter and subject to appropriate safeguards, an attorney may utilize unencrypted e-mail without violating the attorney's ethical obligation to maintain client confidentiality.").

In 1999, the ABA settled on this position.

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

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

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

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

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

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

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

- New Jersey LEO 701 (4/24/06) (allowing law firms to keep their files in an electronic format as long as the law firm exercises reasonable care to preserve the confidences of its clients; "What the term 'reasonable care' means in a particular context is not capable of sweeping characterizations or broad pronouncements. But it certainly may be informed by the technology reasonably available at the time to secure data against unintentional disclosure"; "when client confidential information is entrusted in unprotected form, even temporarily, to someone outside the firm, it must be under a circumstance in which the outside party is aware of the lawyer's obligation of confidentiality, and is itself obligated, whether by contract, professional

standards, or otherwise, to assist in preserving it. Lawyers typically use messengers, delivery services, document warehouses, or other outside vendors, in which physical custody of client sensitive documents is entrusted to them even though they are not employed by the firm. The touchstone in using 'reasonable care' against unauthorized disclosure is that: (1) the lawyer has entrusted such documents to an outside provider under circumstances in which there is an enforceable obligation to preserve confidentiality and security, and (2) use is made of available technology to guard against reasonably foreseeable attempts to infiltrate the data. If the lawyer has come to the prudent professional judgment he has satisfied both these criteria, then 'reasonable care' will have been exercised. In the specific context presented by the inquirer, where a document is transmitted to him by email over the Internet, the lawyer should password a confidential document (as is now possible in all common electronic formats, including PDF), since it is not possible to secure the Internet itself against third party access.").

- North Carolina LEO 2008-5 (7/18/08) (explaining that lawyers may store confidential client files in a website that can be accessed by the internet, but must be careful to protect confidentiality).

- Missouri LEO 127 (5/19/09) ("Rule 4-1.15(j) requires attorneys to maintain the file for a period of ten years, or for such other period as agreed upon with the client. However, no rule or previous opinion addresses the issue of whether the file may be maintained in electronic form.").

- Arizona LEO 09-04 (12/2009) ("Lawyers providing an online file storage and retrieval system for client access of documents must take reasonable precautions to protect the security and confidentiality of client documents and information. Lawyers should be aware of limitations in their competence regarding online security measures and take appropriate actions to ensure that a competent review of the proposed security measures is conducted. As technology advances over time, a periodic review of the reasonability of security precautions may be necessary.").

- Alabama LEO 2010-02 (2010) (analyzing various issues relating to client files; allowing lawyers to retain the client files in the "cloud" as long as they take reasonable steps to maintain the confidentiality of the data; "The Disciplinary Commission . . . has determined that a lawyer may use 'cloud computing' or third-party providers to store client data provided that the attorney exercises reasonable care in doing so.").

- California LEO 2010-179 (2010) ("Whether an attorney violates his or her duties of confidentiality and competence when using technology to transmit or store confidential client information will depend on the particular technology being used and the circumstances surrounding such use. Before using a

particular technology in the course of representing a client, an attorney must take appropriate steps to evaluate: 1) the level of security attendant to the use of that technology, including whether reasonable precautions may be taken when using the technology to increase the level of security; 2) the legal ramifications to a third party who intercepts, accesses or exceeds authorized use of the electronic information; 3) the degree of sensitivity of the information; 4) the possible impact on the client of an inadvertent disclosure of privileged or confidential information or work product; 5) the urgency of the situation; and 6) the client's instructions and circumstances, such as access by others to the client's devices and communications."; "Attorney takes his laptop computer to the local coffee shop and accesses a public wireless Internet connection to conduct legal research on the matter and email Client. He also takes the laptop computer home to conduct the research and email Client from his personal wireless system."; "[A]n attorney should consider the following before using a specific technology: . . . Whether reasonable precautions may be taken when using the technology to increase the level of security. As with the above-referenced views expressed on email, the fact that opinions differ on whether a particular technology is secure suggests that attorneys should take reasonable steps as a precautionary measure to protect against disclosure. For example, depositing confidential client mail in a secure postal box or handing it directly to the postal carrier or courier is a reasonable step for an attorney to take to protect the confidentiality of such mail, as opposed to leaving the mail unattended in an open basket outside of the office door for pick up by the postal service. Similarly, encrypting email may be a reasonable step for an attorney to take in an effort to ensure the confidentiality of such communications remain so when the circumstance calls for it, particularly if the information at issue is highly sensitive and the use of encryption is not onerous. To place the risks in perspective, it should not be overlooked that the very nature of digital technologies makes it easier for a third party to intercept a much greater amount of confidential information in a much shorter period of time than would be required to transfer the same amount of data in hard copy format. In this regard, if an attorney can readily employ encryption when using public wireless connections and has enabled his or her personal firewall, the risks of unauthorized access may be significantly reduced. Both of these tools are readily available and relatively inexpensive, and may already be built into the operating system. Likewise, activating password protection features on mobile devices, such as laptops and PDAs, presently helps protect against access to confidential client information by a third party if the device is lost, stolen or left unattended." (footnotes omitted); "The greater the sensitivity of the information, the less risk an attorney should take with technology. If the information is of a highly sensitive nature and there is a risk of disclosure when using a particular technology, the attorney should consider alternatives unless the client provides informed consent. As noted above, if another person may have access to the communications transmitted between the attorney and the client

(or others necessary to the representation), and may have an interest in the information being disclosed that is in conflict with the client's interest, the attorney should take precautions to ensure that the person will not be able to access the information or should avoid using the technology. These types of situations increase the likelihood for intrusion." (footnote omitted); "If use of the technology is necessary to address an imminent situation or exigent circumstances and other alternatives are not reasonably available, it may be reasonable in limited cases for the attorney to do so without taking additional precautions."; "With regard to the use of a public wireless connection, the Committee believes that, due to the lack of security features provided in most public wireless access locations, Attorney risks violating his duties of confidentiality and competence in using the wireless connection at the coffee shop to work on Client's matter unless he takes appropriate precautions, such as using a combination of file encryption, encryption of wireless transmissions and a personal firewall. Depending on the sensitivity of the matter, Attorney may need to avoid using the public wireless connection entirely or notify Client of possible risks attendant to his use of the public wireless connection, including potential disclosure of confidential information and possible waiver of attorney-client privilege or work product protections, and seek her informed consent to do so." (footnote omitted); "Finally, if Attorney's personal wireless system has been configured with appropriate security features, the Committee does not believe that Attorney would violate his duties of confidentiality and competence by working on Client's matter at home. Otherwise, Attorney may need to notify Client of the risks and seek her informed consent, as with the public wireless connection." (footnotes omitted)).

- New York LEO 842 (9/10/10) ("A lawyer may use an online data storage system to store and back up client confidential information provided that the lawyer takes reasonable care to ensure that confidentiality will be maintained in a manner consistent with the lawyer's obligations under Rule 1.6. In addition, the lawyer should stay abreast of technological advances to ensure that the storage system remains sufficiently advanced to protect the client's information, and should monitor the changing law of privilege to ensure that storing the information online will not cause loss or waiver of any privilege.").

- Florida LEO 10-2 (9/24/10) ("The Professional Ethics Committee has been asked by the Florida Bar Board of Governors to write an opinion addressing the ethical obligations of lawyers regarding information stored on hard drives. An increasing number of devices such as computers, printers, copiers, scanners, cellular phones, personal digital assistants ('PDAs'), flash drives, memory sticks, facsimile machines and other electronic or digital devices (collectively, 'Devices') now contain hard drives or other data storage media . . . (collectively, 'Hard Drives' or 'Storage Media') that can store information. . . . Because many lawyers use these Devices to assist in the

practice of law and in doing so intentionally and unintentionally store their clients' information on these Devices, it is important for lawyers to recognize that the ability of the Devices to store information may present potential ethical problems for lawyers."; "For example, when a lawyer copies a document using a photocopier that contains a hard drive, the document is converted into a file that is stored on the copier's hard drive. This document usually remains on the hard drive until it is overwritten or deleted. The lawyer may choose to later sell the photocopier or return it to a leasing company. Disposal of the device without first removing the information can result in the inadvertent disclosure of confidential information."; "If a lawyer chooses to use these Devices that contain Storage Media, the lawyer has a duty to keep abreast of changes in technology to the extent that the lawyer can identify potential threats to maintaining confidentiality. The lawyer must learn such details as whether the Device has the ability to store confidential information, whether the information can be accessed by unauthorized parties, and who can potentially have access to the information. The lawyer must also be aware of different environments in which confidential information is exposed such as public copy centers, hotel business centers, and home offices. The lawyer should obtain enough information to know when to seek protection and what Devices must be sanitized, or cleared of all confidential information, before disposal or other disposition. Therefore, the duty of competence extends from the receipt, i.e., when the lawyer obtains control of the Device, through the Device's life cycle, and until disposition of the Device, including after it leaves the control of the lawyer."; "A lawyer has a duty to obtain adequate assurances that the Device has been stripped of all confidential information before disposition of the Device. If a vendor or other service provider is involved in the sanitization of the Device, such as at the termination of a lease agreement or upon sale of the Device, it is not sufficient to merely obtain an agreement that the vendor will sanitize the Device upon sale or turn back of the Device. The lawyer has an affirmative obligation to ascertain that the sanitization has been accomplished, whether by some type of meaningful confirmation, by having the sanitization occur at the lawyer's office, or by other similar means."; "Further, a lawyer should use care when using Devices in public places such as copy centers, hotel business centers, and outside offices where the lawyer and those under the lawyer's supervision have little or no control. In such situations, the lawyer should inquire and determine whether use of such Devices would preserve confidentiality under these rules."; concluding that when a lawyer "chooses to use Devices that contain Storage Media such as printers, copiers, scanners, and facsimile machines must take reasonable steps to ensure that client confidentiality is maintained and that the Device is sanitized before disposition, including: (1) identification of the potential threat to confidentiality along with the development and implementation of policies to address the potential threat to confidentiality; (2) inventory of the Devices that contain Hard Drives or other Storage Media; (3) supervision of nonlawyers to obtain

adequate assurances that confidentiality will be maintained; and (4) responsibility of sanitization of the Device by requiring meaningful assurances from the vendor at the intake of the Device and confirmation or certification of the sanitization at the disposition of the Device.").

- District of Columbia LEO 357 (12/2010) ("As a general matter, there is no ethical prohibition against maintaining client records solely in electronic form, although there are some restrictions as to particular types of documents. Lawyers and clients may enter into reasonable agreements addressing how the client's files will be maintained, how copies will be provided to the client if requested, and who will bear what costs associated with providing the files in a particular form; entering into such agreements is prudent and can help avoid misunderstandings. Assuming no such agreement was entered into prior to the termination of the relationship, however, a lawyer must comply with a reasonable request to convert electronic records to paper form. In most circumstances, a former client should bear the cost of converting to paper form any records that were properly maintained in electronic form. However, the lawyer may be required to bear the cost if (1) neither the former client nor substitute counsel (if any) can access the electronic records without undue cost or burden; and (2) the former client's need for the records in paper form outweighs the burden on the lawyer of furnishing paper copies. Whether (1) a request for electronic files to be converted to paper form is reasonable and (2) the former client's need for the files in paper form outweighs the lawyer's burden of providing them (such that the lawyer should bear the cost) should be considered both from the standpoint of a reasonable client and a reasonable lawyer and should take into account the technological sophistication and resources of the former client."; "Even if the lawyer must bear the cost of converting the electronic records to paper form, however, the lawyer may charge the former client for the reasonable time and labor expense associated with locating and reviewing the electronic records where such time and expense results from special instructions or requests from the former client. See D.C. Legal Ethics Op. 283 (1998) ('review of the files is being undertaken for the benefit of the client and, like other forms of client services, may be compensated by a reasonable fee').").

- Vermont LEO 2010-6 (2011) ("The Vermont Bar Association Professional Responsibility Section agrees with the consensus view that has emerged with respect to use of SaaS [Software as a Service]. Vermont lawyers' obligations in this area include providing competent representation, maintaining confidentiality of client information, and protecting client property in their possession. As new technologies emerge, the meaning of 'competent representation' may change, and lawyers may be called upon to employ new tools to represent their clients. Given the potential for technology to grow and change rapidly, this Opinion concurs with the views expressed in other States, that establishment of specific conditions precedent to using SaaS

would not be prudent. Rather, Vermont lawyers must exercise due diligence when using new technologies, including Cloud Computing. While it is not appropriate to establish a checklist of factors a lawyer must examine, the examples given above are illustrative of factors that may be important in a given situation. Complying with the required level of due diligence will often involve a reasonable understanding of: (a) the vendor's security system; (b) what practical and foreseeable limits, if any, may exist to the lawyer's ability to ensure access to, protection of, and retrieval of the data; (c) the material terms of the user agreement; (d) the vendor's commitment to protecting confidentiality of the data; (e) the nature and sensitivity of the stored information; (f) notice provisions if a third party seeks or gains (whether inadvertently or otherwise) access to the data; and (g) other regulatory, compliance, and document retention obligations that may apply based upon the nature of the stored data and the lawyer's practice. In addition, the lawyer should consider: (a) giving notice to the client about the proposed method for storing client data; (b) having the vendor's security and access systems reviewed by competent technical personnel; (c) establishing a system for periodic review of the vendor's system to be sure the system remains current with evolving technology and legal requirements; and (d) taking reasonable measures to stay apprised of current developments regarding SaaS systems and the benefits and risks they present.").

- Pennsylvania LEO 2011-200 (2011) (describing the steps that a lawyer should take when dealing with "cloud" computing, including detailed lists of required steps and descriptions of what other states have held on this issue; "If an attorney uses a Smartphone or an iPhone, or uses web-based electronic mail (e-mail) such as Gmail, Yahoo!, Hotmail or AOL Mail, or uses products such as Google Docs, Microsoft Office 365 or Dropbox, the attorney is using 'cloud computing.' While there are many technical ways to describe cloud computing, perhaps the best description is that cloud computing is merely 'a fancy way of saying stuff's not on your computer.'"; "The use of 'cloud computing,' and electronic devices such as cell phones that take advantage of cloud services, is a growing trend in many industries, including law. Firms may be eager to capitalize on cloud services in an effort to promote mobility, flexibility, organization and efficiency, reduce costs, and enable lawyers to focus more on legal, rather than technical and administrative issues. However, lawyers must be conscientious about maintaining traditional confidentiality, competence, and supervisory standards."; "This Committee concludes that the Pennsylvania Rules of Professional Conduct require attorneys to make reasonable efforts to meet their obligations to ensure client confidentiality, and confirm that any third-party service provider is likewise obligated."; "Accordingly, as outlined above, this Committee concludes that, under the Pennsylvania Rules of Professional Conduct an attorney may store confidential material in 'the cloud.' Because the need to maintain confidentiality is crucial to the

attorney-client relationship, attorneys using 'cloud' software or services must take appropriate measures to protect confidential electronic communications and information. In addition, attorneys may use email but must, under appropriate circumstances, take additional precautions to assure client confidentiality.").

- Oregon LEO 2011-188 (11/2011) ("Lawyer may store client materials on a third-party server so long as Lawyer complies with the duties of competence and confidentiality to reasonably keep the client's information secure within a given situation. To do so, the lawyer must take reasonable steps to ensure that the storage company will reliably secure client data and keep information confidential. Under certain circumstances, this may be satisfied though a third-party vendor's compliance with industry standards relating to confidentiality and security, provided that those industry standards meet the minimum requirements imposed on the Lawyer by the Oregon RPC's. This may include, among other things, ensuring the service agreement requires the vendor to preserve the confidentiality and security of the materials. It may also require that vendor notify Lawyer of any nonauthorized third-party access to the materials. Lawyer should also investigate how the vendor backs up and stores its data and metadata to ensure compliance with the Lawyer's duties." (footnote omitted); "Although the third-party vendor may have reasonable protective measures in place to safeguard the client materials, the reasonableness of the steps taken will be measured against the technology 'available at the time to secure data against unintentional disclosure.' As technology advances, the third-party vendor's protective measures may become less secure or obsolete over time. Accordingly, Lawyer may be required to reevaluate the protective measures used by the third-party vendor to safeguard the client materials." (footnotes omitted)).

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

Best Answer

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

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